A LEGACY OF INACTION

President Obama and Secret Money in Politics

DECEMBER 2015

ROOTSTRIKERS

Table of Contents

Introduction and Executive Summary

Nearly six years ago, the United States Supreme Court ushered in an era of unprecedented anonymous and unlimited political spending with its *Citizens United* decision.

That decision and related Supreme Court jurisprudence has led to a proliferation of outside groups such as super PACs and "secret money" or "dark money" groups – organizations spending with the intent of influencing elections without having to disclose their donors. In the wake of *Citizens United*, the amount of political spending by dark money groups soared from only $5.6m in 2006 to over $300m in the 2012 presidential election cycle. The 2014 elections' $174 million in secret spending set a new record for midterm elections and for secret money spent on congressional races.[1] The 2016 election cycle looks poised to go further: At this point in time, 10 times more "dark money" has been spent in the 2016 presidential election cycle than at the same point four years ago.[2]

The American public's outrage over the decision is palpable, with nearly four out of every five Americans saying the case should be overturned.[3] They are joined by Supreme Court Justice Ruth Bader Ginsburg, who calls it one of the Court's worst rulings, saying, "If there was one decision I would overrule, it would be *Citizens United*."[4]

At first glance, President Obama appears to be among the strongest critics of the *Citizens United* decision and its effects. He famously broke decorum to criticize the Court's decision while six justices sat before him at the first State of the Union address following *Citizens United*. Repeatedly, he has drawn from the rhetorical well of decrying the harm he says the decision has done to our political system, stating "ordinary Americans are shut out of the process" in a system with "millionaires and billionaires bankrolling whoever they want, however they want, in some cases undisclosed."

Yet, President Obama's record has not lived up to his rhetoric.

As this report will detail, the president has numerous avenues to take executive action to fight the impact of secret money in politics, without needing the approval of Congress. With little more than one year left in his term, he has taken none of them.

While Obama has genuflected to the importance of overturning *Citizens United*, the presidency has no authority in the (daunting) amendment process. In contrast, as the

[1] Center for Responsive Politics. Political Non-Profits (Dark Money), accessed 11/14/15
[2] Politifact.org, "Ten times more 'dark money' has been spent for 2016 elections, U.S. Sen. Tammy Baldwin says," 11/5/15
[3] Bloomberg, "Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot," 9/28/15
[4] The New Republic, "Ruth Bader Ginsburg Is an American Hero," 9/28/14

threat posed by secret money has grown, President Obama and his appointees have consistently failed to take the actions against unlimited and secret money in politics over which the executive branch has substantial or even unilateral control:

- **Executive Order –** President Obama has backed away from issuing an executive order requiring large federal contractors – including 70% of the Fortune 100 – to disclose their political spending. His continued inaction comes in the face of increasing public pressure, with more than 850,000 petition signatures from the public delivered in 2015 and support from more than 130 members of his own party in Congress, including Senate Minority Leader Harry Reid.

- **SEC –** Obama's appointee to head the Securities and Exchange Commission, Mary Jo White, removed a rule to require public companies to disclose their political spending from the regulatory agenda, despite it being the most requested rule by investors in SEC history. In response, 44 U.S. Senators wrote Chair White a letter expressing their "frustration and disappointment" with her action.

- **FCC –** Tom Wheeler, Obama's Federal Communications Commission chair, has declared that it is "not a priority" to use the Commission's already existing authority to require greater disclosure of the funders of political ads.

- **IRS –** The IRS commissioner Obama appointed, John Koskinen, has repeatedly delayed issuing rules clarifying the political activity tax-exempt nonprofits can undertake. 501(c)4 organizations have become leading vehicles for secret money spending despite being required to be operated "exclusively" to promote social welfare. But cowed by right wing pressure, Koskinen has said his commission will not act until after the 2016 election.

- **FEC –** President Obama has neglected the primary regulatory agency for campaigns, the Federal Election Commission, by failing to appoint commissioners when sitting commissioners' terms expire. Seven years into his term, the president has appointed only two of the six sitting commissioners, despite five of the six commissioners serving on expired terms.

- **Broken Pledges on Campaign Finance –** The president has walked back many of his previously stated positions on campaign finance, failing to push for public financing of elections after campaigning on the idea, violating his pledge to not have his associates fundraise for any super PAC supporting his 2012 bid, and allowing corporate contributions for his second inauguration festivities after disallowing them in his first inauguration.

- **Signed Bills Increasing Big Money in Politics –** In the few cases where the president has taken direct action on money in politics, his actions have largely worsened an already damaged system, including signing

into law a six-fold increase in the contribution limits governing how much money donors can contribute to political parties in the 2014 "CRomnibus" bill and legislation repealing public financing for political party conventions.

- **Evaded Questions from Press –** When pushed by reporters on whether the president would take executive action to fight secret money in politics, Obama's staff has evaded the question, merely pointing back toward a document of statements criticizing the Supreme Court. The president's administration acknowledges no concrete plans to combat secret money in advance of the 2016 election.

The president's failure to take action on campaign finance reform is especially disappointing given the support the actions above enjoy from the public, a broad range of advocacy groups, and his own party.

While the Obama Administration's typical response to criticism on the issue of money in politics has been to pass the buck by blaming congressional Republicans or the Supreme Court, this ignores the executive actions outlined above, which lie fully within the president's purview. Time is running out to take action to reduce what will almost certainly be a record-breaking amount of secret money spent in the 2016 election.

Before his next State of the Union address, President Obama can and should:

- Issue an executive order requiring federal contractors to disclose their political spending within 24 hours of it happening, to take effect before July 4, 2016.
- Immediately call on the leaders he appointed to the SEC, IRS, and FCC to use their authority to unmask secret political donors.
- Fill all five FEC openings with nominees who will enforce the law.

As the clock winds down on the Obama presidency, advocacy groups and the public have increased the pressure for President Obama to live up to the rhetoric he has delivered to the American people. It remains to be seen whether President Obama will choose to leave a legacy of fighting the corrupting influence of secret money in politics, or of adding to the culture of political cynicism he has repeatedly decried, by failing to take actions available to him.

This report will (1) examine President Obama's stated commitment to reforming the system of big money in politics and concern about the problem of secret money; (2) list the ways in which Obama's record as president has not lived up to his rhetoric; (3) explore the five primary avenues for executive action against secret money; and (4) consider the harm to President Obama's legacy if his inaction against secret money continues.

President Obama Claims the Mantle of Reformer

Since his first campaign for president, Barack Obama strongly claimed the mantle of someone who would work to fundamentally reshape the political culture in Washington.

Candidate Obama Pledged Consistent Commitment to Fighting Money in Politics

In 2007 while running for president, he stated on Meet The Press that "money is the original sin in politics." He acknowledged that by necessity he, too, was a participant in the big money system, but adamantly reassured Americans of his "consistent" commitment to changing that system.[5]

> *"I have said repeatedly that money is the original sin in politics and I am not sinless. I have raised money in order to bankroll my campaigns.* ***But what I have been consistent about is fighting to reduce the influence of money in politics at every level of government.*** *… I've got this track record, and the way I'm conducting this campaign, I think, reflects that interest in reducing money in politics…*
>
> *"[T]his interest, this support of public financing of campaigns, the support of changing the ethics rules, promoting robust disclosure when it comes to how campaigns are financed, those are all laws that I have written and I have passed. So my commitment extends beyond just not taking lobbyists' money and taking PAC money… And that, I think, is the kind of track record, of being willing to take on not only Republicans,* ***but oftentimes taking on leaders in my own party who are resistant to change that I think gives me credibility to say when I am president I am actually going to take this seriously and use my political capital to deal with it…***
>
> *"Tim, I mean, this is the problem when you want to try to fix Washington is if you take certain steps to improve the process, then people will say, 'Well, it's not perfect.' Well, of course it's not perfect. … Most of the people that are writing $2300 checks are wealthy people, and that's one of the problems with our political system.* ***That's something that I am intent on changing, and I've got a track record of actually bringing about change that I believe nobody else has."***[6]

