

Statement of Ciara Torres-Spelliscy¹
Before the Federal Election Commission (FEC)
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Introduction

Thank you to the Commission and Commissioner Ellen L. Weintraub for inviting me to speak here today. I am an Associate Professor of Law at Stetson University College of Law in Florida and a Fellow at the Brennan Center for Justice at NYU School of Law. I am also the author Corporate Citizen? An Argument for the Separation of Corporation and State. In my book I cover, among other topics, the issues of corporate dark money and foreign money in American elections.

Corporate Dark Money

As I explain in my new book, Corporate Citizen?, corporations have been gaining constitutional rights without concomitant responsibilities. In many cases, the Supreme Court is the source of expanded corporate constitutional rights. But the lack of responsibilities is caused by multiple governmental actors including executive administrative agencies like the Federal Election Commission (FEC), Internal Revenue Service (IRS) and the Securities and Exchange Commission (SEC), which all have overlapping jurisdiction over money in politics. Here I will focus on the role of the FEC, which has facilitated dark money in federal elections and has so far failed to clarify when foreign money may be used in U.S. elections.

We know from the FEC's disclosures that certain publicly traded companies exercising their *Citizens United* rights give directly to Super PACs—some spending a million dollars at a time. According to the Center for Responsive Politics, in the 2012 federal election, Chevron (ticker CVX) gave \$2.5 million to the Congressional Leadership Fund Super PAC.² Privately held corporations have also spent in federal elections. For instance, in this election, CV Starr & Co, a private subsidiary of the Starr Companies, gave the Jeb Bush's Super PAC Right to Rise \$10 million.³

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² *2012 Top Donors to Outside Spending Groups*, OPEN SECRETS, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=D&type=O&superonly=N>.

³ *Right to Rise, Contributors 2016 Cycle*, OPEN SECRETS (2016), [HTTPS://WWW.OPENSECRETS.ORG/PACS/PACGAVE2.PHP?CYCLE=2016&CMTE=C00571372](https://www.opensecrets.org/pacs/pacgave2.php?cycle=2016&cmte=C00571372).

But not all of the spending in U.S. elections is transparent. Between 2010 and 2014, there was \$600 million of dark money spent in federal elections alone.⁴ Post-*Citizens United*, the press has shown a renewed interest in hidden corporate political spending.⁵ But as much as the press digs, they cannot see behind the legal secrecy. Consequently, American elections are missing a key part of the story: exactly who is funding political ads.

Dark money is money that has been routed through an opaque nonprofit — thus concealing its true source from voters and investors alike. The source of dark money could be from individuals, unions, associations, nonprofits or for profit businesses.⁶ Corporations do not have a constitutional right to spend money darkly. If anything, according to the Supreme Court, corporations have no right to privacy at all.⁷ But corporations have been clever at exploiting the gaps in regulation between the IRS and elections regulators, which make dark money possible.⁸

Dark money is a problem that predated *Citizens United v. FEC* (2010).⁹ Arguably, corporate dark money was the original sin in Watergate.¹⁰ The reason for keeping the corporate money raised by the

⁴ Eric Schneiderman, *Pulling Up The Curtain On Dark Money*, POLITICO (June 22, 2015).

⁵ Kathy Kiely, *Former IRS Official Sees Dark Money Scandal Brewing as demonstrators continue weeklong protest on Capitol Hill, an expert talks about the toll Citizens United is taking*, MOYERS & CO (Apr. 12, 2016); Karoli Kuns, *How Dark Money Shields Political Donors*, NEWS WEEK (June 30, 2015); *Most expensive midterms EVER: The power of Citizens United and anonymous 'dark money' revealed as spending nears \$4 billion*, AP & REUTERS (Nov. 4, 2014).

⁶ Robert Maguire, *The multiplication magic behind the dark money churn*, OPEN SECRETS (May 3, 2016), <http://www.opensecrets.org/news/2016/05/the-multiplication-magic-behind-the-dark-money-churn/>.

⁷ *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (“corporations can claim no equality with individuals in the enjoyment of a right to privacy. ... The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.”) (internal citations omitted); *see also* *FCC v. AT & T Inc.*, 562 U.S. 397, 409-10 (2011) (“The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations. We trust that AT&T will not take it personally.”).

