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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 9, 2016

MEMORANDUM

TO: The Commission

FROM: Ellen L. Weintraub
Commissioner

SUBJECT: Proposal to launch rulemaking to ensure that U.S. political spending is free from foreign influence

In this tumultuous political year, foreign influence on American elections has emerged as an area of great concern to the American people. A startling story this week in *The Washington Post* provides the latest evidence why: "U.S. intelligence and law enforcement agencies are investigating what they see as a broad covert Russian operation in the United States to sow public distrust in the upcoming presidential election and in U.S. political institutions, intelligence and congressional officials said."[1]

Already, we have seen reports of foreign interference with our political parties.[2] We have seen reports of foreign hacks of state voter-registration data.[3] And we may have spotted the tip of the iceberg in foreign political spending, the true size of which is obscured by a sea of dark money.[4]

Our political parties are taking action. Our state election boards are taking action. The Federal Election Commission must take action as well.

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1 Dana Priest, Ellen Nakashima and Tom Hamburger, *U.S. investigating potential covert Russian plan to disrupt November elections*, WASH. POST (Sept. 6, 2016), http://wpo.st/Hikw1.

2 *See, e.g.*, Eric Lichtblau and Eric Schmitt, *Hack of Democrats' Accounts was Wider than Believed, Officials Say*, N.Y. TIMES (Aug. 10, 2016), http://nyti.ms/2bk07BV.

3 *See, e.g.*, Ellen Nakashima, *Russian Hackers Targeted Arizona Electoral System*, WASH. POST (Aug. 29, 2016), http://wpo.st/52rw1.

4 *See, e.g.*, Lee Fang, Jon Schwarz, Elaine Yu, *Foreign Influence*, THE INTERCEPT, https://theintercept.com/series/foreign-money-2016/; Matt Corley, *Super PAC Exists to Help Big Donors Keep Their Identities in the Dark*, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON (Jan. 20, 2016), http://www.citizensforethics.org/super-pac-exists-to-help-big-donors-keep-their-identities-in-the-dark/; Greg Moran, *More Details Come Out as Azano Trial Nears*, SAN DIEGO UNION TRIBUNE (July 21, 2016), http://www.sandiegouniontribune.com/news/2016/jul/21/azano-trial-setup/; Laurence H. Tribe and Scott Greytak, *Get foreign political money out of US elections*, BOSTON GLOBE (June 22, 2016), http://www.bostonglobe.com/opinion/2016/06/22/get-foreign-political-money-out-elections/qEkLMpfA23BIwxw815RJML/story.html.

As a matter of national security, the U.S. Government limits and tracks foreign influence in many spheres. Foreign interests must disclose when they purchase large interests in U.S. companies. Foreign companies may not be U.S. defense contractors. The amount of foreign investment in a company that wants to own a U.S. broadcast license is limited. And federal law prohibits foreign nationals from spending, directly or indirectly, in our federal, state, and local elections.[5]

There's a reason: The integrity of U.S. elections is a matter of national security. Our elections are the cornerstone of our national political identity. And foreign actors often do not have the United States' best interests at heart. The Federal Election Commission is the agency of the U.S. Government charged with ensuring clean and honest elections, free from foreign influence.

Today, the FEC cannot provide assurances to the American people that foreign money is not being used to sway how American citizens vote. This is unacceptable. It is within the power of this Commission to provide these assurances. It is our duty to do so.

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How did we get here? The Supreme Court's 2010 *Citizens United* decision was a game changer. It profoundly altered the landscape of this nation's campaign finance system. I, along with my Democratic and Independent colleagues on the Commission, immediately saw the need to develop commonsense rules to address the new world of political spending the decision created. We have repeatedly sought a comprehensive rulemaking to ensure that the new corporate spending would not become a vehicle for masking the identity of donors or coercing the political activity of employees. We sought to define super PACs and lay out guidelines that would maintain their independence from candidates and party committees. And, six years ago, we saw a particular need to address the threat that new avenues for corporate political activity would make our democracy vulnerable to foreign individuals, corporations, and governments that seek to manipulate our elections through domestic corporations that they own or control.

