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Judge likens Koch brothers' plight that of civil rights workers in the 1950s

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What do billionaire brothers Charles and David Koch have in common with civil rights pioneers of the 1950s? More than you might think, according to a **recent ruling** by a federal judge.

Each has faced threats and harassment from those who disagree with their views, and each is entitled to privacy when it comes to disclosing certain kinds of information to the government. So said U.S. District Judge Manuel L. Real in an April 21 ruling, citing constitutional grounds.

But the court decision has been more than a little controversial; comparing the travails of billionaires to the violent threats endured by civil rights workers in the 1950s is more than a stretch, say some of those familiar with the case — it's offensive.

The argument is far from academic. Indeed, the case in the U.S. District Court for the Central District of California represents just the latest front in an ongoing legal and public relations battle being waged by a wide range of mostly conservative groups attempting to keep donors to political nonprofits — including "dark money" groups — hidden from view.

Many of the legal tussles revolve around interpretation of a crucial civil rights case from 1958: ***NAACP v. Alabama***. Increasingly cited since the landmark *Citizens United v. Federal Election Commission* decision in 2010, today that 58-year-old civil rights case is being trotted out again and again — in courtrooms, on talk shows, in news articles and in statehouses all over the country.

Death threats via Twitter

The historic Alabama decision — allowing the NAACP to keep its membership list secret — was deployed as a key argument in that recent court case.

Americans for Prosperity Foundation, a charitable, 501(c)(3) nonprofit group, had refused to turn over a list of its donors, their addresses and contribution amounts to the state attorney general, which had requested the information as part of a 2011 filing. The state requires such disclosures by all charities to help it guard against fraud.

While it does not typically release donor lists to the public, there was an inadvertent breech that did allow some filings to be viewed, the foundation noted.

The foundation's chairman is the well-known billionaire industrialist David Koch, who, along with brother Charles Koch, ranks among the nation's most prolific political donors and is playing a major role in the 2016 election.

In December 2014, Americans for Prosperity Foundation asked the judge for an injunction, which would allow it to keep its donor list secret, citing a threat to its First Amendment rights. It presented evidence of "serious and often horrific" threats against Charles and David Koch, **wrote Mark Holden**, senior vice president and general counsel for Koch Industries in a statement filed with the court.

One tweet, for example, stated "I say we kill the Koch brothers and their entire family line."

In court, lawyers for the foundation used the 1958 *NAACP v. Alabama* case as justification for withholding the list of names and donors.

"For some 50 years, Your Honor, since the Supreme Court in 1958 upheld the right of the NAACP to resist compulsion by the state of Alabama of its membership list, courts have recognized that the First Amendment protects against this sort of compulsion in this sort of circumstance," said the foundation's lawyer Derek Shaffer, according to a preliminary transcript of the trial.

Judge Real granted the injunction.

The judge noted in his ruling that AFP Foundation, its employees and supporters "face public threats, harassment, intimidation and retaliation once their support for and affiliation with the organization becomes publicly known."

"And although the Attorney General correctly points out that such abuses are not as violent or pervasive as those encountered in *NAACP v. Alabama* or other cases from that era, this court is not prepared to wait until an AFP opponent carries out one of the numerous death threats made against its members," he wrote.

The state has appealed the decision to the U.S. Court of Appeals for the 9th Circuit.

'Violence and bloodshed' in Alabama

The Alabama case originated in 1956 when state Attorney General John Patterson sued the NAACP for failing to file papers required for it to do business in the state.

During the course of the litigation, a state court, acting on the Alabama attorney general's motion, ordered the NAACP to produce its membership lists.

The NAACP, fearing for the safety of its members, refused to turn them over.

The NAACP was held in contempt and fined $100,000 for failure to produce the list. The Alabama Supreme Court refused to hear an appeal, and the case went to the U.S. Supreme Court in 1956.

The civil rights group argued that it withheld the list for good reason. In an era of enforced desegregation, being a member of the NAACP was a hazardous proposition.

"If the state had these rosters, they would turn them over to the employers and organizations like the Ku Klux Klan, and people's lives would be threatened and endangered as well as their jobs,"

said Bernard Simelton, current president of the Alabama State Conference of the NAACP in an interview with the Center for Public Integrity.

The case was argued in the midst of a tumultuous era for the nation's civil rights movement.

In 1955, NAACP member Rosa Parks famously refused to give up her seat to a white passenger on a bus, sparking the Montgomery bus boycott. The previous year, the U.S. Supreme Court ruled in *Brown v. Board of Education* that state laws establishing separate public schools for black and white students were unconstitutional.

"Violence and bloodshed have been predicted by high state officials if segregation is ended," wrote the NAACP's lawyers in the Alabama case. "Threats and actual acts of violence have been directed against Negros who seek to assist their constitutional rights as well as against whites who seek compliance with the law."

