



Testimony of Professor Ciara Torres-Spelliscy¹ Before the Committee on House Administration September 25, 2019

Honorable Chairwoman, Ranking Member and Members of the Committee,

Introduction – Democracy at Risk

Thank you for having me here today. Our democracy is at a fragile point. Our system of self-governance relies on the faith of voters that elections are fair. There are many ingredients that go into bolstering that faith in democracy including voting machines that have paper ballots that can be audited,² rules that deter foreign governments from interfering in our elections,³ and transparency so that voters can see who is trying to influence their choice of candidate.⁴

Faith in the integrity of American elections was shaken after the American Intelligence Community informed the public in 2016 and in 2017 that the 2016 election was attacked by Russians.⁵ This assessment was then reinforced by indictments in 2018 from the Special Counsel against Russians for hacking during the 2016 election, as well as a large Russian social media disinformation campaign.⁶ And evidence of foreign interference was further articulated in the redacted version of the Special Counsel's Report in 2019.⁷

In light of these revelations about the 2016 election, which I write about in my book Political Brands, American voters need to know that all hands are on deck to prevent or catch the next foreign effort to interfere with our elections.⁸ But instead what Americans have seen from the Federal Election Commission (FEC) is an inability to investigate Russian interference including the purchase political

¹ Ciara Torres-Spelliscy is a Professor of Law at Stetson University College of Law and a Fellow at the Brennan Center for Justice at NYU School of Law.

² Joe Mullin, *If It Doesn't Have Paper Backups and Automatic Audits, It's Not an Election Security Bill*, Electronic Frontier Foundation (Aug. 24, 2018), <https://www.eff.org/deeplinks/2018/08/if-it-doesnt-have-paper-ballots-and-automatic-audits-its-not-election-security>.

³ Fred Wertheimer, *Loopholes Allow Foreign Adversaries to Legally Interfere in U.S. Elections*, Just Security (May 28, 2019), <https://www.justsecurity.org/64324/loopholes-allow-foreign-adversaries-to-legally-interfere-in-u-s-elections/>.

⁴ Ciara Torres-Spelliscy, *Dark Money as a Political Sovereignty Problem*, 28 (2) Kings Law Journal 239 (2017).

⁵ *Joint Statement from the Department Of Homeland Security and Office of the Director of National Intelligence on Election Security*, Department of Homeland Security (Oct. 7, 2016), <https://www.dhs.gov/news/2016/10/07/joint-statement-department-homeland-security-and-office-director-national> (“The U.S. Intelligence Community (USIC) is confident that the Russian Government directed the recent compromises of e-mails from US persons and institutions, including from US political organizations.”); Director of National Intelligence, *Assessing Russian Activities and Intentions in Recent US Elections*, ICA 2017-01D (Jan. 6, 2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf (“We assess Russian President Vladimir Putin ordered an influence campaign in 2016 aimed at the US presidential election. Russia’s goals were to undermine public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency. We further assess Putin and the Russian Government developed a clear preference for President-elect Trump. We have high confidence in these judgments.”).

⁶ U.S. v. Viktor Borisovich Netyksho, 1:18-cr-215 at 7-8 (D.D.C.) (Indictment July 13, 2018), www.documentcloud.org/documents/5021502-Indictment-as-to-Viktor-Borisovich-Netyksho-Et-Al.html (“on or about July 27, 2016, the Conspirators attempted after hours to spearfish for the first time email accounts at a domain hosted by a third-party provider and used by Clinton’s personal office.”); U.S. v. Internet Research Agency LLC, 1:18-cr-32 (D.D.C.) (Indictment Feb. 16, 2018).

⁷ Special Counsel Robert S. Mueller, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election*, Department of Justice (Apr. 18, 2019), www.justice.gov/storage/report.pdf (redacted version).

