

HARD, SOFT AND DARK MONEY

Introduction

Early political scandals involved money used for bribery or buying votes. Modern day scandals involve the appearances of corruption depending where gifts and campaign money came from. The U.S. Supreme Court has made a number of controversial decisions expanding the amounts of money in politics by characterizing political donations and expenditures to be exercises of freedom of speech. Among other results, those decisions have created a large and growing category of election related donations and contributions called “dark money.”

Important Terms Defined

Terms relating to money in politics that are used in this paper have definitions more exactly set out by law. These terms are fully addressed in the MIP paper *Definitions for Money in Politics*,

Disclosure Requirements for PACs

The relationships of PACs to their disclosure requirements are shown in the chart below.

Funding Sources	Disclosure required	Donations limited	May coordinate with candidate	Corporations can donate
Political parties	✓	✓	✓	
PAC's	✓	✓		✓
Super Pac's	✓			
527's	✓		✓	✓
501(c)'s				✓

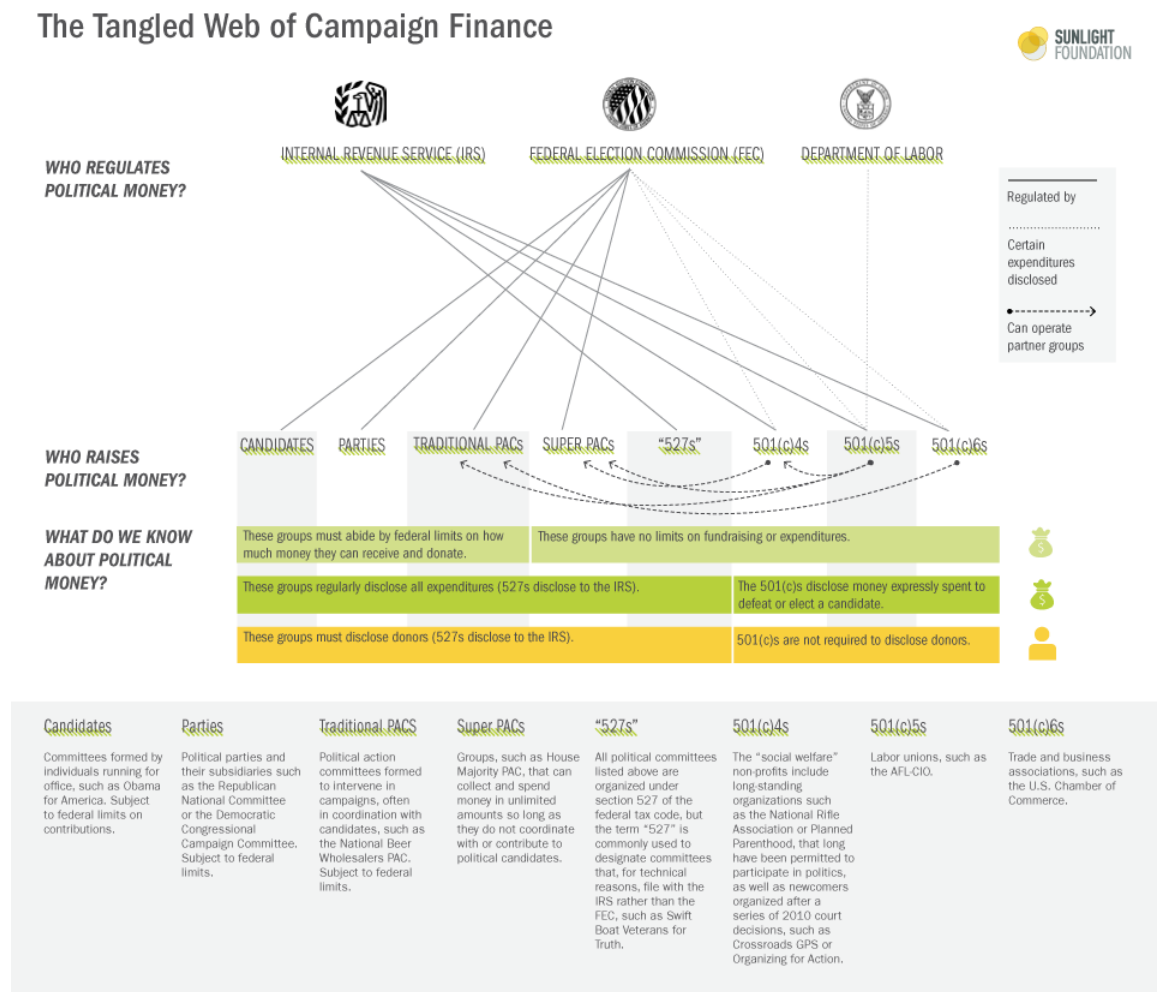
Dark Money

Twenty-nine types of corporations are listed in §501(c) of the Internal Revenue Code (IRC) as qualified for nonprofit status. Social Welfare Organizations under §501(c) (4), Labor Unions under §501(c)(5), and Trade Associations under §501(c)(6) of the Internal Revenue Code are not required to report from whom they get their donations. Hence these donations are referred to as *dark money*. Since social welfare or business interests often intersect with political issues, these groups are allowed to use funds to influence elections, but there is otherwise no dollar limit on how much that can be, and they only need to report the majority of their expenditures in general

terms. However, labor unions must disclose contributors above \$5,000 in a 12-month period to the Department of Labor; and some election expenditures as low as \$200 are reportable to the Federal Election Commission.

