

## CAN “LOVE” BE A CRIME? THE SCOPE OF THE FOREIGN NATIONAL SPENDING BAN IN CAMPAIGN FINANCE LAW

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*Federal campaign finance law prohibits foreign nationals from making contributions or expenditures of “money or other thing of value” in connection with American elections and prohibits anyone from soliciting such a contribution or expenditure. The revelation that officials from Donald Trump’s 2016 presidential campaign met with Russian nationals after being told they would receive “information that would incriminate” Hillary Clinton, Trump’s political opponent, raised the question of how broadly the foreign national spending ban extended.*

*This Note uses the circumstances of the June 2016 meeting to examine the scope of the foreign national spending ban. It analyzes whether “thing of value” should be construed to encompass intangibles such as information about a political rival. It then questions whether a broad reading of the statute would violate the First Amendment. It concludes by suggesting ways in which institutional actors such as the courts, Congress, and the Federal Election Commission might consider clarifying this area of the law.*

### INTRODUCTION

In June 2016, a number of officials from Donald Trump’s presidential campaign—including Donald Trump, Jr., Paul Manafort, and Jared Kushner—attended a meeting with Natalia Veselnitskaya, a Russian lawyer who offered to share documents that “would incriminate Hillary [Clinton] and her dealings with Russia and would be very useful to [Donald Trump] . . . [as] part of Russia and its government’s support for Mr. Trump.”<sup>1</sup> The meeting’s public disclosure a year after its occurrence immediately sparked a debate over the legality of what had transpired.<sup>2</sup> This Note joins that debate by examining several of the questions arising from the meeting’s circumstances. Federal law prohibits foreign nationals from contributing any “money or other thing of value” to a campaign

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1. Jo Becker, Adam Goldman & Matt Apuzzo, Russian Dirt on Clinton? ‘I Love It,’ Donald Trump Jr. Said, N.Y. Times (July 11, 2017), <http://www.nytimes.com/2017/07/11/us/politics/trump-russia-email-clinton.html> (on file with the *Columbia Law Review*) [hereinafter Becker, Goldman & Apuzzo, I Love It] (internal quotation marks omitted) (quoting a June 3, 2016, email sent from an intermediary to Donald Trump, Jr.).

2. See *infra* notes 149–152 and accompanying text.

and bars anyone from soliciting such contributions.<sup>3</sup> However, “thing of value” is not defined in the relevant statute, and it is not immediately clear whether it can be construed so broadly so as to cover information about a political opponent. If it can, then the statute may purport to prohibit or chill speech protected by the First Amendment. Moreover, the debate itself highlights the need for additional clarity in this area of campaign finance law.

In order to examine whether and how the foreign national spending ban can apply to information, this Note proceeds in three Parts. Part I examines the circumstances of the June 2016 meeting, the relevant background law covering the prohibition on foreign nationals’ campaign contributions and expenditures, and relevant First Amendment precedent. Part II examines and grapples with the statutory and constitutional questions raised by the June 2016 meeting. Part III proposes a framework for how courts, Congress, and the Federal Election Commission (FEC) should consider the issue of information from foreign sources in an election context going forward.

## I. THE JUNE 2016 MEETING AND RELEVANT BACKGROUND LAW

This Part introduces the Trump campaign’s June 2016 meeting and relevant background law. Section I.A describes the publicly known facts about the June 2016 meeting. Section I.B discusses the campaign finance law governing campaign contributions or expenditures by foreign nationals, or the solicitation thereof. Section I.C outlines the First Amendment interests at stake and the overbreadth doctrine.

### A. *The June 2016 Meeting*

On June 3, 2016, Donald Trump, Jr., son of the then-presumptive Republican presidential nominee, received an email from Rob Goldstone, a British publicist with whom Trump, Jr. had a “casual relationship,”<sup>4</sup> which stated, “The Crown prosecutor<sup>5</sup> of Russia met with . . . Aras [Agalarov]<sup>6</sup> this morning and in their meeting offered to provide the

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3. 52 U.S.C. § 30121 (Supp. IV 2017).

4. Shawn Boburg & Jack Gillum, *Who Is Rob Goldstone, Whose Email to Trump Jr. on Russia Caused a Sensation?*, Wash. Post (July 15, 2017), <http://www.washingtonpost.com/who-is-rob-goldstone-whose-email-to-trump-jr-on-russia-caused-a-sensation/8471f520-68c0-11e7-8eb5-cbccc2e7bfbf> [https://perma.cc/P4UL-95JJ].

5. Russia has no “Crown prosecutor,” but Goldstone appears to have been referring to Yuri Chaika, the Prosecutor General of the Russian Federation. See Julia Ioffe, *What the Heck Is a Russian ‘Crown Prosecutor’?*, Atlantic (July 11, 2017), <http://www.theatlantic.com/international/archive/2017/07/russian-crown-prosecutor/533295> [https://perma.cc/B7DV-AGS3].

6. Agalarov, a wealthy Azerbaijani Russian developer with ties to the Russian government, had worked with the Trump Organization, Donald Trump’s collection of private businesses, to organize the Miss Universe pageant held outside Moscow in 2013 and was later

Trump campaign with some official documents and information that would incriminate Hillary [Clinton] and her dealings with Russia and would be very useful to your father.”<sup>7</sup> Goldstone continued, explaining, “This is obviously very high level and sensitive information but is part of Russia and its government’s support for Mr. Trump.”<sup>8</sup> Trump, Jr. replied, “If it’s what you say I love it especially later in the summer.”<sup>9</sup> The email

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engaged in talks to construct a Trump Tower in Moscow. See Neil MacFarquhar, *A Russian Developer Helps Out the Kremlin on Occasion. Was He a Conduit to Trump?*, N.Y. Times (July 16, 2017), <http://www.nytimes.com/2017/07/16/world/europe/aras-galarov-trump-kremlin.html> (on file with the *Columbia Law Review*); Andrew Roth, *The Man Who Drives Trump’s Russia Connection*, Wash. Post (July 22, 2017), <http://www.washingtonpost.com/the-man-who-drives-trumps-russia-connection/43485a0e-6c98-11e7-abb0-a53480672286> [<https://perma.cc/ZV9C-JEBC>]; see also Michael Crowley, *When Donald Trump Brought Miss Universe to Moscow*, Politico (May 15, 2016), <http://www.politico.com/story/2016/05/donald-trump-russia-moscow-miss-universe-223173> [<https://perma.cc/YJ7F-5ZH2>] (describing Trump’s involvement in the 2013 Miss Universe pageant).

Agalarov’s son, Emin, a pop singer, had previously worked with Goldstone. See Roth, *supra*. The Trump Organization’s efforts to build a Trump Tower in Moscow continued into mid-2016, months after Trump launched his presidential campaign. See Carol D. Leonnig, Tom Hamburger & Rosalind S. Helderman, *Trump’s Business Sought Deal on a Trump Tower in Moscow While He Ran for President*, Wash. Post (Aug. 27, 2017), <http://www.washingtonpost.com/trumps-business-sought-deal-on-a-trump-tower-in-moscow-while-he-ran-for-president/d6e95114-8b65-11e7-91d5-ab4e4bb76a3a> [<https://perma.cc/FNH4-2BZB>]; see also Anthony Cormier & Jason Leopold, *Trump Moscow: The Definitive Story of How Trump’s Team Worked the Russian Deal During the Campaign*, Buzzfeed (May 17, 2018), <http://www.buzzfeednews.com/anthonicormier/trump-moscow-micheal-cohen-felix-sater-campaign> [<https://perma.cc/W4AN-2X3X>]. Emin Agalarov later claimed a Trump Tower Moscow deal would have been consummated had Trump not run for president. See Dan Alexander & Noah Kirsch, *Meet the Billionaire Russian Family at the Center of the Trump-Russia Controversy*, Forbes (July 11, 2017), <http://www.forbes.com/sites/danalexander/2017/07/11/meet-the-billionaire-russian-family-at-the-center-of-the-trump-russia-controversy> [<https://perma.cc/RCG6-S2R6>].

7. Becker, Goldman & Apuzzo, *I Love It*, *supra* note 1 (internal quotation marks omitted) (quoting a June 3, 2016, email sent from Rob Goldstone to Donald Trump, Jr.). This was not the first overture Goldstone made related to Russia. In July 2015, shortly after Donald Trump launched his presidential campaign, Goldstone emailed Donald Trump’s assistant with an offer to set up a meeting with Vladimir Putin. See Rosalind S. Helderman & Tom Hamburger, *Music Promoter Dangled Possible Putin Meeting for Trump During Campaign*, Wash. Post (Dec. 14, 2017), <http://www.washingtonpost.com/music-promoter-dangled-possible-putin-meeting-for-trump-during-campaign/38d6a8e2-dec5-11e7-89e8-edec16379010> [<https://perma.cc/2V5P-4C48>]. In early 2016, Goldstone connected Donald Trump, Jr. and Dan Scavino, the Trump campaign’s social media director, with Konstantin Sidorkov, an executive at the Russian social media website Vkontakte, who suggested that Trump, Jr. set up a page on the site and offered to help promote the presidential campaign. See Rosalind S. Helderman, Anton Troianovski & Tom Hamburger, *Russian Social Media Executive Sought to Help Trump Campaign in 2016, Emails Show*, Wash. Post (Dec. 7, 2017), <http://www.washingtonpost.com/russian-social-media-executive-sought-to-help-trump-campaign-in-2016-emails-show/31ec8d90-db9a-11e7-b859-fb0995360725> [<https://perma.cc/6JYT-EKKD>]. It does not appear that any such page was ever established. *Id.*

8. Becker, Goldman & Apuzzo, *I Love It*, *supra* note 1 (internal quotation marks omitted) (quoting a June 3, 2016, email sent from Rob Goldstone to Donald Trump, Jr.).