[5] Meet The Press, 11/11/07
[6] Meet The Press, 11/11/07

The 2008 Obama-Biden Presidential Transition team's "Ethics Agenda" led with this quote from President Obama:

> "I am in this race to tell the corporate lobbyists that their days of setting the agenda in Washington are over. I have done more than any other candidate in this race to take on lobbyists — and won. They have not funded my campaign, they will not run my White House, and they will not drown out the voices of the American people when I am president."[7]

On the campaign trail before the 2008 election, Obama frequently cited his spearheading of campaign finance reform legislation in the Illinois State Senate: "The first bill I ever passed was campaign finance reform legislation — the first in a generation in Illinois."[8] He also pledged to work toward public campaign financing for congressional elections and to participate in and then repair the presidential public financing system [9]

Obama would later cite the desire to fight back against big money in politics as one of the primary **reasons** he ran for president, saying in May 2010, "That's one of the reasons I ran for president: Because I believe so strongly that the voices of ordinary Americans were being drowned out by the clamor of a privileged few in Washington."[10]

Obama Has Repeatedly Criticized *Citizens United*, Other Supreme Court Rulings Leading to "Anything Goes" Campaign Finance System

In his 2010 State of the Union address, as six Supreme Court Justices watched on, President Obama said that the *Citizens United* decision "reversed a century of law that, I believe, will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections."[11]

In early 2015, President Obama revived a call for a constitutional amendment to overturn *Citizens United*, saying, "I would love to see some constitutional process that would allow us to actually regulate campaign spending the way we used to, and maybe even improve it."[12]

On the 5th anniversary of the *Citizens United* decision, President Obama issued the following statement, "Our democracy works best when everyone's voice is heard, and no one's voice is drowned out. But five years ago, a Supreme Court ruling allowed big companies – including foreign corporations – to spend unlimited amounts of money to influence our elections. The *Citizens United* decision was wrong, and it has caused real harm to our democracy. With each new campaign season, this dark money floods our airwaves with more and more political ads that pull our politics into the gutter. **It's time to reverse this trend. Rather than bolster the power of lobbyists and special**

---

[7] Change.gov, "Agenda-Ethics," via Internet Archive, accessed 11/15/15
[8] Chicago.SunTimes.com, "Sweet blog special: Obama asked about Sun-Times story about ties with Rezko during debate," accessed 12/3/15
[9] Midwest Democracy Network, "Edwards And Obama Detail Political Reform Plans," 11/27/07
[10] ProPublica, "Obama's Flip-Flops on Money in Politics: A Brief History," 1/30/13
[11] Washington Post, "Obama's campaign finance reform plans have faded," 4/29/13
[12] USA Today, "President Obama wants to reverse Citizens United," 2/9/15

interests, Washington should lift up the voices of ordinary Americans and protect their democratic right to determine the direction of the country that we love."[13]

Obama again blasted the Supreme Court's ruling and secret money in politics in response to the Court's *McCutcheon v. FEC* case, which eliminated limits on the overall amount of contributions an individual donor can give to candidates and political parties.

> *"Well, the latest case would go even further than Citizens United. I mean, essentially, it would say anything goes; there are no rules in terms of how to finance campaigns.* ***There aren't a lot of functioning democracies around the world that work this way, where you can basically have millionaires and billionaires bankrolling whoever they want, however they want, in some cases undisclosed. And what it means is ordinary Americans are shut out of the process...***
>
> ***"And I've continued to believe that Citizens United contributed to some of the problems we're having in Washington right now.*** *You know, you have some ideological extremist who has a big bankroll, and they can entirely skew our politics."*[14]

Obama: Secret Political Spending "Wrong," "Corrosive to Our Democracy," and Threatens "A Potential Corporate Takeover of Our Elections"

President Obama has frequently spoken out against the risks posed by secret money in politics:

> *"The American people ... have the right to know when some group like 'Citizens for a Better Future' is actually funded entirely by 'Corporations for Weaker Oversight.' … What we are facing is no less than a potential corporate takeover of our elections. And what is at stake is no less than the integrity of our democracy."*
>
> ***-President Obama, May 1, 2010***[15]

> *"Millions of Americans are struggling to get by and their voices shouldn't be drowned out by secret, special interest advertising. The American people's voices should be heard."*
>
> ***-President Obama, July 29, 2010***[16]

In 2012, the Obama Administration issued a Statement of Administration Policy supporting the DISCLOSE Act, a legislative response to *Citizens United* that required 'any covered organization' that spends $10,000 or more on campaign-related disbursements to file a disclosure report with the Federal Election Commission within 24 hours of the

[13] Statement from the President, 1/21/15
[14] Remarks by the President, 10/8/13
[15] Whitehouse.gov, "Weekly Address: President Obama Calls on Congress to Enact Reforms to Stop a "Potential Corporate Takeover of Our Elections," 5/1/10
[16] The White House: West Wing Week, 7/29/10

expenditure, and to file a new report for each additional $10,000 or more that is spent." In the SAP, the Obama Administration said, "In the absence of the disclosure rules in S. 3369, corporations and wealthy individuals will continue to be able to shield their donations from disclosure. Congress should act now to hold corporations and special interests that participate in the Nation's elections accountable to the American people."[17]

The president also directly called out the perils of inaction in 2012. He laid the responsibility to act on political leaders, noting they have a choice of whether to "allow this practice to continue."

> *"Two years ago, the Supreme Court ruled in Citizens United that big corporations are allowed to spend unlimited amounts of money to influence American elections. They can buy millions of dollars' worth of TV ads with no obligation to reveal who's actually paying for them. The consequences of this decision are predictable.* ***If we allow this practice to continue, special interests will have unprecedented influence over politicians. It's wrong. It's corrosive to our democracy, and it's a threat to our future."***[18]

[17] Statement of Administration Policy, S. 3369, 7/16/12
[18] The White House, "Statement by the President on the DISCLOSE Act," 7/16/12

Obama's Record as President Belies His Talk

Despite his statements as a candidate about his long track record of "fighting to reduce the influence of money in politics at every level of government," President Obama has been remarkably consistent in failing to use the opportunities open to him as president to reduce secret money in politics.

Instead of taking the actions available to him, he has passed the buck to others, criticizing Republicans in Congress, blaming the Supreme Court, or pointing toward a constitutional amendment, a process in which the president has no authority. He hasn't pursued major campaign finance initiatives, has failed to appoint nominees to key positions, and has allowed his nominees to back away and slow-walk reform proposals at their agencies. And where the president has taken action, oftentimes it has been regressive and counterproductive to the goal of reducing money in politics.

No Executive Actions: "Absence of Leadership and Action" Against Undisclosed Money

Avenues of potential executive action are explored in the following section, but reformers note that the Obama Administration has taken no apparent steps to use its executive authority to reduce secret money in politics. The possible executive actions include:

- An executive order requiring large federal contractors – including 70% of the Fortune 100 – to disclose their political spending.
- A Securities and Exchange Commission rule using existing authority to require public companies to disclose their political spending.
- A Federal Communications Commission rule using existing authority under Section 317 of the Communications Act to require greater disclosure of the funders of political ads.
- Updated Internal Revenue Service regulations limiting abuse of the tax code by clarifying that tax-exempt nonprofits legally defined as operating "exclusively" for social welfare purposes spend no more than an insubstantial amount on politics.
- Replacing the five commissioners serving on expired terms at the notoriously gridlocked, six-member Federal Election Commission with nominees willing to enforce the law.

