



COMMISSIONER ELLEN L. WEINTRAUB
FEDERAL ELECTION COMMISSION
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How Our Broken Campaign Finance System Could Allow Foreign Governments to Buy Influence in Our Elections and What We Can Do About It

Remarks of Commissioner Ellen L. Weintraub

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Good afternoon and thank you for the opportunity to be here. My name is Ellen Weintraub, and I am a commissioner on the Federal Election Commission. I want to particularly thank Senator Whitehouse for inviting me here to speak to you today, and I want to thank all of you for your interest in this critically important topic.

I came here today to share with you my perspective, as a commissioner on the body that is charged with administering and enforcing our campaign finance laws, about the potential for foreign influence in our elections. There is much cause for concern, but I will focus my comments on weaknesses in the implementation of the ban on political spending by foreign nationals and how those are exacerbated by loopholes in our disclosure law and regulations.

The Federal Election Campaign Act¹ broadly prohibits foreign nationals from directly or indirectly making contributions or donations of money or other things of value in connection with any federal, state, or local election,² and gives the FEC the exclusive civil legal authority to enforce and interpret that provision (and the rest of the Act).³ Post-*Citizens United*, Democratic and Independent commissioners on the FEC have repeatedly sought to exercise that authority to limit potential new avenues for foreign spending and to ensure that all political spending is adequately disclosed and that dark money groups are not masking spending by foreign sources. Singly or in combination with colleagues, I have introduced rulemaking proposals,⁴ petitioned

¹ Federal Election Campaign Act of 1971 (“FECA,” “the Act,” 52 U.S.C. § 30101 *et seq.*).

² 52 U.S.C. § 30121.

³ 52 U.S.C. § 30106(b)(1). Contributions are defined by the Act as “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(8)(A).

⁴ See, e.g., Agenda Document No. 11-02 (Jan. 20, 2011), http://www.fec.gov/agenda/2011/mtgdoc_1102.pdf; Agenda Document No. 11-33 (June 15, 2011), http://www.fec.gov/agenda/2011/mtgdoc_1133.pdf; *Proposal to Launch Rulemaking to Ensure That U.S. Political Spending is Free From Foreign Influence* (Sept. 9, 2016), http://www.fec.gov/agenda/2016/documents/mtgdoc_16-40-a.pdf; *Revised Proposal to Launch Rulemaking to*

my own agency,⁵ written an op ed in the New York Times,⁶ convened a forum of legal experts,⁷ and sought insights from the public.⁸ As all of you who share my concern about the potentially corrupting influence of money on our political system know, addressing it is a Sisyphean effort, and, like you, I'm still pushing that boulder up the hill.

Post-*Citizens United* jurisprudence has confirmed that foreign nationals do not stand on the same constitutional footing as U.S. citizens when it comes to participating in our elections. In *Bluman v. FEC*, a decision affirmed by the Supreme Court, a special three-judge D.C. district court noted:

Over the last four decades, the First Amendment issues raised by campaign finance laws have been the subject of great debates involving all three branches of the national government. *See, e.g., Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Buckley v. Valeo*, 424 U.S. 1 (1976). **This case does not implicate those debates.** Rather, this case raises a preliminary and foundational question about the definition of the American political community and, in particular, the role of foreign citizens in the U.S. electoral process.⁹

The court went on to state that “the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of

Ensure that U.S. Political Spending is Free from Foreign Influence (Sept. 28, 2016), https://beta.fec.gov/resources/about-fec/commissioners/weintraub/statements/Foreign_National_2_Memo_28_Sept_2016.pdf; *Discussion of Commission's Response to Alleged Foreign Interference in American Elections* (June 21, 2017), https://s3-us-gov-west-1.amazonaws.com/cg-47928592-406c-4536-8234-99b896e8d57d/cms-content/documents/mtgdoc_17-28-a.pdf.

⁵ Petition for Rulemaking (June 8, 2015) http://www.fec.gov/members/statements/Petition_for_Rulemaking.pdf. After a debate over whether the Commission would consider a petition from two of its own members, this petition was superseded by two nearly identical petitions submitted by members of the public. The FEC received 11,759 comments, and nearly 97% supported the petitions and proposed rulemaking. Nevertheless, the resulting proposed rulemaking failed to move forward on a 3-3 vote. *See* Agenda Document No. 15-65-A (Dec. 17, 2015), http://www.fec.gov/agenda/2015/documents/mtgdoc_15-65-a.pdf.