9. *Id.* (internal quotation marks omitted) (quoting a June 3, 2016, email sent from Donald Trump, Jr. to Rob Goldstone).

exchange continued until Goldstone offered to schedule a “meeting with you and [t]he Russian government attorney who is flying over from Moscow for this Thursday.”<sup>10</sup>

The meeting took place on June 9, 2016, in Trump, Jr.’s office in Trump Tower in New York City and included eight participants.<sup>11</sup> The *New York Times* first publicly revealed the meeting’s occurrence in July

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10. *Id.* (internal quotation marks omitted) (quoting a June 7, 2016, email sent from Rob Goldstone to Donald Trump, Jr.).

11. See *id.* Present at the meeting were Donald Trump, Jr.; Paul Manafort; Jared Kushner; Rob Goldstone; Natalia Veselnitskaya, the Russian lawyer referenced in Goldstone’s email; Rinat Akhmetshin; Anatoli Samochornov; and Irakly Kaveladze. See Sharon LaFraniere & Adam Goldman, Guest List at Donald Trump Jr.’s Meeting with Russian Expands Again, *N.Y. Times* (July 18, 2017), <http://www.nytimes.com/2017/07/18/us/politics/trump-meeting-russia.html> (on file with the *Columbia Law Review*).

Manafort, then the chairman of the Trump campaign, would later resign in August 2016 amid revelations he had secretly received millions of dollars to work on behalf of a pro-Russian political party in Ukraine, see Maggie Haberman & Jonathan Martin, Paul Manafort Quits Donald Trump’s Campaign After a Tumultuous Run, *N.Y. Times* (Aug. 19, 2016), <http://www.nytimes.com/2016/08/20/us/politics/paul-manafort-resigns-donald-trump.html> (on file with the *Columbia Law Review*), before eventually pleading guilty to a variety of crimes stemming from his work on behalf of his Ukrainian clients, see Statement of the Offenses & Other Acts at 24, *United States v. Manafort*, No. 17-201-1 (ABJ) (D.D.C. filed Sept. 14, 2018), <http://www.justice.gov/file/1094156/download> [<https://perma.cc/SJN3-JWVN>].

Kushner, President Trump’s son-in-law, was a senior figure in the Trump campaign, at one point becoming “the de facto campaign manager,” and would go on to serve as a senior advisor in the White House. Glenn Thrush & Maggie Haberman, Jared Kushner Named Senior White House Adviser to Donald Trump, *N.Y. Times* (Jan. 9, 2017), <http://www.nytimes.com/2017/01/09/us/jared-kushner-senior-adviser-white-house-trump.html> (on file with the *Columbia Law Review*).

Veselnitskaya, a Russian lawyer and former prosecutor, was previously best known as “an outspoken advocate for lifting economic sanctions imposed by Congress against Russia for human rights violations.” Michael Kranish et al., Russian Lawyer Who Met with Trump Jr. Has Long History Fighting Sanctions, *Wash. Post* (July 11, 2017), <http://www.washingtonpost.com/russian-lawyer-who-met-with-trump-jr-has-long-history-fighting-sanctions/05e2467c-65b1-11e7-94ab-5b1f0ff459df> [<https://perma.cc/9XSJ-2H68>].

Akhmetshin is a Russian American lobbyist believed to have long-standing ties to Russian intelligence. See Sharon LaFraniere, David D. Kirkpatrick & Kenneth P. Vogel, Lobbyist at Trump Campaign Meeting Has a Web of Russian Connections, *N.Y. Times* (Aug. 21, 2017), <http://www.nytimes.com/2017/08/21/us/rinat-akhmetshin-russia-trump-meeting.html> (on file with the *Columbia Law Review*).

Samochornov is an American translator who has previously worked with Veselnitskaya. See Katie Zavadski & Emilie Plesset, The Translator Swept Up in Donald Trump Jr.’s Russian Dirt Hunt, *Daily Beast* (July 14, 2017), <http://www.thedailybeast.com/man-who-joined-russians-in-trump-meeting-just-an-interpreter-says-mother-in-law> [<https://perma.cc/2UAS-M96N>].

Kaveladze is a Georgian American employee of Aras Agalarov’s company. See Rosalind S. Helderman & Tom Hamburger, Eighth Person in Trump Tower Meeting Is Identified, *Wash. Post* (July 18, 2017), <http://www.washingtonpost.com/eighth-person-in-trump-tower-meeting-is-identified/e971234a-6bce-11e7-9c15-177740635e83> [<https://perma.cc/EYQ3-FTKW>].

2017, over a year later.<sup>12</sup> As new details emerged over the ensuing days, Trump, Jr. issued a series of evolving statements explaining the meeting.<sup>13</sup> He later claimed to have attended the meeting believing that he would receive “[p]olitical [o]pposition [r]esearch” about Hillary Clinton, the then-presumptive Democratic presidential nominee.<sup>14</sup> However, he also explained that although Veselnitskaya began the meeting by “stat[ing] that she had information that individuals connected to Russia were funding the Democratic National Committee and supporting Ms. Clinton . . . [i]t quickly became clear that she had no meaningful information.”<sup>15</sup> Furthermore, “[i]t became clear . . . that [the Magnitsky Act, a sanctions

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12. See Jo Becker, Matt Apuzzo & Adam Goldman, Trump’s Son Met with Russian Lawyer After Being Promised Damaging Information on Clinton, N.Y. Times (July 9, 2017), <http://www.nytimes.com/2017/07/09/us/politics/trump-russia-kushner-manafort.html> (on file with the *Columbia Law Review*).

13. See Liam Stack, Donald Trump Jr.’s Two Different Explanations for Russian Meeting, N.Y. Times (July 9, 2017), <http://www.nytimes.com/2017/07/09/us/donald-trump-jrs-two-different-explanations-for-russian-meeting.html> (on file with the *Columbia Law Review*) (“In less than 24 hours, President Trump’s eldest son, Donald Trump Jr., has given two different explanations for a meeting he held during the 2016 campaign with a Kremlin-connected Russian lawyer who promised to provide damaging information about Hillary Clinton.”). The *Washington Post* later reported that President Trump personally dictated Trump, Jr.’s misleading initial statement, see Ashley Parker et al., Trump Dictated Son’s Misleading Statement on Meeting with Russian Lawyer, Wash. Post (July 31, 2017), <http://www.washingtonpost.com/trump-dictated-sons-misleading-statement-on-meeting-with-russian-lawyer/04c94f96-73ae-11e7-8f39-eeb7d3a2d304> [<https://perma.cc/5FR7-ZPWA>], a fact the White House later acknowledged after months of denials, see Michael S. Schmidt et al., Trump’s Lawyers, in Confidential Memo, Argue to Head Off a Historic Subpoena, N.Y. Times (June 2, 2018), <http://www.nytimes.com/2018/06/02/us/politics/trump-lawyers-memo-mueller-subpoena.html> (on file with the *Columbia Law Review*).

14. Donald J. Trump, Jr. (@DonaldJTrumpJr), Twitter (July 11, 2017), <http://twitter.com/DonaldJTrumpJr/status/884789418455953413> [<https://perma.cc/6UEV-6UUV6>] (“The information [Rob Goldstone, Emin Agalarov, and Natalia Veselnitskaya] suggested they had about Hillary Clinton I thought was Political Opposition Research.”). In a subsequent interview with Sean Hannity, Trump, Jr. elaborated on what he thought he would be receiving by attending the meeting with Veselnitskaya: “Honestly, my takeaway, when all of this was going on, is that someone has information on our opponent . . . . Listen, I’d been reading about scandals that people were probably underreporting for a long time. So maybe it was something that had to do with one of those things.” Donald Trump Jr. on ‘Hannity’: In Retrospect, I Would’ve Done Things Differently, Fox News (July 11, 2017), <http://www.foxnews.com/transcript/2017/07/11/donald-trump-jr-on-hannity-in-retrospect-wouldve-done-things-differently.html> (on file with the *Columbia Law Review*). He continued: “[T]he pretext of the meeting was, [‘]Hey, I have information about your opponent.[’] . . . For me, this was opposition research. They had something, you know, maybe concrete evidence to all the stories I’d been hearing about, but were probably underreported for, you know, years; not just during the campaign.” Id.

By August 2018, President Trump had begun describing the purpose of the meeting similarly. See Donald J. Trump (@realDonaldTrump), Twitter (Aug. 5, 2018), <http://twitter.com/realDonaldTrump/status/1026084333315153924> [<https://perma.cc/HU29-PH9E>] (“This was a meeting to get information on an opponent . . .”).

