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The DISCLOSE Act won't fix campaign finance

Ezra Klein | 7.27.12

Campaigns need votes to win. But they need money simply to survive. They get that money from a vanishingly small percentage of Americans.

According to Harvard law professor Lawrence Lessig, only 0.26 percent of Americans give more than \$200 to congressional campaigns. Only 0.05 percent give the maximum amount to any congressional candidate. Only 0.01 percent — 1 percent of 1 percent — give more than \$10,000 in an election cycle. And in the current presidential election, 0.000063 percent of Americans — fewer than 200 of the country's 310 million residents — have contributed 80 percent of all super-PAC donations.

“This, senators, is corruption,” Lessig said Tuesday, in testimony before the Senate Judiciary Committee. “Not ‘corruption’ in the criminal sense. I am not talking about bribery or quid pro quo influence peddling. It is instead ‘corruption’ in a sense that our Framers would certainly and easily have recognized: They architected a government that in this branch at least was to be, as Federalist 52 puts it, ‘dependent upon the People alone.’ You have evolved a government that is not dependent upon the People alone, but that is also dependent upon the Funders. That different and conflicting dependence is a corruption of our Framers’ design, now made radically worse by the errors of Citizens United.”

Last week, Senate Democrats took another run at blunting the influence of Citizens United, the U.S. Supreme Court ruling that permits unlimited contributions to independent political committees. The lawmakers voted for the Disclose Act, which would have required groups making more than \$10,000 in campaign-related expenditures to disclose contributors who had donated more than \$10,000. No longer would information about election spending be limited to, “This ad paid for by Americans United for a More American America.”

They failed. Senate Republicans successfully filibustered the legislation. But even if the Democrats had succeeded, the Disclose Act would not have gone nearly far enough.

It's a quirk of politics that we tend to focus on the aspects of problems that are readily dramatized by legislation. This makes a certain kind of sense: It's better to spend our time thinking about what we can fix than what we can't. It can also make us a little myopic.

The Disclose Act was ultimately a minor piece of legislation. Recall those numbers above? It wouldn't have changed any of them. Nor could the act truly force full disclosure. As Lessig argued in his testimony, the Disclose Act wouldn't force disclosure of money that hadn't been spent. In today's world of unlimited super-PAC expenditures, that may be the most influential money of all.

The power of super-PACs is not restricted to their ability to buy airtime for television ads. That's what attracts all the news coverage, but the more insidious function of super-PACs may be influencing legislation before a single dollar is spent — by threatening to buy future airtime.

Imagine the oil industry wants a small, technical change in a law setting environmental standards. It's an issue few voters are following, or will even hear about. But it's worth billions of dollars to the industry. So oil companies establish a super-PAC and send lobbyists to every congressional office with a simple message: Legislators who support the change will receive a donation, and each legislator who votes against it will be subject to \$1 million in super-PAC attack ads in their district in the last week of the campaign.

The most likely outcome is that compliant lawmakers will guarantee that the super-PAC money never has to be spent. Without spending, there is nothing to disclose.

The deeper problem is that the Disclose Act is addressing the wrong problem. Citizens United focused attention on the failures of our system of campaign finance. But it did not create them. As Lessig puts it, "On Jan. 20, 2010, the day before Citizens United was decided, our democracy was already broken. Citizens United may have shot the body, but the body was already cold."

The real culprit is arguably the 1976 case *Buckley v. Valeo*, in which the Supreme Court held that political money is tantamount to political speech. As a result, Congress can't limit spending by campaigns. Citizens United and related court decisions made it harder to regulate spending by outside groups, which further eroded the legitimacy of the system. It is all but impossible to break politicians' dependence on big funders so long as their opponents can benefit from moneyed interests spending unlimited amounts of cash on an election.

There are good ideas out there. The Fair Elections Now Act would make it substantially easier for members of Congress to rely on small donors to fund their

campaigns, though it still would not do them much good if a super-PAC descended in the final days of a race and spent millions on negative ads.

Fundamental solutions require more radical thinking. At the same Senate hearing where Lessig testified, Ilya Shapiro, a scholar at the libertarian Cato Institute, said, “To the extent that ‘money in politics’ is a problem, the solution isn’t to try to reduce the money — that’s a utopian goal — but to reduce the scope of political activity the money tries to influence. Shrink the size of government and its intrusions in people’s lives and you’ll shrink the amount people will spend trying to get their piece of the pie or, more likely, trying to avert ruinous public policies.”

It is true that if you could shrink the government to a size where it no longer mattered in people’s lives, moneyed interests might be less likely to try to influence elections. But that seems unlikely, and between the dismantling of the social safety net and the destruction of our military might, the cure might be worse than the disease.

The other side of the coin — and, I admit, this is utopian thinking — is a constitutional amendment making it possible to limit the role of private money in politics. This is not a solution I like endorsing, because it seems impossible to imagine it actually happening. But it was, presumably, difficult for a previous generation to imagine that the Constitution would be amended to permit the direct election of senators, thus necessitating expensive campaigns that only a small fraction of Americans would fund. Yet here we are.