⁸ Ciara Torres-Spelliscy, Political Brands (Elgar Publishing 2019).



ads on Facebook with rubles,⁹ the failure to make any new rules that would address foreign interference, and the failure to address dark money which could provide cover for foreign meddling.¹⁰

1. Dark Money and Domestic Elections

Nearly a decade ago I told this Committee after *Citizens United v. FEC*, that I predicted two problems with inviting corporate money into our democracy: a lack of consent and a lack of transparency.¹¹ Today since we are addressing oversight of the Federal Election Commission (FEC), I'll focus on the latter, which is sometimes known as the dark money problem and encompasses secretive political spending in federal elections. (The investor consent problem is one where the House Financial Services Committee has jurisdiction.)¹²

As I discuss in my first book, Corporate Citizen, dark money has plagued American elections in the intervening years between 2010 and today:

The impact of *Citizens United* was immediately clear. Roughly \$450 million in outside money was spent in [the 2010 midterm] federal election, and \$131 million of that spending was from dark money sources. “Dark money,” means political spending where the original source is impossible for the public to discover. As the Chair of the Federal Election Commission (FEC) Ann Ravel noted, “[t]here are circuitous ways to spend. We have the nesting doll problem with dark money.” Because much of that dark money was funneled through trade associations like the U.S. Chamber of Commerce, there is a deep suspicion that much of this dark money came from corporations exercising their new *Citizens United* rights to spend. But because the money is dark, the public may never know for sure. As prominent political lawyer Trevor Potter explained, “[w]e only know corporate funding of most political ads when it is inadvertently disclosed.”¹³

In fact, over \$1 billion dollars in dark money has been spent in federal elections alone since 2008.¹⁴ In the 2018 election, over \$147 million in dark money was spent.¹⁵ Dark money is money spent in elections which cannot be traced to its real source.¹⁶ With dark money, the voting public only knows

⁹ Josh Dawsey, *Russian-funded Facebook ads backed Stein, Sanders and Trump*, Politico (Sept. 26, 2017), <https://www.politico.com/story/2017/09/26/facebook-russia-trump-sanders-stein-243172>.

¹⁰ See *infra*.

¹¹ Ciara Torres-Spelliscy's *Testimony for the Committee on House Administration Hearing*, Brennan Center for Justice (Feb. 2, 2010), <https://www.brennancenter.org/analysis/ciara-torres-spelliscys-testimony-committee-house-administration-hearing>; for more information on corporate political spending see Ciara Torres-Spelliscy, *Corporate Democracy from Say on Pay to Say on Politics*, 30(2) Constitutional Commentary 431 (Summer 2015).

¹² Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 Harvard Law Review 83, 83-85 (2010).

¹³ Ciara Torres-Spelliscy, *Corporate Citizen?: An Argument for the Separation of Corporation and State* 14 (Carolina 2016) (internal citations omitted).

¹⁴ Anna Massoglia, *State of Money in Politics: Billion-dollar 'dark money' spending is just the tip of the iceberg*, Open Secrets (Feb. 21, 2019), <https://www.opensecrets.org/news/2019/02/somp3-billion-dollar-dark-money-tip-of-the-iceberg/>.

¹⁵ *Dark Money Basics*, Open Secrets (last visited Sept. 16, 2019), <https://www.opensecrets.org/dark-money/basics> (showing \$147.7 million in dark money spent in 2018).

¹⁶ Michael E. Hartmann, *The Etymology of "Dark Money" Where did the phrase originate, and what does it mean?*, Capital Research Center (July 15, 2019) (Bill Allison at the Sunlight Foundation coined the phrase 'dark money.').



the last entity that spends in an election, but not the identity of underlying donors. (There's an entirely separate dark money problem in state and local elections, which is outside of your purview.)¹⁷ The typical way dark money is created is by spending through an opaque non-profit like a 501(c)(4) (a social welfare organization) or 501(c)(6) (a trade organization). And then porous rules at the FEC have allowed donors to these nonprofits to remain anonymous, even if they spend millions during elections to influence voters.¹⁸

A functioning and effective Federal Election Commission could have crafted rules to prevent dark money even before *Citizens United* because the phenomenon started before 2010.¹⁹ But to date the FEC has not promulgated any rules to make dark money transparent for American voters.²⁰

The only slight improvement on the dark money front has come at the order of a federal court, not through the normal notice and comment rule making process.²¹ The D.C. District Court in *CREW v. FEC* in 2018 mandated that those entities who buy independent expenditures must actually name their donors.²² The FEC provided guidance on how to comply with the court's order for political ads purchased after September 18, 2018 directing the listing of donors over \$200 in filings with the Commission.²³ The Supreme Court let the ruling in this case stand for the purposes the 2018 election.²⁴ Troublingly, the Campaign Legal Center found that many groups were not complying with the new

¹⁷ Chisun Lee & Douglas Keith, *How Semi-Secret Spending Took Over Politics*, The Atlantic (June 28, 2016), <https://www.theatlantic.com/politics/archive/2016/06/the-rise-of-gray-money-in-politics/489002/>.

