

What do Corporations Have to Hide? Glimpses of Dark Money

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Introduction

Playwright Lin-Manuel Miranda told the graduates of the University of Pennsylvania, “[e]very story you choose to tell, by necessity, omits others from the larger narrative.”¹ This is true. But American elections are missing a key part of the story: exactly who is funding political ads. Between 2010 and 2014, there was \$600 million of dark money spent in federal elections alone. But now that corporate money is allowed in politics through perfectly legal independent expenditures, the open question remains, why is corporate money going dark?

Post-*Citizens United*, the press has shown a renewed interest in hidden corporate political spending.² They have reported on inadvertent and court ordered disclosures by corporations. These reports provide an admittedly limited glimpse into what corporations are doing on the down low and allows us to start to explore what exactly are corporate political spenders hiding and why. Because of the brevity of this piece a definitive account of all that is hidden in the realm of corporate political spending is not possible. But this piece can offer a starting point for both discussion and further research.

Defining the Modern Dark Money Problem

Here “dark money” does not refer to the excellent book by Jane Mayer of the same title, but rather, it refers to untraceable political spending.³ Dark money is money that has been routed through an opaque nonprofit — thus concealing its true source from voters and investors alike. The source of dark money could be from individuals, unions, associations, nonprofits or for profit

¹ Lin-Manuel Miranda, *Full Transcript: Lin-Manuel Miranda’s Commencement Speech at UPenn*, HEARST (May 16, 2016 5:23 pm), <https://heatst.com/entertainment/full-transcript-lin-manuel-mirandas-commencement-speech-at-upenn/>.

² Kathy Kiely, *Former IRS Official Sees Dark Money Scandal Brewing As demonstrators continue weeklong protest on Capitol Hill, an expert talks about the toll Citizens United is taking*, MOYERS & CO (Apr. 12, 2016), <http://billmoyers.com/story/former-irs-official-sees-dark-money-scandal-brewing/>; Michael Isikoff, *Secret \$1.5 million donation from Wisconsin billionaire uncovered in Scott Walker dark-money probe*, YAHOO NEWS (Mar. 23, 2015); Karoli Kuns, *How Dark Money Shields Political Donors*, NEWS WEEK (June 30, 2015), <http://www.newsweek.com/how-dark-money-shields-political-donors-348852>; *Most expensive midterms EVER: The power of Citizens United and anonymous 'dark money' revealed as spending nears \$4 billion*, AP & REUTERS (Nov. 4, 2014), <http://www.dailymail.co.uk/news/article-2819897/Most-expensive-midterms-power-Citizens-United-anonymous-dark-money-revealed-spending-nears-4billion.html#ixzz48kE7j11f>.

businesses. Here I will focus on dark money from for profit businesses.⁴ Dark money is also used to shape policy between elections.

Corporations do not have a constitutional right to spend money darkly. If anything, corporations have no right to privacy at all.⁵ But corporations have been clever at exploiting the gaps in regulation between the IRS and elections regulators, which make dark money possible.⁶

As I explain in my new book Corporate Citizen?, corporate dark money was a problem that predated *Citizens United v. FEC* (2010).⁷ Arguably, corporate dark money was the original sin in Watergate.⁸ The reason for keeping the corporate money raised by the 1972 reelection campaign of Richard Nixon secret was easy enough to discern. (1) There was a gap in the law which failed to require disclosure for months in early 1972;⁹ thus Nixon's fundraisers thought they could get away with hiding it. And (2) corporate contributions to the campaign were illegal.¹⁰ Some of the illegal

³ JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* (2016).

⁴ Robert Maguire, *The multiplication magic behind the dark money churn*, OPEN SECRETS (May 3, 2016), <http://www.opensecrets.org/news/2016/05/the-multiplication-magic-behind-the-dark-money-churn/>.

⁵ *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (“corporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.”) (internal citations omitted); see also *FCC v. AT & T Inc.*, 562 U.S. 397, 409-10 (2011) (“The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations. We trust that AT & T will not take it personally.”).

⁶ Ciara Torres-Spelliscy, *Hiding Behind the Tax Code*, NEXUS CHAPMAN'S J. OF LAW & PUB. POL'Y (2011).

⁷ CIARA TORRES-SPPELLISCY, *CORPORATE CITIZEN? AN ARGUMENT FOR SEPARATION OF CORPORATION AND STATE* (2016).

⁸ Albert R. Hunt, *A Banner Year for 'Dark Money' in Politics*, BLOOMBERG (Jan 3, 2016 11:42 AM EST), <http://www.bloomberg.com/view/articles/2016-01-03/a-banner-year-for-dark-money-in-politics> (“The key,’ [Bob Woodward] said a half-century ago [in Watergate], ‘was the secret campaign cash.”).