The lawyers cited a year-long series of bombings and shootings of black leaders around the bus segregation issue. An attempt was made to bomb the Montgomery home of the Rev. Martin Luther King, who was an emerging figure of the civil rights movement and a spokesman for the bus boycott. Ku Klux Klan activity, demonstrations and cross burnings were reported in the Alabama communities of Opelika, Montgomery, Mobile, Birmingham and Prattville, among others.

"In Birmingham, Rev. F. L. Shuttlesworth was physically attacked when he attempted to enroll Negro students in an all-white school," the lawyers wrote.

The high court ruled unanimously in the NAACP's favor. On June 30, 1958, Justice John M. Harlan noted that the NAACP had made "an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."

NAACP case also used by 'dark money' groups

Citations of the NAACP case have gone beyond groups like the Americans for Prosperity Foundation. So-called "dark money" groups — made possible by the landmark 2010 *Citizens United v. Federal Election Commission* decision — have been using the *NAACP v. Alabama* case in arguments designed to keep their donors hidden from view as well.

The differences between the Americans for Prosperity Foundation and these "dark money" organizations are critical, especially to the Internal Revenue Service. As such, the use by "dark money" groups of the NAACP case as an argument for continued secrecy has been of far greater interest to campaign finance reformers and donors alike.

The Americans for Prosperity foundation, as a 501(c)(3) organization, is prohibited from paying for advertising that attacks or supports a candidate. In addition, donations to the organization are tax deductible. A "dark money" group, which is organized as a 501(c)(4) "social welfare" organization, can pay for such advertisements, and thanks to the Citizens United decision, can use corporate and labor union money to do it — meaning more and more cash is flowing in this direction. Donations to social welfare groups are not tax deductible.

In 2006, less than $5.2 million was spent by groups that spent money supporting or opposing candidates but did not release the names of their donors, **according to the Center for Responsive Politics**. That amount grew to well over $300 million in the 2012 presidential cycle.

As the presidential race has narrowed to two candidates, a flood of "dark money" spending is expected in the 2016 race as well.

Americans for Prosperity Foundation actually has a sister organization, Americans for Prosperity, that is indeed a "dark money" nonprofit. Legally, they are separate organizations, but they share the same address, phone number, receptionist and spokesman.

The connections go even deeper. In the foundation's 2014 tax return, it reported that the sister group is **more than 35 percent controlled** by the foundation and the "dark money" group pays the foundation **millions of dollars** for unspecified "services."

The NAACP case is now being used as justification — in court, in press releases and in the media — for these social welfare, "dark money" nonprofits to continue to keep their donors secret.

For example, the Koch-backed "dark money" group **American Commitment**, which has spent **more than $2 million** on political expenditures supporting or opposing candidates since 2012, was adamant that the Center for Public Integrity use this quote when asked in 2014 about its donors:

"We agree with the Warren Court's landmark 1958 ruling in *NAACP v. Alabama* that protecting the privacy of our members is critical to their core First Amendment rights of free speech and free association."

The quote was emailed by Phil Kerpen, a veteran of Koch-backed groups Americans for Prosperity and the Cato Institute.

Among the biggest and most active of the "dark money" groups is Crossroads GPS, a 501(c)(4) social welfare nonprofit, co-founded by Karl Rove, once an adviser to former President George W. Bush. In the 2012 election alone, the group made **$71 million worth** of independent political expenditures that promoted or slammed candidates. More than $15 million directly targeted President Barack Obama, who was seeking re-election.

Rove, in an interview on Fox News in April 2012, signaled how conservatives had seized on the NAACP case in framing their arguments against increasing pressure to disclose donors.

"They want to intimidate people into not giving to these conservative efforts," he said of disclosure advocates.

"I think it's shameful," Rove continued. "I think it's a sign of their fear of democracy. And it's interesting that they have antecedents, and those antecedents are a bunch of segregationist attorney generals trying to shut down the NAACP."

The U.S. Chamber of Commerce, a 501(c)(6) trade organization, pays for ads but does not reveal its donors and has **used the NAACP case argument** to block attempts at disclosure — like the

DISCLOSE Act, which would have required increased disclosure for corporations and labor unions.

The bill, which has never made it through Congress, was the subject of intense lobbying by the business league. Of the 2012 version, the chamber wrote, it is "designed unconstitutionally to encourage retaliation against certain speakers who have unpopular or unfavorable political views by requiring groups to disclose the names and addresses of their donors."

The NAACP decision has now been referenced in numerous lawsuits. It's been used to bolster cases before the Federal Election Commission, such as in 2013, when the Tea Party Leadership Fund asked the agency whether it could avoid disclosing its donors because of "a reasonable probability of threats, harassment, or reprisals from government officials or private parties." (The FEC, as it often does, **deadlocked** on the question — twice.).

