



Dark Money, Black Hole Money, and How to Solve It

Ciara Torres-Spelliscy

Dark money has the potential to do real damage to the public's faith in elections. At worst, dark money, or its cousin black hole money, could be hiding foreign sovereign spending in American elections. And this type of secretive political spending thwarts accountability for voters and other stakeholders. Congress should act to address dark money. But even without Congressional action, regulators at the Federal Election Commission, the Securities and Exchange Commission, and the Internal Revenue Service should tighten up their reporting requirements to require political spenders to list their underlying donors so that the voting public has a complete picture of who is trying to influence their vote. If the next administration takes this issue seriously and prioritizes new agency rules to address the issue, then the 2016 election could be the last election rife with dark money.

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This election year, playwright Lin-Manuel Miranda told the 2016 graduates of the University of Pennsylvania, “[e]very story you choose to tell, by necessity, omits others from the larger narrative.” This is true. But American elections are missing a key part of the story: exactly who is funding political ads. Between 2010 and 2014, there was \$600 million of dark money spent in federal elections alone.¹ That total will only grow in the 2016 election. Dark money is a product of poor disclosure rules by election administrators that allow individuals and entities to mask their involvement in political spending. But this is a solvable problem that the new administration should tackle.

Here, “dark money” refers to untraceable political spending. Dark money is money that has been routed through an opaque nonprofit — thus concealing its true source from voters and investors alike. The source of dark money could be individuals, unions, associations, nonprofits, or for-profit businesses. Political spenders have been clever at exploiting the gaps in regulation between the IRS and elections regulators, which make dark money possible. But as Trevor Potter and Bryson B. Morgan remind us, “[t]his lack of disclosure is not to be confused with anonymity. The sources of these funds are likely well known to candidates and party elites, but withheld from the public.”²

Dark money is discernable at the federal level because there are requirements at the FEC to report certain types of political spending on political ad buys, but if an underlying donor does not earmark her money going into a dark money nonprofit, then the nonprofit does not have to report that donation to the FEC. As a result, the public knows when the nonprofit spends the money on political ads, but doesn’t know from whom the money originated.

But there is other political spending that is not reported to the FEC. For example, money that is spent on an ad that is aired over 60 days before a federal election that lacks words of express advocacy like “vote for” or “vote against” is not regulated by the FEC, even if the ad includes criticism or praise of candidates for federal office in an election year. Thus any money spent on such an early “sham issue ad” is not reported to the FEC in any way. The money spent on this type of ad is what I refer to as “black hole” money. We know that this black hole money is being spent because we can see that there are advertisements that mention candidates, which are not being reported as political expenditures to any regulator.

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¹ Kathy Kiely, *Former IRS Official Sees Dark Money Scandal Brewing*, MOYERS & Co. (Apr. 12, 2016), <http://billmoyers.com/story/former-irs-official-sees-dark-money-scandal-brewing/>; Karoli Kuns, *How Dark Money Shields Political Donors*, NEWSWEEK (June 30, 2015), <http://www.newsweek.com/how-dark-money-shields-political-donors-348852>; AP & REUTERS, *Most Expensive Midterms Ever: The Power of Citizens United and Anonymous 'Dark Money' Revealed as Spending nears \$4 Billion*, DAILY MAIL (Nov. 4, 2014), <http://www.dailymail.co.uk/news/article-2819897/Most-expensive-midterms-power-Citizens-United-anonymous-dark-money-revealed-spending-nears-4billion.html#ixzz48kE7j11f>.

² Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the “Dark Money” Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL’Y 383, 385 (2013).

But just like with dark money ads, the public does not know who is behind the black hole ads either.

I. Don't Blame *Citizens United* for Dark Money

As I explain in my new book *CORPORATE CITIZEN?*, dark money was a problem that predated *Citizens United v. FEC* (2010).³ Arguably, dark money was the original sin in Watergate. The reason for keeping certain money raised by the 1972 reelection campaign of Richard Nixon secret was easy enough to discern. Corporate contributions to the campaign were illegal, but there was a gap in the law which failed to require disclosure for months in early 1972 and Nixon's fundraisers thought they could get away with hiding it.⁴ Some of the illegal corporate dark money gathered by Nixon's reelection campaign ended up funding the Watergate burglary.⁵

Citizens United may have facilitated more money in American elections by inviting in new spending by corporations and unions, but the decision did not cause the uptick in dark money. Indeed, *Citizens United* upheld the constitutionality of disclosure of the underlying sources of money in politics by a vote of 8 to 1. But because of the dark money problem, Americans often don't know what they don't know about money in politics. Not everyone thinks dark money is a bad thing,⁶ and reasonable people can disagree about whether campaign finance reforms that would require more transparency are desirable.

