

## The Victims of “Dark Money” Disclosure

*How government reporting requirements suppress speech and limit charitable giving*

By Jon Riches

**Summary:** *Anonymous political speech has been essential to democratic discourse since the founding of our republic. Debates over whether to ratify the U.S. Constitution were primarily conducted through a series of anonymous papers. Yet in recent years, anonymous political speech has been under attack by so-called “dark money” critics, who demand that government expose the identities of individuals, businesses, labor unions, and nonprofits that spend money to participate in political dialogue. Couched as “transparency” measures, “dark money” disclosure mandates are often used as excuses to silence disfavored speech. Troublingly, mandated disclosure of private donors is sweeping the country in the form of vague and overbroad regulations of nonprofit organizations that operate in nearly every sector and industry and represent views across the political spectrum. These mandates have diluted political dialogue, invited harassment and retaliation against speakers, and chilled speech and association. Although the Constitution protects political and private associations against compelled disclosure, federal courts have often failed to enforce those protections. Liberty advocates should fight for greater constitutional protection of free speech and association rights, both in court and in state laws that regulate spending on political issues.*



The following cautionary tale is a true story. It reveals how endangered political speech is in America.

“Anne” was alarmed when she heard an early morning pounding on her front door. “It was so hard. I’d never heard anything like it. I thought someone was dying outside.” When she ran to open the door, armed police came pouring into every room of the house, yelling orders, cornering her family, and seizing Anne’s private property. The police verbally abused Anne and her family, instructing them not to contact a lawyer or tell anyone about the early morning raid.

**September 2015**

### CONTENTS

The Victims of “Dark Money”  
Disclosure  
Page 1

Briefly Noted  
Page 8

# Organization Trends

Anne's crime? She had supported Wisconsin's Act 10—Gov. Scott Walker's public union reform bill that passed in 2011. Anne's story is one of several incidents of harassment and intimidation that occurred in Wisconsin's "John Doe" investigations, so named because of the extraordinary powers granted to law enforcement to maintain the secrecy of their investigations. The investigators didn't have to reveal the names of their targets, and even when those targets, including Anne, had their homes publicly raided, they were put under gag orders and required not to reveal they were under investigation, even as government agents compelled the targets to disclose their personal information (*Wall Street Journal*, Nov. 18, 2013).

The investigation began as a probe into the activities of Walker and his staff, and expanded to reach nonprofits nationwide that had made independent political expenditures in Wisconsin, including the League of American Voters, Americans for Prosperity, and the Republican Governors Association (*Milwaukee Journal Sentinel*, Sept. 14, 2011).

---

**Editor:** Matthew Vadum

**Publisher:** Terrence Scanlon

## **Organization Trends**

is published by Capital Research Center, a non-partisan education and research organization, classified by the IRS as a 501(c)(3) public charity.

### **Address:**

1513 16th Street, N.W.  
Washington, DC 20036-1480

**Phone:** (202) 483-6900

**Long-Distance:** (800) 459-3950

### **E-mail Address:**

[mvadum@capitalresearch.org](mailto:mvadum@capitalresearch.org)

### **Web Site:**

<http://www.capitalresearch.org>

**Organization Trends** welcomes letters to the editor.

**Reprints** are available for \$2.50 pre-paid to Capital Research Center.

---

This John Doe probe serves as a chilling example of one state's attempt to criminalize political speech. It shows the danger to free speech when regulators use their authority to silence political expression with which they disagree.

The apparently politically motivated attempts to suppress speech in Wisconsin and invade Anne's privacy led her to protest that this was not the America she recognized. Nor is it consistent with this country's long tradition of respecting the right to free association and private speech of all kinds.

Indeed, when Americans were debating whether to ratify the U.S. Constitution, much of the public discussion occurred through anonymous essays and pamphlets. The most famous of these were the *Federalist Papers*, written with great secrecy under the pen name "Publius" by Alexander Hamilton, James Madison, and John Jay, in hopes of persuading citizens—especially in the critical state of New York—to ratify the Constitution.

