

## Transcript

### Forum: Corporate Political Spending and Foreign Influence

*Hosted by Commissioner Ellen L. Weintraub*

*Federal Election Commission, 999 E St. NW, Washington, DC 20463*

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### SECOND PANEL: QUESTIONS AND ANSWERS

**John Coates, Harvard Law School**

**Robert Jackson, Columbia Law School**

**Mace Rosenstein, Covington & Burling**

**Donald Tobin, University of Maryland School of Law**

**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 if 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].

