

## Transcript

### Forum: Corporate Political Spending and Foreign Influence

*Hosted by Commissioner Ellen L. Weintraub*

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#### **Statement of Richard Briffault, Columbia Law School**

**RICHARD BRIFFAULT, COLUMBIA LAW SCHOOL:** Thank you, Commissioner, for inviting me here and actually for inviting everybody who's been here. I have learned so much from the prior two panels. I hope we're able to sustain the energy and engagement level of our predecessors because I think they've been great so far. I want to talk about three things. First, I actually sort of want to do a little bit of back to basics, which is why does campaign finance law restrict corporate and foreign political activity.

Second, talk about *Citizens United* and its impact on both the justifications and on the rules that it doesn't directly affect, but how it, nonetheless, and some of this picks up on themes we heard in the prior panel, particularly from Don Tobin, how it affects things it doesn't directly regulate.

And finally, you put me down as Administrative Law and I've been trying to put my administrative hat on, what kind of actions the FEC itself can take in terms of rulemaking to address some of these issues of corporate political spending and foreign influence that have been triggered after *Citizens United*.

So first, what are the traditional justifications for restricting corporate participation in elections? Traditionally, there were two. First, really dates back to the 19th century. There were speeches that Andrew Jackson gave denouncing the role of the second bank of the United States in the 1832 election. There were speeches of Lincoln and Hayes and Cleveland which is the concept later picked up famously in a phrase by Justice Frankfurter, that corporations are aggregations of wealth. That corporations,

because of their wealth and power, were seen as a special threat to democracy and similarly, when, when unions became more powerful during the New Deal, they were also added into the mix of entities that were by their very nature singled out for special treatment. So federal, state laws began to treat corporations as special in the 1890s. Federal law, in 1907, our oldest continuing federal election law, is the Tillman Act, which banned corporate contributions in federal elections. And then on the Taft-Hartley legislation in the 1940s, extending that to expenditures and to unions.

So, number one has always been this concept of corporations as because of the corporate form, being able to amass distinctive wealth. Second, and I think my colleague Rob Jackson alluded to this this morning, is the concept of minority shareholder protection, what Justice Brandeis referred to as "other people's money," that you had corporations and various investigations that go back to 1905. The Armstrong Commission of New York State, of corporate managers using corporate funds in ways that were actually adverse to the interests of certain corporate shareholders.

So the two dominant justifications going down to the year 2010 were that the aggregations of wealth and the protection of minority shareholders.

Well, *Citizens United*, I think, effectively eliminates the first. I think that's the gist of the court statement, that I won't say corporations are people too, but corporations are not distinctively bad actors. That the fact that they have wealth and power, does not make them different from private citizens who have wealth and power as well. You can't single out corporations because of their status as devices for accumulating wealth.

And the court was also pretty dismissive, some would read it as totally dismissive, I think there might be a tiny bit of wiggle room, but not much on the argument of that there's a, that their restricting corporations was justified in the interest of protecting minority shareholders. I do think you see that

concern animating a lot of the effort to get the SEC to take action for greater disclosure and greater corporate management accountability to corporate shareholders.

But there is one other justification which did not get a lot of play really until the current century, but emerges, particularly in the *FEC v. Beaumont* decision. And that, I think, is the dominant one for addressing corporations and that I think Don Tobin alluded to this in the first panel, which is the ease of creating corporations and their ability to use them to circumvent otherwise legitimate restrictions and requirements that would be imposed on individuals.

So the corporate form, it's... a form, it's not just that it's a source of power, it's easy to generate and under American law has long been a distinct and separate actor. This justification, the anti-circumvention restriction really was not at issue for *Citizens United*. It has been invoked by many courts of appeals in the last six years which have considered and rejected challenges to the bans on the corporate contributions and, as I mentioned, the *Beaumont* case which predates *Citizens United* also used it.

It's particularly relevant to the remaining areas, the areas in which we deal with individuals, which is contribution restrictions and especially disclosure. Because of the, both the potential and the actual use of not-for-profit corporations and other entities, such as LLCs, to avoid disclosure and perhaps, to participate in campaigns where they shouldn't be allowed to.

