

# BRENNAN CENTER FOR JUSTICE

at New York University School of Law

## REQUIRING GOVERNMENT CONTRACTORS TO DISCLOSE POLITICAL SPENDING

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### Introduction

Who pays for American elections? Too often it is no longer possible to know. In significant part as a result of *Citizens United* and related U.S. Supreme Court decisions, shadowy groups can collect and spend vast sums on political advertisements without revealing their contributors. This is “dark money,” and since *Citizens United* in 2010, groups have spent well over \$600 million of it in federal elections,<sup>1</sup> much of it concentrated in a handful of competitive races.

In his most recent State of the Union address, President Barack Obama spoke out against this wave of dark money. He was right to do so. But it is time for more than words. The President has the power and authority to immediately order disclosure of political spending by government contractors. We urge him to act now.

Americans deserve to know who is trying to influence them with political advertisements, and what those advertisers want from the government. Political spending by a veterans’ group to elect a candidate, for instance, may signal something different than spending by a major defense contractor. Without knowing who is behind efforts to sway them, voters cannot make truly informed decisions, and we lose one of the last remaining checks on corruption by special interests.

The good news is the President can take a critical step to address this problem — without the cooperation of a Congress that has shown itself unable and unwilling to do so — by issuing an Executive Order to require government contractors to disclose all of their campaign contributions.

Such disclosure would not bring all dark money to light, but it would expose a type of dark money that should be especially troubling: campaign contributions that could have been given to influence a contract awarded by the government. The federal government spends hundreds of billions of dollars on such contracts every year. Disclosure would protect the integrity of the contract award process, and provide the public with confidence that taxpayer money is not being misused to reward big donations.

Moreover, we know that government contractors, their affiliates, and principals are big contributors of disclosed money;<sup>2</sup> there is every reason to believe a significant portion of the dark money that has entered our politics in recent years could be from them as well. Shining light on this spending will make our democracy as a whole more transparent — exactly what the President says he wants.

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1. *Outside Spending by Disclosure, Excluding Party Committees*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/outsidespending/disclosure.php> (last updated Mar. 9, 2015). This figure likely is under-inclusive, because it represents only reported spending by dark money groups that do not disclose any of their donors.

2. See Jay Riestenberg, *Top Federal Contractors’ Disclosed Spending Tripled Over the Last Decade. But What About their Undisclosed Spending?*, COMMON CAUSE DEMOCRACY WIRE (Mar. 11, 2015), <http://www.commoncause.org/democracy-wire/federal-contractors-disclosed.html>.

## Billions of Taxpayer Dollars are at Stake

Dark money is a problem no matter where it comes from, but is especially troubling coming from federal contractors. Pay to play — giving public officials gifts or contributions to influence contracting decisions — is “[a]n unspoken, but entrenched and well-understood practice . . .”<sup>3</sup> Nowhere else is there a greater risk of corruption. The federal government spent approximately \$460 billion in FY2013 on private sector contracts.<sup>4</sup> Almost 40 percent of that total, roughly \$177 billion, went to just 25 major companies.<sup>5</sup> Since 2000, the top 10 federal contractors have made **\$1.5 trillion** from the government.<sup>6</sup>

With so much money at stake, the imperative to court those in power is obvious. As of 2011, federal contractors made up 33 of the 41 largest disclosed corporate campaign contributors over the previous two decades.<sup>7</sup> In the 2014 cycle, the top 25 federal contractors all made disclosed contributions through their PACs; in total, they gave more than \$30 million.<sup>8</sup> Contributions by the top five corporate contractors have more than doubled since 2004.<sup>9</sup>

There is nothing to stop these same companies, along with the various individuals and entities affiliated with them, from contributing unlimited amounts to dark money groups who do not disclose some or all of their donors. Such secret election spending can foster a hidden pay to play culture, in which awards go to those best able to play the political money game, rather than those offering the best, most cost-effective product or service.

Because the risks of corruption are so serious, a number of states ban contractors and the entities and individuals associated with them from making political contributions.<sup>10</sup> Others opt for the less-burdensome alternative of disclosure,<sup>11</sup> which, while it may not always prevent improper dealings, at least ensures a measure of transparency so the public can judge for itself whether officials and contractors have behaved appropriately.

