SECTION 3 *of* WHAT DEMOCRACY LOOKS LIKE

Limiting Secret Money in Politics

In a government that is of the people, by the people, and for the people, the most sacred tenet of civic participation is the ability of the people to elect a government that represents them. In its idealized form, the democratic process is a marketplace of ideas in which the American people choose representatives who best reflect the views of the electorate.

But that ideal is not reality. The marketplace is broken. Our elections have become a competition for money—not just for votes. Once elected, representatives give unparalleled access to donors and professional lobbyists and have strong incentives to value the input of monied interests over the views of their constituents.

Our system of laws and regulations governing campaign fundraising and spending is failing. Building on earlier laws, Congress laid the groundwork for a system that would protect against political corruption through unchecked campaign contributions with the Federal Election Campaign Act of 1971 (FECA). Shortly thereafter, following the disclosure of campaign finance abuses in the 1972 elections, Congress bolstered the FECA by creating an independent body—the Federal Election Commission (FEC)—to enforce federal campaign finance laws, and established a system for the public financing of presidential elections.

Since then, the Supreme Court has systematically dismantled federal campaign finance law by ruling unconstitutional major components of the FECA and subsequent bipartisan congressional efforts to impose rational and fair limits on the influence of money in politics. The Court struck down limits on campaign and independent expenditures and made it possible for corporations, unions and wealthy individuals to spend millions of dollars influencing voters without disclosing who is behind those messages. The Court also struck down aggregate limits on contributions to all candidates in a single cycle. As a result, voters have been robbed of the opportunity to judge the credibility of political advertising and the integrity of their federal candidates by knowing the identities of the people and institutions behind those messages.

On top of this, the FEC—tasked with ensuring compliance with campaign finance laws and creating regulations to protect the integrity of our elections—is broken. In its current state, it has effectively worked against transparency and disclosure through inaction.

Laws intended to reduce the outsized influence of paid lobbying on officials once they have been elected to office have also proven too weak. While some transparency exists, loopholes in disclosure laws allow lobbyists to effectively conceal the beneficiaries of their efforts as they move easily through the halls of power. As a result, we do not know the extent to which federal agencies and Congress are captured by powerful interests.

In this section, we lay out a roadmap of solutions to begin to pick up the pieces in a post-*Citizens United* landscape. Our proposals are designed to address major issues in campaign finance that can be implemented even if the Supreme Court's restrictive decisions remain in place, though in section 8 of this report, we also advocate for a constitutional amendment to reestablish Congress's authority to regulate campaign finance. We support a federal small-dollar matching program to reduce the outsized role of big money in politics; efforts to close disclosure gaps that corporations, shell companies, and others have exploited; regulations on microtargeted online political advertising; disclosure of expenditures spent on judicial nomination and confirmation fights; as well as reforms to the perpetually gridlocked FEC. We also support efforts to prevent nonprofits from circumventing limits on political activities and affirmative disclosure obligations on executive and legislative officials who have contacts with paid lobbyists.

Issue 1: Limitless, undisclosed political spending

The Supreme Court has reasoned that the corrupting influence of limitless election spending by individuals, corporations, and unions can be addressed with disclosure requirements and a prohibition on the coordination of these expenditures with political campaigns. In *Buckley v. Valeo* (1976), the Supreme Court ignored compelling anti-corruption concerns and invalidated limits on independent expenditures by individuals, reasoning that "virtually every means of communicating ideas in today's mass society requires the expenditure of money." In 2010, the Court doubled down on this logic in *Citizens United v. Federal Election Commission* when it invalidated limits on corporate and union spending in elections. In addressing concerns about corruption or even the appearance of corruption associated with unlimited political spending, the *Citizens United* Court reasoned that "[t]he absence of prearrangement and coordination [with candidates]. . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."

The Court could not have been more wrong. The disclosure laws are not working as intended. In effect, the voting public is subjected to (and bombarded with) political advocacy with no real ability to discern its source, and thus, its credibility. This setup is an invitation for the creation of shell companies and the abuse of nonprofit rules to create dark money groups, often referred to as 501(c)(4)s or social welfare organizations, for the sole purpose of hiding the identity of political donors.

Although the identities of those funding these activities are not known to the public, they are almost certainly known to the candidates receiving support. Election expenditures are therefore a valuable, secret means of obtaining influence—presenting the precise danger of a *quid pro quo* that the Supreme Court dismissed in *Citizens United*. Funders can spend vast sums on public influence campaigns without voters understanding that the ad may also have the effect of indebting the candidate to the special interests of the corporation, wealthy individual, or union who actually funded it.

The Federal Election Commission (FEC) has rendered some existing disclosure requirements functionally useless. For example, the Bipartisan Campaign Reform Act of 2001 (BCRA) requires that all persons making a disbursement of $1,000 or more for the creation or airing of an electioneering communication disclose the names and addresses of every donor who contributed to the $1,000 disbursement. Republican commissioners of the FEC have chosen to exempt from this requirement corporate "persons" by only requiring them to disclose the names of donors who earmark contributions for the specific electioneering communication (i.e. political ad) in question. This amounts to another enormous loophole that allows individuals and corporations to spend unlimited amounts of money to influence our elections without disclosing their identities. Other ways to evade disclosure—like the use of "pop-up super political action committees (PACs)" that time their appearance on the scene to avoid reporting who funded them until after the election—further undermine the ability of disclosure to perform the anti-corruption function the Supreme Court has relied on.

Political spending by corporations also goes unchecked in another regard: corporate shareholders are often left in the dark regarding political spending, further increasing the risk that such spending can become a vector for corruption inside and outside the corporation. The lack of fairness in this approach has not gone unnoticed. In response to significant advocacy, some public companies have voluntarily set policies disclosing political spending information to shareholders; however, there is no law or rule requiring them to do so.

The failure to rein in undisclosed political spending has led to the dilution of everyday citizens' voices in our elections—an unacceptable result that is antithetical to our "by the people, for the people" democratic process.

Solutions

- **Congress should pass the DISCLOSE Act**. The DISCLOSE Act was introduced in response to *Citizens United* and would amend the Federal Election Campaign Act of 1971 to require near real-time disclosure of the identity of donors who contribute $10,000 or more in an election cycle via super PACs or 501(c)(4) organizations that spend significant money in elections. The bill also requires companies spending money in elections to disclose their true owners, preventing the abuse of shell companies to circumvent election spending requirements. Together, these requirements narrow the transparency loopholes used by donors who use the two most common forms of dark money to hide their identities—501(c)(4) organizations and shell corporations.

