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## **Bob Bauer Discusses Kate Shaw's Recent Article on Campaign Finance Disclosure**

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### **Recommended Citation**

Benjamin N. Cardozo School of Law, "Bob Bauer Discusses Kate Shaw's Recent Article on Campaign Finance Disclosure" (2015). *Cardozo News 2015*. 10.  
<https://larc.cardozo.yu.edu/cardozo-news-2015/10>

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## BOB BAUER DISCUSSES KATE SHAW'S RECENT ARTICLE ON CAMPAIGN FINANCE DISCLOSURE

May 21, 2015

### The FEC, the Big Issues, and Getting Right a Few Basics—Like Disclosure

By **Bob Bauer** *via* [More Soft Money Hard Law](http://www.moresoftmoneyhardlaw.com)

(<http://www.moresoftmoneyhardlaw.com/2015/05/fec-big-issues-getting-right-basics-like-disclosure/>)

May 21, 2015

Public Citizen has concluded that the Federal Election Commission is failing. Its shortcomings are “dramatic and uncharacteristic”, because they range across the entire field of their responsibilities in conducting audits; enforcing the law through investigations, settlements and lawsuits; and issuing regulations and advisory opinions. The Public Citizen analysis is statistical and focuses on vote deadlocks. The FEC is indeed disagreeing a great deal—about that, there is no doubt. But is the agency failing or is the old regulatory model collapsing under the pressure of changing law and political practice?

Public Citizen cannot answer this question because it is looking at agency performance in the aggregate. It is unable, for example, to explain what might be happening in particular cases, or why deadlocks are occurring across various agency functions. There are certainly instances where the vote for enforcement is as suspect as a vote against it. The result is still deadlock but the reasons for it are not quite what Public Citizen implies. Nonetheless, it being assumed that matters could not have gotten this bad without dereliction of duty somewhere, the FEC takes the blame. It is expected to take up the big issues, such as those involving “coordination” or “dark money”, which are precisely the issues over which disagreement is certain to arise. And so around and around it goes.

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Professor Lindsay Nash published a short essay in the [Journal on Migration and Human Security](#) (<https://cmsny.org/jmhs/>) (JMHS), a publication of the Center for Migration Studies.

August 20, 2019

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One alternative available to the FEC in this period of uncertainty is to commit itself to less controversial but highly productive functions. Bipartisan suggestions have been made, for example, that it could do better in discharging its disclosure function, and in reforming, as Congress has directed, the operation of its Administrative Fines program. There is value in starting with these basic responsibilities. To the Commission's credit, it has initiated a rulemaking to move in this direction.

And on this question of disclosure, there is much to be done, more than suspected by many who hold the view that, for all the discord and disappointment, campaign finance law administration has performed well on public reporting. Now we have some fresh scholarship by Jennifer Heerwig and Katherine Shaw that subjects this assumption to careful, critical examination. Jennifer A. Heerwig and Katherine Shaw, *Through a Glass Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, Geo. L. J. 1443 (2014).

The authors review how the Supreme Court has defined the disclosure interest—information for voters, additional protections against corruption and support for enforcement—and they then match these policy objectives to the performance of the reporting system in providing contributor information. With the use of a database that tracks the population of unique individual contributors from 1980 through 2008, the authors look closely at “systemic flaws in the FEC mechanisms for collecting, maintaining, and disseminating information.” Their goal is to see how things work and then recommend steps for “better aligning the reality of disclosure with its identified goals.” A reader may not embrace all of the recommendations and yet recognize the value of an analysis that usefully examines what information is, in fact, made available to the public.

The authors discover that contributor reporting information is affected by four basic reporting problems: selective compliance (incomplete information), valid nonresponse (information provided but generally useless), low response consistency (variations in information provided on same contributor), and dissimulation (misrepresentation). For example, contributors may provide the full names but not necessarily their legal names, and because the filings are not subject to a standardized reporting system for occupation, there results “a hodgepodge of self-reported occupations.”

[Supreme Court \(/news/professor-zelinsky-cited-utah-supreme-court\)](#)

The Utah Supreme Court cited Zelinsky in *Steiner v. Utah State Tax Commission*.