A final factor, which I think is not given a lot of weight, but is relevant to some recent actions or non-actions of the FEC and is picked up actually in the 1971 federal, the FECA, the Federal Election Campaign Act and the '74 amendments which authorized corporate and union solicitation on behalf of PACs is the protection of employees from coercion. Corporations have firms in general, unions as well, corporations are not only collections of shareholders but they're also obviously collections of employees.

And I think one of the strands, one of the powerful strands in the statute, authorizing corporations to participate through PACs was the protection of employees from coercion and threats of reprisal.

So I think 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'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 many, in other countries, it is far more common for business enterprises to be controlled by foreign, 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.

I don't want to talk today, because it's not our focus, but the ban on corporate contributions of course requires some sharp distinction between contributions and expenditures. And as we all know that has been pushed very hard through the emergence of coordinated expenditures which are not nominally coordinated and it seems to me that although the existing coordination rules are ripe for reconsideration in light of the experience that we gained from super PACs over the last six years, that coordination has to be redefined in a more realistic way. This goes beyond the specific issue of corporate campaign participation, but it is one important way of addressing the possibility of corporations participating through donations because donations entities like super PACs and other entities, when those entities act in close corporation with elected official campaigns, that's *de facto* a contribution. So, I think it's not our major focus today, but I think an agency would be well-advised to think about new rules dealing, redefining what coordination is.

The bigger issue for me is disclosure. Although popular concern, with *Citizens United* focused on the potential for misuse of... the potential power of large businesses and corporations entering our elections, I think the real issues have been the explosion of campaign activity by nonprofits, by 501(c)(4)s and (c)(6)s, which can pool funds from donors and engage in campaign activity, but because their major purpose is technically not electoral, they don't have to register as political committees and by closely held corporations, LLCs and dummy or shell corporations, entities which are really there to disguise the presence of one or a very, very small number of people.

It's interesting if you look at the history of litigation over the corporate participation in our elections. Almost all the cases have actually involved ideological corporations, nonprofits, not business corporations. The only departure of that is *Bellotti vs. First National Bank of Boston* but if you look at the major federal cases, *National Right to Work Committee*, *Wisconsin Right to Life Committee*, *Michigan Chamber of Commerce*, *Citizens United* itself, *Western Tradition Partnership*, all of the path-breakers in either failing to or succeeding in extending corporate participation have been ideological entities. That's really where the action is.

Now, as we know, (c)(4)s and (c)(6)s do have to disclose their electioneering and communication expenditures, but due to FEC regulations adopted before *Citizens United* and interpreted narrowly since then, these entities, even if in the corporate form, only have to disclose those donors who earmark their funds for specific expenditures which, in practice, means no one. So, I think one appropriate response, and because you put me in Administrative Law, I'm thinking administrative actions.

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? Here's, I think, until now, the issues have come up and a lot of, let's say, the inactions that divided non-actions of the FEC, have come up in enforcement actions. And there is – I may not agree with it – but there are plausible

arguments in some of those cases that you're making law through enforcement in gray areas. This is not unique to this agency. Most federal administrative, many federal administrative agencies, prefer to act through enforcement actions rather than through rulemaking. But an appropriate response would be to actually sit down to do some rulemaking and try to figure out, and this, I think, picks up on Don Tobin's distinction, tripartite distinction, but really it's two and one, between, on one hand, nonprofits and closely held corporations and large publicly held corporations. I don't think it makes sense to treat every shareholder as somebody who has donated money to the corporation's political activity but for nonprofits, which exist solely to collect contributions to engage in political activity, or for narrowly defined privately held corporations. Those contributions are supporting the political activity.

Now it may be that someone for the (c)(4)s and (c)(6)s, you do have entities which are not totally electoral. They may not even be primarily electoral. But I think the functional way to address this is not to say it's gotta be earmarked, but to do it in reverse, to basically say something along the lines of, we're going to treat contributions above a threshold (the current law is \$1,000; I'm not wedded to that, it may be that a higher threshold makes sense), to treat them as donations supporting the electioneering communication unless they're earmarked for a non-electoral fund. And you could encourage corporations that are both electoral and non-electoral to set up electoral and non-electoral accounts. And if you want to give your money to the non-electoral version of a Sierra Club's activity- well, they're a (c)(3), so... the non-electoral portion of Crossroads, if that such exists [laughter], you give it to that, and if you don't, you're treated as supporting its electoral activity.