15. Stack, *supra* note 13 (internal quotation marks omitted) (quoting a statement released by Donald Trump, Jr.).

package targeting several Russian officials,] was the true agenda all along and that the claims of potentially helpful information were a pretext for the meeting,” which, according to Trump, Jr., concluded after twenty to thirty minutes.<sup>16</sup>

In written testimony submitted to the U.S. Senate Judiciary Committee, Veselnitskaya claimed that Trump, Jr. “asked if I had any financial documents proving that what may have been illegally obtained funds were also being donated to Mrs. Clinton’s foundation.”<sup>17</sup> In a media interview, she also stated that Trump, Jr. responded to the concerns she raised about the Magnitsky Act by saying, “Looking ahead, if we come to power, we can return to this issue and think what to do about it,”<sup>18</sup> although she testified that she understood this statement to be simply a polite farewell.<sup>19</sup>

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16. *Id.* (internal quotation marks omitted) (quoting a statement released by Donald Trump, Jr.). Veselnitskaya brought an English translation of her talking points in memorandum form to the meeting, which primarily focused on the activities of an American businessman, Bill Browder. See Elias Groll, *Here’s the Memo the Kremlin-Linked Lawyer Took to the Meeting with Donald Trump Jr.*, *Foreign Pol’y* (Oct. 16, 2017), <http://foreignpolicy.com/2017/10/16/heres-memo-kremlin-lawyer-took-to-meeting-donald-trump-jr> [<https://perma.cc/F8H5-GVZN>]. The document alleges that Browder defrauded the Russian government, and—in order to deflect attention from his own illegal activities—falsified a *different* corruption scandal, which became, in part, the impetus for passage of the sanctions package known as the Magnitsky Act. *Id.* Hillary Clinton is mentioned only once, indirectly, as the possible recipient of campaign donations from Browder’s business partners. *Id.*

Veselnitskaya had previously discussed the allegations with Yuri Chaika, the Russian prosecutor general, and her talking points closely tracked a document the prosecutor general’s office had provided to an American congressman months earlier, likely indicating some coordination with the Russian government. See Sharon LaFraniere & Andrew E. Kramer, *Talking Points Brought to Trump Tower Meeting Were Shared with Kremlin*, *N.Y. Times* (Oct. 27, 2017), <http://www.nytimes.com/2017/10/27/us/politics/trump-tower-veselnitskaya-russia.html> (on file with the *Columbia Law Review*) (“[I]nterviews and records show that in the months before the [June 2016] meeting, Ms. Veselnitskaya had discussed the allegations with one of Russia’s most powerful officials . . . . The coordination between the Trump Tower visitor and the Russian prosecutor general undercuts Ms. Veselnitskaya’s account that she was a purely independent actor . . . .”). After hacked emails revealed that Veselnitskaya worked with the prosecutor general’s office to thwart a U.S. Justice Department civil fraud case brought against a Russian real estate firm, she acknowledged her ties to the Russian government in an April 2018 interview: “I am a lawyer, and I am an informant’ . . . . ‘Since 2013, I have been actively communicating with the office of the Russian prosecutor general.’” Andrew E. Kramer & Sharon LaFraniere, *Lawyer Who Was Said to Have Dirt on Clinton Had Closer Ties to Kremlin than She Let On*, *N.Y. Times* (Apr. 27, 2018), <https://www.nytimes.com/2018/04/27/us/natalya-veselnitskaya-trump-tower-russian-prosecutor-general.html> (on file with the *Columbia Law Review*).

17. Testimony of Natalia Veselnitskaya Before the United States Senate Committee on the Judiciary 28 (Nov. 20, 2017) [hereinafter *Veselnitskaya Testimony*], [http://www.judiciary.senate.gov/imo/media/doc/2017-11-20%20Veselnitskaya%20to%20CEG%20\(June%209%20Meeting\).pdf](http://www.judiciary.senate.gov/imo/media/doc/2017-11-20%20Veselnitskaya%20to%20CEG%20(June%209%20Meeting).pdf) (on file with the *Columbia Law Review*).

18. Irina Reznik & Henry Meyer, *Trump Jr. Hinted at Review of Anti-Russia Law, Moscow Lawyer Says*, *Bloomberg* (Nov. 6, 2017), <http://www.bloomberg.com/news/articles/2017-11-06/trump-jr-said-anti-russia-law-may-be-reviewed-moscow-lawyer-says> [<https://>

Ultimately, irrespective of what may or may not have actually been exchanged at the June 2016 meeting, it appears from his own statements that Trump, Jr. arranged the meeting under the impression he was to receive “[p]olitical [o]pposition [r]esearch” from a Russian attorney—which he was told was part of the Russian government’s support for his father—and, according to Veselnitskaya, asked her directly for that information at the meeting itself.<sup>20</sup>

#### B. *Foreign Influence in American Elections*

This section covers the campaign finance laws implicated by the June 2016 meeting, which today prohibit foreign campaign contributions or expenditures of “money or other thing[s] of value.”<sup>21</sup> Section I.B.1 discusses historical concerns over foreign influence in American policymaking and the development of relevant campaign finance law. Section I.B.2 reviews current statutory and regulatory limitations on the rights of foreign nationals to participate in the electoral process. Finally, Section I.B.3 turns to a discussion of *Bluman v. FEC*, which upheld the statutory ban on campaign contributions and expenditures by foreign nationals against a First Amendment challenge.<sup>22</sup>

1. *Development of Campaign Finance Law.* — A distrust of foreign interference in elections was present in the American constitutional design at the Founding. Attendees at the Constitutional Convention “were concerned that the small size of the young country (compared to the great European powers) would open it up to foreign corruption.”<sup>23</sup> Several provisions were included in the Constitution specifically to address this

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perma.cc/YKV2-9BML] (internal quotation marks omitted) (quoting Veselnitskaya recalling her conversation with Trump, Jr.).

19. Veselnitskaya Testimony, *supra* note 17, at 31 (“Mr. Trump, Jr. politely wound up the meeting with meaningless phrases . . . I personally regarded this as an elegant, but final farewell. That’s all about it.”).

20. See *supra* notes 14, 17 and accompanying text.

21. 52 U.S.C. § 30121(a)(1) (Supp. IV 2017).

22. 800 F. Supp. 2d 281, 282–83 (D.D.C. 2011), *aff’d mem.*, 565 U.S. 1104 (2012).

23. Zephyr Teachout, *The Anti-Corruption Principle*, 94 *Cornell L. Rev.* 341, 353 (2009) (describing the centrality of concerns about preventing corruption to debates at the Convention). The potential for foreign influence over a republican form of government is also a recurring concern throughout *The Federalist Papers*. See, e.g., *The Federalist No. 22*, at 145 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“One of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption.”); *The Federalist No. 66*, at 404 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (arguing that the division of power between an executive and bicameral legislature would guard against, among other dangers, the possibility “of a few leading individuals in the Senate who should have prostituted their influence in that body as the mercenary instruments of foreign corruption”); *The Federalist No. 68*, at 411 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“[C]abal, intrigue, and corruption . . . [can be expected to arise] chiefly from the desire in foreign powers to gain an improper ascendant in our councils.”).

concern, such as residency requirements for members of Congress,<sup>24</sup> the Emoluments Clause,<sup>25</sup> and the Natural-Born Citizen Clause.<sup>26</sup>

Concerns over foreign influence would wax and wane over the ensuing decades, peaking at moments such as the Quasi-War with France in the late 1790s, which resulted in the enactment of the Alien and Sedition Acts.<sup>27</sup> The years preceding World War II saw a resurgence in concern regarding foreign influence over American policy; Congress responded by passing the Foreign Agents Registration Act (FARA) in 1938,<sup>28</sup> which “established disclosure requirements for certain kinds of political expression sponsored by foreign principals but did not place any restrictions on the speech itself.”<sup>29</sup> In 1966, Congress strengthened FARA by making it a felony for any “agent of a foreign principal” to directly or indirectly, on behalf of the foreign principal, “knowingly make[] any contribution of money or other thing of value . . . in connection with an election to any political office.”<sup>30</sup> The law also prohibited “knowingly solicit[ing], accept[ing], or receiv[ing]” such a contribution.<sup>31</sup> It was riddled with loopholes, however, and remained focused on agents of foreign principals rather than the principals themselves.<sup>32</sup>

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24. U.S. Const. art. I, § 2, cl. 2; id. § 3, cl. 3; see also Teachout, *supra* note 23, at 358 (noting that residency requirements for officeholders “represented a concern about foreign power, which was often intermingled with the fears of corruption”).

25. U.S. Const. art. I, § 9, cl. 8; see also Teachout, *supra* note 23, at 361–62 (arguing the Emoluments Clause was proposed because “the delegates [to the Constitutional Convention] were deeply concerned that foreign interests would try to use their wealth to tempt public servants and sway the foreign policy decisions of the new government”).

26. U.S. Const. art. II, § 1, cl. 5; see also Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 *BYU L. Rev.* 927, 939 (“[T]he natural-born requirement was motivated by a fear of foreign involvement in the government.”).

27. See Matt A. Vega, *The First Amendment Lost in Translation: Preventing Foreign Influence in U.S. Elections After Citizens United v. FEC*, 44 *Loy. L.A. L. Rev.* 951, 965–66 (2011).

28. Foreign Agents Registration Act of 1938, Pub. L. No. 75-583, ch. 327, 52 Stat. 631 (codified as amended at 22 U.S.C. §§ 611–621 (2012)).

