



COMMISSIONER ELLEN L. WEINTRAUB
FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**Written Testimony of Commissioner Ellen L. Weintraub
Before the Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Civil Liberties
U.S. House of Representatives**

**Citizens United at 10:
The Consequences for Democracy and Potential Responses by Congress**

February 6, 2020

Chair Cohen, Ranking Member Johnson, and members of the subcommittee, thank you for inviting me to testify today.

Citizens United has distorted America's elections for a full decade now. During that time, according to the Center for Responsive Politics, we have seen \$1.2 billion given to candidates, parties, and outside-spending groups from just the top ten contributors. We have *not* seen who's behind the nearly billion dollars that have been spent by dark-money groups that keep their donors secret. And there has been \$4.5 billion in non-party outside spending – *12 times* as much per year compared to the 20 years before *Citizens United*.¹

This spending floods to the most competitive races, where it has the biggest impact. From 2000 to 2006, candidate spending outpaced outside spending in the top ten most expensive Senate races in every single race. But by 2014, after *Citizens United*, outside spending topped candidate spending in *seven* of those top-ten races – and in those races, the outside groups spent an average of 80% more than the candidates.²

Some of the most significant ills brought by *Citizens United* can only be fixed by a constitutional amendment, as you will hear detailed by other witnesses this morning, or by some future Supreme Court. But there is no shortage of problems wrought by *Citizens United* that Congress can address head-on right now.

¹ Karl Evers-Hillstrom, Doug Weber, Anna Massoglia, Andrew Mayersohn, Grace Haley, Sarah Bryner, Alex Baumgart, "More Money, Less Transparency: A Decade Under *Citizens United*," Center for Responsive Politics (Jan. 14, 2020), found at <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united>.

² See "Most Expensive Races," Center for Responsive Politics, found at <https://www.opensecrets.org/overview/topraces.php?cycle=2018&display=allcandsout>.

Some of these solutions are well-known to members of this subcommittee. H.R. 1, which passed the House in 2019, contained many useful reform proposals:

- Requiring better disclosure of large donors to political committees;
- Extending the foreign-national political spending ban to ballot issues;
- Creating a small-dollar matching public financing program;
- Creating a Democracy Vouchers pilot program;
- Reforming the financing of inaugural committees;
- Extending electioneering communications disclosure requirements to online ads; and
- Requiring a public file of online political ads to be kept.

In the post-*Citizens United* era, not all the news from the Supreme Court has been bad. In *Bluman v. FEC*, the Court affirmed an opinion holding that stringent restrictions on foreign-national political spending survive strict scrutiny and are constitutional. This ruling affirms Congress's power to take strong action to keep America's elections in the hands of Americans.

One reform that would aid in the important effort to exclude foreign money from our system was in an earlier version of H.R. 1. That provision would have required corporations that are spending in politics to certify that they are complying with the foreign-national political-spending ban. This was a disappointing loss in H.R. 1; I urge you to restore it if the bill is introduced in a future Congress.

All these reforms would be helpful. All would lift corners off the veil that *Citizens United* has thrown over our campaign-finance system.

But more can be done.

Congress should set real limits on coordination between candidates and the super PACs that support them. The only reason that courts allow super PACs to exist³ is that they are, by law, supposed to be entirely independent of candidates. But in reality, this is a corrosive fiction.

It is absurd when candidates appear as "special guests" at fundraisers for the so-called independent super PACs supporting them. That is obvious coordination.

It is absurd when the so-called independent super PACs supporting a given candidate are established by close family of that candidate or current or former staff of that candidate – or even that *candidate herself*, just before declaring her candidacy. That is obvious coordination.

It is absurd when candidates publicly make known which so-called independent super PAC they favor, and encourage people to support it. That is obvious coordination.

³ Super PACs, also known as "independent expenditure-only political committees" or "IEOPCs," were created in the wake of *Citizens United* by *SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

It is absurd when a so-called independent super PAC lifts high-definition video *of the candidate* from the campaign's website – video clearly created for the purpose of being repurposed – and uses it in its own ads.

While I have repeatedly found reason to believe that these types of activities already constitute unlawful coordination between candidates and super PACs, or unlawful republication of campaign materials, other commissioners have refused to investigate even the most egregious fact patterns. Congress should make crystal clear that if we are going to have independent spending groups, they must be truly independent of the candidates.

Joint fundraising committees are another problem exacerbated by *Citizens United* and the subsequent *McCutcheon* decision.⁴ These have blown a substantial hole in limits to candidates and parties. The Supreme Court, in upholding FECA's contribution's limits in *Buckley v. Valeo*, recognized "the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed."⁵ This inherent risk is very real when candidates and parties are accepting more than half-million-dollar checks from individual donors to joint fundraising committees. And we have seen this loophole exploited by both sides.⁶

The proliferation of super PACs in the post-*Citizens United* era has also given rise to new opportunities for those who would defraud citizens seeking to exercise their First Amendment rights to support candidates. Scam PACs have become an increasing problem. The FEC has repeatedly and unanimously requested that Congress strengthen the FECA's anti-fraud provisions. I reiterate that request today.

Citizens United, in empowering corporations to spend in politics, opened the door to the use of anonymous shell companies to drop unlimited and untraceable money into our elections. I hope that Congress will pass legislation requiring corporations that spend in politics to disclose their beneficial owners.