- **Congress should pass the Stand By Every Ad Act**. The Stand By Every Ad Act requires meaningful transparency of political ads by requiring the ads to also include links to the top five donors funding the ad and requiring those funding entities to disclose the name and title of their highest-ranking official. These requirements reduce the ability of wealthy donors to hide their true identities behind corporate entities that provide the voter with no timely information that would allow them to assess the credibility of the ad.

- **Congress should pass legislation that requires publicly traded companies to disclose political expenditures to their shareholders.** Two existing legislative proposals worth noting include the Corporate Political Disclosure Act of 2019, which requires publicly traded corporations to disclose their political spending to shareholders by creating a uniform reporting requirement through the Securities and Exchange Commission (SEC), and the Shareholder Protection Act of 2019, which covers electioneering communications and independent expenditures and requires shareholders to authorize, on an annual basis, the company's political activities budget while also requiring that public companies disclose (online, to shareholders, and to the SEC) individual board member votes and the details of each approved expenditure.

- **Congress should ensure that big political spenders, like large dark money groups, can't use their size to evade disclosure requirements.** Many disclosure requirements are premised on whether political spending constitutes a certain percentage of the money a group spends overall. But this can be manipulated by very large groups to inject substantial amounts of money into elections by keeping their political spending just under 50 percent of their total spending. Congress should set a monetary baseline to require disclosures by groups that spend a certain amount regardless of the percentage that amount represents, strengthen and clarify the definition of what gets included in the percentage of spending that is considered "political", or both. This will curb the ability of organizations to inject substantial amounts of money into elections while avoiding disclosure.

Resources

Rep. Sarbanes' For the People Act of 2019, H.R. 1, § 4001 et seq. (116th Congress, 2019).

Sen. Whitehouse and Rep. Cicilline's DISCLOSE Act of 2019, S. 1147 (116th Congress, 2019).

Sen. Warren and Rep. Lujan's Accountable Capitalism Act, S. 3215 (116th Congress, 2020).

Stuart McPhail, Citizens United allowed money in politics to explode. It's up to us to stop it, CREW, January 21, 2020.

Stuart McPhail, Remembering Buckley's mistakes, *CREW*, January 30, 2018.

Dark Money Basics, *Open Secrets Center for Responsive Politics*.

Tim Lau, Citizens United Explained, *Brennan Center for Justice*, December 12, 2019.

Mystery Money: How a loophole could allow foreign money to flow into super PACs through secretive shell companies, *Issue One*, July 2020.

Comments on REG 2018-03, Definition of Contribution, *Public Citizen*, March 4, 2019.

Issue 2: The outsized role of big money in politics

The Supreme Court's decision in *Citizens United* (2010) ushered in a new era of money in politics. By eliminating prohibitions on corporate independent expenditures and electioneering communications, the Court opened the door to an infusion of corporate funds in federal campaigns. Since 2010, outside spending on political campaigns more than tripled, and subsequent cases have helped large individual donors massively increase the total amount they can give—in 2010, the largest individual donor gave around $7 million, whereas in 2018, the largest individual donors gave $123 million.

Small dollar matching programs are one way to restore balance to campaign finance. By multiplying the impact of small donations from citizens, matching programs create an incentive for politicians to court real people who live in their districts rather than corporations and those who control them. For example, candidates who participated in New York City's small donor matching program have indicated that "by pumping up the value of small contributions, the New York City system gives them an incentive to reach out to their own constituents rather than focusing all their attention on wealthy out-of-district donors, leading them to attract more diverse donors into the political process." After implementing small dollar matching in Connecticut, the number of individual donors that gave to candidates increased. And in places like Arizona and Maine, matching resulted in a decrease in overall time spent fundraising. Less time fundraising allows more time for doing the actual work of elected office—including legislating or meeting with constituents.

These programs also have the benefit of resting on solid legal ground. While the Supreme Court has ruled that many forms of campaign finance regulations are unconstitutional, it has upheld matching programs. At least 14 states utilize different versions of small dollar matching options for candidates, and in several jurisdictions, matching programs have enhanced equitable participation in campaign fundraising.

In addition to restoring balance, it is important to ensure that the legal guardrails on political spending are properly enforced. The use of "straw donors" and illegally coordinated expenditures are two of the more common ways that money that should not be in the political system, even under the current rules, can get in. A straw donor scheme is essentially one person giving political money but reporting it as being from someone else - the "straw donor." Often in order to execute this kind of scheme, insiders like campaign staff or contractors will play a critical role, for example in falsifying the paperwork. Under current law, though, these insiders are not themselves accountable for the illegal donations they've helped make happen, so they can continue this conduct elsewhere even if it is detected in one instance. Another way that campaign insiders can facilitate illegal spending is by coordinating with supposedly independent groups. Although such coordination is illegal, the rules are easily evaded.

Solutions

- **Congress should create an opt-in small-dollar matching program for federal elections.** Donations of up to $200 would be considered small-dollar donations and would be subject to a matching system with a 6-1 ratio. Public financing would apply to candidates who actively choose to only accept small dollar contributions and meet the threshold for participation. Participating candidates and campaigns would agree to lower contribution limits.

- **Congress should close loopholes in the rules that prohibit coordination between candidates and outside groups.** Even if spending is disclosed, it can still lead to corruption, particularly if it is used for expenditures that are coordinated with candidates. In these circumstances, an outside group can effectively become an arm of a campaign, undermining any donation limits that do exist and risking corruption. Congress should strengthen the definition of what constitutes improper coordination of spending between outside groups and candidates in order to ensure that these groups are truly independent from candidates.

- **Congress should strengthen the rules against contributions illegally made via "straw donors" by also making it illegal to direct or assist someone else in executing this type of scheme.** Contributions made in the name of another person are illegal, and often setting up a system to make them without detection requires insiders, like lawyers or political consultants, who know the rules and how to evade them. These participants should themselves be able to be held accountable for the improper contributions they facilitate.

Resources

Rep. Sarbanes' For the People Act of 2019, H.R. 1, § 5111 et seq. (116th Congress, 2019).

