



TRANSPARENCY INTERNATIONAL | USA

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Money, Elections, Elected Officials and Combating Corruption: Transparency International-USA's Perspective

Transparency International-USA (TI-USA) is the U.S. chapter of Transparency International, a global civil society organization dedicated to fostering integrity and fighting corruption. TI-USA is non-partisan.

TI-USA regards corruption as a dangerous threat to the integrity of those institutions most essential to the proper functioning of the American government, economy and other non-governmental institutions. America's unique and treasured institutions become corrupted when officials who have accepted the duty and been entrusted with the authority to advance the public interest neglect their duty and abuse their authority in order to pursue their own personal or private gain. In government, corruption will occur when public officials allow private interests, including private financial considerations, to cause them to neglect their duty to promote the public interest and act to advance their own personal interests.

There is a vigorous debate in the United States over the best ways to ensure that private contributions to candidates' election campaigns and private spending on electoral messages do not lead to corruption or the perception of corruption of the political process. This debate was given new energy by the decisions of the Supreme Court in *Citizens United* and *McCutcheon*. As an anti-corruption NGO, TI-USA wishes to offer its perspective on this issue. In general, TI-USA believes that vigorous public debate, active citizen engagement and truly independent political speech are important ways to keep government and public officials accountable. We do not address in this statement all issues, including important issues such as the overall size of political spending or important issues related to "undue influence," nor do we address in this statement issues related to lobbying or the conduct of appointed officials. For a number of reasons, including a desire to encourage early action that could be supported across the political spectrum, we have chosen to make recommendations that can be implemented within the framework established by recent Supreme Court decisions, including *Citizens United*. Rather, this contribution will focus on our core interests – promoting transparency and combating corruption – as they relate to elections and the conduct of elected officials.

TI-USA hopes the following recommendations will contribute not only to a respectful public debate but also to bipartisan action that will strengthen

American institutions. If the United States fails to do so, the institutions that make America strong will corrode and the ability of the United States to lead in the global fight against corruption will erode.

Rules Relating to Campaign Contributions

1. TI-USA supports existing federal laws that prohibit corporations and unions from making contributions from their treasuries to the campaigns of candidates for public office. We advocate that similar prohibitions be adopted at the state and local level in those cases where this has not already been done. We support full enforcement of such laws and regulations.

To prevent corruption or the appearance of corruption, federal law prohibits commercial corporations and unions from contributing from their treasuries to the campaigns of candidates for federal public offices. TI-USA supports this prohibition and would oppose moves to change existing prohibitions. We also encourage the many states and municipalities that have not put in place such prohibitions to consider introducing them.

Full Disclosure of Independent Expenditures Advocating the Election of Candidates

2. TI-USA supports full, timely and evenhanded disclosure of the funding sources of entities such as Political Action Committees (PACs) and "Super-PACs" that advocate the election or defeat of candidates for public office.

TI-USA supports vigorous debate on public policy issues. In this statement, we do not propose measures to limit independent political spending – that is, spending not coordinated in any way with candidates' campaigns – that advocates the election or defeat of a candidate for public office. At the same time, we strongly advocate full and timely disclosure of the source of the funds that support such independent expenditures. Such disclosure requirements are legally available and they do not in our view unduly burden public debate and free speech. In fact, we believe disclosure facilitates public debate because citizens can assess the strength of arguments for or against a candidate when they know the identity of the persons or organizations making the case. We also believe that full and evenhanded disclosure of the original funding sources of PACs and Super-PACs reduces the risk of corruption or the perception of corruption by empowering the press and citizens. For these reasons, disclosure should take place promptly during the election cycle.

3. TI-USA advocates the further development of clearer and more effective rules to ensure that independent political spending actually is not coordinated – directly, tacitly or effectively – with a candidate's campaign committee. The fundamental framework currently governing election law breaks down when this distinction is not upheld.

The current legal framework established by the Supreme Court's decision in Citizens United makes a sharp distinction between independent political spending – which is essentially unrestricted in the interest of protecting freedom of speech – and campaign contributions, which are restricted and in some cases prohibited in order to guard against corruption and the perception of corruption. This framework is based on the premise that independent spending does not lead to corruption or the perception of corruption. In contrast, the current legal framework is based on the premise that contributions to a specific campaign organization by individuals above certain limits established by law – and any contributions to campaign organizations by commercial corporations and by unions – can lead to corruption or the perception of corruption.

TI-USA believes that it is imperative that this distinction between independent political spending and campaign contributions be adhered to in practice as well as in theory – otherwise the framework breaks down. Links between campaign organizations and various organizations that engage in electoral advocacy – PACs and Super PACs – can be troublingly close. TI-USA therefore supports bipartisan legislative action at the federal and state levels to formulate clear and workable rules that ensure this distinction is maintained.

Special Considerations Regarding the Election of Judges

4. TI-USA advocates close scrutiny and full disclosure of spending in connection with the election of Judges.

The integrity of the judicial system is vital for the preservation of democratic institutions. As part of a global anti-corruption movement, TI-USA is acutely aware that democracy cannot thrive where there is a corrupt judiciary. Transparency International has spoken out about corruption in judicial systems around the world and TI-USA has joined two amicus briefs to the U.S. Supreme Court on issues related to spending that advocates the election or defeat of candidates for judicial positions.

