



Session Report

Please know you may design the structure of this report to better suit the session. It's important to capture the key outcomes and solutions proposed for the future.

Session Title: Shadow Campaigns: How Straw Donors and Dark Money Groups Can Hide Corruption in Elections

Date & Time: Thursday, 08.12.2022, 8:30 am – 10:00 am GMT -5

Report prepared by: Sophia Gonsalves-Brown, Researcher, Campaign Finance & Ethics, Campaign Legal Center

Moderated by: Erin Chlopak, Senior Director, Campaign Finance, Campaign Legal Center

Panellists:

- Saurav Ghosh – Director, Federal Campaign Finance Reform, Campaign Legal Center
- Beth Rotman – Executive Director, New York City Campaign Finance Board
- Meredith McCoy – Counsel, Venable LLP

Share the thematic focus of the session, it's purpose and corruption risks?

Unlimited spending by undisclosed sources to influence elections is a growing phenomenon in the United States. Although U.S. laws generally require transparency about the sources of money spent to influence elections, loopholes in the law and inconsistency in enforcement have led to abuses that can be dangerous for democracy, while also making it difficult for those who want to comply with the law to understand how to do so.

This session explores existing U.S. transparency requirements for election spending; gaps and loopholes in those requirements and resulting exploitation and confusion; and solutions to improve transparency and facilitate better compliance.

Summary of panellists' contributions & discussion points

Saurav Ghosh – Director, Federal Campaign Finance Reform, Campaign Legal Center:

Ghosh discussed the legal history of the campaign finance system in the United States:

- *Buckley v. Valeo* (1976) was a seminal Supreme Court decision on the issue of campaign finance and the First Amendment, in which the Court equated spending to influence elections with political speech protected by the First Amendment. The decision struck down as unconstitutional limits on how much individuals could spend to independently support or oppose candidates—limits that had been imposed by Congress in the Federal Election Campaign Act of 1971 (FECA).
- A subsequent decision by the U.S. Supreme Court, *Citizens United v. FEC* (2010), reversed a century-old law prohibiting corporations and unions from spending money to influence elections.
- A subsequent lower court decision led to the creation of “independent expenditure only” political action committees (commonly known as super PACs). These committees are forbidden from coordinating with candidates but can raise and spend unlimited amounts of money to influence elections.
- The combination of these court decisions has led to an explosion of supposedly independent spending money on American elections, with new spending records set each election cycle.

Ghosh also explained what ‘dark money’ is, and how it can lead to corruption in the American political system:

- Dark money generally refers to political spending through tax-exempt organizations (501(c)4s and 501(c)6s), which are corporations that exist to further social welfare and advocate for issues important to society. These organizations are permitted to engage in political spending without losing their tax-exempt status.
- Dark money groups generally do not have to publicly disclose their donors. So when these groups spend money to influence elections, it raises major transparency and corruption concerns.
- In recent election cycles, dark money groups have given directly to super PACs (which are not subject to contribution limits). As a result, the true sources of these contributions are hidden. This practice appeals to wealthy donors seeking a way to secretly support a candidate in order to advance their personal policy agendas.

Ghosh discussed the consequences of these transparency loopholes on the American political system, including the potential for foreign interference in elections, and provided an example from the 2016 presidential election:

- Global Energy Producers LLC (GEP) was set up by Lev Parnas and Igor Fruman under the premise that the company would be prospecting in natural gas. However, as reflected in indictments and ultimately successful prosecutions by the Department of Justice, GEP was a front to facilitate various contributions to a super PAC that supported the presidential candidacy of Donald Trump. These contributions included money from a Ukrainian billionaire (which violated the explicit ban on donations to political committees by foreign nationals). Parnas and

Fruman have since been sentenced to prison time for their involvement in the scheme.

Ghosh also explained the role of the Federal Election Commission (FEC):

- Discussion of the FEC usually includes the word ‘dysfunction.’ The agency’s six Commissioners—three from each of the two major U.S. political parties—are starkly divided on what the law should be, how regulations should be enforced, and even what the agency mission should be.
- As a result, laws regulating political spending are not updated in a reasonable or timely manner.

Beth Rotman – Executive Director, New York City Campaign Finance Board

Rotman explained the importance of transparency in American elections, and why transparency gaps exist at the state and local levels:

- There is a mistaken assumption that, because we live in a digital age and have the capacity to learn things as they happen contemporaneously, we already have full transparency in our elections.
- Transparency matters for two main reasons:
 - “Sunlight is the best disinfectant,” meaning that transparency is a key anti-corruption measure.
 - People have a right to make informed decisions while participating in the political process. Being able to “follow the money” allows citizens to participate more meaningfully.
- The regulatory pieces of election systems are often underfunded, which presents challenges to holding actors accountable.
- Some states and municipalities (including New York City) are more successful than others and can serve as a model.
- When there are avenues for concealed spending, bad actors can pursue their policy agenda privately – allowing for corruption.