⁹ RICHARD REEVES, *PRESIDENT NIXON: ALONE IN THE WHITE HOUSE* 462 (2002) (“there was no law. The Corrupt Practices Act of 1972, a compromise bill that passed both houses of Congress by huge margins and was signed into law by the President on February 7 The new law would not take effect until April 7, sixty days after the President signed it In those sixty days, the President and his committee collected more than \$20 million--almost \$2 million of it in cash--with no requirement or intention to name names or amounts.”).

¹⁰ U.S. General Accounting Office, *Impact of Foreign Corrupt Practices Act on U.S. Business: Report To The Congress* 1 (1981) (reporting 450 companies admitted making \$300 million in questionable or illegal payments); see also Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices Submitted to the Senate Banking, Housing and Urban Affairs Committee 2 (May 12, 1976) (“In 1973, as a result of the work of the [Watergate] Special Prosecutor, several corporations and executives officers were charged with using corporate funds for illegal domestic political contributions.”).

corporate dark money gathered by Nixon's Committee to Reelect the President (CREEP) ended up funding the Watergate burglary.¹¹

Citizens United may have facilitated more money in American elections, but the decision did not cause the uptick in dark money. Indeed, *Citizens United* upheld the constitutionality of disclosure of the underlying sources of money in politics by a vote of 8 to 1.¹² But because of the dark money problem, often we don't know what we don't know about corporate money in politics.¹³ And I should be clear: not everyone thinks dark money is a bad thing. Just as there are fans of asbestos,¹⁴ there are fans of dark money too.¹⁵ And reasonable people can disagree about whether campaign finance reforms that would require more transparency are desirable.¹⁶ But I am firmly in the camp that wants transparency of where money in politics originated.

¹¹ Andy Kroll, *Follow the Dark Money*, MOTHER JONES (July/August 2012), <http://www.motherjones.com/politics/2012/06/history-money-american-elections> ("it was secret until some of that Mexican money [from Gulf Oil] ended up in the bank account of a one-time CIA operative named Bernard Barker, one of the five men whose bungled burglary at the Democratic National Committee headquarters in the Watergate complex...").

¹² Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GA. ST. U. L. REV. 1057 (2011) (There were a slew of lawsuits filed against disclosure laws after *Citizens United*. In the first year after the decision, nearly all of these challenges failed and disclosure was upheld as perfectly constitutional.).

¹³ Jennifer Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEORGETOWN L. J. 1443 (2014) ("Relying on the Longitudinal Elite Contributor Database ... [w]e suggest that much of what the Court and reformers assume about disclosure is wrong — that their views are premised on an effective and well-functioning disclosure regime that in fact bears scant resemblance to the system of disclosure maintained by the FEC. Correcting these misunderstandings will be critical to crafting better reform proposals."); Lloyd Hitoshi Mayer, *Politics and the Public's Right to Know*, 13 ELECTION L. J. 138 (2014) ("a number of public debates raise the issue of whether this right to know should extend beyond government-government and private-government interactions to also reach private-private interactions that indirectly attempt to influence government officials. For example, should the right to know extend to public identification of "bundlers" who successfully encourage others to make substantial campaign contributions? Similarly, should the right to know require the public disclosure of all significant funders for election-related spending done independently of candidates and political parties?").

¹⁴ Jock McCulloch, *Saving the Asbestos Industry, 1960 to 2006*, 121(5) PUBLIC HEALTH REP. 609–614 (Sep-Oct 2006), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1564458/> ("On December 4, 1970, the Asbestos Information Association/North America (AIA) was formed ... The AIA's stated objectives were to provide a channel of communication to the public about asbestos, to rebut 'irresponsible and uninformed criticism' of the industry and its products, and to 'propagate the benefits and indispensability of asbestos through advertising, publicity, and speeches.'").

¹⁵ John Riches, *The Victims of "Dark Money" Disclosure: How Government Reporting Requirements Suppress Speech and Limit Charitable Giving*, GOLDWATER INSTITUTE (Aug. 5, 2015) (The author argues that "in recent years, anonymous political speech has been under attack by so-called 'dark money' critics, who demand that government expose the identities of individuals, businesses, labor unions, and nonprofits that spend money to participate in political dialogue. Couched as 'transparency' measures, 'dark money' disclosure mandates are often used as excuses to silence disfavored speech. ... These mandates have diluted political dialogue, invited harassment and retaliation against speakers, and chilled speech and association.").