Unfortunately, notwithstanding that modern campaign finance laws were passed partly in response to the pay to play scandals of the Nixon era,<sup>12</sup> federal pay to play protections today are quite weak with respect to campaign contributions. Federal law prohibits contracting entities themselves from contributing to candidates and political parties.<sup>13</sup> But that prohibition does not extend to directors, officers, shareholders, or corporate PACs, and there is absolutely nothing to prevent a contractor or any individual or entity affiliated with it from giving unlimited funds to a dark money group.<sup>14</sup>

This lack of protections creates substantial risks. The federal government relies on private contractors to, among many other things, supply our military, care for our veterans, guard our embassies, manage our prisons, test the quality of our air and water, and even police other contractors.<sup>15</sup> Pay to play practices do not simply waste tax dollars. By compromising the integrity of the contract award process, they can have a huge impact on American lives.

3. ELIZABETH KENNEDY AND ADAM SKAGGS, BRENNAN CTR. FOR JUSTICE, THE PEOPLE'S BUSINESS: DISCLOSURE OF POLITICAL SPENDING BY GOVERNMENT CONTRACTORS 5 (2011), available at <https://www.brennancenter.org/analysis/people%E2%80%99s-business-disclosure-political-spending-government-contractors> (quoting former SEC Chair Mary Schapiro).
4. Danielle Ivory, *Federal Contracts Plunge, Squeezing Private Companies*, N.Y. TIMES, Jan. 15, 2014, available at <http://www.nytimes.com/2014/01/16/business/federal-contracts-plunge-squeezing-private-companies.html>.
5. FISCAL YEAR 2013 TOP 100 CONTRACTORS REPORT, FEDERAL PROCUREMENT DATA SYSTEM — NEXT GENERATION, available at <https://www.fpds.gov/fpdsng/cms/index.php/en/reports/62-top-100-contractors-report3.html>.
6. Kiran Dhillon, *What You Need to Know about the Top Federal Contractors, in Three Graphs*, TIME, June 24, 2014, available at <http://time.com/2917578/government-contractors-lockheed/>.
7. Richard Wolf, *Obama Proposal Could Shed Light on Campaign Cash*, USA TODAY, Apr. 22, 2011, available at [http://content.usatoday.com/communities/theoval/post/2011/04/obama-proposal-could-shed-light-on-campaign-cash-1#.VP9c\\_S4sBsR](http://content.usatoday.com/communities/theoval/post/2011/04/obama-proposal-could-shed-light-on-campaign-cash-1#.VP9c_S4sBsR) (quoting Paul Blumenthal of the Sunlight Foundation).
8. Jay Riestenberg, *Top Federal Contractors Spent \$30.6 Million on the Federal Election (That We Know About)*, COMMON CAUSE DEMOCRACY WIRE (Jan. 22, 2015), <http://www.commoncause.org/democracy-wire/top-federal-contractors-spent-30-million.html>.
9. Jay Riestenberg, *Top Federal Contractors' Disclosed Spending Tripled Over the Last Decade. But What About their Undisclosed Spending?*, COMMON CAUSE DEMOCRACY WIRE (Mar. 11, 2015), <http://www.commoncause.org/democracy-wire/federal-contractors-disclosed.html>.
10. ELIZABETH KENNEDY AND ADAM SKAGGS, BRENNAN CTR. FOR JUSTICE, THE PEOPLE'S BUSINESS: DISCLOSURE OF POLITICAL SPENDING BY GOVERNMENT CONTRACTORS 8 (2011), available at <https://www.brennancenter.org/analysis/people%E2%80%99s-business-disclosure-political-spending-government-contractors>.
11. *Id.* at 9.
12. CRAIG HOLMAN, PHD AND MICHAEL LEWIS, PUBLIC CITIZEN, PAY-TO-PLAY LAWS IN GOVERNMENT CONTRACTING AND THE SCANDALS THAT CREATED THEM 3-4 (June 26, 2012), available at <http://www.citizen.org/documents/wagner-case-record.pdf>.
13. See 52 U.S.C. § 30119. A case challenging the constitutionality of this provision with respect to certain contractors was argued before the D.C. Circuit on September 30, 2014. No decision has issued. See *Wagner v. FEC*, No. 13-5162 (D.C. Cir.).
14. Although some companies claim to voluntarily disclose some election spending, barely a quarter of the fifteen largest federal contractors disclose all of their contributions to both 501(c)(4) “social welfare” organizations and 501(c)(6) trade associations, the two most prevalent types of dark money groups, according to Public Citizen. See Lisa Gilbert, *Taxpayer Dollars and Disclosure in Politics*, ROLL CALL, Mar. 17, 2015, available at <http://www.rollcall.com/news/taxpayer-dollars-and-disclosure-in-politics-commentary-240732-1.html?pg=1>.
15. See, e.g., *Southwest Research Institute Wins \$20 million EPA Contract for Emissions Testing, Analytical Services*, YAHOO!NEWS (Feb. 24, 2015), <http://finance.yahoo.com/news/southwest-research-institute-wins-20-211900595.html>; Kiran Dhillon, *What You Need to Know about the Top Federal Contractors, in Three Graphs*, TIME, June 24, 2014, available at <http://time.com/2917578/government-contractors-lockheed/>; Tom Bowman, *No U.S. Troops, but an Army of Contractors in Iraq*, NPR, Dec. 27, 2011, available at <http://www.npr.org/2011/12/27/144198497/no-u-s-troops-but-an-army-of-contractors-in-iraq>; Alice Lipowicz, *14 Contractors Make VA's \$12B T4 Contract Winners List*, WASH. TECH. (July 5, 2011), <http://washingtontechnology.com/articles/2011/07/05/va-awards-12b-t4-contract-to-14-companies.aspx>; Scott Shane, *In Washington, Contractors Take on Biggest Role Ever*, N.Y. TIMES, Feb. 4, 2007, available at <http://www.nytimes.com/2007/02/04/washington/04contract.html?pagewanted=all>; *Contract Prisons*, FEDERAL BUREAU OF PRISONS, [http://www.bop.gov/about/facilities/contract\\_facilities.jsp](http://www.bop.gov/about/facilities/contract_facilities.jsp) (last visited March 24, 2015).

