CHARLES FRIED

September 27, 2017

Dear Chairman Mahoney and Chairwoman Gobi:

I am writing regarding three bills currently before the Joint Committee on Election Laws: S.394, H.2081, and H.2904.

I am the Beneficial Professor of Law at Harvard Law School, where I have taught since 1961. In 1985, President Reagan appointed me to the position of Solicitor General of the United States, where I represented the federal government before the Supreme Court until 1989. I also served as an Associate Justice of the Supreme Judicial Court of Massachusetts from 1995-99. During my career at Harvard I have taught Constitutional Law, Contracts, Criminal Law, Commercial Law, Roman Law, Torts, Labor Law, Federal Courts, and Appellate and Supreme Court Advocacy.

It has long been a principle of federal and state campaign finance regulations that interference in U.S. elections by foreign persons, entities, or governments may be forbidden, and punished if and when they do occur. One need only consider the universal outrage expressed when the United States government alerted the nation to the serious possibility that individuals from the Russian Federation, perhaps acting in concert with their government, had been attempting to interfere with the current presidential election by illicitly accessing confidential communications between persons and entities with a formal role in the election,[1] and the increasingly disturbing revelations that continue to emerge almost daily.

Of course, direct foreign contributions and expenditures violate federal law.[2] Ever since the U.S. Supreme Court decision in *Buckley v. Valeo*,[3] entities acting independently of candidates or their official committees have been free to expend time, effort, and money in connection with expressing their support of political causes or candidates for public office—so long as they act independently of and in no way coordinate their efforts with the candidates they support. Yet it has always been understood that this principle in no way opens the door for foreign interests to intervene in elections in the United States. While *Citizens United v. FEC*[4] made clear that this principle extended to

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[1] *See* Thomas Rid, "How Russia Pulled Off the Biggest Election Hack in U.S. History," ESQUIRE, Oct. 20, 2016, http://www.esquire.com/news-politics/a49791/russian-dnc-emails-hacked/.
[2] *See* 52 U.S.C. § 30121(a).
[3] 424 U.S. 1 (1976).
[4] 558 U.S. 310 (2010).

independent expenditures by corporate entities as well,[5] nowhere has there been any intimation that this ruling undermined the principle that foreign intervention in American elections is abhorrent and forbidden. That principle is bedrock.

The ruling in *Citizens United* did, however, raise the possibility that this bedrock principle might be easily undermined. For example, a corporation organized under the laws of Delaware might have as its shareholders only foreign nationals, and yet still count as a citizen of Delaware. Those foreign owners could elect directors and officers all of whom are United States citizens but who will act in the interests of their shareholders, as officers and directors of a corporation are ordinarily required to do. Thus, foreign entities interested in buying up property in a U.S. municipality and electing local officials friendly to their interests in those properties could, through its corporate form, dominate a local election through independent expenditures and further its interests to the detriment of the citizens of that municipality. *Citizens United* did not address this danger, nor did it suggest in any way that its holding was meant to undermine the principle that foreign interference in American elections at any level is abhorrent.

The aforementioned bills currently before you address this danger by setting a threshold of foreign ownership above which the danger of foreign domination of the corporation and thus of its intervention in American elections is deemed too great. (As it is well known that a relatively small percentage of shareholders acting in concert can dominate a corporation and determine the choice of its directors and officers, it is not surprising that such a threshold might be at a level that, in other contexts, would seem to be de minimis.) Though this precise issue has not, to my knowledge, been litigated, the danger is real, and no explicit ruling precludes the Massachusetts General Court, by such legislation, from seeking to protect itself and its citizens from it.

Please contact me if I can be of further assistance in this regard.

Sincerely,

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[5] Whether to such entities in general or just to certain kinds of entities similar to Citizens United remains a matter of contention.