29. Vega, *supra* note 27, at 968.

30. Act of July 4, 1966, Pub. L. No. 89-486, sec. 8(a), § 613, 80 Stat. 244, 248 (emphasis added).

31. *Id.*

32. See Vega, *supra* note 27, at 971 (“[FARA’s exclusive focus on foreign principals’ agents] created a glaring ‘agents-only’ loophole that foreign corporations generously exploited.”). FARA was initially focused on propagandists and resulted in twenty-three successful criminal prosecutions during the World War II era. U.S. Dep’t of Justice, *Justice Manual, Criminal Resource Manual* § 2062, <http://www.justice.gov/jm/criminal-resource-manual-2062-foreign-agents-registration-act-enforcement> [<https://perma.cc/X46Q-ZQCM>] (last updated Sept. 19, 2018). The 1966 amendments modified FARA “to focus on the integrity of the United States Government decision-making process, and to emphasize agents seeking economic or political advantage for their clients.” *Id.* Since then, “there have been no successful criminal prosecutions under FARA and only 3 indictments returned or informations filed charging FARA violations.” *Id.*



Efforts to constrain foreign influence over American officeholders would eventually intersect with the laws governing the financing of American campaigns. In 1971, after decades of taking a piecemeal approach, Congress enacted comprehensive legislation to address the rapidly rising cost of presidential and congressional elections and enhance disclosure of campaign spending and sources of fundraising.<sup>33</sup> But the initial version of the Federal Election Campaign Act (FECA) proved as ineffective as previous attempts to regulate campaign finance had—“[i]n indeed, from 1910 to 1974 federal campaign finance law was honored more in the breach than in the observation.”<sup>34</sup> Over the next few years, however, as revelations stemming from the break-in at the Watergate Hotel unfolded, a groundswell of political pressure led Congress to address the outside influence of money in politics.<sup>35</sup>

Congress responded by enacting the Federal Election Campaign Act Amendments of 1974 (“1974 FECA Amendments”),<sup>36</sup> which “transformed American campaign finance law” by establishing limits on contributions to federal candidates, total campaign expenditures by presidential and congressional campaigns, and independent campaign expenditures by individuals; mandating disclosure of campaign contributions; creating a public financing system for presidential campaigns; and establishing an independent agency, the Federal Election Commission, to enforce federal campaign finance law.<sup>37</sup> Scholars have pointed to the Watergate scandal and ensuing reforms—specifically the 1974 FECA Amendments and

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33. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 52 U.S.C. §§ 30101–30126, 30141–30145 (Supp. IV 2017)); see also Matthew A. Melone, *Citizens United* and Corporate Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?, 60 DePaul L. Rev. 29, 32–39 (2010) (describing the evolution of twentieth-century campaign finance law leading to the reforms of 1974). Professor Ciara Torres-Spelliscy has noted that federal laws restricting foreign ownership of broadcasters emerged throughout this period and were rooted in the same “deep concern about the impact of foreign propaganda on the American electorate” motivating limitations on foreign campaign contributions. Ciara Torres-Spelliscy, *Dark Money as a Political Sovereignty Problem*, 28 King’s L.J. 239, 251–53 (2017).

34. Anthony J. Gaughan, *The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform*, 77 Ohio St. L.J. 791, 798 (2016) [hereinafter Gaughan, *Forty-Year War*]; see also Richard Briffault, *Reforming Campaign Finance Reform: A Review of Voting with Dollars*, 91 Calif. L. Rev. 643, 651–52 (2003) (describing pre-FECA campaign finance disclosure laws as “ha[ving] little real effect other than signifying the symbolic importance of disclosure” due to “drafting defects and the lack of enforcement”); Rebecca Curry, *Making Law with Lawsuits: Understanding Judicial Review in Campaign Finance Policy*, 46 Suffolk U. L. Rev. 389, 400 (2013) (“Early campaign finance laws were notoriously easy to circumvent because their policymaking structure made compliance largely a matter of individual choice.”).

35. See Gaughan, *Forty-Year War*, supra note 34, at 799–800.

36. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered titles of the U.S.C.).

37. See Gaughan, *Forty-Year War*, supra note 34, at 802.

*Buckley v. Valeo*,<sup>38</sup> the subsequent landmark Supreme Court case that considered FECA's constitutionality—as commencing the “modern era” of campaign finance regulation.<sup>39</sup>

In *Buckley*, the Supreme Court struck down the 1974 FECA Amendments' limits on expenditures as unconstitutionally infringing on the right to political speech protected by the First Amendment,<sup>40</sup> thereby drawing a distinction between contributions and expenditures<sup>41</sup> that persists “[a]t the heart of American campaign finance law” to this day.<sup>42</sup> The Court reasoned that whereas expenditure limits “necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached,”<sup>43</sup> contribution limits are lesser restraints on political speech because they “permit[] the symbolic expression of support evidenced by a contribution but do[] not in any way infringe the contributor's freedom to discuss candidates and issues.”<sup>44</sup> Indeed, the Court ruled that contribution limits were “only a marginal restriction” on free speech rights, since “[a] contribution serves as a general expression of support . . . but does not communicate the underlying basis for the support.”<sup>45</sup> FECA's contribution restrictions and disclosure requirements were therefore justified by the government's compelling interest in preventing corruption and the appearance of corruption.<sup>46</sup>

Among the provisions of the 1974 FECA Amendments that survived *Buckley* was a ban on foreign contributions sponsored by Texas Senator Lloyd Bentsen.<sup>47</sup> Bentsen introduced the amendment after reports revealed that President Nixon had accepted over \$10 million in foreign

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38. 424 U.S. 1 (1976) (per curiam).

39. See, e.g., Samuel Issacharoff & Jeremy Peterman, Special Interests After *Citizens United*: Access, Replacement, and Interest Group Response to Legal Change, 9 Ann. Rev. L. & Soc. Sci. 185, 187 (2013) (“The modern era of federal campaign finance regulation begins with the Federal Election Campaign Act of 1971 (FECA), Pub. L. 92-225, and the Supreme Court's decision in *Buckley v. Valeo* (1974) that immediately followed.”); Kenneth D. Katkin, Campaign Finance Reform After *Federal Election Commission v. McConnell*, 31 N. Ky. L. Rev. 235, 239 (2004) (“The modern era of campaign finance reform began with the Federal Election Campaign Act Amendments of 1974, which was enacted in the wake of the Watergate scandal.” (footnote omitted)).

40. See *Buckley*, 424 U.S. at 51.

41. *Id.* at 20–21.

42. Richard Briffault, Coordination Reconsidered, 113 Colum. L. Rev. Sidebar 88, 88 (2013), <http://columbialawreview.org/wp-content/uploads/2016/05/Briffault-113-Colum.-L.-Rev.-88-2013.pdf> [<https://perma.cc/N8Z4-46ZP>].

43. *Buckley*, 424 U.S. at 19.

44. *Id.* at 21.

45. *Id.* at 20–21.

46. *Id.* at 26–29, 68, 72, 82.

47. See Vega, *supra* note 27, at 972.

contributions during his 1972 reelection campaign.<sup>48</sup> The amendment prohibited foreign nationals, except U.S. permanent residents, from making campaign contributions and prohibited candidates from “knowingly solicit[ing] or accept[ing] a [campaign] contribution” from foreign nationals.<sup>49</sup> While introducing the amendment, Senator Bentsen explained, “I do not think foreign nationals have any business in our political campaigns . . . . Their loyalties lie elsewhere; they lie with their own countries and their own governments.”<sup>50</sup> In 1976, the FEC was granted jurisdiction to enforce this provision.<sup>51</sup>

In 1989, the FEC promulgated a rule that extended the ban on foreign contributions to “expenditures” by foreign nationals, meaning “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made . . . for the purpose of influencing any election for Federal office.”<sup>52</sup>

Following the 1996 election, legal permanent residents were implicated in funneling contributions from the Chinese government to the Democratic National Committee.<sup>53</sup> The ensuing controversy provided part of the impetus for comprehensive campaign finance reform legislation,<sup>54</sup> championed by Senators John McCain and Russ Feingold, which included a section titled “Strengthening Foreign Money Ban.”<sup>55</sup> That bill

48. See *id.* at 972 & n.129 (describing Bentsen’s amendment as a response to revelations about the influence of foreign money in the 1972 presidential election).

49. 120 Cong. Rec. 8782 (1974) (text of amendment No. 1083).

50. *Id.* at 8783 (statement of Sen. Bentsen).

51. See Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, sec. 112, § 324, 90 Stat. 475, 493-94 (codified as amended at 52 U.S.C. § 30121 (Supp. IV 2017)).

52. Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 *Yale L. & Pol’y Rev.* 503, 513 & n.50 (1997) (emphasis added) (quoting 2 U.S.C. § 431(9)(A)(i)-(ii) (1994)). There was some controversy as to whether the foreign national spending ban covered “soft money”—contributions to political parties for state and local elections which could be used to fund mixed-purpose activities, such as get-out-the-vote drives, to influence federal elections as well—since the language in the 1974 FECA Amendments was somewhat ambiguous. The FEC interpreted the ban to cover state and local soft money, a construction that was eventually upheld by the D.C. Circuit. See *United States v. Kanchanalak*, 192 F.3d 1037, 1049-50 (D.C. Cir. 1999) (upholding the FEC’s interpretation of the 1974 FECA Amendments covering state and local elections as reasonable in light of the statute’s legislative history). The foreign national spending ban was later amended in 2002 to explicitly cover “Federal, State, or local election[s].” Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 303, 116 Stat. 81, 96 (codified at 52 U.S.C. § 30121 (Supp. IV 2017)).

