

Transcript

Forum: Corporate Political Spending and Foreign Influence

Hosted by Commissioner Ellen L. Weintraub

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SECOND PANEL:

John Coates, Harvard Law School

Robert Jackson, Columbia Law School

Mace Rosenstein, Covington & Burling

Donald Tobin, University of Maryland School of Law

COMMISSIONER ELLEN L. WEINTRAUB: Okay, if everyone could get seated, we'll get started with our second panel. And if anybody wants to make themselves... feel free to leave the doors open so if people want to lounge on the couches out there and listen from that side... I think we have a screen over there, so that's... We had a shortage of chairs in the first panel. We want everybody to be comfy.

Well, I am extremely excited to welcome you all back and to listen to this blockbuster panel. I'm so excited to bring these people here. I believe that, Donald, correct me if I'm wrong, but I don't think any of these people have actually testified before the Commission, or if so, it's been a really, really long time.

DONALD TOBIN, UNIVERSITY OF MARYLAND SCHOOL OF LAW: I have.

COMMISSIONER WEINTRAUB: You have? Okay, well, it's been a really, really long time. This is not the usual suspects for us. Which, I think is so important for us to hear different perspectives and what this panel is going to do is to try and bring in some perspectives from different areas of the law.

We have on this panel John Coates, who teaches corporate governance and finance at Harvard Law School and Harvard Business School. And before coming to Harvard he was a partner at the Wall

Street law firm Wachtell, Lipton, Rosen, & Katz. So any of the lawyers in the room, we've all heard of Wachtell. So he has seen it from both sides: the academic and the practical side.

Robert Jackson is Professor of Law and co-director of the Ira M. Millstein Center for Global Markets and Corporate Ownership at Columbia Law School – how incredibly relevant to what we're talking about today – where his research emphasizes empirical study of executive compensation and corporate governance matters. Before joining the faculty in 2010, Professor Jackson served as an advisor to senior officials at the Department of the Treasury and in the Office of the Special Master for TARP Executive Compensation.

Mace Rosenstein is a partner at Covington & Burling and chair of the firm's Media and Internet and Telecommunications Practice Area. His practice is focused on, among other things, what he calls "arcane foreign investment limitations under the Communications Act and implementing FCC rules and policy."

And my dear old friend Donald Tobin is dean of the University of Maryland Carey School of Law and a former faculty member and Associate Dean at the renowned Ohio State School of Law, which is so well-known for its election law professors and teaching and scholarship. He's also a former Justice Department attorney and former Capitol Hill aide and has spent his career working at the intersection of election law and tax law. And the purpose of this panel was to try and bring in these experts to help guide us and bring some perspectives from other areas of the law that are not just focused on the FECA, the Federal Election Campaign Act. So, we're going to do this in, again, in an alphabetical order so, Professor Coates, start us off!

JOHN COATES, HARVARD LAW SCHOOL: Okay, thank you. And thank you very much for the invitation to be in a place I don't usually go, right? So, my background is, my introduction alluded to it, is the corporate and financial market side and I was blissfully ignorant of and happy to ignore everything that everybody else in this room has spent their careers focusing on, until *Citizens United* and actually, in fairness, *Citizens United* did wake me up to something that I think the corporate law community has neglected too, which is the way that corporations have, long before *Citizens United*, but not going back that far to the '70s, started using the Constitution quite aggressively and opportunistically to deregulate when they lose the lobbying battles that they are very good at fighting. So, they get two rounds of regulatory reform, one in the actual regulatory process and another in court where they're increasingly using the First Amendment to take on greater and greater pieces of the regulatory world, an area that I've written about.

But today, I'm going to focus principally on a couple of narrow topics drawing on my teaching and research in the corporate area and just to make some basic points about disclosure, or its absence, of ownership, including foreign ownership and the fact that in many, many domains, nevertheless, there are long-standing statutes, regulations, legal traditions for treating foreign companies and foreign influence to control companies quite differently than we treat domestic and there's nothing particularly surprising or pernicious about that. It's not an embrace of nativism, it's not an embrace of Trump's approach to trade, it's a standard part of the way that every country thinks about regulating business activity in, you know, in their country.

So, as you all probably know, there's no disclosure obligation on companies as such in the U.S. to disclose their political activity. There have been efforts ongoing to try to get the SEC to do something for public companies but Chevron could spend a million dollars and no one would know unless they bragged about it, not even its current owners, right? So that's standard baseline, but there's probably a

bigger gap in the disclosure laws that you may not be fully aware of which is that here's no general obligation for a company operating in the U.S. to tell anybody who its owners are. There're more than 5 million active business corporations active enough to file returns with the IRS and of those, less than 1% are public companies and even of the public companies, the public companies, essentially, have obligations only to disclose the ownership interests of the people, currently executive officers or directors of the company or if they own more than 5%. But again, just want to stress, most companies, including very, very large companies, are not public and are not even subject to that disclosure regime.

So, in sum, if the public wants to know who owns a given company that shows up in any forum as a donor, for example, in the FEC regulatory process, there's no way to find out, actually, who owns the company under normal disclosure obligations. There are some reporting requirements to specific pieces of the government, I'll come back to that in a second, such as the IRS, but they're generally not available to the public, and they've very carefully circumscribed in how that data can be used.

So is this an issue, is there any reason to think that foreign control of U.S. companies is common? Well, actually, yes. That IRS data I was just alluding to discloses in the most recent update I could find, about \$12 trillion of assets owned by U.S. companies that were controlled by foreign owners – 51% or more.

Something like 100,000 such companies with a nontrivial amount of revenue and assets operating in the U.S. One you all know, actually. So you know that Budweiser can, you've seen, turn into something called America? It's actually owned by a Belgian company. The lonely city of Belgium, as Donald Trump has referred to it recently.

Okay... what about less than full control? The IRS collects data on full controlled, controlled companies. There's a separate data regime that the Federal Reserve Bank of New York and the U.S. Treasury run where they survey banks and brokers and issuers, large issuers, to try to figure out how

much portfolio investment, that is, non-controlling investment, there is into U.S. corporate stock. And the best data from that is that, an astonishing increase, actually, over the past 30 years. Back to 1982 about 5% of all U.S. corporate stock was held or controlled by foreigners. Now, it's now up to 25. Twenty-five. So let that sink in for a second.

One in four dollars, in value terms, in U.S. corporations is controlled, directly or indirectly, by a foreign owner. Now what kind of foreign owner? Well, we don't know. It's part of the disclosure gap. It could be individuals, it could be companies, they could be governments and of course, in many countries like China, where governments and businesses are essentially identical, and so, a little hard to tease out, even if you know the country from which the investment is coming.

The largest single country source in that data, which they report, is the Cayman Islands. Which means, basically, it could be anybody, anywhere in the world, since the Cayman Islands are not exactly a location for major independent economic activity; it's really a location for corporate – fictional – entities to shelter their ownership.

Okay... what about elections? Is there any indication that corporations, in fact, are moving into the elections? This is something you probably already heard about to some extent on the first panel but just to pick out a couple things, to reiterate if you haven't heard them.

Earlier in this presidential cycle, \$2.5 million was given to Rubio's single-candidate super PAC by a Panamanian company. We don't know the owners of that company. I know one of them, Hank Greenberg, because I was involved in litigation involving STAR and AIG in which that company figured, but the actual total, current composition of the ownership is unknown because it's a private company and there's no obligation to disclose in any forum the owners of that company. There's a company called Children of Israel, LLC, you may have read about in *The Washington Post*, organized in the U.S. by a Silicon Valley realtor named Lisa Gao, who has no prior history of making political donations herself.

