



**Statement of Ciara Torres-Spelliscy¹
to the
Federal Election Commission
Re: Why Foreign Money Should Be Kept Out of American Elections
September 9, 2016**

I write to provide historical and legal reasons for why it would be appropriate to bar spending by the U.S. subsidiaries of foreign owned companies. The point of excluding foreign money from the electoral process is to keep American elected officials as James Madison once said, “dependent on the people alone.”² Keeping purely American funding in our privately financed elections protects American sovereignty. This is an excerpt of a piece that will soon be published in a law review article.

American Sovereignty

I will start by defining what I mean by the concept of “sovereignty.” To many historians, sovereignty begins with the treaty of Westphalia and the creation of the modern nation-state in Europe.³ In its traditional form, “sovereignty” typically means that a government has exclusive control over a particular defined geographic area.⁴ As H.L.A. Hart once rationalized, “a sovereign state is one not subject to certain types of control, and its sovereignty is that area of conduct in which it is autonomous.”⁵ Or as Yale Professor Oona A. Hathaway explained, “[t]o be sovereign, a state must be independent, which means that the state cannot be put under a duty or obligation by those external to it.”⁶

In the traditional formulation of sovereignty, power over the territory was vested in a king. But in the American context, there is no monarch. Rather, through the U.S. Constitution the American people are

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² James Madison, *The Federalist No. 52* in *THE FEDERALIST* 269 (Max Beloff ed.) (1987).

³ James Madison, *The Federalist No. 52* in *THE FEDERALIST* 269 (Max Beloff ed.) (1987).

⁴ Lea Brilmayer, *Land and Sea: Two Sovereignty Regimes In Search of a Common Denominator*, 33 N.Y.U. J. INT’L L. & POL. 703, 706 (2001) (“The Peace of Westphalia, which ended the Thirty Years War in 1648, typically is viewed as the moment that the modern nation-state first was created.”).

⁵ John H. Jackson, *Sovereignty – Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT’L L. 782 (2003) (“Ambassador Richard Haass, ... noted in January 2003: ‘At the beginning of the twenty-first century, sovereignty remains an essential foundation for peace, democracy, and prosperity.’”).

⁶ H.L.A. HART, *THE CONCEPT OF LAW* 223 (2d. ed 1994), available at <http://fs2.american.edu/dfagel/www/Class%20Readings/Hart/International%20Law%20Chapter%20From%20Concept%20of%20Law.pdf>.

⁷ Oona A. Hathaway, *International Delegation and Domestic Sovereignty*, 71 LAW & CONTEMP. PROBS. 115, 121 (2008).



the sovereign⁷ even though the word “sovereignty” is absent from the Constitution.⁸ While the monarchy reproduced itself through bloodline succession (literally passing from parent to child); popular sovereignty in the American context requires democratic elections to fill political offices.⁹ As Yale Professor Akil Amar notes: “[t]he American answer was at once traditional and arresting: True sovereignty resided in the People themselves. ... Government officials were ‘representatives,’ ... of the People... Therefore, government entities were sovereign only in a limited and derivative sense, exercising authority only within the boundaries set by the sovereign People.”¹⁰

And as democracy itself has become a norm (but not yet ubiquitous) across the globe, the integrity of a democratic process has become a valued marker of an independent nation.¹¹ As Yale Professor W. Michael Reisman notes, “[i]nternational law still protects sovereignty, but-not surprisingly it is the people’s sovereignty rather than the sovereign’s sovereignty.”¹² Popular sovereignty itself can be subdivided into its constituent parts as well. As Professor Wilson Huhn argues,

the American conception of popular sovereignty embraces the following [] fundamental principles: 1. *The Rule of Law*. The people are sovereign and their will is expressed through law. The Constitution is ordained and established as law—the supreme law of the land. ... 4. *Equal Political Rights*. Each person is a sovereign political actor; therefore each person has an equal right to participate in government. Accordingly, the Constitution protects freedom of political expression, freedom of political association, the equal right to vote, and the principle of majority rule. ...[and] 7. *National Independence and the Limited Authority of International Law*.