So I think that, I don't know that you're going to get this, but I think the current phrase of for the purpose of furthering electioneering communication has been used to hide donors supporting electioneering communications, including, obviously, corporations.

Now, although the D.C. Circuit recently upheld the current rule as consistent with the discretionary authority, the FEC, the language clearly indicates they would support the opposite rule or at least a strong showing in that language. That given the arguments for this and the nature of the FEC's rulemaking authority that *Van Hollen* would support the opposite result.

So, I think this would be something to do. Included in that is I would have a kind of peel back the onion rule, which is, as we've already discussed, in I think Don's comments earlier and as it came out in public news accounts the last couple election cycles, of the so-called daisy chain. Corporation, A giving to corporation, B giving to corporation, C giving to the super PAC. And I would push for some rule, and I don't have legislative language in front of me, that says that any entity that engages in electioneering communication has to be able to disclose either the humans behind, maybe call it the human participation rule, or at least the publicly held corporation. I'm not so concerned about publicly held corporations, they exist on record. We know something about them or a union. They exist on record. It's the Americans for A Better Tomorrow, it's the People for Good Government, the meaningless titles which you can peel back and peel back and peel back. That's the problem. I think it would be within the authority of this Commission to basically say disclosure has to mean disclosure and disclosure has to be the real interests. Is there a term for the inside of an onion? Once you peel back all the layers... the inside of the onion rule, the pith rule. So I think that would be relevant and I think this takes on something similar with the LLCs.

I know the Commission was recently unable to take action with respect to treating certain LLC donations as if they were straw donors. I would reframe that to say simply not that the LLC's donation is a straw donation, but when an LLC makes a donation, we should know who is behind them and that, I think, could be addressed through rulemaking. Now, I may be optimistic as to what kind of rulemaking will actually occur, but I think it's a good strategy to at least, for one thing, if a rulemaking is launched,

it'll get comments from people in this room and all around the country which can come up with, I think, an informed approach to this and to see whether there is something, except where we are supporting disclosure that would be more effective.

That gets, I have actually less to say, unfortunately, about the ban on foreign money. I think a lot of that was addressed very effectively in the prior panel. I think, though, one way to begin is to figure out what's there. And I think, enhanced disclosure, particularly on, by the, on the spending of the money behind the non-profits, the money behind the (c)(4)s and (c)(6)s and behind the entities that are giving to the super PACs, when it's a (c)(4) that's giving to a super PAC. At least they begin to give us a better sense of the scope of the problem and the modes of participation of foreign entities. So, that's one thought. The second thought is to think about to what extent it makes sense to pick up the model of PAC regulation, because, although corporate spending in elections is a new thing, as of 2010, PAC, corporate PAC spending in elections is not new. That's been legitimated since 1972 and probably predates that a little bit.

And there, of course, the law takes a fairly hard line, treating any involvement of an individual foreign national in the operation of the PAC, serving as an officer of the PAC, participating in the selection of the persons who operate the PAC, making decisions regarding the PAC's contributions and expenditures, as making it foreign. So, I'm not sure you want to take as hard a line as that, but you could begin with the PACs.

And finally, in connection with this, and part of what I'm doing here, I think, is picking up on FEC decisions or non-decisions that I don't agree with and try to see if they can be redone, is actually maybe to develop a rule that thinks about, that addresses the relationship between corporations and their subsidiaries more effectively. Here, of course, I'm thinking of the *Chevron* decision and the idea that Chevron and Chevron USA are two unrelated entities and, therefore, one of them is a government

contractor and the other one is not when the one that is not a government contractor is wholly owned by the one that is. And this again was the result of an enforcement action. And this, I think, as the... the rule of corporate participation didn't matter so much when corporations were completely banned. Now that corporations are in the game, we have to think about who they are, who's behind them, and what are their relationships to each other? And so, I'm not sure if this is my third rulemaking or my fourth, and this is going to keep you through your next couple decades of not being replaced, I think another area for appropriate rulemaking is figuring out what's the, and there are obviously models of this from many other... corporations come up in almost every regulated sphere, labor, everywhere else... is to figure out what's nature of the relationship between the subsidiary and a parent between affiliates. And it's relevant for the government contractor ban, it's relevant for the foreign corporation ban, and it's relevant generally even for the corporate contributions. I'll stop there.