



DISCLOSE Is a SHAM

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It's an election year, and incumbents are nervous. And so, in a classic sign of political weakness, Senate Democrats have scheduled a vote on legislation that would manipulate campaign-finance laws to silence their opponents.

Their weapon is the "DISCLOSE Act," a gimmicky acronym for "Democracy Is Served by Casting Light on Spending in Elections." Democrats in Congress have been trying to pass various versions of the bill since the winter of 2010, when Republican Scott Brown's stunning victory in the special election to succeed the late Ted Kennedy in Massachusetts revealed the unpopularity of Obamacare and the Democratic agenda.

Despite claims that the bill would merely inform the public about campaign spending, DISCLOSE originally would have prohibited large amounts of speech, and not just about candidates. Senate Democrats failed to break a Republican filibuster on this first version by one vote in 2010, and their majority has shrunk since then. But they haven't given up, and while they haven't passed a budget in over three years, they have scheduled a cloture vote (i.e., the vote needed to break a filibuster) on a new version of DISCLOSE for Monday.

In an implicit admission of the true scope of the original DISCLOSE bill, we are assured that the new bill has been stripped of all the 2010 bill's provisions that had nothing to do with disclosure.

If the bill has been stripped of its non-disclosure provisions, why should anyone be opposed to it? First, because DISCLOSE attempts to scare and regulate people into remaining silent. Second, because this is clearly being done for partisan purposes. And third, because we already have more campaign-finance disclosure than ever before, and more disclosure is simply unnecessary.

First, silence. As Senator Charles Schumer (D., N.Y.) said when introducing the original bill in 2010, "the deterrent effect [of DISCLOSE] should not be underestimated."

The bill's real aim is to force trade associations and nonprofits to publicly name their donors. Such lists might be used by competing groups to poach members, or, more ominously, by government officials to threaten or retaliate against political opponents, or by interest groups to gin up boycotts and threats against the individual and corporate

members of the groups.

As Senate Minority Leader Mitch McConnell (R., Ky.) noted in a recent speech at the American Enterprise Institute, the Obama campaign has already been encouraging supporters to harass and publicly vilify and embarrass political opponents. Liberal groups have also been threatening corporations with lawsuits, disruption of shareholder meetings, and boycotts if they engage in political speech that departs from the liberal agenda. Conservative organizations' members and donors have lost their jobs after liberal groups boycotted their employers — employers that had nothing to do with conservative causes themselves.

Beyond intimidation, there is the sheer force of regulation. Perhaps the most infamous provision of the McCain-Feingold law was a restriction on the ability of groups, within 60 days of a general election, even to mention the name of a congressman running for reelection. DISCLOSE resurrects this idea with a vengeance.

Unlike McCain-Feingold, DISCLOSE does not contain an outright ban on such ads, because the Supreme Court has held that McCain-Feingold's ban is unconstitutional. Instead, Democrats now seek to discourage political opposition by using massive amounts of red tape to bury groups that want to use TV or radio ads to lobby Congress or inform the public. The added rules are intended to wreak havoc on the groups' already-overregulated activities.

Consider an environmental group that runs an ad in January of an election year urging support for a bill to regulate carbon dioxide. It might ask viewers to contact their congressman.

Under DISCLOSE, the group would have to name all major donors to the FEC. Some of those donors might need to preserve their privacy in order to keep their jobs. Some might have responded to a request to support the group's clean-water efforts. The bill could actually associate individuals with ads they do not in fact support, potentially to their peril.

If an individual did not want to be associated with funding particular ads, he would have to inform the organization that his donation could not be used for any ads mentioning a candidate in an election year. But that means his money could not be used for any ads, including ads he might support. Similarly, the nonprofit could protect its donors' privacy only by creating a special bank account where it could deposit funds from donors who designate their funds to support ads that might run in election years. This substantially complicates fundraising and management, and consequently suppresses speech for those who cannot or will not take on the additional overhead and administrative burden. The Supreme Court has already said Congress can't justify a prohibition on the use of general-treasury funds to pay for advertisements by offering a segregated-fund option.

Moreover, DISCLOSE stretches the McCain-Feingold limitation on mentioning a candidate's name in an ad: Rather than a ban during the 60 days before an election, the prohibition now would cover the entire election year: more than 10 months in Senate and House races, and 14 months in presidential races. The bill's burdens fall heaviest on

smaller groups that can't afford a pricey lawyer to tell them what is and isn't legal.

Second, partisanship. The *Wall Street Journal* recently ran a front-page story on massive election spending by unions in behalf of Democratic candidates — spending that is not reported to the Federal Election Commission because it is at least nominally directed at union members. According to the *Journal*, this amounted to \$3.3 billion from 2005 through 2011. But DISCLOSE doesn't push for such union activities to be reported to the FEC. DISCLOSE is designed to exempt unions from the membership disclosures it requires of other groups, and to allow unions — but not corporations — to make large undisclosed transfers of funds to the parent national and international associations. Democratic sponsors have made clear that their goal is to silence business support for Republicans. If more disclosure is desired, lawmakers should write the rules in a nonpartisan manner and make certain First Amendment rights are protected.

But that brings us to a final point. Contrary to the heated rhetoric so often employed by supporters, the bill is simply unnecessary.

Current law requires disclosure of all independent expenditures (ads that are independent of the campaign but that support or oppose a candidate's election) of \$250 or more. It also requires disclosure to the Federal Election Commission of all "electioneering communications" (broadcast ads that merely mention a candidate close to an election) of \$10,000 or more. Donors who give \$200 or more for independent expenditures or \$1,000 or more for "electioneering communications" to an organization must also be disclosed.

All candidates, political parties, traditional PACs, and so-called super PACs must disclose all donors over \$200, and all expenditures, to the FEC, where they are made publicly available online. Close to an election, these reports must often be filed within 24 hours, and they are typically available on the Web within 48 to 72 hours.

Finally, all political ads must have written or spoken disclaimers, or both, stating who paid for them.

Ignoring this already-robust disclosure regime, DISCLOSE piles enormous costs on nonprofits and other speakers, and it seeks the public disclosure of not only the names of those who contribute to fund political speech, but also the names of all members of any group that engages in independent spending on politics. As the Supreme Court noted 36 years ago in [*Buckley v. Valeo*](#): "We have repeatedly found that compelled disclosure [of membership lists], in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."

DISCLOSE seeks to impose costs that would chill speech, and it appears intended to accomplish indirectly, through costly and arbitrary compliance provisions, what the First Amendment prevents Congress from doing directly: silence opposing voices.

DISCLOSE is a SHAM: a Strategic, Ham-Fisted Attempt at Manipulation.

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