¹⁶ Bruce E. Cain, *Foundational Wisdom: The Scholarship of Daniel Lowenstein*, 9 ELECTION L.J. 263 (2010) ("some democratic solutions seem at first glance to be unlimited goods. The mere whiff of more democracy, as I noted earlier, is a powerful narcotic for the reform community. If transparency is a good thing, then more is even better. If competitive elections are a democratic foundation, then more competition is surely an improvement. And so forth. The allure of anti-corruption

In the post-*Citizens United* era (2010-2016), the high water mark for dark money was the 2012 election when President Obama was defending his presidency against Mitt Romney. According for the Center for Responsive Politics (better known by its web address Open Secrets), in 2012 most of the dark money flowed through social welfare 501(c)(4) groups—to the tune of \$257 million; while \$55 million in dark money went through 501(c)(6) trade associations. Dark money in the 2016 got off to a fast pace.¹⁷ But as of June 1, 2016, comparatively little dark money--\$31 million from all sources-- has been spent in the 2016 race.¹⁸

Transparent Corporate Spenders

Not every corporation involved in politics is hiding that fact.¹⁹ Responding to pressure from shareholders and the Center for Political Accountability, over 100 of the largest publicly traded companies are finally being more transparent about their politicking.²⁰ In 2014, the nonpartisan journalists at the Center for Public Integrity (CPI) followed the flow of funds from the disclosing companies and found that many of the transparent companies only disclose that they are giving to an otherwise dark money group—typically a trade association like PhRMA, the Business Roundtable, the U.S. Chamber of Commerce, or the National Association of Manufacturers.²¹ In total the CPI found publicly traded corporations gave \$173 million to politically active non-profits.²²

rhetoric is similarly powerful.”); Joel M. Gora, *The First Amendment . . . United*, 27 GA. ST. U. L. REV. 935 (2011) (“The ultimate essence of the Court’s ruling [in *Citizens United*] is that under the First Amendment there are no privileged speakers and no pariah speakers. . . . Most of the press does not like the decision because they do not want the competition; most of the politicians do not like the decision because they do not want the criticism and the pushback. But the competition and the criticism will inevitably work to the benefit of the public and the political process, and ultimately, to the strength of our democracy.”).

¹⁷ Tom Kertscher, *Ten times more 'dark money' has been spent for 2016 elections*, U.S. Sen. Tammy Baldwin says, FACTCHECK.ORG (Nov. 5, 2015 at 6:00 a.m.) (“for the 2016 cycle, \$4.88 million in dark money expenditures have already been made, according to the center. That’s more than 10 times the \$440,000 that was spent at this point during the 2012 cycle. The \$4.88 million has been spent by six groups, including the U.S. Chamber of Commerce (\$3 million) and Americans for Prosperity (\$1.5 million)[.] The only liberal group was Planned Parenthood, which spent just under \$75,000[.]”).

¹⁸ *Political Nonprofits (Dark Money)*, CTR. FOR RESPONSIVE POLITICS (data up to date as of May 27, 2016), https://www.opensecrets.org/outsidespending/nonprof_summ.php.

¹⁹ Dave Levinthal, *Companies disclosing more political spending*, PUBLICINTEGRITY.ORG (May 13, 2014), <https://www.publicintegrity.org/2013/09/25/13462/companies-disclosing-more-political-spending> (explaining that a growing number of companies are voluntarily disclosing their campaign-related spending).

²⁰ CTR. FOR POL. ACCOUNTABILITY, *THE 2015 CPA-ZICKLIN INDEX OF CORPORATE POLITICAL DISCLOSURE AND ACCOUNTABILITY* (2015), available at http://files.politicalaccountability.net/index/CPA-Zicklin_Index_Final_with_links.pdf.

²¹ Michael Beckel, *Top U.S. corporations funneled \$173 million to political nonprofits*, COMPANY FILINGS SHINE LIGHT ON DARK MONEY, CTR. FOR POLITICAL INTEGRITY (Sept. 23, 2014), <https://www.publicintegrity.org/2014/01/16/14107/top-us-corporations-funneled-173-million-political-nonprofits>.

²² Michael Beckel, *Top U.S. corporations funneled \$173 million to political nonprofits*, PUBLICINTEGRITY.ORG (Sept. 23, 2014), <https://www.publicintegrity.org/2014/01/16/14107/top-us-corporations-funneled-173-million-political-nonprofits> (revealing that among the biggest donors to

But the trail goes cold again once the money flows to a non-disclosing trade association (or another opaque nonprofit).

Leaks & Litigation

There are two ways that dark money becomes more transparent: (1) through leaks (either purposeful or inadvertent) and (2) through litigation.