⁶ *Taking On Citizens United*, NY TIMES (March 30, 2016), <http://nyti.ms/230BOgq>.

⁷ *Forum: Corporate Political Spending and Foreign Influence* (June 23, 2016), <https://www.fec.gov/about/leadership-and-structure/ellen-l-weintraub/forum-corporate-political-spending-and-foreign-influence/>.

⁸ *See Despite public's pleas, FEC won't move to block foreign meddling in elections, commissioner says.* <https://mic.com/articles/182319/despite-publics-pleas-fec-wont-move-to-block-foreign-money-in-elections-commissioner-says#.Je6dSSvkw>.

⁹ *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011) (emphasis added).

American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.”¹⁰

Loopholes in the campaign disclosure regime exacerbate the risk of foreign money seeping into our political system through corporations. Corporations, be they for-profit or non-profit, can operate as a shield against disclosure of the real parties providing political resources. This can happen when 501(c)(4) organizations¹¹ and LLCs¹² engage in direct advocacy or donate to “super PACs.” It can happen when a political spender gets money from one corporation, which received it from another, which received it from another, until the trail back to the source of the funds is completely obscured.

The *Citizens United* majority protected the First Amendment rights of corporations as “associations of citizens.” Citizens do not lose political rights when they come together using a corporate form, but individuals don’t gain rights by virtue of forming a corporation, either. The risk is that the people behind corporate political spenders may not be U.S. citizens, and the resources they use may well be owned by foreigners.¹³

As I read Supreme Court precedent, ownership matters. When a U.S.-based company is owned by foreigners, the U.S. managers, even if they are U.S. citizens, would be breaching their fiduciary duties if they spent company resources other than in the best interest of their foreign owners.

¹⁰ *Id.*

¹¹ See Statement of Reasons of Commissioners Ann M. Ravel & Ellen L. Weintraub in the Matter of MUR 6880 (Carolina Rising), dated Nov. 11, 2016; MUR 6880 (Carolina Rising, Inc.), available at <https://www.fec.gov/data/legal/matter-under-review/6880/>; Statement of Reasons of Commissioners Ann M. Ravel & Ellen L. Weintraub in the Matter of MURs 6391 & 6471 (Commission on Hope, Growth & Opportunity), dated Nov. 5, 2015; MUR 6391 (Commission on Hope, Growth & Opportunity), available at <https://www.fec.gov/data/legal/matter-under-review/6391/>; MUR 6471 (Commission on Hope, Growth & Opportunity), available at <https://www.fec.gov/data/legal/matter-under-review/6471/>; Statement of Reasons of Commissioners Ann M. Ravel & Ellen L. Weintraub in the Matter of MURs 6612 & 6696 (Crossroads Grassroots Policy Strategies), dated Jan. 22, 2016; see also MUR 6612 (Crossroads GPS), available at <https://www.fec.gov/data/legal/matter-under-review/6612/>; MUR 6696 (Crossroads GPS), available at <https://www.fec.gov/data/legal/matter-under-review/6696/>; MUR 6729 (Checks and Balances for Economic Growth), available at <https://www.fec.gov/data/legal/matter-under-review/6729/>.

¹² See Statement of Reasons of Commissioners Ann M. Ravel & Ellen L. Weintraub in the Matters of MURs 6485 (W Spann LLC, *et al.*), 6487 & 6488 (F8, LLC, *et al.*), 6711 (Specialty Investments, Inc., *et al.*), 6930 (Prakazrel "Pras" Michel, *et al.*), dated Apr. 13, 2016; MUR 6485 (W Spann LLC, *et al.*), available at <https://www.fec.gov/data/legal/matter-under-review/6485/>; MUR 6487 & 6488 (F8, LLC, *et al.*), available at <https://www.fec.gov/data/legal/matter-under-review/6487/>; MUR 6711 (Specialty Investments, Inc., *et al.*), available at <https://www.fec.gov/data/legal/matter-under-review/6711/>; MUR 6930 (Prakazrel "Pras" Michel, *et al.*), available at <https://www.fec.gov/data/legal/matter-under-review/6930/>.