In 2011, after fruitless months of effort toward a comprehensive rulemaking, the Commission twice considered but, on 3-3 votes, failed to issue Notices of Proposed Rulemaking that would have addressed concerns about disclosure and foreign nationals.[6] No Republican commissioner would vote to go forward. A 2011 external petition for a rule that would have required more disclosure of independent expenditures went nowhere. In December 2011, the Commission again could not muster the votes for a comprehensive *Citizens United* rulemaking and (over my objection[7]) advanced a drastically limited rule

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[5] 52 U.S.C. § 30121.

[6] 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.

[7] *Statement of Commissioner Ellen L. Weintraub on the 2014* Citizens United *Rulemaking* (Oct. 9, 2014), http://www.fec.gov/members/weintraub/statements/2014-10-09_Statement_of_Commissioner_Weintraub_on_2014_CU_Rulemaking.pdf.

that eventually passed in 2014.[8] In June 2015, Commissioner Ravel and I submitted a petition to the Commission (superseded by two petitions filed by members of the public), asking for a rulemaking on coordination, coercion, disclosure, and foreign-national political spending.[9] 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 in December 2015.[10]

Earlier this year, I wrote an op-ed for *The New York Times* with a new take on *Citizens United*, highlighting the risk of foreign actors influencing our politics through corporate political contributions.[11] In a nutshell, the op-ed pointed out that *Citizens United* protected the First Amendment rights of corporations as "associations of citizens."[12] But the people behind corporate political spenders are not always U.S. citizens, and the resources they use may well be owned by foreigners. This warning piqued the interest of investigative journalists who started to dig into the possibility of foreign actors hiding behind corporate political contributions – and they appear to have found some.[13]

Most recently, I hosted a forum at the FEC in June 2016 on *Corporate Political Spending and Foreign Influence.*[14] I invited some of the nation's keenest legal and political minds to bring before us their best thoughts on this issue. Highlights of their testimony are attached as Exhibit A. And indeed they are Exhibit A of why a rulemaking is necessary.

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I regret that we could not find consensus, despite repeated attempts over the past six years, to tackle the wide range of issues raised by *Citizens United* in a thorough and comprehensive way. Bearing in mind the definition of insanity, however, I am trying something different with this rulemaking proposal, and am hoping for a different result.

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[8] Agenda Document No. 11-73 (Dec. 15, 2011), http://www.fec.gov/agenda/2011/mtgdoc_1173.pdf; Agenda Document No. 14-53-A (Oct. 9, 2014), http://www.fec.gov/agenda/2014/documents/mtgdoc_14-53-a.pdf.

[9] Petition for Rulemaking (June 8, 2015) http://www.fec.gov/members/statements/Petition_for_Rulemaking.pdf.

[10] Agenda Document No. 15-65-A (Dec. 17, 2015), http://www.fec.gov/agenda/2015/documents/mtgdoc_15-65-a.pdf.

[11] *Taking On Citizens United*, NY TIMES (March 30, 2016), http://nyti.ms/230BOgq.

[12] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). *See also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___ (2014) ("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.") (Emphasis in original).

[13] Fang, Schwarz, Yu, *supra* n. 4. My article also inspired a measure that is now working its way through the St. Petersburg, Fla., City Council that seeks, in part, to prohibit foreign-influenced corporations from spending in municipal elections. *See* Darden Rice and Scott Greytak, *Keep super PAC cash out of St. Petersburg elections*, TAMPA BAY TIMES (July 15, 2016), http://www.tampabay.com/opinion/columns/column-keep-super-pac-cash-out-of-st-petersburg-elections/2285582.

[14] *Forum: Corporate Political Spending and Foreign Influence* (June 23, 2016), http://www.fec.gov/members/weintraub/CorporatePoliticalSpendingandForeignInfluence.shtml.