In 2013, Americans for Campaign Reform, Campaign Legal Center, Common Cause and four other groups wrote a letter to the president decrying his failures on campaign finance reform. In the letter, these groups wrote to express "our deep concern about the nation's corrupt campaign finance system and about your failure, to date, as President to provide meaningful leadership or take effective action to solve this fundamental problem facing our democracy."[19]

After listing a bill of particulars including the lack of movement on all the above courses of executive action, the letter from the reform community concludes with the following indictment of the Obama presidency:

> "Given the absence of leadership and action on your part, we can only conclude that in your view the scandalous campaign finance system facing the country is not important enough for you to spend political capital on, or take meaningful steps to repair. In taking this approach, thus far, you have failed the citizens of this country on an issue of paramount importance – preventing the corruption of our democracy."[20]

Where Obama Has Acted on Campaign Finance, It Has Worsened the Big Money Problem

Particularly during his second term, President Obama and his administration have undertaken other actions that have materially worsened a situation even he agrees is already problematic.

The 2014 "CRomnibus" to fund the government "lifts campaign contribution limits to party organizations allowing fundraisers to hit up donors for just under $1.6 million in each two-year election cycle, up from the current $260,000 limit," nearly a six-fold increase. Fred Wertheimer of Democracy 21 said that the measure "destroys critically important anti-corruption campaign finance laws that were enacted to protect the interest of 300 million Americans."[21]

The same year, President Obama signed into law a measure repealing public financing of political conventions, opening the door once again to unfettered influence buying by large donors seeking access to the nation's most powerful political figures.[22]

As this report goes to print, there is a risk that this process will repeat itself again. News reports indicate that Senate Majority Leader Mitch McConnell will attempt to insert a policy rider onto a must-pass spending bill to fund the federal government, similar to the 2014 CRomnibus. This measure would eliminate caps on coordinated spending between political parties and federal candidates, undermining candidate contribution limits.[23]

[19] Letter from Americans for Campaign Reform et al to President Obama, 4/29/13
[20] Letter from Americans for Campaign Reform et al to President Obama, 4/29/13
[21] Bloomberg Politics, "RIP: Obama the Campaign-Finance Reformer,"12/15/14
[22] NPR, "Say Goodbye To The Taxpayer-Funded Political Convention," 3/26/14
[23] Politico, "GOP rider would boost party spending." 11/25/15

He also converted his campaign organization, Obama for America, into a group organized under the 501(c)4 section of the tax code – often used by secret money groups – allowing unlimited contributions and no disclosure, although the group has elected to voluntarily disclose some donor information.[24]

The Washington Post editorial board wrote that "Organizing for Action should be renamed Paying for Access"[25] and the New York Times called it a "disturbing" move.[26]

Broken Pledges and Reversals

The first warning signs of the legacy President Obama is now leaving on money in politics could be seen as early as President Obama's 2008 campaign. Many cautioned that as a candidate Obama was unable to "unilaterally disarm" in the money race, and that his record as president would be the important measure of his commitment to fighting money in politics.

Even by that standard, his willingness to make and then break clear pledges on campaign finance didn't only give many pause during his campaigns, it was a harbinger of his current record of inaction.

In 2008, President Obama broke his promise to "aggressively pursue" an agreement with his Republican opponent to both participate in public financing for the general election. He became the first presidential candidate to ever opt out of public campaign financing for the general election[27] – a turnaround fact checkers at *The Washington Post* called "blatant."[28]

He also reversed a pledge not to let his staff or associates fundraise for a super PAC supporting his re-election campaign. In 2011, the pledge was unequivocal, per Obama campaign spokesman Ben LaBolt:

> *"Neither the president nor his campaign staff or aides will fundraise for super PACs… Our campaign will continue to lead the way when it comes to transparency and reform."*[29]

However, by the following year, members of Obama's team as senior as Chief of Staff Jack Lew and top aide Rahm Emmanuel had been dispatched to fundraise for Priorities USA Action, the super PAC backing Obama's 2012 bid.[30]

---

[24] Washington Post, "Organizing for Action raises $4.9 million in first quarter," 4/12/13
[25] Washington Post, "The Temptation of Dark Money," 3/3/13
[26] NY Times, "The White House Joins the Cash Grab," 3/3/13
[27] Washington Post, "RESOLVED: President Obama doesn't (really) care about campaign finance reform," 2/25/13
[28] Washington Post, "Obama Reneges on Public Financing," 6/20/2008
[29] Washington Post, "New breed of 'super PACs,' other independent groups could define 2012 campaign", 7/4/11
[30] Washington Post, "Worried Democrats scramble to close fundraising gap with GOP," 9/5/12

Finally, at the start of his second term, President Obama broke course with his decision to bar corporate contributions for his 2009 inauguration, allowing corporate sponsors to fund his second inaugural festivities.[31]

The policies that the White House might point to as evidence of progress are primarily small administrative shifts increasing accessibility of information already publicly available, in lieu of reforms that address the underlying problems with secret money or gather new information for public review. These steps include the FCC's online publication of broadcaster political files, a pledge to release some nonprofit tax returns online in bulk,[32] a policy precluding registered lobbyists from serving in the White House – albeit one "undermined by exceptions,"[33] and the online posting of some ethics filings and visitor logs.[34]

Though he has verbally supported a constitutional amendment to reverse *Citizens United*, he has limited means to advance that policy goal.[35]

In Response to Criticism, Obama Points to His Past Rhetoric, Passes Buck to Others

When directly pushed by reporters on whether the president would take executive action to fight secret money in politics, Obama's staff has evaded the question, merely pointing back toward statements criticizing the Supreme Court. This is notably demonstrated in an email correspondence disclosed by ProPublica. An Obama 2012 spokesman was asked twice whether the president supported a campaign finance executive order, but the spokesperson's response lacked any reference to executive action and pointed toward the president's stated opposition to secret money and support of legislative remedies.[36]

In response to criticism on the topic of money in politics, President Obama has largely pointed a finger at congressional Republicans and conservatives on the Supreme Court. Take for example his comments following the filibuster of the DISCLOSE Act in 2012:

> *"Unfortunately, Republicans chose to block it. Instead of standing up for the American people, Republicans stood with big banks and oil companies – special interests that certainly don't need more clout in Washington.*
>
> *"I will continue to do everything I can to repair the deficit of trust between Washington and the American people. I'm disappointed Republicans in Congress failed to take action and hold corporations and special interests accountable to the American people."*[37]

---

[31] The Daily Beast, "Obama Reverses Himself and Takes Corporate Money for Second Inaugural," 12/8/12
[32] The Open Government Partnership, 10/27/15
[33] Huffington Post, "Barack Obama Campaign Finance Reforms Fiddled While System Crumbled," 9/6/12
[34] Huffington Post, "Barack Obama Campaign Finance Reforms Fiddled While System Crumbled," 9/6/12
[35] Washington Post, "Obama's campaign finance reform plans have faded," 4/29/13
[36] ProPublica, 1/29/13
[37] Statement By The President on the DISCLOSE Act, 7/16/15

If President Obama holds himself and his executive branch to the same standard of action he holds members of the Republican Party he has not made that clear in any public statements.

No Plans to Take Action Before 2016 Elections

White House spokesman Josh Earnest has stated that the Obama Administration has no plan to take action to improve campaign finance rules ahead of the 2016 election, with Bloomberg BNA reporting, "The Obama Administration has no specific plans to push for stronger campaign finance laws as the 2016 presidential election campaign gears up with predictions of record spending from candidates, super PACs and other organizations."[38]

Media Reports: Obama Partially Responsible for Campaign Finance Status Quo

Many media reports have noted President Obama's lack of leadership on the issue of secret political spending, despite his reform-oriented rhetoric.

