

*A voluntary system offers advantages over mandatory donor anonymity.*

# Another Approach to Anonymity

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**I**N LAST SUMMER'S ISSUE OF *REGULATION*, Yale Law School professor Ian Ayres suggested that campaign finance laws be reformed to require that contributions pass through blind trusts ("Should Campaign Donors Be Identified?"). That way, a candidate would never know for certain who contributed to his campaign, or how much the contributor gave. The lack of knowledge would hamper campaign finance corruption; accommodating candidates would not know to whom they owe favors and donors would not be certain that they successfully "purchased" access and influence.

As Ayres noted in his "Readings" list, he is not the first to propose an anonymity scheme. I, myself, suggested a voluntary system in a 1996 article ("Campaign Finance Reform," *Chronicles*, Vol. 20, No. 3). Under that scheme, candidates who opted into the anonymity system would be exempted from other campaign finance rules, including limits on the size of donations. Donors, in turn, would contribute to their candidates through a single private institution that I call the "Campaign Finance Bank" (CFB). I believe such a regime offers several advantages over Ayres' mandatory system.

## PROBLEMS WITH MANDATORY ANONYMITY

Perhaps the most serious difficulty for Ayres is constitutional uncertainty: Would the courts permit government suppression (or, at least, a 10-year government delay in the release) of campaign finance information? Perhaps, in order to prevent "corruption or the appearance of corruption," the courts would accept the regime, but that is far from certain. However, under a voluntary system, the constitutionality question would be moot. Because the candidate volunteers to participate in the system (in exchange for avoiding other campaign finance regulations), he would have no legal grounds to challenge its rules.

Secondly, Ayres' regime likely would face challenges

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outside the courtroom, from civil libertarians. For them, government-required suppression of campaign finance information would be worrisome, to say the least. A voluntary system would raise fewer concerns because candidates would not have to opt into the system. If they do, they would gain other freedoms that civil libertarians likely would endorse, including no limits on the size of contributions or on the type and size of otherwise-legal campaign expenditures. Free speech opportunities would be expanded. Political action committees (PACs) and other organizations would be free to make unlimited donations to participating candidates. And candidates who participate in the voluntary system would be free from the intrusive hand of the Federal Elections Commission (FEC).

A final problem for Ayres' mandatory scheme is that it would offer wrong incentives to candidates and the private financial institutions that operate the blind trusts. Candidates would want to know the identity of donors and institutions would want the candidates' business, so there would be significant mutual benefit from illicit disclosure. By having just one CFB, there would be less incentive for disclosure.

## HOW VOLUNTARY ANONYMITY COULD OPERATE

A candidate who agrees to receive all of his campaign contributions through the CFB would be said to "participate fully" in the system and would thus not be constrained by the FEC's current regulations. Full participants could receive contributions from PACs, provided that the PAC contributions are processed through the CFB. In-kind contributions other than labor would be prohibited.

To deter cheating, fully participating candidates would have to agree to make all campaign expenditures on debit cards issued by the CFB. That would ensure that expenditures do not exceed donations, and would enable vendors of campaign goods and services to detect and report violations.

Candidates would receive a copy of their account balance from the CFB at the end of each accounting period—typically monthly, but more frequently as the election nears. To prevent "signaling" by a donor, a 20-percent rule would be applied: No single donation could exceed 20 percent of

the total contributions within a single accounting period. Any excess would be deferred by the CFB to the next accounting period, with the 20-percent rule being reapplied as necessary.

**Donor's kit** Contributions to candidates would be made via a "donor's kit" consisting of a pair of attached envelopes that are both stamped with the same bar-coded serial number. In the first envelope, the donor would insert his check payable to the CFB. If the donor wishes a receipt, he would include his name and address with the check. In the second envelope, he would insert a slip of paper identifying the name of the candidate/recipient and the office sought. Both envelopes would then be sealed and mailed to the CFB.

At the bank, the two envelopes would be separated and each sent to a different department. In one, a CFB employee would open the envelope containing the check. The employee would scan the serial number into a computer, along with the amount of the check. If requested, a receipt would then be generated and mailed to the donor.

Meanwhile, in another department, a different CFB employee would open the second envelope containing the name of the intended recipient/candidate. The employee would scan the serial number into the computer and enter the recipient/candidate's name, enabling the contribution to be routed electronically to the candidate's account.

To prevent a donor from defeating the anonymity system by simply handing an unsealed-but-completed donor's kit to a candidate, a different procedure would apply for donations above, say, \$200. Instead of writing the recipient/candidate's name on the slip that goes in the second envelope, the donor would write his own name, phone number, and code word. At the CFB, an employee would call the donor and, after receiving the correct code word, would connect the donor to an electronic menu from which he could select the candidate whose campaign is to receive the donation.

Only the contributor and the computer would "know" all of the following: the donor's identity, the recipient/candidate's identity, and the amount donated. But the computer is sealed and it is not talking. Meanwhile, the envelopes and their contents, which would provide a "paper trail" to match donor to candidate, would be destroyed at the end of each day. What is more, once the contribution is routed electronically to the correct account and the check has cleared, information matching the contribution to the donor would be deleted from the computer's memory.

To ensure that the system works properly, an observer from each political party could be present to observe CFB employees' data entry. Copies of the system's software would be made public so that all interested parties could be confident the program is honest and error-free. And party officials could witness the uploading of the computer system and the subsequent "sealing" of the software input system, thus further alleviating concerns over tampering.

**Useful deception** The only evidence that a donor would have that he made a contribution would be his receipt.

But it would not identify the recipient/candidate. The donor could take the receipt to virtually any politician in the country and claim that the specified donation was for his campaign, but candidates eventually would grow skeptical of such assertions.

I say "eventually" because, following the adoption of this scheme, candidates initially would be well informed about their donors. However, over time, the value of candidates' information would deteriorate. The donation patterns and donors with which they once were familiar would morph into unfamiliar patterns and different donors whose veracity they would be unable to confirm.

## GAINING ADOPTION

There are two incentives to encourage participation in such a system. The first is a market incentive: Candidates who agree to accept all of their contributions through the CFB would likely be looked on more favorably by voters than candidates who participate in the current system. That would give anonymity participants a competitive edge. The marketplace would then render its judgment, and successful behavior would be imitated.

A second and more powerful incentive would be the exemption of anonymity participants from federal campaign finance laws and regulations, including jurisdiction by the FEC. Participation would exempt entities from all contribution limits, from all reporting requirements, and, of course, from all disclosure requirements. Donations would be permitted from any domestic source that collects its contributions through the CFB. That implies that corporate employees and union members would be required to donate as individuals or make their anonymous donations to the corporate account and the union account, respectively, at the CFB. Congress would enact penalties on candidates who agree to participate fully, but who cheat by receiving direct contributions or who make campaign expenditures through means other than their CFB-issued debit card.

**Tantalizing Congress** At first glance, it would seem that the likelihood of Congress enacting such legislation would be close to zero. But there is a nearly foolproof way to get the proposal adopted: Let some private organization establish the CFB and announce that it is accepting donations for all political candidates, with the understanding that no money would be released to candidates until it becomes legal to do so. (The donations would be refundable until the necessary legislation becomes law.)

From time to time, the sum collected by the CFB would be announced, especially the total sum designated for presidential and congressional candidates. At some point, Congress would find the sum irresistible; moreover, members would be insatiably curious to know the balance in their individual accounts. The only way they could get their hands on the money would be to enact the appropriate legislation. So, in a sense, perhaps we could bribe Congress to quit taking bribes. **R**