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NEWSLETTER

The Downside of Government-Compelled Exposure Needs Scrutiny

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Privacy in Focus®

The U.S. Supreme Court ruled in *NAACP v. Alabama* in 1958 that the First Amendment protects the privacy of political associations and donations. The State of Alabama had sought to compel the NAACP to disclose the names of its members and donors in order to establish that the NAACP had been doing business in Alabama without registering over several years. The NAACP resisted the disclosure because government officials would make the information public, thereby exposing NAACP members and donors to harassment, loss of employment, and even threats of physical harm. The Supreme Court ruled that government exposure policy is responsible when it triggers private retaliation and harassment against the citizens who are exposed. It struck down the disclosure requirement under the First Amendment, thus protecting the political privacy of NAACP members and donors. This landmark case recently was analyzed in *Privacy in Focus*.

The Supreme Court subsequently protected the right to associational privacy in many contexts following its holding in *NAACP v. Alabama*. However, two decades later, in its 1976 *Buckley v. Valeo* decision, the Court made an exception, upholding a law requiring the disclosure of contributors to election campaign committees. The government argued that people making contributions to campaigns for public office presented a unique need for public exposure. Such exposure was necessary, the government posited, to combat the corruption of politicians. So long as contributors were publicly disclosed, it reasoned, the public could hold candidates and elected officials accountable, thereby reducing the chances of politicians doing improper favors for contributors.

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The government did not argue – indeed denied – that other candidates or public officials would weaponize public disclosure of campaign contributors to retaliate against them, harass them, or hold them out to public ridicule, economic loss or perhaps worse. But that happened recently when U.S. Rep. Joaquin Castro published the names of 44 Trump campaign contributors (some of whom ironically were Castro contributors too), accusing them of responsibility for the President's rhetoric about immigration that Castro found objectionable. He also identified their businesses. This was publicly interpreted by many as a shaming or "doxing" exercise intended to invite retaliation against the disclosed individuals. The Castro event has renewed legal and popular debate over the proper and improper uses of government-compelled exposure of private associations. The Castro event also has underscored the inherent dangers and potential misuses of government-compelled exposure.

Since the *Buckley* decision, the lower federal courts have blithely extended the public exposure rules tailored for campaign finance and upheld mandatory public disclosure requirements in far-flung contexts such as speakers and associations engaged in issue advocacy, public policy discussions, nonprofit solicitations, and state ballot measure advocacy. Many of these scenarios involve little risk of corrupting politicians but do enable doxing designed to silence speakers. Although the Supreme Court has reiterated its endorsement of compelled exposure of donors in the campaign finance context in a number of cases (*see, e.g.*, *Citizens United v. FEC* in 2010), the Court has been reticent to clarify the First Amendment limits for compelled exposure in other contexts. However, after the Third Circuit upheld a Delaware law requiring the disclosure of donors to groups that post public officials' voting records on the internet, in *Delaware Strong Families v. Attorney General of Delaware* (2015), two Justices – Justice Thomas and Justice Alito – voted in favor of granting certiorari. Observers are watching closely to see if the two new Justices, Justice Gorsuch and Justice Kavanaugh, will join them to provide the four votes needed to grant Supreme Court review of government-compelled exposure in such other contexts and, at least, delimit *Buckley* to campaign finance and the corruption of politicians.

A handful of cases are pending in lower courts that could make their way to the Supreme Court for review and offer the opportunity for the Court to provide needed clarification. They include two cases in the Ninth Circuit, *Center for Competitive Politics v. Harris* and *Americans for Prosperity Foundation v. Becerra,* which require disclosure of donors to certain nonprofits. A petition for certiorari is expected in *Becerra* by August 26. Another potential review vehicle is *The Washington Post v. McManus,* pending in the Fourth Circuit, which involves *The Washington Post*'s challenge to Maryland's law requiring internet-based advertising platforms to collect and publish extensive detailed information about political advertisers. So, stay tuned.

For more detail on the First Amendment political privacy issues in need of clarification by the Supreme Court, see the recent article by Lee Goodman in *Privacy in Focus*.