



Secret and Foreign Spending in U.S. Elections

Why America Needs the DISCLOSE Act

Liz Kennedy and Alex Tausanovitch

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It has been nearly a decade since Congress took any significant action to address the problems in the U.S. campaign finance system. During the ensuing years, loopholes within the system expanded to a point where hidden spending by big donors is now an ordinary part of American politics and spending by foreign citizens—and even foreign governments—is a latent threat to U.S. elections.

Absent congressional oversight, foreign entities, wealthy citizens, and big corporations can amass improper influence with U.S. elected officials. A foreign government could, for example, instruct an agent to acquire a significant share in an American corporation or set up a limited liability corporation (LLC). Next, the agent funnels a large payment through that entity to a tax-exempt organization. The tax-exempt organization then uses that money to support or oppose U.S. candidates¹—and the American public never knows the source of the funds. This activity is illegal. But inaction and obstruction at the Federal Election Commission (FEC) has made it close to impossible to detect or penalize such misconduct. The law needs to be updated to respond to current threats and realities.

Under the current system of campaign finance disclosure, voters often don't know where much of the money is coming from, whether it be wealthy special interests, corporations, foreign sources, or American citizens. Citizens are increasingly concerned that political spending from deep-pocketed interests are pushing their interests to the sidelines of public policy.² Today, as trust in government nears an all-time low, it is time for Congress to fix the loopholes that allow improper political influence to be gained through secret and potentially foreign political spending in U.S. elections.³

Passing the DISCLOSE Act of 2017, first introduced by then Rep. Chris Van Hollen (D-MD) and Sen. Chuck Schumer (D-NY) in 2010, would reverse this trend by taking substantial, commonsense steps to increase the transparency of money in politics and eliminate foreign political spending. Under the DISCLOSE Act, organizations that

engage in significant election-related spending, including tax-exempt nonprofits, will have to promptly report that activity. Loopholes that protect donors from disclosure will be closed. And protections against foreign national spending will be extended to cover domestic corporations with foreign owners and decision-makers.

The DISCLOSE Act would enact broad transparency requirements for political spending and a strict prohibition on foreign contributions, policies which have both been clearly upheld by the U.S. Supreme Court. Even Justice Antonin Scalia, who often viewed campaign finance rules with skepticism, wrote approvingly of disclosure requirements, stating that “[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.”⁴ And the Supreme Court in 2011 summarily affirmed a case stating that it was constitutionally permissible to restrict campaign spending by foreign nationals—and not only permissible, but “fundamental to the definition of our national political community.”⁵

Disclosure of the sources of political spending is not a panacea for fixing our politics. However, it is a first step and a critical tool for exposing and deterring some of the most troubling forms of improper political influence.

Secret political spending

Secret political spending is, by definition, difficult to quantify. Many organizations that engage in political activity do not disclose the identities of their donors. Even those that do disclose their own donors sometimes just end up peeling back one layer to a dark money group that hides the source of their funds, concealing the true donor.

Under current law, organizations have to report broadcast communications that mention federal candidates within 60 days prior to a general election,⁶ but they do not have to report any of their donors unless the donors specifically designated funds for making those communications.⁷ Moreover, groups may not report spending on such advertisements at all, if those ads are run more than 60 days prior to a general election.⁸ This secret spending is increasingly funded by shell companies, which hide the true source of campaign funds behind obscure corporate forms. Even without a complete picture, it is clear that spending by dark money organizations that report at least some of their activity, without disclosing the source of the funds, has been on the rise.

- More than \$900 million in dark money has been spent to influence federal elections in the last five cycles.⁹
- In presidential races, secret political spending went up from \$5.9 million in 2004 to \$183.5 million in 2016, a 31-fold increase.¹⁰
- In the 2014 midterm elections, the most expensive midterm elections in U.S. history, reported dark money spending accounted for 31 percent of all outside spending.¹¹
- In 2016, 840 LLCs donated a combined total of roughly \$21 million to groups backing presidential candidates, almost double the amount spent by 109 LLCs in the 2012 race.¹²

The spread of dark money contributes to the toxicity of America’s political culture, which is being poisoned by the politics of personal destruction. For example, in the 2016 presidential primary, an analysis of political ads in 23 media markets found that 70 percent of the ads aired by dark money groups were attack ads, compared to only 20 percent of ads by other political groups.¹³

The public is right to be concerned that all this undisclosed money adds up to a massive, behind-the-scenes effort by special interests to obtain influence over government. Even the U.S. Supreme Court’s misguided 2010 ruling in *Citizens United v. FEC* assumed that unlimited corporate political spending would be paired with “effective disclosure,” which would “provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”¹⁴ Under current law and regulation, however, effective disclosure requirements do not exist.

