

Testimony before the Joint Standing Committee on Veterans and Legal Affairs
**LD 2136 An Act To Prohibit Contributions, Expenditures and Participation by Foreign
Nationals To Influence Referenda**

March 11, 2020

Senator Luchini, Representative Schneck, and members of the Joint Standing Committee on Veterans and Legal Affairs:

Good morning Senator Luchini and Representative Schneck. My name is Robert Howe. I'm a resident of Brunswick. I am speaking today on behalf of Maine Citizens for Clean Elections in qualified support of LD 2136.

Our testimony on this and many of the bills that come before this committee is guided by the fundamental principle that elections should be decided by people – voters – without undue influence from deep pocket special interests.

This principle applies to candidate campaigns as well as issue campaigns. Whether issue or candidate campaigns -- we continue to believe that large amounts of money distort the public dialogue and is harmful to our democracy.

We believe this bill is constitutional. The leading federal case on the general issue of foreign contributions is *Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (three-judge court) (Kavanaugh, J). In that case, soon-to-be-Justice Kavanaugh upheld the federal ban on foreign contributions in candidate races:

It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government. It follows, therefore, 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.
Id. at 288.

Although the constitutional factors in the context of issue campaigns are somewhat different from those in candidate campaigns, most legal scholars believe the principle in *Bluman* can be extended to apply to foreign contributions intended to influence the lawmaking process carried out through ballot measures.

I'm also attaching expert testimony from Ellen Weintraub, the Chair of the Federal Election Commission, and Laurence Tribe, professor of law at Harvard Law School, given in connection with a recent Seattle ban on "foreign-influenced corporation" contributions. These experts explain both the legal and policy rationale for treating foreign contributions and expenditures differently than those originating entirely within our country.

One of the issues in this bill is the ownership threshold. Although 50% ownership may seem reasonable, it fails to sweep in a very large number of corporations which are plainly subject to foreign influence. Experts suggest that the threshold should be as low as one percent, which would bring the bill into line with legislation recently passed in Seattle, and similar legislation pending in New York State, Maryland, and Massachusetts. (Although those bills relate to candidate elections, the threshold arguments are germane here.) Professor Tribe gave the opinion that any amount of foreign ownership would justify bringing a corporation under such a prohibition.

In November 2019 the Center for American Progress published its report, "Ending Foreign-Influenced Corporate Spending in U.S. Elections." The report noted that a full 35% of the stock of U.S. corporations is foreign-owned, and lays out the case why a lower threshold of foreign ownership is necessary and appropriate in this arena. In short, in the world of shareholder influence, even a single shareholder with less than 1% ownership is a very significant player and can expect that the CEO will always take his or her call.

It is reasonable to assume that nearly all of the money affected by LD 2136 would be contributions from corporations. Despite the shibboleth that "corporations are people," we do not agree that corporate rights in our democracy should be equated with those of voters. We certainly don't allow corporations to vote or hold office.

We believe that Maine should address corporate contributions of all kinds – whether foreign or domestic. In the next legislature, we will be supporting a strong corporate contribution ban similar to the ban already in place for federal candidate elections, and in many other states. In this regard, we would note that the Supreme Court has never questioned the constitutionality of corporate contribution bans in candidate races.

Laurence H. Tribe
Carl M. Loeb University Professor



Tel.: 617-495-1767

Seattle City Council
Seattle, Washington 98124

RE: Proposed ordinance to limit political spending by foreign-influenced corporations

January 3, 2020

Dear Councilmembers,

I write to you to express my opinions on an ordinance that has been proposed for consideration by the Seattle City Council. First, that U.S. Supreme Court constitutional precedent permits limits on political spending by foreign-influenced corporations in the form of campaign contributions, “independent expenditures,” or contributions to super PACs, as provided in the proposed ordinance. Second, that I consider this bill to be a valuable tool for protecting and preserving the integrity of elections, including Seattle’s, from the threat to the American ideal of self-government posed by foreign-influenced political spending.