## The History of Contracting Scandals Shows the Risk of Corruption is Real and Significant

A good example of the sort of pervasive pay to play culture that political spending by contractors can foster emerged last decade around the practice of Congressional earmarking (inserting money for special projects into appropriations bills outside of the normal budgeting process). In 2010, the House Ethics Committee acknowledged a “widespread perception” among earmark recipients that political donations would increase their chances of receiving funds.<sup>16</sup> In one example, *The New York Times* reported that Rep. Harold Rogers (R-Ky.), a powerful member of the House Appropriations Committee, inserted an earmark for the Army to purchase \$17,000 drip pans for Black Hawk helicopters — about seven times what they should have cost — from a company owned by his contributors (Rogers and his contributors denied wrongdoing).<sup>17</sup> The paper reported that another member, Rep. Peter Visclosky (D-Ind.), allegedly solicited contributions from executives at an intelligence software firm that had received a \$2.4 million earmark. As one of the firm’s executives later wrote to his colleagues in an e-mail quoted by the paper, the opportunity to lobby the congressman and his staff “would not have been possible without your generous contributions.”<sup>18</sup> The House Ethics Committee declined to pursue an investigation.<sup>19</sup>

While traditional earmarks are no longer permitted in many instances, members of Congress continue to exert significant influence over how federal agencies spend appropriated funds — including with respect to contractors. In fact, the most powerful members probably have more clout than ever, which they typically deploy through informal back channels to agency officials.<sup>20</sup> Last year, for example, *The Washington Times* reported that a number of members — including former Rep. Robert Andrews (D-N.J.), once the Chairman of the House Armed Services Committee’s procurement review panel — lobbied Veterans Administration officials on behalf of