Rep. Rice's Political Accountability and Transparency Act, H.R. 679 (116th Congress, 2019).

Rep. Boyle's Clean Money Act of 2019, H.R. 3834 (116th Congress, 2019).

Sen. Durbin's Fair Elections Now Act of 2019, S. 2257 (116th Congress, 2019).

Alex Tausanovitch and James Lagasse, The Small Donor Antidote to Big-Donor Politics, *Center for American Progress*, June 11, 2018.

Legislative Recommendations of the Federal Election Commission, December 2018.

Public Financing of Campaigns: Overview, National Conference of State Legislatures, February 8, 2019.

Nirali Vyas, Chisun Lee, Joanna Zdanys, The Constituent Engagement Effect of Small Donor Public Financing, September 8, 2019.

Gareth Fowler and Daniel I. Weiner, Understanding H.R.1's Public Financing Provisions, *Brennan Center for Justice*, September 20, 2019.

Michael J. Malbin and Brendan Glavin, Small Donor Public FInance in the State of New York - major Innovations, with a Catch, *National Institute on Money in Politics*, January 15, 2020.

State and Local Public FInancing Programs Are Leading the Way - Now It's Time for Congress to Follow with H.R. 1, *Campaign Legal Center*, February 14, 2020.

Issue 3: Inadequate protections against pay-to-play in federal contracting

One type of corporation stands out amongst the proliferation of post-*Citizens United* corporate influencers: federal contractors. Federal law prohibits the actual contracting entities from making direct contributions to political candidates or parties. Nothing, however, prevents those who stand to make millions of dollars from these entities' federal contracts (i.e., officers, directors, controlling shareholders) from making direct donations to candidates and parties, nor is there anything stopping these individuals or corporate-affiliated political action committees (PACs) from making *unlimited* contributions to dark money groups that allow them to hide their identities and escape scrutiny for potential pay-to-play corruption.

By definition, federal contractors are paid with taxpayer money. From 2000 to 2014, taxpayers have paid the top ten federal contractors approximately $1.5 trillion. In fiscal year 2019 alone, federal contractors were paid $597 billion. Of the $597 billion paid to federal contractors in 2019, approximately $173 billion went to the top ten contractors, including five mainstays on this list: Lockheed Martin Corp. ($48.3 billion), Boeing Co. ($28.1 billion), General Dynamics Corp. ($21 billion), Northrop Grumman ($16.4 billion), and Raytheon ($15.9 billion). Comparing these five mainstays to the list of the top five federal contractor-affiliated political donations for the 2018 midterm elections, it may not be surprising to find that the companies are identical: Northrop Grumman ($3.6 million), Boeing ($2.893 million), Lockheed Martin ($2.8 million), General Dynamics ($2 million), and Raytheon ($1.9 million). With the government's expenditure of taxpayer money comes the responsibility of ensuring that the decision to spend the money is driven by the best interest of the people. Even the appearance of any other consideration undermines the people's confidence in government.

The prohibition on federal contractors making direct donations to political campaigns is insufficient in the era of super PACs and dark money. We need to ensure that federal contractors disclose all of their political activity so that pay-to-play schemes cannot go undetected and so that the American people have confidence that federal contracts are being awarded on the basis of merit, not favors. It is entirely appropriate for the federal government to condition receipt of federal contracts on disclosure of political activity. After all, getting business from the government is not a right—it is a privilege, and it can come with conditions intended to stave off corruption.

Solutions

- **Federal contractors should be required to publicly disclose their political spending, including money given through dark money groups and super political action committees.** Congress should enact this requirement by statute or, alternatively, repeal an existing budget rider prohibiting the president from requiring entities applying for federal contracts to disclose their political spending in federal elections.

- **Congress should pass the DISCLOSE Act**. The DISCLOSE Act would, among other things, amend the Federal Election Campaign Act of 1971 to include a requirement that companies spending money in elections disclose their owners. This could help ensure that federal contractors are not evading limits by using shell companies to hide their spending.

Resources

Rep. Sarbanes' For the People Act of 2019, H.R. 1, § 4601 (116th Congress, 2019).

Sen. Whitehouse and Rep. Cicilline's DISCLOSE Act of 2019, S. 1147 (116th Congress, 2019).

Matt Corley, Hensel Phelps donations to pro-Buck dark money group finally revealed, *CREW*, November 19, 2019.

Ciara Torres-Spelliscy, The Fight for Corporations to Reveal Political Spending, *Brennan Center for Justice*, February 14, 2018.

Tim Lau, Citizens United Explained, *Brennan Center for Justice*, December 12, 2019.

Dark Money Basics, *Open Secrets Center for Responsive Politics*.

Issue 4: Anonymous and microtargeted online political ads

Current campaign finance law requires that anyone who pays for a political ad on television or radio must be identified in the ad, and the broadcaster must keep a list of all political ad purchases and make this information publicly available. Further, foreign nationals are prohibited from purchasing ads that even mention a political candidate's name within a specified time leading up to an election. These transparency rules were implemented as part of the robust Bipartisan Campaign Reform Act of 2001 (BCRA), commonly referenced as "McCain-Feingold."

The BCRA was the first major update to campaign finance laws since the Federal Election Campaign Act of 1971 was amended in the 1970s. During the period in which the BCRA was negotiated and ultimately signed into law, Google's search engine was just beginning to attract a following, and Facebook had not yet been founded. Since then, there have been rapid digital innovations that transformed the ways in which everyday Americans interact with the internet. These advances are reflected in the exponential growth in online political ad spending: there was a 260 percent increase in digital political ad spending between the 2014 and 2018 midterms, and some estimates place online political ad spending over $1.4 billion in the 2016 election cycle alone. Federal campaign finance laws have not kept up with this reality. While the BCRA's transparency provisions continue to apply to television, broadcast, and satellite communications, these rules have yet to be expanded to recognize the current digital landscape and critical role of social media in election influence.

This loophole was exploited by Russia in the 2016 election. In Volume I of the Report On The Investigation Into Russian Interference In The 2016 Presidential Election, Special Counsel Robert Mueller plainly and unequivocally concluded that "[t]he Russian government interfered in the 2016 presidential election in sweeping and systematic fashion." One way this interference was accomplished was targeted disinformation campaigns carried out on digital media platforms and facilitated through the purchase of online political ads.