¹³ See Transcript of Forum: Corporate Political Spending and Foreign Influence, Fed. Election Comm’n., <https://www.fec.gov/resources/about-fec/commissioners/weintraub/text/Coates.pdf> (Statement of Prof. John Coates, Harvard Law School) (June 23, 2016).

In the 2014 *Hobby Lobby* case, the Supreme Court wrote: “An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.”¹⁴ It *matters* whose rights are being protected and whether the people who own or control corporations have the right to participate in our elections at all. Foreign nationals do not. Foreign governments do not.

While I have long been concerned with the potential of foreign actors, using foreign-owned and – influenced corporations to interfere in our elections, recent news reports – and U.S. intelligence agencies – have suggested that there are foreign actors who have simply skipped the corporate middleman and attempted to directly meddle in our elections. This possibility is deeply troubling. And it suggests an urgent need to close off any loopholes in our campaign finance laws that could allow foreign entities to intercede invisibly in American elections. With the next election only 16 months away, I believe the time to act is now.

With that in mind, last week, I brought to my colleagues six proposals for the Commission to consider that would *prospectively* help protect *future* U.S. elections from foreign influence.¹⁵ They would have allowed the FEC to gather the information it needs to figure out what the foreign-money threats are to our elections, make sure the FEC’s staff has what it needs to respond to those threats, and then figure out which regulations we need to fix and which statutory changes we may wish to recommend to Congress. I thought we should reach out to other parts of the government that are currently investigating claims of foreign interference to offer our expertise on any campaign finance issues that might be raised and seek to find out if there is information we should know in preparation for next year’s elections. I proposed that if we could not reach consensus on a comprehensive rulemaking, could we at least seek to ensure that there is no political spending by corporations that are owned or controlled by foreign governments. That one seemed to me to be a no-brainer, but sadly we could not even agree to move forward on that proposal.

These were some pretty basic ideas. None of them were, shall we say, reaching for the stars. But I am sorry to report that my colleagues had virtually no interest in these proposals. We’ll probably put out a statement from our IT folks giving reassurances about our own data security, but that’s likely to be it. In particular, my Republican colleagues dismissed the notion of crafting any new rules now as completely unnecessary.

¹⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2768 (2014) (emphasis in original).

¹⁵ See *Discussion of Commission's Response to Alleged Foreign Interference in American Elections* (June 21, 2017), https://s3-us-gov-west-1.amazonaws.com/cg-47928592-406c-4536-8234-99b896e8d57d/cms-content/documents/mtgdoc_17-28-a.pdf.

The FEC's refusal to act is quite frustrating. But it's also illuminating, and it makes my remarks to you today all the more timely, because it highlights that if change is to be made, it will have to come from Congress. In crafting new legislation, Congress need not recreate the wheel. The notion that ownership can indicate control, for example, is not a novel idea in the law. Other areas of law specify various ownership levels that may be deemed a controlling interest. For example, federal securities law considers the purchase of a 5% share of a corporation to be significant and worthy of disclosure.¹⁶ Communications law limits foreign ownership of entities seeking broadcast licenses to a 20% share.¹⁷ It would be appropriate for Congress to look to these examples as it seeks to ensure that resources that are spent in our elections are not controlled by foreign interests.

The combination of corporate spending, foreign interest, and lack of disclosure presents too many opportunities for those who are not part of our political community to try to intervene in our democratic processes. I believe the threat is real and must be foreclosed.

Again, thank you for having me here today. I look forward to the rest of the discussion and to your questions.

¹⁶ See Transcript of Forum: Corporate Political Spending and Foreign Influence, Fed. Election Comm'n., <https://www.fec.gov/resources/about-fec/commissioners/weintraub/text/Tobin.pdf> (Statement of Dean Donald Tobin, University of Maryland School of Law) (June 23, 2016).

¹⁷ See Transcript of Forum: Corporate Political Spending and Foreign Influence, Fed. Election Comm'n., <https://www.fec.gov/resources/about-fec/commissioners/weintraub/text/Rosenstein.pdf> (Statement of Mace Rosenstein, Covington & Burling) (June 23, 2016).