FedBid, a reportedly troubled procurement contractor.<sup>21</sup> According to the story, the VA’s senior procurement official had placed FedBid under a moratorium for, among other things, allegedly permitting “unauthorized, potentially counterfeit medical devices” to enter the VA’s supply chain (FedBid denied the allegations). Under congressional pressure from Rep. Andrews and other members who received campaign donations from FedBid, the moratorium was lifted; the VA later cut its ties to the company.<sup>22</sup>

Apart from the federal government’s long experience with pay to play, there have also been numerous scandals at the state level. Examples include former Illinois Gov. Rod Blagojevich’s notorious efforts to shake down state contractors for campaign contributions; the “Coingate” scandal in Ohio, in which a politically-connected contractor reportedly lost millions of dollars in state money through bad investments in rare coins; and the swirl of allegations against a major contractor for Boston’s Big Dig (the largest public works project in U.S. history), which, according to news reports, used political donations to shield itself from concerns about safety and cost overruns.<sup>23</sup> In these and many other cases, a pervasive pay to play culture cost taxpayers millions of dollars, undermined confidence in government, and sometimes (as was alleged in the Big Dig case) endangered lives.

Whether pay to play is similarly rampant in federal contracting today is unclear, because so much federal election spending remains secret. But given how much contractors already spend on disclosed contributions, their contributions to dark money groups likely are significant. It is implausible to think that the politicians who benefit from such spending do not feel gratitude towards their benefactors — and when the benefactor is a federal contractor, opportunities to tip the scale in its favor in return are legion. Without disclosure, such conduct will remain immune from routine public scrutiny — at least until the next major scandal comes to light.

16. Eric Lichtblau, *Earmark Abuse Feared After Ethics Panel Ruling*, N.Y. TIMES, Mar. 4, 2010, available at [http://www.nytimes.com/2010/03/05/us/politics/05ethics.html?\\_r=0](http://www.nytimes.com/2010/03/05/us/politics/05ethics.html?_r=0).

17. Eric Lichtblau, *Earmark Puts 17,000 Pans on Army Helicopters*, N.Y. TIMES, May 18, 2012, available at <http://www.nytimes.com/2012/05/19/us/politics/behind-armys-17000-drip-pan-harold-rogers-earmark.html>.

18. Eric Lichtblau, *Earmark Abuse Feared After Ethics Panel Ruling*, N.Y. TIMES, Mar. 4, 2010, available at [http://www.nytimes.com/2010/03/05/us/politics/05ethics.html?\\_r=0](http://www.nytimes.com/2010/03/05/us/politics/05ethics.html?_r=0).

19. *Id.*

20. See Kate Brannen, *Congressional Earmark Ban Changes Business on Capitol Hill*, DEFENSENEWS (July 5, 2012), <http://archive.defensenews.com/article/20120705/DEFREG02/307050003/>.

21. Jim McElhatton, *Congress Defended FedBid, the Disgraced Contractor Ousted by the VA*, WASH. TIMES, Nov. 27, 2014, available at <http://www.washingtontimes.com/news/2014/nov/27/congress-defended-disgraced-contractor-fedbid/?page=all>.

22. *Id.*; see also Jim McElhatton, *Democratic Congressman Pressured VA to Help Politically-Connected Congressman*, WASH. TIMES, Oct. 29, 2014, available at <http://www.washingtontimes.com/news/2014/oct/29/jim-moran-pressured-va-on-behalf-of-reverse-auction/?page=all>; Jim McElhatton, *VA Severs Ties with Embattled Contractor that Sought to ‘Assassinate’ Official’s Character*, WASH. TIMES, Nov. 20, 2014, available at <http://www.washingtontimes.com/news/2014/nov/20/va-cuts-ties-to-reverse-auction-contractor-fedbid-/?page=all>.

23. CRAIG HOLMAN, PHD AND MICHAEL LEWIS, PUBLIC CITIZEN, PAY-TO-PLAY LAWS IN GOVERNMENT CONTRACTING AND THE SCANDALS THAT CREATED THEM 12, 17 (JUNE 26, 2012), available at <http://www.citizen.org/documents/wagner-case-record.pdf>; Raphael Lewis and Sean P. Murphy, *Lobbying Translates Into Clout*, BOSTON GLOBE, Feb. 11, 2003, available at <http://www.boston.com/globe/metro/packages/bechtel/021103.shtml>.