It was years after ratification before the authors were revealed, and the essays themselves are now universally acknowledged as the greatest guide to our Constitution. The U.S. Supreme Court has cited the essays hundreds of times, from the landmark 1819 decision *McCulloch v. Maryland* down to the present day. Considering the personalities involved, regional rivalries at the time, and the importance of focusing the debate on the message rather than the messenger, it is unlikely that the *Federalist Papers* would have been as effective had their authors been forced to disclose their identities (see "Publius Was Not A PAC: Reconciling Anonymous Political Speech, the First Amendment, and Campaign Finance Disclosure," 14 *Wyoming Law Review* 253).

At the time of ratification, Alexander Hamilton in particular was subject to personal

attacks because of his foreign birth and perceived links to the British Crown. Similarly, although a less controversial character, James Madison's Virginian roots would have made New Yorkers suspicious of his arguments, had they been penned in his own name. Simply put, the Constitution may never have been ratified had it not been for anonymous political speech.

Yet, under some present-day state laws requiring disclosure of individuals and groups speaking on political issues, Publius's great essays would likely be considered publications authored by a "political committee," which would then be forced to disclose its authors or cease its publications. Broad disclosure laws now empower government to silence dissenting opinions. If the authors of the *Federalist Papers* had been subject to compulsory disclosure under current campaign finance laws, then so would other issue advocacy groups, including charitable organizations established under section 501(c)(3) of the U.S. tax code.

Funded largely by the Ford Foundation and radical left-wing philanthropist George Soros, the proponents of so-called "dark money" disclosure have already swept today's nonprofit organizations into the ambit of laws designed to regulate candidate campaign financing.

## **What is "Dark Money"?**

The wide use of the phrase "dark money" is itself a major propaganda victory for advocates of government reporting by private civic groups. The expression is, in essence, a political smear. Absurdly equating a lack of regulation—otherwise known as freedom—with sinister darkness, the phrase conjures images of shady political operatives greasing the palms of politicians in dark, smoked-filled rooms. But should the concept of "dark money" be applied to traditional political

activities, like you and your neighbor contributing your time and money to civic and social activities that you support? Is that really a threat to democracy, or are those who seek to silence the voice of opposition and limit speech the real menace?

So called “dark money” generally refers to funds spent for political activities by businesses, unions, nonprofit groups, and individuals who are not required by law to disclose the identities of their donors. Depending on where supporters of government disclosure draw the inherently arbitrary line, dark money could refer to donations made to the American Civil Liberties Union (ACLU) or to your local church or soup kitchen.

Already, as a general rule, any spending which calls for the election or defeat of a political candidate constitutes what the law calls “electioneering communications” and requires some disclosure to the government. In fact, our laws today have more disclosure obligations than at any other time in our nation’s history. (See [www.campaignfreedom.org/.../12/2014-08-19\\_Policy-Primer\\_Disclosure.pdf](http://www.campaignfreedom.org/.../12/2014-08-19_Policy-Primer_Disclosure.pdf).) Nevertheless, some anti-speech activists claim the current laws do not go far enough. They say certain charitable and social welfare organizations, including those organized under section 501(c) of the federal tax code, should be forced to disclose the identities of their individual donors when those organizations engage in political activity, even if that is not their primary function. Those calling for the elimination of “dark money” are thus attempting to dramatically extend the reach of government-mandated disclosure to a wide variety of organizations, activities, and communications.

Some government-disclosure advocates claim that so-called “dark money” expenditures constitute a significant portion of political spending in the United States, but

that assertion is false. In the 2014 election cycle, the Federal Elections Commission reported approximately \$5.9 billion in total spending on federal elections. Of that sum, roughly \$173 million came from groups that are not required by law to disclose donors.