53. See Brown, *supra* note 52, at 505-07; Vega, *supra* note 27, at 974.

54. Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. (1997).

55. *Id.* § 506. Although the proposed act contained many provisions, a significant amount of the floor debate was concerned with the issue of foreign contributions. See, e.g., 143 Cong. Rec. 21,172-73 (1997) (statement of Sen. Feingold); *id.* at 21,169 (statement of Sen. Abraham); *id.* at 21,157 (statement of Sen. Shelby); *id.* at 21,147 (statement of Sen. Feingold); *id.* at 21,145 (statement of Sen. Hagel); *id.* at 21,086-89, 21,099, 21,103

failed to overcome a filibuster in the Senate,<sup>56</sup> but a subsequent version was enacted five years later as the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>57</sup>

One of “BCRA’s goals was to provide enhanced criminal penalties for knowing and willful FECA violations . . . [and] to put in place a strong sentencing guideline for FECA crimes.”<sup>58</sup> BCRA therefore increased FECA’s criminal penalties,<sup>59</sup> extended the statute of limitations for all causes of action,<sup>60</sup> and added the involvement of “a contribution, donation, or expenditure from a foreign source” as an aggravating factor to be considered at sentencing.<sup>61</sup> It also clarified that the foreign national spending ban extended to state and local elections and expanded the ban on foreign national contributions to expenditures, independent expenditures, contributions to political parties, and electioneering communications, thereby codifying and expanding the FEC’s 1989 rule.<sup>62</sup>

2. *Current Law.* — The current statutory language of FECA makes it illegal for “a foreign national, directly or indirectly, to make . . . a contribution or donation of money *or other thing of value*, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election.”<sup>63</sup> Foreign nationals are also prohibited from making “contribution[s] or donation[s] to a committee of a political party” and “expenditure[s], independent expenditure[s], or disbursement[s] for an electioneering communication.”<sup>64</sup> In addition, the law bars any person from “solicit[ing], accept[ing], or receiv[ing] a contribution or donation . . . from a foreign national.”<sup>65</sup>

The term “foreign national” is statutorily defined in this context as foreign governments; foreign political parties; foreign partnerships, associations, corporations, and organizations; and individuals who are not

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(statement of Sen. McConnell); *id.* at 20,565 (statement of Sen. Feingold); *id.* at 20,562–64 (statement of Sen. Cleland); *id.* at 20,559 (statement of Sen. Lieberman).

56. 143 Cong. Rec. 22,061–62 (1997) (recording a 52-47 vote).

57. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended at 18 U.S.C. § 607 (2012), 36 U.S.C. §§ 510–511, 47 U.S.C. § 315, 52 U.S.C. ch. 301 (Supp. IV 2017)).

58. Craig C. Donsanto & Nancy L. Simmons, U.S. Dep’t of Justice, Federal Prosecution of Election Offenses, at xiii (7th ed. 2007), <http://www.justice.gov/sites/default/files/criminal/legacy/2013/09/30/electbook-0507.pdf> [<https://perma.cc/8CJB-XGKH>].

59. Bipartisan Campaign Reform Act of 2002 § 312.

60. See *id.* § 313.

61. See *id.* § 314.

62. See *id.* § 303; see also *supra* note 52 and accompanying text (describing the 1989 rule).

63. 52 U.S.C. § 30121(a)(1)(A) (Supp. IV 2017) (emphasis added).

64. *Id.* § 30121(a)(1)(B)–(C).

65. *Id.* § 30121(a)(2).

U.S. citizens, U.S. nationals, or lawful permanent residents.<sup>66</sup> The FEC defines “solicit” as “ask[ing], request[ing], or recommend[ing], explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide *anything of value*.”<sup>67</sup> FEC regulations also prohibit “provid[ing] substantial assistance in the solicitation, making, acceptance, or receipt of a contribution or donation” by a foreign national or “provid[ing] substantial assistance in the making of an expenditure, independent expenditure, or disbursement” by a foreign national.<sup>68</sup>

There are some important exceptions relevant to the foreign national spending ban. The “media exemption” provides that “[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station . . . , Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, is not a contribution.”<sup>69</sup> This exemption applies quite broadly to the activities of a person or organization determined to be a “press entity.”<sup>70</sup> Debate over the outer limits of who qualifies as a press entity remains ongoing,<sup>71</sup> but the general trend appears to favor an increasingly expan-

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66. See 22 U.S.C. § 611(b) (2012); 52 U.S.C. § 30121(b). Generally, a foreign corporation is one “organized under the laws of a foreign country.” Donsanto & Simmons, *supra* note 58, at 165. The FEC has established a body of precedent to deal with more complicated situations, such as the status of domestic subsidiaries of foreign corporations or domestic corporations owned by foreign nationals. See *id.* at 165–66; Foreign Nationals, FEC (June 23, 2017), <http://www.fec.gov/updates/foreign-nationals> [<https://perma.cc/5Y3M-P37Q>] (collecting the rules and precedents governing political activities by foreign-owned corporations or domestic subsidiaries of foreign corporate parents).

67. 11 C.F.R. § 300.2(m) (2018) (emphasis added) (“A solicitation is an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a clear message asking . . . or recommending that another person make a contribution, donation . . . or otherwise provide anything of value. A solicitation may be made directly or indirectly.”); see also *id.* § 110.20(a)(6) (incorporating the definition in § 300.2(m) into the foreign national spending context).

68. *Id.* § 110.20(h). “Substantial assistance” is defined as “active involvement in the solicitation, making, receipt or acceptance of a foreign national contribution or donation with an intent to facilitate successful completion of the transaction.” Contribution Limitations and Prohibitions, 67 Fed. Reg. 69,928, 69,945 (Nov. 19, 2002) (codified as amended at 11 C.F.R. pts. 102, 110 (2018)). The FEC promulgated the substantial assistance ban pursuant to its statutory charge to develop rules “necessary to carry out the provisions of [FECA],” 52 U.S.C. § 30107(a)(8), after determining that such a provision was “necessary to effectuate one of the key purposes of BCRA, that is, to prevent foreign national funds from influencing elections,” Contribution Limitations and Prohibitions, 67 Fed. Reg. at 69,945.

69. 11 C.F.R. § 100.73; *id.* § 100.132 (describing the same exception for expenditures).

70. See Note, Defining the Press Exemption from Campaign Finance Restrictions, 129 Harv. L. Rev. 1384, 1392 (2016) (“The FEC has only twice in recent years found that a media company’s activities were outside the scope of the press exemption.”).

71. See *id.* at 1395–96 (identifying a split among FEC commissioners over whether the media exemption should be narrowed or whether the First Amendment precludes such line drawing).

sive interpretation of the exemption.<sup>72</sup> There is also an exemption for volunteer services.<sup>73</sup> The key question in applying this exemption is whether the services provided are voluntary and uncompensated, whether by the campaign or any other person or entity;<sup>74</sup> establishing a formal “volunteering” relationship with a campaign is not a prerequisite.<sup>75</sup>

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72. See Jason M. Shepard, *Campaigning as the Press: Citizens United and the Problem of Press Exemptions in Law*, 16 *Nexus* 137, 139, 144, 147–48 (2010–2011). The FEC conducts a series of two-step analyses to determine whether the media exemption applies. The FEC first asks whether the entity is “a press or media entity.” FEC Advisory Op. 2010-08, at 4 (June 11, 2010) [hereinafter FEC, AO 2010-08], <http://saos.fec.gov/aodocs/AO%202010-08.pdf> [<https://perma.cc/Y88Z-722Q>]. Because this term is not defined in statute or regulation, the FEC focuses “on whether the entity in question produces on a regular basis a program that disseminates news stories, commentary, and/or editorials” when making this determination. *Id.* at 5. If the entity is a “press or media entity,” the FEC then applies a two-part analysis derived from *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981), which requires the FEC to determine “(A) [t]hat the entity is not owned or controlled by a political party, political committee, or candidate; and (B) [t]hat the entity is acting as a press entity in conducting the activity at issue (*i.e.*, whether the press entity is acting in its ‘legitimate press function’).” FEC, AO 2010-08, *supra*, at 4–5. In determining whether the press entity is acting pursuant to its “legitimate press function,” the FEC asks “(1) whether the entity’s materials are available to the general public, and (2) whether they are comparable in form to those ordinarily issued by the entity.” *Id.* at 6.

In 2010, for example, the FEC determined that the media exemption applied to *Citizens United*, an advocacy group which was the named plaintiff in *Citizens United v. FEC*, 558 U.S. 310 (2010), thereby reversing a 2004 Advisory Opinion that had held that the same organization did *not* qualify for the media exemption. See FEC Advisory Op. 2004-30, at 6 (Sept. 10, 2004), <http://saos.fec.gov/aodocs/2004-30.pdf> [<https://perma.cc/HZ9B-RAHF>]. In applying the media exemption to *Citizens United*, the FEC noted that the organization had produced and released significantly more documentary films in the preceding years as compared to 2004, FEC, AO 2010-08, *supra*, at 5 n.9; that it was not controlled by a political party or candidate, *id.* at 6; and that distributing documentary films was a legitimate press function for an entity like *Citizens United*, in part because it was being compensated by broadcasters for distributing its films in video-on-demand format rather than paying to air them, *id.* at 6–7. The FEC’s determination was arguably in conflict with the Supreme Court’s decision in *Citizens United*. See Shepard, *supra*, at 148 (noting that the Court had characterized *Citizens United*’s documentary as a “feature-length negative advertisement” that would still be subject to disclosure and disclaimer requirements; requirements which, Shepard argues, “ironically” would no longer apply under the press exemption (quoting *Citizens United*, 558 U.S. at 325)).

