INSTITUTE FOR FREE SPEECH

Five Misconceptions about "Dark Money"

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"Dark money" is a pejorative term for spending on ads urging the election or defeat of candidates by nonprofit groups – typically 501(c)(4) social welfare organizations, 501(c)(5) labor unions, and 501(c)(6) trade associations – that do not report the names and addresses of their individual donors to the government, unless donations are earmarked to fund specific ads. The term evokes an emotional, fearful reaction, and many of the statistics published on the topic aim to mislead rather than enlighten.

I. Despite the rhetoric, "dark money" comprises a very small percentage of total campaign spending.

The Federal Election Commission (FEC) reports that approximately $7.3 billion[1] was spent on federal races in the 2012 election cycle. According to figures from the Center for Responsive Politics (CRP), approximately $309 million was spent by organizations that did not provide itemized disclosure of their donors.[2] That is just under 4.3 percent of the total money spent in the 2012 election cycle. On its own, $309 million sounds like a lot of money. Placed in context, a shade over four percent of total spending on federal races doesn't sound like much money at all.

According to CRP and FEC data, in the 2014 election cycle, roughly $173 million was spent by non-itemizing groups compared to roughly $5.3 billion spent on federal races overall, or just 3.3 percent of total political spending – a full percentage point decrease from the 2012 cycle.[3]

II. "Dark money" groups actually disclose a great deal of information about their activities.

The United States currently mandates more disclosure of political spending and contributions than any time in its history. Like individuals, for-profit corporations, and unions, 501(c)(4) social welfare organizations, such as the National Rifle Association and the Sierra Club, and 501(c)(6) trade associations, like the National Association of Manufacturers, must disclose their independent expenditures, electioneering communications, and the individual information of donors who give money earmarked for such spending. All of this information is freely available on the FEC's website. Current law also requires broadcast political ads to include, within the ad, the identity of the organization paying for such ads.

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Given this extensive disclosure regime, it is a misnomer to speak of "undisclosed spending." Recognizing the reality of this extensive disclosure regime, rather than railing about "dark money," is crucial to understanding the nature of this spending.

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1 We derive the $7.3 billion figure by adding the Federal Election Commission's (FEC) 2012 election cycle summary data for "Total Disbursements" ($6,982.2 billion, http://www.fec.gov/press/press2013/pdf/20130419release.pdf) and the Center for Responsive Politics' "Outside Spending by Nondisclosing Groups, Cycle Totals, Excluding Party Committees" bar graph data for 2012 (approximately $309 million, http://www.opensecrets.org/outsidespending/disclosure.php), as the FEC doesn't report this information.

2 "Outside Spending by Nondisclosing Groups, Cycle Totals, Excluding Party Committees (2012)," Center for Responsive Politics. Retrieved on July 8, 2015. Available at: http://www.opensecrets.org/outsidespending/disclosure.php (May 6, 2015).

3 We derive the $5.3 billion figure by adding the Federal Election Commission's (FEC) 2014 election cycle summary data for "Total Disbursements" by "2014 Congressional Candidates" ($1.6 billion), "Party Committees" ($1.2 billion), and "PACs" ($2.3 billion) ($5.1 billion combined, http://www.fec.gov/press/press2015/pdf/20150403release.pdf) and the Center for Responsive Politics' "Outside Spending by Nondisclosing Groups, Cycle Totals, Excluding Party Committees" bar graph data for 2014 (approximately $173 million, http://www.opensecrets.org/outsidespending/disclosure.php), as the FEC doesn't report this information.

III. "Dark money" groups are often well-known organizations that have long been engaged in politics.

Political activity by nonprofit organizations long predates the oft-cited Citizens United decision, including by groups such as the League of Conservation Voters and NARAL Pro-Choice America.

Moreover, "dark money" statistics tend to overstate the issue because many of the largest 501(c) spenders are well-established organizations. Indeed, only 28 organizations that did not publicly disclose all of their donors spent more than $1 million on independent expenditures in 2012. Most of these groups were well-known, including the Humane Society, the National Association of Realtors, the National Rifle Association, Planned Parenthood, and the U.S. Chamber of Commerce.

Even many spenders that are not historically well-known are quite familiar to anyone who follows the news, such as the Koch-backed Americans for Prosperity, Karl Rove-affiliated Crossroads GPS, and Tom Steyer-financed NextGen Climate Action. Further, a simple Google search of an organization's name will usually provide information about a newer group's positions and key funders in a matter of seconds.[4]

IV. "Dark money" spending is severely limited by tax rules that distinguish multi-purpose nonprofits from political organizations.

Because 501(c) organizations are prohibited by law from having political activity as their primary purpose, they must stay within IRS guidelines to maintain their exempt status. In effect, then, a donor whose main objective is political activity faces, effectively, an equivalent of a 50 percent or higher tax on political donations given to a 501(c) organization rather than to a Super PAC or other primarily political organization, which reports its donors to the government. As a result, it is doubtful that spending by 501(c) organizations will increase substantially as a percentage of total spending.

V. Expanding this reporting even further would create "junk disclosure" that misleads the public.

When individuals donate to a political committee or political party, they know the funds will be used to support or oppose candidates. The same is not at all true of donors to 501(c) membership organizations, 501(c)(5) labor unions, and 501(c)(6) trade associations. People give to these groups not because they agree with every position a group takes, but because on balance they think the group provides a voice for their views or otherwise advances their shared interests. To publicly identify contributing individuals with political expenditures of which they had no advance knowledge and may even oppose is both unfair to members and donors, and misleading to the public. It is "junk disclosure" – disclosure that serves little purpose other than to provide a basis for official or private harassment, and that may actually misinform the public.

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The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government. Originally known as the Center for Competitive Politics, it was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. The Institute is the nation's largest organization dedicated solely to protecting First Amendment political rights.

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4 *See* Julie Bykowicz, "Two Republican Dark Money Groups Spent $311 Million Last Year," *Bloomberg*. Retrieved on July 8, 2015. Available at: http://go.bloomberg.com/political-capital/2013-11-18/two-republican-dark-money-groups-spent-302-million-last-year/ (November 18, 2013) and Nicholas Confessore, "Financier Plans Big Ad Campaign on Climate Change," *The New York Times*. Retrieved on July 8, 2015. Available at: http://www.nytimes.com/2014/02/18/us/politics/financier-plans-big-ad-campaign-on-environment.html? (February 17, 2014).