⁷ John H. Jackson, *Sovereignty – Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT’L L. 782, 788 (2003) (quoting Professor Thomas Franck) (“Professor Thomas Franck, perceiving that sovereignty was devolving to the people, asserted ... ‘First came the normative enticement to self-determination. ... Now we see the emergence of a normative entitlement to a participatory electoral process.’”).

⁸ Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE LAW J. 1425, 1464 (1987) (“the word ‘sovereignty’ never appears in the Constitution ...”).

⁹ W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866, 874 (1990) (“the remark of Thomas Pickering, the United States Permanent Representative, [was] that ‘the people, not governments, are sovereign.’”).

¹⁰ Amar, *supra* note 8 at 1435-36; *see also id.* at 1436 (“As sovereign, the People need not wield day-to-day power themselves, but could act through agents on whom they conferred limited powers. ... So long as the People at all times retained the ability to revoke or modify their delegations, such agency relationships were in no sense a surrender or division of ultimate sovereignty.”).

¹¹ Reisman, *supra* note 9 at 868-69 (“the concept of popular sovereignty was not to remain mere pious aspiration. The international lawmaking system proceeded to prescribe criteria for appraising the conformity of internal governance with international standards of democracy.”).

¹² *Id.* at 869.



The American people as a whole are sovereign and independent and are not subject to any foreign law or power.¹³

A key factor to both sovereignty of the nation and the popular sovereignty of the American people is the soundness of the electoral process. As Yale Professor Paul W. Kahn summarizes, “We [Americans] also have rituals of sovereign action—[such as] elections We believe that unless an assertion of governmental authority can be traced to an act of popular sovereignty, it is illegitimate.”¹⁴

A close corollary to sovereignty is the concept of the right a people to self-determination.¹⁵ Thomas Jefferson wrote in the American Declaration of Independence: “[t]hat to secure [] rights, Governments are instituted among Men, deriving their just powers from the consent of the governed...”¹⁶ Jefferson was building on themes from John Locke:

yet the Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supream [sic] Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them. ...¹⁷

Locke, in turn, was picking up on ideas from Hobbes’s social contract from The Leviathan that “the Right of all Sovereigns, is derived originally from the consent of every one of those that are to bee [sic] governed...”¹⁸

The concepts of sovereignty and self-determination are intertwined in a democracy, as the people in a given country decide their fate. As Professor Lee Seshagiri explores, “[t]he call for self-determination is at its most basic level a call for autonomy—for freedom in self-governance rather than outside constraint. The call may be made by individuals or groups. It is a call that is informed by the classic liberal tradition, permitting individuals and groups to shape the course of their lives to the exclusion of other voices. I decide. *We* decide.”¹⁹ Thus having

¹³ Wilson R. Huhn, *Constantly Approximating Popular Sovereignty: Seven Fundamental Principles of Constitutional Law*, 19 WM. & MARY BILL RTS. J. 291, 292-93 (2010).

¹⁴ Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT’L L. 1, 3 (2000).

¹⁵ Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE INT’L L. 177, 179-80 (1991) (“The ... principles of self-determination of peoples, ... [means] every nation or people has a right to determine its own destiny. This notion of self-determination can be traced to the American Revolution (and in particular to the Declaration of Independence)...”).

¹⁶ Thomas Jefferson, *Declaration of Independence* (July 4, 1776).

¹⁷ JOHN LOCKE, SECOND TREATISE, Sec. 149 (1689).

¹⁸ THOMAS HOBBS, LEVIATHAN 424 (1651) (ed. A.R. Waller 1904).

¹⁹ Lee Seshagiri, *Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law*, 51 HARV. INT’L L.J. 553, 556 (2010).



foreigners interfere with the choice of the people of their government in a democracy is to risk a particular type of perversion.

