

## Transcript

### Forum: Corporate Political Spending and Foreign Influence

*Hosted by Commissioner Ellen L. Weintraub*

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#### **Statement of Robert Jackson, Columbia Law School**

**ROBERT JACKSON, COLUMBIA LAW SCHOOL:** Well, thank you very much. I'm delighted to be here. For those of you I haven't had the chance to meet yet, I'm Robert Jackson. I teach corporate law and corporate finance at Columbia. Thank you to the Commissioner for having us today and to her staff for making this possible. I'm, like Professor Coates, I'm also a corporate lawyer. I got the sense that security downstairs might know that. They looked at me skeptically, like, "You guys aren't allowed here, what are you doing here?"

I'm going to be brief because I only have a few points to make and also because the other people on the panel are smarter than me. Professor Coates was my corporate law professor, so I really don't have anything interesting to say. [Laughter]

**JOHN COATES:** You did well!

**ROBERT JACKSON:** So let me offer... I'm going to focus on a slightly different topic than Professor Coates did. One of the topics of the panel that's been set out for us is for us to tell you "What is the state of other areas of the law and what can it tell you about election law and what it should look like?" So I'm going to focus on that and particularly I'm going to focus on the law that governs political spending by large public companies in the United States.

So... I'm going to focus on that subject. I'm going to tell you what the state of the law is, how it's changing, and then, last, I'm going to make a plea to you, I'm going to lobby you for some help. So first,

let me say, the question is, what is the state of the law governing large public companies, the Coca-Colas, the IBMs, and whether and how they can take shareholders money and spend it on politics. That's one of the questions, the state of the law. I'm here to tell you, we don't have any.

The reason is that corporate and securities law is typically not concerned with these subjects. We, in fact, until the *Citizens United* decision and things that preceded it, corporate and securities law focused on rather different matters, questions of the shareholders' interests, do the managers have those in mind? But we didn't imagine that corporations would have this very powerful constitutional right to spend the shareholders' money on politics until the Supreme Court told us in a series of decisions that, of course, culminated with *Citizens United* in 2010. When they did, a few of us started thinking about, now that corporations have this power, what should be the rules of the game for how they use it? Who decides? The management? The directors? The shareholders, whose money it is? We didn't know because we really hadn't given the topic much thought. And so a few of us have set out, myself included with Professor Coates' colleague Lucian Bebchuk, to try and establish, get a sense for what the rules of the game ought to be if a large public company wants to take shareholder money and use it for political purposes.

The first thing I want to say about this is that in the area of corporate law, when I say we don't have any law about this, I'm not joking. We actually don't have rules that govern this. What we have is the standard default rule of American corporate law, which is known, for those of you who will remember it from law school, it is the business judgment rule.

This is a rule that says the people who run the corporation are experts. We should let them make decisions as experts and leave them alone when they do. And it's a good rule, I'm a fan of this rule. It applies in almost all situations where corporations make decisions, except this one where the managers' interest, those who control the corporation, are different from those of those who own it,

shareholders. A good example is executive compensation. In that area, often the managers want to pay themselves more and the shareholders would rather they take less, and so they have a conflict of interest and we have law that deals with that.

We allow the shareholders to get information about it. We have mandatory disclosure of this stuff and also, recently, because of the Dodd-Frank Act, we give shareholders a vote on what they think of the executive's pay. We don't have any of that in corporate law when it comes to political spending. We treat corporate spending on politics as a business judgment. That is we treat it just like the decision to buy a factory or hire or fire people, we treat it as a judgment where the managers are using shareholder money and presumably in the shareholders' interest. And if I convince you of anything today it should be that that's the wrong rule for this kind of thing. That instead in this area, the managers' interests are very different from those of the shareholders, or at least they could be. Because shareholders don't choose what corporations they own based on the corporations' politics. They choose it on the basis of the business or their interest in diversification.

