

EXECUTIVE SUMMARY
Testimony of Professor Heather K. Gerken
J. Skelly Wright Professor of Law
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Submitted to the United States Senate Committee on Rules and Administration
July 18, 2014

Robust disclosure mechanisms are an essential foundation for any campaign finance system. In the United States, however, our disclosure rules are neither adequate nor effective. “Dark money” – money spent on campaigns by donors who are untraceable – flows freely through the system and grows in significance each election cycle. Hundreds of millions of dollars of independent spending occurred in 2012, with much of it untraceable. Experts expect that number to increase during the next two election cycles. The need for adequate disclosure mechanisms has become even more important as the Supreme Court dismantles much of our current campaign-finance system, leaving American politics even more vulnerable to money’s hidden influence.

I will make three points in my testimony. First, disclosure rules have garnered considerable bipartisan support, and with good reason. Outside of Washington’s tight circles, transparency measures enjoy a high level of support among policymakers, academics, and the American people. Unsurprisingly, they have been endorsed by political leaders on both sides of the aisle.

Second, transparency mandates stand on firmer constitutional footing than any other type of campaign-finance regulation. Even members of the Supreme Court who are deeply skeptical of campaign-finance regulations have offered full-throated endorsements of disclosure requirements.

Finally, there a variety of models for ensuring that disclosure requirements remain robust and efficacious over many election cycles. I offer a new proposal here, one that is aimed at the central problem in campaign finance law: keeping up with the ever-changing strategies donors have found to conceal their influence. Congress and the FEC have long struggled to keep up with the emergence of new, nontransparent organizations in each election cycle, facing a regulatory version of “whack-a-mole.” This proposal avoids that problem by regulating the advertisement, not the organization. It’s a universal disclosure rule that requires any advertisement funded directly or indirectly by an organization that does not disclose its donors to acknowledge that fact with a simple and truthful disclaimer: “This ad was paid for by ‘X,’ which does not disclose the identity of its donors.” The fix is universal and flexible enough to accommodate changes in future election cycles and ensure that disclosure regulations keep pace with politics.

For all of these reasons, now is the right moment for Congress to pass new disclosure requirements. This is one of the rare instances when the need for change is significant, the time is ripe, and the American people are ready.

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Robust disclosure mechanisms are an essential foundation for any campaign finance system. In the United States, however, our disclosure rules are neither adequate nor effective. “Dark money” – money spent on campaigns by donors who are untraceable – flows freely through the system and grows in significance each election cycle. Hundreds of millions of dollars of independent spending occurred in 2012, with much of it untraceable. Experts expect that number to increase during the next two election cycles. The need for adequate disclosure mechanisms has become even more important as the Supreme Court dismantles much of our current campaign-finance system, leaving American politics even more vulnerable to money’s hidden influence. Moreover, outside of Washington’s tight circles, transparency measures enjoy a high level of bipartisan support and impeccable constitutional credentials. The time to act is now.

I will make three points in my testimony. First, disclosure rules enjoy considerable bipartisan support, and with good reason. Second, transparency regulations stand on strong constitutional footing and have been endorsed even by members of the Supreme Court who are most skeptical of campaign-finance regulations. Finally, I will propose a new solution to the problem of dark money, one that helps solve the central problem in campaign finance law: keeping up with the ever-changing strategies donors have found to conceal their influence. Congress and the FEC have long struggled to keep up with the emergence of new, nontransparent organizations in each election cycle, facing a regulatory version of “whack-a-mole.” Our proposal solves this problem by regulating the advertisement, not the organization. It’s a universal disclosure rule that requires any advertisement funded directly or indirectly by an organization that does not disclose its donors to acknowledge that fact with a simple and truthful disclaimer: “This ad was paid for by ‘X,’ which does not disclose the identity of its donors.”

A. Bipartisan Support for Disclosure Rules

Outside of the narrow confines of Washington’s partisan politics, disclosure rules enjoy substantial bipartisan support, and with good reason. Disclosure sits at that sweet spot in policymaking, where democratic idealism and political realism meet. These rules provide the American people with the information they need to make informed decisions about the advertisements they watch and the politicians they support. It does so without placing restrictions on where and how donors spend their money, trusting the political marketplace – not top-down government regulation – to do the work.

