The Intimidation Game: How the Left Is Silencing Free Speech, by Kimberley Strassel

Reviewed by Stephen R. Klein

Note from the Editor:

This article favorably reviews Kimberley Strassel's new book about efforts by the left to suppress freedom of speech.

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• Sunlight Foundation, *A Comprehensive Disclosure Regime in the Wake of the Supreme Court's Decision in Citizens United v. Federal Election Commission*, *available at* https://sunlightfoundation.com/policy/documents/comprehensive-disclosure-regime-wake-supreme-court/.

• Trevor Potter & B. B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the Dark Money Election*, 27 Notre Dame J.L. Ethics & Pub. Pol'y 383 (2013), *available at* http://scholarship.law.nd.edu/ndjlepp/vol27/iss2/4.

Purchase this book at https://www.amazon.com/Intimidation-Game-Left-Silencing-Speech/dp/1455591882.

About the Author:

Stephen R. Klein is an attorney with the Pillar of Law Institute, a nonprofit public interest law firm that protects citizens nationwide from unconstitutional campaign finance laws, and a member of the Federalist Society's Free Speech & Election Law Practice Group Executive Committee.

Campaign finance, taxation, securities, and freedom of information are complex areas of legal practice, each with pitfalls into which even experienced attorneys can stumble. Because of this, it is often difficult to explain legal requirements to clients, particularly in light of evolving regulations and enforcement practices. Moreover, when, constitutionally speaking, something really *stinks* with the laws governing these areas, lawyers have to work twice as hard to expose the problem, not only to the courts hearing challenges, but to the public that has the right to hold government accountable. This is especially difficult when the government has its own narrative and—thanks again to that legal complexity—plausible deniability.

In *The Intimidation Game*, Kim Strassel tells compelling stories of Americans immersed in unconstitutional stink, assembling a convincing narrative of an effort predominantly by the left to silence its opponents, subverting the freedom of speech in the process. The book is a welcome and accessible account of the IRS scandal of targeting Tea Party groups, the Wisconsin "John Doe" campaign finance inquisition, and other shameful activities. As a free speech attorney who has been involved directly or close at hand in some of the cases Strassel describes, I was nevertheless taken aback at the breadth of the intimidation game, which stems from an all-encompassing term: "disclosure."

Instinctively, disclosure is a comforting term, a pleasant platitude to suggest that citizens expect to be informed about the happenings in government. And it is certainly true that citizens expect to have access to the kind of information exposed by disclosure rules. However, disclosure applies not only to the government, but to private citizens and organizations attempting to influence the government, particularly through elections. Since the mid-1970s, contributions to federal candidates and political action committees ("PACs") have been publicly disclosed, and election advertisements have required disclaimers that state who or what organization is paying for them. Since the turn of the century, however, the type of political activities subject to disclosure and the amount of disclosure required of individuals and organizations who undertake such activities have both increased. This adds financial costs to political participation—a core part of free speech—and puts more risk on participation; the more forms one must fill out, the more chances there are to make a mistake, and with mistakes under the law come punishment. Moreover, assuming donors properly comply with disclosure, they can be subject to retaliation, either from fellow citizens or from the government. The intimidation game, as Strassel details, is the culmination of this expansive disclosure effort, making disclosure not a check against corrupted government, but a corrupt political tool.

The *Citizens United* case overturned restrictions on independent political speech by corporations and unions, but upheld a limited campaign finance disclosure requirement for certain types of political advertisements.[1] With this imprimatur, Democrats wanted to expand disclosure requirements legislatively, but could not do so after Republicans won a majority in the House of Representatives in the 2010 election cycle. Undaunted by this setback, various progressive interest groups, Democratic members of Congress and, Strassel argues, the White House successfully prodded the administrative state to expand disclosure require-

1 Citizens United v. Fed. Elec. Comm'n, 558 U.S. 310, 366–71 (2010).

ments by any means necessary. Strassel tells the complete story of the IRS scandal—what is known, that is—and of the evolution of certain SEC commissioners to support regulating corporate political disclosure. She details FEC Commissioner Don McGahn's efforts to bolster free speech and due process at the agency against recalcitrant bureaucrats, campaign finance interest groups, and an all-too biased press.[2] Just as concerning as the full-fledged scandals are the scandalous efforts that did not come to fruition; for example, there is evidence that, before the IRS scandal came to light, the DOJ sought to investigate Tea Party groups for false statement crimes based on their IRS filings.