> ***Washington Post:*** *"President Obama's once-broad ambitions to clamp down on the influence of special interests have been largely abandoned since his reelection, dismaying longtime allies in the campaign-finance reform movement."*[39]
>
> ***Bloomberg:*** *"RIP: Obama the Campaign-Finance Reformer. The president is overseeing a new era of big money politics, despite pledges to level the playing field with wealthy interests."*[40]
>
> ***ProPublica:*** *"Obama's shameless finance reform flip-flopping."*[41]
>
> ***Bruce Ackerman and Ian Ayers, Slate.com:*** *"If the president is to be taken seriously, it's time for him to make campaign finance a centerpiece of the upcoming campaign."*[42]
>
> ***WashingtonPost:*** *"Here's a novel concept: For all of the rhetoric he has devoted to the need to reform how campaigns are funded, President Obama has done little to, you know, actually bring about those reforms. And, it can be argued relatively convincingly that Obama has actually done plenty to exacerbate the influence of money in politics."*[43]

---

[38] Bloomberg BNA, "Campaign Money Order Would Affect Top Companies," 4/30/15
[39] Washington Post, "Obama's Campaign Finance Reform Plans Have Faded," 4/29/13
[40] Bloomberg Politics, "RIP: Obama the Campaign-Finance Reformer,"12/15/14
[41] Salon.com. "Obama's shameless finance reform flip-flopping," 2/2/13
[42] Bruce Ackerman and Ian Ayres, Slate.com, "All Eyes on Obama," 4/4/14
[43] WashingtonPost.Com, The Fix, "RESOLVED: President Obama doesn't (really) care about campaign finance reform," 2/25/13

Huffington Post: *"The four years of Obama's presidency have featured some of the biggest rollbacks of the campaign finance regulatory regime created in the wake of the Watergate scandal.* ***And Obama's own actions, or lack thereof, are partly to blame."***

Los Angeles Times: *"Obama hasn't reigned in big money: Relaxed inauguration rules reflect how he has largely given up the fight for what was once a high priority."*[44]

Julian Zelizer, CNN.com: *"Obama dropped ball on campaign finance reform."*[45]

[44] Los Angeles Times, "Obama hasn't reigned in big money," 1/10/13
[45] Julian Zelizer, CNN.com: "Obama dropped ball on campaign finance reform," 10/18/10

The Current Fight

Executive Actions the Obama Administration Could Take – But Has Not

The Obama Administration has typically pointed toward Republicans in Congress or conservatives on the Supreme Court to explain the lack of reforms to reduce secret money in politics. It has not addressed head-on actions that could significantly reduce the amount of secret money spent in politics and can be accomplished solely using existing executive authority.

These include:

- An executive order requiring large federal contractors – including 70% of the Fortune 100 – to disclose their political spending.
- A Securities and Exchange Commission rule using existing authority to require public companies to disclose their political spending.
- A Federal Communications Commission rule using existing authority under Section 317 of the Communications Act to require greater disclosure of the funders of political ads.
- Updated Internal Revenue Service regulations limiting abuse of the tax code by clarifying that tax-exempt nonprofits legally defined as operating "exclusively" for social welfare purposes spend no more than an insubstantial amount on politics.
- Replacing the five commissioners serving on expired terms at the notoriously gridlocked, six-member Federal Election Commission with nominees willing to enforce the law.

In addition to the direct authority the president holds to issue an executive order improving disclosure and to nominate new FEC commissioners, the example of Title II net neutrality offers a way forward with agency rulemaking as well. President Obama's statement favoring the policy was widely credited with giving the FCC the space to move forward with strong net neutrality rules in the face of intense pressure from industry and some members of Congress.[46]

[46] NY Times, "F.C.C. Plans Strong Hand to Regulate the Internet," 2/5/15

All 3 Leading Democratic 2016 Candidates Explicitly Pledge Executive Action

The contrast between President Obama's inaction and the views of the leading Democratic candidates to replace him as the next president is stark.

Hillary Clinton, Bernie Sanders, and Martin O'Malley have each released plans pledging to take executive action against undisclosed political spending. Of course, despite these candidates' support, the only prospect for action before the 2016 election – and what will almost certainly be a record-breaking sum of secret political spending – is from President Obama.

Hillary Clinton – As part of her pledge to "end secret, unaccountable money in politics,"[47] Clinton has explicitly pledged to take executive action against secret money in politics, as explained in a campaign fact sheet:

> *"To increase transparency in our political system and end the era of unaccountable money in politics, Clinton will ...*
>
> ***"Promote SEC rulemaking requiring publicly traded companies to disclose all political spending to their shareholders.*** *Clinton believes that information about how corporate funds are being used to fuel political activity and influence elected officials is material to investment decisions and should be made available to shareholders.*
>
> ***"Sign an Executive Order requiring federal government contractors to fully disclose all political spending.*** *If Congress fails to act on common sense campaign finance reform, Clinton will use executive authority to increase transparency of political spending by all companies that are awarded federal contracts."*[48]

Bernie Sanders – The campaign finance reform platform released by Sanders includes a pledge to sign the campaign finance disclosure executive order and take executive action through a range of federal agencies, as explained on his campaign website:

> *"As president I will ... Insist on complete transparency regarding the funding of campaigns, including through disclosure of contributions to outside spending groups, via legislation, action by the Securities and Exchange Commission, Federal Election Commission, and Federal Communication Commission, and an executive order requiring government contractors to disclose their political spending."*[49]

[47] HillaryClinton.com, accessed 12/3/15
[48] HillaryClinton.com, 9/8/15
[49] BernieSanders.com, accessed 12/3/15

Martin O'Malley – O'Malley has pledged to take "extensive executive action" to "bring 'dark money' political spending into the light," which his staff has confirmed includes signing the executive order requiring large federal contractors to disclose,[50] and his website details would include executive action by the SEC, IRS, and FCC, and appointing FEC commissioners and an Attorney General ready and willing to assertively enforce campaign finance laws:

> *"As president, Governor O'Malley will:*
>
> ***"Use Executive Authority to Increase Transparency.*** *In addition to the FEC rules described above, the Securities and Exchange Commission, Internal Revenue Service, and Federal Communications Commission each have the authority to strengthen campaign finance disclosure laws. O'Malley will direct each agency to act, completing regulations that require publicly traded companies to disclose political spending to their shareholders, restrict political spending by dark money groups, and enforce laws requiring broadcasters to disclose the real identities of sponsors who run political ads.*
>
> ***"Strengthen Enforcement of Campaign Finance Laws.*** *O'Malley will make real enforcement of campaign finance laws a federal priority. O'Malley will appoint FEC Commissioners and an Attorney General committed to assertively enforcing our nation's existing laws even as we forge a new consensus for broader reforms to restore our democracy."*[51]

[50] Twitter, 10/1/15
[51] MartinOMalley.com, 10/1/15

Executive Order

Obama Could Require Federal Contractors to Disclose

The most direct step the Obama Administration can take to improve disclosure of political spending is to issue an executive order requiring large federal contractors to disclose contributions to federal candidates and groups that could be reasonably expected to run electioneering communications or independent expenditures.

White House Backed Down From 2011 Draft Executive Order

Originally, a draft of an order like this circulated among government agencies in April of 2011.[52] That year, the executive order met opposition from Republicans and representatives of large businesses. The United States Chamber of Commerce, one of the largest secret money spenders in politics,[53] declared its full-throated opposition to the order. R. Bruce Josten, the Chamber's top lobbyist said the group "is not going to tolerate" a "backdoor attempt" to silence opponents by making them disclose their donations. He also said that the Chamber "will fight it through all available means. To quote what they say every day on Libya, all options are on the table."[54] In the face of the opposition, the order was never issued.