Background

I am the Carl M. Loeb University Professor and Professor of Constitutional Law at Harvard University and Harvard Law School, where I have taught since 1968 and where my specialties include constitutional law and the U.S. Supreme Court.* I have prevailed in three-fifths of the many appellate cases I have argued (including 35 in the U.S. Supreme Court).

Constitutionality of regulating political spending by foreign-influenced corporations

Regulating political spending by corporations with significant foreign ownership is consistent with the Constitution and Supreme Court precedent. Indeed, concern about potential foreign influence over our democratic politics is written into the

* Title and university affiliation included for identification purposes only.

Constitution itself.¹ And while the Supreme Court has held that the First Amendment prohibits limits on independent expenditures *in general*, it has made an important exception for spending by foreign nationals.

Federal law already prohibits foreign nationals—a category defined by federal law to include foreign governments, corporations incorporated or with their principal place of business in foreign countries, and individuals who are not U.S. citizens or lawful permanent residents—from spending money on federal, state, or local elections.² In the 2012 decision *Bluman v. Federal Election Commission*, the Supreme Court upheld this law against a post-*Citizens United* constitutional challenge, confirming the federal government’s ability to ban independent expenditures by foreign nationals.³ As explained by the lower court opinion in that case, written by then-Circuit Judge Brett Kavanaugh and affirmed by the Supreme Court, the legal rationale for restricting political spending by foreign nationals is that “foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government.”⁴

The Supreme Court’s decision in *Citizens United* created a loophole through which foreign investors can circumvent this ban using the corporate form. Yet if foreign investors do not have a constitutional right to spend money to influence federal, state, or local elections, then they do not have a constitutional right to use the corporate form to do indirectly what they could not do directly.⁵

This is not only an issue of corporations that are majority-owned by foreign investors. As I told the federal House of Representatives Committee on the Judiciary shortly after the *Citizens United* decision, the same Supreme Court that decided *Citizens United* would probably have upheld a law limiting political advertising by corporations with a

¹ See U.S. Const. art. I, § 9, cl. 8 (prohibiting federal officials from accepting “any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State”).

² 52 U.S.C. § 30121(a).

³ *Bluman v. Fed. Election Comm’n*, 565 U.S. 1104 (2012) (mem.).

⁴ *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (3-judge court), *aff’d mem.*, 565 U.S. 1104 (2012). Despite this quotation’s reference to “foreign citizens,” the *Bluman* decision later noted that the federal statute specifically does *not* define lawful permanent residents as “foreign nationals” subject to the political spending prohibition. See *id.* at 292. Since the bills use the exact same definition of “foreign national” as does the federal law, lawful permanent residents would not be affected in the slightest.

⁵ See Ellen Weintraub, “Taking on *Citizens United*,” Mar. 30, 2016, N.Y. TIMES, <https://nyti.ms/1qhmpKB>.

considerably smaller percent of equity held by foreign investors.⁶ Indeed, the reasoning behind the *Bluman* decision suggests this limit could apply to corporations with *any* equity held by foreign investors.

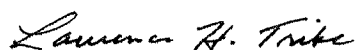
Unfortunately, neither Congress nor the beleaguered Federal Election Commission are in any position to lead this fight. As I wrote in the *Boston Globe* in 2017, the 2016 election and the federal government's failure to act shows why state and local governments need to close the foreign corporate political spending loophole.⁷ I believe Seattle's interest in self-government provides a comparable and constitutionally sufficient ground to support regulating campaign contributions, independent expenditures, and contributions to super PACs, by what the bill terms "foreign-influenced corporations." As such, I believe it to be constitutional under the Court's *Citizens United* and *Bluman* decisions and a reasonable complement to existing federal law.

Conclusion

I applaud Seattle for its leadership on issues so critical to the health of our democracy, and I thank you for considering this admirable effort to guard our political systems from the dangers posed by foreign-influenced corporate spending. I am confident that the U.S. Supreme Court would uphold a ban on foreign-influenced corporations' political spending as provided in the proposed ordinance.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,



Laurence H. Tribe
Carl M. Loeb University Professor and Professor of Constitutional Law
Harvard Law School

⁶ Laurence H. Tribe, "Citizens United v. Federal Election Commission: How Congress Should Respond," Testimony to U.S. House of Representatives, Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties 7 (Feb. 3, 2010), *available at* <http://bit.ly/2ueI4KT>.