This proposal is narrowly drawn to examine just the role of foreign political spending in U.S. elections post-*Citizens United*, a topic for which I hope there is greater agreement among Commissioners. No member of the Federal Election Commission should be willing to tolerate the risk of foreign nationals interceding in American elections.

In my *New York Times* op-ed, I underscored the need for this rulemaking, as without a clarifying rule, arguably the only standard consistent with the flat statutory ban on direct and indirect foreign-national political spending in U.S. elections is a zero-tolerance standard for political spending by corporations with foreign owners. I proposed alternatively that we require corporations to verify that the share of their foreign ownership is less than 20 percent (or some other threshold that a rulemaking process would help us identify).

The experts who convened at the June forum at the FEC provided a wealth of further suggestions for us to examine. Full transcripts and audio and video links to their presentations are available.[15] Just a few of their many good thoughts include:

- that the SEC and FCC's regulatory regimes on foreign interests (such as the 5% foreign-ownership threshold under the Williams Act) could inform the FEC's efforts;

- that our rules should distinguish among publicly traded corporations, private corporations, non-profit corporations, and LLCs;

- that we should take into account the possibly divided loyalties of both U.S. based companies with global assets and foreign companies with U.S. subsidiaries;

- that we should consider whether U.S. corporations that reincorporate in other countries to avoid U.S. taxes should retain the ability to spend in U.S. elections;

- that we should couple enhanced disclosure of dark money with reverse certifications (i.e., certifications that no foreign money was spent on U.S. political activity); and

- that we should consider whether unknown shareholders should be treated as foreign or domestic.

It was also noted that a rulemaking could provide definitions of such key terms as "foreign money," "ownership," and "control," which we now lack.

These are the kinds of ideas I propose we consider as part of this rulemaking.

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The proliferation of dark money groups in the wake of *Citizens United* has made it impossible to know the sources of all the funds flooding into our political system. I continue to support greater transparency for all political spending. But if we cannot find

[15] *Id.*

consensus to let the American people know who precisely is trying to influence their votes, let us at least pursue requiring political spenders to verify and certify that they are *not* spending foreign money.

Earlier this year, I promised to introduce a rulemaking proposal to address foreign money in our elections. In anticipation of fulfilling that promise next week, I reached out to my colleagues to solicit their thoughts on what a foreign political spending rulemaking should include. I look forward to hearing their ideas.

The First Amendment concerns that are frequently raised to doom campaign finance regulatory proposals are not implicated by the bar on foreign political spending. In *Bluman v. FEC*, [16] a decision affirmed by the Supreme Court, a special three-judge D.C. district court held that "the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process." The Court noted that the "government may bar foreign citizens (at least those who are not lawful permanent residents of the United States) from participating in the campaign process that seeks to influence how voters will cast their ballots in the elections." [17]

In 2011, perhaps some commissioners saw the risk of foreigners trying to influence our elections as hypothetical. We know better today. A person would have to be wearing some very rose-colored glasses to think there are not foreign operatives interested in exploiting any vulnerability to influence our elections, and that there are no loopholes to exploit. My proposal is that we direct our counsel to draft a notice of proposed rulemaking that would allow the Commission to consider every option for reducing the potential for foreign spending in our elections – the options described in my op-ed, the options suggested by the experts at the June forum, the options laid out in the 2011 proposed NPRMs, and any other options my colleagues and our staff can devise.

Our courts have said that foreign money *may* be barred from our elections. Congress has said that foreign money *must* be barred from our elections. The American public has the right to expect the Federal Election Commission to ensure that foreign money *is* barred from our elections. To fail to do so is to threaten the integrity of America's political institutions and thus the national security of America herself.

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16 *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011) (Kavanaugh, J.).

17 *Id*.