The cancer of dark money has metastasized in the body politic. Some politicians are actively raising massive amounts of untraceable dark money themselves, even though this should run afoul of laws meant to prevent corruption and the appearance of corruption. In a rare public unveiling of this dynamic, *The Guardian* newspaper uncovered emails to Wisconsin Gov. Scott Walker concerning his fundraising efforts on behalf of the Wisconsin Club for Growth, a 501(c)(4) tax exempt organization that does not disclose its donors. One email from Gov. Walker’s main fundraising consultant suggested fundraising strategies to the governor and a handful of his advisors:

*Take Koch’s money. Get on a plane to Vegas and sit down with Sheldon Adelson. Ask for \$1m now. Corporations. Go heavy after them to give. ... Create a new c4 [dark money group]. Club for Growth name has issues.*¹⁵

In an era of secret spending, this advice is hardly surprising. Not only are politicians encouraged to try to secure million-dollar donations, they are advised to hide behind organizations with anodyne names.

Under the DISCLOSE Act, much less of this activity would be allowed to escape the scrutiny of the American public. Public disclosure of the sources of political spending is essential to educating voters and to having open, informed elections. In the words of the U.S. Supreme Court, public disclosure “provid[es] the electorate with information and insure[s] that the voters are fully informed about the person or group who is speaking.”¹⁶ Transparent political spending, “enables the electorate to make informed decisions and give proper weight to different speakers and messages.”¹⁷ Effective disclosure can deter or uncover corruption and provide more tools for shareholders—who are now kept in the dark—to exercise accountability over political spending by corporations. As the 10th Circuit Court of Appeals has noted, disclosure requirements are “even more essential and necessary to enable informed choice in the political marketplace” after *Citizens United* opened the door to unlimited corporate political spending.¹⁸

Foreign political spending

Channels for political spending where donors are cloaked in secrecy are one of the U.S. election system's major points of vulnerability for foreign interests looking for opportunities to improperly influence American politics.

Disturbing accounts of foreign spending in elections have already arisen:

- In 2015, for example, Chinese businessman Gordon Tang reportedly gave \$1.3 million to Jeb Bush's Right to Rise super PAC, funneling the money through a U.S. corporation.¹⁹
- A wealthy Mexican businessman allegedly provided approximately \$600,000 through a U.S. corporation to local mayoral candidates and to a committee supporting federal candidates.²⁰
- A declassified version of a report released by the U.S. director of national intelligence states that the Russian government financed communications through "state-funded media, third-party intermediaries, and paid social media users," as part of an effort to influence the outcome of the 2016 U.S. presidential election.²¹
- Reports have recently surfaced that European intelligence officials warned their U.S. counterparts in the spring of 2016 that "Russian money might be flowing into the presidential election."²²

These examples are now publicly known in part because they were so brazen. Gordon Tang, for example, not only owns a majority share of his U.S.-based corporation, but also apparently admitted to directing the contribution; this activity appears to be unlawful even under the limited guidance provided by the FEC.²³ Whether other foreign entities, including foreign governments, have engaged in similar conduct is unclear, but purchasing a stake in an American company poses little obstacle. To provide one example, consider that the government of Saudi Arabia recently purchased a 5 percent stake in U.S.-based Uber.²⁴ By one estimate, "One in four dollars, in value terms, in U.S. corporations is controlled, directly or indirectly, by a foreign owner."²⁵

Despite numerous loopholes within the U.S. election system, existing law is clear that it is unlawful for a campaign to solicit or receive anything of value from a foreign national.²⁶ However, without stronger transparency requirements and enforcement, these unlawful transactions can easily go undetected.