Semi-Dark Money

Contributors can also conceal their identity by shuffling money from one campaign entity to another. This takes advantage of the complex sources of law and regulation relating to different entities. A full explanation goes beyond the scope of this paper, but is illustrated in the chart below¹.



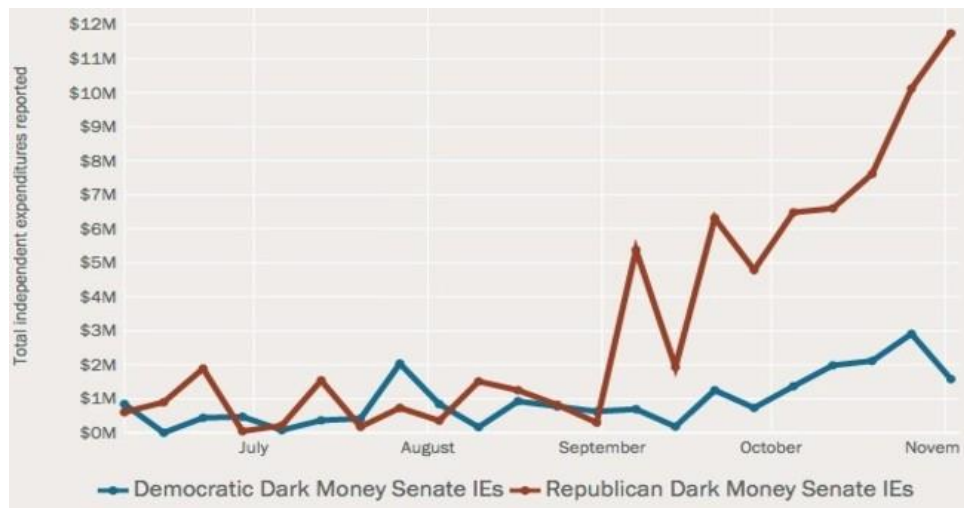
¹ Sunlight Foundation, "U.S. Political Finance: Americans Spend More on Elections But They Lead from Behind," Nov. 10, 2014, found at <http://sunlightfoundation.com/blog/2014/11/10/u-s-political-finance-americans-spend-more-on-elections-but-they-lead-from-behind/>.

Amounts of Dark Money

Analysis by the Sunlight Foundation indicated that dark money spending for the 2014 midterm elections was at least \$145 million.² A graph showing relative amounts for the two major parties is shown below. *Politico* reported amounts of \$127 million by conservatives and \$33 million by liberals for a total of \$160 million but noted that this was “just a fraction” of the overall total³.

Open Secrets reported that:

*... three times more dark money spending has already been reported to the Federal Election Commission than at this point [April 2014] during the 2012 presidential campaign. In that election, 501(c)(4) social welfare organizations and 501(c)(6) trade associations, which do not have to disclose their donors to the public, spent more than \$310 million.*⁴



FEC filings show that Americans for Prosperity, a 501(c)(4) entity, spent only \$6.4 million on ads in the 2014 midterm elections. But sources indicate that the principal contributors’ budget ranged roughly from \$125 to \$290 million⁵. Likewise, only \$35 million of the U.S. Chamber of

² Sunlight Foundation, “Why does the IRS regulate political groups? A look at the complex world of campaign finance,” May 17, 2013, found at <http://sunlightfoundation.com/feature/why-does-the-irs-regulate-political-groups-a-look-at-the-complex-world-of-campaign-finance/>.