As a result, transparency rules enjoy broad support among policymakers, academics, and the American people. Dating back more than a century, federal disclosure provisions have been termed “probably the most successful element of our campaign finance system” and “are the most widely adopted form of campaign finance regulation in democracies around the world.”¹ Most academics view them as an essential feature of a well-functioning campaign-finance system. And poll after poll shows that Americans value transparency when it comes to funding elections.

As one of the 29 Commissioners on the Bipartisan Policy Center’s Commission on Political Reform, I witnessed first-hand what happens when a politically savvy bipartisan group deliberates about the relationship between transparency and democracy. The Commission -- chaired by Senators Trent Lott, Olympia Snowe, and Tom Daschle, Secretary Dan Glickman, and Governor Dick Kempthorne -- included academic, political, and community leaders. The Commission just issued a report making 65 recommendations for improving American democracy.

One of the Commission’s most important recommendations concerned transparency. Recognizing that one of the central problems plaguing our election system is that Americans don’t know who is funding our elections, the Commission recommended the disclosure of “all political contributions, including those made to outside or independent groups.” The Commission did so *unanimously*. The Commissioners made this recommendation after a lively debate, and they were well aware that this policy debate -- like most issues in election law -- is divisive in some circles. But every person on the Commission agreed on the importance of disclosure reform, including the many highly respected elected officials who had witnessed the damaging effects of dark money first-hand. It’s worth keeping in mind that the Commission included individuals with wide range of political commitments and was led by political figures who are highly respected on both sides of the political aisle. And yet even in today’s heated political environment, this bipartisan group came together to affirm that transparency measures are the type of common-sense reform that will make our democracy stronger.

It’s not just my work on the Commission that has convinced me of the importance of robust disclosure rules. My academic work has focused on the emergence of what I call “shadow parties” -- independent organizations (like 501(c)(4)’s and SuperPACs) that exist outside of the formal party structure, house party elites, carry out a great deal of campaign work, and closely cooperate with the campaigns even if they do not, as a legal matter, “coordinate” with them under the rules promulgated by the FEC.² These “shadow parties” are shifting the center of gravity away from the formal party apparatus into private, nontransparent organizations. That’s because these “shadow parties” enjoy substantial advantages

¹ Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 Elec. L. J. 273, 273 (2010).

² For a full analysis, see Heather K. Gerken, “The Real Problem with *Citizens United*: Campaign Finance, Dark Money, and Shadow Parties,” *Marquette Lawyer* 10 (Summer 2014).

over the formal parties in terms of fundraising capacity. But many – specifically, the 501(c)(4)'s -- also offer donors another significant advantage: anonymity.

As my recent work makes clear, these shadow parties are reshaping the political landscape in ways that ought to concern us all. A new report issued by Ohio State's Moritz College of Law³ provides compelling evidence of the problems associated with this new regime. Because one of its authors, Professor Tokaji, is testifying today, I'll leave it to him to provide you further details. I will just note for purposes of this hearing that many independent spending organizations will continue to enjoy an important structural advantage over the formal parties unless and until Congress passes a more robust disclosure regime.

B. Transparency's Solid Constitutional Foundations

Disclosure rules aren't just good policy; they also rest on the firmest of constitutional footings. Even as the Supreme Court has upended much of campaign-finance law, it has repeatedly affirmed the constitutionality of transparency measures.

It is well established that Congress has the power to ensure that election spending is transparent. See, e.g., *Burroughs v. United States*, 290 U.S. 435 (1934) (upholding congressional power to create disclosure rules for federal elections and take other steps to "preserve the departments and institutions of the general government from impairment."). While the First Amendment limits Congress's ability to regulate campaign finance generally, the Court has concluded that transparency rules *promote* First Amendment values:

The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 370-71 (2010).

The Court has reaffirmed this principle in a variety of settings, including a case involving the public disclosure of signatures in support of a referendum. "Public disclosure . . . promotes transparency and accountability in the electoral process to an extent other measures cannot," the Chief Justice wrote in that case. For that reason, public disclosure "is substantially related to the important interest of preserving the integrity of the electoral process." *Doe v. Reed*, 561 U.S. 186, 199 (2010).

³ Daniel P. Tokaji & Renata E.B. Strause, "The New Soft Money: Outside Spending in Congressional Elections" (2014).