This represents a mere 2.9 percent of all spending on federal elections—hardly a significant portion. As the Center for Competitive Politics observed from the 2012 election cycle, “Nearly all of the organizations that financed such independent expenditures ... were well-known entities, including the U.S. Chamber of Commerce, the League of Conservation Voters, the National Rifle Association, Planned Parenthood, the National Association of Realtors, the National Federation of Independent Business, NARAL Pro-

*“Anonymity is a shield from the tyranny of the majority.”  
—McIntyre v. Ohio Elections Commission, 1995*

Choice America, and the Humane Society.” As a result, it is not a secret what causes and issues those groups support.

Claims that “dark money” is distorting American politics are even more tenuous when leveled at 501(c)(3)s, considering that these nonprofit organizations are prohibited from participating in *any* partisan political activity.

### **What are 501(c)(3) nonprofits?**

There are nearly one million tax-exempt charities in the United States organized under section 501(c)(3) of the federal tax code. These organizations include schools, churches, hospitals, art centers, public radio stations, research foundations, and other groups dedicated to a range of issues from improving the environment to providing legal services to the poor. These groups run the

entire political spectrum. The ACLU, the National Rifle Association, Focus on the Family, and the Cato Institute, for example, are all 501(c)(3) public charities. While all types of 501(c) groups are tax-exempt or “nonprofit,” meaning that they do not normally owe taxes on their revenues, only contributions to the (c)(3)s are tax-deductible for donors.

Another important distinction between (c)(3) groups and other 501(c) organizations is that (c)(3) groups are *prohibited* from engaging in any express political activity involving political candidates. Other 501(c) organizations, notably 501(c)(4) social welfare groups, can advocate for the election or defeat of political candidates, so long as those activities are not the organization’s primary activity.

Organizations recognized under 501(c)(4) can also engage in unlimited lobbying to further the purpose of the organization. By contrast, 501(c)(3) public charities can only engage in limited lobbying under certain circumstances.

Of course, the entire point of a public or social benefit organization is to advance an issue or set of issues through public dialogue, including political dialogue. According to government disclosure advocates, however, people should not be able to donate privately to the charities of their choice if those entities engage in *any* political dialogue. What would this mean in practice? A donation to Planned Parenthood would cease to be your private business and become a public record. Member dues to the NRA or Greenpeace would be reported to the government and disclosed to the public. Even donors

# Organization Trends

to a theater group that engaged in political activity on an issue affecting the arts would be made public.

## Trends

Advocates of greater government reporting have engaged in a multi-pronged attack on anonymous speech to force more organizations, including 501(c)(3) nonprofits, to reveal their private donors. After a federal disclosure bill failed by a single vote on a procedural motion in the U.S. Senate, government reporting advocates have largely focused their attention on state legislatures, where several proposals have recently passed or nearly passed that would require a wide range of mandatory public disclosure.

Worse, some anti-speech activists have put aside the need to trouble themselves with actually passing laws and instead have persuaded state regulators to demand private donor information as part of their oversight of charitable fundraising. Many of these new mandates have been sweeping; for example, by expanding the definition of an “electioneering communication” or a “political committee.” In many instances, these efforts have resulted in compelled disclosure of transactions by both private individuals and nonprofit entities whose purpose is not primarily political.

The legislative proposals have generally come in one of two forms: dramatically expanding the definition of what constitutes (1) a “political committee” or (2) an “electioneering communication.” Many of these efforts have direct implications for 501(c)(3) organizations, particularly those that engage in limited lobbying. Additionally, the broad sweep of these proposals and statutes have ensnared private citizens engaging in grassroots political activity.

For example, in 2013, Nevada amended its campaign finance laws to expand the defini-

tion of a “committee for political action,” so that any group that receives or spends more than \$5,000 on an election or ballot question is deemed a political committee, regardless of the overarching nature or purpose of the organization. Under this law, 501(c)(3) organizations that, for example, support a ballot measure, would almost certainly have to disclose the identities of all their donors, even if that organization by no means has political activity as its primary purpose.