Her job, which she markets herself as, is a realtor in the Silicon Valley area, helping PRC Chinese nationals find houses in Silicon Valley. They've given money, that LLC which she's the president of has given money to a number of single candidate super PACs.

One in eight dollars flowing to these super PACs now come from corporations and that of course doesn't count dark money, where the principal organized groups are predominantly business corporation members: Chamber, Business Roundtable, etc. Larry Tribe in yesterday's *Boston Globe* pointed out that Uber and Lyft are now playing a massive and completely unheralded, previously unheralded, role in local elections, fighting off local requirements that they get their drivers to have background checks. And finally, I think, actually, the thing that's the most troubling for me from an overall policy perspective, are the ghost companies where, as you probably know, companies spring up, within a week, make a \$250,000 donation to a single candidate super PAC and no one has any idea who these companies are, who they're owned by, anything else. They're likely owned by U.S. citizens, my guess, on average, but we don't know. And we certainly don't know what's going to be coming down the pike. That path has been laid.

Now, just to make my final point, is it, what's the... are there precedents for thinking about differentially regulating foreign companies. And, well, obviously free trade, parity of treatment when it comes to trade and business, is a standard part of the ideology, at least traditionally, within both parties and within most of the population, if they think about it over time, long and hard enough about it. You know, sometimes we flirt with protectionism, but not in a serious way.

However, coinciding with that long tradition of free trade, we have very specific foreign restrictions throughout a number of different industries, just as every country in the world has. So take the most example, obvious defense: you simply can't do business with the Defense Department unless

you go through a very specific regulatory approval process and they won't grant it to many companies because of national security concerns.

Infrastructure is another big category. Shipping, aircraft, telecom, all of those industries have very strict limits on foreign ownership. Some ban it completely and some it's regulated through an approval process. And maybe not so obvious, financial services. Now, the crisis, hopefully, has taught the lesson the financial markets are a type of crucial public infrastructure and we regulate foreign ownership in this area. There's a recent deal that fell apart involving an insurance company based in Iowa called Fidelity Life. Ang Bang, a Chinese company, was going to buy them. They announced a deal and the New York life insurance commissioner asked, as is typical, "Who owns you?" [The buyer] and the company refused to disclose their ownership. And the deal died over that. It's a multibillion dollar deal. That company actually owns the Waldorf Astoria. In case, any of you are sleeping there any time soon, you're sleeping in a hotel owned by a company that refuses to disclose its ownership to the New York state life insurance company as part of a routine acquisition.

Now, one reason probably for the sensitivity of ownership disclosure in that case is that the current chairman is married to a granddaughter of the former chairman of the party in China and *The New York Times* has done a little sleuthing around what little disclosure there is in China and has found that two of the shareholders are state-owned enterprises, all right, they're part of the government of China. And 37 other companies are companies owned by other companies, which in turn are owned by other companies, which in turn are owned by other companies. In other words, you can't trace the ownership in any serious way, probably because it all ultimately traces back to, let's say, economically and politically advantaged descendants of the founders of the party in China, which could be politically embarrassing within China.

So... that's an example of where we already have, for good reason, an existing skepticism about foreign ownership. There are many. What more fundamental feature of our government is the protection of the republic? Foreign interest and domestic interest are going to predictably diverge. If you're appointing a president, an independent committee chairman, et cetera, through a political system that has oversight of the industries where we ban foreign ownership, it's a little odd then to allow foreign influence to occur at the top of that chain and not further down that chain. That is to say if the Defense Department can ban somebody from participating in a contract, why would you let people with influence over the contract higher up the chain be influenced in the electoral system by the very same foreign companies? And I will stop there.

COMMISSIONER WEINTRAUB: That was great! Thank you so much! Bob?

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.

COMMISSIONER WEINTRAUB: Thank you. Mace?

MACE ROSENSTEIN, COVINGTON & BURLING: Well, I'm the piker on this panel, obviously, because, you know, I'm just a lowly communications attorney. This isn't my space and I'm also not as smart as any of these guys, but I'll fake it, okay? So just humor me.

COMMISSIONER WEINTRAUB: Don't believe any of them when they say that.

MACE ROSENSTEIN: I practice in one of the areas that, as Professor Coates mentioned, does have an existing regime to regulate foreign investment and ownership and that's in the telecom space. So I guess that's a good thing, you know, you guys can sort of write on a blank slate here, I have a century-old statutory regime that I have to struggle with and try to adapt to modern exigencies. And I thought it might make sense, because the FCC does have a very complex statutory and regulatory and policy regime, to walk you through some of the highlights of it that they might inform some of the thinking that you guys are doing and some of the discussion that is going on today So this is where it becomes sort of the dry, lecture portion of the program, but I think it'll be interesting.

As I mentioned, the fundamental challenge that I think the FCC faces and that practitioners in this area face and that the regulated parties face is that our law governing foreign investment, which is embodied in the Communication Act, was enacted in 1934 and it hasn't changed since. And what's even more interesting is that its underpinnings, really, its progeny, its providence can be traced back to the Radio Act of 1912, over 100 years ago, when the whole world looked different, much less our communications infrastructure and our communications policy infrastructure. Congress, in fact, first became concerned about foreign ownership of radio communications in 1912, you ready for this? There was no commercial communications infrastructure industry. They were concerned that Germany or its proxies might gain control of privately held ship-to-shore radio stations along the East Coast in the run-up to the first World War and that they might use those facilities in order to send merchant ships off course and into the shoals. That's where our problem began, if you will, because, ever since that time, the Congress and the Commission have struggled with how, to what extent, to regulate foreign investment in this sector.

So let me walk through, with you, a little bit about that statutory underpinning. And I think what you'll see is, and this may not be what this room wants to hear, because the progression, the evolution of the FCC in this area has been from strict prohibition to a much more permissive environment to the extent that now, and I'm fast forwarding, we'll get there, now, for all intents and purposes, it is possible to have 100% foreign ownership of a U.S. communications facility with certain exceptions that we can talk about.

So... since 1934, when the Communications Act was promulgated, wireless communications licenses – think broadcasters, and for our purposes today, think cell phone operators, right, anything that allows you to communicate by, over spectrum without putting a signal through a wire – has been subject to section 310 of the Act. 310 does about three different things. First, it prohibits any foreign government or its representative or any alien or any representative of an alien (and “an alien” has the common sense definition here) or any foreign organized corporation from holding an FCC license. Period, full stop. If you're a foreigner, if you're a foreign corporation, much less a foreign government, you may not apply to the FCC to hold a radio license. That's the first thing. The second thing 310 does is prohibits foreign individuals and foreign governments and foreign organized corporations from owning or voting more than 20% of the equity or voting interests in an FCC licensee. So, you can't be a licensee outright but you can hold up to a 20% interest in a licensee, whether it's a C Corp., whether it's a partnership, whether it's an LLC.

Interestingly, and we'll sort of touch on this in a little bit, too, the FCC, notwithstanding that it's an outright and categorical limit, the FCC has determined within the last three or four years that it has discretion to forebear from enforcing that limit when it believes that the public interest warrants doing so. So, in effect, the FCC has determined that it has discretion and that hasn't been challenged to allow relaxation of that 20% statutory cap.