73. See 52 U.S.C. § 30101(8)(B) (Supp. IV 2017) (“The term ‘contribution’ does not include . . . the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee . . . .”); 11 C.F.R. § 100.74 (“The value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee is not a contribution.”); see also *id.* § 100.75 (exempting the use of a volunteer’s residential property); *id.* § 100.76 (exempting a volunteer’s use of a church or community room); *id.* § 100.77 (exempting the cost of invitations, food, and beverages provided at a residential property or a church or community room by a volunteer); *id.* § 100.94 (exempting certain kinds of volunteer internet activities, such as sending email or providing a hyperlink).

74. Bernie Sanders’s 2016 presidential campaign, for example, paid a \$14,500 civil penalty to the FEC to settle claims it violated the foreign national spending ban by placing delegates from the Australian Labor Party as “volunteers” with the campaign. See Conciliation Agreement at 2–3, *Bernie 2016*, MUR 7035 (FEC Feb. 15, 2018), <http://>

FECA's provisions are civilly enforceable by the FEC, but "knowing and willful" violations are also criminally enforceable and can be referred to the Department of Justice (DOJ) for investigation and prosecution.<sup>76</sup> "Knowingly" here means that a person either (1) has "actual knowledge that the source of the funds solicited, accepted or received is a foreign national"; (2) is "aware of facts that would lead a reasonable person to conclude that there is a substantial probability that the source" of such funds is a foreign national; or (3) is "aware of facts that would lead a reasonable person to inquire whether the source" of such funds is a foreign national, but failed to make a reasonable inquiry.<sup>77</sup>

3. *A Challenge to the Foreign National Spending Ban: Bluman v. FEC.* — The above-mentioned provisions were challenged on First Amendment grounds in *Bluman v. FEC*.<sup>78</sup> The plaintiffs, Benjamin Bluman and Asenath Steiman, were Canadian and Canadian Israeli citizens living in the United States on temporary work visas.<sup>79</sup> Bluman sought to make contributions to federal and state campaigns and to print and distribute flyers supporting President Obama's reelection; Steiman wanted to contribute to federal campaigns, the National Republican Senatorial Committee, and the Club for Growth, an independent advocacy organization.<sup>80</sup>

Then-Judge Brett Kavanaugh, writing for a three-judge panel of the U.S. District Court for the District of Columbia, acknowledged that "foreign citizens in the United States enjoy many of the same

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[eqs.fec.gov/eqsdocsMUR/18044437388.pdf](https://eqs.fec.gov/eqsdocsMUR/18044437388.pdf) [<https://perma.cc/9NSP-6KE2>]. Although the Australians "engaged in hands-on activity typical of volunteers . . . including encouraging voter attendance at campaign events, recruiting volunteers, canvassing with volunteers, and planning events," the Australian Labor Party had paid for their flights and provided them with a daily stipend. *Id.* at 2. The fact that the Australian "volunteers'" activities were compensated by another entity meant their activities were not covered by the volunteer services exemption—meaning the Sanders campaign had "accepted a \$24,422 prohibited in-kind foreign national contribution in violation of 52 U.S.C. § 30121(a)(2)." *Id.* at 3.

75. See Internet Communications, 71 Fed. Reg. 18,589, 18,603 (Apr. 12, 2006) (codified at 11 C.F.R. pts. 100, 110, 114) ("[FECA as amended] does not require that a candidate or political committee formally recognize an individual as a 'volunteer' for that individual's activities to be exempt from the definitions of 'contribution' and 'expenditure.'").

76. See 52 U.S.C. § 30109(a)(5)(C) (describing referral procedures); *id.* § 30109(d) (describing criminal penalties). The DOJ may also investigate and prosecute an alleged FECA violation independently of any FEC referral. See *Fieger v. U.S. Att'y Gen.*, 542 F.3d 1111, 1121 (6th Cir. 2008) ("[FECA] neither grants the FEC exclusive jurisdiction to enforce criminal provisions of the Act nor limits, in any way, the Attorney General's plenary power to enforce the criminal provisions of the Act.")

77. 11 C.F.R. § 110.20(a)(4); see also Richard C. Pilger ed., U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* 152–55 (8th ed. 2017), <http://www.justice.gov/criminal/file/1029066/download> [<https://perma.cc/4X9Z-F4ML>] (describing the intent requirement for criminal liability under FECA).

78. 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd mem.*, 565 U.S. 1104 (2012).

79. *Id.* at 285.

80. *Id.*

constitutional rights that U.S. citizens do,”<sup>81</sup> but nevertheless, the “government may exclude foreign citizens from activities ‘intimately related to the process of democratic self-government.’”<sup>82</sup> This is because “the ‘exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community’s process of political self-definition.’”<sup>83</sup>

Concluding that political contributions and express-advocacy expenditures are integral to the process of democratic self-government, the court upheld the foreign national spending ban.<sup>84</sup> It noted that its holding did not mean Congress could extend the ban to cover lawful permanent residents or bar foreign nationals from other forms of speech, such as issue advocacy, and cautioned that criminal convictions for violating this provision required proof of knowledge of the law.<sup>85</sup> The plaintiffs appealed, but Judge Kavanaugh had the last word as the Supreme Court summarily affirmed the decision.<sup>86</sup>

### C. *The First Amendment and the Overbreadth Doctrine*

Litigators seeking to challenge a statute as violating the First Amendment may argue that it is unconstitutionally overbroad. Scholars trace the origins of First Amendment “overbreadth doctrine” to the

81. *Id.* at 286.

82. *Id.* at 287 (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)).

83. *Id.* (emphasis added by *Bluman*) (quoting *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982)).

84. *Id.* at 288.

85. *Id.* at 292.

86. See *Bluman v. FEC*, 565 U.S. 1104, 1104 (2012) (mem.), *aff’g* 800 F. Supp. 2d 281. Some scholars have argued that the Court’s summary affirmance rendered its campaign finance jurisprudence incoherent, since Judge Kavanaugh’s reasoning in *Bluman* is in considerable tension with *Citizens United v. FEC*, 558 U.S. 310 (2010). See, e.g., Richard L. Hasen, *Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections* 113–18 (2016) (questioning why, in the First Amendment context, “legislators can decide that ‘different rules might apply’ to foreign individuals, but . . . they cannot make the same judgment about artificial entities such as corporations” (quoting Brad Smith, *Bluman v. FEC* and the Infield Fly Rule, *Inst. for Free Speech* (Jan. 9, 2012), <http://www.ifs.org/2012/01/09/bluman-v-fec-and-the-infield-fly-rule> [<https://perma.cc/D8A3-Z8NL>])); Liz Kennedy & Seth Katsuya Endo, *The World According to, and After, McCutcheon v. FEC, and Why It Matters*, 49 *Val. U. L. Rev.* 533, 563 (2015) (“Chief Justice Roberts’s commitment to the value of unbridled speech even in the context of campaign finance is difficult to square with *Bluman v. FEC* . . .”); Todd E. Pettys, *Campaign Finance, Federalism, and the Case of the Long-Armed Donor*, 81 *U. Chi. L. Rev. Dialogue* 77, 91 (2014), [http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1029&context=ucprev\\_online](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1029&context=ucprev_online) (on file with the *Columbia Law Review*) (“Even if *Bluman*’s fit with *Citizens United* ultimately remains uncomfortable, the Court’s decision to issue a two-word affirmance in the former seems only to confirm that the justices are unlikely to rethink a central piece of *Citizens United*.”). This argument is perhaps reinforced by the fact that the *Bluman* court relied in part on the dissent in *Citizens United* but not the majority opinion. See *Bluman*, 800 F. Supp. 2d at 289.



Supreme Court's 1940 decision in *Thornhill v. Alabama*.<sup>87</sup> Overbreadth challenges are unusual in several respects. First, they allow for third-party standing,<sup>88</sup> relaxing the typical requirement “that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”<sup>89</sup> Additionally, under overbreadth doctrine, facial challenges to a law or regulation may be brought under a less stringent standard than usual. Normally, a plaintiff “would have to establish ‘that no set of circumstances exists under which [the law] would be valid.’”<sup>90</sup> A law restricting speech, however, “may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’”<sup>91</sup>

The overbreadth doctrine allows parties to bring facial challenges to laws that restrict or chill constitutionally protected speech, out of a recognition “that the First Amendment needs breathing space.”<sup>92</sup> For this reason, “statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.”<sup>93</sup> Acknowledging that this is “strong medicine,” the Court has stated it should be applied “sparingly and only as a last resort.”<sup>94</sup>

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87. 310 U.S. 88 (1940); see also Richard H. Fallon, Jr., Making Sense of Overbreadth, 100 Yale L.J. 853, 863–64 (1991) (providing an overview of the historical origins of the overbreadth doctrine).