Compounding the vulnerabilities created by largely unregulated digital communities is the ability of online ad purchasers to microtarget their ads. Unlike a TV broadcast in which individuals in the same market receive the same message, online ads can be narrowly tailored to target demographic criteria. This capability allows campaigns and entities placing online ads to manipulate public discourse in a way that is damaging to our democracy. Instead of a marketplace of ideas, Americans are exposed to a slew of ads that talk past each other and prevent people from engaging on the same issues. Microtargeted online ads have also proven to be particularly virulent tools for spreading disinformation, and social media organizations have struggled to police intentional efforts to spread lies or distrust about the election.

Solutions

- **Congress should update campaign finance laws by passing the Honest Ads Act**. The Honest Ads Act closes the loophole that treats internet ads differently from television and other ads, requires digital platforms to make reasonable efforts to prevent foreign nationals from buying ads on their platforms, and increases online ad transparency through measures such as requiring platforms to maintain a public database of all online political ad purchases and requiring ad purchasers to disclose in the ad its financial sponsor.

- **The Federal Election Commission should update its regulations to take into account that many political ads are now on the internet.** Since 2011, the Federal Election Commission (FEC) has been considering a rulemaking that would provide guidelines for digital ad disclaimers and clearly apply existing rules to communications over the internet that are produced for a fee or placed or promoted for a fee on another person's website or digital device, application, service, or platform, and are then shared by or to a website or digital device, application, service, or platform. This guidance is long overdue.

- **Congress should pass the Banning Microtargeted Political Ads Act**. The Banning Microtargeted Political Ads Act prohibits online platforms, including social media, ad networks, and streaming services, from targeting political ads based on the demographic or behavioral data of users. A carve-out is included for targeting ads to broad geographies—states, municipalities, and congressional districts. To ensure functional avenues for enforcement, the bill also includes a private right of action (in addition to a FEC enforcement regime).

Resources

Sen. Klobuchar and Rep. Kilmer's Honest Ads Act, S. 1989 (115th Congress, 2017).

Sen. Klobuchar's Stopping Harmful Interference in Elections for a Lasting Democracy Act, S. 2669 (116th Congress, 2019).

Rep. Eshoo's Banning Microtargeted Political Ads Act, H.R. 7014 (116th Congress, 2020).

FAQ on the BCRA and Other New Rules, *FEC*, February, 2005.

U.S. Senate Select Committee on Intelligence, Report: Russian Active Measures Campaigns and Interference in the 2016 U.S. Election, Volume 2: Russia's Use of Social Media, October 8, 2019.

Tim Lau, The Honest Ads Act Explained, *Brennan Center for Justice*, January 17, 2020.

Joshua Geltzer, Good Governance Paper No. 10: Addressing Foreign Election Interference—An Overdue To-Do List, *Just Security*, October 27, 2020.

Issue 5: Abuse of tax-exempt status by dark money nonprofits

Nonprofit organizations play a uniquely important role in our society, such as providing food and shelter to our most vulnerable citizens, promoting civic engagement and education, and other charitable missions. Congress provides that these organizations are entitled to special privileges—namely the ability to receive income exempt from taxation. Because these entities are exempt from tax, all other taxpayers essentially subsidize their activities. In exchange for this special taxpayer subsidy, Congress has placed certain limits on the purpose and activities of these organizations. In the case of section 501(c)(4), the organization must be organized for social welfare purposes and is limited, in practice, to having no more than 50 percent of their activity be political. Similar rules apply to labor organizations (section 501(c)(5)) and business leagues (section 501(c)(6)). Section 501(c)(3) organizations, which receive an additional benefit because the law allows donations made to the organization to be tax-deductible to the donor, must be organized exclusively for a charitable, religious, or educational purpose, and no part of their activities may be political. Organizations that violate the limits imposed by Congress can have their tax-exempt status revoked.

Under Internal Revenue Service (IRS) guidance, section 501(c)(4) organizations, known as "social welfare organizations," are permitted to engage in a limited amount of political activity while retaining their privileged tax status, as long as politics do not become what the IRS considers a primary activity. Although Congress has said such groups' activities should be "exclusively" for social welfare, the IRS enforces this rule only if more than 50 percent of the group's spending is political.

Over the past decade, the IRS has largely abandoned enforcing the statutory requirements that limit the political activities of 501(c) organizations. There are four shortcomings in the IRS's enforcement scheme. First, the enforcement budget was drastically cut (with the division overseeing nonprofits reportedly shrinking by almost half from 2010 to 2018). Second, career IRS civil servants fear political retribution for enforcement, in large part because many of their colleagues suffered fallout from the Republican-led multi-year investigation into the "Tea Party scandal" regarding whether inappropriate criteria were used to trigger review of applicants for 501(c)(4) status in the early 2010s. Third, Republican members of Congress have stripped the IRS of rule-making authority to clarify when a 501(c)(4) crosses the line into an inappropriate level of political activity. A 2015 budget rider prohibited the IRS from using funds "to issue, revise, or finalize any regulation, revenue ruling, or other guidance … to determine whether a [501(c)(4)] organization is operated exclusively for the promotion of social welfare." Finally, the IRS has made its own job harder by loosening reporting requirements. In 2018, the Trump Administration withdrew a requirement that 501(c)(4)s disclose to the IRS donors who contributed more than $5,000—further limiting the ability of the agency to scrutinize 501(c)(4) s.

The defunding, politicization, and gutting of the IRS enforcement regime has had enormous consequences. A 2019 ProPublica report recently revealed the extent of the IRS enforcement regime's deterioration: Since 2015, thousands of complaints alleging that 501(c)(4)s were abusing the rules were filed by citizens, public interest groups, and even IRS agents, but the agency did not strip a single organization of its tax-exempt status during that period. In fact, as one IRS employee reported to ProPublica, there were at least 2,000 complaints that merited attention from the internal IRS oversight committee, but none of those complaints were actually reviewed by the committee during the relevant time frame.

Solutions

- **Congress should fully fund the Internal Revenue Service, including its exempt organizations division.** Enforcement of the basic conditions for nonprofit status needs to become a priority for the IRS. That priority needs to be reflected in a commitment to increasing the capacity of the enforcement division in the agency's budget.