If anything, the Court's controversial decision in *Citizens United* has strengthened the constitutional case for disclosure. Even as the Court struck down restrictions on independent expenditures, it offered a ringing endorsement of transparency rules. That portion of the opinion was joined by every Justice save one. Moreover, the Court's dramatic unwinding of the current campaign-finance regime has been premised on the assumption that Americans would have adequate information about the money spent on campaigns. Justice Kennedy, who penned *Citizens United*, assured us that disclosure rules were an important safeguard against independent spending's potentially damaging effects. Such transparency ensures that "shareholders can determine whether their corporation's political speech advances the corporation's interest," and "citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests." *Citizens United*, 558 U.S. at 370.

That's why the Court in *Citizens United* explicitly rebuffed the parties' First Amendment challenge to disclosure rules, including those requiring rapid disclosure. As it noted, there were stronger First Amendment interests on the other side: "the public has an interest in knowing who is speaking about a candidate shortly before an election," Justice Kennedy wrote. *Id.* at 369. So, too, in *McConnell* the Court held that the government's interest in the timely disclosure of campaign expenditures was "unquestionably significant." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 200 (2003). Congress can therefore regulate as long as there is a "'substantial relation' between the disclosure requirement and a 'sufficiently important governmental interest.'" *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley v. Valeo*). A "sufficiently important governmental interest" includes "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196; see also *Citizens United v.*, 558 U.S. at 366-67.

Finally, note that there is robust support for transparency even among the Court's most conservative members. With the exception of Justice Thomas, the Justices who are the most skeptical of campaign-finance regulation have consistently voted to uphold transparency measures. They have even authored many of the touchstone opinions in this area. Justice Kennedy, for instance, penned *Citizens United*, and Chief Justice Roberts wrote for the Court in *Doe v. Reed*. So, too, one could not ask for a more full-throated endorsement of disclosure than that recently offered by Justice Scalia:

Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which . . . campaigns anonymously . . . and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.

Doe, 561 U.S. at 228 (Scalia, J., concurring in the judgment).

III. A New Path toward Transparency

Disclosure requirements are only effective if they are timely and accessible. Information must be disclosed before the election, and data dumps do little to promote transparency if they cannot be easily accessed and sorted. Moreover, as Richard Briffault has pointed out, there are limits to how much disclosure is useful. If too much information is disclosed, it becomes difficult for reporters and public interest groups to sort the wheat from the chaff.⁴

The core obstacle to transparency efforts is evasion. As we have seen in recent years, donors can hide behind shell organizations to shield their identity behind a vague but inspiring name. Donors can also evade disclosure rules by giving money to multipurpose organizations (those that engage in political and nonpolitical activities) without specifying whether the money is for political activities. Here the states have led the way in dealing with problems like these. Washington State, for instance, has prevented donors from using vaguely named fronts to shield their identity by requiring disclosure of the sponsor or the “top five contributors” of a political advertisement within the advertisement itself. Wash. Rev. Code § 42.17.320. Similarly, California has addressed efforts to evade disclosure rules by failing to earmark donations to multipurpose organizations. It has specified when a non-earmarked donation to such an organization will be deemed a form of political contribution for disclosure purposes. See California Gov’t Code §84211; 2 CCR § 18215(b)(1).

Wade Gibson, Webb Lyons, and I have proposed another, novel solution to help solve the problem of evasion.⁵ In our view, the core problem with disclosure efforts is what we term the regulatory game of “whack-a-mole.” Whenever regulations make it hard for wealthy donors to fund politics through one outlet, donors find another outlet for their energies. Congress closed the “soft money” loophole for political parties, and money flowed into issue ads and 527s. 527s have now been displaced by SuperPACs and 501(c)(4)s. The risk is that donors will always find new organizations to hide behind.

In order to avoid the “whack-a-mole” problem, our proposal regulates the ad, not the organization. Rather than trying to guess which organizations will emerge in the next campaign cycle, we offer a simple fix: Any advertisement funded directly or indirectly by an organization that does not disclose its donors must acknowledge that fact with a simple and truthful disclaimer: “This ad was paid for by ‘X,’ which

⁴ Briffault, *supra* note 1.