⁷ *See* Laurence H. Tribe & Ron Fein, "How Massachusetts can fight foreign influence in our elections," BOSTON GLOBE, Sept. 26, 2017, <http://bit.ly/2fOULSH>.



COMMISSIONER ELLEN L. WEINTRAUB
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January 6, 2020

Councilmembers:

I write to urge you to support Council Bill No. 119731, the proposed ordinance that aims to help protect Seattle's municipal elections from foreign influence. As I am sure you are well aware, elections at all levels in the United States are under sustained direct attack from our foreign adversaries. Leading cities such as Seattle are wise to protect their elections from such intrusions and to set an example for others to follow.

The Seattle City Council is widely renowned for its leadership on campaign-finance reform issues. Seattle's Democracy Voucher program is one of the most exciting reforms in this field to emerge anywhere in the country in the past few years.

While Council Bill No. 119731 will build upon your leading-edge reputation for campaign-finance reform, it nonetheless fits comfortably within existing federal statutory law and Supreme Court precedent.

What you are considering here is the sort of reform that may *only* succeed at the local and state levels at the moment, as ideological opposition to campaign-finance law enforcement has effectively paralyzed both the Federal Election Commission and Congress. Fortunately, state and local governments across the country are stepping into the breach and leading the way with innovative solutions to campaign-finance problems.

Council Bill No. 119731 is consistent with an approach I laid out in an op-ed for *The New York Times* (attached) that described a new way to read the *Citizens United* decision together with the foreign-national political-spending ban.

In a nutshell, I noted that since the *Citizens United* majority protected the First Amendment rights of corporations as "associations of citizens," and held that a corporation's right to participate in elections flows from the collected rights of its individual shareholders to participate, it follows that the *limits* on the rights of a corporation's shareholders must *also* flow to the corporation.

And one of the most important campaign-finance limits we have is that foreign nationals are absolutely barred from spending directly or indirectly in U.S. elections at *any* political level – federal, state, or city. It thus defies logic to allow groups of foreign nationals, or foreign nationals in combination with American citizens, to fund political spending through corporations. One cannot have a right collectively that one does not have individually. Accordingly, your proposed ordinance seeks to ensure that only those corporations owned and influenced by people who have the right to participate in your elections are doing so.

The heart of your proposed ordinance’s definition of a “foreign-influenced corporation” is one percent ownership by one foreign owner, or five percent ownership by more than one foreign owner. This might feel like a very tight standard, but I would ask you to keep in mind that you are not working your way down from a 100 percent or 50 percent foreign ownership standard – you are working your way *up* from the *zero* foreign-influence standard that a strict reading of federal law would suggest.

The risks addressed by this measure are not theoretical. Last year, reporters used FEC filings to uncover \$1.3 million in illegal foreign donations to a super PAC routed through APIC, an American subsidiary of a foreign corporation. As a result, the Commission negotiated the largest aggregate penalty in one matter in the post-*Citizens United* era. Had APIC been required to sign the certifications required by the measure before you, their illegal behavior may well have been deterred.

Again, I am delighted that the Seattle City Council is moving forward to address this key campaign-finance issue at a moment when the federal government is unable to do so. By passing this ordinance, you will be doing not just Seattle but also Washington and your country a great service. You will set an example that can be followed by others at the local, state, and, *hopefully* someday, federal levels.

If you have any further questions about how the terms of this proposed ordinance mesh with federal campaign-finance law (or any other questions), please feel free get in touch with me. I am available at commissionerweintraub@fec.gov and (202) 694-1035.

Sincerely,



Ellen L. Weintraub
Commissioner, Federal Election Commission

The Opinion Pages | OP-ED CONTRIBUTOR

Taking On Citizens United

By ELLEN L. WEINTRAUB MARCH 30, 2016

SOMETHING is very wrong with the way we fund our elections. This has become especially clear since Citizens United, the 2010 Supreme Court decision that struck down campaign spending limits on corporations, ruling they were intrusions on free speech.