In empowering corporations, the *Citizens United* court also created opportunities for unscrupulous employers to pressure their employees to engage in political activity. Congress should adopt new laws to strengthen protections for employees from being coerced by their employers to support those employers' favored candidates.

One change Congress did make to the law it would be wise to revisit. What we call the "CRomnibus accounts," created in the dead of night on New Year's Eve 2014 and supposedly paying for building party headquarters, legal expenses, and convention expenses, are less well-

⁴ *McCutcheon v. FEC*, 572 U.S. 185 (2014) (holding election-cycle contribution caps unconstitutional).

⁵ *Buckley v. Valeo*, 424 U.S. 1, 28 (1976).

⁶ See, e.g., Statement of Reasons of Chair Ellen L. Weintraub, MURs 7304, 7331 (Hillary Victory Fund, et al.) and 7339 (Trump Victory, et al.) (May 31, 2019), found at https://eqs.fec.gov/eqsdocsMUR/7304_1.pdf.

defined than would be ideal.⁷ They allow contributors to give hundreds of thousands of dollars to the national party committees – more than \$1.5 million per person per election cycle.⁸ Again, such large contributions pose the inherent risk of corruption. If Congress decides to keep them around, one improvement would be to allow the party headquarter building funds to be used to pay for cybersecurity defenses for parties and candidates.

In the wake of *Citizens United*, my repeated efforts to conduct a comprehensive rulemaking – a rulemaking that could address important issues like coordination, coercion, disclosure, and foreign national spending – have been thwarted.⁹ We have no regulations specifically addressing super PACs. None. And our coordination regulations, passed in an earlier era, were simply not designed to bear the weight that super PACs have placed on them.

As you know, the Commission, which should have six commissioners, is currently without the bare minimum of four required to conduct our most important business – launching investigations, penalizing those who violate the law, clarifying the law through regulations and advisory opinions. This is an unacceptable situation, particularly in a presidential election year. But the FEC’s problems predate *Citizens United*. The history at the agency over the last 12 years highlights how much it matters not just that there are enough FEC commissioners in the building to do business at all, but also that there are enough commissioners appointed to the Commission who are interested in faithfully implementing the laws Congress passed and fulfilling the important mission of the agency. To shed light on money in politics. To ensure an informed electorate.

It is worth noting that none of the reforms discussed above touch the most impactful changes that *Citizens United* has unleashed upon our political system. The chief concern when *Citizens United* enabled corporations to spend freely in politics was that the Fortune 1000 would start to throw its weight around. By and large, this has not happened. Instead, it is billionaire megadonors who use the dark-money groups and super PACs that followed *Citizens United* to exert wildly

⁷ See, e.g., Carrie Levine, “Limits Unclear on New Political Party ‘Slush Funds,’” Center for Public Integrity (Aug. 3, 2015), found at <https://publicintegrity.org/politics/limits-unclear-on-new-political-party-slush-funds/>.

⁸ R. Sam Garrett, “Increased Campaign Contribution Limits in the FY2015 Omnibus Appropriations Law: Frequently Asked Questions,” Congressional Research Service (March 17, 2015) at 1, found at <https://fas.org/sgp/crs/misc/R43825.pdf>.

⁹ See, e.g., FEC, 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; Petition for Rulemaking (June 8, 2015), https://www.fec.gov/resources/about-fec/commissioners/statements/Petition_for_Rulemaking.pdf; Agenda Document No. 15-65-A (Dec. 17, 2015), http://www.fec.gov/agenda/2015/documents/mtgdoc_15-65-a.pdf; Ellen L. Weintraub, “Proposal to Launch Rulemaking to Ensure that U.S. Political Spending is Free from Foreign Influence,” FEC (Sept. 9, 2016), found at https://www.fec.gov/resources/about-fec/commissioners/weintraub/statements/Weintraub-Foreign_Political_Spending_Rulemaking.pdf; Ellen L. Weintraub, “Revised Proposal to Launch Rulemaking to Ensure that U.S. Political Spending is Free from Foreign Influence,” FEC (Sept. 28, 2016), found at https://www.fec.gov/resources/about-fec/commissioners/weintraub/statements/Foreign_National_2_Memo_28_Sept_2016.pdf.

disproportionate power in our political system.¹⁰ The top one percent of super PAC donors accounted for 96 percent of funding to these groups in 2018. Together, those 1,562 donors gave \$818 million.¹¹ No statute, no regulation, no FEC advisory opinion can touch this problem. Only a judicial or constitutional reversal of *Citizens United*, and potentially the 1976 case that paved the way for *Citizens United*, *Buckley v. Valeo*,¹² can get at the root of the problem.

Again, thank you for inviting me here today. I look forward to your questions.

¹⁰ See, e.g., “*Citizens United* 10 Years Later: 25 Ultrarich People Have Spent \$1.4 Billion on Elections,” Public Citizen (Jan. 15, 2020), found at <https://www.citizen.org/news/citizens-united-10-years-later-25-ultrarich-people-have-spent-1-4-billion-on-elections/>.

¹¹ Evers-Hillstrom, *et al.*, Center for Responsive Politics, *supra* n. 1.

¹² 424 U.S. 1 (1976).