



Addressing the Influence of Money in Politics Through Executive Action

By Alex DeMots

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The dominance of unaccountable and often anonymous, big-money contributors in political campaigns is an increasing problem. According to the Center for Responsive Politics, the 2014 midterm elections were the most expensive in history with more than \$3.6 billion in spending. A significant amount of this spending, especially in competitive races, was conducted by groups that are ostensibly independent of the candidates.¹ And many of these so-called “independent” organizations—often referred to as “dark-money” groups—do not disclose their donors. According to the Brennan Center for Justice, independent groups actually outspent candidates in the 10 most competitive 2014 Senate races.² This leaves many campaigns largely in the hands of interests that voters cannot hold directly accountable or, in some cases, even identify. Allowing a small subset of Americans to set the terms of the nation’s political discourse, and to buy outsized and often secret influence in elections and policymaking, is not healthy for democracy. It is even bad for the economy.³

This state of affairs stems from a succession of U.S. Supreme Court decisions curtailing laws aimed at curbing the corrupting influence of money in politics. *Citizens United v. Federal Election Commission* is blamed most frequently, but the Court has been enabling money to dominate politics for nearly 40 years, beginning with *Buckley v. Valeo* in 1976. In *Buckley*, the Court declared campaign spending to be “speech” protected by the First Amendment, thereby allowing individuals to engage in unlimited campaign spending, provided their efforts are “independent” of the candidate.⁴ *Citizens United* basically extended this right to corporations and labor unions.⁵

Ultimately, the nation should work toward a constitutional balance that protects free speech without sanctioning the right of wealthy interests to leverage economic power into political power. This is a long-term project, requiring a change in the composition and posture of the Supreme Court or amending the U.S. Constitution. But it is a change that must happen for the sake of democracy. In the meantime, these legal precedents severely limit the policy options available to address the problems of money in politics.

One significant avenue for addressing the influence of money in politics remains open: disclosure. Even as the Court struck down the corporate campaign spending prohibition in *Citizens United*, it gave a strong endorsement of disclosure, stating that transparency in political spending “enables the electorate to make informed decisions and give proper weight to different speakers and messages.”⁶ If voters know the interests that are funding a political message, they can use this information to inform their vote and ascertain exactly to whom candidates are beholden.

Unfortunately, the current Congress is highly unlikely to pass any sort of campaign finance reform. And while Democratic commissioners on the Federal Election Commission, or FEC, are pressing the agency to address disclosure in an upcoming rulemaking, history suggests that the Republican commissioners will block efforts to address undisclosed spending.⁷ However, there are several areas in which the executive branch could act under existing law to increase transparency and accountability.

IRS rulemaking on political activity by nonprofit organizations

The Internal Revenue Service, or IRS, is presently drafting new regulations to tighten the rules governing political activity by nonprofit organizations.⁸ The current regulations enable so-called dark-money groups⁹ to masquerade as 501(c)(4) “social welfare” organizations and thereby avoid campaign finance disclosure laws. Promulgation of objective, bright-line standards on political activity by nonprofit groups would significantly cut down abuse, as well as make compliance easier for legitimate 501(c) organizations.

In addition to clarifying the rules for 501(c) organizations, the IRS should tackle the problem of undisclosed political spending more directly by also amending the regulations for Section 527 of the tax code. Section 527 governs political organizations such as candidate committees, political parties, and political action committees, or PACs. 527 groups are required to publicly disclose their donors—either by registering with the FEC or a state campaign finance agency or by filing publicly disclosed reports with the IRS itself.¹⁰ Rather than simply regulating dark-money groups out of Section 501(c), the IRS should regulate those groups into Section 527.

The IRS should promulgate regulations that definitively classify as a 527 organization any group that spends the majority of its funds on advertising that mentions a candidate and is run within a certain number of days preceding an election.¹¹ These regulations would act as a backstop for the revised 501(c) regulations, ensuring that organizations that engage primarily in political advertising are explicitly required to register as such and to disclose their contributors.