Escalating Pressure for Executive Order in 2015

In 2015, the idea of an executive order to require government contractors to disclose their political contributions has been revived. Despite a rider inserted into a spending bill by congressional Republicans in 2014 that attempted to block the first draft executive order, the measure only applies to disclosures required before a government grant is issued. This leaves the president free to require political spending disclosure by federal contractors after they receive their contract.[55]

In June 2015, more than 100 members of the House of Representatives sent a letter to President Obama asking him to issue that order. They wrote, "Taxpayers have a right to know where their money is spent and you have the power to ensure that the American people can obtain this information. With public funds come public responsibilities, and any company receiving federal tax dollars should be required by executive order to fully disclose their political spending in a timely and accessible manner."[56]

---

[52] Draft Executive Order of Disclosure of Political Spending By Government Contractors, 4/13/11
[53] Center for Responsive Politics, accessed 12/3/15
[54] New York Times, "Lobbyist Fires Warning Shot Over Donation Disclosure Plan," 4/26/11
[55] The Hill, "Obama urged to impose rules on campaign spending disclosure," 3/3/15
[56] Letter for Rep. Anna Eshoo et al to President Barack Obama, 6/23/15

On the same day, 26 senators sent a similar letter saying, "Political spending by government contractors is a problem you can address without congressional authorization. You would be on solid legal ground if you were to issue an executive order requiring disclosure of political spending by entities that have been awarded government contracts and their senior leadership."[57] Senate Minority Leader Harry Reid has since joined his colleagues in supporting this executive order.[58]

The executive order would have a significant reach: At least 70% of Fortune 100 companies would be covered, according to a Public Citizen analysis.[59] Similarly, the measure enjoys broad public support, with more than 850,000 public petitions backing the executive order submitted to the president[60] and both Republicans (66%) and Democrats (78%) favor the measure in recent polling.[61]

[57] Letter from Sen. Sheldon Whitehouse, et al to President Barack Obama, 6/23/15
[58] Huffington Post, "Harry Reid Joins Call For Obama To Take Action on Dark Money," 11/11/15
[59] Public Citizen, "An Executive Order on Contractor Political Spending Disclosure Would Reach 70 Percent of Top Companies," 4/27/15
[60] U.S. PIRG, News Release "851,000 Citizens Urge President Obama To Sign Secret Money Executive Order," 11/10/15
[61] MAYDAY.US, "NEW MAYDAY.US POLL: Voters of Every Political Stripe Agree on the Need for Fundamental Reform to the Campaign Finance System," 9/25/15

SEC

Failure To Require Companies To Disclose Political Spending

The Securities and Exchange Commission requires a wide range of disclosures by publicly traded companies to serve investors' interests. President Obama should publicly urge the SEC chair he appointed, Mary Jo White, to reverse her earlier decision and put a rule back on the SEC's agenda requiring disclosure of political spending by public companies.

Rulemaking Petition Asks for Political Disclosure Rule

On August 3, 2011, the Committee on Disclosure of Corporate Political Spending, a group made up of "ten academics whose teaching and research focus on corporate and securities law," filed a rulemaking petition with the Securities and Exchange Commission asking that it "develop rules to require public companies to disclose to shareholders the use of corporate resources for political activities." According to the petition,

> "Shareholders in public companies have increasingly expressed strong interest in receiving information about corporate spending on politics, and such spending is likely to become even more important to public investors in the future. Furthermore, shareholders need to receive such information for markets and the procedures of corporate democracy to ensure that such spending is in shareholders' interest. Still, while many large public companies have begun to provide such information, no existing rule requires disclosure of this information to investors, and corporate political spending remains opaque to investors in most publicly traded companies. The Commission should address this lack of transparency and, drawing on its expertise and experience in designing rules for disclosure of other information that is of interest to investors, should adopt rules concerning disclosure of corporate political spending."[62]

Obama's SEC Chair Removes Political Disclosure From Agenda

The rule was put on the rulemaking agenda for the SEC in 2013 under outgoing Chair Mary Schapiro, but in the first agenda released by Chair Mary Jo White after she was appointed by President Obama, it was removed.

In May of 2013, after being pressed by House Republicans about the disclosure rule, Mary Jo White said that she did not want to "prejudge" the issue and that "[n]o one is working on a proposed rule now."[63]

---

[62] Securities and Exchange Commission, Rulemaking Petition 4-637, Committee on Disclosure of Corporate Political Spending, 8/3/11

[63] Washington Post, "SEC pressed to abandon corporate political spending disclosures petition," 5/16/13

Former SEC Chairs Support Political Disclosure Rule

On May 27th, 2015, three former members of the SEC wrote a letter to Mary Jo White supporting the SEC disclosure petitions. William Henry Donaldson (SEC chair from 2003-2005), Arthur Levitt, (SEC chair from 1993-2001), and Bevis Longstreth (SEC commissioner from 1981-1984) wrote, in the wake of the *Citizens United* decision in 2010, that disclosure was "one of the essential building blocks supporting the opinion in the case." They wrote further, "[T]o date, the Court's expectation of disclosure, which can only be assured by SEC rule, has been denied. It is now five years since *Citizens United* and almost four years since Petition 4-637 was filed. The Commission's inaction is inexplicable. Its failure to act offends not only us, who are alumni of this agency struggling to retain our deep pride of association, but investors and the professionals who serve them. And it flies in the face of the primary mission of the Commission, which has since 1934 been the protection of investors. To use a metaphor, mandatory disclosure of corporate political activities should be a 'slam dunk' for the Commission."[64]

Disclosure Rule Has Seen Record Support from Investors, Strong Support from Public

The SEC political disclosure rule has received a record-setting level of investor support. More than 1.2 million public comments have been filed in support of the rule and they continue to be filed.[65] In September of 2015, a poll by Public Policy Polling revealed that "88 percent of Democrats and 88 percent of Republicans either 'strongly agree' or 'somewhat agree' that the Securities and Exchange Commission (SEC) should issue a rule that mandates reporting,"[66] Members of public company boards also support the rule. According to a survey by BDO USA, 53% of public company board members "believe that the SEC needs to develop mandatory disclosure rules for corporate political contributions."[67]

44 Senate Dems: "Frustration and Disappointment" at Chair White's Removal of Political Spending Disclosure From SEC Agenda

On August 31, 2015, forty-four U.S. Senators referenced the letter by the former SEC Chairmen in their communication to Mary Jo White supporting the corporate disclosure rule. Led by Sen. Jeff Merkley, the Senators wrote, "**We add our voices to the many who have expressed frustration and disappointment that the SEC decided to remove this issue from its regulatory agenda entirely.** We appreciate your willingness to strongly consider the importance of this rulemaking and reconsider the decision to remove it from the SEC's regulatory agenda. We ask that you make this a top priority for the SEC in

[64] Letter from Donaldson, Levitt and Longstreth to SEC Chair Mary Jo White, 5/27/15
[65] SEC.gov, Comments on Rule Making Petition, Petition to require public companies to disclose to shareholders the use of corporate resources for political activities , File No. 4-637, accessed 11/17/15
[66] The Hill, "Poll shows bipartisan voter support for corporate giving rule," 9/28/15
[67] Press Release, BDO USA, LLP, "BDO USA Survey Reveals Attitudes of Public Company Boards on New and Proposed Accounting and Financial Reporting Disclosures," 10/14/15

the near term and inform us of the basis for your decision should you not plan to include it on the Commission's agenda for the upcoming year."[68]

On October 22, 2015, fifty-eight members of the U.S. House of Representatives wrote a letter to Mary Jo White supporting the SEC disclosure rule. They specifically referenced the removal of the disclosure rule from the SEC rulemaking agenda. They wrote, "We urge you to reconsider the frustrating decision to remove corporate political disclosure from the regulatory agenda and make corporate disclosure a top priority for protecting investors."[69]

[68] Letter from Sen. Merkley, et al to SEC Chair Mary Jo White, 8/31/15
[69] Letter from Rep. Patrick Murphy, et al to SEC Chair Mary Jo White, 10/22/15

FCC

"Not A Priority" To Require Disclosure of the True Identity of Secret Ad Sponsors

The FCC has legal authority to require disclosure of the "true sponsor" of advertisements, including for political ads. While existing FCC regulations allow donors to conceal their identities behind front groups with misleading names, President Obama should publicly encourage his FCC Chair Tom Wheeler and the rest of the commission to move forward with rules that meaningfully reveal the true sponsor behind political ads.