And because the directors, the managers', interest might conflict with those of shareholders, we need special rules in this area. And so, to be honest with you, my message today is not so much about what we can tell you about corporate law, but instead, the ways that election law can help us build a better corporate law for these questions because, as I say, we don't have any corporate law in that area. For that reason, several law professors five years ago petitioned the Securities and Exchange Commission to develop a rule requiring corporations to disclose to their investors when corporate money is used for politics.

You see, the idea here would be, if the managers use the money in a way that shareholders don't like, well, shareholders will get information about that. And if they do, then shareholders can take action. They can sell the company stock, they can vote out the directors who are doing stuff they don't

like. But without that information, these markets can't work. It's a little bit like executive pay. We said the SEC should require disclosure of this. It was a group of ten corporate law professors, nine famous ones and me, who asked the Securities and Exchange Commission to require disclosure of this and I'm happy to say that this petition has gained some support. More than 1.2 million people have written to the SEC and asked them to do this. That makes it the most commented in the history of the Securities and Exchange Commission.

And for a brief moment in time, it appeared the SEC might take action under the commission under the last chairman, but then we got a new chairman who was called to a hearing at the House of Representatives and asked by every majority member of that panel not to do it. And shortly thereafter, the petition came off the SEC's agenda and that's where it stayed during this chairman's term.

My hope is that the next election will give us a new president and a new chairman of the SEC and when it does it'll be important for this new chairman to take seriously the need for a rule in this area.

But in the meantime, I want to tell you what we have in corporate law for disclosure of political spending because it's not quite right to say we don't have anything at all, we just have no law.

Instead, we have voluntary agreements between company shareholders and their managers where more than 100 of the largest U.S. public companies agreed voluntarily to disclose that information at shareholder's request. Request from shareholders that companies do this, these are through shareholder proposals that can be made to U.S. public companies, are among the most common topics, subjects of shareholder proposals in the United States.

They have overwhelmingly led to voluntary agreements by the largest public companies to disclose this stuff. And see, you might say to me, "Okay, well, Jackson, that means we don't need an SEC

rule in this area because, you see, companies are doing it voluntarily so let's just wait until they all do!"  
So that's wrong.

Let me say why. First, in general, when we need information about something, when U.S. investors need information about something a corporation is doing, we don't make them ask on a company-by-company basis. Because there are like 11,000 public companies and that takes a lot of time. Also shareholders are diversified; they have very few incentives to take that kind of action. And so there's... it's unlikely that they'll do it. But putting that to one side, the bigger problem is, the companies that will agree to disclose voluntarily, are the ones least likely to be spending money in a way that shareholders don't like. See, that's why they're willing to volunteer information, or at least that would be a concern. And so, the voluntary efforts in this area, they exist, if you go to public company websites, you'll see information on how they spend on politics, but you'll see it in a selected way, just the tip of the iceberg for the actual amount of corporate political spending that's happening in this country.

And that brings me to my last point, my plea to you, my pitch to election law experts here and otherwise. You see, one of the reasons that the SEC has refused to develop the rule I just described is that they claim they lack the expertise. They say, "well, you know, elections are complicated, it's not our thing; we have lots of securities lawyers, but this election stuff, we don't really know anything about it, so we can't do it."

So, I've pointed out to them that this building exists [laughter] and that there are some extraordinary election lawyers who know about things like should there be a *de minimis* limit of political spending and should it be disclosed or not. When should it be disclosed? What form should it be disclosed in? Whether there should be exemptions for certain kinds of disclosures. You see, they claim to be clueless about this, but my sense is, you have ideas and I want to urge you to share them with the Securities and Exchange Commission. And the reason I say this is that as long as these two groups of

lawyers don't talk to each other, they'll be able to claim that the reason they haven't done this is because they don't know how. And based on what I've heard this morning and what I'm sure I'll hear the rest of the day, that's not a good enough answer. In fact, we do have the capacity both inside and outside the government to write a rule that would give investors transparency into what's happening in corporate political spending, and I hope you help them do that. Thank you very much.