- **Congress should pass the Spotlight Act**. The Spotlight Act requires tax-exempt organizations that fall under sections 501(c)(4), 501(c)(5), and 501(c)(6) of the Internal Revenue Code (e.g., social welfare organizations, labor organizations, business leagues) to disclose the names and addresses of all substantial contributors on their returns. While this would not extinguish the problem of lack of oversight and enforcement, it would ensure the IRS has the information it needs to investigate and, if necessary, enforce tax law.

- **Congress should pass legislation that requires 501(c)(4)s to publicly report political expenses on a quarterly basis**. This disclosure should also include their overall spending for the quarter. This will shift some of the burden of IRS investigation to the applicable organizations, increasing oversight efficiency.

- **The Internal Revenue Service should revise its regulations to comport with the law's requirement that 501(c)(4)s operate "exclusively" for non-political purposes. If it does not, Congress should pass more detailed restrictions on the political activities of 501(c)(4)s.** The "primary activity" threshold, which has come to be interpreted as an entity spending less than 50 percent of its budget on political activities, is not restrictive enough. To secure the tax benefits associated with 501(c)(4) status, nonprofits should be obligated to spend a greater percentage of their budget on social welfare activities, which do not include political activities, than the IRS currently requires. If there is a specific monetary threshold, it should be well below 50 percent, and the law or rule should also specify what activities are considered political, so that the IRS can effectively enforce the law. If Congress is not going to legislate on this matter, it must at least eliminate the budget rider that in recent years has prevented the IRS from acting on this issue.

- **The Internal Revenue Service should publish timely, complete, machine-readable nonprofit data.** The IRS still provides certain information about nonprofits on DVDs it sends in the mail. This and other extremely outdated mechanisms for receiving information on nonprofit organizations is unacceptable. While the IRS has a search that includes some information on some groups, it has no universal search for public Form 990 tax returns, Form 1024 application materials, and tax-exempt determination letters, leaving the public and accountability groups to try to cobble together what they can from e-file data and other information. To remedy this, Congress should mandate the creation of a public database for nonprofit data and other public materials, akin to the one the agency already manages for section 527 political groups. In addition, Congress should add Form 8976 notifications to the list of materials to be made public under section 6104 of the tax code.

Resources

Rep. Sarbanes' For the People Act of 2019, H.R. 1, § 4401 et seq. (116th Congress, 2019).

Rep. Crow's End Dark Money Act, H.R. 868 (116th Congress, 2019).

Rep. Golden's Crack Down on Dark Money Act, H.R. 7525 (116th Congress, 2019).

Sen. Tester and Rep. Price's Spotlight Act, S. 276 (116th Congress, 2019).

Adam Rappaport, The Dark Money Debate: Responses to Arguments Against Reforming IRS Treatment of 501(c) Groups, *CREW*, January, 2014.

Julie Patel, IRS Rarely Audits Nonprofits for Politicking, *Center for Public Integrity*, January 22, 2015.

Maya Miller, How the IRS Gave Up Fighting Political Dark Money Groups, *ProPublica*, April 18, 2019.

Issue 6: Use of shell companies to conceal federal election spending

The use of shell corporations in election financing poses a threat to our democracy because they are used to hide the source of election-related spending. Although the Federal Election Campaign Act of 1971 requires corporations that make independent expenditures or electioneering communications to disclose their donors, the actual source of funds can be hidden if donors give to an intermediary—such as a shell corporation. The entity that engaged in campaign spending then only has to disclose the shell company as a donor—not the individuals or entities that are actually giving money.

Nor are there alternative sources for understanding who owns or contributes to these entities. Corporate licensing and registration in the United States has traditionally been a matter of state and tribal law, and few of those jurisdictions gather and disclose who actually owns or controls corporations. The true ownership or control of a corporation—that is, the person or entity at the very top of the pyramid—is commonly described as "beneficial ownership," and, to the extent this information exists within government systems, it is distributed throughout the states and numerous agencies in the federal government. This information is not generally made available to the public.

An example of how donors and special interests use shell corporations to obscure their involvement in election spending is instructive: Prior to the 2018 midterm elections, Wayne and Monica Hoovestol and Andy Lucht, ostensibly under-the-radar Iowa Republican business owners, apparently created a limited liability company named DRT, LLC in Carter Lake, Iowa. This LLC made a $250,000 contribution to pro-Trump super political action committee (PAC) America First Action in April 2018, and a $10,000 contribution to the Mitch McConnell-aligned Senate Leadership Fund two weeks before election day in November 2018. The only way eagle-eyed dark money investigators managed to trace this money was because DRT, LLC's registered address happened to be the same as Lone Mountain Truck Leasing, a company owned by Wayne Hoovestol and whose CFO is Andy Lucht. Many of Wayne Hoovestol's businesses use the same Iowa address. And there is good reason to think this tactic is more broadly used; CREW has filed legal complaints against several such entities and the donors who seek to use them to hide their political spending.

This kind of scheme may well be just the tip of the iceberg. The reality is that neither the Federal Election Commission (FEC) nor campaign finance watchdogs have the resources to undertake extensive, time- and financially-consuming investigations and litigation to understand the extent to which political donations flow through shell companies. At the same time, the federal government is not powerless to address this issue. Congress can require corporations that engage in interstate commerce to disclose more information about their election-related activities and their beneficial owners.

Solutions

- **Congress should amend current disclosure requirements to ensure that true sources of large political spending are publicly disclosed.** Super PACs and some other groups that spend on politics are in theory already required to disclose the "true source" when reporting on funds they receive, but the use of shell companies can make this disclosure requirement ineffective. To address this in the case of large sources of funds, groups that report contributions to the FEC should be required to disclose the beneficial owners of contributors who contribute $10,000 or more in an election cycle. For the purposes of this disclosure, a beneficial owner should include anyone who (1) exercises substantial control over a corporation or limited liability company, (2) owns 25 percent or more of the interest in a corporation or limited liability company, or (3) receives substantial economic benefits from the assets of a corporation or limited liability company.

- **Congress should require all corporations and limited liability companies (not just those that engage in political activity) to disclose their beneficial owners to the Department of the Treasury.** For the purposes of this disclosure, a beneficial owner should include anyone who (1) exercises substantial control over a corporation or limited liability company, (2) owns 25 percent or more of the interest in a corporation or limited liability company, or (3) receives substantial economic benefits from the assets of a corporation or limited liability company. The regime should also require foreign corporations to disclose U.S. beneficial owners. Failure to comply or intentionally providing inaccurate information would be punishable by civil and criminal penalties.