Constitutional Text Limiting Foreign Influence

The U.S. Constitution recognized this danger of foreign interference in the Emolument Clause which says, “no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”²⁰ This bars officials from receiving gifts from a foreign government unless there is consent from Congress. In other words, the Framers of the Constitution were trying to guard against foreign influences.²¹ This part of the Constitution was inserted at the request of delegate Charles Pinckney, who “urged the necessity of preserving foreign Ministers & other officers of the U. S. independent of external influence[.]”²² Explaining why the Emolument Clause was necessary Edmund Randolph told the Virginia delegates, “[t]his restriction was provided to prevent corruption.”²³ And contemporaneous to the adoption of the U.S. Constitution St. George Tucker wrote of the Emolument Clause in the American version of Blackstone’s Commentaries in 1803:

Nothing can be more dangerous to any state, than influence from without, because it must be invariably bottomed upon corruption within. Presents, pensions, titles and offices are alluring things. In the reign of Charles the second of England, that prince, and almost all his officers of state were either actual pensioners of the court of France, or supposed to be under its influence, directly, or indirectly, from that cause. The reign of that monarch has been, accordingly, proverbially disgraceful to his memory.²⁴

U.S. Supreme Court Justice Story similarly explicated, “[t]he [] clause, as to the acceptance of any emoluments, title, or office, from foreign

²⁰ U.S. Constitution Art. I Sec. 9 (1789).

²¹ Toni M. Massaro, *Foreign Nationals, Electoral Spending, and the First Amendment*, 34 HARV. J. OF L. AND PUB. POL’Y 663, 685 (2011) (“One commonly intoned justification for regulation of foreign political expression is that the United States has a legitimate interest in preventing undue foreign influence over elections. A subset of this concern is the government’s interest in restricting political propaganda from other nations.”).

²² The Founders’ Constitution, Records of the Federal Convention [2:389; *Madison*, 23 Aug.] (as related to U.S. Constitution Article 1, Section 9, Clause 8) available at http://press-pubs.uchicago.edu/founders/documents/a1_9_8s6.html.

²³ ZEPHYR TEACHOUT, CORRUPTION IN AMERICA 27 (2014) (quoting Randolph).

²⁴ St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*. 5 vols. (1803 Rothman Reprints, 1969), available at http://press-pubs.uchicago.edu/founders/documents/a1_9_8s12.html.



governments, is founded in a just jealousy of foreign influence of every sort.”²⁵

Professor Zephyr Teachout notes the Constitution’s Emolument Clause was based a similar clause that was in the Articles of Confederation that was more restrictive because it was a total ban. The current version allows for gifts with Congressional assent.²⁶ Yet as Professor Teachout indicates, “[t]he lack of an exception for small tokens in the gifts clause is striking. The clause does not merely stop at ‘no gifts.’ But emphasizes the prohibition through the use of ‘any kind whatsoever,’ underlying the extreme importance of the prohibition. Moreover, it forbids presents –not bribes. No exchange or agreement is required to bring it with the ban.”²⁷

Statutory Limits on Foreign Influence

Statutory restrictions on foreign influence over the American political process started around World War I and continue to show up in laws as recent as 2002. These laws have taken two distinct approaches: (1) restricting who can own broadcasters and (2) restricting who may spend in elections. These restrictions have clear overlaps as much of the money that is spent in elections is actually spent to broadcast advertisements. So at the root of both restrictions appears to be a deep concern about the impact of foreign propaganda influencing the American electorate.

Indeed these two restrictions are analogous.²⁸ As Professor Adeno Addis explains, “a fear of foreigners that has expressed itself in the communications field and has been part of the legal and political landscape since the turn of the last century. The laws and regulations of the United States severely restrict foreign ownership of the broadcast media. ... The restriction was...premised on the fear that foreigners could use this powerful, and at the time not very well understood, medium to undermine national security.”²⁹ Some of these fears were based in wartime anxiety. As Professor Ian Rose chronicles, “[w]hen Congress passed the Radio Act of 1912, it restricted foreign ownership of radio stations out of concern that, during wartime, foreigners would transmit

²⁵ Joseph Story, Commentaries on the Constitution of the United States. 3 vols. (1833).