## Previous Efforts to Address Dark Money Spending

Since *Citizens United*, Congress and various agencies have wrestled with the dark money problem, but to little avail. In 2010, Congress came close to passing the DISCLOSE Act, which would have eliminated many dark money loopholes in federal law, but the law was filibustered in the Senate, where it fell one vote short of cloture.<sup>24</sup> The FEC, our nation's campaign finance regulator, is mired in even greater dysfunction; commissioners there have repeatedly deadlocked on proposals to address dark money.<sup>25</sup> And while there have been glimmers of hope at other federal agencies, including a proposal currently before the SEC to require disclosure for publicly-traded companies<sup>26</sup> and an IRS rulemaking to address political spending by tax exempt nonprofits,<sup>27</sup> those initiatives are moving very slowly. The IRS has already stated it is unlikely to take any action before the 2016 election.<sup>28</sup>

This climate of inaction has not been lost on the Obama Administration. In April 2011, a draft was leaked of an Administration executive order that would have required prospective contractors to disclose dark money spending along with their bids. The draft order noted that the contract decision process must be “merit-based” and “free from [] undue influence,” and that the public must also have “the utmost confidence” in that process.<sup>29</sup> To further these objectives, the draft order would have required entities seeking federal contracts to disclose all political spending by the entities and their directors, officers, affiliates, and subsidiaries aggregating more than \$5000.<sup>30</sup>

When the proposal became public, many members of Congress and reform groups expressed support. As

some members explained in a letter to the President, after *Citizens United*, “companies are allowed to spend unlimited sums on independent expenditures in election campaigns. Absent public disclosure, there will certainly be some contractors who would seek to influence the awarding of contracts through unreported political contributions.”<sup>31</sup>

Others criticized the proposal, however, on the grounds that forcing those bidding on contracts to include political spending on their bid applications would itself inject politics into the award process. The House Committee on Small Business held a joint hearing with the Committee on Oversight and Government Reform entitled “Politicking Procurement: Will President Obama’s Proposal Curb Free Speech and Hurt Small Business?”<sup>32</sup> In his opening statement, Oversight Chairman Darrell Issa (R-Calif.) warned of “bipartisan and bicameral alarm” about the draft order, while Rep. Tim Walberg (R-Mich.) charged that it would create a “partisan spoil system” if enacted.<sup>33</sup> Another member, Rep. Sam Graves (R-Mo.), suggested that politically motivated appointees would penalize small businesses who had not donated, and that businesses would fear “improper scheming,” creating a chilling effect.<sup>34</sup> He also argued that the draft order would force small businesses out of the market because they would not be able to comply with its recordkeeping and reporting requirements.<sup>35</sup>

In light of these concerns, Republicans introduced several bills intended to prevent the President from issuing the draft order, two of which became law. First, Congress passed a rider to the 2012 appropriations act providing that no funds could be used “to recommend or require any entity submitting an offer for a Federal contract to