⁸ Ciara Torres-Spelliscy, *Hiding Behind the Tax Code*, NEXUS CHAPMAN’S J. OF LAW & PUB. POL’Y (2011).

⁹ CIARA TORRES-SPELLISCY, *CORPORATE CITIZEN? AN ARGUMENT FOR SEPARATION OF CORPORATION AND STATE* (2016).

¹⁰ Albert R. Hunt, *A Banner Year for 'Dark Money' in Politics*, BLOOMBERG (Jan. 3, 2016) (“The key,’ [Bob Woodward] said a half-century ago [in Watergate], ‘was the secret campaign cash.”).

1972 reelection campaign of Richard Nixon secret was easy enough to discern. (1) Federal law failed to require disclosure for months in early 1972;¹¹ thus Nixon’s fundraisers thought they could get away with hiding it. And (2) corporate contributions directly to the campaign were illegal.¹² Some of the illegal corporate dark money gathered by Nixon’s Committee to Reelect the President (CREEP) funded the Watergate burglary.¹³

Citizens United may have facilitated more money in American elections, but the decision did not cause the uptick in dark money. Indeed, *Citizens United* upheld the constitutionality of disclosure of the underlying sources of money in politics by a vote of 8 to 1.¹⁴ But because of the dark money problem, often we don’t know what we don’t know about corporate money in politics.¹⁵ And I should be clear: not everyone

¹¹ RICHARD REEVES, *PRESIDENT NIXON: ALONE IN THE WHITE HOUSE* 462 (2002) (“there was no law. The Corrupt Practices Act of 1972, a compromise bill that passed both houses of Congress by huge margins and was signed into law by the President on February 7 . . . The new law would not take effect until April 7, sixty days after the President signed it In those sixty days, the President and his committee collected more than \$20 million--almost \$2 million of it in cash--with no requirement or intention to name names or amounts.”).

¹² U.S. General Accounting Office, *Impact of Foreign Corrupt Practices Act on U.S. Business: Report To The Congress* 1 (1981) (reporting 450 companies admitted making \$300 million in questionable or illegal payments); *see also* Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices Submitted to the Senate Banking, Housing and Urban Affairs Committee 2 (May 12, 1976) (“In 1973, as a result of the work of the [Watergate] Special Prosecutor, several corporations and executives officers were charged with using corporate funds for illegal domestic political contributions.”).

¹³ Andy Kroll, *Follow the Dark Money*, *MOTHER JONES* (July/August 2012).

¹⁴ Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GA. ST. U. L. REV. 1057 (2011) (There were a slew of lawsuits filed against disclosure laws after *Citizens United*. In the first year after the decision, nearly all of these challenges failed and disclosure was upheld as perfectly constitutional.).

¹⁵ Jennifer Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEORGETOWN L. J. 1443 (2014) (“Relying on the Longitudinal Elite Contributor Database ...[w]e suggest that much of what the Court and reformers assume about disclosure is wrong — that their views are premised on an effective and well-functioning disclosure regime that in fact bears scant resemblance to the system of disclosure maintained by the FEC.”).

thinks dark money is a bad thing. Just as there are fans of asbestos,¹⁶ there are fans of dark money too.¹⁷

In the post-*Citizens United* era (2010-2016), the high water mark for dark money was the 2012 election when President Obama was defending his presidency against Mitt Romney. According for the Center for Responsive Politics, in 2012 most of the dark money flowed through social welfare 501(c)(4) groups—to the tune of \$257 million; while \$55 million in dark money went through 501(c)(6) trade associations.