Clearly the memo has gone out.

In Arizona, for example, Republican Gov. Doug Ducey signed a bill in late March that would actually provide less disclosure for nonprofits. The legislation's chief proponent, Republican state Rep. J.D. Mesnard, cited the NAACP case in an interview with a reporter for the Arizona Capitol Times.

"Transparency is a good principle," he said. "But it is not the overarching principle."

NAACP chagrined

To Simelton of the NAACP in Alabama, the argument rings hollow.

"To use the justification that they're using … it really devalues the importance of what was going on back then," he said.

Campaign finance reformers agree.

"Depending how it can be used, it can be offensive," said Larry Noble of the Campaign Legal Center, of the argument. "It tends to minimize what true harassment really is."

"What happened in the NAACP case is very, very different," he continued. "People were being shot at, being killed, offices being destroyed."

The Center for Public Integrity's calls to Americans for Prosperity and Americans for Prosperity Foundation (they use the same number) were directed to spokesman Levi Russell. Messages on Russell's cell phone and office line were not returned.

Who deserves an exemption?

Exemptions from required disclosure of political donations have historically been rare. Ask an election lawyer to name an example, and they will invariably point to the same case — *Brown v. American Socialist Workers Party*, decided in 1982 by the U.S. Supreme Court.

The Socialist Workers Party was a small political party with 60 members in Ohio that aimed to "abolish capitalism and establish a workers' government to achieve socialism." The group

regularly ran candidates for office, without much success. Donors to the candidates were subject to considerable harassment, from both the government and private citizens.

Socialist Workers Party members and supporters in the four years preceding the trial experienced threatening phone calls, hate mail, the burning of literature, destruction of property, police harassment of a party candidate and the firing of shots at a Socialist Workers Party office, according to the trial court's findings.

There was also evidence that in the 12 months before trial, 22 Socialist Workers Party members, including four in Ohio, were fired from jobs because of their party membership.

In addition, the group was subjected to "massive" surveillance by the FBI, which also ran the "SWP Disruption Program," an initiative in which the bureau disseminated information designed to impair the ability of the Socialist Workers Party and another group to function, according to the court opinion, penned by Justice Thurgood Marshall.

In deciding whether that was enough to grant exemption from disclosure, the court looked to another Supreme Court case: *Buckley v. Valeo*. In that case, decided in 1976, the justices ruled that those seeking anonymity must show a "reasonable probability" that the disclosure will subject members to "threats, harassment or reprisals."

The Buckley ruling also laid out the basic reasoning for why candidates should disclose in the first place. There are three government interests: enhancement of voters' knowledge about a candidate's possible allegiances and interests; deterrence of corruption and the enforcement of contribution limits.

In balancing the two interests, the court favored the Socialists. Justice Marshall wrote: "In light of the substantial evidence of past and present hostility from private persons and Government officials against the SWP, Ohio's campaign disclosure requirements cannot be constitutionally applied to the Ohio SWP."

Why don't nonprofits disclose?

Given that exemptions for disclosure are so rare, and that the U.S. Supreme Court has consistently upheld rules requiring disclosure of political donations, why then are "dark money" groups permitted to stay dark?

First, nonprofits are not like political parties and are overseen by the IRS. While the IRS requires these groups to disclose their donor information to the government, it does not require that this information be made public. The Citizens United decision did not carve out any specific exemption for nonprofit groups — it didn't have to. Donor identities were already secret.

When a social welfare groups pays for an advertisement or any other tool to support or oppose a candidate, that activity falls under the jurisdiction of the FEC. And the FEC, in 2007, said that nonprofits making election expenditures need identify their donors only if their donation was specifically for the furtherance of making an expenditure supporting or opposing a candidate.

In other words, unless the donor directs the nonprofit to use the donation for a specific election expenditure, it need not be reported. And that rarely, if ever, happens.

“Dark money” groups are not supposed to making politicking their “primary purpose.” There have been numerous complaints about secretive nonprofit groups spending the majority of their funds to advocate for or against a candidate, but the IRS has not acted on them.

In fact, there has been little action on the disclosure issue in Washington.

But there is a lot going on in the states.

“Dark money” groups have become highly influential in statewide elections, spending $25 million in 2014, according to a Center for Public Integrity **analysis**.

“Since Citizens United, disclosure in general has been where the action is,” said Wendy Underhill, program director for elections and redistricting with the National Conference of State Legislatures. “And in the most recent years, as independent expenditures have become a major source of financing, that’s when legislators have looked at disclosure.”

So far in 2016, legislatures have considered a whopping 350 bills in 46 states related to campaign finance disclosure, according to the National Conference of State Legislatures’ database.

The outcome of all this debate on whether “dark money” spending will ever see the light of day remains uncertain. What is certain is that much of it will hinge on the words Justice Harlan penned some 58 years ago.