Exhibit A

Forum: Corporate Political Spending and Foreign Influence

Hosted by Commissioner Ellen L. Weintraub
Federal Election Commission, 999 E St. NW, Washington, DC 20463
June 23, 2016

http://www.fec.gov/forum

Highlights of testimony

Richard Briffault, Columbia Law School

John Coates, Harvard Law School

Jared DeMarinis, Director, Candidacy and Campaign Finance Division, Maryland State Board of Elections

Robert Jackson, Columbia Law School

Sheila Krumholz, Center for Responsive Politics

Norman J. Ornstein, American Enterprise Institute

John Pudner, Take Back Our Republic

Mace Rosenstein, Covington & Burling

Donald Tobin, University of Maryland School of Law

Ciara Torres-Spelliscy, Stetson University College of Law

Melissa Yeager, Sunlight Foundation

Richard Briffault, Columbia Law School: If we look at justifications for regulating corporations today, it's primarily about the prevention of circumvention of otherwise legitimate rules dealing with individuals and I think also protecting some corporate and union affiliates, their employees, from undue pressure to participate in the corporate project.

Turning to restrictions on foreign money: interestingly, although you might think of this as very basic, it's far more recent. If federal restrictions on corporations date back to 1907, the actual addressing of foreign money in elections really only goes back to 1966, although

where it first shows up tells us more about where it came from, which was, it first began as an amendment to the Foreign Agents Registration Act of 1938.

That gives us a sense of why this is there. The 1938 FARA Foreign Agents Registration Act was in part a concern… 1938 tells you that the time of a possibility of foreign, particularly Nazi and potentially Communist, diversion of the legislative process through lobbying. And so there was an effort to get greater disclosure of the identities of people recruited to act on behalf of foreigners, initially foreign governments, but also expanded to include foreign individuals. And it reminds me, actually I was struck by Mace [Rosenstein]'s presentation in the first panel, how much this is connected to issues of national security. The Radio Act of 1912, the telecom regulations and defense. I think in the first panel there, was some reference to this, so this is kind of reflexive. Only American citizens should be participating in the American political process.

I think that's maybe part of it and that is certainly the language that the D.C. circuit used in the *Bluman* case upholding the ban on foreign nationals' contributing money in American elections. But I think there's another strand, which is a quasi-national security/foreign interest, and especially a concern about foreign governments participating in our elections, often through nominally private entities because I think it was also alluded to in the last panel. In other countries, it is far more common for business enterprises to be controlled by the governments themselves. Whether it's in China or Russia or the use of sovereign wealth funds through many of the oil countries. So I think you see both. The concerns about foreign governments, especially the arms of foreign agencies and the sense of "foreigners are not members of our polity."

What does *Citizens United* do? As we all know, it struck down restrictions on corporate expenditures in our elections and eliminating the two principal justifications of the problems posed by corporate wealth and the protection of minority shareholders. It left in place everything else. In particular, the ban on corporate contributions in American elections and it left in place the anti-circumvention function….

One appropriate response here would begin to do a new rulemaking, to think through what does it mean to be a corporate, a donor to electioneering communications?

John Coates, Harvard Law School: There's no disclosure obligation on companies as such in the U.S. to disclose their political activity. There have been efforts ongoing to try to get the SEC to do something for public companies but Chevron could spend a million dollars and no one would know unless they bragged about it, not even its current owners, right? So that's standard baseline, but there's probably a bigger gap in the disclosure laws that you may not be fully aware of which is that here's no general obligation for a company operating in the U.S. to tell anybody who its owners are. There're more than 5 million active business corporations active enough to file returns with the IRS and of those, less than 1% are public companies and even of the public companies, the public companies, essentially, have obligations only to disclose the ownership interests of the people, currently executive officers or directors of the company or if they own more than 5%. But again, just want to stress, most companies, including very, very large companies, are not public and are not even subject to that disclosure regime.

So, in sum, if the public wants to know who owns a given company that shows up in any forum as a donor, for example, in the FEC regulatory process, there's no way to find out, actually, who owns the company under normal disclosure obligations. There are some reporting requirements to specific pieces of the government such as the IRS, but they're generally not available to the public and they're very carefully circumscribed in how that data can be used.

So is this an issue, is there any reason to think that foreign control of U.S. companies is common? Well, actually, yes. That IRS data I was just alluding to discloses in the most recent update I could find, about $12 trillion of assets owned by U.S. companies that were controlled by foreign owners. 51% or more.