And then we get to section 310B4 which is the provision that has most bedeviled our industry and the FCC and which I most want to focus on today, and that has to do with the limitation of indirect investment in FCC licensees. That is, an investment in a U.S.-organized entity that itself directly or indirectly controls that licensee entity that we were talking about a second ago. Here's what it does, and it is... I can't project it here. If you're interested, you should go back and look at it because it is one of the least artfully drafted statutory provisions I've ever come across. Admittedly, my practice area is narrow, but the Communications Act is a really big document.

Section 310B4 limits indirect foreign ownership to 25%. Okay, so it's a bump up from the direct ownership cap if the commission finds the public interest would be served by prohibiting it, right? So, a common sense reading of the statute and the statute by its terms appears to say, it's okay to own as much as you want unless the FCC tells you that you can't. However, historically, the FCC interpreted it as a cap, as a categorical cap that could only be, if you will, waived, not the technically correct term, upon application to the FCC. So it's an interesting tension. The FCC historically just read the statute wrong in my view and said "no, no, no, you can't own more than 25% unless you come to us." Even though what the statute says is, you can own as much as you want unless the FCC tells you you can't. That has been one of the challenges we dealt with with the interpretation on the application of this statute through the years.

I should note, and I don't want to get too far down into the weeds, but it also may be relevant to some of the things that you're going to be thinking about. The 25% limitation is calculated separately for voting and equity interests. So the FCC will run two separate calculations and must be satisfied that neither the voting prong nor the economic prong exceeds 25% in order for you to certify or for it to find you're in compliance with the limitation.

And that equity ownership generally is calculated on an outstanding, rather than a fully diluted basis, and it generally disregards debt, including convertible debt, it disregards contingent future interests such as warrants or options until they're exercised. And over time, this will not surprise you, vehicles such as debt, including convertible debt and options and warrants, have become preferred mechanisms in the industry in order to screen ownership from the foreign ownership calculation, right? In other words, I can issue warrants to my foreign investors and until they're exercised, they're not relevant to, either to my disclosure to the FCC or to the FCC's calculation of the, you know, the foreign ownership quotient. But of course because there's an exception to every rule, the FCC also determined, goaded by Rupert Murdoch in 1995, it has discretion to pierce a nominal capital structure or it has reason to believe that that structure doesn't align, at least reasonably, that it's not on the curve with the actual locus of economic ownership.

Let's digress there briefly. My disclaimer and disclosure here is that this was my case. You recall that Murdoch became a U.S. citizen in 1985-86 because he wanted to buy a bunch of TV stations here. And remember, under 310, he couldn't because he wasn't a U.S. citizen. And he arranged, shall we say, an expedited path to citizenship. That was not my part of the case. My part of the case came [laughter] my part came ten years later when a whistle blower went to the FCC and said, "Hang on. His ownership disclosures at the FCC indicated that he has 76% of the voting and equity interests," right, because he had to keep the foreign interests below 25%. Whereas the News Corporation, an Australian company, owns the other 24%; but records indicate that he only paid \$760,000 for his 76% voting control interest and the company is worth however many multiple billions of dollars. That resulted in a protracted and very difficult FCC proceeding and that case resulted in the FCC's determination that in fact, it has the power to pierce the capital structure because what it said was "hang on, Murdoch only put down \$760,000 and yet says he controls 76% of this company; 99% plus of the economic value and risk is flowing out to the shareholders of the News Corporation Limited, an Australian company."

Here's another behind the scenes look at the FCC. It's a very results-driven agency, alright? They had a huge problem when they made the finding that the company was out of compliance with the statute. Because theoretically it could have led to the revocation of those licenses and would have been the end of the line for FOX, which at that time was only a few years old and had provided a fourth national broadcast network which had been a huge policy objective and initiative for the FCC for generations.

We first argued from the statute and we lost. I won't go into that argument. We then tried to recapitalize the company using debt and we said "Okay, fine, you know, you don't count debt, we'll just, you know, we'll just recapitalize and all that and the company will issue debt to News Corporation" and the FCC, looking in part to the service and tax law said "no, no, no; you can't have a 99.9% – .1 debt equity ratio" and so the FCC reverted to plan C which was purple cow and a waiver, right? They couldn't take the risk that Murdoch would take his chips and go home and shut down the fourth network. So they said "You know what? This is a unique situation. It's never going to recur. The public interest value of that fourth network is really important. So we will allow this structure, we will bless this structure and essentially forebear from enforcing that 25% gap under the statute, even though everybody acknowledges that it's not in compliance. So, life went on. That's not an unusual approach for the FCC to take when they have two conflicting sort of policy objectives.

And as it happened, this is a footnote, you probably know that news Corp. has been redomiciled in Delaware. The public float has done what a public float will do over time. And over time, the attributable foreign ownership of the public float has settled down at around 25% or less. There've been a couple bumps up. The FCC has mechanisms to deal with that.

Let's go back to history, briefly. As I mentioned, the Radio Act of 1912 completely forbade any foreign ownership. Period. Nothing. Fifteen years later, Congress in the 1927 radio act decided that they

would begin to permit some foreign ownership so they set limits on direct foreign ownership, that 20% that we've talked about. But that's all that they did. And the legislative history emphasized national security concerns for those restrictions and that's something, again, that we've been talking about a little bit today. And in particular they wanted to prevent foreign influence over domestic communications in time of war. By 1927, of course, there was, over the air, entertainment radio, right? You could get your crystal set and you could listen to the radio. And so the concern had evolved, not just from the ship-to-shore communications that had a very sort of practical implication and consequence, but the concern had broadened to a more generalized concern that a hostile foreign power could propagandize and influence the hearts and minds of American radio listeners. But the '27 Congress left something out. They forgot about indirect foreign ownership and of course communications lawyers being what they are and the industry being what it is, they determined that this loophole could allow them to evade foreign restriction altogether simply by organizing a U.S. holding company, right? In '34 that loophole was closed and that's when we landed on the regime that we have now with the limitations 25% on indirect foreign ownership 60 or so years passed, the Commission from time to time and on a very ad hoc basis would permit foreign ownership in excess of 25%, although always in the common carrier context, the telephone context, never in the broadcast context, and I want to spend just a few minutes on that too, because I think it's relevant to what we're talking about here.

And then came the WTO in the mid-90s. And, in particular, the basic telecommunications agreement, pursuant to which, I think about 65 or 70 countries around the world undertook to open their telecommunications markets. We, of course, joined the WTO and ratified it but we took a reservation for broadcasting. We said we will only open our wireless radio markets, that is, cell phones, but we're not going to open the broadcast sector. And, in short order, after the adoption of the WTO, you saw the flood gates opening a little bit. You saw more access to foreign capital. And, I think in 2001, you saw Deutsche Telecom's acquisition of what was then called Voice Stream Wireless, which you

would now know as T-Mobile, which is owned 100% by the government of Germany. Senator Hollings vociferously opposed that transaction but the FCC concluded that under the WTO, it really had no choice and could not identify any public interest harms to allowing a friendly foreign state to own a critical United States telecommunications infrastructure.

