



September 16, 2013

The Honorable Richard J. Durbin
Chairman
Subcommittee on the Constitution, Civil Rights and Human Rights
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Durbin:

On behalf of the Center for Competitive Politics (CCP),¹ I am writing in response to your August 6 letter inquiring as to the Center's involvement with the American Legislative Exchange Council (ALEC) and our position on "stand your ground" laws.

According to news accounts, you have sent similar or identical letters to more than 300 groups and you are quoted in an article as saying, "My concern is with the lack of transparency. As a public official, when I take a position, I stand up to explain and defend it. I file annual financial disclosures, campaign finance reports and have to face the scrutiny of public opinion."

The purpose of disclosure is to allow citizens to monitor government, not to allow government to monitor citizens. We recognize that in practice this distinction can dissolve. For example, if we demand public disclosure of who gave money to a public official, in order to monitor that official, we will necessarily give the government the tools to monitor us. But as a first principle for thinking about what disclosure is proper, it is a good starting point.

"Because members of the Senate want to know" is simply not a valid reason for the government invading an organization's privacy or the privacy of its supporters. "As a public official" is the key phrase in your response. You are a public official. You file financial reports and campaign finance reports because you are a public servant. Citizens do not have to report on their beliefs and activities to the government. The two are not comparable.

¹ The Center for Competitive Politics is a nonpartisan, non-profit 501(c)(3) organization focused on promoting and protecting the First Amendment political rights of speech, assembly, and petition. It is the nation's largest organization dedicated solely to protecting First Amendment political rights. Bradley Smith founded the Center in 2005, after completing his term as Commissioner at the Federal Election Commission (FEC), because it had become clear to him, both as an academic and then in his time as a Commissioner, that the public is greatly misinformed about campaign finance laws and regulations. The Center has worked tirelessly to maintain an honest, nonpartisan approach to issues of campaign finance reform.

For a member of the United States Senate to demand to know if citizens financially support certain private groups and organizations, and what they think of certain laws, with the openly stated intention of publicizing the responses in an official Senate hearing is, we believe, an act of intimidation and an abuse of office.

Your request is made at a time when Americans' confidence in government has been rocked by information that the IRS has targeted groups for their political beliefs. You are one of a number Senators who specifically urged the IRS to investigate conservative non-profit groups. Such pressure on the agency appears to have been a major factor in creating the current IRS scandal, which will have longstanding repercussions for the agency's reputation and the voluntary compliance of citizens with the tax system. Your letter to the IRS Commissioner, which would have been illegal if sent by the president or his staff,² demanded an audit of one group.³ That demand also may violate Senate Rule 43,⁴ which governs communications "with an executive or independent government official or agency." That rule does not permit demands of government officials such as that contained in your letter.

The First Amendment grants Americans the right to speak about politics without fear of official retribution from the government or elected officials. Sending letters on official U.S. Senate stationery demanding information about organizations' constitutionally-protected associations and specific political stances, with a clearly implied threat of political retaliation, has a chilling effect on both speech and association. Individuals and businesses may now hesitate to associate with ALEC or other groups for fear of retribution. Of course, this may have been the unstated goal of your letter, which was sent on the eve of ALEC's 2013 Annual Meeting.

These demands are reminiscent of the rejected "DISCLOSE Act," which would have mandated disclosure of donations not related to the election or defeat of political candidates. The bill was about politics and silence as much as "disclosure." As Senator Charles Schumer said when the first bill was introduced, "the deterrent effect [on citizens' speaking out] should not be underestimated." It appears the ultimate aim of such proposals is to force trade associations and non-profits to publicly list all their members along with their dues and contributions. Such lists can be used by competing groups to poach members and, more ominously, to gin up boycotts and threats to the individuals and corporate members of the groups— indeed, this is already being done. Further in the background lies the thinly veiled threat of official government retaliation.

The desire to preserve privacy stems from a growing awareness by individuals and the Supreme Court that threats and intimidation of individuals because of their political views is a very serious issue. As the Supreme Court has stated, "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action" (*NAACP v. Ala. ex rel. Patterson*, 357 U.S. at 462). By questioning every organization that has associated with an organization whose views you seem to dislike, you have, we hope unintentionally, engaged in the sort of subtle intimidation that the Court has warned is so dangerous and pernicious.

² 26 USC § 7217

³ <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=833d8f1e-bbdb-4a5b-93ec-706f0cb9cb99>

⁴ http://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=efa7bf74-4a50-46a5-bb6f-b8d26b9755bf

This is a powerful reminder that transparency and disclosure can be abused by government and government officials. At its best, transparency allows citizens to monitor the activities of their government and elected officials. Demanding to know with whom Americans associate and what causes they support, under the not so subtly implied threat to use the power of government to attempt to embarrass them, or more, is to do precisely the opposite. It seeks to use the power of government to monitor the activities of its citizens, with the apparent purpose of directly pressuring speakers to shut up, or providing political allies with weapons to use against common political opponents.

We strongly encourage you to reconsider your approach out of simple respect for your fellow citizens and the First Amendment. Otherwise, we fear that such activity will not only become more pervasive, but will also tarnish your legacy and forever be enshrined in political lexicon as Durbinism. Americans engaged in political or advocacy activities should not have to wonder if they might be hauled up to a future hearing of a Senate committee to be publicly grilled on their views and support for certain organizations or beliefs.

With the foregoing in mind, we answer your letter voluntarily and it should not be presumed that we will respond to future such requests, which we deem inappropriate.

As a non-partisan, tax exempt 501(c)(3) organization, the Center for Competitive Politics does not engage in electoral advocacy and is strictly limited in the de minimis amount of lobbying it may conduct pursuant to IRS rules. CCP has provided its expertise to numerous government agencies and private organizations seeking to improve the electoral and campaign finance systems. CCP is not a member of ALEC and has not provided funding to ALEC in 2013. In fulfillment of our mission, representatives of CCP previously served on ALEC's Election Law task force, which was disbanded in 2011. CCP also has worked with the National Conference of State Legislatures, providing speakers at that organization's last two annual meetings, and provided expert testimony and analysis to numerous congressional committees and state legislative bodies. As an organization whose mission is to promote and defend the First Amendment's rights to free political speech, assembly, and petition, CCP takes no position on "stand your ground" laws. However, we strongly believe that persons have a right to advocate for or against "stand your ground" laws without being subjected to intimidating letters from members of the U.S. Senate.

We ask that, as promised in your letter requesting this information, you include this response in the record of the Committee hearing.

Very Truly,



David Keating
President