FCC Holds Legal Authority to Require Disclosure of Political Ad Sponsors

In February of 2013, Michael Copps, a former FCC commissioner, wrote an op-ed arguing that the FCC already had the authority to require disclosure of donors behind political advertising. Copps wrote, "Section 317 of the Communications Act (47 USC § 317) requires on-air identification of the sponsors of all advertisements, political as well as commercial. Explaining the rules it wrote to implement the statute, the FCC stipulated years ago that political ads must 'fully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or other entity' paying for them. 'Listeners are entitled to know by whom they are being persuaded,' the commission said." Copps argued that the rule had "lain dormant for more than twenty years… yet all that is needed is a modest updating of the rules to ensure that viewers are able to know where all that money is coming from. Using the normal FCC notice-and-comment process, this needn't take longer than ninety days."[70]

A petition to the FCC filed in 2011 started by Andrew Schwartzman of the Media Access Project would have required groups to disclose those who contribute more than 10% of the budgets of ad sponsors in public documents filed with broadcast stations, and on air disclosure of donors who provide more than 25% of the budget. In his petition, Schwartzman wrote, "the statutory objective of informing the electorate about who is the 'true' sponsor of political messages is not being met… Existing campaign finance and IRS regulations allow organizations which are often hollow shells for one or a few organizations or individuals to purchase commercials without identifying the source of their funding."[71] The FCC never responded to the petition.

In 2013, the Government Accountability Office, responding to a request from members of Congress, recommended that the FCC update and clarify their rules on sponsor identification of political advertising. In the report, the GAO said, "FCC should, among

[70] Michael J. Copps, The Nation, "One Easy Way to Shine A Light On Dark Money," 2/6/13
[71] Washington Post, "Consumer advocates: FCC should require more disclosure on political ads," 3/22/11

other things, update its sponsorship identification guidance and consider providing additional examples relevant to more modern issues."[72] This report prompted House Democratic Leader Nancy Pelosi to say, "The FCC must simply update its rules to reflect the law, ensuring disclosure in our elections, transparency in our campaigns, and fairness for all voters."[73]

Obama FCC Chair Tom Wheeler: Political Disclosure "Not a Priority"

In late 2013, President Obama nominated Tom Wheeler to be Chairman of FCC, replacing Julius Genachowski. Senator Ted Cruz (R-TX) put a hold on his nomination, in order to get answers regarding how Wheeler would deal with the question of disclosure of political advertisement. Cruz lifted his hold after Wheeler told him in a private meeting that requiring the political ads to disclose their true source of funding was "not a priority." According to Cruz, "In our meeting this afternoon, Mr. Wheeler stated that he had heard the unambiguous message that trying to impose the requirements of the DISCLOSE Act, absent congressional action, would imperil the Commission's vital statutory responsibilities, and he explicitly stated that doing so was 'not a priority.' Based on those representations, I have lifted my hold on his nomination, and I look forward to working with him on the FCC to expand jobs and economic growth."[74]

In April of 2015, Rep. John Yarmuth (D-KY) introduced the KOCH (Keeping Our Campaigns Honest) Act that would force outside groups to disclose their major donors at the end of television ads. The bill was introduced by 17 Democratic House members including Leader Nancy Pelosi. In introducing the bill, Rep. Yarmuth said he hoped the bill would prompt the FCC to use the authority it already had to push through that type of rule. He said, "I would hope that this bill would get attention, and if it is not successful – this legislation – I would hope the FCC would look carefully at what it can do in its existing authority to provide transparency."[75]

On April 30, 2015, Senator Bill Nelson sent a letter to FCC Commissioner Tom Wheeler calling on the FCC to update its guidance regarding the adequate identity of any entity buying advertising. In his letter, Nelson wrote,

> "In an era where billions of dollars are being spent to market products and influence political races with TV advertising, it is high time that the FCC update its rules to ensure viewers know who actually is footing the bill for these advertisements. **The FCC's recent steps to make the contents of public files accessible online are laudable, but they are no substitute for making sure listeners know who is behind the ads they are seeing on television and hearing on the radio.**
>
> "I intend to introduce legislation in the coming days directing the FCC to take action under Section 317 and modernize its sponsorship identification rules to reflect the ways commercial and political advertisers seek to

[72] GAO Report, "Requirements for Identifying Sponsored Programming Should Be Clarified," 1/1/13
[73] FreePress.net, "Shadow Groups, Dark Money and a Silent FCC," 3/6/13
[74] Variety.com. "Ted Cruz Says He's Lifting His Hold on Tom Wheeler's Nomination to FCC," 10/29/13
[75] The Huffington Post, "Dems: Feds have authority to force super-Pac disclosure," 4/30/15

> influence Americans today. That legislation will require the FCC to issue new rules and guidance on both commercial and political advertisements, and to consider how to make those disclosures more effective given changes in technology and the ways Americans access information. I look forward to working with the FCC as this legislation moves forward.
>
> **"At the same time, I urge the Commission to immediately launch a long-overdue rulemaking to update its sponsorship identification requirements.** Supreme Court Justice Louis Brandeis made his famous statement that "sunlight is said to be the best of disinfectants" in a 1913 Harper's Weekly article. The FCC has a critical but largely underused role to play in making sure that information about the sponsors of television and radio advertising is open, honest, and transparent to the American public."[76]

Tom Wheeler said in the spring of 2015 that he has no plans to review the FCC disclosure rules. Wheeler deferred to Congress, saying, "Well if the Congress acts, then we will clearly follow the mandate of Congress." He continued, "And maybe you noticed, we have a long list of difficult telecommunications related decisions that we are dealing with right now. And that will be our focus." When pressed, he said, other telecommunications issues would be the "focus at this point in time."[77]

[76] Senator Bill Nelson Letter to FCC Commissioner Tom Wheeler, 4/30/15
[77] The Hill, "Chairman suggests FCC has no plans to act on political ad disclosures," 5/21/15

IRS

Inaction Threatens to Influence 2016 Election

The primary means through which "dark money" flows into elections is through "social welfare" groups and other nonprofits running political ads and thinly veiled "issue ads" intended to affect support for a candidate. Inaction by the IRS following Supreme Court cases like *Citizens United* and *Wisconsin Right to Life* have left an enormously ambiguous legal framework which aggressive political actors have used to funnel large amounts of secret money toward electoral ends while hiding the identity of its original donor.

IRS Commissioner John Koskinen can and should clarify what constitutes political activity by nonprofit organizations and return to the standard that "social welfare" groups may not spend more than an insubstantial amount directly on politics.

IRS Redefinition of "Exclusively" Non-Political Creates Secret Money Loophole

The legislation creating the nonprofit section of the tax code declared that 501(c)4 organizations must be "operated exclusively" for "social welfare" purposes, something that political activity does not qualify as.

The IRS later reinterpreted this to mean that groups must be "primarily" operated to promote social welfare. While that term is not clearly defined, following Supreme Court cases loosening rules on political spending by corporations, including nonprofit corporations, aggressive political operatives have pushed the limit and the IRS has allowed these supposedly "nonpolitical" groups to spend up to 49.9% of their budgets directly on politics.[78]

Members of Congress: IRS Should "Prevent Abuse of the Tax Code By Political Groups"

Observers have noted the explosion of secret political spending by nonprofits is in apparent conflict with the IRS's legal responsibility to oversee these groups. Members of Congress repeatedly have called on the IRS to take action since 2010.