- **Companies applying for employer identification numbers should be required to disclose usable beneficial ownership information.** Currently, the employer identification number (EIN) numbering system does not lead to usable beneficial ownership information. Congress should require that companies that apply for EINs disclose such information on their paperwork to the Internal Revenue Service and the Department of Treasury.

Resources

Sen. Whitehouse and Rep. Doggett's Stop Tax Haven Abuse Act, S.779 (116th Congress, 2019).

Sen. Wyden and Rep. Maloney's Corporate Transparency Act of 2019, S. 1978 (116th Congress, 2019).

Sen. Warner's ILLICIT CASH Act, S. 2563 (116th Congress, 2019).

PACs, Super PACs, and Dark Money--What's The Difference?, CLC Advancing Democracy Through Law, June 20, 2018.

Dark Money Basics, *Open Secrets Center for Responsive Politics*.

Issue 7: A gridlocked and dysfunctional Federal Election Commission

The Federal Election Commission (FEC) is an independent federal regulatory agency that was created by Congress to enforce and adjudicate campaign finance laws. Sadly, the FEC is a broken institution, and in the last few years has become more dysfunctional than ever. The FEC's decline stems predominantly from a well-intended framework that enables stonewalling and gridlock.

The FEC was designed to promote bipartisanship and prevent one-party control. It is governed by six commissioners, no more than three of whom can be from the same party. Four commissioners—a bipartisan majority—must agree to investigate potential campaign finance violations, to pass regulations, and take other major agency actions. While the partisan balance of commissioners might seem reasonable, the commission has increasingly succumbed to a destructive impasse in which the commission rarely has four votes to take important action. In 2006, FEC commissioners deadlocked at a mere 2.9 percent of substantive enforcement votes, but by 2016, 30 percent of all substantive enforcement votes resulted in deadlock.

The commission has also experienced a string of vacancies that has deprived it of a quorum (four commissioners) for long stretches of time. Combined with new resignations, this has pushed the FEC down to three commissioners during much of the 2020 federal election cycle—below the necessary quorum to conduct activity. Without a quorum, the FEC is powerless to take action on any complaints it receives, no matter how meritorious they are.

As a result of partisan deadlock and the frequent absence of a quorum, the FEC has become powerless to police even the most blatant violations of federal campaign finance laws.

Solutions

- **Congress should bolster and expand the citizen-suit provisions of the Federal Election Campaign Act of 1971.** If the FEC can not agree on corrective action in a certain amount of time, the default should not be that nothing happens. Instead, parties that have filed campaign finance complaints should be permitted to pursue them in court if the FEC fails to do so. Specifically, Congress should address procedural issues like waiting periods, attorney fees, and statutes of limitations, but also substantive issues like imposing limits on the FEC's ability to undermine these suits by claiming "prosecutorial discretion" over the outcome and requiring minimum standards if the FEC wants to settle a matter to keep it out of court.

- **Congress should provide that career staff at the Federal Election Commission have authority to begin investigations.** Under the current rules, FEC staff cannot even begin to investigate a potential violation without the Commission's approval. Congress should change the law to permit career FEC staff to investigate potential violations they think could have merit; the Commission would then determine whether there is reason to believe a violation has occurred.

- **The composition of the commission itself should be changed to facilitate a move away from gridlock.** The number of commissioners and the way in which they are selected can have a significant impact on the effectiveness of the agency. No single change of this kind alone will address the issue of gridlock, however, and this cannot be a substitute for the other changes we suggest.

- **Congress should ensure that the Federal Election Commission is sufficiently funded.** A functioning, effective FEC also requires sufficient funding, and Congress should ensure that the FEC's resources are sufficient to fulfill the mission that Congress sets for it.

Resources

Rep. Sarbanes' For the People Act of 2019, H.R. 1, § 6001 et seq. (116th Congress, 2019).

R. Sam Garrett, The Federal Election Commission: Overview and Selected Issues for Congress, *Congressional Research Service,* December 22, 2015.

Ann M. Ravel, Dysfunction and Deadlock at the Federal Election Commission, *New York Times*, February 20, 2017.

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Tim Lau, How Congress Can Help Fix the Federal Election Commission, Brennan Center for Justice, April 30, 2019.

Daniel I. Weiner, Fixing the FEC: An Agenda for Reform, Brennan Center for Justice, April 30, 2019.

Anna Massoglia and Karl Evers-Hillstrom, Court says it can't rescue FEC from partisan deadlock … again, *Open Secrets Center for Responsive Politics,* May 14, 2019.

Sarah Frostenson, What Happens When The FEC Can't Do Its Job?, *FIveThirtyEight*, September 4, 2019.

Issue 8: Anonymously funded judicial nominations campaigns

In recent years, anonymous donors have spent millions of dollars to influence federal judicial nomination and confirmation fights. This spending is not subject to any disclosure requirements. Federal election laws only regulate contributions and expenditures relating to electoral politics; thus, expenditures, contributions, and advocacy efforts for federal judgeships are not covered under the Federal Election Campaign Act of 1971.

The lack of any disclosure requirements imperils the judicial objectives of independence and impartiality. Individuals and organizations surreptitiously spending vast sums of money for a specific lifetime appointment may receive preferential treatment from the judge once confirmed. And litigants cannot access needed information to seek a judge's recusal if warranted.

The scale of this spending is profound. Outside groups spent more than $10 million on television to advocate for or against the confirmation of Supreme Court Justice Brett Kavanaugh, for example. The Center for Responsive Politics conducted a review of online and TV spending on the Kavanaugh nomination and concluded that only a fraction of advocacy-related spending was disclosed.

The influence of dark money on the judiciary is even more pronounced in states that conduct judicial elections. In those jurisdictions, anonymous spending by outside groups accounts for a large share of the total. Several organizations that spend money on federal judicial nominations also spend money on state judicial elections.

The consequences of unchecked judicial influence are severe—particularly for federal judges. Unlike a president or a member of Congress, a federal judge cannot simply be voted out of office at the next opportunity. This means, barring impeachment, a judge who has been "captured" by outside spending is entitled to serve for life.