And in the years since then, that was sort of the signal event in this transition, but since that time, I think the FCC has approved 150 to 200 instances of foreign ownership of a wireless common carrier licensee in excess of 25%. They have only allowed such ownership, twice, in the broadcast context, once was Murdoch and more recently, the Pandora case, in which Pandora, you know, the music service, was seeking to acquire a terrestrial radio station, as a public company had difficulty calculating its foreign ownership, went to the FCC and asked for permission to go to 49% which the Commission approved, subject to certain reporting and other requirements.

A couple of minutes, and I'm finishing soon, I promise. A couple minutes on this common carrier broadcast dichotomy, again because I think it might inform some of the stuff that we're talking about today. As I mentioned, you know, historically, the concern in general about foreign ownership was that foreign powers could acquire and disrupt our sort of private communications or ship to shore communications. Later, as I mentioned, with the emergence of commercial broadcasting there was a concern that foreign powers could manipulate U.S. public opinion over the radio or over television. In contrast to what the FCC has characterized as its traditionally heightened concern for foreign influence over control of licensees which exercise editorial discretion over the content of their transmissions, re: broadcasters, they've justified their willingness to consider foreign investment and common carrier licensees on the ground that they're just merely passive conduits for information provided by others.

Let's pause for a second. I'd ask you to think about whether that rationale can continue to be squared with the realities of telecommunications technology and the media marketplace in the 21st

century. And, in fact, I think what you'll see is that policymakers, not just telecommunications policy makers, are becoming increasingly concerned about foreign influence, not over broadcast content (because, as we all know nobody watches broadcast television anymore anyway); but the possibility that foreign agents or hostile foreign governments could engage in cyber warfare using our communications networks. And I'd dare say that's probably trending in the right direction because communications infrastructure, think about the information that you know, they may be passive conduits, and after the open Internet decision from the court a couple of weeks ago they may be sort of locked into being passive conduits, but our communications networks control the delivery and processing of vast amounts of highly sensitive information not just for the government but for financial institutions and other markets. And I think one could argue, you know, the Commission, if it were to reexamine these issues, might want to be shifting its focus away from broadcasting, you know, how much influence can you exercise by owning a radio station in Fargo? To our wired and unwired communications networks, given the vast quantities of data that they distribute and given their vulnerabilities from a national security perspective. In partial recognition of that reality I think starting at around 2000, 2001, the Commission started to refer transactions involving foreign investment to Team Telecom. Do you know what I mean when I talk about...? Isn't that like a great name, by the way? Like Team USA, Team Telecom, right? Team Telecom is an interagency task force comprising DOJ, FBI, Homeland Security, and Defense, which reviews every single FCC transaction involving a certain quantum of foreign investment and they review it from a national security perspective. And, in fact, the process has evolved to the point now where the FCC will either unilaterally refer a transaction out to Team Telecom or more often, we'll hear from Team Telecom as soon as the transaction is filed. And Team Telecom will instruct the FCC to put down its pen until such time that the Team Telecom national security review has been completed. Sometimes it's uneventful. Sometimes it results in what's called a national security agreement in which the transaction

parties are obligated to enter into essentially a contract with the government, regulating certain aspects of their network operations.

And now it appears from the Pandora case and a couple of other pending proceedings that that same lens will be brought to bear on broadcast transactions as well as the Commission works to rationalize its approach to foreign ownership now across sectors and is taking baby steps to harmonize its treatment of broadcasters and its treatment of common carriers. And finally, on methodology.

Because I know that is another issue. And I will shut up now. You know, once you get me started on this, it's very hard to get me to stop. But, historically, the Commission, I should say, is a very open agency, it's very transparent. There are fairly extensive disclosure obligations on applicants for new radio stations, on applicants to sell or acquire radio stations or FCC licenses. There are periodic ownership reporting requirements of all FCC licensees, just in the ordinary course, they have to make certain disclosures about their owners. And they also have to certify compliance with the foreign ownership provisions of the communications act. That's certain junctures in a licensing process or license renewal process.

Historically the FCC has left it to licensees to determine how they're going to figure out what their foreign ownership is. Obviously in closely held corporations, they know. The commission has allowed you to rely on known shareholders, registered shareholders, management holdings. They have allowed you to conduct surveys and they will accept any survey that produces a statistically significant result but more recently they've started to legislate the types of methodology that are acceptable, in particular, in recognition of the challenge that big, global, public companies face in knowing who owns them.

And the Commission, I think, has conceded, in fact, it's very difficult – and you guys will keep me honest – for corporations to know who owns them. And I think, if you were to go carefully and review

SEC filings and give it some thought, maybe do a little regression analysis, you might find that companies that nominally are in compliance with the 25% cap or believe they are, or can represent that they are, aren't. And that their foreign ownership may be well in excess of 25% from time to time or at any given time but it may be impossible for them to know that. So among those steps that the Commission is considering in a pending proceeding that was launched last October would be to accept shareholder street addresses as proxy for citizenship. Absent circumstances under which the filer has knowledge or should know that a domestic street address is being used by a foreigner. They're taking a very close look and I was in last week talking to them about whether to use the SEG-100 process, you know what that is? I can't understand it, but it is, I guess, an algorithm or software that's deployed by the depository trust company that allows corporations to tag shares and to segregate them based on certain characteristics, in this case, whether the corporation has reason to believe that they're foreign-owned or I guess whether the holder itself acknowledges that it's foreign-owned or not.

The FCC is asking a lot of questions about that. And, in an interesting liberalization, they are reconsidering their historic position that an unknown response to a survey or an unknown shareholder must be deemed to be foreign. And among the proposals they're considering, would be some sort of proportional test that, you know, that unreported shares or unknown shares would be treated in proportion to known shares with respect to foreign versus domestic ownership. That proceeding is pending. The Commission is working very hard to rationalize its process and the industry is, I think, very engaged in trying to get to something that works both for the industry and for the agency. I'll be quiet.

COMMISSIONER WEINTRAUB: Well, thank you very much. I want to note that our non-professor gave an incredibly wonky professorial presentation. So we thank you for that. That was really illuminating.

Donald?

DONALD TOBIN, UNIVERSITY OF MARYLAND SCHOOL OF LAW: Well, thank you, Commissioner Weintraub, and thank you for hosting today....

COMMISSIONER WEINTRAUB: I should say, Dean Tobin. Sorry.

DEAN DONALD TOBIN, UNIVERSITY OF MARYLAND SCHOOL OF LAW: That's all right... for hosting today's event. It was actually 12 years ago I testified before the Commission to talk about the regulation of 527 political organizations, so, amazingly, things haven't changed much since that time. I've lost a lot of hair, but beyond that, not much has changed.

The Supreme Court's decision in *Citizens United v. Federal Election Commission* dramatically changed our campaign finance landscape by really creating an entirely new type of donor. Although much has been written about the decision and about the consequences of corporate spending on independent election advocacy, very little has looked at the ramifications of how to fit corporate election activity within our current regulatory framework.

Or about what new regulations are necessary in order to ensure compliance by corporations with existing election laws. The Supreme Court has found that corporations have a right to engage in independent election advocacy, but it has not clearly enunciated what the principles are that underlie that right. So, as regulators think through how to ensure corporate compliance with existing election laws, they must consider how strongly corporations differ from individual citizens and how those different characteristics raise tremendous regulatory questions.

So today, what I'd like to discuss is, as we look at some of these unanswered questions, how do we look at tax law and maybe a little bit of corporate law to see what rules and what lessons we can learn?