Leaks

Dark money can be spent in state or federal elections. Most leaks have dealt with spending at the state level. For instance, the Alabama House Republican Caucus, which is a 501(c)(4) social welfare organization, inadvertently provided their Form 990 Schedule B to reporters, which listed 16 contributor names and their contribution amounts.²³ The companies on the list included, Blue Cross and Blue Shield of Alabama, and Alabama Power as well as FedEx Corp.'s PAC.²⁴

The Republican Governors Association (RGA) is a 527, which reports its donors to the IRS.²⁵ But the RGA made more of its funding opaque by creating dark nonprofit affiliates like the Republican Governors Association Public Policy Committee.²⁶ In 2014 a there was a leak of a document from the Republican Governors Association Public Policy Committee which showed what corporations were giving money to it and at which level.²⁷ Included in this leak were records of

bankroll politically active nonprofits in recent years are “energy giant Exelon Corp., health insurer WellPoint Inc. and technology titan Microsoft Corp.” ... “As part of the investigation, the center created an interactive database with information about each of the donor companies and how much they gave. It can be found at <https://www.publicintegrity.org/2014/01/16/14121/pulling-back-veil-corporate-contributions>”.

²³ Michael Beckel, *Documents reveal GOP group's secret donors*, CTR. FOR PUBLIC INTEGRITY (Mar. 12, 2014), <https://www.publicintegrity.org/2014/03/12/14413/documents-reveal-gop-groups-secret-donors> (stating that Rachel Adams, the communications director for Alabama House Speaker Mike Hubbard, accidentally provided journalists with the Alabama House Republican Caucus a version of the group's Form 990 that the IRS usually only sees. The form is available at <http://www.documentcloud.org/documents/1005383-alabama-house-republican-conference-inc-2012-irs.html>).

²⁴ *Id.*

²⁵ Andy Kroll, *The Republicans' Dark-Money-Moving Machine Inside the GOP group that skirts election rules by shuffling millions across state lines and then "wiping the fingerprints off the money."*, MOTHER JONES (Jan./Feb. 2012), <http://www.motherjones.com/politics/2012/01/republican-governors-association-perry-michigan>.

²⁶ Paul Abowd, *Governors' groups rely increasingly on 'dark money' affiliates shift to nonprofits obscures donors*, CTR. FOR PUBLIC INTEGRITY (May 19, 2014), <https://www.publicintegrity.org/2013/04/04/12431/governors-groups-rely-increasingly-dark-money-affiliates>.

²⁷ Jonathan Weisman, *G.O.P. Error Reveals Donors and the Price of Access*, N.Y. TIMES (Sept. 24, 2014), http://www.nytimes.com/2014/09/25/us/republicans-corporate-donors-governors.html?_r=0 (“Such an error by the Republican Governors Association recently resulted in the disclosure of exactly the kind of information that political committees given tax-exempt status usually keep secret, namely their corporate donors and the size of their checks.”).

privately held corporations and their trade associations that gave at least \$250,000 to the RGA including: American Beverage Association, Health Care Service Corporation, Koch Companies Public Sector, Metropolitan Milwaukee Association of Commerce, Ryan Industries, and USAA. The RGA leak also showed *publicly traded* companies giving at the \$250,000 “Statesmen” level including: Aetna, Inc., Centene Corporation, Coca-Cola, Corrections Corporation of America, ExxonMobil, Microsoft, Motorola, Pfizer, Pike Electric, Inc., Range Resources Corporation, Reynolds American, Sanofi, United Health Group, WalMart, WellCare Health Plans Inc., and WellPoint, Inc.²⁸ In the same year (2014), the IRS provided additional inadvertent disclosures for this RGA group to the Center for Public Integrity, which included a page of the “Schedule B” list of donors, which the IRS does not require to be made public. The corporate donors included in this IRS disclosure were HCA Inc. (\$89,000), and Healthsouth Corp. (\$10,500).²⁹ This secretive funding of the RGA’s Policy Committee is significant because the RGA is typically one of the largest political spenders in state elections across the nation.³⁰ And they are wildly successful at electing governors as there are 34 Republicans in governors’ mansions across the land.³¹

Of course, dark money is also a prominent feature in federal elections as well. But fewer dark money sources have been revealed at the federal level. In one of the few federal leaks, the United States’ cable industry’s largest trade organization, National Cable & Telecommunications Association’s Form 990 showed that it gave tens of thousands to dark money groups that worked to defeat President Barack Obama. Those groups include Americans for Prosperity, Americans for Tax Reform, American Commitment, and The Center for Individual Freedom.³²

In the RGA leak, someone (presumably hostile to the RGA) leaked the document, which named the RGA’s underlying donors. At times, the leak is from the donor itself. Insurance company “Aetna accidentally disclosed to insurance regulators . . . that in 2011, it had contributed \$3 million

²⁸ *Best Practices 2011 Best Practices Report*, REPUBLICAN GOVERNORS PUBLIC POLICY COMMITTEE (Nov. 30, 2011), available at http://www.citizensforethics.org/page/-/PDFs/CREW_RGPPC_Documents.pdf?nocdn=1.