24. Dan Eggen, *Bill on Political Ad Disclosures Falls a Little Short in Senate*, WASH. POST, July 28, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/27/AR2010072704656.html>.
25. See Statement of Commissioner Ellen L. Weintraub on the 2014 *Citizens United* Rulemaking, Oct. 9, 2014, available at [http://www.fec.gov/members/weintraub/state-ments/2014-10-09\\_Statement\\_of\\_Commissioner\\_Weintraub\\_on\\_2014\\_CU\\_Rulemaking.pdf](http://www.fec.gov/members/weintraub/state-ments/2014-10-09_Statement_of_Commissioner_Weintraub_on_2014_CU_Rulemaking.pdf).
26. Sarah Lynch, *Activists Demand U.S. SEC Rule to Make Companies Reveal Political Spending*, REUTERS, Sept. 4, 2014, available at <http://www.reuters.com/article/2014/09/04/us-usa-election-sec-politicalspending-idUSKBN0GZ2JM20140904>.
27. Julie Patel, *IRS Chief Promises Stricter Rules for 'Dark Money' Nonprofit Groups*, PUBLIC INTEGRITY, June 28, 2014, available at <http://www.publicintegrity.org/2014/06/18/14960/irs-chief-promises-stricter-rules-dark-money-nonprofit-groups>.
28. Theodor Meyer, *New IRS Rules on Dark Money Likely Won't Be Ready before 2016 Election*, HUFFINGTON POST (Jan. 5, 2015), [http://www.huffingtonpost.com/2015/01/05/irs-dark-money\\_n\\_6417050.html](http://www.huffingtonpost.com/2015/01/05/irs-dark-money_n_6417050.html); see also Alec MacGillis, *Mary Jo White Doesn't Scare Anyone: Obama's SEC Chief Has Whiffed on Regulating Corporations*, NEW REPUBLIC, May 4, 2014, available at <http://www.newrepublic.com/article/117632/secs-mary-jo-white-whiffs-transparency-wall-street-dark-money> (describing SEC Chair's reluctance to move forward with disclosure rulemaking).
29. See Draft Executive Order: Disclosure of Political Spending by Government Contractors, available at <http://www.scribd.com/doc/53440033/Executive-Order-Disclosure-of-Political-Spending-by-Government-Contractors> (last visited March 24, 2015).
30. Matea Gold and Tom Hamburger, *Obama Order Could Make Corporate Political Spending Public*, L.A. TIMES, May 8, 2011, available at <http://articles.latimes.com/2011/may/08/nation/la-na-0509-donor-disclose-20110508>.
31. Letter from Michael E. Capuano et al. to President Barack Obama (June 2, 2011), available at <http://www.citizen.org/documents/Letter-EO-Contractor-Contributions-20110602.pdf>. The letter was supported by the Brennan Center, Campaign Legal Center, Common Cause, Democracy 21, Public Citizen, and U.S. PIRG. See Press Release, Brennan Ctr. for Justice, *Reform Groups Support Letter in Favor of President Obama's Proposed Transparency Executive Order* (June 3, 2011), <http://www.brennancenter.org/press-release/reform-groups-support-letter-favor-president-obama%E2%80%99s-proposed-transparency-executive>.
32. *Politicking Procurement: Will President Obama's Proposal Curb Free Speech and Hurt Small Business? Before the H. Comm. on Oversight and Gov't Reform and the H. Comm. on Small Business*, 112th Cong. (2011), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hrg70516/pdf/CHRG-112hrg70516.pdf>.
33. *Id.* at 2, 111.
34. *Id.* at 32.
35. *Id.* at 32-33.

disclose [political spending] as a condition of submitting the offer.”<sup>36</sup> Identical language appears in the 2015 Consolidated Appropriations Act passed last December.<sup>37</sup> Second, a permanent prohibition whose scope is limited to certain military agencies was added in late 2011 to the Defense Authorization Act.<sup>38</sup> Under the law (10 U.S.C. § 2335), military agencies may not require a contractor to submit “political information” (1) “as part of a solicitation . . . or any other form of communication designed to solicit offers in connection with the award of a contract;” or (2) “during the course of contract performance as part of the process associated with modifying a contract or exercising a contract option . . .”<sup>39</sup>

Apart from these relatively narrow pieces of legislation, Reps. Issa, Graves, and Tom Cole (R-Okla.) also introduced H.R. 2008, the “Keeping Politics out of Federal Contracting Act of 2011.”<sup>40</sup> A Senate version was sponsored by Sen. Susan Collins (R-Me.).<sup>41</sup> The first part of the bill contained language almost identical to the language that is now in 10 U.S.C. § 2335, but the bill also had a subsection forbidding agencies from requiring disclosure of political spending “any time prior to contract completion and final contract closeout.”<sup>42</sup> Neither the House nor Senate acted on this broader legislation.