²⁶ TEACHOUT, SUPRA NOTE 23 AT 26-27.

²⁷ *Id.* at 28.

²⁸ U.S. Gov’t Accountability Office, *Sovereign Wealth Funds: Laws Limiting Foreign Investment Affect Certain U.S. Assets and Agencies Have Various Enforcement Processes*, GAO.GOV (May 2009), <http://www.gao.gov/new.items/d09608.pdf> (“sectors with specific restrictions on foreign investments include transportation, communications, and energy. For example, foreign governments may not be issued radio communications licenses and foreign entities are not allowed to own or control more than 25 percent of the voting interest of any U.S. airline.”).

²⁹ Adeno Addis, *Who’s Afraid of Foreigners? The Restrictions on Alien Ownership of Electronic Media*, 32 COLUM. HUM. RTS. L. REV. 133, 139 (2000).



information to enemy forces or jam American military communications. As commercial radio stations became popular, Congress also feared that foreigners would broadcast subversive propaganda.”³⁰ Though interestingly, these restrictions have not been relaxed in peacetime.

If the restrictions on foreign broadcast ownership are an indirect way to curb foreign political propaganda, Congress has passed various laws to curb direct foreign influence over American elections including the 1966 amendments to the Foreign Agents Registration Act (FARA) which bar foreign political contributions to candidates for federal, state and local office.³¹ As Professor Bruce Brown explains, “[i]n 1966, Congress added a section to FARA forbidding agents of foreign principals from making monetary contributions on behalf of their overseas clients relating to any campaign for elective office. Soliciting or accepting any such funds was also barred.”³² The 1966 FARA amendments were pushed by Senator Fulbright. According to Professor Brown, “on the Senate floor, Fulbright spoke of protecting ‘the integrity of the decision-making process of our Government[.]’”³³ Columbia Professor Lori Damrosch said of the legislative history of FARA amendments that:

[The Fulbright] [h]earings... vividly document the efforts of certain foreign interests to ensure the reelection of sympathetic legislators by channeling campaign contributions through lawyers or other agents in Washington. . . . Although some of the activities covered by the hearings involved foreign businesses rather than governments, a key issue was the extent to which foreign governments had attempted to influence U.S. policy through techniques outside normal diplomatic channels.³⁴

Professor Brown argues that FARA “spring[s] from a [] protective impulse--to limit or otherwise control participation by noncitizens in our own marketplace of ideas.”³⁵

The last time that Congress strengthened campaign finance laws was in 2002’s Bipartisan Campaign Reform Act (also known as BCRA). BCRA included putting “in place a strong sentencing guideline for FECA

³⁰ Ian M. Rose, *Barring Foreigners from Our Airwaves: An Anachronistic Pothole on the Global Information Highway*, 95 COLUM. L. REV. 1188, 1188-89 (1995).

³¹ Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 YALE L. & POL’Y REV. 503, 503 (1996) (“[I]n the 1960s], Congress decided, for the first time, to take steps to limit this manifestation of overseas influence in the U.S. political scene.”).

³² *Id.* at 508-09.

³³ *Id.* at 509-10.

³⁴ *Id.* at 509 (quoting Damrosch).

³⁵ *Id.* at 510.



crimes.”³⁶ The federal sentencing guidelines were amended to reflect the new strictures of BCRA including sentencing enhancements for foreign money in American elections especially if the source was a foreign *government*.³⁷ To wit: “the new guideline provides alternative enhancements, at §2C1.8(b)(2), if the offense involved a foreign national (two levels) or a foreign government (four levels). These enhancements respond to another specific directive in the BCRA and reflect the seriousness of attempts by foreign entities to tamper with the United States’ election processes.”³⁸

There are criminal cases prosecuting violations of the ban on foreign money in U.S. elections.³⁹ Generally the criminal prosecutions of using foreign money in an American election are cases where the prosecutors at the Department of Justice get a guilty plea from the defendant.⁴⁰ Though in *United States v. Kanchanalak*, the defendant challenged whether the ban could apply to soft money payments. The D.C. Circuit held that the foreign ban did apply to soft money as well as hard money.⁴¹

³⁶ Craig C. Donsanto & Nancy L. Simmons, *Federal Prosecution of Election Offenses*, U.S. DEPARTMENT OF JUSTICE xiii (May 2007), <https://www.justice.gov/sites/default/files/criminal/legacy/2013/09/30/electbook-0507.pdf>.