II. Contemporary Dark Money in Federal Elections

In the post-*Citizens United* era, the high water mark for the aggregate amount of dark money was the 2012 election when President Barack Obama was defending his presidency against Governor Mitt Romney.⁷ According to the Center for Responsive Politics, in 2012 most of the dark money flowed through social welfare 501(c)(4) groups—to the tune of \$257 million; while \$55 million in dark money went through 501(c)(6) trade associations. By contrast, the highest percentage of dark money (47%) in a federal election was in 2010.⁸ Dark money in the 2016 election got off to a fast pace.⁹ But as of October 11, 2016, comparatively less dark money – \$99 million from all sources – has been spent in the 2016 race.¹⁰

³ CIARA TORRES-SPELLISY, *CORPORATE CITIZEN? AN ARGUMENT FOR SEPARATION OF CORPORATION AND STATE* (2016).

⁴ RICHARD REEVES, *PRESIDENT NIXON: ALONE IN THE WHITE HOUSE* 462 (2002).

⁵ Andy Kroll, *Follow the Dark Money*, *MOTHER JONES* (July/Aug. 2012), <http://www.motherjones.com/politics/2012/06/history-mon-ey-american-elections>.

⁶ John Riches, *The Victims of "Dark Money" Disclosure: How Government Reporting Requirements Suppress Speech and Limit Charitable Giving*, *GOLDWATER INST.* (Aug. 5, 2015), <http://goldwaterinstitute.org/en/work/topics/constitutional-rights/free-speech/the-victims-of-dark-money-disclosure-how-governmen/>.

⁷ Potter & Morgan, *supra* note 2, at 385.

⁸ Elizabeth Garrett, *Campaign Finance in the Hybrid Realm of Recall Elections*, 97 *MINN. L. REV.* 1654, 1696 (2013).

⁹ Tom Kertscher, *Ten Times More 'Dark Money' has been Spent for 2016 Elections, U.S. Sen. Tammy Baldwin Says*, *POLITIFACT* (Nov. 5, 2015), <http://www.politifact.com/wisconsin/statements/2015/nov/05/tammy-baldwin/ten-times-more-dark-money-has-been-spent-2016-elec/>.

¹⁰ *Political Nonprofits (Dark Money)*, *CTR. FOR RESPONSIVE POL.*, (last updated Oct. 11, 2016), https://www.opensecrets.org/outsidespending/nonprof_summ.php.

The \$699 million in dark money (and counting) leaves the public wondering what might be hiding among that money. One of the possible sources that could be hiding among that dark, unaccountable and unaccounted money is foreign money. And foreign money seeking to influence American elections could be from foreign private sources or foreign governments. For example, CITGO is an oil company owned by the government of Venezuela. While CITGO has American gas stations, it is doubtful that Americans want foreign sovereign-owned CITGO to have any say over American energy policies or who is elected to American offices. As far as the public record shows, CITGO has not spent in American elections. But the \$699 million dark money problem could be hiding that type of spending in plain sight.

III. Ways to Fix the Dark Money Problem at the Federal Level

Judge Richard Posner worries that campaign finance reform is hampered because “[l]imited terms in office (with or without term limits) truncate politicians’ time horizons; and interest-group politics, operating with vast sums of money on a complex decentralized system of government strongly biased to the status quo, has little trouble pushing needed reforms off beyond those horizons.”¹¹ But difficult is not impossible, and here’s where policies may change.

In Congress, new legislation could re-clarify that all of the underlying sources paying for political ads in federal elections must be disclosed over a reasonable threshold. Such legislation, including the DISCLOSE Act of 2010, aims to bring greater transparency to spending in federal races. But this Act was narrowly defeated in a Republican filibuster. At least for the past few years, Congress has shown little appetite to act. A new Congress that arrives in January 2017 should adopt transparency legislation to end dark money. In the meantime, congressional deadlock does not serve as an insurmountable barrier to reform at the federal level. In terms of the dark money problem, multiple federal agencies have jurisdiction and therefore could implement significant reforms.

A. FEC Reform

The federal government needs a strong and functioning agency to enforce its campaign finance laws and the current FEC is failing in that charge. The issue is structural and ideological. The FEC is made up of three Democratic appointees and three Republican appointees, but the Commission needs four votes to act on anything. The two factions can rarely agree, resulting in frequent 3-3 ties. The effect of the 3-3 ties is that enforcement actions are dropped, and individuals who have asked for advisory opinions get no guidance from the agency on the meaning of the law.¹² Adding a seventh vote or appointing

¹¹ RICHARD A. POSNER, *THE CRISIS OF CAPITALIST DEMOCRACY* 387 (2010).

¹² Fred Wertheimer & Don Simon, *The FEC: The Failure to Enforce Commission*, AM. CONST. SOC’Y (Jan. 2013), https://www.acslaw.org/sites/default/files/Wertheimer_and_Simon_-_The_Failure_to_Enforce_Commission.pdf.

Commissioners who are willing to put partisanship aside to uphold the rule of law would solve this problem of deadlock.

Another structural problem at the FEC is very high-level regulatory capture. Congress controls the FEC's budget, and the Senate confirms the Commissioners, but the FEC is supposed to regulate members of Congress running for reelection. Furthermore, the agency does not have random audit power over the candidates that file campaign finance reports. The FEC lost its random audit power roughly four years into its existence because Congress did not like being audited.¹³ This basically put the Congress on the honor system not to break campaign finance laws.¹⁴ Congress should reauthorize random FEC audits.