Political activity by federal contractors

The executive branch could also mandate further disclosure of political spending by federal contractors. In 2011, the Obama administration reportedly considered an executive order that would have required federal contractors—as well as their directors, officers, affiliates, and subsidiaries—to publicly disclose their political contributions and expenditures.¹² This executive order is worth revisiting. As part of the government’s newest spending bill, sometimes referred to as the “cromnibus” legislation, Congress prohibited requiring this kind of disclosure from a federal contractor “as a condition of submitting” a bid on a federal contract.¹³ However, the administration arguably retains the authority to require a contractor to disclose its political spending after the contractor has been awarded a contract. This transparency could help to ferret out corruption in the contracting process and would allow the public to evaluate whether contracts are being awarded on the basis of merit and value to the taxpayer rather than political favoritism. Voters would also broadly benefit from more transparency regarding the role that federal contractors play in elections.

The laws governing federal contractors also offer another avenue for combatting corruption born of political spending. The law currently prohibits federal contractors from “directly or indirectly” making federal political contributions.¹⁴ For many years, this prohibition was largely moot because separate laws prohibited corporations, which comprise the bulk of federal contractors, from engaging in electoral spending. But *Citizens United* struck down the prohibition on corporate political expenditures, so corporations are now free to use their treasury money to fund campaign advertisements, generally through contributions to nonprofit corporations—or super PACs—that run ads.

Because of the limited historical relevance of the federal contractor prohibition, there is little legal authority suggesting exactly how far the ban on indirect federal political contributions extends. FEC regulations interpret the statute to prohibit not only contributions from federal contractors to federal candidates or PACs, but also spending on explicitly electoral communications made by the contractor.¹⁵ Arguably, the indirect prohibition extends further to contributions by a federal contractor to a third party, if that third party might use the contribution to fund political spending.

By executive order, the Obama administration could require federal contractors to affirmatively certify that they are in compliance with this law and to take reasonable steps to ensure continued compliance. Such steps might include placing legal restrictions on any contributions by the contractor to a third party to prevent the funds from being used for political spending. Contractors could also be asked to verify that neither they nor a third party using their funds are collaborating with a federal candidate in any manner that would constitute a prohibited in-kind contribution to that candidate. Such efforts would encourage strict compliance with existing laws aimed at preventing corruption in federal contracting and, in the process, might uncover purposeful, or even inadvertent, circumventions of the law.

SEC rulemaking

In *Citizens United*, the Court asserted that the “prompt disclosure of expenditures” would allow investors to hold companies accountable and would also allow the public to make sure elected officials were not “‘in the pocket’ of so-called moneyed interests.”¹⁶ However, there is no rule requiring this type of disclosure to shareholders or to the general public. Companies are also able to obscure their political spending by running it through nondisclosing trade associations and 501(c)(4)s.

In August 2011, a group of 10 prominent securities law academics submitted a petition for rulemaking, encouraging the U.S. Securities and Exchange Commission, or SEC, to develop a rule requiring corporations to disclose political activity expenditures to their shareholders.¹⁷ The petition received overwhelming support from labor investment funds, public officials who manage money as fiduciaries such as state treasurers, academics, members of Congress, major investors, and a few progressive businesses and resulted in a record number of public comments to the SEC. Discussion of a disclosure rule was on the 2013 SEC agenda but was dropped in the 2014 and 2015 agendas by SEC Chair Mary Jo White.¹⁸ Although the agenda is nonbinding, it is a strong signal of priorities for the SEC in the coming months.

The SEC should change course and prioritize the development and implementation of a political activity disclosure rule. A political activity disclosure rule would not only help to ensure that corporate spending is in line with shareholder interest and a company’s overall mission, but it would also combat the problem of dark money.

Conclusion

In his dissent in *Citizens United*, Justice John Paul Stevens warned that the “ruling threatens to undermine the integrity of elected institutions across the Nation.”¹⁹ This prediction is already coming true. Ironically, *Citizens United* also undermined the very transparency that the Court majority assumed would “enable the electorate to make informed decisions” by opening up new avenues for undisclosed political spending by corporations and individuals.²⁰ American democracy is slowly being auctioned off, and it is not even clear whom the buyers are. If Congress will not address this problem, the executive branch must step in and do what it can.