What we can do about it: The DISCLOSE Act of 2017

The DISCLOSE Act of 2017 takes a major step toward eliminating secret and foreign money in our elections. The legislation would:

- **Restore donor disclosure.** Right now, organizations that spend money in elections are often able to hide the true source of their funds. The DISCLOSE Act would tackle this problem by requiring organizations that engage in over \$10,000 of political spending to either: (1) report all their donors; or (2) establish a separate account for that spending, and report all of the donors to the separate account. Reporting would be limited to donors that make aggregate contributions of \$10,000 or more during a two-year election cycle.
- **Expand the window for reporting communications that identify a federal candidate.** Currently, ads that identify a candidate and are broadcast more than 60 days prior to a general election or 30 days prior to a primary election—referred to as “electioneering communications”²⁷—are not required to be reported to the FEC unless the ads expressly advocate for the election or defeat of a candidate.²⁸ The DISCLOSE Act expands electioneering disclosure to cover the entire calendar year preceding a general election, and 120 days preceding a primary election. Moreover, it expressly states, as the U.S. Supreme Court has held, that ads that can be “interpreted by a reasonable person only as advocating the election or defeat of a candidate” must be disclosed.²⁹
- **Prohibit the use of shell organizations to hide a donor’s identity.** The DISCLOSE Act requires the owners of any pass-through organizations—typically LLCs—to be disclosed, so that the public is made aware of the true source of the contribution.
- **Strengthen the ban on foreign election spending, particularly through domestic corporations.** Previous FEC guidance, implemented prior to *Citizens United*, has been lax on the issue of what to do when a domestic corporation is partially owned or controlled by foreign nationals. Until *Citizens United*, this guidance had few consequences, because for-profit corporations could not spend money to influence elections except under very limited circumstances.³⁰ The DISCLOSE Act contains a carefully tailored, bright-line test: If a foreign government owns 5 percent or more of the voting shares of a company, or if a foreign national owns 20 percent or more of the voting shares of a company, that company is subject to the ban on foreign national contributions and election spending. Furthermore, any company in which a foreign national has the power to “direct, dictate, or control” decision-making about political spending, or the corporation’s U.S. interests as a whole, will be treated as a foreign national and subject to the prohibition on political spending.³¹ All corporations engaging in political spending will be required to certify that they are not violating the ban on election spending by foreign nationals.

To a certain extent, political reform is always a work-in-progress, but we must take action to begin to restore the integrity of U.S. democratic institutions. Special interests are always looking for new ways to evade constraints on their anti-democratic political influence, and a series of 5-4 split U.S. Supreme Court decisions have made it more difficult to prevent political corruption and ensure fair representation for all. The DISCLOSE Act is commonsense, court-approved, and a major advance in the fight against secret and foreign spending and special interest influence. Congressional inaction on this issue would only leave our political system more vulnerable to influence from foreign governments and those who seek to hide their identities while using their wealth to shape American democracy and government for their own benefit.

Liz Kennedy is the director of Democracy and Government Reform at the Center for American Progress; Alex Tausanovitch is the associate director of Democracy and Government Reform at the Center.

