

STATEMENT SUBMITTED BY JOEL M. GORA TO THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM AND THE COMMITTEE ON SMALL BUSINESS OF THE UNITED STATES HOUSE OF REPRESENTATIVES CONCERNING THE PROPOSED EXECUTIVE ORDER ON DISCLOSURE OF POLITICAL SPENDING BY GOVERNMENT CONTRACTORS.

Joel M. Gora
Professor of Law
Brooklyn Law School

May 12, 2011

My name is Joel M. Gora, and I am a full-time Professor of Law at Brooklyn Law School, where I teach Constitutional Law, First Amendment Law and Election Law. Prior to my joining the Brooklyn faculty in 1978, I was a full-time attorney with the American Civil Liberties Union, handling cases in a number of areas, most particularly, the First Amendment. Because of that specialty, I became involved in numerous cases dealing with the clash between First Amendment rights and campaign finance restrictions and requirements, such as disclosure. I worked on a number of cases dealing with those issues even before the Supreme Court landmark decision in Buckley v. Valeo, 424 U.S. 1 (1976). I was one of the lawyers who argued before the Supreme Court in that case, challenging the Federal Election Campaign Act's disclosure requirements in particular. Since Buckley, I have participated, on behalf of the ACLU in most of the major Supreme Court cases on campaign finance controls, including most recently, the Court's landmark decision in Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010). In addition to working on these cases, I have written extensively about these issues in scholarly journals, and I recently co-authored a book with Peter J. Wallison entitled BETTER PARTIES, BETTER GOVERNMENT: A Realistic Proposal for Campaign Finance Reform (AEI Press, 2009). Notwithstanding these various affiliations, the views set forth here are solely my own.

I very much appreciate the opportunity to submit this written statement to give my assessment of the Proposed Executive Order entitled Disclosure of Political Spending by Government Contractors. This Order would compel unprecedented disclosure of political activity of the thousands of companies seeking federal government contracts and, even worse, of the personal political donations of the tens of thousands of officers of such companies. In my opinion, and based on my experience, the proposed Order would skirt settled constitutional principles in a number of questionable ways. I think that no case has been made for the unprecedented expansion of disclosure requirements, and that the potential abuse of political association and deterrence of political speech outweigh whatever valid governmental benefits the Executive Order might accomplish.

First, the Order is an end-run around the principles of separation of powers. Having lost this issue in the Congress with the defeat of the so-called DISCLOSE Act, President Obama is now trying to push key portions of the failed bill through as an executive order. But it is axiomatic, going back at least to the 1952 Steel Seizure case, Youngstown Sheet and Tube Co. v.

Sawyer, 343 U.S. 579 (1952), that significant actions affecting individual rights should require joint action by Congress and the President, not unilateral action by the President alone.

Second, the Executive Order is also an end run around the Supreme Court's ruling in Citizens United v. Federal Election Commission, by undercutting the decisions' strong political speech protection for corporations, unions and non-profit groups by imposing unprecedented and burdensome disclosure requirements. The proposed Executive Order goes well beyond any disclosure authorized by the Supreme Court in the Citizens United case.

Third, the Order tries to skirt First Amendment protections for freedom of association and political privacy. Those protections go all the way back to the landmark decision of NAACP v. Alabama, 357 U.S. 449 (1958) which recognized and established the right of individuals to contribute to political organizations and causes without fear of government or private harassment or retaliation made possible by compelled disclosure of their support for those organizations.

The Executive Order would compel disclosure of perfectly lawful contributions to candidates, parties, independent groups and even non-profit organizations, well beyond anything that has been upheld before. Here's how the scheme would work.

In order to seek a federal contract, a company would have to publicly disclose whether it or any of its subsidiaries or officers had given or spent as little as \$5,000 in a year for any one candidate, campaign, party organization or independent group that might engage in regulated campaign speech. Right now, only partisan individual contributions of more than \$200 must be publicly reported to the government. Under the Executive Order, lawful individual contributions below that \$200 amount -- which is still a ridiculously low figure -- can be swept up in public, online reporting if the aggregate of contributions from one company to a particular candidate or campaign exceeds \$5,000 in an entire year, a relatively paltry sum. So, an officer of a company who gives as little as \$100 to a candidate or political organization runs the very real risk of having that personal act of political participation subject to unlimited public disclosure.

