



House Draft COVID-19 Emergency Bill Contains Hidden Threats to First Amendment Rights

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Yesterday, Democratic leadership in the House of Representatives unveiled a draft bill: the “Take Responsibility for Workers and Families Act.” Ostensibly, this legislation is intended to address the economic damage caused by the COVID-19 pandemic.

But buried amid its more than 1,400 pages are two provisions that would require Americans to surrender vital constitutional rights before receiving economic aid.

The first condition states that “[a]ny corporation that receives Federal aid related to COVID-19 shall, until the date on which all such Federal aid is repaid by the corporation to the Federal Government... not carry out any Federal lobbying activities.” As the D.C. Circuit once pointedly observed, “lobbying is of course a pejorative term, but another name for it is petitioning for the redress of grievances” – a liberty expressly protected by the First Amendment.

The second condition is that an “accelerated filer” – SEC speak for large corporation – must file certain “political spending disclosures” with the Securities and Exchange Commission “on a quarterly basis (and make such disclosures available to shareholders of the corporation and the public).” Some of these political spending disclosures are duplicative of filings that would already be made to the Federal Election Commission (and are therefore useless). Some ask for unknowable precision (“the total amount of expenditures for political activities *intended* to be made by the corporation for the forthcoming fiscal year”). Others go further: such as forcing COVID-19 aid recipients to report online political communications that non-recipients do not have to report.

Perhaps most aggressively, it would require accelerated filers to report dues or donations given to trade associations and social welfare groups. At present, such donations are private under federal law, as part of Congress’s longstanding recognition of the fact that “compelled disclosure, in itself, can seriously infringe on privacy of association and belief,” rights protected by the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam).

Now, you may ask: “Hey, wait a minute! I’ve read the First Amendment! And it says that Congress shall make no law abridging the freedom of speech or the right to petition. But Congress isn’t actually banning or abridging anything – it’s just imposing conditions on the receipt of federal aid. Doesn’t Congress do this all the time?”

Congress *does* place conditions on funds all the time. Money given to the Corporation for Public Broadcasting can only be used for public broadcasting purposes. It cannot be used to fund, say, the manufacture of PBS zeppelins.

However, Congress *cannot* force the recipient of a federal benefit to choose between forfeiting her constitutional rights and receiving that benefit. The Bush administration could not have conditioned Hurricane Katrina relief on recipients ceasing to criticize the government’s cleanup efforts in Louisiana, and the Obama administration could not have conditioned Fox News’s broadcasting license upon its ceasing to air interviews with Donald Trump.

The Supreme Court has articulated “an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). “The doctrine prevents the Government from using conditions to produce a result which it could not command directly.” *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 584 U.S. __; 138 S. Ct. 1365, 1377 n.4 (2018) (citation and quotation marks omitted). As the Court reasoned in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), “if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited...Such interference with constitutional rights is impermissible.” The Court notes that the unconstitutional conditions doctrine applies even if the regulated target “has no entitlement to th[e] benefit.” *United States v. Am. Library Ass’n*, 539 U.S. 194, 210 (2003) (quotation marks and citation omitted).

So, could the government condition vital financial assistance by asking recipients to forfeit their Petition Clause rights? No. At least not if the recipient is using non-federal funds.

For example, the Supreme Court has ruled that the aforementioned Corporation for Public Broadcasting cannot condition disbursement of its funds to local stations upon a ban on editorializing. *Fed. Communications Comm’n v. League of Women Voters*, 468 U.S. 364 (1984). As Congress could not directly prohibit editorializing, it also could not do so indirectly.

Similarly, the new disclosure requirements imposed on accelerated filers would have to survive “[t]he strict test” of exacting scrutiny. *Buckley*, 424 U.S. at 66. The effort to flush out donors to trade groups and other nonprofits is particularly constitutionally sensitive, given the Court’s longstanding defense of the First Amendment right of all Americans “to pursue their lawful private interests privately and to associate freely with others in so doing” outside of the very narrow context of direct electoral advocacy. *NAACP v. Ala.*, 357 U.S. 449, 466 (1958).

Sadly, the House’s coronavirus response is not the first time that a Congressional effort was undertaken to impose unconstitutional conditions on federal dollars in order to crack down on lobbying and associational freedoms. Back in 1995, Republicans in Congress introduced a measure to do just that, conditioning federal grants to, among others, charities spending “more than five percent of their own private resources” on lobbying and also “impos[ing] new and extensive reporting requirements” on targeted groups. Timothy C. Layton, Note: Welfare for Lobbyists or Nonprofit Gag Rule..., 47 *Syracuse L. Rev.* 1065, 1067-1068 (1997).

That effort ultimately failed to become law, perhaps due to the advice of Professor David Cole, now the National Legal Director for the American Civil Liberties Union. He testified before Congress and explained that the proposal “seeks to have the government control what grant

recipients do with their own money, on their own time, outside of any project funded with federal dollars. As such, it plainly violates well-established principles of constitutional law.”

Our more expert readers may have another objection. “What about *Regan v. Department of Taxation*, 461 U.S. 540 (1983)? That case established that Congress could choose not to subsidize the lobbying activities of § 501(c)(3) nonprofit corporations.”

But *Regan* determined that tax-deductible contributions and tax exemptions were the equivalent of “cash grants.” 461 U.S. at 544. Since this understanding of the tax code essentially meant that § 501(c)(3) groups were functionally funded by the taxpayer, “Congress...merely refused to pay for the lobbying out of public moneys.” *Id.* at 545. Even *Regan* conceded that Congress had no power to limit spending on constitutionally-protected acts, such as lobbying, when groups use “their own money.” *Id.* at 546, n.7.

The Act does not say that recipients may not lobby “using the funds received in federal aid.” Nor does it condition its new disclosure burdens on money spent “using the funds received in federal aid.” Rather, it orders disclosure compliance and bans lobbying paid for with *any* corporate resources. (And even if the Act *did* seek to only condition the actual aid money from being spent on the question, given the breadth of anticipated relief, it may well spark a need for a reevaluation of the *Regan* exception to the unconstitutional conditions doctrine.) *Regan* is no get-out-of-constitutional-jail-free card for those who advocate such restrictions.

In short: Congress cannot force American companies to make a choice between their constitutional rights or their economic life. These unconstitutional, unrelated provisions ought to be stripped from this draft legislation. In the midst of a public health and economic crisis, relief should not be held up over unrelated policy goals.

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