Something like 100,000 such companies with a nontrivial amount of revenue and assets. Operating in the U.S. One you all know, actually. So you know that Budweiser can you've seen turn into something called America? It's actually owned by a Belgian company. The lonely city of Belgium, as Donald Trump has referred to it recently.

Okay...what about less than full control? The IRS collects data on full controlled, controlled companies; there's a separate data regime that the Federal Reserve Bank of New York and the U.S. Treasury run where they survey banks and brokers and issuers, large issuers, to try to figure out how much portfolio investment, that is, non-controlling investment, there is into U.S. corporate stock. And the best data from that is that, an astonishing increase, actually, over the past 30 years. Back to 1982 about 5% of all U.S. corporate stock was held or controlled by foreigners. Now, it's now up to 25. *Twenty-five.* So let that sink in for a second.

One in four dollars, in value terms, in U.S. corporations is controlled, directly or indirectly, by a foreign owner. Now what kind of foreign owner? Well, we don't know. It's part of the disclosure gap. It could be individuals, it could be companies, they could be governments and of course, in many countries like China, where governments and businesses are essentially identical, and so, a little hard to tease out, even if you know the country from which the investment is coming.

What more fundamental feature of our government is the protection of the republic? Foreign interest and domestic interest are going to predictably diverge. If you're appointing a president, an independent committee chairman, et cetera, through a political system that has oversight of the industries where we ban foreign ownership, it's a little odd then to allow foreign influence to occur at the top of that chain and not further down that chain. That is to say if the Defense Department can ban somebody from participating in a contract, why would you let people with influence over the contract higher up the chain be influenced in the electoral system by the very same foreign companies?

Jared DeMarinis, Director, Candidacy and Campaign Finance Division, Maryland State Board of Elections: [T]he states are taking this responsibility about corporations and shareholders in a new light. I think that they used to look at the federal side and say, that used to be the shining model of disclosure and activity for compliance and the states were always 'let almost anything go.'

Now I think the roles have kind of flipped here. For example, with independent expenditures in the state of Maryland, if you're an entity that makes an independent expenditure in our state for a state or local election and you have shareholders, you have to submit your activity to the shareholders on their regular shareholder report.

So the shareholders will have some knowledge about that. I think I wanted to talk about, a little bit, one of the questions here is, "What can the FEC do? You know, how can they build a record about this?" And... I can say that how this change came about, I can talk about the fact that we had two commissions, to study campaign finance law, one by the Attorney General, another one by the General Assembly or that outside groups did reports about how much money was passed through the loophole, which in one four year cycle was $5 million in the very small state of Maryland, which, as you can see, had a very significant impact there or the press was very knowledgeable about this loophole. But in the end, it was really the *Citizens United* case.

I think that the *Citizens United* case, even in the state, where it had no effect, prior, I mean, after its ruling, made legislators rethink and take a look about corporate influence. And I think that in their mind, because we, everyone looked at the federal model, you had a lot of people go, "Oh, of course corporations can never give because the federal law prohibits corporations from giving." Once *Citizens United,* it opened up and it was in the press that corporations can give, corporate owners felt a little bit more secure about giving in state and local elections, and that they weren't going to run afoul of everything.

Robert Jackson, Columbia Law School: We didn't imagine that corporations would have this very powerful constitutional right to spend the shareholders' money on politics until the Supreme Court told us in a series of decisions that, of course, culminated with *Citizens United* in 2010. When they did, a few of us started thinking about, now that corporations have this power, what should be the rules of the game for how they use it? Who decides? The management? The directors? The shareholders, whose money it is? We didn't know because we really hadn't given the topic much thought. And so a few of us have set out… to try and establish, get a sense for what the rules of the game ought to be if a large public company wants to take shareholder money and use it for political purposes.