### **The President Retains the Power and Authority to Immediately Order Disclosure**

Congress’s failure to pass H.R. 2008 means that the President retains ample authority to issue an Executive Order requiring contractors to disclose their political spending after they have been awarded a government contract. On their face, the two pieces of legislation that did pass only preclude a disclosure requirement as part of the bid process and as a condition for modifying a contract or exercising a contract option. Under basic statutory interpretation principles, “there must be

evidence that Congress meant something other than what it literally said before a court can depart from [that] plain meaning.”<sup>43</sup> While members introduced a bill that would have prohibited requiring disclosure at “any time prior to contract completion and final contract closeout,” that broader legislation went nowhere.<sup>44</sup> It follows that Congress only intended to foreclose an Executive Order in limited circumstances.<sup>45</sup>

Requiring disclosure after a contract has been awarded would provide all of the transparency and accountability that the 2011 draft executive order would have provided, without risking any political taint to the bidding process. Such an order would simply put contractors in the same position that they were in less than a decade ago, when they could not give unlimited funds to dark money groups. Moreover, it is quite likely that many of the government officials involved in decision-making on contract awards already know about the dark money spending that benefits themselves or their allies. A post-award disclosure requirement will simply let the public see what those on the inside already know.<sup>46</sup>

Of course, some will continue to argue that *any* new disclosure requirement risks chilling political speech. Both the U.S. Supreme Court and Congress have repeatedly determined, however, that the public’s interest in knowing who is behind electoral spending generally outweighs any incidental burden on political expression, absent showing a “reasonable probability” of “threats, harassment, or reprisals.”<sup>47</sup> Given that significant electoral spending associated with government contractors must already be disclosed — including spending by their corporate PACs — such troubling consequences of disclosure would already be apparent if they existed. Any lingering concerns can be addressed by setting the monetary threshold for disclosure high enough to allow small donations to remain anonymous, and through other careful drafting of the new order’s provisions.<sup>48</sup>

36. Pub. L. 113-76, 128 Stat 5, § 735 (Jan. 17, 2014). The prohibition applies to any contribution, expenditure, or disbursement for an electioneering communication.

37. Pub. L. 113-235, 128 Stat 2130, § 735 (Dec. 16, 2014).

38. The prohibition applies to any person who is “head of an agency,” which is defined in the law as “the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, the Secretary of Homeland Security, and the Administrator of the National Aeronautics and Space Administration.” 10 U.S.C. § 2302(1).

39. 10 U.S.C. § 2335(a). “Political information” is defined broadly to include any contribution or expenditure by the contractor or its partners, officers, and employees.

40. Keeping Politics out of Federal Contracting Act of 2011, H.R. 2008, 112th Cong. (2011), available at <http://www.opencongress.org/bill/hr2008-112/show>. Rep. Cole also offered an unsuccessful amendment to H.R. 2017 (112th Cong.) that would have contained a disclosure prohibition. See <https://www.congress.gov/amendment/112th-congress/house-amendment/405/text>.

41. Keeping Politics out of Federal Contracting Act of 2011, S. 1100, 112th Cong. (2011), available at <http://www.opencongress.org/bill/s1100-112/show>.

42. H.R. 2008 § 2.

43. Engine Mfrs. Ass’n v. E.P.A., 88 F.3d 1075, 1088 (D.C. Cir. 1996).

44. H.R. 2008 § 2.

45. See, e.g., Nat’l Pub. Radio, Inc. v. FCC, 254 F.3d 226, 231 (D.C. Cir. 2001) (“Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.”) (quotation marks omitted); Halaim v. INS, 358 F.3d 1128, 1134 n.1 (9th Cir. 2004) (noting that original version of statute included the word “presumption,” but the word was “dropped in the enacted version . . . support[ing] a view that Congress considered but rejected a version of the Amendment that created a presumption”).

46. To be sure, the officials who actually make final contracting decisions usually are not themselves elected. Clearly, however, members of Congress often remain able to play a significant role. Further, officials in the executive branch may also have close ties to the President, giving rise to similar concerns about favoritism toward his political supporters.

47. Citizens United v. FEC, 558 U.S. 310, 367 (2010).

48. Concerns about burdening small business, for example, could be addressed by making the Executive Order apply only to large contracts valued above a certain threshold.