TI-USA sees important distinctions between the responsibilities of judges and the responsibilities of other government officials. Elected legislators and executive branch officials are expected to make efforts to carry out the political and policy agendas that they pledged to pursue if elected. Judges, in contrast, accept the duty and are given the authority to interpret the law as it exists, and to do so in an even-handed matter. A number of state governments have a tradition of electing judges to serve in state courts. TI-USA advocates close scrutiny of judicial elections given their potential to foster corruption or the perception of corruption. We believe that there should be especially close scrutiny and full disclosure of spending in connection with the election of judges.

At the federal level and in those states which utilize an appointment system for selecting judges, TI-USA endorses transparency and selection systems that emphasize merit.

5. TI-USA believes that elected judges should be required to recuse themselves from cases in which one of the parties made disproportionately large expenditures advocating the judge's election.

TI-USA joined in an amicus brief in the Supreme Court case *Caperton v AT Massey*. Consistent with the position adopted in that brief, we believe that elected judges must recuse themselves from cases involving persons or entities that were significant spenders in support of their election. In addition, we support clear and strong recusal policies addressing situations where judges have close personal relationships with litigants. We believe that it is important to survey the recusal practices now in place in different states and to identify, disseminate and promote the adoption of best practices.

Rules Relating to Elected Officials' Personal Finance

6. TI-USA supports laws and regulations that require elected officials at the federal, state and local level to disclose broadly and to make available to the public appropriate basic information about their financial assets and outside income. We support efforts to identify, disseminate and discuss information about best practices and we advocate efforts to harmonize disclosure requirements across jurisdictions. We also support vigorous and even-handed enforcement of these laws.

Disclosure of public officials' outside income and assets helps citizens assess whether officials are making decisions to promote the public interest, or whether their decisions may be influenced by their personal financial interests. Disclosure is a preventive measure that builds trust and confidence and helps prevent corruption or the appearance of corruption.

7. TI-USA supports strong and more uniform laws and regulations restricting the size and requiring the disclosure of personal gifts to elected officials at the federal, state and local level. We support efforts to identify, disseminate and discuss information about best practices followed in different jurisdictions. We also support vigorous and even-handed enforcement of these laws.

When organizations or individuals provide financially significant personal gifts to elected public officials, this raises serious problems of corruption or the perception of corruption. The lack of clear laws and expectations in some jurisdictions creates problems for the courts. For example, in some jurisdictions, the provision of rather substantial gifts has not, in and of itself, been contrary to applicable law. This creates lack of clarity about standards. Laws and regulations must give citizens confidence that a public office cannot be "sold" in return for personal gifts to the office holder. TI-USA believes that stronger, clearer and more

uniform laws and regulations restricting the provision of such personal gifts would be an effective way of controlling corruption and the perception of corruption. In addition, stronger, clearer and more uniform laws would ensure that there are clearer standards of conduct for office holders and in this way would enhance trust in government.

8. TI-USA believes that an amendment to federal law is required to prohibit undisclosed "self-dealing" by public officials. We support Congressional enactment of targeted legislation, potentially drawing on proposals formulated by TI-USA.

Self-dealing refers to instances when public officials have a personal financial stake in public policy decisions in which they are involved. Several years ago the federal law that often had been used to prosecute cases of self-dealing was struck down by the Supreme Court as unconstitutionally vague. TI-USA has published a White Paper

<http://www.transparency-usa.org/documents/TI-USA-WhitePaper-UndisclosedSelf-DealingbyPublicOfficialsandtheNeedforaLegislativeResponeto.pdf>)

that makes the case for a targeted amendment of federal law to prohibit undisclosed self-dealing in a manner that would avoid the constitutional problems with the earlier statute. TI-USA advocates prompt Congressional action to enact legislation along these lines.

9. Regulatory Oversight and Enforcement at the Federal and State Level: The Federal Elections Commission (FEC) and Various State Regulatory Agencies.

Considerable political controversy and sensitivity surrounds enforcement of rules related to campaign finance and other spending on electoral advocacy. Taking this controversy and sensitivity into account, TI-USA advocates an approach based on clear rules, transparency, full disclosure and effective enforcement. We believe this approach should make the task of overseeing these rules more straightforward and less controversial. TI-USA challenges the Administration and the Congress to develop new procedures to establish a bi-partisan consensus on enforcement and effective bi-partisan scrutiny over enforcement priorities.

Pending the elaboration of such new approaches, TI-USA advocates enhanced transparency and disclosure to the public in the operations of the FEC and other agencies involved in the enforcement of rules on campaign contributions and political spending.

Likewise, TI-USA advocates that election law administrators at the state and local levels implement clear campaign finance rules, promote timely public disclosure and enforce laws and regulations effectively.

Governance Issues Related to Political Spending by Corporations and Unions

10. TI-USA welcomes corporate and union initiatives to make their electoral advocacy more transparent, as well as initiatives that other NGOs have undertaken to promote strong internal governance procedures related to corporate and union electoral advocacy.

TI-USA advocates full and even-handed disclosure of independent electoral spending by corporations and unions to prevent corruption and the perception of corruption. Public concerns about corruption and the perception of corruption suggest to us that, as an internal governance matter, corporations and unions should vet their spending on electoral advocacy with their shareholders, employees and members.

Concluding Comment

TI-USA understands that the issues surrounding money, elections, elected officials and combating corruption in the United States are among the most controversial and hotly debated, both here and abroad. We offer these recommendations in a spirit of non-partisanship and in the hope that they can be a starting point for progress.