Several law professors five years ago petitioned the Securities and Exchange Commission to develop a rule requiring corporations to disclose to their investors when corporate money is used for politics. You see, the idea here would be, if the managers use the money in a way that shareholders don't like, well, shareholders will get information about that. And if they do, then shareholders can take action. They can sell the company stock, they can vote out the directors who are doing stuff they don't like. But without that information, these markets can't work. It's a little bit like executive pay. We said the SEC should require disclosure of this. It was a group of ten corporate law professors, nine famous ones and me, who asked the Securities and Exchange Commission to require disclosure of this and I'm happy to say that this petition has gained some support. More than 1.2 million people have written to the SEC and asked them to do this. That makes it the most commented in the history of the Securities and Exchange Commission.

One of the reasons that the SEC has refused to develop the rule I just described is that they claim they lack the expertise. They say, "Well, you know, elections are complicated, it's not our thing; we have lots of securities lawyers, but this election stuff, we don't really

know anything about it, so we can't do it." So I've pointed out to them that this building exists [laughter] and that there are some extraordinary election lawyers who know about things like: Should there be a *de minimis* limit of political spending and should it be disclosed or not? When should it be disclosed? What form should it be disclosed in? Whether there should be exemptions for certain kinds of disclosures? You see, they claim to be clueless about this, but my sense is, you have ideas and I want to urge you to share them with the Securities and Exchange Commission. And the reason I say this is that as long as these two groups of lawyers don't talk to each other, they'll be able to claim that the reason they haven't done this is because they don't know how. And based on what I've heard this morning and what I'm sure I'll hear the rest of the day, that's not a good enough answer. In fact, we do have the capacity both inside and outside the government to write a rule that would give investors transparency into what's happening in corporate political spending.

Sheila Krumholz, Center for Responsive Politics: Since the *Citizens United* decision, outside money has grown and become increasingly important in funding elections. It now exceeds $400 million in this cycle and is close to three times as high in the current cycle as it was at this point in 2012. It is 16% of the grand total raised, higher than all previous cycles. Corporate PACs have been a steady source of contributions over time and have increased their contributions substantially in the 21st century. Adjusting for inflation, corporate PAC contributions increased by 80% between 2000 and 2014.

I can't see how unlimited secret contributions, which are also, I believe, too often or largely, transactional in nature, could ever be good in the sense that we wouldn't have the mitigating effects of public ability to view those contributions and hold the members and the party leaders accountable.

So corporate donors giving secretly through non-disclosing groups, straw donors giving secretly and improperly if not illegally through LLCs, and foreign donors giving secretly and illegally – all are issues of enormous importance for the integrity of the democratic process generally and public confidence, specifically.

We know, based on scandals of the past, of the wherewithal and willingness of foreign donors to contribute in shaping U.S. elections. Is it logical to believe that interest is any less now that they can do so in complete anonymity?

Norman J. Ornstein, American Enterprise Institute: Corporations, which are set up under charters directly with the goal of maximizing shareholder return, are very different from individuals. They are not people, they have different motives.

But I would also say that corporations are different now than they used to be. In 1953, Charles Wilson, then the CEO of General Motors, made a statement in testimony to Congress that became very famous: What's good for General Motors is good for America and vice versa. That was then. This is now. Now we have corporate inversions, where companies that used to say we're proud to be part of America are sending their ownership and charters abroad to save on taxes. We have a vast expansion of foreign companies buying, foreign countries and entities buying American companies and creating American subsidiaries. And we have a global economy. So a General Motors, which has not done

an inversion, which is proudly still based in Detroit, is a global company where the vast majority of its manufacturing elements and its business are done abroad.

Now, what that means is that they have a variety of interests in their goal of making money. And those interests do not necessarily coincide with American national interest.

It could be if you took some of the suggestions that are on the table for the FEC that requires entities contributing to politics to basically certify that there is no foreign money or foreign influence involved, and if you combine that with real disclosure, then at least you would have a better enforcement mechanism.

John Pudner, Take Back Our Republic: We do know that people right now, all over, foreign and domestic, know that political investment is a very good investment. That the chance to put millions of dollars into political contributions with the possible net result of billions of dollars in taxpayer money, coming back to you through either policy changes or actual special interest money, is a tremendous investment.