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[Professor Chris Buccafusco Talks to Rolling Stone and The Wall Street Journal about Katy Perry Copyright Case \(/news/professor-chris-buccafusco-talks-rolling-stone-and-wall-street-journal-about-katy-perry\)](#)

Professor Chris Buccafusco (<https://cardozo.yu.edu/directory/christopher-j-buccafusco>) spoke to *Rolling Stone* and *The Wall Street Journal* about the Katy Perry copyright case.

July 31, 2019

[Professor Sam Weinstein Comments on T-Mobile/Sprint Merger in NY Times and Wall Street Journal \(/news/professor-sam-weinstein-comments-t-mobilesprint-merger-ny-times-and-wall-street-journal\)](#)

Professor Sam Weinstein was quoted in *The New York Times* regarding the T-Mobile/Sprint merger. “There is a lot of criticism of the agencies that they are not doing enough about big tech and this is a way to respond to that criticism,” he said.

Here Heerwig and Shaw offer an instructive example:

Charles... has donated for nearly 30 years and has made more than a hundred distinct contributions [He] variously appears as “businessman,” “horse breeder,” “Farmer,” “oil and gas investor,” “investor” and “self – employed.”

Nor has Charles misreported. He happens to be the grandson of an oil tycoon, a co-owner and board member of numerous energy and investment companies, and the owner of a thoroughbred horse farm, on top of which he has served at a senior level in the State Department. While a government he official, he continued to describe himself as a race-horse farm owner.

The case of Charles also exposes the problems with the disclosure of contributor addresses. He “appears in two cities in two different states within the 1988 election cycle – – one corresponding to a residential address and the other to a horse farm in another state.”

The problem for a public that is supposedly the intended audience for this information extends well beyond the opaque manner of reporting. The data can be downloaded from the FEC website but the files are formatted as raw text files and the use of these files – – which “involves downloading thousands or possibly millions of records” – – is beyond the capacity, patience or resources of many users. So naturally they are thrown back upon the assistance of intermediaries. Some of the organizations providing these intermediary services are filtering or organizing the information to express a distinct point of view about policy or politics. In any event it goes too far to say that this disclosure regime makes all this information “available to the public.”

The authors conclude the reforms are necessary and they have a few to propose for consideration. One of the simplest: a standardized disclosure form for donors, for both online and paper contributions. It would, for example, direct donors to supply their full legal given name and surname. Another suggestion is that all reporting fields would have to be completed as a condition of the campaign's acceptance of the contribution. The law would have to change to impose his condition, but after all the years of frustration with misreporting, some of it sloppy and some perhaps worse, it might be well worth discussing options for more rigorously enforcing reporting obligations.

Heerwig and Shaw also suggest more engagement with donors to

assure that they are correctly reporting occupations. Their suggestion here is to revise the FEC reporting reform so it is more like the Census Bureau's long form. And they suggest providing donors with a unique donor-identification number, such as a "synthetic identifier" that would combine legal surname date of birth, (partial) Social Security number and gender. They concede that a donor identification scheme could trigger keen privacy concerns, particularly for small donors, and they suggest the collection of more complete information but public reporting of only some of it on a "semi-disclosed" basis like the one proposed by Bruce Cain.

And, finally, the authors urge consideration Professor Justin Levitt's proposal to supply "Democracy Facts" about candidates, which would provide voters with general statistics about the extent and character of the financial support a candidate draws . An example would be breaking down receipts by occupations and industry.

It is not a strike against the authors' proposals that some will meet with objections. Their larger point is that we should take seriously the actual operation, day-to-day, of the FEC reporting system. On something very basic, largely taken for granted -- that we have meaningful disclosure -- we should see just how much disclosure there really is. The conflicts over questions like "coordination" will continue to consume the most time and energy in this debate, with slim prospects for successful resolution anytime soon (or not so soon) . While this is going on, it is a good idea to get right but we can, where there is no disagreement that the law is on firm constitutional ground and that the FEC should be expected and helped to enforce it successfully.

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