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Endnotes

- 1 Center for Responsive Politics, “Estimated Cost of Election 2014,” available at <https://www.opensecrets.org/overview/cost.php> (last accessed January 2015).
- 2 Ian Vandewalker and Eric Petry, “Election Spending 2014: Outside Spending in Senate Races Since ‘Citizens United’” (New York: Brennan Center for Justice, 2015), available at <http://www.brennancenter.org/publication/election-spending-2014-outside-spending-senate-races-citizens-united>.
- 3 John Craig and David Madland, “How Campaign Contributions and Lobbying Can Lead to Inefficient Economic Policy” (Washington: Center for American Progress, 2014), available at <http://cdn.americanprogress.org/wp-content/uploads/2014/05/CampaignFinance-brief.pdf>; David Madland, “Growth and the Middle Class,” *Democracy* 20 (2011), available at <http://www.democracyjournal.org/20/growth-and-the-middle-class.php?page=all>.
- 4 *Buckley v. Valeo*, 424 U.S. 1 (1976).
- 5 Under Supreme Court precedent, individuals, corporations, and unions have the right to engage in unlimited campaign spending that is conducted independently of the candidate. However, many recent independent groups have stretched this concept mightily. For instance, many supposedly independent groups coordinate with candidates through public channels, are run by party insiders, use footage filmed by candidates’ campaigns, and even have candidates raise money for them. Congress or the FEC could theoretically step in to curtail these practices, but neither is likely to do so.
- 6 *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
- 7 Letter from Ann M. Ravel, Steven T. Walther, and Ellen L. Weintraub to the Federal Election Commission, October 9, 2014, available at <http://sers.fec.gov/fosers/showpdf.htm?docid=305264>; Daniel I. Weiner, “The FEC Deadlocks (Again) on Dark Money,” Brennan Center for Justice, August 1, 2014, available at <http://www.brennancenter.org/blog/fec-deadlocks-again-dark-money>.
- 8 Julie Patel, “IRS chief promises stricter rules for ‘dark money’ nonprofit groups,” The Center for Public Integrity, June 18, 2014, available at <http://www.publicintegrity.org/2014/06/18/14960/irs-chief-promises-stricter-rules-dark-money-nonprofit-groups>.
- 9 “Dark-money groups” refers to organizations that behave similar to political organizations—in that they are primarily engaged in campaign advertising—yet do not disclose their donors, as would be required of a political organization registered with the FEC, the IRS, or a state campaign finance agency.
- 10 26 U.S.C. § 527(j).
- 11 For instance, the regulations could create a class of activity called “political advertising”—which would include communications made through television, radio, direct mail, or paid placement on the internet or social media that mention a candidate and are made within 90 days of a general election or 30 days of a primary election, as well as explicitly electoral communications made at any time. If more than 50 percent of an organization’s spending supports political advertising, it would automatically qualify as a 527 organization.
- 12 Kenneth P. Vogel, “Obama administration considers moves to limit anonymous donations,” *Politico*, April 19, 2011, available at <http://www.politico.com/news/stories/0411/53445.html>.
- 13 *Consolidated and Further Continuing Appropriations Act*, Public Law 113-235, 113th Cong., 2d sess. (December 16, 2014), Division E, Title VII, Section 735.
- 14 2 U.S.C. § 441c. The constitutionality of this law is currently being challenged in the D.C. Circuit Court of Appeals in *Wagner v. FEC*. Federal contractors are permitted to make federal campaign contributions and expenditures through a connected PAC.
- 15 11 C.F.R. § 115.2.
- 16 *Citizens United v. Federal Election Commission*.
- 17 Letter from Committee on Disclosure of Corporate Political Spending to Elizabeth M. Murphy, August 3, 2011, available at <http://www.sec.gov/rules/petitions/2011/petn4-637.pdf>.
- 18 U.S. Securities and Exchange Commission, “Agency Rule List - Fall 2014,” available at http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3235&Image58.x=51&Image58.y=11 (last accessed January 2015).
- 19 *Citizens United v. Federal Election Commission*.
- 20 *Ibid.*