²⁹ Paul Abowd, *IRS ‘outs’ handful of donors to Republican group*, CTR. FOR PUBLIC INTEGRITY (May 19, 2014), <https://www.publicintegrity.org/2013/04/04/12426/irs-outs-handful-donors-republican-group> (stating that the IRS accidentally outed a handful of donors to the Republican Governors Association (RGA) Public Policy Committee).

³⁰ Ciara Torres-Spelliscy, *The \$500 Million Question: Are the Democratic and Republican Governors Associations Really State PACs Under Buckley’s Major Purpose Test?*, 15 NYU J. OF LEGISLATION & PUBLIC POLICY 485 (Spring 2012).

³¹ *Gubernatorial and legislative party control of state government*, BALLOTPEdia (2016), https://ballotpedia.org/Gubernatorial_and_legislative_party_control_of_state_government.

³² Julie Patel, *‘Dark money’ groups fueled by cable industry*, PUBLICINTEGRITY.ORG (July 28, 2014), <https://www.publicintegrity.org/2013/11/15/13780/dark-money-groups-fueled-cable-industry>.

to the American Action Network.”³³ Aetna later removed the disclosure from its filing.³⁴ The American Action Network spends money to elect Republican candidates and to defeat Democratic candidates.³⁵

Litigation

While the administrative state has struggled mightily with making dark money transparent, the judiciary can shine a light on the sources of dark money. Sometimes it is hiding in plain sight in public court filings by the parties. For instance, the bankruptcy court filings of Corinthian Colleges, which had been a publicly-traded for-profit education company, contained such a dark money reveal. Corinthian Colleges got into deep trouble with the U.S. Department of Education, the Consumer Financial Protection Bureau,³⁶ and Attorney General of California,³⁷ who all accused the company of fraud in misrepresenting the job placements of its graduates. The Securities and Exchange Commission (SEC) is also investigating whether Corinthian misled investors as well.³⁸

In the bankruptcy filings by Corinthian Colleges (Case 15-10952-KJC) the matrix of creditors listed the American Legislative Exchange Council (also known as ALEC), U.S. Chamber of Commerce, and Crossroads GPS.³⁹ ALEC, which is backed by the Koch brothers, is the nonprofit that has long worked on privatizing aspects of education, which were previously run by government or nonprofits. ALEC also supports a slew of conservative policies from voter ID, to stand your

³³ Russ Choma, *Nonprofits, shell corporations help shield identity of ad backers*, PUBLICINTEGRITY.ORG (Oct. 30, 2012), <https://www.publicintegrity.org/2012/10/30/11661/nonprofits-shell-corporations-help-shield-identity-ad-backers>.

³⁴ *Id.*

³⁵ FactCheck.org, *American Action Network*, ANNENBERG PUBLIC POLICY CTR. (Aug. 10, 2010), <http://www.factcheck.org/2010/08/american-action-network/>.

³⁶ Michael Stratford, *Corinthian Dismantling Continues*, INSIDE HIGHER ED (Apr. 15, 2015), <https://www.insidehighered.com/news/2015/04/15/us-fines-corinthian-colleges-30-million-and-effectively-closes-head-chain>.

³⁷ David Halperin, *Who Owns the Awful Corinthian Colleges? Wells Fargo, Marc Morial, Pension Funds*, REPUBLICAN REPORT (Oct. 15, 2013 12:51 pm), <http://www.republicreport.org/2013/who-are-corinthian-colleges/>.

³⁸ Ben Conarck, *SEC's Corinthian Colleges Probe Held Up By Privacy Issues*, LAW360 (Mar. 23, 2015, 7:47 PM ET), <http://www.law360.com/articles/634755/sec-s-corinthian-colleges-probe-held-up-by-privacy-issues>.

³⁹ Alan Pyke, *When Scummy For-Profit Colleges Need a Hand, They Turn to the Republican Party*, THINKPROGRESS.ORG (May 5, 2015, 4:07 PM), <http://thinkprogress.org/economy/2015/05/05/3655138/corinthian-bankruptcy-crossroads-gps/> (“At the same time Corinthian Colleges, Inc. was luring ambitious people into overpriced classes for underpowered degrees, the now-bankrupt company was also funding one of the most prominent secret-donor organizations on the Republican side of the election-influencing industry. The company still owes money to Crossroads GPS, according to a bankruptcy filing that lists every person and organization to which Corinthian is indebted. The list also includes a variety of D.C.-area heavy hitters like the American Enterprise Institute and the U.S. Chamber of Commerce...”).

ground gun laws, to environmental deregulation.⁴⁰ The U.S. Chamber is a politically active trade association that does not name its sources. Meanwhile, Crossroads GPS doesn't reveal its donors.⁴¹ But thanks to bankruptcy, at least one mystery is solved as apparently Corinthian was one source of their funds.