88. See *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 392–93 (1988) (“[L]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.” (second alteration in original) (internal quotation marks omitted) (quoting *Sec’y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 956–57 (1984))).

89. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

90. *United States v. Stevens*, 559 U.S. 460, 472 (2010) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

91. *Id.* at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)); see also *Virginia v. Hicks*, 539 U.S. 113, 118 (2003) (“The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges.”).

92. *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973).

93. *Id.* at 611–12; see also *Hicks*, 539 U.S. at 119 (“We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or ‘chill’ constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.”).

94. *Broadrick*, 413 U.S. at 613; see also *Hicks*, 539 U.S. at 119 (“[T]here are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct.”).

Therefore, to be declared facially invalid, a law must be *substantially* overbroad.<sup>95</sup> While this concept “is not readily reduced to an exact definition[,] . . . the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.”<sup>96</sup> Rather, “there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.”<sup>97</sup>

In practice, this analysis often comes down to how prevalent the situations are in which the court believes the law could be applied to prohibit protected speech.<sup>98</sup> Professor Richard Fallon has argued for a balancing test that weighs the state’s interest in sanctioning a particular kind of speech against the First Amendment interest in avoiding chilling protected conduct, such that “[t]he more weighty the state’s context-specific interest . . . [and] the farther that chilled conduct lies from the central concerns of the First Amendment[,] . . . the more a federal court should hesitate about” invalidating a statute.<sup>99</sup>

Courts can employ various tools to temper this “strong medicine.” They may construe a statute narrowly to avoid overbreadth problems.<sup>100</sup> They may also sever an overbroad portion of a law from the rest of the

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95. See *United States v. Williams*, 553 U.S. 285, 292 (2008) (“[W]e have vigorously enforced the requirement that a statute’s overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.”); *Broadrick*, 413 U.S. at 615 (“[T]he overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”).

96. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984); see also *New York v. Ferber*, 458 U.S. 747, 772 n.27 (1982) (“[W]ithout a substantial overbreadth limitation, review for overbreadth would be draconian indeed. It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application.” (internal quotation marks omitted) (quoting Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 859 n.61 (1970))).

97. *Vincent*, 466 U.S. at 801.

98. See, e.g., *United States v. Stevens*, 559 U.S. 460, 481–82 (2010) (striking down a statute banning certain depictions of animal cruelty because its “presumptively impermissible applications . . . far outnumber any permissible ones”). Compare *City of Houston v. Hill*, 482 U.S. 451, 466–67 (1987) (striking down as overbroad an ordinance that made it illegal to interrupt police officers as they carried out their duties, since its “plain language is admittedly violated scores of times daily”), with *Ferber*, 458 U.S. at 773 (upholding a state law prohibiting child pornography even though it could apply to works with real value because such works would not constitute “more than a tiny fraction of the materials within the statute’s reach”).

99. Fallon, *supra* note 87, at 894–95.

100. See, e.g., *Osborne v. Ohio*, 495 U.S. 103, 115–16 (1990) (upholding the Ohio Supreme Court’s narrow construction of a statute in the face of an overbreadth challenge); *Boos v. Barry*, 485 U.S. 312, 329–32 (1988) (upholding a lower court’s narrowing construction of a law which regulates gatherings near buildings in the District of Columbia occupied by foreign governments and subsequently finding that the statute was not substantially overbroad).

statute and strike down only the overbroad provision while upholding the rest.<sup>101</sup> The Supreme Court has typically been more willing to adopt statute-saving interpretations—thereby upholding laws against overbreadth challenges—in the criminal, rather than civil, context.<sup>102</sup>

Of course, in addition to the facial-challenge route allowed by overbreadth doctrine, a litigant can still argue that application of the law to her would be unconstitutional in the more conventional manner: as applied. This type of claimant “attacks the validity of [the statute] not facially, but as applied to his acts of solicitation,” whereas the person invoking overbreadth “may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him.”<sup>103</sup>

## II. EVALUATING THE LEGALITY OF THE TRUMP TOWER MEETING

This Part examines the legal questions raised by the June 2016 meeting between members of the Trump campaign and Russian officials by applying the law discussed in Part I. Section II.A examines the scope of the phrase “thing of value” in the context of 52 U.S.C. § 30121. Section II.B considers the constitutional implications of a broad interpretation of the foreign national spending ban.

### A. *What Does “Thing of Value” Mean?*

This section explores the range of activities that could be considered an illegal contribution or expenditure by a foreign national under the statutory language. Section II.A.1 discusses the relevant regulatory definitions. Section II.A.2 looks at past FEC precedent in handling intangible goods or services, such as information. Section II.A.3 examines how “thing of value” is interpreted in other legal contexts. Section II.A.4 considers how canons of statutory interpretation should inform the analysis.

1. *Regulatory Definitions.* — Under current campaign finance law, foreign nationals are prohibited from making campaign contributions

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101. See, e.g., *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 507 (1985) (“In these circumstances, the issue of severability is no obstacle to partial invalidation, which is the course the Court of Appeals should have pursued.”); *Ferber*, 458 U.S. at 769 n.24 (“[I]f the federal statute is not subject to a narrowing construction and is impermissibly overbroad, it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated.”).

102. See *The Supreme Court, 2007 Term—Leading Cases*, 122 Harv. L. Rev. 276, 385–86 (2008) (“Although overbreadth claims are nominally available to both civil litigants and criminal defendants on equal terms, they have been almost invariably rejected by the Supreme Court when brought as defenses to prosecution . . . . [W]hen criminal defendants champion speech interests, courts may become less protective of First Amendment rights . . . .”).

103. *Bd. of Trs. v. Fox*, 492 U.S. 469, 482–83 (1989) (alteration in original) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 462 & n.20 (1978)).

and it is illegal to solicit such a contribution.<sup>104</sup> But a contribution need not be in the form of money. Rather, a “contribution” can be “[a] gift, subscription, loan . . . , advance, or deposit of money or *anything of value* made by any person for the purpose of influencing any election for Federal office.”<sup>105</sup> “[A] *nything* of value includes *all* in-kind contributions . . . [u]nless specifically exempted . . . .”<sup>106</sup> Providing goods or services for free, or for “less than the usual and normal charge”—meaning less than the market price at which goods would be ordinarily purchased or the prevailing commercially reasonable rate for services—constitutes a contribution.<sup>107</sup> Nearly identical language is used in the definition of “expenditure.”<sup>108</sup> On its face, therefore, the statutory and regulatory language indicates a very broad application.

2. *FEC Precedent.* — Indeed, when faced with the question, the FEC has found that the foreign national spending ban covers a broad range of in-kind goods and services. In 1982, in one of the first advisory opinions (AOs) addressing this provision, the FEC held that a foreign national artist could not donate an original work of art to a U.S. Senate campaign for fundraising purposes.<sup>109</sup> The FEC determined that such a donation would be a “thing of value” provided in connection with an election and would therefore violate the foreign national spending ban.<sup>110</sup>

The FEC has also held that oral communications about valuable, campaign-related information can constitute a contribution. In 1990, a U.S. House of Representatives candidate, Sean Strub, sought guidance

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104. See *supra* section I.B.2.

105. 11 C.F.R. § 100.52(a) (2018) (emphasis added).

106. *Id.* § 100.52(d)(1) (second emphasis added).

107. *Id.* § 100.52(d)(1)–(2).

108. See *id.* § 100.111(e).

109. FEC Advisory Op. 1981-51, at 1–2 (Jan. 29, 1982) [hereinafter FEC, AO 1981-51], <http://fec-dev-proxy.app.cloud.gov/files/legal/aos/1981-51/1981-51.pdf> [<https://perma.cc/2LMW-FDTQ>].

110. *Id.* But see FEC Advisory Op. 1987-25, at 1–2 (Sept. 17, 1987) [hereinafter FEC, AO 1987-25], <http://www.fec.gov/files/legal/aos/62519.pdf> [<https://perma.cc/V2KG-TYC2>] (holding that a foreign national student could work as an uncompensated volunteer, since such services fell under the exemption for uncompensated volunteer services). The two U.S. Code sections referred to in these AOs, 2 U.S.C. § 431(8)(B)(i) (volunteer services exemption) and § 441e (foreign national spending ban), are now codified at 52 U.S.C. § 30101(8)(B)(i) (Supp. IV 2017) and § 30121, respectively.