¹⁸ *Instructions for Preparing FEC FORM 9 (24 Hour Notice of Disbursements/Obligations for Electioneering Communications)*, Federal Election Commission (Jan. 2018), <https://www.fec.gov/resources/cms-content/documents/fecform9i.pdf> (“Schedule 9-A [listing donors] must be filed only if the donations received for the purpose of furthering electioneering communications aggregate \$1,000 or more per donor since the first day of the preceding calendar year. ... 11 CFR 104.20(c)(9).”).

¹⁹ Steve Weissman, *Press Release New CFI Report Soft Money Political Spending by 501(c) Nonprofits Tripled in 2008 Election*, Campaign Finance Institute (Feb. 25, 2009), http://www.cfinst.org/press/releases_tags/09-02-25/Soft_Money_Political_Spending_by_Nonprofits_Tripled_in_2008.aspx.

²⁰ Office of Commissioner Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp*, Federal Election Commission (Feb. 2017) (“Due to the bloc’s ideological opposition to campaign finance law, major violations are swept under the rug and the resulting dark money has left Americans uninformed about the sources of campaign spending.”); Megan R. Wilson, *FEC deadlocked on 'dark money'*, The Hill (Feb. 11, 2015), <https://thehill.com/homenews/campaign/232582-fec-deadlocked-on-dark-money>; Daniel I. Weiner, *The FEC Deadlocks (Again) on Dark Money*, Brennan Center Blog (Aug. 1, 2014), <https://www.brennancenter.org/blog/fec-deadlocks-again-dark-money>.

²¹ Ciara Torres-Spelliscy, *The 2018 Elections Have \$100 Million in Dark Money and Counting Voters are more in the dark than ever about who's funding political ads*, Brennan Center Blog (Oct. 22, 2018), <https://www.brennancenter.org/blog/2018-elections-dark-money>.

²² *Citizens for Responsibility and Ethics in Washington (CREW) v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018).

²³ Press Release, *FEC provides guidance following U.S. District Court decision in CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018), Federal Election Commission (Oct. 4, 2018), <https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/>.

²⁴ Dave Levinthal & Sarah Kleiner, *Supreme Court Lets Stand a Decision Requiring 'Dark Money' Disclosure*, The Atlantic (Sept. 18, 2018), <https://www.theatlantic.com/politics/archive/2018/09/supreme-court-lets-stand-a-decision-requiring-dark-money-disclosure/570670/>.



required transparency on the eve of the 2018 midterm election.²⁵ Moreover, *CREW v. FEC* is still being litigated in 2019, so the ultimate result in the federal courts is unknown.²⁶

CREW v. FEC won't solve the dark money problem completely because it only applies to independent expenditures which contain *Buckley v. Valeo*'s magic words of express advocacy (such as "vote for" or "vote against").²⁷ Yet many political ads fall into a different category called "electioneering communications." These are broadcast ads that never use the magic words, but feature a federal candidate in the days leading up to a federal election.²⁸ The *CREW v. FEC* case doesn't apply to electioneering communications. Thus, those ads are more likely to be funded by dark money. However, Congress should know that the Supreme Court has been consistent in decisions over the past four decades that disclosure of money in politics is perfectly constitutional.²⁹

On-line political ads that lack magic words present a significant problem as they fundamentally fall into a no-mans-land and thereby escape traditional campaign finance reporting requirements.³⁰ Essentially if an on-line political ad that attacks or supports a federal candidate yet avoids *Buckley*'s magic words, it is not a reportable expenditure under current federal law. States are stepping up to fill this void in transparency for on-line political ads by expanding campaign finance reporting requirements to on-line platforms for state elections.³¹ In meantime, Congress could provide more clarity in legislation that dark money is not allowed in federal elections, specifying reasonable donor disclosure thresholds for campaign ads including those that appear on-line.

2. Foreign Money

As I explain in my book [Political Brands](#), one thing that the American public still doesn't know is whether dark money is hiding illegal money like money from foreign nationals:

As Lisa Gilbert of Public Citizen notes ... "One of our biggest concerns about our system of money in politics is that it can flow in a very secretive way. And because

²⁵ Brendan Fischer & Maggie Christ, *How the FEC is Still Allowing Dark Money Groups to Remain Dark*, Campaign Legal Center (Oct. 17, 2018), <https://campaignlegal.org/update/how-fec-still-allowing-dark-money-groups-remain-dark>.