California Attorney General Kamala Harris

Such a broad definition of “political committee” even ensnared a concerned *individual* in Arizona. In 2011, Dina Galassini opposed a bond proposal set to appear on the Town of Fountain Hills’ November ballot. One month before the election, she sent a personal e-mail to 23 friends and neighbors asking them to join her in opposing the bond by writing letters and attending a protest where they would hold signs on a street corner. Shortly after sending her e-mail, town officials sent Galassini a “cease and desist letter,” claiming that she must register as a political committee. Galassini was frightened by the letter and cancelled her two planned protests. Exactly what town officials were hoping for,

and a chilling example of how thoroughly anti-speech activists hope to muzzle even the simplest, neighbor-to-neighbor engagement in public policy.

Some left-wing activist organizations take it further, engaging in what community organizers euphemistically label “accountability” actions. Tom Matzzie, a former organizer for the liberal pressure group MoveOn, created a group called Accountable America whose

mission was to intimidate donors planning to give money to conservative groups. Here is the group’s self-description from its website:

“Accountable America works to stop the outrageous policies of right-wing and special interests in Washington especially in the areas of economic policy, energy policy, national security policy and government reform. Our first project seeks to discourage groups and right-wing donors trying to ‘swiftboat’ progressives.”

Matzzie told the *New York Times* that he planned to send “warning letters” to big-

money donors to the Republican Party. “The warning letter is intended as a first step, alerting donors who might be considering giving to right-wing groups to a variety of potential dangers, including legal trouble, public exposure and watchdog groups digging through their lives,” the newspaper reported.

Imagine what these activist groups, who are more interested in muscling their opponents than throwing sunlight on campaign finance, might do if all “dark money” contributions were available in the public square.

The disclose-everything movement is making inroads at the state level across the nation. State legislatures have been seeking to expand the definition of “electioneering communication” to require 501(c)(3) nonprofits and other small groups to disclose their donors simply for speaking about political issues. For example, the Minnesota legislature recently considered two bills that greatly expanded the definition of “electioneering communication” to include any communication that (1) refers to a candidate, (2) is distributed within 30 days of a primary election or 60 days of a general election, and (3) “can be received by more than 1,500 persons.” These bills would have forced the organization to turn over the “name, address, and amount attributable to each person” who donated more than \$1,000 used for these so-called “electioneering communications.” Given the broad scope of this definition of “electioneering communications,” these bills would likely affect 501(c)(3) nonprofits, that published a nonpartisan voter guide, for example, and require that such groups disclose their donors.

These provisions that would force private organizations to report the names and addresses of their supporters to the government are often tucked into bills that are billed as “ethics” legislation, “anti-corruption”



**Tom Matzzie**

measures, or laws aimed at creating more “transparency.” Who could oppose ethics, anti-corruption, or transparency laws? But these laws turn the concept of transparency on its head. Transparency laws are supposed to make the government transparent to citizens, not to make citizens and our private political preferences transparent to the government.

### **Regulatory Efforts to Compel Disclosure**

Government reporting advocates also have been using the power of regulatory agencies to force nonprofit organizations to reveal their donors. These efforts attack the lifeblood of 501(c)(3) organizations – the ability to fundraise – giving nonprofit organizations the

untenable choice between ceasing fundraising activities or invading the privacy of the organization’s donors. The most aggressive such efforts are underway in the cultural bellwethers of California and New York.

In order to solicit charitable contributions in California, nonprofits, including 501(c)(3) organizations, must register with the California Registry of Charitable Trusts. As part of the registration process, 501(c)(3) nonprofits have historically submitted a redacted IRS Form 990 to state regulators. That form excluded names or other identifying information of donors. In 2014, however, California Attorney General Kamala Harris (D) began demanding that 501(c)(3) nonprofits submit an unredacted IRS Form

## Organization Trends

990 that includes the names, addresses, and contribution levels of donors (*Wall Street Journal*, Dec. 19, 2014). Even worse, once this donor information is turned over to the state government, California freedom of information laws arguably require government officials to make these records available to anyone who makes a public records request. In other words, the chief law enforcement officer in the state of California intends to unilaterally coerce private charities into disclosing their private donors as a precondition to engage in constitutionally protected speech and association.