Point two we know is that there are, believe it or not, unscrupulous political consultants, who, if you find them a way to get money into a system, will do it to make money. The math is very simple here. If you can find a way to get a million dollars from somewhere and can do a media buy with it, you get $150,000. If you start talking tens of millions, you're pretty well off pretty quickly.

Obviously, if you have a (c)(4) that doesn't have to disclose its owners, that's one of many dark money avenues that can be used. That if you are overseas and want to get money in and knew that a (c)(4) could do it without you being reported, and, by the way, they're spending well over half of their money on political activity. That's an inviting avenue as well.

Third thing we know is there are foreign interests who are willing to hack into government servers, into political party servers, even worse things, they'll carry on deadly acts. I mean, this kind of concept: "Would you really think *anyone* would channel money in from abroad to affect U.S. policy?" is almost incomprehensible when I hear that from people. I mean, there are very unscrupulous players who benefit greatly from changes in U.S. policy.

Mace Rosenstein, Covington & Burling: Historically, the concern in general about foreign ownership was that foreign powers could acquire and disrupt our sort of private communications or ship to shore communications. Later, as I mentioned, with the emergence of commercial broadcasting there was a concern that foreign powers could manipulate U.S. public opinion over the radio or over television. In contrast to what the FCC has characterized as its traditionally heightened concern for foreign influence over control of licensees which exercise editorial discretion over the content of their transmissions, re: broadcasters, they've justified their willingness to consider foreign investment and common carrier licensees on the ground that they're just merely passive conduits for information provided by others.

Let's pause for a second. I'd ask you to think about whether that rationale can continue to be squared with the realities of telecommunications technology and the media marketplace

in the 21st century. And, in fact, I think what you'll see is that policymakers, not just telecommunications policy makers, are becoming increasingly concerned about foreign influence, not over broadcast content (because, as we all know nobody watches broadcast television anymore anyway); but the possibility that foreign agents or hostile foreign governments could engage in cyber warfare using our communications networks. And I'd dare say that's probably trending in the right direction because communications infrastructure, think about the information that you know, they may be passive conduits, and after the open Internet decision from the court a couple of weeks ago they may be sort of locked into being passive conduits, but our communications networks control the delivery and processing of vast amounts of highly sensitive information not just for the government but for financial institutions and other markets. And I think one could argue, you know, the Commission, if it were to reexamine these issues, might want to be shifting its focus away from broadcasting, you know, how much influence can you exercise by owning a radio station in Fargo? To our wired and unwired communications networks, given the vast quantities of data that they distribute and given their vulnerabilities from a national security perspective.

Donald Tobin, University of Maryland School of Law: The Supreme Court's decision in *Citizens United v. Federal Election Commission* dramatically changed our campaign finance landscape by really creating an entirely new type of donor. Although much has been written about the decision and about the consequences of corporate spending on independent election advocacy, very little has looked at the ramifications of how to fit corporate election activity within our current regulatory framework.

Or about what new regulations are necessary in order to ensure compliance by corporations with existing election laws. The Supreme Court has found that corporations have a right to engage in independent election advocacy, but it has not clearly enunciated what the principles are that underlie that right. So as regulators think through how to ensure corporate compliance with existing election laws, they must consider how strongly corporations differ from individual citizens and how those different characteristics raise tremendous regulatory questions.

For example, considering the existing rule that foreign nationals are prohibited from engaging in electioneering communication: In simple terms, a foreign individual could create a Wyoming corporation. The Wyoming corporation could be the sole owner of a Delaware corporation that, in turn, could own a Nevada corporation. The Nevada corporation could then engage in independent expenditures on behalf of a candidate. For those who don't practice corporate law, I hope I picked the four most difficult corporate states to be able to break the corporate structure.

So, under existing law, it'd be incredibly difficult for any government entity, including the FEC, to have any idea that the funds in question came from a foreign individual.