Endnotes

- 1 Perhaps an even greater concern is that they use the threat of millions of dollars in campaign spending to attempt to blackmail an incumbent legislator. See, for example, Daniel P. Tokaji and Renata E.B. Strause, "The New Soft Money: Outside Spending in Congressional Elections" (Columbus, OH: Election Law @ Moritz, 2014), p. 80, available at <http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf>. Tokaji and Strause state that, although explicit threats may be rare, one congressional staffer and one former senator stated in interviews that a lobbyist had directly threatened that their client would finance independent ads against them if the member of Congress in question did not take the position the client wanted on particular legislative action.
- 2 In a 2015 poll conducted by *The New York Times* and CBS NEWS, 84 percent of Americans said money had too much influence in political campaigns. *The New York Times*, "Americans Views on Money in Politics," June 2, 2015, <https://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html>.
- 3 For example, see Gallup, "Trust in Government," <http://www.gallup.com/poll/5392/trust-government.aspx> (last accessed July 2017).
- 4 *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J. concurring).
- 5 *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012) (Mem.).
- 6 These communications, referred to as "electioneering communications," must also be "targeted to the relevant electorate." 11 C.F.R. § 100.29(a)(3).
- 7 See, generally, *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016).
- 8 Or 30 days prior to a primary election. See 52 U.S.C. § 30104(f)(3)(A)(i)(II).
- 9 Center for Responsive Politics, "Political Nonprofits (Dark Money)," available at https://www.opensecrets.org/outside-spending/nonprof_summ.php (last accessed July 2017).
- 10 Center for Responsive Politics, "Follow the Shadow of Dark Money," available at <https://www.opensecrets.org/dark-money/shadow-infographic.php> (last accessed July 2017).
- 11 Kennedy Elliott, Matea Gold, and Tim Farnam, "Dark money in the midterm elections," *The Washington Post*, November 29, 2014, available at <http://www.washingtonpost.com/wp-srv/special/politics/2014-midterms/dark-money/>.
- 12 Ashley Balcerzak, "Surge in LLC contributions brings more mystery about true donors," Center for Responsive Politics, April 27, 2017, available at <https://www.opensecrets.org/news/2017/04/surge-in-llc-contributions-more-mystery/>.
- 13 Frank Bass, "'Dark Money' Groups More Likely to Sponsor Attack Ads," Maplight, August 17, 2016, available at <https://maplight.org/story/dark-money-groups-more-likely-to-sponsor-attack-ads/>.
- 14 *Citizens United v. FEC*, 558 U.S. 310, 370 (2010).
- 15 Email from Kate Donner to Keith Gilkes and others, "Walker Recall Fundraising Efforts – thoughts," September 7, 2011, available at <http://www.documentcloud.org/documents/3105984-2012-08-14-Exhibits-01-100-PT1.html#document/p58/a317774>; embedded in Ed Pilkington, "Because Scott Walker asked," *The Guardian*, September 14, 2016, available at <https://www.theguardian.com/us-news/ng-interactive/2016/sep/14/john-doe-files-scott-walker-corporate-cash-american-politics>.
- 16 *Citizens United*, 558 U.S. at 368 (internal citations and quotation marks omitted).
- 17 *Ibid.* at 371.
- 18 *Free Speech v. FEC*, 720 F.3d 788, 798 (10th Cir. 2013).
- 19 Lee Fang, Jon Schwarz & Elaine Yu, "Power Couple: Meet the Chinese Husband-and-Wife Team Whose Company Spent \$1.3 Million Trying to Make Jeb Bush President," *The Intercept*, August 3, 2016, <https://theintercept.com/2016/08/03/chinese-couple-million-dollar-donation-jeb-bush-super-pac/>.
- 20 *United States v. Matsura*, 129 F. Supp. 3d 975, 977 (S.D. Cal. 2015).
- 21 U.S. Office of the Director of National Intelligence, *Background to "Assessing Russian Activities and Intentions in Recent US Elections": The Analytic Process and Cyber Incident Attribution*, (2017), available at https://www.dni.gov/files/documents/ICA_2017_01.pdf.
- 22 Shane Harris, "Russian Officials Overheard Discussing Trump Associates Before Campaign Began," *The Wall Street Journal*, July 12, 2017, available at https://www.wsj.com/article_email/russian-officials-overheard-discussing-trump-associates-before-campaign-began-1499890354-1MyQjAX-MT13MjE5MjExMzI0WjIj.
- 23 The limited guidance provided by the FEC, in the form of pre-*Citizens United* advisory opinions, has allowed domestic subsidiaries of foreign corporations to engage in some political spending, but only under the conditions that: (1) the spending is funded with funds generated in the United States; and (2) "all decisions concerning the donations and disbursements will be made by individuals who are U.S. citizens or permanent residents, except for setting overall budget amounts." FEC Advisory Opinion 2006-15 (Trans-Canada) at 2.
- 24 Quentin Hardy, "What Saudi Arabia's \$3.5 Billion in Uber Buys," *The New York Times*, June 2, 2016, available at <https://www.nytimes.com/2016/06/03/technology/what-saudi-arabias-3-5-billion-in-uber-buys.html>.
- 25 Statement of Professor John Coates, Federal Election Commission Forum on Corporate Political Spending and Foreign Influence, June 23, 2016, available at <https://www.fec.gov/resources/about-fec/commissioners/weintraub/text/Coates.pdf>.
- 26 52 U.S.C. 30121(a)(2); 11 C.F.R. § 110.20(g). The ban on solicitation is extremely broad. According to the FEC's definition, to "solicit" means "to request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value." Even indirect communication may constitute a solicitation. 11 C.F.R. § 300.2(m).
- 27 52 U.S.C. § 30104(f)(3)(A)(i)(II); 11 C.F.R. § 100.29.
- 28 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.
- 29 The DISCLOSE Act of 2017, 115th Cong. § 201(a)(1); *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 451 (2007) (defining a communication that is the functional equivalent of express advocacy as one that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate").
- 30 Corporations could engage in political spending only through a separate fund of voluntary employee contributions, subject to limits. See 52 U.S.C. § 30118; 11 C.F.R. § 114.5.
- 31 The DISCLOSE Act of 2017, 115th Cong. § 101(a).