New York Attorney General Eric Schneiderman has demanded the same information from 501(c)(3) nonprofits. He and his California counterpart are defending lawsuits against their demands for information.

### The Danger of Disclosure

Proponents of government-mandated disclosure make several arguments for compelling charitable organizations to disclose their donors. Those arguments range from the wrong but perhaps well-intentioned, to the nefarious. On the soft end of the spectrum are those who claim they are not seeking to prevent speech, but only to inform the public of who is speaking.

Daniel I. Weiner of the far-left Brennan Center for Justice is typical of this school of thought. He laments that the *Citizens United* decision and the economic freedom that flows from it are somehow unjust and empowering the rich at the expense of everyone else. It is “deeply disheartening to Americans who believe in transparency and think that all citizens, regardless of wealth, should be heard.”



New York Attorney General Eric Schneiderman

On the hard end of the spectrum are partisan political operatives who wish to use disclosure mandates to silence opposing views. As Arshad Hasan, executive director of ProgressNow put it, “The next step for us is to take down this network of [conservative and libertarian] institutions that are state-based in each and every one of our states.” (Ricochet, July 22, 2014)

One of the most significant challenges is protecting speakers who choose to remain private, particularly when speaking truth to power. Political actors have routinely sought the identities of anonymous speakers with whom they disagree in order to harass, humiliate, and ultimately silence them. During the Civil Rights era, for example, the Alabama attorney general sought to compel the National Association for the Advancement of Colored People (NAACP) to turn over the names and addresses of all of its members to the state. Fortunately, this attempt at intimidation was rebuffed by the U.S. Supreme Court as a

violation of the First Amendment rights of the NAACP and its members. (*NAACP v. Alabama ex rel. Patterson*, 1958)

Similar efforts to silence critics through forced disclosure continue today. These include threats from government bureaucrats, like we saw when Dina Galassini tried to organize some friends and neighbors to oppose a local bond measure in Arizona. They include threats from other citizens, such as when Margie Christoffersen lost her job as a restaurant manager after her \$100 donation to support a California ballot initiative defining marriage as the union of one man and one woman became public (“Prop. 8 Stance Upends Her Life,” *Los Angeles Times*, Dec. 14, 2008). And perhaps most ominously, these include threats from those wielding law enforcement authority, like the controversial Arizona Sheriff, Joe Arpaio, who has jailed journalists critical of his office as well as political opponents. (“Maricopa County supervisors settle lawsuits filed by ‘New Times’ founders, Stapley,” *Arizona Republic*, Dec. 20, 2013)

In this sense, mandatory disclosure laws do what many government reporting advocates want – they silence opposing views. In his concurring opinion in *Citizens United*, Justice Clarence Thomas cited a *New York Times* article that described a new nonprofit group formed in the run-up to the 2008 elections that “plann[ed] to confront donors to conservative groups, hoping to create a chilling effect that will dry up contributions ... [by exposing donors to] legal trouble, public exposure and watchdog groups digging through their lives.” This organization’s leader described his donor disclosure efforts simply as “going for the jugular.”

## Conclusion

Cloaked as advocates of greater information and transparency, the enemies of free speech are at the gate. Defenders of the First Amendment must be ready to identify the dangers of donor disclosure and challenge efforts to compel government reporting wherever they occur.

The nearly one million nonprofits – whose activities range from civil rights advocacy to equestrian therapy – should not fall victim to politically-driven efforts to silence their views and curtail their activities. All Americans have the right to support causes they believe in.