The FEC has jurisdiction over political ads in federal elections. When a nonprofit reports to the FEC, under the current rules, only the donors of earmarked funds are reportable. This allows for Alice in Wonderland FEC filings, claiming that millions have been spent in a federal election, but identifying no particular source of the funds. The FEC should adopt new rules which require reporting the source of all funds spent in federal elections, not just the earmarked ones.

B. SEC Rulemaking

The Securities and Exchange Commission (SEC) also has a role to play in lessening dark money, and has acted before in the area of money in politics. In 2010, the SEC promulgated an anti-pay-to-play rule that applies to the investment advisers to public pension funds. SEC Rule 206(4)-5 prevents investment advisers from exchanging large contributions for the ability to manage a public pension fund's investments. Under Rule 206(4)-5, investment advisers can choose to be big fundraisers for municipal and state candidates or they can advise public pension funds, but they cannot do both simultaneously.¹⁵ Explaining why such a rule was needed, Andrew J. Donohue, Director of the SEC's Division of Investment Management, explained, "[p]ay-to-play serves the interests of advisers to public pension plans rather than the interests of the millions of pension plan beneficiaries who rely on their advice. The rule we are proposing today would help ensure that advisory contracts are awarded on professional competence, not political influence."¹⁶

The SEC could address the issue of dark money through a new rule as well. Support for the SEC's improving disclosure requirements of corporate political activity is also high among the general public. According to a 2015 poll, a super majority (88%), including

¹³ Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279, 300 n.50 (1991).

¹⁴ *No Bark, No Bite, No Point: The Case for Closing the Federal Election Commission and Establishing a New System for Enforcing the Nation's Campaign Finance Laws*, PROJECT FEC 72-73 (2002), <http://www.democracy21.org/uploads/%7BB4B5C24-65EA-4910-974C-759644EC0901%7D.pdf>.

¹⁵ Political Contributions by Certain Investment Advisers, 17 Fed. Reg. 41,018 (July 14, 2010) (codified at 17 C.F.R. § 275.206(4)-(5)).

¹⁶ Curtis C. Verschoor, *We Need to Stop Pay-to-Play Corruption*, STRATEGIC FIN. 16 (Sept. 2009), http://www.imanet.org/PDFs/Public/SF/2009_09/09_09_ethics.pdf.

both Republicans and Democrats, wants the SEC to have a transparency rule for corporate political spending.¹⁷ Many members of boards of directors also want an SEC rule. According to the BDO Board Survey conducted in September 2015, “[a]lthough some companies voluntarily disclose corporate political spending voluntarily, a majority (53%) of public company board members believe that the SEC needs to develop mandatory disclosure rules for corporate political contributions.”¹⁸

In 2011, ten corporate law professors filed a petition with the SEC asking for the Commission to promulgate a new rule requiring transparency for corporate political spending by publicly traded companies. By mid-2016, the petition had over 1.2 million signatories including institutional investors, state treasurers, members of Congress and former Chairs of the SEC.¹⁹ This is the most public comments any SEC petition has ever received in the history of the Commission, and the next administration should act on this clear mandate.

C. IRS Rulemaking

The IRS has jurisdiction over the tax exempt 501(c)(4)’s and 501(c)(6)’s that are being used to funnel dark money in politics. This funneling of dark money could be remedied by up to date rules at the IRS over the appropriate use of nonprofits for political spending. In 2014, the IRS started a rule-making, which could have clarified exactly what counts for tax purposes as “candidate-related political activity.”²⁰ After being roundly criticized in over 100,000 public comments, the IRS decided to scrap the rule and go back to the drawing board. But as of October 2016, the IRS had done nothing to fix the rules for nonprofits that facilitate dark money, or black hole money. This should be a priority issue when the new administration takes office.

IV. Conclusion

Dark money has the potential to do real damage to the public’s faith in elections. At worst, dark money or its cousin black hole money, could be hiding foreign sovereign spending in American elections. But even if it is all domestic, this type of secretive political spending thwarts accountability for voters and other stakeholders. Congress should act to address dark money. But even without Congressional action, regulators should tighten up their reporting requirements to require political spenders to list their underlying donors so that the voting public has a complete picture of who is trying to influence their vote. If the next administration takes this issue seriously, then the 2016 election could be the last election rife with dark money.

¹⁷ *New MAYDAY.US Poll: Voters of Every Political Stripe Agree on the Need for Fundamental Reform to the Campaign Finance System*, MAYDAY.US (Sept. 25, 2015), <http://blog.mayday.us/post/129846704150/new-maydayus-poll-voters-of-every-political>.

¹⁸ *2015 Board Survey*, BDO U.S. (Oct. 2015), <https://www.bdo.com/insights/assurance/client-advisories/2015-board-survey#sthash.TiOeNaKP.dpuf>.

¹⁹ Jennifer Taub, *Still Too Big to Fail: Opportunities for Regulatory Action Seven Years after the Bear Stearns Rescue*, CORP. REFORM COAL. 23 (May 7, 2015), <http://www.citizen.org/documents/still-too-big-to-fail-crc-report.pdf>.

²⁰ IRS REG-134417-13 (2014).