Similar problems exist with regard to the disclosure provisions. In *Citizens United*, the Court upheld disclosure as justified based on a government interest in providing the electorate with information and acknowledged there was evidence in the record in *McConnell* that independent groups were running election related advertisements while hiding behind dubious and misleading names.

Complex-entity relationships hide donors from both the public and from regulators. If we had individuals donating in the name of another person, that'd be criminal. But our existing regulatory regime seems perfectly comfortable allowing this to be done through the corporate form….

So when we think about corporate money in that context being spent on elections, we're actually thinking of shareholder profits that are being used in that way.

So, then, when we look at that, we have to think, Well, what are the underlying rationales for allowing corporations to participate in political campaigns? Are we concerned about who owns the corporation? Are we concerned about who controls the corporation? Are we concerned about who's funding the election activities? We have to understand, in a sense, the evil we're trying to address so we can think about the ways to solve that problem.

So I think there are several ways to look at this in the publicly held context and the first is really when we're looking at sort of beneficial ownership. What is the way in which somebody has enough ownership of the corporation that they are really involved? And in a different context, the SEC has used a 5% threshold for determining that amount. And I don't know, the 5% is not magic, it's actually in a totally different context, but what it does tell us is it wouldn't be overly burdensome to ask a publicly traded corporation to know who its owners were in the 5 to 10% range, right? It's clearly difficult for them to know it in the .01% range. It's clearly hard for them to know who owns any share. But if we're talking about somebody who owns a significant share of a publicly traded corporation, it's not that hard, not that burdensome to require the shareholder to disclose that information.

Ciara Torres-Spelliscy, Stetson University College of Law: [T]he Supreme Court has held in *Buckley*, in *McConnell*, in *Citizens United* itself, that there is a voter informational interest which justifies campaign finance disclosure as a matter of constitutional law. The basic idea that the Supreme Court has endorsed is about heuristics for voters. Basically, if I know as a voter that an ad is paid for by the American Lung Association, I will treat it differently than if it is paid for by a tobacco company. The funding is a cue to the voter.

But there's another aspect of accountability that is also served by transparency of money in politics which Justice Kennedy himself alluded to in *Citizens United.* Justice Kennedy, writing for the majority in *Citizens United,* said the following: "Shareholder objections raised through the procedures of corporate democracy can be more effective today because modern technology makes disclosures rapid and informative. With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." If investors are to hold their companies accountable, then we need more transparency than we have today. Including which corporation is funding which political ad.

[D]ark money is a problem for voters who may not want to vote for a candidate that is backed by industry. Dark money is a problem for investors who may not want to foot the bill for corporate political spending. Dark money is a problem for customers who may not

want to support a firm that supports their political opponents. But without greater transparency, voters, investors, and customers can be duped.

Melissa Yeager, Sunlight Foundation: We're seeing more and more dark money coming from 501(c)(4) nonprofit social welfare groups and limited liability companies that we kindly refer to as “shell LCs,” set up for the sole purpose of influencing campaigns and elections.

If we’ve learned anything from the recent reporting including stories concerning the Panama Papers it’s that LLCs are internationally used as a vehicle for people to move money in secret. And there are many examples of LLCs already in this cycle but we know of at least one example where the owner admitted he was using it to distance himself from a campaign. For example, an analysis by the Sunlight Foundation showed that a super PAC supporting Marco Rubio had several untraceable LLC donors. The biggest was a $500,000 donation from IGX LLC, with an address in Delaware. The only information on the LLC filing is that of the corporate that registered them, Corporation Service Company, and that's where the paper trail ends.

Andrew Duncan, the owner of IGX, told the AP that he had used IGX to max the donation because he was worried about reprisals, which is refreshingly honest but also troublesome. While here are many agencies that should be concerned about the lack of information about LLCs, the FEC has a duty to ensure the integrity of our election and know the source of their funding. The Supreme Court has repeatedly ruled that the First Amendment supports disclosure of campaign contributions; under some circumstances, people do have the right to anonymous speech, but there is no explicit right to make anonymous contributions. Nor do the people who are not U.S. citizens or permanent residents have any right to participate in American elections.