Rotman spoke further about state and local level election regulatory models, including NYC’s system of public financing:

- States and municipalities have the capacity to pass stronger regulatory systems than at the federal level, and many have done so successfully.
- “Never waste a good scandal” – often, these systems come out of widely publicized instances of misconduct.
- Public financing of elections (also known as small dollar democracy) provides an opportunity for everyday people to participate meaningfully in the political process, as smaller contributions have a larger impact. NYC provides for matching funds, which amplify the power of smaller contributions.
- Public financing of elections can thus cut down on the arms race of political spending and empowers candidates to rely on contributions from their constituents.
- Because the system involves public funds, the NYC Campaign Finance Board has a greater capacity for accountability, including through transparency and oversight rules.

Meredith McCoy – Counsel, Venable LLP

McCoy discussed the need to balance transparency goals with First Amendment rights that U.S. courts have recognized, as well as the political reality that informs how corporations and other actors participate in the American political process. She highlighted that a lack of clarity in political spending regulations makes it very difficult for those trying to operate within the law:

- Regulators and civil society groups focus (by necessity) on bad actors attempting to subvert the law.
- While working in private practice, McCoy has observed that most organizations are actively trying to stay within the bounds of the law.
- There are several deterrents that keep corporate actors from attempting to evade campaign finance regulations:
 - Violators of campaign finance law are subject to criminal and civil penalties
 - Companies can face backlash from their shareholders and/or employees
 - Companies may face reputational damage, which can lead to a loss of business

McCoy also spoke about 501(c)4 organizations, explaining that not all of these groups are seeking to subvert transparency laws and pour dark money into American elections:

- 501(c)4s are a counterpoint to public charities, which cannot engage in political activity.
- The U.S. tax code allows for these groups to lobby and participate in elections on a limited basis.
- Many of these groups are formed for legitimate purposes. For example, the American Civil Liberties Union (ACLU) is organized as a 501(c)4.
- Donors to 501(c)4s give to support their organizational missions.
- 501(c)4s may make political contributions to support candidates that support their mission.
- 501(c)4s are required to disclose donors that give to their organization with the *express intent* to influence elections through electioneering communications. These groups are faced with the practical challenge of determining the motivation behind these contributions.
- Compliance with transparency measures requires clear rules and regulations.

McCoy also explained how, in the absence of clear guidance from the FEC and Congress, the regulated community has had to come up with their own system and standards:

- *“When a regulator is not able to keep up with the pace of change in elections, the regulated community will regulate itself.”*
- For example, the FEC recently approved a new rule on internet ad disclaimers. However, this rule did not reflect much change from the standards developed by the community participating in elections and digital ad platforms.

Proposed Solutions

McCoy

- We need to put forward clear, detailed standards. Laws are written broadly so that they are flexible (can be applied to different situations) and can evolve to reflect the changing nature of our elections. However, broad laws do not provide practical standards. States that have successfully created a compliance environment have regulatory bodies that are empowered to put forward regulations that adapt to changing norms, standards, and practices and issue informal guidance to give clear answers.

Ghosh

- Congress can pass the DISCLOSE Act, which would provide clarity to anyone who wants to engage in election spending. The Act would also provide transparency to voters that want to know who is spending to influence elections.
- The DISCLOSE Act would require 501(c)4s to disclose all donors that give \$10,000 or more to be spent on political activities. The bill also includes provisions that require tracing back any money that is spent on political activities to its original source.
- Unfortunately, this bill has consistently been stonewalled in Congress by individuals that mischaracterize its provisions and underlying purpose.

Rotman

- The problem is not the people who run for office, but the structure and limitations of many oversight agencies. A system like the one overseen by the NYC Campaign Finance Board is a counterpoint to dysfunction at the federal level. The five member NYC Campaign Finance Board is enabled to be nimble and thus, successful in the oversight role. Further, the Board and staff are empowered to review the program and work with lawmakers, which has led to phenomenal changes to the NYC program over its 30-year arc of progress. The nimble ability of the oversight Board is key to ensuring the program upholds the public trust.

Rapporteur's name and date submitted

Sophia Gonsalves-Brown, 08.12.2022