Dark money in the 2016 got off to a fast pace.¹⁸ But as of June 1, 2016, comparatively little dark money--\$36.8 million from all sources--has been spent in the 2016 race.¹⁹ According to the Wesleyan Media Project in partnership with the Center for Responsive Politics, dark money in 2016 has migrated from the presidential race to U.S. Senate elections. They found that “[n]early 60 percent of the outside group spending in Senate races so far has come from 501(c) organizations.”²⁰

As Trevor Potter and Bryson B. Morgan, remind us, “[t]his lack of disclosure is not to be confused with anonymity. The sources of these funds are likely well known to candidates and party elites, but withheld from the public.”²¹

¹⁶ Jock McCulloch, *Saving the Asbestos Industry, 1960 to 2006*, 121(5) PUBLIC HEALTH REP. 609–614 (Sep-Oct 2006), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1564458/> (“On December 4, 1970, the Asbestos Information Association/North America (AIA) was formed ... The AIA's stated objectives were to provide a channel of communication to the public about asbestos, to rebut ‘irresponsible and uninformed criticism’ of the industry and its products, and to ‘propagate the benefits and indispensability of asbestos through advertising, publicity, and speeches.’”).

¹⁷ John Riches, *The Victims of “Dark Money” Disclosure: How Government Reporting Requirements Suppress Speech and Limit Charitable Giving*, GOLDWATER INSTITUTE (Aug. 5, 2015).

¹⁸ Tom Kertscher, *Ten times more ‘dark money’ has been spent for 2016 elections, U.S. Sen. Tammy Baldwin says*, FACTCHECK.ORG (Nov. 5, 2015 at 6:00 a.m.) (“for the 2016 cycle, \$4.88 million in dark money expenditures have already been made, according to the center. That’s more than 10 times the \$440,000 that was spent at this point during the 2012 cycle. The \$4.88 million has been spent by six groups, including the U.S. Chamber of Commerce (\$3 million) and Americans for Prosperity (\$1.5 million)[.] The only liberal group was Planned Parenthood, which spent just under \$75,000[.]”).

¹⁹ *Political Nonprofits (Dark Money)*, CTR. FOR RESPONSIVE POLITICS (data up to date as of June 19, 2016), https://www.opensecrets.org/outsidespending/nonprof_summ.php.

²⁰ Robert Maguire, *Advertising surges in presidential race; dark money dominating Senate contests*, CENTER FOR RESPONSIVE POLITICS (May 13, 2016),

²¹ Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending In U.S. Elections & How 2012 Became the “Dark Money” Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL’Y 383, 385 (2013).

The full impact of *Citizens United* is yet to be known. Studies have shown an increase of negative ads since *Citizens United*. For example, The New Soft Money found: “[i]n 2012 there was \$714 million in outside spending in Congressional races and 74.22 percent was spent on TV ads. Of that spending, 77 percent was for negative ads spent against a candidate — e.g. trying to tear a candidate down instead of trying to tout the good qualities of a candidate.²² This is a problem because it can “reduce[] public trust and satisfaction with government”²³ and could have a deleterious impact on the electorate.²⁴ Media expert Craig Aaron from Free Press explained, “[t]hey don’t run attack ads so that you’ll like the other guy a little less. They run attack ads to discourage you from voting at all. Attack ads work and they depress turnout and keep people from participating in the political process.”²⁵

The Federal Election Commission (FEC) has jurisdiction over political ads in federal elections. When a nonprofit reports to the FEC, under the current rules, only the donors of earmarked funds are reportable. Earmarked means the donor said what candidate or what ad campaign should be supported with the donor’s money. Thus current FEC rules allows for Alice in Wonderland FEC filings, that claim millions have been spent in a federal election, but no one in particular was the source of the funds. The FEC should adopt new rules that require reporting of the source of all funds spent in federal elections, not just the earmarked ones.

Foreign Money in US Elections

A few days after *Citizens United*, President Obama in his first State of the Union address chastised the Justices of the Supreme Court sitting in the gallery about the opinion:²⁶

²² Daniel P. Tokaji & Renata E. B. Strause, *The New Soft Money: Outside Spending in Congressional Elections*, ELECTION LAW @ MORITZ AT THE OHIO ST. U. MORITZ COL. OF L.

²³ JOHN NICHOLS & ROBERT W. MCCHESENEY, *DOLLAROCRACY HOW THE MONEY AND MEDIA ELECTION COMPLEX IS DESTROYING AMERICA* 128 (2013) (quoting studies from Rutgers and George Washington University).