In 2010, then-Senator Max Baucus of Montana wrote a letter to the IRS asking them to conduct an investigation about whether tax-exempt nonprofits were misusing their tax-exempt status. Baucus said, "[p]olitical campaigns and powerful individuals should not

[78] ProPublica, "How Nonprofits Spend Millions on Elections and Call it Public Welfare," 8/18/12

be able to use tax-exempt organizations as political pawns to serve their own special interests."[79] In his letter, Baucus made the following request:

> "I request that you and your agency survey major 501(c)(4), (c)(5) and (c)(6) organizations involved in political campaign activity to examine whether they are operated for the organization's intended tax exempt purpose and to ensure that political campaign activity is not the organization's primary activity. Specifically you should examine if these political activities reach a primary purpose level – the standard imposed by the federal tax code – and if they do not, whether the organization is complying with the notice or proxy tax requirements of Section 6033(e). I also request that you or your agency survey major 501(c)(4), (c)(5), and (c)(6) organizations to determine whether they are acting as conduits for major donors advancing their own private interests regarding legislation or political campaigns, or are providing major donors with excess benefits."[80]

In 2012, Senator Chuck Schumer (D-NY) and other Democratic senators wrote a letter to the IRS complaining that some political groups were, as reported by the Washington Post, "improperly claiming tax-exempt status and possibly allowing donors to wrongly claim tax deductions for their contributions."[81] In the letter, the senators wanted the IRS to take action. They wrote, "We urge the IRS to take these steps immediately to prevent abuse of the tax code by political groups focused on federal election activities."[82]

In March of 2012, Congressman Peter Welch (D-VT) called for an IRS investigation of nonprofits affiliated with super PACs that were in violation of the tax code. In a letter to the IRS commissioner, Welch wrote, "We strongly urge you to fully enforce the law and related court rulings that clearly reserve 501(c)(4) tax status for legitimate non-profit organizations. And we urge you to investigate and stop any abuse of the tax code by groups whose true mission is to influence the outcome of federal elections." In his letter, Welch referred to the IRS restriction on 501(c)(4) groups as "engaging in more than an 'insubstantial' amount of campaign activity."[83]

In June of 2012, Senator Carl Levin (D-MI) wrote a letter urging the IRS to remind 501(c)(4) groups of the restriction on political activity. Levin wrote, "At a minimum under either the 1997 letter or Mr. Miller's interpretation, a message needs to be sent to Section 501(c)(4) entities on an urgent basis to ensure they understand that any political activities they undertake must constitute a secondary and not the primary activity of their organization. To make the message crystal clear, I urge the IRS to remind all 501(c)(4) organizations about their obligation to observe that restriction on their activities if they want to retain their tax exempt status."[84]

[79] New York Times, "Republicans See a Political Motive in I.R.S. Audits," 10/6/10
[80] Letter from Senator Max Baucus to I.R.S. Commissioner Douglas Shulman, 9/29/10
[81] Washington Post, "Senate Democrats demanded stricter IRS standards for tax-exempt groups," 5/13/13
[82] Letter from Senator Chuck Schumer (D-NY), et al to I.R.S. Commissioner Douglas Shulman, 2/16/12
[83] Letter from Rep. Peter Welch (D-VT) to I.R.S. Commissioner Douglas Shulman, 3/2/12
[84] Letter from Senator Carl Levin (D-MI) to I.R.S. Commissioner Douglas Shulman, 6/13/12

After Being Sued Over Lack of Action, IRS Releases Flawed Rules, Later Backs Off

Representative Chris Van Hollen joined campaign finance reform groups in August 2013 to sue the IRS over its failure to issue clear rules governing nonprofit political spending.[85]

Soon after, in November of 2013, the IRS issued proposed new rules that clarified what political activity tax exempt organizations could undertake. According to the IRS release announcing the rules, "This proposed guidance defines the term 'candidate-related political activity,' and would amend current regulations by indicating that the promotion of social welfare does not include this type of activity."[86]

However, the rules themselves were widely viewed as deeply flawed and saw heavy opposition from both liberals and conservatives.[87] In May of 2014, the agency backed off of its rule. In a statement, the IRS said, "Given the diversity of views expressed and the volume of substantive input, we have concluded that it would be more efficient and useful to hold a public hearing after we publish the revised proposed regulation."[88]

"The I.R.S. Gives Up on 'Dark Money'"

In June of 2014, IRS Commissioner John Koskinen told a reporter for the Center for Public Integrity that new draft regulations regarding the political spending of nonprofits would be out in early 2015. Koskinen said, "There are three issues: What should be the definition, to whom should it apply and how much … can you do before you jeopardize your exemption? The next resolution will differ from the first draft because it will deal with all three questions."[89] Koskinen also suggested that the rule will be less robust than it should be, allowing nonprofits to spend up to 49% of their money on politics. He said "If you spend at this point less than 49% of your money on politics, you can be a (c)(4)."[90]

However, in January 2015, the IRS said that the draft regulations wouldn't be ready before the 2016 elections.[91] In July of 2015, the New York Times reported that the IRS appears "certain to delay trying to curb widespread abuses at nonprofits until after the 2016 election." According to Paul Streckfus, a former nonprofit specialist at the IRS "It's anything goes for the next couple of years. The whole system has really collapsed."[92]

Later, in July of 2015, the IRS Commissioner John Koskinen testified before a House Committee that there would be no change in the tax code in how the IRS treats political nonprofits before the 2016 election. He appeared cowed by residual conservative outcry over the so-called scandal surrounding the IRS's treatment of liberal and conservative

[85] Huffington Post, "IRS Sued Over Rule That Lets Dark Money Flood Elections," 8/21/13
[86] US Department of Treasury Press Release, "Treasury, IRS Will Issue Proposed Guidance For Tax-Exempt Social Welfare Organizations," 11/26/13
[87] NY Times, "Left and Right Object to I.R.S. Plan to Restrict Nonprofits' Political Activity," 2/14/14
[88] ProPublica, "IRS Delays New Rules for Dark Money Groups," 5/23/14
[89] Center for Public Integrity, "IRS chief promises stricter rules for 'dark money' nonprofit groups," 6/18/14
[90] Los Angeles Times, editorial, "Loopholes in political spending laws keep voters in the dark, 4/12/15
[91] ProPublica, "New IRS Rules on Dark Money Likely Won't Be Ready Before 2016 Election," 1/5/15
[92] New York Times, "I.R.S. Expected to Stand Aside as Nonprofits Increase Role in 2016 Race," 7/5/15

groups – despite repeated congressional and Inspector General reports unable to find evidence of intentional wrongdoing.[93] He told reporters, "I don't want people thinking we are trying to get these regs done so we can influence the election."[94]

The New York Times editorial board blasted the move by Koskinen, in a piece declaring "The I.R.S. Gives Up on 'Dark Money'":

> "The federal government has all but surrendered to the powerful, rich donors whose anonymous contributions threaten to undermine the 2016 elections. The commissioner of the Internal Revenue Service, John Koskinen, signaled as much on Thursday when he told a House committee that there would be no change in the tax code in 2016 to end its growing abuse by political operatives using nonprofit 'social welfare' institutions to disguise the identities of affluent campaign contributors.
>
> …The statement was remarkable for blessing further procrastination at the I.R.S., whose clear obligation is to enforce existing law in a way that would end the current flood of 'dark money' financing politics.

In keeping open one of the most-used loopholes for secret money to flow into the political system, Koskinen may be – contrary to his stated goals – set to influence the results of the 2016 elections. Non-partisan sources note that the groups taking advantage of this secret money loophole lean strongly Republican, nearly 5-to-1 in the 2014 election.[95]

[93] USA Today, "Senate subcommittee: No political bias in IRS Targeting," 9/5/14
[94] New York Times editorial, "The I.R.S. Gives Up On Dark Money," 7/25/15
[95] Center for Responsive Politics, "Political Nonprofits (Dark Money)," accessed 12/3/15

FEC
Gridlock and Neglect

Because of its evenly split makeup of three Republicans and three Democrats and a concerted long-term effort by opponents of campaign finance rules to exploit this partisan split,[96] the Federal Election Commission has spent the post-*Citizens United* years in gridlock. It has failed to enforce key laws and update regulations to respond to the new legal environment generated by the Court's decisions.

The gridlock has been worsened by the neglect and inattention paid by the Obama Administration. Although the commissioners are three Republicans and three Democrats, the president is responsible for naming all of them. In reality, President Obama's neglect has left the commission with five out of six members serving on expired terms. He should immediately replace the commissioners on expired terms with nominees willing to assertively enforce the law.