## An Executive Order is Needed Now More than Ever

The need for robust disclosure of election spending by government contractors has only increased since 2011. Outside spending in federal elections has continued to skyrocket, sometimes dwarfing both candidate and party spending.<sup>49</sup> More and more of that spending is dark. For example, spending by dark money groups in Senate elections more than doubled between 2010 and 2014.<sup>50</sup> In 10 of the races rated most competitive before the election, almost 60 percent of outside spending came from such groups, and that money went overwhelmingly to support the winning candidates.<sup>51</sup>

An increasing number of dark money groups, moreover, appear to have been formed to back a single candidate. By giving to these groups, donors can target particular races in exactly the same way as with direct contributions to candidates — only with no limits and in secret.<sup>52</sup> The increased risk of corruption emanating from such secret contributions is obvious.

A new Executive Order requiring disclosure of dark money spending by contractors would help citizens hold their elected representatives accountable, strengthen confidence in government, and safeguard taxpayer dollars. This is an easy opportunity for the President to improve our politics and secure a lasting legacy.

### Conclusion: Now is the Time to Act

The President has ample basis and authority to issue a new Executive Order on contractor disclosure — but he does not have long to do so.

Any order he issues will need time to be implemented.<sup>53</sup> The 2016 race for the White House is well under way, with leading candidates and supportive outside groups already raising tens of millions of dollars every month.<sup>54</sup> If the President waits too long, there will not be enough time to implement an order before the election — or perhaps even during his Administration. If President Obama truly wants to make a better politics part of his legacy, the time to act is now.

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49. See DANIEL I. WEINER, BRENNAN CTR. FOR JUSTICE, *CITIZENS UNITED FIVE YEARS LATER* 4, 7 (2015), available at <https://www.brennancenter.org/publication/citizens-united-five-years-later>.
50. IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, *ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE CITIZENS UNITED 2* (2015), available at <https://www.brennancenter.org/publication/election-spending-2014-outside-spending-senate-races-citizens-united>.
51. *Id.* at 2, 13.
52. *Id.* at 9. Indeed, in 2014, 45 percent of the funding for single-candidate groups in key Senate races who did disclose their donors came from donors who had also maxed out the candidates' campaigns. Campaign donors (both maxed out and not maxed out) contributed more than 80 percent of the funding for these groups. *Id.* at 11.
53. This task would most likely fall to the Federal Acquisition Regulatory Council (the FAR Council) and its counterpart for defense appropriations, the Defense Acquisition Regulatory Council (the DAR Council). Regulations promulgated to carry out an executive order "have the status of law as long as they are reasonably within the contemplation of some statutory grant of authority." Steven Ostrow, *Enforcing Executive Orders: Judicial Review of Agency Action under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659, 663 (1987). The usual method for enforcing executive orders pertaining to government contracts is cancellation or suspension of the contract. If potential cancellation is deemed an improper remedy, instituting fines for failure to disclose or offering contractors incentives to comply (such as more flexible performance schedules or an agreement to seek only reduced damages in the event of a breach) are also possibilities. In an Executive Order issued in February of 2014 establishing a minimum wage for federal contractors, for example, the President directed the Secretary of Labor to "investigat[e] potential violations of and obtain[] compliance with this order." Executive Order 13658 — Establishing a Minimum Wage for Contractors, Fed. Reg. 79, 34 (Feb. 12, 2014), available at <http://www.gpo.gov/fdsys/pkg/FR-2014-02-20/pdf/2014-03805.pdf>. A new contractor disclosure Executive Order could contain a similar directive to the FAR and DAR Councils.
54. Leigh Ann Caldwell, *Ted Cruz Raises Half a Million In First Day As Presidential Candidate*, NBC NEWS, Mar. 24, 2015, available at <http://www.nbcnews.com/politics/elections/cruz-raises-half-million-first-24-hours-n329226>; Marea Gold, *Why Super PACs Have Moved from Sideshow to Center Stage for Presidential Hopefuls*, WASH. POST, Mar. 12, 2015, available at [http://www.washingtonpost.com/politics/once-the-sideshows-super-pacs-now-at-the-forefront-of-presidential-runs/2015/03/12/516d371c-c777-11e4-a199-6cb5e63819d2\\_story.html](http://www.washingtonpost.com/politics/once-the-sideshows-super-pacs-now-at-the-forefront-of-presidential-runs/2015/03/12/516d371c-c777-11e4-a199-6cb5e63819d2_story.html).

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