⁵ See Heather Gerken, Wade Gibson & Webb Lyons, “Rerouting the flow of ‘dark money’ into political campaigns,” *Washington Post* (Apr. 3, 2014); see also Heather K. Gerken, “Nondisclosure Disclosure: Giving Lawmakers an Excuse to Avoid the Hard Questions,” *electionlawblog.org* (Apr. 8, 2014). What follows draws heavily upon those two pieces.

does not disclose the identity of its donors.” This “nondisclosure disclosure” would thus require all organizations that do not publicly identify their donors to acknowledge that fact. It provides voters with a helpful shorthand while giving donors an important choice: put their money into transparent organizations (like political parties or SuperPACs), or fund groups that keep their donors hidden but risk running ads that may not persuade cynical voters.

Unlike most of the proposals on the table, ours would apply not just to all of the entities we currently worry about – social welfare groups *and* labor unions *and* the chambers of commerce *and* private individuals – but future organizations built to funnel dark money into the system. The fix is universal and flexible enough to accommodate changes in future election cycles. Congress and the FEC have always had trouble keeping up with those changes. Because our proposal offers universal disclosure, it guarantees that disclosure regulations will keep pace with politics.

Another core benefit of our proposal is that it doesn’t place an unfair burden on voters. Voters could presumably try to trace all the organizations and shell organizations behind any given ad, but it would require them to know a great deal about election law (even corporate law), and it’s very hard to do. Rather than ask voters to do so every time a 30-second ad flashes across the screen, voters should be told the simple fact of the matter: Some ads are funded anonymously. There’s no reason voters shouldn’t be able to sort between ads funded transparently and ads funded anonymously. In that respect, our proposal is little different from the “stand by your ad” requirement. That requirement demands that the connection between the ad and a candidate is identified. Ours demands that the connection between the ad and an anonymous donor is identified.

Finally, rather than attempt to sail against political headwinds, our proposal works with rather than against political incentives. It harnesses politics to fix politics. We are under no illusions that donors are going to stop seeking anonymous outlets for funding. But our proposal should reduce the value of those anonymous outlets by giving voters a reason to be skeptical of ads they put out. Donors will thus be forced to choose. They can fund organizations that disclose their donors, like the political parties or SuperPACs. Or they can fund groups that keep donors’ identities hidden, knowing their ads will lose some of their oomph in the eyes of cynical voters. Political incentives will push money into transparent organizations rather than away from them. Money and political influence will be easier to trace. That’s not a full remedy for our ailing system, but it’s the type of reform that makes bigger and better reform possible.

Conclusion

Now is the right moment for Congress to pass new disclosure requirements. A disclosure regime is one of the basic building blocks of a healthy campaign finance system, and ours is sorely in disrepair. Transparency mandates stand on firmer constitutional footing than any other type of campaign-finance regulation, and they

enjoy substantial bipartisan support. Moreover, there a variety of models for ensuring that disclosure requirements remain robust and efficacious over many election cycles. This is one of the rare examples of reform for which the need is significant, the time is ripe, and the American people are ready.

Biographical Information

Heather K. Gerken is the J. Skelly Wright Professor of Law at Yale Law School. Professor Gerken specializes in election law and constitutional law. She has published in the *Harvard Law Review*, the *Yale Law Journal*, the *Stanford Law Review*, *Political Theory*, and *Political Science Quarterly*. Her most recent scholarship explores questions of election reform, federalism, diversity, and dissent. Her work has been featured in *The Atlantic's* "Ideas of the Year" section and the Ideas Section of the *Boston Globe* and has been the subject of a festschrift and a symposium. Professor Gerken clerked for Judge Stephen Reinhardt of the 9th Circuit and Justice David Souter of the United States Supreme Court. After practicing for several years, she joined the Harvard faculty in September 2000 and was awarded tenure in 2005. In 2006, she joined the Yale faculty. She has won teaching awards at both Yale and Harvard, has been named one of the nation's "twenty-six best law teachers" in a book published by the Harvard University Press, and has won a Green Bag award for legal writing. Professor Gerken served as a senior legal adviser to the Obama for America campaign in 2008 and 2012. Her proposal for creating a "Democracy Index" was incorporated into separate bills by then-Senator Hillary Clinton, then-Senator Barack Obama, and Congressman Israel and turned into reality by the Pew Trusts, which created the nation's first Election Performance Index in February 2013.