Obama and Administration Claimed Commitment to Nominating FEC Commissioners

During his first run for president, Obama recognized the dysfunction of the FEC and pointed toward the president's responsibility to address it:

> *"My initial goal as president will be to determine whether we can make the FEC more effective through appointments. What the FEC needs most is strong, impartial leadership that will promote integrity in our system. ...* ***As president, I will appoint nominees to the commission who are committed to enforcing our nation's election laws."***[97]

In 2012, complaints of inaction prompted a petition on the White House website asking the Obama Administration to nominate commissioners to the FEC. It received over 27,000 signatures. In response, Tonya Robinson, a White House Special Assistant for Justice and Regulatory Policy responded, saying, "While the Administration doesn't comment publicly about the President's personnel decisions before he makes them, **the Obama Administration is committed to nominating highly qualified individuals to lead the FEC. The agency, and the system of open and fair elections that the FEC is charged with protecting, deserve no less.**"[98]

[96] NY Times, "Long Battle by Foes of Campaign Finance Rules Shifts Landscape," 10/15/10
[97] Midwest Democracy Network, "Edwards And Obama Detail Political Reform Plans," 11/27/07
[98] WhiteHouse.Gov We, the People Petition, "Nominate New Commissioners to the Federal Election Commission (FEC)," 1/11/12

Five of Six Commissioners Sit on Expired Terms Due to Lack of Nominations

Despite earlier protestations of a commitment to nominate qualified FEC commissioners, only two of the six commissioners sitting on the Federal Election Commission were appointed by President Obama. Four of the Commission's six members are George W. Bush appointees. Five of the six commissioners serve on expired terms, giving President Obama an opportunity to dramatically reshape the agency if he so chose.

On April 30, 2013, the Obama Administration's neglect of the FEC became impossible to ignore. As of midnight that day, no FEC commissioner was serving a current term. All five commissioners then serving had seen their terms expire and there was one vacancy. In fact, as of April, 30, 2013, five of the terms had expired prior to February of 2011.[99]

President Obama then named his only two successful nominees to the commission, Chair Ann Ravel and Republican Member Lee Goodman, who were both confirmed in 2013. Goodman's term expired on April 30th, 2015. Goodman and all other members are currently on expired terms.[100]

Obama's previous and only other nominee to the FEC, Democratic labor lawyer John Sullivan, withdrew from consideration in 2010 after opposition by campaign finance reformers in the Senate[101] and skepticism from outside reform groups.[102] He had also received praise from opponents of campaign finance regulation.[103]

The Obama Administration has long been criticized for this lack of action on nominating FEC commissioners. In January 2012, a coalition of ten watchdog groups criticized the Obama Administration for its lack of action on campaign finance reform.

> ***Fred Wertheimer, president of Democracy 21:*** *"The bottom line is nothing can happen to change the commission unless the White House names new commissioners, and they are refusing to do so. The result is going to be an election with no enforcement."*[104]

> ***Lloyd Leonard, advocacy director for the League of Women Voters:*** *"We have a full conversation with them, and they smile sweetly and they express understanding of our point of view. And nothing happens.*[105] *This seems to be rope-a-dope from the administration… They are very consistent at not responding and failing to provide any reasons for their failure to move ahead."*

[99] Think Progress, "The Term Of Every Federal Election Commission Member Has Expired," 4/30/13
[100] Federal Election Commission, About the FEC, The Commissioners, accessed 11/14/15
[101] Politico, "McCain, Feingold fight Obama on FEC," 7/1/09
[102] Politico, "Mixed Reviews for W.H.'s FEC pick," 5/1/09
[103] Center for Competitive Politics, "CCP statement on John Sullivan's FEC nomination," 5/2/09
[104] ABCNews.com, "Election Watchdogs Assail Obama on FEC Appointments," 1/12/12
[105] ABCNews.com, "Election Watchdogs Assail Obama on FEC Appointments," 1/12/12

Melanie Sloan, executive director of CREW: *"We're tired of having feel-good meetings with the White House with no real results. The White House says 'we hear you.' We're looking for a little more than being heard."*[106]

Record Gridlock at FEC, Chair Calls Commission "Worse Than Dysfunctional"

FEC Chair Ann Ravel has called the commission "worse than dysfunctional" and declared that regarding campaign finance rules in the 2016 election, "[t]he likelihood of the laws being enforced is slim."[107]

According to an analysis by Public Citizen, the gridlock at the FEC has gotten worse since 2008. As Craig Holman wrote, "Prior to 2008, the FEC on average voted on 727 enforcement actions a year and deadlocked on only 1.1 percent of those actions. Ever since 2008, on the other hand, the agency on average has voted on only 178 enforcement actions per year and deadlocked on 15.7 percent of those votes - more than a 14-fold increase in deadlocked votes on just a fraction of its previous enforcement decisions."[108]

FEC Has Not Updated Rules Post-*Citizens United*

A comment filed in 2015 by a group of reform advocates took the FEC to task for its lack of action. In a comment filing support for new rules on electioneering communications and independent expenditure disclosure, rules on foreign donations, and rules on coordination, the reformers took the commission to task.

> "The Federal Election Commission has fallen short in updating and creating new rules to implement FECA in compliance with the Citizens United decision and the emerging political environment. Most notoriously, the FEC has promulgated a unique and disastrous disclosure rule – in defiance of both the law and Citizens United – that is primarily responsible for the flood of dark money in federal elections. The Commission has neglected to address the new avenues of foreign money that may well be flowing into U.S. elections, despite explicit federal laws prohibiting contributions and expenditures from foreign nationals. And critically, the FEC has repeatedly refused to update its coordination rules to deal with the obvious and even comical level of coordination between candidates and super PACs and outside electioneering groups."[109]

[106] ABCNews.com, "Election Watchdogs Assail Obama on FEC Appointments," 1/12/12
[107] NY Times, "F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says," 5/2/15
[108] Craig Holman, Government Affair Lobbyist, Public Citizen, op-ed, "Roiled in Partisan Deadlock, FEC is Failing," 5/20/15
[109] Campaign for Accountability, et al, "Disclosure, Foreign Nationals, and Coordination Rulemaking in the Wake of Citizens United," Comments on REG 2015-04, 10/27/15

Conclusion

President Obama Will Choose the Legacy He Leaves

During his most recent State of the Union address, President Obama decried the culture of political cynicism he sees in Washington, declaring "I still think the cynics are wrong."[110]

But nearly seven years into his presidency, President Obama seems poised to prove the cynics right. Some doubted all along that his pledges to fight against big money in politics were anything more than election year rhetoric.

Before his next State of the Union, he has a chance either to prove those cynics are indeed wrong, or to give disillusioned voters one more reason to doubt the promises they hear from politicians and stay home on Election Day.

While President Obama cannot control the actions of Republicans in Congress or sitting members of the Supreme Court, he is responsible for his own actions – and inactions.

This report provides a glimpse at the first draft of the legacy President Obama will leave on the problem of big money in our political system. Time is rapidly running out, but there is still an opportunity to change course. Obama can – and should – take rapid executive action to combat the corroding influence of secret political spending and redeem his money-in-politics legacy.

Before his next State of the Union address, President Obama should:

- Issue an executive order requiring federal contractors to disclose their political spending within 24 hours of it happening, to take effect before July 4, 2016.
- Immediately call on the leaders he appointed to the SEC, IRS, and FCC to use their authority to unmask secret political donors.
- Fill all five FEC openings with nominees who will enforce the law.

The president alone will choose the legacy he leaves. He has shown a willingness to take strong executive action to deliver for the American people and bolster his legacy on issues like climate change, criminal justice, and preserving the open internet.

After years of telling Americans he agrees that ordinary people should not be drowned out by big money in politics, President Obama still holds a final chance to live up to those words. If, on the other hand, he does not take action and remove this stain from his legacy, he will only further empower the cynics who say participating in politics is a fool's errand and politicians are never deserving of our trust.

[110] ABC News, "President Obama's Legacy Turn: From Yes We Can to Yes We Did," 1/20/15