Strassel stresses that free speech is bigger than the First Amendment. Even if "disclosure" passes scrutiny in court, its stalwarts often use it to censor political opposition. Their specific tactics include burying Tea Party groups in endless and frivolous IRS questionnaires to receive tax-exempt status.[3] Though that scandal is, for the moment, resolved, there are plenty of other avenues of intimidation. One that remains popular is to file invasive freedom of information requests with universities demanding entire email caches of professors who question climate science orthodoxy. Some state attorneys general, taking cues from this effort, are now using their subpoena powers against not only scientists, but any organizations with which they might associate. Reaching down to individual donors, a most effective tactic is to utilize disclosed data to create interactive maps that show the addresses of large and small donors to issue campaigns. When you see the scope and severity of all of these tactics being applied by ostensibly neutral bureaucrats, the righteousness of accountability promised in "disclosure" sounds all the more like "shut up"—in legal terms, it has a chilling effect. Throw in myriad coincidences—such as conservative donors and their businesses facing irregular audits from the IRS, the Department of Labor, the FDA, and other agencies around the same time their donations were singled out by the press or politicians—and the chill looks more like a bad winter. All the more concerning, even a sleuth like Strassel cannot get to the bottom of some of the governmental workings behind these scandals, because the government does not have the same disclosure obligations it imposes on the people.

The Intimidation Game suffers from a few unnecessary, perhaps partisan, slips. For example, in her effort to tie the Obama administration to the IRS scandal, Strassel takes aim at former White House counsel Bob Bauer, with repeated unflattering references throughout the book. Certainly, when he represented the Obama campaign, Bauer filed FEC complaints against groups that opposed Obama, and some of these complaints stood on constitutionally dubious ground. However, since leaving the White House, Bauer has continued to provide thoughtful views on campaign finance law, unafraid to contradict the so-called "reform" movement. In fact, Bauer has authored some of the most biting critiques of "disclosure" disciples.[4] To put this into perspective, consider the credit Strassel gives to Ted Olson, former Solicitor General under George W. Bush. Though Olson argued—and won—the *Citizens United* case at the Supreme Court in 2010, as Solicitor General he argued—and won—*McConnell v. FEC* in 2003, which upheld constitutionally dubious provisions of McCain-Feingold that were later struck down in *Citizens United*. Olson's earlier work is described as "dutiful," while Bauer receives no credit for his work outside of dutiful representation of his own past client. The critique is unfair, and plenty of campaign finance reformers display a bloodlust worthier of Strassel's ire.

Although the book is a much-needed compilation of the intentional or, at least, grossly negligent game the left has played with free speech in recent years, at times the book is counterproductive. Opponents of all-encompassing disclosure sometimes falter in wielding a similarly all-encompassing definition of intimidation that can make it seem like they are wallowing in victimhood. Strassel accuses President Obama and members of Congress of dog-whistling to cause the IRS scandal and other happenings. But the president and legislators are elected officials, and free to enjoy the same political speech as Tea Party groups or anyone else—speech that can be intimidating for the faint of heart. Unless there is a governmental action that crosses the line—and Strassel details plenty of them—we must accept that politics still ain't beanbag. Strassel, to her credit, makes this very point in other parts of the book; some of the most powerful anecdotes are about targets that fight back politically, such as the American Legislative Exchange Council (ALEC) standing against a cabal of campaign regulation advocates and Senator Dick Durbin.

Disclosure is at a historically high-water mark within campaign finance law, and may continue its rise. Following *Citizens United* and numerous lower court decisions in its wake, various states have imposed onerous requirements onto individuals and groups who pay for even a modicum of political speech.[5] In court, it is nearly pointless to try and appeal to binding precedent from *NAACP v. Alabama* and similar cases that once provided exemptions from disclosure to individuals and groups who were intimidated by the government. Free speech advocates now have the difficult task of challenging red tape as a costly burden and illustrating that disclosed information does not actually serve an interest that justifies such burdens.[6] But given that law follows culture—disclosure certainly did—Strassel's book and other narratives are now, perhaps, the most important contributions to the fight for political privacy.

Minor quibbles aside, it is encouraging to have a book that I can recommend with the simple quip, "it shows what we're up against." More importantly, *The Intimidation Game* is sure to encourage others to join this fight, to assure the game's future targets that they are not alone, and to let the would-be speech police know that their deniability is no longer plausible.

2 I interned for Don McGahn at the FEC in the summer of 2008.

3 *See* True the Vote, Inc. v. Internal Revenue Serv., No. 14-5316 (D.C. Cir. Aug. 5, 2016) (reinstating lawsuits against the IRS over the scandal), *available at* https://www.cadc.uscourts.gov/internet/opinions.nsf/E780A4723CBF0726852580060052C212/$file/15-5013.pdf.

4 *See, e.g.*, Bob Bauer, *Mr. Noble in His Gyrocopter*, More Soft Money Hard Law, Apr. 15, 2015, http://www.moresoftmoneyhardlaw.com/2015/04/mr-noble-gyrocopter/

5 *See* Stephen R. Klein, Bailey v. Maine Commission on Governmental Ethics*: Another Step Toward the End of Political Privacy*, 14 Engage: J. Fed. Soc'y Practice Groups, Jul. 2013, at 54, *available at* http://www.fed-soc.org/publications/detail/bailey-v-maine-commission-on-governmental-ethics-another-step-toward-the-end-of-political-privacy.

6 *See, e.g.*, Coalition for Secular Gov't v. Williams, 815 F.3d 1267 (10th Cir. 2016).