²⁴ *2012 Shatters 2004 and 2008 Records for Total Ads Aired*, WESLEYAN MEDIA PROJECT (Oct. 24, 2012), <http://mediaproject.wesleyan.edu/releases/2012-shatters-2004-and-2008-records-for-total-ads-aired/> (“One of the dominant features of the 2012 election has been the increase in negativity.”) (showing data indicating that 88.7% of ads from Democratic groups were negative and 95.2% of ads from Republican groups were negative).

²⁵ Ciara Torres-Spelliscy interview with Craig Aaron, President Free Press (July 27, 2015).

²⁶ Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES, Jan. 28, 2010.

With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests -- including foreign corporations -- to spend without limit in our elections. (Applause.) I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. (Applause.) They should be decided by the American people.²⁷

Sitting in the audience, Justice Alito was caught on camera mouthing "not true." And ever since then, there has been a lingering question about whether foreign corporate money will get into U.S. elections or not post *Citizens United*.

In *Citizens United* itself, the Supreme Court largely ducks the question of corporations that have foreign investors or corporations that are owned and controlled by foreign sovereigns. The Court merely cryptically said,

[w]e need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process. Cf. 2 U.S.C. § 441e (contribution and expenditure ban applied to "foreign national[s]"). Section 441b is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders. Section 441b therefore would be overbroad even if we assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process.²⁸

A year after *Citizens United* a Canadian named Benjamin Bluman challenged the long-standing ban on foreigners' spending in U.S. elections in a case called *Bluman v. FEC*. His argument was that the logic of *Citizens United*, that the First Amendment does not discriminate based on the identity of the speaker, should apply to him too. The lower court in *Bluman* ruled against the foreign plaintiffs stating,

Plaintiffs ... acknowledge that they do not have the right to vote in U.S. elections, but they contend that the right to speak about elections is different from the right to participate in elections. But in this case, that is not a clear dichotomy. When an expressive act is directly targeted at influencing the outcome of an election, it is both speech and

²⁷ Remarks by the President in State of the Union Address, Jan. 27, 2010 <https://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

²⁸ *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 362 (2010).

participation in democratic self-government. Spending money to contribute to a candidate or party or to expressly advocate for or against the election of a political candidate is participating in the process of democratic self-government.²⁹

The *Bluman* court went on to note, “distinguishing citizens from non-citizens in this context is hardly unusual or deserving of scorn; rather, it is part of a common international understanding of the meaning of sovereignty and shared concern about foreign influence over elections.”³⁰ This case was summarily affirmed without an oral argument by the Supreme Court.³¹

But despite the *Bluman* ruling, is foreign corporate money actually getting into our elections? As a matter of statutory law, foreigners (the human kind) are not allowed to spend in an American election. That includes federal, state and local elections. A foreigner can’t even pay for a race for dog catcher. Here’s the law:

It shall be unlawful for— (1) a foreign national, directly or indirectly, to make— (A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election; (B) a contribution or donation to a committee of a political party; or (C) an expenditure, independent expenditure, or disbursement for an electioneering communication (within the meaning of section 434(f)(3) of this title); (2) a person to solicit, accept, or receive a contribution or donation described in subparagraph (A) or (B) of paragraph (1) from a foreign national.³²

Note that nothing in the statute refers to candidates. It merely bars foreign nationals spending in an American “election.” But just as the Tillman Act didn’t prevent all corporate money from getting into the Nixon campaign, this part of the law has not stopped all foreign money from getting into U.S. elections. A concrete example occurred in an election in Los Angeles. In 2012, there was a Ballot Measure called “the Safer Sex in the Adult Film Industry Act,” which would require that actors in pornography wear condoms. The measure passed with 1,617, 866 votes in favor (56.96%) vs. 1, 222, 681 votes against (43.04%). Spending against Ballot Measure B included \$327,000 from two

²⁹ *Bluman v. FEC*, 800 F.Supp.2d 281, 289-90 (D.D.C. 2011).

³⁰ *Id.* at 292.

³¹ *Bluman v. FEC*, 132 S.Ct. 1087 (2012).