So, let's start with the assumption that *Citizens United* will remain good law. I, then, see two areas where the uniqueness of the corporate form creates significant regulatory challenges and those involve both donations by foreign nationals and by government contractors, and disclosure.

In the tax context, policymakers have struggled for years with the corporate form and how some corporations can be used by people to manipulate and obfuscate tax laws. Tax shelters, tax evasion, tax cheats often use complex corporate arrangements including the use of holding companies or other sub-corporations as a means of hiding income.

Recent public outcry surrounding the Panama Papers highlights the length that individuals will go to avoid U.S. tax law. What tax law teaches us is that the use of the corporate form to manipulate compliance with the law is not a theoretical problem. But it's a real one.

For example, consider the existing rule that foreign nationals are prohibited from engaging in electioneering communication. In simple terms, a foreign individual could create a Wyoming corporation. The Wyoming corporation could be the sole owner of a Delaware corporation that, in turn, could own a Nevada corporation. The Nevada corporation could then engage in independent expenditures on behalf of a candidate.

For those who don't practice corporate law, I hope I picked the four most difficult corporate states as far as disclosure... to be able to break the corporate structure.

So, under existing law, it'd be incredibly difficult for any government entity, including the FEC, to have any idea that the funds in question came from a foreign individual.

Similar problems exist with regard to the disclosure provisions. In *Citizens United*, the Court upheld disclosure as justified based on a government interest in providing the electorate with

information and acknowledged there was evidence in the record in *McConnell* that independent groups were running election-related advertisements while hiding behind dubious and misleading names.

Complex-entity relationships hide donors from both the public and from regulators. If we had individuals donating in the name of another person, that'd be criminal. But our existing regulatory regime seems perfectly comfortable allowing this to be done through the corporate form.

So, in thinking through the regulatory responses to these problems, I suggest we actually have to think of three different types of corporate entities. We have our publicly held corporate entities, we have our privately held corporate entities, and then we have tax-exempt organizations, which have all been put under this corporate rubric. That doesn't even include LLCs, who have generally been regulated as partnerships.

So, why do I suggest that difference? Well, these entities have very different operations, they have very different ways of acting, that I think have significant different ramifications in the election law context.

Publicly traded corporations are traded on stock exchange, they usually have diverse groups of shareholders, they're highly regulated under securities law. And in this case, an owner of a publicly held corporation is not generally contributing to the capital of the corporation. They're generally buying their shares from someone else.

So when we think about corporate money in that context being spent on elections, we're actually thinking of shareholder profits that are being used in that way.

So, then, when we look at that, we have to think, "Well, what are the underlying rationales for allowing corporations to participate in political campaigns? Are we concerned about who owns the corporation? Are we concerned about who controls the corporation? Are we concerned about who's

funding the election activities?" We have to understand, in a sense, the evil we're trying to address so we can think about the ways to solve that problem.

So I think there're several ways to look at this in the publicly held context and the first is really when we're looking at sort of beneficial ownership. What is the way in which somebody has enough ownership of the corporation that they're really involved? And in a different context, the SEC has used a 5% threshold for determining that amount. And I don't know, the 5% is not magic, it's actually in a totally different context, but what it does tell us is it wouldn't be overly burdensome to ask a publicly traded corporation to know who its owner were in the 5 to 10% range, right? It's clearly difficult for them to know it in the .01% range. It's clearly hard for them to know who owns any share. But if we're talking about somebody who owns a significant share of a publicly-traded corporation, it's not that hard, not that burdensome to require the shareholder to disclose that information.

So, that's one way we've looked at that before. The second way corporate law and tax law often looks at this is effective control. Not just if you have a 15% share in the corporation, but do you have enough ownership interest that you really control the activity of the corporation? So we could look at effective control in making our determinations.

And then an out-of-the-box kind of way we've looked at this is our CFIUS regulations, the Committee on Foreign Investment in the United States, which looks at foreign ownership of defense-related activities where there's a national security interest and there, it looks at a functional definition of control. So there's not a bright line test. In lots of other areas of election law and tax law, we argue about bright line test versus not bright line test. But what CEPHEUS is really looking at is, what abilities do the shareholders have to control the activities of the corporation? And looks at a whole set of different activities there.

So, we do have models to look at to say, when is enough, enough? When is it, when is the participation in a publicly held corporation, which has diffuse ownership, enough that we really want to think about regulating it?

The second is privately held. And that gets, to me at least, a lot scarier. We heard that a little bit in the earlier panel. But unlike publicly held corporations, in the privately held context, capital contributions to the privately held corporation may, in fact, be providing funds to the corporation that the corporation could use for election advocacy. So in other contexts I've written about the concern that taxable entities will become the new major loophole for campaign advocacy and then what you'll do is give to a corporation as a contribution to capital that's not taxed and then that capital contribution will be spent by the privately held corporation on election advocacy.

If a foreign owner donated – excuse me, contributed – capital to a privately held corporation, and that privately held corporation then spent that money on election advocacy, we would have no idea that was happening. And our existing regulatory regime has no way for identifying that.

So, here, we need to have some method that requires privately held corporations who engage, right? It's not every privately held corporation, most do not actually engage in election advocacy, who engage in election advocacy to disclose how the corporation received its funds, where its funds come from and give us some type of disclosure about at least the owners that have effective control of the corporation. But I would even say we could look at the 5% threshold for privately held corporations.

The last thing, the last area I want to talk about and to me, it's actually the most scary, is tax-exempt organizations. They don't really, you know, the Supreme Court has kind of treated them like corporations, but they're totally different than corporations. They don't really fit within a lot of the concerns we have in corporations, but what they do is shield incredibly well – donors. And, at the moment, at least, you could give a foreign contribution to, let's say, the favorite social welfare

organization and as long as that foreign contribution wasn't designated for the purpose of electioneering communication or for the purpose of a particular ad, there's no disclosure requirement on that contribution, right? And that money can be mixed with the money of lots of other people in a very fungible way.

So, we've had a crisis, I think, on disclosure in the tax-exempt context for some time, but I think what we're highlighting now is this, how much that, the crisis is expanded by the fact that they can be used in a way of, in a sense, cleansing a donor's identity.

So due to wanting to leave at least some time for people to ask questions, I'm going to mainly stop there but I want to raise a whole set of other types of questions and concerns. In both the tax and the corporate context, we always worry about attribution rules, right? How you become an owner. So we have to know, do we use family attribution rules? Do we use other types of ways of combining ownership interest to know if there's effective control or not or if there's some type of improper influence. How do we do look-throughs? This is a real problem in, I think, all of our industries. You know, if you can set up 12 corporations with holding companies, how do you actually get through to find out who the real owner is? We're seeing it in campaign finance disclosure regime, right? Where the disclosure is of the corporation, not of its actual members and of course, if a corporation gives to another corporation, we make it even further.

What does it mean to be foreign? Do we care about where it's organized? Do we care about who its members are? What about, we have, having corporate inversion now? What about when a standard U.S. corporation leaves and goes to a foreign country. So it's now in a foreign country, not even paying U.S. tax, but it maybe is made up of a majority of U.S. shareholders. Is that a foreign corporation? Do we want corporations that don't even pay any U.S. tax to be able to participate in our election process?