Similarly, the bankruptcy of coal company Alpha Natural Resources (a publicly traded company which bought Massey Energy) revealed money going to a number of dark money conduits.⁴² According to reporter Lee Fang:

Alpha Natural Resources also helped finance campaign entities associated with the Koch brothers campaign network, including Americans for Prosperity, Themis Trust (a campaign data company), and Freedom Partners Chamber of Commerce, a clearinghouse used to fund a range of organizations supporting Republican election efforts. The Institute for Energy Research, an advocacy group founded by Charles Koch that lobbies in support of fossil fuel subsidies and against renewable energy policies, had a financial relationship with Alpha Natural Resources.⁴³

Thus bankruptcy filings may be one of the few places where the public learns (albeit long after the fact) where at least a sliver of corporate money was spent in politics.

In other lawsuits, the controversy that is being litigated is compliance with a state's campaign finance disclosure laws and whether a given litigant is required to disclose money that was spent during an election. In Montana, a dark money group called Western Tradition Partnership (WTP) (which later changed its name to American Tradition Partnership) tried to keep its funders secret while spending in Montana elections. When WTP was raising money it included this solicitation:

we're not required to report the name or the amount of any contribution that we receive. So, if you decide to support this program, no politician, no bureaucrat, and no radical environmentalist will ever know you helped make this program possible. The only thing we plan on reporting is our success to contributors like you who can see the benefits of a program like this. You can just sit back on election night and see what a difference you've made.⁴⁴

⁴⁰ Peter Overby, *Boycotts Hitting Group Behind 'Stand Your Ground'*, NPR (Apr. 5, 2012 3:31 AM ET), <http://www.npr.org/2012/04/05/150013705/boycotts-hitting-group-behind-stand-your-ground>.

⁴¹ Kim Barker, *Karl Rove's Dark Money Group Promised IRS It Would Spend Limited Money on Elections*, PROPUBLICA.ORG (Dec. 14, 2012), <https://www.propublica.org/article/what-karl-roves-dark-money-nonprofit-told-the-irs> (stating that in 2010 Crossroads GPS told the IRS it would focus on social welfare instead of on influencing elections).

⁴² Lee Fang, *Giant Coal Company Bankruptcy Reveals Secret Ties to Climate Denial, GOP Dark Money Groups*, THE INTERCEPT (Aug. 25, 2015, 1:34 p.m.), <https://theintercept.com/2015/08/25/coal-giant-bankruptcy-reveals-secret-ties-republican-dark-money-groups/>.

⁴³ *Id.*

⁴⁴ *Western Tradition Partnership v. Attorney General of Montana* 2011 MT 328 at *13 (Mont. 2011), <http://electionlawblog.org/wp-content/uploads/MT-expenditures-decision.pdf>.

As it turned out, this promise of secrecy was one that they could not keep after a judge ordered disclosures. According to PBS's *Frontline*:

The WTP bank records, which cover a period from March 2008 to December 2010, show that the group raised almost \$1.1 million from other social welfare nonprofits, corporations, a political committee and individuals. It received \$650,000 from the nonprofits, \$70,000 from an Oklahoma businessman and his company and \$50,000 from a Colorado homebuilder.⁴⁵

Two dark money groups settled with California for a \$1 million fine after they hid the source of spending for two California ballot initiatives in 2012.⁴⁶ As *Pro Publica* explained:

As part of the settlement, the Center to Protect Patient Rights conceded it was responsible for funneling \$11 million through Americans for Responsible Leadership to a political committee spending money to fight a tax-hike measure and to support a proposition restricting unions' political power. The Center to Protect Patient Rights also gave an additional \$4 million to another dark money group, the American Future Fund, which gave the money to another political committee spending on the anti-union measure.⁴⁷

But again, the money trail falls cold in this case as the groups revealed that one source of their dark money was another dark money group.⁴⁸ Thus the courts can be a last resort to pry open an otherwise dark money group that is spending in elections where transparency is required by law.

Besides using campaign finance statutes to gain disclosures, another path to transparency is using the rights of shareholders under Delaware corporate law to inspect a corporation's books and records.⁴⁹ In 2013, the Comptroller of the State of New York sued Qualcomm in his capacity as a shareholder to get it to reveal its political expenditures. Qualcomm settled the suit and agreed to be transparent about its political spending. Some of the spending Qualcomm now reveals is money going to the U.S. Chamber of Commerce, a dark money conduit. In its latest report Qualcomm gave

⁴⁵ Kim Barker, Rick Young & Emma Schwartz, *Dark Money Group's Donors Revealed*, FRONTLINE (Nov. 5, 2012), <http://www.pbs.org/wgbh/frontline/article/dark-money-groups-donors-revealed/>.