²⁶ Citizens for Ethics in Washington, *CREW VS. FEC – CROSSROADS GPS* (last visited Sept. 16, 2019), <https://www.citizensforethics.org/lawsuit/crew-vs-fec-crossroads-gps/>.

²⁷ *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976), see also *Writing Reform*, Brennan Center for Justice at VII-5 - VII-7 (2010).

²⁸ *The Nuts and Bolts of Electioneering Communications*, Open Secrets (last visited Sept. 17, 2019), <https://www.opensecrets.org/527s/electioneering.php>.

²⁹ *Citizens United v. FEC*, 130 S. Ct. 876, 915-917 (2010) (upholding BRCA's disclosure requirements); *McConnell v. FEC*, 540 U.S. 93, 191-193 (2003) (upholding BRCA's disclosure requirements); *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (upholding FECA's disclosure requirements).

³⁰ Megan Janetsky, *Low transparency, low regulation online political ads skyrocket*, Open Secrets (Mar. 7, 2018), <https://www.opensecrets.org/news/2018/03/low-transparency-low-regulation-online-political-ads-skyrocket/>.

³¹ Kelly Born, *How states are experimenting with digital political advertising regulation: Interview with Campaign Legal Center's Erin Chlopak*, Hewlett Foundation (May 28, 2019), <https://hewlett.org/how-states-are-experimenting-with-digital-political-advertising-regulation-interview-with-campaign-legal-centers-erin-chlopak/> ("Vermont, Washington, and Wyoming each amended their campaign finance laws to extend reporting and disclaimer requirements to online political ads."); *id.* ("Maryland, California, and New York have enacted legislation that requires the creation of digital archives of information about online ads relating to candidates and ballot initiatives.").



dark money flows behind the scenes, foreign nations are able to take advantage of the lack of transparency, and influence our politics.”³²

And because the FEC has largely been nonfunctional or stuck in deadlocks even investigations of foreign spending or punishment for foreign spending has been lacking.³³ The FEC also has not made new rules to better deter foreign spending post-2016.³⁴ Though I should note that the current Chair of the FEC has put out strong statements reminding the public that foreign spending in U.S. elections is illegal, especially when the spending is from foreign governments.³⁵

Are foreigners spending in U.S. elections? Largely we don’t know because many of those that would be sophisticated enough to spend in U.S. elections, likely know how to spend in a secretive way. But there have been examples of foreign spending in U.S. elections that has been caught red-handed. For example, a Chinese company supported a pro-Jeb Bush Super PAC called Right to Rise in the 2016 presidential election. In a rare instance of the FEC enforcing the ban on foreign spending in U.S. elections, a complaint against Right to Rise resulted in FEC fines against the Super PAC and the Chinese company that provided over \$1 million during the election.³⁶

In other cases, the FEC has been passive about enforcing the law against foreign spending. As I discussed in Corporate Citizen, in a particularly colorful episode, a foreign pornographer spent in a Los Angeles election in 2012. This spending violated a longstanding ban on foreign money in any American election (federal, state or local).³⁷ Nevertheless the FEC would not enforce the federal law against the foreign pornographer. This spending also violated California law, and fortunately for the rule of law, California enforced its law against him.³⁸

In another case which is ongoing, Pras Michel of the musical group The Fugees has been indicted by the U.S. Department of Justice (DOJ) for allegedly facilitating political spending from a foreign donor in the 2012 presidential election. As soon as these actions were discovered, campaign finance experts complained about Mr. Michel’s alleged behavior to the FEC, which, again, did nothing about it.³⁹ Thankfully the DOJ picked up the ball that the FEC dropped in this case, which allegedly involved over \$21 million in foreign money.⁴⁰

³² Political Brands at 304 (quoting Lisa Gilbert).

³³ Rick Hasen, *Breaking: Republican FEC Commissioners Block Investigation into NRA Russian Ties in 2016 Election*, Election Law Blog (Aug. 16, 2019 11:54 AM), <https://electionlawblog.org/?p=106940>.

³⁴ Jordan Muller, *FEC rejects proposal to consider new rules on foreign spending in US elections*, Open Secrets (May 25, 2018), <https://www.opensecrets.org/news/2018/05/fec-rejects-proposal-to-consider-new-rules-on-foreign-spending-in-us-elections/>.