Solutions:

- **Congress should establish disclosure requirements for groups and individuals that spend significant money on federal judicial nominations.**

  Groups that spend more than $50,000 in a calendar year on advocacy related to federal judicial nominations should be required to disclose donors who have given more than $5,000 to the group during that year and the preceding year.

  Groups or individuals who spend money on advocacy related to a judicial nomination should be required to disclose information about each advertisement related to a judicial nomination including the name of the nominee the advertisement is about.

  Establish a requirement that advertisements related to a judicial nomination identify the group funding the advertisement.

- **Congress should prohibit foreign nationals, foreign corporations, and wholly owned subsidiaries of foreign corporations from funding advertisements related to a judicial nomination.** Just as foreign entities are not permitted to spend to influence U.S. elections, they should not be permitted to spend to influence U.S. judicial nominations.

Resources

Sen. Feinstein and Rep. Lofgren's Judicial Ads Act, S. 4183 (116th Congress, 2020).

Sen. Sheldon Whitehouse, Dark Money and the US Courts: The Problem and Solutions, *57 Harvard Journal on Legislation 273*, 2020.

Issue 9: Weak lobbying disclosure laws

In 2019, total reported special-interest lobbying spending reached a record-high of $3.51 billion. These lobbyists move easily through the halls of power, funneling money directly to candidates while effectively concealing the beneficiaries of their efforts and leaving the public wondering whether their elected leaders are acting on behalf of the people or the powerful interests that fund their campaigns. Our government institutions cannot continue to bear the strain these opaque powerful interests place on their legitimacy—especially as we are currently nearing record lows in public trust of government.

In 1995, Congress passed the Lobbying Disclosure Act (LDA) to counter "the perception that Congress in particular is beholden to special interests and that ordinary people cannot rise above the din of lobbyists having special access to and currying favor from members of Congress or top officials in the executive branch." The law imposes a requirement that lobbying entities file with the Secretary of the Senate and the Clerk of the House of Representatives identifying information for the entity and clients (if the lobbying entity is acting on behalf of outside clients), a general description of issues addressed during lobbying contacts, and the identity of any organizations providing more than $5,000 to fund lobbying efforts when these donors also play a major supervisory role. Additionally, under the 2007 amendments to the LDA (the Honest Leadership and Open Government Act of 2007), lobbyists are required to file a semi-annual report listing any campaign contributions to federal candidates and expenses related to events that honor members of Congress, and the Act requires that registration and disclosure statements be provided in a searchable and sortable format online for public inspection.

While these disclosure requirements provide a baseline of transparency, weaknesses in the definitions and disclosure thresholds have created loopholes for lobbyists to exploit. The current laws only capture a fraction of the lobbying that takes place in Washington, DC, leaving the rest of these influencing activities to take place in the dark. The problems posed by the immense power of these opaque influences demands immediate action and immense political courage. Congress must act immediately to bring sunshine into its halls and to restore public confidence that the government works for the people, not against them.

Solutions

- **Congressional and executive branch offices should be required to proactively disclose contacts with lobbyists and lobbying materials.** Require these offices to not only disclose the contact itself, but also any materials provided to these offices by lobbyists. This information should be centralized and made available to the public in a searchable, sortable, downloadable online format and updated quarterly.

- **Congress should pass the For the People Act, which includes provisions to bolster lobbying transparency**. It includes requiring the online linking of Federal Election Commission reports and LDA reports, and clarifying that counseling in support of lobbying contacts is considered lobbying under the LDA and therefore triggers registration.

Resources

Sen. Warren and Rep. Jayapal's Anti Corruption and Public Integrity Act, S. 3357, § 611 (115th Congress, 2018).

Rep. Sarbanes' For the People Act of 2019, H.R. 1, § 7201 et seq. (116th Congress, 2019).

Rep. Phillips's Lobbying Disclosure Reform Act of 2020, H.R. 8022 (116th Congress, 2020).

Lobbying Law in the Spotlight: Challenges and Proposed Improvements, Report of the Task Force on Federal Lobbying Laws Section of Administrative Law and Regulatory Practice, American Bar Association, January 3, 2011.

Issue 10: The revolving door between paid advocacy and government work

The revolving door between both high-profile and mid-level federal government jobs and outside advocacy organizations has, for decades, been a critical driver of corporate and big-money influence in our nation's policy priorities. Many political actors and policymakers move freely between policy-making positions in government and policy-influencing positions with immensely wealthy corporations, industry groups, and other special interests. Dozens of former members of Congress, including immensely powerful members like former Representatives Dick Armey and Joe Crowley, former Senator Tom Daschle, and former Senator and Attorney General John Ashcroft, now receive large salaries from corporations and special interests as they attempt to influence the government in which they used to serve.

And this influence operation goes both ways. During Donald Trump's presidency, a total of 225 individuals were either lobbyists prior to joining the Administration, or became lobbyists after departing. Moreover, President Trump has named seven former lobbyists to his cabinet, including former Chamber of Commerce lobbyist Eugene Scalia to lead the Department of Labor.

This seemingly never-ending cycle of policymakers moving between immense corporate interests and the federal government leaves the public to wonder whether they are even represented by their government. And this looming question is neither idle nor easy to dismiss given the current corporate capture of our government. President Dwight Eisenhower's powerful warning about the "unwarranted influence by the military-industrial complex" is being fully realized in our own time, as corporations have wildly benefited from their spending on lobbyists, federal elections, and new revolving door hires. In fact, according to a 2012 Harvard study, half of the senators and 42 percent of House members who left Congress between 1998 and 2004 became lobbyists, as did 310 former appointees of President George W. Bush and 283 of President Bill Clinton.

The problems posed by the revolving door present a substantial threat to our democracy. While administrations of both parties have taken steps, especially in recent years, to self-impose some limits via presidential executive orders and ethics pledges, these solutions are not durable, transparent or enforceable. It is time for Congress to step up and codify into law these basic safeguards.

Solutions

- **Congress should put statutory limits on people joining the government and working on specific issues that would affect their former employer or client**. Congress should prohibit all appointees, for two years after appointment, from participating personally and substantially in any particular matter in which the appointee's former employer or client has a financial interest.

- **Congress should put statutory limits on former government employees' lobbying after they leave the government.**

Prohibit all appointees from lobbying (including lobbying activities): their former executive branch departments or agencies for a period of five years after leaving government service; and any executive branch department or agency for a period of two years after leaving government service.