What is even more unusual and troubling is that officials at companies who give any amount to a non-profit 501(c)(4) organization, such as the ACLU, NAACP or NRA, will have that contribution disclosed, if, once again, a mere \$5000 is contributed from anywhere in the entire company to the organization, and the organization might engage in any regulated campaign speech. There has never been such potentially sweeping disclosure of the identity of such small individual contributions to non-partisan organizations in the history of federal campaign finance regulation. The closest we came was a rogue statutory provision passed as part of the major 1974 amendments to the FECA, requiring all issue organizations to disclose the names of anyone who gave the group more than \$100 to support commentary on the voting records of political candidates. That provision was unanimously struck down as almost a per se First Amendment violation by the courts as part of the Buckley case. See Buckley v. Valeo, 519 F. 2d 821, 869-78 (D.C. Cir. 1975, en banc), aff'd in part, rev'd in part, 424 U.S. 1 (1976). Indeed, the consensus of its unconstitutionality was so deep that the government did not even appeal the invalidation of the disclosure provision and it was allowed to lapse.

Worse still, the Order is also an end run around the principle that your political beliefs and affiliations are none of your boss's business. Instead the Order requires that any prospective government contractor must investigate all political contributions by their officers, not just to candidates and parties, but to third party organizations as well, far removed from partisan politics. We have had an unfortunate experience with employers snooping on their employee's political affiliations during the anti-communist era of the 1950's. Why would we want to mandate similar snooping by employers today?

Fourth, the President's Order circumvents two 1996 Supreme Court cases holding that a business cannot be denied a government contract because they make or refuse to make political campaign contributions, or because of their political activity generally. See O'Hare Truck Services Inc., v. Northlake, Ill., 518 U.S. 712 (1996); Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 518 U.S. 668 (1996). Since government contractors cannot constitutionally be penalized for giving or refusing to give campaign contributions, what purpose is served by requiring them to list in their application all of the political contributions that their officers have made? If anything, that requirement would seem, ironically, to facilitate the very political discrimination and bias and favoritism that the Court has rejected on First Amendment grounds.

These Supreme Court decisions are examples of the large principle embedded in the unconstitutional conditions doctrine, which the Executive Order flaunts and violates. A company -- or anyone -- may not have a right to a government contract, but it cannot be required to sacrifice the First Amendment rights of its officials in order to seek such a contract. How would we feel about asking any applicant for a government contract to list the political party affiliation and non-profit organization membership and contributions of all of its key officials as the price to pay for seeking a government contract? This Order is tantamount to that.

Fifth, there is little record of serious or widespread "pay-to-play" or other claimed episodes of corruption in federal contracting. First Amendment protections cannot yield unless, at the very least, there is a manifest showing of the need to overcome them. No such showing has been made here.

Finally, perhaps the most telling end-run is around the core principle that in regulating speech, government cannot pick and choose which speakers or ideas shall be favored and which shall be burdened. Yet, the Executive Order does just that. It enables groups that tend to favor Democrats and disables those which tend to favor Republicans. It applies only to government contractors, which tend to be business corporations, largely Republican in outlook. Totally exempt are the entities that get huge amounts of government grants through the OMB procedures, namely, non-profits, largely Democratic in orientation. Not surprisingly, public employee unions with a huge stake in government spending are totally exempt as well.

If there is any core lesson that the Citizens United case taught us it is that the First Amendment is allergic to a situation where there are restrictive rules and burdensome requirements for some speakers but not for others.

While I think that the basic thrust and premise of the proposed Executive Order are

fatally flawed, if there were to be new regulation in this area, I think it must follow the long-standing requirement that where First Amendment rights are being burdened in a serious way, as here, the government must choose those alternative methods of regulation which are least restrictive of or burdensome to those rights. There are a number of ways that the Executive Order could be narrowed. While none of them -- singly or in the aggregate -- can cure the unconstitutionality of this Order, they would make the order less objectionable, though still unacceptable. Here are some possible more limited alternatives.

1. The definition of electioneering communications that trigger the reporting obligation should be narrowed to just those communications that contain express advocacy of election or defeat of a federal candidate.

2. Exempt from the disclosure obligations of the contract bidder those officers and directors whose contributions do not exceed \$200 for any particular candidate or political entity.

3. Permit contractors to submit an aggregate amount of contributions to any candidate or organization from the entity or its officers, rather than requiring public listing of each of those individuals. If there is any relevant information there, it is that the contractor was the source of a contribution or supported a candidate, not which individuals affiliated with it did so.

4. Replace the reference to intention or reasonable expectation set forth in Section 2(b) in favor of more certain language that triggers reporting only if the recipient entity has actually made independent expenditures or electioneering communications (as narrowly defined) in the previous election cycle.

But, as I said at the outset, while these improvements would make the proposed Executive Order less intolerable, the basic thrust of the Order is still fatally flawed.

For these reasons, I respectfully submit that steps should be taken to prevent this Executive Order from becoming law and being implemented.