³⁷ *Amendments to The Sentencing Guidelines*, UNITED STATES SENTENCING COMMISSION 28-29, http://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20030501_Amendments_0.pdf (“BCRA significantly increased statutory penalties for campaign finance crimes, formerly misdemeanors . . . The offenses that will be sentenced under §2C1.8 include: violations of the statutory prohibitions against . . . contributions by foreign nationals (2 U.S.C. § 441e) . . .”).

³⁸ *Amendments to the Sentencing Guidelines*, United States Sentencing Commission 28-29, http://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20030501_Amendments_0.pdf (last visited Jul. 14, 2016).

³⁹ *New Indictment in Campaign Finance Case Adds Gun, Bribery, and Falsification of Records Charges*, FEDERAL BUREAU OF INVESTIGATION (Aug. 12, 2014), <https://www.fbi.gov/sandiego/press-releases/2014/new-indictment-in-campaign-finance-case-adds-gun-bribery-and-falsification-of-records-charges>. (“The indictment details approximately \$600,000 in such illegal donations. . . .”); *Yogesh Gandhi Pleads Guilty to Election Law, Mail Fraud and Tax Violations*, DEPARTMENT OF JUSTICE (Jun. 25, 1999),

<https://www.justice.gov/archive/opa/pr/1999/June/275crm.htm>. (“Gandhi admitted that in May 1996, he wrote a \$325,000 check to the Democratic National Committee . . . the donation was unlawful because it was made by Gandhi on behalf of a foreign national.”); *Democratic Contributor Sentenced Today for Violating Federal Election Law*, DEPARTMENT OF JUSTICE (Aug. 16, 1999),

<https://www.justice.gov/archive/opa/pr/1999/August/362crm.htm>. (“A federal court . . . sentenced Robert S. Lee . . . for aiding and abetting the making of an illegal foreign campaign contribution to the Democratic National Committee . . . Lee, 49, pleaded guilty to violating federal law by giving the DNC a \$150,000 check drawn from an account that was entirely funded by a South Korean corporation.”); *Donor Pleads Guilty to Campaign Violations*, LOS ANGELES TIMES (May 22, 1999),

<http://articles.latimes.com/1999/may/22/news/mn-39757> (“‘Charlie’ Trie pleaded guilty to campaign finance violations Friday and agreed to cooperate in an investigation of illegal Asian donations to the Democrats. . . .”).

⁴⁰ *New Jersey Man Pleads Guilty to Helping Disguise Foreign Contributions during 2012 Presidential Election*, U.S. DEPARTMENT OF JUSTICE (June 29, 2016), <https://www.justice.gov/opa/pr/new-jersey-man-pleads-guilty-helping-disguise-foreign-contributions-during-2012-presidential>. (“Shehu, 48, pleaded guilty . . . to . . . willfully making foreign contributions and donations in connection with the 2012 presidential election . . .”).

⁴¹ *United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999) (holding that § 441e of FECA also prohibits foreign soft money donations).



Conclusion

As U.S. Justice John Paul Stevens reasons in his book, Six Amendments, if we do not want the money of a foreign individuals in our elections because they are not citizens, it may also follow that we do not want foreign corporate money in elections for the same reason.⁴² Barring foreign money that is funneled through a U.S. corporate subsidiary is a reasonable step to protect the integrity of American elections.

⁴² JOHN PAUL STEVENS, SIX AMENDMENTS HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 59 (2014) (“I shall explain why it is unwise to allow persons who are not qualified to vote—whether they be corporations or nonresident individuals—to have a potentially greater power to affect the outcome of elections than eligible voters have.”).