³⁵ Chair Ellen L. Weintraub’s Statement Regarding Illegal Contributions From Foreign Governments, Federal Election Commission (June 14, 2019), <https://go.usa.gov/xy38U>.

³⁶ Kate Sullivan, *FEC fines Jeb Bush super PAC and a Chinese company \$1 million over foreign interference in 2016 election*, CNN (Mar. 11, 2019) (“The FEC fined the Jeb Bush super PAC Right to Rise \$390,000 for soliciting a contribution from a foreign national and the American Pacific International Capital \$550,000 for making the contribution...”).

³⁷ 52 U.S.C. § 30121 & 11 CFR 110.20.

³⁸ Corporate Citizen at 121-122.

³⁹ Megan McAllen, *Delay, Deadlock, Dismiss: Pras Michel indictment exposes how FEC dysfunction opens our elections to foreign meddling*, Campaign Legal Center (May 15, 2019), <https://campaignlegal.org/update/delay-deadlock-dismiss-pras-michel-indictment-exposes-how-fec-dysfunction-opens-our>.

⁴⁰ Press Release, *Entertainer/Businessman and Malaysian Financier Indicted for Conspiring to Make and Conceal Foreign and Conduit Contributions During 2012 U.S. Presidential Election*, Department of Justice (May 10, 2019),



The Supreme Court has upheld the foreign ban.⁴¹ Yet the lack of enforcement by the FEC against foreign spending in the two notable cases mentioned above, among others, has sent a terrible message to anyone paying attention: the message is campaign finance law is basically not enforced at the federal level to keep foreign money at bay. Given the experience of 2016 with Russians' breaking U.S. election laws with abandon, the lessons for North Korea, China, Iran or any other hostile foreign actors is that interference in our elections can be done largely without legal consequences from the primary regulator—the FEC.

3. The Lack of a Quorum and Ties at the FEC

As the U.S. faces the 2020 election, there is not even a quorum at the FEC to enforce the campaign finance rules and laws that do exist.⁴² This leaves the DOJ to enforce willful violations of law alone. But this exposes a vast wasteland of unenforced campaign finance laws where cheating and corner cutting is all but invited while American voters are tasked with choosing the next President, all of the Members of the House, a third of the Senate as well as eleven governors and 45 state legislatures in 2020.⁴³

The FEC needs a full complement of Commissioners so that they can at least act, investigate and make necessary rules to protect our democracy.⁴⁴ And if Congress is serious about reform, Congress needs to add an additional seat to the FEC so that, like nearly every other federal agency, there are an odd number of Commissioners who can effectively enforce the law instead of deadlocking and letting scofflaws off.⁴⁵

Conclusion

Congress is running out of time to ensure that the 2020 elections are secure and transparent. There are common sense fixes such as providing rules about auditable voting machines and the funding for states to purchase and deploy that technology. Elections also need a functioning regulator to help protect the integrity of our elections from foreign interference, including an FEC with six duly-appointed Commissioners. Even better, a seventh seat should be added and filled at the FEC. And finally, Congress should give clear statutory guidance to the FEC that disallows dark money, which so long as it is allowed, remains an open invitation for mischief and illegality in U.S. elections.

<https://www.justice.gov/opa/pr/entertainerbusinessman-and-malaysian-financier-indicted-conspiring-make-and-conceal-foreign>.

⁴¹ *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012) (upholding the federal foreign political spending ban).

⁴² Lachlan Markay, *The FEC Is Officially Broken. It Might Not Matter. As of next week, the commission will lack a quorum and won't be able to do much of anything.*, Daily Beast (Aug. 29, 2019 7:49PM ET), <https://www.thedailybeast.com/the-fec-is-officially-broken-it-might-not-matter>.

⁴³ *Looking Ahead to 2020*, Ballotpedia (last visited Sept. 17, 2019), https://ballotpedia.org/Elections#Looking_ahead_to_2020.

⁴⁴ *Enforcing foreign money ban in U.S. elections on hold without quorum at FEC*, PBS NewsHour (Sept. 12, 2019 6:35 PM EDT), <https://www.pbs.org/newshour/show/as-2020-elections-near-fec-functions-are-limited-by-lack-of-commissioners>.

⁴⁵ Daniel I. Weiner, *Fixing the FEC: An Agenda for Reform*, Brennan Center for Justice (Apr. 30, 2019), <https://www.brennancenter.org/publication/fixing-fec-agenda-reform>. Alternatively, having five FEC Commissioners and majority rule would also be an improvement over the current structure.