So... what I'd say is what tax law really tells us about corporate involvement and campaign advocacy is that the situation is a mess. I mean, I wish I could give you a really more academic wonderful world for this but the fact is, tax law is a mess, because of the ability to manipulate corporate forms both here and abroad to hide income and bringing that kind of disaster into the election law context is only going to be a further disaster.

So what I really urge is as much as possible, we need to get our hands on the corporate form. You know, the Supreme Court came in and basically said corporations have this right, but we all know that corporations aren't people. It's going to take me a long time to have children, raise them up enough so they're voting for the people I think they should vote for and then they might not even listen to me, right? But in the corporate context, I can do that with people like this in a matter of minutes. So we have to get a hold on how these corporate entities work and how we want to have a disclosure regime and a regulatory regime that gives them the rights that they're entitled to have under *Citizens United* while protecting the liberties that are so important to us. So I thank you for the opportunity to be here today, it's always nice to do something else as a Dean, and I appreciate the opportunity.

COMMISSIONER WEINTRAUB: Well, thank you very much. That was incredible. Really, all of you. We have a lot of great questions but I'm going to assert the moderator's privilege and ask the first one myself. This one goes most directly to Professor Jackson, but I'll also invite Professor Coates to weigh in. As with our other panelists, we're looking for ways of moving forward, you know, and possible insights that can be gained from other fields. Now, you said there's no law, but there may not be law in the corporate context on what corporations can politically disclose, but there are rules and laws in the corporate context about what constitutes ownership and control of an entity.

So I'll invite you to speak for a few minutes about, and, I realize that there may be different standards in different states, but you know, how is that issue looked at in the corporate context and you know, because maybe there's something there that we could use as a starting point to say well, maybe this is what constitutes foreign or, you know, if there's a definition of ownership and control. You know, Dean Tobin raised the fundamental question: what does it mean to be foreign? You know, maybe we could look at that as a potential avenue to move forward.

ROBERT JACKSON: So, I'm delighted with the chance to say more about that. I agree with Dean Tobin that some of the existing standards we have in corporate and securities law might be insightful in this respect. So, as he mentioned, we have a 5% beneficial ownership rule that requires disclosure under the Williams Act and not only that, but... one thing I'll say about that, that might be useful for your consideration, yours and the staff's, is that we go even further. We require this 5% threshold. If you owned 5% or more of the beneficial securities of a publicly traded company, not only do you have to disclose that you exist, but you have to disclose who you are, where you got the money to buy this stuff, and here's the important part: What your intentions are. Do I intend to try to take control, do I intend to be a passive investor? We have different forms for this. And there's a lengthy debate in front of the SEC about that. So that's one set of thoughts.

Here's one more. There is some data on this, but as Professor Coates explained, it's really rather incomplete and not directed at this question, but if you want to study the issue carefully, large institutional investors in this country who own public companies have to file a form, it's called Form 13F. In securities law, we have the most boring names for every possible.

COMMISSIONER WEINTRAUB: Oh, we don't know about that at all.

ROBERT JACKSON: Yeah, I was going to say, I feel like maybe that's just an agency thing... so we have this form that the institutional investors have to file and it's very rich with data on who owns what. Now,

the good news is you can, the data that have been used in research, and you can get it easily; the bad news is, it's not directed, Commissioner, at this problem, at the problem of finding foreigners who are owners. These are usually investors that have some investment activity here in the United States but not always. So you could start with examining these data to get a sense of who are the owners. It'd be very incomplete and only a first cut. But that would be a first start at getting a picture of what's going on. And from there you could take some guidance and cues from, as Dean Tobin has pointed out, the 5% beneficial owner standards that give some information about not only who these owners are, but what are their intentions having acquired this stake?

JOHN COATES: So, let me flesh out the 5% a little more and then say something else about control, which is a slightly different question. So... beneficial ownership, generally speaking, means, as with the telecom structure, either voting power or right to profit or equity ownership. So, that's the way it's defined. It captures both ideas.

The SEC is slightly more worried about warrants and the like. So...warrants don't count, options don't count. Converts don't count. Except if they're used to influence control. So there's a residual, non-bright-line standard that could be used to deem it to be ownership. There's one other thing that you've got to think about it you're going to take this beneficial ownership approach.

The reason for it, by the way, is precisely that if you looked simply to the corporate law, the nominal owner of the shares of most, certainly public companies, even many private companies, is not really the owner. It's a conduit set up not to evade or do anything that we might be worried about in this context, but simply for administrative needs. A repository trust company that was referred to earlier is a collective, a non-profit membership organization that banks and brokers run. They basically own most stock. If you looked at corporate law question: who owns the stock? But they only own it on behalf of the banks and brokers. And then the banks and brokers, in turn, don't really own it; they own it on

behalf of their customers: trusts, clients, brokers, firms, and the like, and the SEC, realizing this many, many years ago, said we can't really think about corporate law. What we're interested in is disclosure of the risk of control-shifting. Control isn't limited to formal ownership. It also is through all these intermediate ways. So they came up with a definition of beneficial ownership that goes all the way out to whoever can influence votes or has the right to get profit from the organization. In addition, they realized many, many years ago in the context of some scandals that people can get around that by splintering their ownership up 4.9, 4.9, 4.9, get much higher than 5, effectively control the company. So they have a concept called "Group" and the term "group" has purposefully never been defined so as to scare all the lawyers who are giving advice to their clients. It basically means "group."

[Laughter]

It means kind of anything beyond mere communication. So it would certainly pick up, for example, in your area, the head of a campaign who shares offices with the head of a super PAC and they talk to each other every single... almost certainly they'd be a group under the SEC's conception of this; that would be easy to capture. Less clear would be truly independent owners who collectively look at the candidate's website and take cues from it and act in a concerted way that happens to be exactly the same kind of independent expenditure result, right? Sending out mailers that look very similar to each other: that would be, I think, probably on the border of the SEC area, alright?

So that's ownership. On control, both within securities law and within the foreign ownership restrictions, going beyond telecom and going to the other industries that I've talked about it and under state corporate law for some takeover regulation purposes. You can find thresholds for control at 5, 10, 15, 20, 25 and 50 and probably there's one at 40. I just, I don't remember it off the top of my head. So anything that gets you all the way up, any threshold in there. And I would say, if there's a policy rationale for all the different choices, if it's a disclosure regime, then you'd start low, because why not?

And in fact, I've never actually heard a credible articulation of a real reason not to disclose 5% ownership, with the one exception that sometimes people like Warren Buffett will argue that disclosure of what stocks he's buying gives away his strategy and he doesn't want to give away competitive strategy to his competitor investors. So the SEC even has a way of dealing with that, which is you can [disclose] just to the SEC and then to the public on a delayed basis.

So... that's, so, in the opposite extreme, if what you're after is a ban, you just simply cannot engage in this kind of activity, that would push you towards a higher threshold of the kind that the telecom acted on, to implement. So those are some further thoughts on those two choices.

COMMISSIONER WEINTRAUB: Thank you. So, here's a question that came in by e-mail that kind of touches on some of what you just mentioned. And this is for any of the panelists on panel two: I was wondering if they could comment on the impact of H.R.5053 on foreign money in U.S. elections and non-disclosed money in elections in general. H.R.5053 is the Preventing IRS Abuse and Protecting Free Speech Act... love the names of these things... which just passed in the House of Representatives and would, in addition to other things, remove the requirement that non-profit organizations report their donors to the IRS in the form 990 Schedule B. [Laughter] I'm just reading the questions that came in!