At the same time, the disrespect shown for anonymity in political dialogue and association disregards our nation’s rich history and tradition of protecting these rights and demeans Americans who cherish freedom of thought and speech. As the New York Supreme Court admonished in *People v. Duryea*, a First Amendment decision over 40 years ago:

Do not underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is responsible, what is valuable, and what is truth.

*Jon Riches is a senior attorney and general counsel at the Goldwater Institute. This paper is based on a longer report available at [goldwaterinstitute.org](http://goldwaterinstitute.org).*

**OT**

Please remember  
**Capital Research Center**  
in your will and estate planning.  
Thank you for your support.  
**Terrence Scanlon, President**

# Briefly Noted

Violating the Left's unspoken rule against attacking fellow leftists, **MoveOn** launched a broadside against Sen. **Chuck Schumer** (D-N.Y.) for daring to oppose President **Obama's** botched nuclear nonproliferation deal with the terrorist-sponsoring Islamic Republic of Iran. In fundraising emails, MoveOn dishonestly labeled Schumer a war hawk and took the risible position that not supporting the deal will lead to war with Iran, a nation where leaders conduct "Death to America" rallies every day. "We didn't stop the last war," MoveOn declared. "We'll all have to live with that—those of us who didn't lose our lives to it. But we can stop this one."

The Rev. **Al Sharpton** of **National Action Network** is urging black churches to organize support for the Iran deal. "We have a disproportionate interest, being that if there is a war, our community is always disproportionately part of the armed services, and that a lot of the debate is by people who will not have family members who will be at risk," Sharpton said. As **TruthRevolt** observes, "with the poll numbers for Obama's 'Legacy' foreign policy deal looking worse and worse for the administration, Sharpton apparently has decided that he needs to enlist the help of others to turn the tide."

Although Congress rejected legislation to defund **Planned Parenthood**, a group that is at the very center of gravity of the American Left, the group's problems aren't over. New sting videos shot by the **Center for Medical Progress** keep popping up, showing PP officials doing things like poking tiny human baby organs on a Petri dish while they haggle over how much the organs will fetch on the market. In order to discourage organ-harvesting for profit, federal law forbids anyone from carrying out an abortion procedure aimed at preserving some fetal organs at the expense of other organs.

Incivility evidently pays: Since members of the **Black Lives Matter** movement loudly booed former Maryland Gov. **Martin O'Malley** (D) and U.S. Sen. **Bernie Sanders** (I-Vt.) and stormed the stage at a radical left-wing activists' presidential candidates' forum, the movement has enjoyed a renaissance, *Politico* reports. Although viewed initially as a "disastrous disruption," the political theater at **Netroots Nation** in Phoenix, Ariz., has "supercharged the **Black Lives Matter** movement and pushed **Hillary Clinton** and her rivals ... to speak to the concerns of an African-American community ... enraged by high-profile incidents of police misconduct ..." **NAACP** president **Cornell William Brooks** praised the disrupters. "We're not having this conversation because [the protesters] haven't been polite," he said. "We're having this conversation because the presidential candidates are not being sufficiently precise."

Speaking of the NAACP, its longtime chairman **Julian Bond** died in August at the age of 75. He was also a co-founder of the **Southern Poverty Law Center**.

**American Enterprise Institute** scholar **Mark J. Perry**, a professor of economics at the University of Michigan's campus in Flint, the home of mockumentary maker **Michael Moore**, reports that the \$15 per hour minimum that appropriately took effect this past April Fool's Day in Seattle is already claiming victims. The wage law, which Perry dubs a "government-mandated wage floor that guarantees reduced employment opportunities for many workers," began a few months ago with an increase of the \$9.47 an hour minimum to \$11 an hour. As a result, restaurant layoffs in Seattle are already legion. The minimum rises to \$15 by 2022. This policy makes "Seattle the first major city in America to take such an action to address income inequality." It is also an "economic death wish," Perry writes.