³² 52 USC § 30121 (formerly 2 USC § 441e(a)).

companies tied to Manwin Licensing International. Manwin Licensing International is a foreign corporation located in Luxembourg that runs adult webpages around the world. Its CEO is Fabian Thylmann who is a German national who works in Belgium.³³

The FEC received a complaint about the foreign spending in the L.A. ballot measure back in 2012,³⁴ but failed to take action. In 2015, then-FEC Chair Ann Ravel revived the matter by filing a memorandum urging the FEC to clarify that ballot measures are covered by 52 USC § 30121, the federal law which bans foreign money in the U.S elections.³⁵ On October 1, 2015, the commission deadlocked again, which means there is no clarification from the FEC on whether foreign money is barred from funding American ballot measures or not.³⁶ This could impact California's expensive ballot initiatives, state constitutional amendments, and every attempt nationwide to legalize marijuana through a ballot measure.

This whole episode with the foreign pornographer spending corporate funds in a L.A. election brings us back to President Obama's assertion in his State of the Union that foreign corporate money would be spent in U.S. elections. Trevor Potter stated, foreign money in American elections "may be happening now."³⁷ When I interviewed him for my book, Mr. Potter explained how:

the problem is, many international corporations have significant foreign ownership. Many U.S. corporations have significant foreign ownership. It is easy for a foreign corporation to establish a U.S. registered corporate subsidiary. Many boards of directors have non-U.S. members on their boards. Money is transferred freely around the world. Foreign nations have investments in the U.S. Many Chinese state companies have investments here including in U.S. companies. All of that occurs behind a veil

³³ First General Counsel Report, FEC, re: Complaint by Michael Weinstein against MindGeek & Manwin Licensing International (Aug. 15, 2014), <http://eqs.fec.gov/eqsdocsMUR/15044372921.pdf>.

³⁴ FEC Complaint from Michael Weinstein against Manwin (Oct. 26, 2012), http://www.aidshealth.org/wp-content/uploads/2012/10/Manwin_FEC-Complaint.pdf.

³⁵ Memorandum from FEC Chair Ann Ravel to the FEC re: State and Local Ballot Measures and the Ban on Foreign National Contributions (Sept. 22, 2015), <http://www.aidshealth.org/wp-content/uploads/2015/09/FEC-Ravel-agenda-Measure-B-2015-09-22.pdf>.

³⁶ Kate Buckley, *Commission Divides Sharply on Scope of Foreign National Ban*, PERKINS COIE (Oct. 1, 2015).

³⁷ Ciara Torres-Spelliscy interview with Trevor Potter, President Campaign Legal Ctr. (July 27, 2015).

because it is not possible for somebody to know from the public record what the sources of funding are for a U.S. corporation. So saying that companies can spend so long as they have a U.S. charter, opens up the possibility that they will give [foreign money] through the dark money groups.³⁸

If Los Angeles is a harbinger, foreign corporate money may well be a factor in the 2016 elections. As Justice Stevens reasons in his book, Six Amendments, if we do not want the money of a Canadian person (Mr. Bluman) in our elections because he is not a citizen, it may also follow that we do not want foreign corporate money in elections for the same reason.³⁹

The Supreme Court has welcomed corporations to spend in ballot measure campaigns and in candidate elections through *Bellotti* and *Citizens United*. In so doing, the Court overturned federal and state laws that were put in place to keep separation of corporations from the state electoral process. This turn of events has opened the risk of corporate foreign money being injected into American elections. This may already be happening through dark money channels. And disturbingly, foreign money was used in a local election in L.A. without any subterfuge, and still, the FEC did not act to discipline the spender. This could broadcast precisely the wrong message to other potential foreign corporate political spenders to jump right into U.S. elections.

I encourage the Commission to act to stop dark money and to put protections in place to prevent the spending of foreign money in American elections. Thank you again for your consideration of these key issues.

³⁸ *Id.*; see also Ciara Torres-Spelliscy interview with Ann Ravel, Chair Federal Election Commission (Nov. 3, 2015) (“I think there is no question that there is foreign corporate money in elections, but we can’t see it”).

³⁹ JOHN PAUL STEVENS, *SIX AMENDMENTS HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* 59 (2014) (“I shall explain why it is unwise to allow persons who are not qualified to vote—whether they be corporations or nonresident individuals—to have a potentially greater power to affect the outcome of elections than eligible voters have.”).