⁴⁶ Viveca Novak, *California Investigation Reveals Some Donors in Dark Money Scheme*, CTR. FOR RESPONSIVE POLITICS (Oct. 24, 2013), <http://www.opensecrets.org/news/2013/10/california-investigation-reveals-so/> (listing once secret donors to Americans for Job Security including: Jesse Rogers of Altman Capital, \$450,000; Greg Penner of Wal Mart, \$500,000; Margaret Bloomfield of Baron Real Estate Fund, \$500,000; Glen Stearns and Stearns Lending, \$250,000; The Tulley and Elise Friedman Fund, \$100,000; The American Council of Engineering Companies of California, \$500,000; Wayne Hughes, \$450,000; and Hitchcock Automotive, \$100,000).

⁴⁷ Kim Barker, *Dark Money Groups Pay \$1 Million in Fines in California Case*, PROPUBLICA (Oct. 24, 2013, 7:04 p.m.), <https://www.propublica.org/article/dark-money-groups-pay-1-million-dollars-in-fines-in-california-case>.

⁴⁸ Paul Blumenthal, *'Dark Money' Group In Arizona Discloses Donors As Other 'Dark Money' Groups*, HUFF. POST (Nov. 5, 2012), http://www.huffingtonpost.com/2012/11/05/dark-money-group-california_n_2077382.html

⁴⁹ 8 Del. C. § 220.

half a million to the Chamber--\$262,500 for non-deductible (read political) purposes. In 2015, the New York Comptroller sued Oracle using the same theory to try to get more transparency from the firm.⁵⁰ The Oracle case is still open.

The most popular route for dark money 2010-2016 has been through 501(c)(4) social welfare groups. And much of that money was flowing through one prolific 501(c)(4) called Crossroads GPS, co-founded by Karl Rove. Of the \$257 million spent by 501(c)(4)s in 2012, \$70 million went through Crossroads GPS and of the \$118 million spent by 501(c)(4)s in 2014, \$26 million went through Crossroads GPS.⁵¹ But this organization is just one more stop on a trip down a dark money rabbit hole as its tax filings showed that Crossroads GPS gave millions to other politically active nonprofits in 2014 to influence the midterm elections.⁵² The second most popular route for dark money is flowing through 501(c)(6) trade associations. These trade associations lobby, spend in elections and litigate. One of the primary objectives of litigation is deregulating in one sphere or another.⁵³

So why are corporations hiding the ball with their political spending? One general reason is to avoid accountability—especially accountability from those people who are indirectly and unwittingly funding their political spending. As Professors Fisk and Chemerinsky argued in a recent piece:

In *Citizens United*, *Boy Scouts of America v. Dale*, and other recent cases, the Supreme Court has given organizations a newly-robust First Amendment right to use the

⁵⁰ Freeman Klopott, *Oracle Sued by N.Y. Pension Over Political-Giving Disclosure*, BLOOMBERG (Oct. 28, 2015), <http://www.bloomberg.com/news/articles/2015-10-28/oracle-sued-by-new-york-pension-fund-over-political-funding>.

⁵¹ *Crossroads GPS Outside Spending Summary 2012*, CTR. FOR RESPONSIVE POLITICS <https://www.opensecrets.org/outsidespending/detail.php?cmte=C30001655&cycle=2012>; *American Crossroads/ Crossroads GPS Outside Spending Summary 2014*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/detail.php?cycle=2014&cmte=American+Crossroads%2FCrossroads+GPS>.

⁵² Carrie Levine, *New tax documents show Crossroads GPS poured millions into 2014 Senate race*, PUBLICINTEGRITY.ORG (Nov. 17, 2015), <https://www.publicintegrity.org/2015/11/17/18865/new-tax-documents-show-crossroads-gps-poured-millions-2014-senate-race>.

⁵³ Patrick Caldwell, *Did You Know That Antonin Scalia's Son Is Sabotaging Wall Street Reform?*, MOTHER JONES (July/August 2014), <http://www.motherjones.com/politics/2014/07/eugene-scalia-court-antonin-financial-reform-dodd-frank>; JENNIFER TAUB, OTHER PEOPLE'S HOUSES 291 (2014) ("since Dodd-Frank was enacted in 2010, the financial services lobby devoted considerable resources to delay implementation of the strongest parts...").

entity's money in ways that stakeholders within the organization may find anathema ...to advance the expressive interest of the entity.⁵⁴

But by lobbying, litigating and electioneering through an opaque group like a trade association, each company has hidden their role in advancing a particular agenda, especially if that agenda is contrary to the wishes of the company's customers, investors or regulators,⁵⁵ or are ones that are rightfully vilified-- like climate change denial.⁵⁶ Another theory for why corporations hide their spending is to avoid alienating whoever is elected if the spending was made against particular politician. This might explain why so much dark money was secretly spent against the reelection of President Obama.