DONALD TOBIN: So... I'm, I'm commenting on something I know a lot about and know very little about in that I have not read this bill. But I've worked a lot with 990s and know a lot about the reason for disclosure on 990s and, you know, I will say it is incredibly important from a tax compliance standpoint that you have a sense of what's on the 990s. Now, what is also very important for people to know is that the 990s donor disclosure is used for IRS tax compliance purposes and is not released to the public at large. The provision of the law already doesn't require that to be released. And, you know, it's this, to me, fictional fear of the IRS getting that information that's driving it, but the IRS has to make sure that non-profit tax-exempt organizations are actually what they say they are. They have tremendous benefits

under existing law. They are exempt from property tax in a lot of cities and states. They have, depending on the type of tax-exempt organization, donations to those organizations are tax exempt. If they are making profit in their organization and it's related to their tax-exempt activity, then that profit is tax-exempt. There are significant public policy reasons why we want to know the donors to those activities and under existing law, they are not disclosed to the public.

Now, we'll make your questioner happy, and one of the things I've proposed is it should be, right? That outside of this 501(c)(3) context, when people are engaged in political advocacy, we should be disclosing the donors who give 5,000 or more and it's not administratively burdensome because we're already collecting it. But the idea that the IRS wouldn't have that information is really a very difficult... It would make it, it would make their compliance requirements very difficult.

JOHN COATES: I'll just, I mean I can't help but... Scalia's comment about having the moral courage to stand by your convictions and be publicly identified with your free speech seems to be relevant to me here – anybody's idea of free speech being hiding in the shadows. We're not talking about membership in the NAACP where disclosure might lead you to be lynched. We're talking about Exxon or Chevron hiding behind this as a way of channeling money through a nonprofit to influence elections without anybody even remotely possibly knowing, much less the public, which they can't, anyway. It's just ridiculous... Flat out ridiculous. You want to go live in Russia, go move to Russia. [Laughter]

COMMISSIONER WEINTRAUB: Well... Justice Scalia did say that democracy would be doomed if people didn't have that kind of civic courage. Here's a question that perhaps comes from a different perspective. Assuming state interest in self-government is much stronger than the interest in foreign influence in domestic communications, do you think the FCC's 20% threshold is far too high for election law purposes? And I think that is probably directed at Mace, but anybody who wants to weigh in is welcome to.

MACE ROSENSTEIN: I'm not sure that I would be comfortable saying whether it's appropriate or not for election law purposes. But I think I can get to an answer or at least help amplify what I think is going on in the question by looking at, talking a little bit, about the FCC's ownership attribution standards, because, as in other industries and other regimes, the FCC deems certain interests that are far below what we would, I think, intuitively think of as controlling interests or perhaps even influential interests as being ownership interests that must be disclosed to them and that could have regulatory consequences.

In the corporate context, it's a 5% test, which seems to be pretty common, based on what I'm hearing. But think about a limited partnership or an LLC, where the Commission has taken the position that any interest, irrespective of its economic value, that is to say, say a 1/100th percent partnership interest will be deemed to be ownership of the entire partnership unless the holder of that interest subscribes to certain insulating criteria that effectively screen her from any participation and/or influence over the day-to-day operations or affairs of the partnership. And those are prescribed limitations, the failure to comply with which can cause your interest to be deemed to be an interest in the whole. Think about the consequences that could have, the structural ownership restrictions, foreign ownership restrictions and the like.

The FCC has spent decades grappling with the question of how much influence is too much influence? How do we quantify it? How do we restrict it? And the 5% figure has tended to be a proxy, you know, they know it when, like Justice Stewart, they know it when they see it. 5% allows you to have a voice in corporate affairs and I dare say the number could be lower, actually. How many of these – is it Ds or Gs – actually get filed, in a disclosing interest in excess of 5%, I would dare say not many, right? I don't know.

JOHN COATES: I mean, I think actually about 30 to 40% of U.S. companies do have a 13D filing, the very largest ones, so much smaller percentages because it's hard to get that much capital. I mean, the only thing I'd add to that is I think the partnership distinction and the LLCs are, in many ways, more like partnerships than they are like corporations in this respect, not only tax, but also here. They're subject to very extensive agreements which create the governance structure for them. And so whereas a standard business corporation, there's certain strong presumptions about how we govern, but the partnership is not true. And that's why having a very, very low ownership interest often is coupled with rights that effectively give you significant influence to that partnership agreement. I mean, I can't imagine any agency wanting to read these agreements and try to sort them on the basis of actual granted powers, which is why I think the presumption you're talking about makes sense. That is, to sort of force the person using the structure to show you that they're not conveying control in that way. And the other way to go would just be to have an *in terrorem*, undefined notion of control which, after the fact, they could go to jail for it if, in fact, they had it that would be the other... that's effectively what the SEC does.

COMMISSIONER WEINTRAUB: We don't send people to jail here.

JOHN COATES: You know... fine them.

COMMISSIONER WEINTRAUB: That's another building across the way. So, here's another question from e-mail that, again, touches on some of the same issues. Can the panel explain an individual's ownership interest in corporate assets? In particular, do shareholders have an indivisible interest in the entirety of a corporation's assets such that 1% shareholder has a 1% ownership interest in every dollar of the corporation's? If that's the case, can one really say as a matter of law that any dollar of a corporation with any foreign shareholder ownership could be said to be wholly domestic?

JOHN COATES: So, a standard corporation, if you own 1% of the share, you have 1% right in the corporation's value, if and when it's liquidated and 1% of the dividends stream attached to it, and 1% of the voting rights. Now, you might think that 1% of the voting rights doesn't sound like very much but actually you may very well be the largest individual voting holder of a large public company with 1% of the shares. And in the current corporate governance environment, the boards of companies that are confronted by 1% shareholders listen to them. Not, you know, they don't do what they say, necessarily, all the time, but they do engage with them. So I don't know if that's... that's my stab at that answer.

ROBERT JACKSON: Yeah, that's right. So... so, when we teach corporate law to law students who are thinking about these issues for the first time, we explain that what a share in a corporation gives you, as Professor Coates explained, 1% interest in the value of the firm; if you prefer, its ongoing profits. But what it doesn't entitle you to do is to call them up and say "Hey, look, give me 1% of the money," and this is a very important legal distinction. It's important from the way I think about corporate law because it frees the corporations to make investments. They don't have to worry that the owners will call them up and say "Hey, look, that looks like a great desk, send it to my place 'cause I own 1% and that's about 1% of the stuff in here." That's not the law. But I think, I'm not sure how much that tells us about whether the money in the corporation is foreign money, so to speak. And here's why: for me, anyway, what we're more interested in is the subject that you asked me about and we've been discussing, which is control of the corporate resources and for the reasons Professor Coates gave, 1% ownership in a public corporation could yield a significant amount of control and the way to think about this, I think, is that the corporation is this box with enormous resources and the interesting question is not whose money is it? And sort of, can we trace it back? But the issue, the question is, who decides what happens

with those resources? And the answer, in the case of a 1% shareholder of a very large public company is that, they'll be given a fair amount of attention.

