Seven Myths (and Realities) about Disclosure

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For more information on achievable reforms, please visit BlueprintsForDemocracy.org, which describes actions states and localities are taking to provide citizen funding for elections, political spending disclosure, and other reforms.

Myth #1:
The Supreme Court's ruling in Citizens United v. FEC weakened political donor disclosure requirements.

Reality:
Far from striking down disclosure laws, the Court's decision in Citizens United was predicated on the idea that the corporate money the Court was allowing in federal elections would be fully disclosed. Justice Kennedy wrote for the majority that a "campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today." Although the Court was sharply divided on other issues in the case, not so with disclosure: the Justices voted 8-1 to uphold the disclosure and advertising disclaimer provisions being challenged, with only Justice Thomas dissenting. The Court's opinion in Citizens United states, in no uncertain terms: "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."

Myth #2:
Under existing law, groups can legally organize for the purpose of spending money in federal elections without having to disclose where their funding comes from or how they spend it.

Reality:
Dark money groups – organizations that take advantage of laws meant to govern social welfare organizations and charities – *are* required under campaign finance laws to disclose the funders of their political advertising in many circumstances. This is so in two ways: First, federal law requires "political committees," that is, any group that has the major purpose of electing or defeating federal candidates and that receives or spends $1,000 or more in a year, to register with the Federal Election Commission and publicly disclose its contributors and expenditures. Second, under a McCain-Feingold provision upheld by the Supreme Court, even groups whose major purpose is not political activity (and which thus don't qualify as "political committees") must disclose their donors if, in a single calendar year, they spend at least $250 on independent expenditures (any uncoordinated activity "expressly advocating the election or defeat of a clearly

identified candidate") or at least $10,000 on electioneering communications (TV and radio ads that are run within 30 days of a primary or 60 days of a general election, mention any "clearly identified candidate" and are targeted to the relevant electorate).

In short: regardless of what dark money groups call themselves on paper, the law requires that they file public disclosure reports detailing their major donors with the FEC if they undertake election advocacy. However, instead of enforcing the law, the FEC has deadlocked on major enforcement votes, failing to hold dark money groups accountable even when its own general counsel believed the law had been broken.

Myth #3:
Corporate shareholders know if and how corporate funds are being spent in elections.

Reality:
The Supreme Court assumed that shareholders would know how their money was being used to influence elections; the majority in *Citizens United* claimed there was "little evidence of abuse that cannot be corrected by shareholders through the procedures of corporate democracy." The Court also stated that "shareholders can determine whether their corporation's political speech advances the corporation's interest . . ." However, this has not proved to be the reality – corporations claim their political activity is "nonmaterial" to their financial reports and many do not disclose it to their shareholders. The Securities and Exchange Commission does not currently require such disclosure. The SEC has had a pending petition since 2011 to require corporate officers to inform shareholders if their money is used for political ends; the SEC has not even placed this matter on the agenda in the four years since, let alone enacted a shareholder disclosure rule.

Myth #4:
Records of all money spent in elections are publicly available via the internet.

Reality:
The Supreme Court appeared to believe this myth when it wrote in *Citizens United*: "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." However, in truth, the internet can only enable citizens to access information that exists in the public realm: FEC reports, SEC filings, TV station advertising forms, etc. If the information is not publicly reported in some way, then it is not going to appear in an internet search. In fact, Justice Kennedy recently admitted as much in a talk at Harvard Law School, saying "You live in this 'cyber age.' You don't need to wait for three months after the election for a report on who gave money; it can be done in 24 hours. . . But that's not working the way it should."

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-Justice Anthony Kennedy

Myth #5:

Super PACs, dark money groups, and their donors are guaranteed anonymity by Supreme Court's decisions such as NAACP v. Alabama.

Reality:

While super PACs, dark money groups, and their ultra-wealthy donors claim they are constitutionally entitled to anonymity, the Supreme Court has repeatedly rejected comparisons between PACs/dark money groups and the NAACP's situation in *NAACP v. Alabama*. The groups in *Citizens United* aren't facing the sort of "threats, harassment, or reprisals" that the NAACP was in 1950s Alabama – super PACs are afraid that their donors will garner bad publicity if they disclose their names, while the NAACP feared imminent, credible, physical threats to the lives of its members. Justice Scalia noted, in support of disclosure requirements, that laws already exist to protect speakers from threats to their safety and property, stating: "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, thanks to the Supreme Court, 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."

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> **-Justice Antonin Scalia**

Myth #6:

If an "issue ad" does not explicitly tell viewers to vote for or against a candidate, it does not need to be reported to the FEC.

Reality:

Any television or radio advertisement which refers to a clearly identified federal candidate, targets that candidate's relevant electorate, and runs within 30 days before a primary election or 60 days before a general election is considered an "electioneering communication" under the law. Any group which engages in electioneering communications must disclose that expenditure to the FEC and identify the donors who paid for the ad. The FEC has failed to enforce this disclosure provision, despite two court decisions stating the Commission's failure to do so is "contrary to law."

Myth #7:

State and local governments cannot implement their own financial disclosure rules that are more rigorous than federal law.

Reality:

With Congress gridlocked and the FEC deadlocked, some states and municipalities already have implemented stronger disclosure laws to fight back against money in politics. States like Washington and California have disclosure and enforcement regimes which are enforced far more aggressively than federal campaign laws. By avoiding reliance on a paralyzed FEC and an inattentive Congress, states have been able to ensure the public knows who is responsible for pouring money into their elections.