The majority opinion in *Citizens United v. Federal Election Commission* was clear: The First Amendment rights of corporations may not be abridged simply because they are corporations. But while corporations may be deemed to have some of the legal rights of people, the court has never held that corporations have any of the political rights of citizens.

This key distinction, read in harmony with existing law, provides ways to blunt the impact of the decision that gave corporations the right to spend unlimited sums of money on federal elections.

The effect of that decision has been pronounced: The Washington Post reported this month that through the end of January, 680 corporations had given nearly \$68 million to “super PACs” in this election cycle — 12 percent of the \$549 million raised by such groups. This figure does not include the untold amounts of “dark money” contributions to other groups that are not disclosed by the donor or the recipient.

Throughout *Citizens United*, the court described corporations as “associations of citizens”: “If the First Amendment has any force,” Justice Anthony M. Kennedy wrote, “it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.” In other words, when it comes to political speech, which the court equated with political contributions and expenditures, the rights that citizens hold are not lost when they gather in corporate form.

Foreign nationals are another matter. They are forbidden by law from directly or indirectly making political contributions or financing certain election-related advertising known as independent expenditures and electioneering communications. Government contractors are also barred from making contributions.

Thus, when the court spoke of “associations of citizens” that have the right to participate in American elections, it can only have meant associations of American citizens who are allowed to contribute.

But many American corporations have shareholders who are foreigners or government contractors. These corporations are not associations of citizens who are allowed to contribute. They are an inseparable mix of citizens and noncitizens, or of citizens and federal contractors.

Since the court held that a corporation’s right to participate in elections flows from the collected rights of its individual shareholders to participate, it follows that limits on those individuals’ rights must also flow to the corporation.

You cannot have a right collectively that you do not have individually. Individual foreigners are barred from spending to sway elections; it defies logic to allow groups of foreigners, or foreigners in combination with American citizens, to fund political spending through corporations. If that were true, foreigners could easily evade the restriction by simply setting up shell corporations through which to funnel their contributions.

Arguably, then, for a corporation to make political contributions or expenditures legally, it may not have any shareholders who are foreigners or federal contractors. Corporations with easily identifiable shareholders could meet this

standard, but most publicly traded corporations probably could not.

This may sound like an extreme result, but it underscores how urgently policy makers need to examine these issues with an eye toward drawing acceptable lines. Perhaps we could require corporations that spend in federal elections to verify that the share of their foreign ownership is less than 20 percent, or some other threshold. The Federal Communications Commission, for example, bars companies that are more than 20 percent owned by foreign nationals from owning a broadcast license. At the moment, without a clarifying rule, the only standard that follows the law is a zero-tolerance standard.

If one thing is clear this election season, it is that many voters feel that their voices are not being heard. We should make sure that the voices of citizens are not being drowned out by corporate money. American billionaires already have an outsize influence on our elections. Let's not cede yet more power to foreign elites.

To that end, at the next public meeting of the Federal Election Commission, I will move to direct the commission's lawyers to provide us with options on how best to instruct corporate political spenders of their obligations under both Citizens United and statutory law. The American people deserve assurances from American corporations that they are not using the money of foreign shareholders to influence our elections.

Regardless of whether the perpetually deadlocked F.E.C. takes action, lawyers may wish to think twice before signing off on corporate political giving or spending that they cannot guarantee comes entirely from legal sources.

States can also take action, since Citizens United and federal law barring foreign money apply with equal force at the state level. States can require entities accepting political contributions from corporations in state and local races to make sure that those corporations are indeed associations of American citizens — and enforce the ban on foreign political spending against those that are not.

Polls show that overwhelming majorities of Americans reject the conclusions of Citizens United and want to see it overturned. But in the meantime, federal and state policy makers and authorities can at least ensure that corporations are not being

used as a front to allow foreign money to seep into our elections.

Ellen L. Weintraub is a member of the Federal Election Commission.

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