³ Politico, “Koch Brothers plan \$125M spree,” May 9, 2014, found at <http://www.politico.com/story/2014/05/koch-brothers-americans-for-prosperity-2014-elections-106520.html>.

⁴ <https://www.opensecrets.org/news/2014/04/how-2014-is-shaping-up-to-be-the-darkest-money-election-to-date/>

⁵ Federal Election Commission, October 2014, “FEC Summarizes 18-Month Campaign Activity of the 2013-2014 Election Cycle,” found at <http://www.fec.gov/pages/fecrecord/2014/october/18monthsummary2014cycle.shtml>

Commerce's election spending as a 501(c)(6) entity shows up in filings, but the group indicated that it spent twice that amount.

The difference between disclosed and undisclosed spending often relates to advertisements or mailings that focus on issues (undisclosed) rather than elections (disclosed). However, issue based ads can be quite hard-hitting and often indistinguishable from election ads to the average viewer. Such ads serve the legal purpose of apolitical activity required to be their major purpose of the 501 entity. Super PACs, on the other hand, can spend all their cash on election ads.

For a perspective on the relative amounts of disclosed versus dark spending, as of June 2014, the FEC records showed that:

- 1383 House candidates received \$721 Million,
 - 224 Senate candidates received \$422 Million,
 - Political parties had receipts of \$760.7 Million,
 - 7,212 PACs had receipts of \$1.5 Billion, and
 - Super PAC's received \$74.5 Million.

Another category, *independent expenditures*, had an additional \$74.5 Million for Super PACs along with other groups that totaled \$124 Million⁶. This increased significantly between June and November 2014 but those figures were not finalized as of this writing.

Legislative and Regulatory Efforts to Address the Dark Money Problem

The DISCLOSE Act

In response to the January 2010 *Citizens United* decision, The "Democracy Is Strengthened by Casting Light On Spending in Elections" Act, (usually called the DISCLOSE Act) was introduced on April 29, 2010. It was defeated in September of that year. In March 2012, DISCLOSE Act 2.0 was introduced and also defeated.

Key points of the DISCLOSE Act of 2014 proposed to amend the Federal Election Campaign Act of 1971 (FECA) follow. The legislation would:

- Redefine the term "independent expenditure" as an expenditure by a person that, when taken as a whole, expressly advocates the election or defeat of a clearly identified candidate, or is the functional equivalent of express advocacy because it can be interpreted by a reasonable person only as advocating the election or defeat of a candidate, taking into account whether the communication involved mentions a candidacy, a political party, or a challenger to a candidate, or takes a position on a candidate's character, qualifications, or fitness for office.
- Expand the period during which certain communications are treated as electioneering communications.
- Prescribe disclosure requirements for corporations, labor organizations, and certain other entities, including a political committee with an account established for the purpose of

⁶ See DISCLOSE Act of 2014, <https://www.congress.gov/bill/113th-congress/senate-bill/2516>.

accepting donations or contributions that do not comply with the contribution limits or source prohibitions under FECA (but only with respect to such accounts).

- Repeal the prohibition against political contributions by individuals age 17 or younger.

Federal Election Commission (FEC)

The FEC took 5 years to update their rules after the *Citizens United* decision, but current Chair Ann Ravel seems ready to change that. “I still have hope for this year,” said Ravel, who joined the FEC in late 2013 after leading the California Fair Political Practices Commission. “My goal is at least make some incremental change in the disclosure of dark money.”⁷

Internal Revenue Service (IRS)

IRS Commissioner John Koskinen recently announced that the IRS intends to clamp down on politically active social welfare nonprofit groups. Under the proposal, if a social welfare nonprofit spends a substantial amount on political activity, the organization would lose its special tax status and would have to disclose its donors.

Securities and Exchange Commission (SEC)

The SEC has been asked to create a rule requiring publicly traded companies to disclose their political spending to shareholders. This would prevent these companies from anonymously giving to politically active business leagues, most notably the U.S. Chamber of Commerce, which are not required to disclose their donors.

⁷ Center for Public Integrity, “New FEC Chief on ‘Dark Money’ Mission,” Dec. 17, 2014, found at <http://www.publicintegrity.org/2014/12/17/16527/new-fec-chief-dark-money-mission>