Prohibit very senior appointees from lobbying (including lobbying activities) any part of the executive branch or Congress for a period of at least two years after leaving government service.

Enact a five year cooling off period for lobbying by former presidents, vice presidents, members of Congress, and federal judges.

Resources

Sen. Warren and Rep. Jayapal's Anti Corruption and Public Integrity Act, S. 3357, § 101 et seq. (115th Congress, 2018).

Rep. Sarbanes' For the People Act of 2019, H.R. 1, § 8061 et seq. (116th Congress, 2019).

Virginia Canter, The Trump Ethics Pledge: Explained, *CREW*, January 30, 2017.

Issue 11: Failures to regulate foreign influence in politics and policy

During the Trump Administration, we learned a great deal about the extent to which foreign countries seek to influence American politics and policy. In 2016, the Russian government perpetrated an unprecedented attack on American democracy. Among other tactics, Russian agents posed as Americans on social media accounts to sow discord, promote the candidacy of Donald Trump and denigrate his rival Hillary Clinton. The investigation of Russia's attack on our democracy revealed other shadow influence campaigns by foreign powers, prompting renewed focus on the Foreign Agents Registration Act of 1938 (FARA), which requires people who on behalf of a foreign entity conduct the kinds of activities that can influence policy, such as lobbying, public relations, fundraising, and some types of legal representation, to register with the Department of Justice (DOJ) and to disclose information about those activities. The DOJ uses this information to "identify foreign influence in the United States and address threats to national security." The DOJ also makes FARA registrant information available to the public so that the American people and our elected representatives know when someone is representing foreign interests. Russian agents operating in the United States were charged with FARA violations, and several close associates of President Trump, including Paul Manafort, Rick Gates, and Michael Flynn, pleaded guilty to FARA charges or admitted violations.

In addition, the prohibition on foreign campaign expenditures and contributions in United States elections also has received renewed attention in recent years. Lev Parnas and Igor Fruman, close associates of President Trump and his attorney Rudy Giuliani, were recently charged in a multi-count indictment that included criminal violations of the Federal Election Campaign Act of 1971's (FECA) prohibition on foreign expenditures or contributions.

In 2016, the DOJ inspector general released the results of a comprehensive audit of the enforcement of the FARA, and among other conclusions described "the lack of a comprehensive FARA enforcement strategy" and serious issues with the existing disclosure system. It is also unclear whether the DOJ will have success trying to enforce the FARA with criminal prosecutions. In 2019, attorney and former White House Counsel Greg Craig was acquitted by a jury of FARA charges uncovered during the Special Counsel Mueller's investigation.

The Special Counsel investigation of Russian interference in the 2016 election also revealed an apparent gap in the regime that seeks to regulate foreign influence in elections: in the Special Counsel's view, it is not clear whether voluntarily provided "opposition research" can constitute "a thing of value that could amount to a contribution under campaign-finance law." In addition, FECA violations are only criminal if they involve at least $2,000 in a calendar year (the threshold for a misdemeanor) or at least $25,000 in a calendar year (for a felony). While legal commenters disagreed with the Special Counsel's analysis of the FECA, the DOJ's reluctance to pursue charges in such a high profile and important case suggest that the FECA may not deter foreign efforts to make in-kind campaign contributions or expenditures.

Solutions

- **Congress should amend criminal statutes prohibiting foreign campaign contributions and expenditures to specify that certain types of information, including opposition research, hacked or stolen data, polling, or information about voters constitutes a "thing of value."** A knowing and willful violation of the ban involving a thing of value—including information—should be sufficient for the DOJ to pursue criminal FECA charges for unlawful foreign campaign contributions and expenditures.

- **Senior administration officials and members of Congress should have a long cooling-off period before lobbying for foreign governments.** One tried and true method for avoiding undue influence is to prohibit government officials from exiting the revolving door and immediately starting to influence their former colleagues. A five-year cooling-off period for senior administration officials and members of Congress when it comes to leveraging their influence for foreign governments would be appropriate.

- **Lobbyists and public relations consultants should be required to do basic due diligence on their clients, just as banks and financial institutions must.** Congress should acknowledge that foreign influence is now deployed in the United States not largely via propaganda, but by a sophisticated industry with powerful firms. Congress should require basic due diligence by those who seek to deploy influence on behalf of foreign governments; anti-money laundering laws and regulations can be a model for these requirements.

- **Loopholes in the existing Foreign Agents Registration Act disclosure system should be eliminated, and civil enforcement should play a larger part in ensuring compliance.** Investigations like the DOJ inspector general's audit have identified a number of loopholes in the existing FARA disclosure regime (a major one being that FARA exempts lobbyists who have disclosed under a separate system, the Lobbying Disclosure Act, even though the information required in each is different). Loopholes such as these undermine the efficacy of the system and should be closed. Exemptions such as those for commercial activity and for activity not "directed" by a foreign government should also be clarified, perhaps by directing the DOJ to issue regulations to provide notice and an opportunity to comment to the regulated community. An effective enforcement regime that places greater emphasis on reasonable civil measures, such as fines, would also be appropriate.

- **The Foreign Agents Registration Act disclosure system should be modernized to permit public analysis of required information.** Information should be submitted in an electronic structured data format and published in a digitized, machine-readable format.

Resources

Rep. Sarbanes' For the People Act of 2019, H.R. 1, § 7101 et seq. (116th Congress, 2019).

Rep. Buck's FARM Act of 2019, H.R. 5122 (116th Congress, 2019).

Rep. Schiff's Protecting Our Democracy Act, H.R. 8363, § 1101 et seq. (116th Congress, 2020).

Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act, *U.S. Department of Justice Office of the Inspector General*, September, 2016.

Lydia Dennett, Comparing Current Foreign Influence Reform Legislation, *POGO*, August 9, 2018.

Nick Robinson, 'Foreign Agents' in an Interconnected World: FARA and the Weaponization of Transparency, *69 Duke Law Journal 1075 (2020)*, February 4, 2019.

Bob Bauer and Jack Goldsmith, The Senate Russia Report and the Imperative of Legal Reform, *Lawfare*, August 19, 2020.

Limiting Foreign Meddling in U.S. Campaigns: Key Policy Recommendations, *Brennan Center for Justice*.