And I want to highlight one ironic thing that's worth noting here which is that in the last decade or so, shareholders of U.S. public corporations for various reasons have been given a lot more influence than they once had. And the thing to understand about – this... so, there's many reasons why that might be good. There are reasons why it might not be good. And one thing to keep in mind is that, because that's true, that there's no borders on that change, right? That's equally true of a shareholder who is a U.S. shareholder in the way you'd want to speak about it, and a foreign shareholder. Now... I think that's just worth understanding from your perspective, because... increasingly, U.S. corporations are becoming more responsive to shareholder interests and that's something for you to keep in mind, given that we know corporations are active in elections.

COMMISSIONER WEINTRAUB: Okay, so here's another question from the room. Are charitable contributions by a public company subject to the business judgment rule?

ROBERT JACKSON: Um... yes. So, a question I'm often asked about this idea that they should have to disclose their corporate spending on politics is should the same be true about their charitable contributions? And this is where it's great to be a professor and not something else because I'm just required to tell the truth. That's, like, the one obligation of my job. And the truthful answer is there is no, in my view, intellectually consistent way to think they should disclose their spending on politics and not their spending on charity. They're enormously similar.

My whole argument is about the managers' interest and what they do with shareholders' money. Managers might have interest in giving money to charity for particular reasons. They might conflict with the shareholders' interests and if that's the reason to require disclosure, that's equally true for charitable contributions as it might be of political contributions.

That said, my view is that there are lots of reasons why shareholders might feel much more strongly about information having to do with politics than they would information having to do with charity. Because, for example, if you're a shareholder of a public company, it might trouble you that the money you've given to the corporation is going to be used for politics to send a message that you abhor. And you might feel more strongly about that than you might feel about what they might do with charitable contributions and so for this case I think the case for disclosing political spending is marginally stronger, but I think if you believe the arguments I've given, they're equally powerful in the case of charity as they are in the case of political spending.

DONALD TOBIN: To your point, I was just whispering, you know, as a Dean that likes to raise money [laughter], most of the time my donors actually want to be disclosed. And I think that you have two different kinds of ways corporations give, but I think most of the time, corporations are giving, they're already disclosing in the charitable context. And maybe when they're not, it raises more of your concerns because why are they not? But in general... and corporations have different ways of giving. They often are giving through foundations and other charitable organizations they've set up and then oftentimes, when they're giving from their corporate treasury, they actually see more of a business reason to be giving and they want more of a business connection to the donation, so... you know, I wouldn't be troubled one way or the other, as long as you, with all of these things, make the thresholds high enough. I don't think corporations should have to disclosing \$500 activities. I mean, you want it to be real.

ROBERT JACKSON: Or if they give money to the University of Maryland law school.

DONALD TOBIN: I'm happy to disclose that. [Laughter]

ROBERT JACKSON: No, I think you're actually making an extremely important point because, you know, one of the things that's interesting, this proposal's been out there for some time and many, many

comments have come from many, many sources, investors, politicians, you name it, they've commented on this. The number of comments from corporations from corporate boards who say they don't want to disclose, like, "Look, we'd really rather not do this," is zero. Zero. It doesn't strike me that corporations have a hard time, like, saying stuff when they want to. I feel like there are a lot of people on K Street whose full-time job is helping them do that. And it's striking to me that they say this. When I talk to Boards of Directors, they don't say to me, "I really don't want to have to disclose this." In fact what they say is, "Boy, I'd love to have disclosure because then I'll know what my competitors are doing, I'll be able to scale it appropriately, and I'll have... there'll be some accountability for where my money goes which is all to the good for a well-run business (and *everybody* thinks they work for a well-run business). So it's important to note that there are lots of reasons to oppose this kind of thing, but... the idea that they're significant corporate opposition at least as it's been in the public comment file isn't one of them.

COMMISSIONER WEINTRAUB: Okay, so here's a question that came in by way of Twitter earlier actually, on the first panel, but I saved it because I thought you guys actually might know a little bit more about this. Could the Bank Secrecy Act be an effective tool to prevent foreign donors from influencing our elections?

JOHN COATES: So I can say a little bit about that. I mean, the Bank Secrecy Act, in a related apparatus of regulations designed to help prevent money laundering, is implemented through the banking system. It doesn't quite capture what I think we are focused on, because most equity ownership isn't caught, most people don't, in any meaningful sense, sell directly to a bank shares or buy from them in the U.S., largely banks are forbidden from directly owning. They may sponsor oversea trusts that own equity shares but for the most part, the Bank Secrecy Act and the apparatus attached to it is aimed at cash and flows of cash. It could, some of the surveillance pieces of it, I think, could be adapted. And one thing I'll note is the Federal Reserve Bank of New York survey I described earlier, it's done under the auspices of a

statute giving the Treasury the right to do it, but then sort of delegates it to the Fed, it's similar. They reach out to banks, brokers, and large companies. They give a survey out. The banks have to respond to it and there's some check on the provision of information to that. None of that's public currently. And it's only aggregated. So the data is only aggregated.

COMMISSIONER WEINTRAUB: And here's another question from the room. This one's for Mace. What do you think of the quote "true sponsorship" provision, especially as a means to force disclosure of a group's funders within TV ads themselves, specifically referring to political/issue ads?

MACE ROSENSTEIN: Yeah, you know, there is, there are provisions in the Communications Act governing the disclosure of the identity of sponsored material on the air. And of course, that's of particular sensitivity in the political advertising context. And the FCC has been struggling with how to implement provisions that, you know, require what I would call, you know, a look-through to, you know, the true sponsorship of organizational or PAC-funded ads. I guess the question is, if I'm in favor of it, I mean, I guess I am and, you know, there's an interesting jurisdictional overlap between your Commission and the FCC in this respect and an interesting tension, too, in that the FCC, under its own implementing statute, cannot censor candidate speech. Which, in itself, has had some interesting ratifications in our age with, in particular, shall we call them abortion-focused spots and spots containing graphic imagery, which broadcasters endeavor not to air but ultimately are obligated, as a statutory matter, to air. The disclosure provisions arise in that context also and it's a work in progress at the FCC.

JOHN COATES: Can I just quick follow-up? I'm just curious about that regime.

COMMISSIONER WEINTRAUB: You're supposed to be answering the questions.

JOHN COATES: I know, but he should know, I hope he knows. If I set up a company and dump a million dollars into it and that company dumps \$1,000,000 into a single-candidate super PAC and that super PAC buys a television ad, who shows up as the sponsor for the ad, under current law?

DONALD TOBIN: The super PAC.

MACE ROSENSTEIN: Yeah, the super PAC.

JOHN COATES: So if I name my company something mysterious and the super PAC too, there's basically no real transparency there.

MACE ROSENSTEIN: Yeah.

DONALD TOBIN: Citizens for a Great America.

COMMISSIONER WEINTRAUB: Citizens for a Better Tomorrow, Tomorrow? Wasn't that Stephen Colbert's PAC?

This has been incredibly illuminating and helpful to me personally and I hope to everybody else in the room and who is listening on the audio and video feed. So please join me in thanking this great panel for all their insights.

[Applause]

COMMISSIONER WEINTRAUB: And now, the moment that many of you have been eagerly waiting for: it's lunch time! So there is food directly across the hall, restrooms are to the right and the left and let me say, if anybody is curious or concerned about where their taxpayer dollars are being spent, lunch is on me. The taxpayers... the only taxpayer who paid for your lunch is this one right here. [Applause] There are veggie wraps, there are chicken wraps and we'll be back here at 2:00 p.m. to start up with our last panel of the day.

[Applause]

[Lunch break].