Conclusion

In sum, disclosures through litigation have revealed corporate money going to trade associations like the U.S. Chamber of Commerce; corporate money flowing to the American Legislative Exchange Council (also known as ALEC); and corporate money seeping into politically active 501(c)(4)s like Karl Rove's Crossroads GPS.⁵⁷ Leaked disclosures have shown corporate backing of the Republican Governors Association.⁵⁸ Trade associations like the Business Roundtable and the U.S. Chamber have recently renewed their admonition to member corporations to resist calls to be more transparent vis a vis the firm's political spending.⁵⁹ So voluntary disclosures are likely to be slow in materializing.

⁵⁴ Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights after Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023 (2012-2013).

⁵⁵ Gretchen Goldman & Christina Carlson, *Tricks of the Trade: How Companies Anonymously Influence Climate Policy Through Their Business and Trade Associations*, CTR. FOR SCIENCE & DEMOCRACY AT THE UNION OF CONCERNED SCIENTISTS (Jan. 2014), <http://www.ucsusa.org/sites/default/files/legacy/assets/documents/center-for-science-and-democracy/tricks-of-the-trade.pdf>.

⁵⁶ Douglas Fischer, *"Dark Money" Funds Climate Change Denial Effort: A Drexel University study finds that a large slice of donations to organizations that deny global warming are funneled through third-party pass-through organizations that conceal the original funder*, THE DAILY CLIMATE (Dec. 23, 2013), <http://www.scientificamerican.com/article/dark-money-funds-climate-change-denial-effort/> ("In all, 140 [dark money] foundations funneled \$558 million to almost 100 climate denial organizations from 2003 to 2010. Meanwhile the traceable cash flow from more traditional sources, such as Koch Industries and ExxonMobil, has disappeared.").

⁵⁷ Ciara Torres-Spelliscy, *Courts Shine Light on Dark Money*, BRENNAN CTR. BLOG (May 26, 2015), <https://www.brennancenter.org/blog/courts-shine-light-dark-money>; Lee Fang, *Corinthian Colleges Secretly Funded D.C. Think Tanks, Dark Money Election Efforts*, THE INTERCEPT (May 4 2015, 3:47 p.m.), <https://theintercept.com/2015/05/04/bankruptcy-filing-shows-corinthian-colleges-secretly-funded-d-c-think-tanks-dark-money-election-efforts/> ("The [bankruptcy] filing doesn't list amounts, but shows that Corinthian made payments to Crossroads G.P.S., ... The American Legislative Exchange Council, a nonprofit that helps corporate interests draft model legislation, is listed as a creditor.").

⁵⁸ Jonathan Weisman, *G.O.P. Error Reveals Donors and the Price of Access*, N.Y. TIMES (Sept. 24, 2014), <http://www.nytimes.com/2014/09/25/us/republicans-corporate-donors-governors.html>.

⁵⁹ Dave Levinthal, *Trade groups to top corporations: Resist political disclosure* U.S. Chamber and allies say transparency efforts 'used to attack companies', CTR. FOR POLITICAL INTEGRITY (Jan. 27, 2016).

Until laws are changed to provide transparency across the board,⁶⁰ dark money will continue to present a democratic accountability and a corporate governance accountability problem.⁶¹ As a result, the public will only catch a glimpse of who is really paying for elections and unknown unknowns will grow.

⁶⁰ Ciara Torres-Spelliscy, *Safeguarding Markets from Pernicious Pay to Play: A Model Explaining Why the SEC Regulates Money in Politics*, 12(2) CONNECTICUT PUBLIC INTEREST L. J. 361 (2012-2013).

⁶¹ Brian D. Einhorn, *The Dying of the Light*, 93 Mich. B.J. 16, 16 (May 2014) (The President of the Michigan Bar stating “[t]his new ‘right’ is a right to fund campaign ads secretly. It is a right to be free from criticism and consequences while participating (at least from the shadows) in the democratic process. This ‘right’ has no basis in law and, in my view, is fundamentally anti-democratic.”); Robert K. Young, *Retired Judges: Impact of Citizens United Decision Worse Than Feared*, 35 Pa. Law. 46, 47 (Sept./Oct. 2013)(Retired Court of Common Pleas Court Judge Young states, “[a]side from the misrepresentations often made in advertisements and political messages offered up by anonymous donors, corporate secret spending is generally not disclosed or approved by shareholders, whose money might be better used to increase dividends or lower prices charged to consumers.”).