The 1987 AO does not clarify why the foreign national student’s volunteer services fall under the volunteering exemption, but the foreign national artist’s do not. Adding to the lack of clarity, the FEC acknowledged the potential conflict with FEC, AO 1981-51, *supra* note 109, but explicitly declined to overrule or supersede it. See FEC, AO 1987-25, *supra*, at 2. In 2015, the FEC finally expressly superseded AO 1981-51, determining that it failed to fully account for the volunteer services exemption. See FEC Advisory Op. 2014-20, at 3 n.5 (Mar. 19, 2015) [hereinafter FEC, AO 2014-20], [http://www.fec.gov/files/legal/aos/2014-20/AO-2014-20-\(Make-Your-Laws-PAC\)-Final-\(3.19.15\).pdf](http://www.fec.gov/files/legal/aos/2014-20/AO-2014-20-(Make-Your-Laws-PAC)-Final-(3.19.15).pdf) [<https://perma.cc/MQ7L-Y9TY>]. The FEC did not, however, overrule AO 1981-51’s broad interpretation of “thing of value.” See *id.*

on accepting part-time volunteer services from a former rival for the same seat who had decided to drop out.<sup>111</sup> That rival had commissioned a poll for his own campaign while still a candidate.<sup>112</sup> The FEC determined that because the rival had commissioned the poll for his own candidacy and not in contemplation of working for the Strub campaign, the rival's receipt of the poll results was a completion of the original transaction and his newly gained knowledge was therefore not a contribution to the Strub campaign.<sup>113</sup> However, if the volunteer "impart[ed] poll result information" to anyone involved with the Strub campaign or "use[d] the poll information to advise [the Strub] campaign on matters such as campaign strategy or creating media messages," then it would be considered a contribution.<sup>114</sup> Similarly, in a 2001 enforcement matter, the FEC's general counsel determined that sharing the findings from opposition research with a campaign free of charge constituted an in-kind contribution.<sup>115</sup>

In 2007, the FEC advised a U.S. House candidate that he could not accept, free of charge, printed materials such as "flyers, advertisements, door hangers, tri-folds, [and] signs" from former Canadian political candidates who had previously used those items in their own campaigns.<sup>116</sup> The FEC determined that this transaction would constitute an illegal contribution, "*particularly in light of the broad scope of the prohibition on contributions from foreign nationals.*"<sup>117</sup> The FEC may consider a good or service to be a "thing of value" for the purposes of campaign finance law even when "the value . . . may be nominal or difficult to ascertain."<sup>118</sup>

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111. See FEC Advisory Op. 1990-12, at 1 (Aug. 3, 1990) [hereinafter FEC, AO 1990-12], <http://fec-dev-proxy.app.cloud.gov/files/legal/aos/1990-12/1990-12.pdf> [<https://perma.cc/6FUM-CDV2>].

112. See *id.*

113. See *id.* at 2.

114. *Id.*

115. General Counsel's Brief at 85, Cone, MURs 4568, 4633, 4634 & 4763 (FEC July 18, 2001), <http://eqs.fec.gov/eqsdocsMUR/28044192498.pdf> [<https://perma.cc/5C5K-RXYB>] (finding that "the pre-emptive Opposition Research reports on various Republican candidates that were commissioned and paid for by Triad/CSM and Triad Inc." constituted "in-kind contributions"). Triad/CSM and Triad Inc., companies that billed themselves as "for-profit enterprise[s] whose business was providing specialized information, advice and services to conservative donors in connection with their political and charitable contributions," were determined by the FEC to be "unregistered and nonreporting political committees, whose major purpose was electoral activity." *Id.* at 3. The FEC found that these entities spent tens of thousands of dollars conducting "pre-emptive" opposition research on Republican political candidates and then shared their findings with the candidates in order to provide a "warning of what issues their opponents might raise during the upcoming campaign." *Id.* at 85.

116. FEC Advisory Op. 2007-22, at 6 (Dec. 3, 2007) [hereinafter FEC, AO 2007-22], <http://www.fec.gov/files/legal/aos/2007-22/2007-22.pdf> [<https://perma.cc/YR3B-ZQMX>].

117. *Id.* (emphasis added).

118. *Id.* at 5-6.

In fact, “[t]he lack of a market, and thus the lack of a ‘usual and normal charge,’ . . . does not necessarily equate to a lack of value.”<sup>119</sup>

In some circumstances, however, the FEC has found that foreign nationals may provide uncompensated volunteer services, which fall within the volunteer services exemption<sup>120</sup> and therefore do not count as a “contribution.” The same FEC AO that found that accepting printed campaign materials from Canadians would be prohibited also concluded that the U.S. House campaign could accept Canadian citizens as volunteers to engage in canvassing and get-out-the-vote activities.<sup>121</sup>

119. First General Counsel’s Report at 8 n.12, Citizens for Responsibility & Ethics in Wash., MUR 5409 (FEC Sept. 1, 2004) [hereinafter FEC, MUR 5409], <http://www.fec.gov/files/legal/murs/current/31200.pdf> [<https://perma.cc/HK42-TMBS>]. But see *infra* note 208 and accompanying text (questioning the precedential value of a footnote in a general counsel’s report).

120. 11 C.F.R. § 100.74 (2018) (“The value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee is not a contribution.”); see also *supra* notes 73–75 and accompanying text (describing the volunteer services exemption).

121. FEC, AO 2007-22, *supra* note 116, at 3; see also FEC, AO 2014-20, *supra* note 110, at 1–4 (concluding that a political action committee (PAC) can accept volunteer services from foreign nationals likely to result in the development of website code and logos); FEC Advisory Op. 2004-26, at 1–3 (Aug. 20, 2004) [hereinafter FEC, AO 2004-26], <http://fec-dev-proxy.app.cloud.gov/files/legal/aos/2004-26/2004-26.pdf> [<https://perma.cc/PK8Y-J2CC>] (concluding that a foreign national can engage in volunteer services for a congressional campaign and nonconnected PAC, so long as she does not take part in the decisionmaking processes); FEC, AO 1987-25, *supra* note 110 (concluding that a foreign national student can volunteer for a presidential campaign).

The FEC has also previously determined that a concert performance by Elton John, a foreign national, at a fundraiser for Hillary Clinton’s 2008 presidential campaign fell under the volunteer exemption. See First General Counsel’s Report at 3, Am. Right to Life Action, MURs 5987, 5995 & 6015 (FEC Jan. 26, 2009) [hereinafter FEC, MURs 5987, 5995 & 6015], <http://eqs.fec.gov/eqsdocsMUR/10044264653.pdf> [<https://perma.cc/2RHN-SCG3>]. The FEC acknowledged the apparent conflict with FEC, AO 1981-51, *supra* note 109, at 2, but attempted to distinguish the two situations by noting that the foreign artist in 1982 proposed to donate “a tangible good (original artwork and the right to reproduce it), whereas . . . [i]n the present matter, Elton John’s uncompensated concert performance would constitute the donation of [a] service.” *Id.* at 7. This distinction is relevant because the volunteer exemption references “the value of *services provided* without compensation.” 52 U.S.C. § 30101(8)(B)(i) (Supp. IV 2017) (emphasis added); see also 11 C.F.R. § 100.74 (“The value of *services provided* without compensation by any individual who volunteers on behalf of a candidate or political committee is not a contribution.” (emphasis added)). The FEC also cited another AO in which it had “concluded that uncompensated performances by individuals in the entertainment industry would be exempt from the definition of ‘contribution’ as long as the performers provided the services in their individual capacities and all costs associated with the performances themselves would be paid” by the candidate. FEC, MURs 5987, 5995 & 6015, *supra*, at 7–8 (citing FEC Advisory Op. 2007-08 (July 12, 2007), <http://fec-dev-proxy.app.cloud.gov/files/legal/aos/2007-08/2007-08.pdf> [<https://perma.cc/KQ3B-WPU7>])).

Apparently recognizing the incongruence of treating two foreign national artists differently simply due to their medium of art, the FEC later rejected its earlier distinction between goods and services. See FEC, AO 2014-20, *supra* note 110, at 3 n.5 (“[T]o the

It seems unlikely that what Veselnitskaya offered—as characterized by Goldstone<sup>122</sup>—could be deemed uncompensated volunteer services. “Political [o]pposition [r]esearch”—what Trump, Jr. believed he was being offered<sup>123</sup>—is a resource-intensive product that campaigns regularly pay for.<sup>124</sup> While the market value for such information might be difficult to ascertain, the FEC has indicated that valuation challenges do not prevent a good or service from constituting something of value and thus qualifying as a contribution.<sup>125</sup> Even if what was shared was simply orally conveyed information about the findings of an opposition research operation, the information could likely constitute a banned contribution under AO 1990-12 if it were used to shape campaign strategy or messaging.<sup>126</sup>

3. *Other Legal Contexts.* — “Thing of value” is a term that appears in other areas of the law, most notably the federal laws that prohibit giving bribes or gratuities to public officials.<sup>127</sup> Courts have construed “anything of value” in the bribery context very broadly, covering intangibles such as sex,<sup>128</sup> expungement of convictions,<sup>129</sup> a promise of future employment,<sup>130</sup>

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extent that MURs 5987, 5996, and 6015 (Hillary Clinton For President) sought to distinguish Advisory Opinion 1981-51 (Metzenbaum) by making a distinction between the provision of volunteer services by a foreign national and the creation and donation of a tangible good, the Commission does not adopt that reasoning.”).

122. Goldstone’s email to Trump, Jr. claimed the Russian “Crown prosecutor . . . offered to provide the Trump campaign with some official documents and information that would incriminate Hillary and her dealings with Russia and would be very useful to your father.” Becker, Goldman & Apuzzo, *I Love It*, supra note 1 (internal quotation marks omitted). He continued, “This is obviously very high level and sensitive information but is part of Russia and its government’s support for Mr. Trump.” *Id.* (internal quotation marks omitted). Goldstone was apparently referencing Yuri Chaika, Russia’s prosecutor general. See Ioffe, supra note 5.

123. Trump, Jr., supra note 14.

124. See infra notes 196–197, 210 (describing political opposition research as a multimillion-dollar industry).

125. See supra notes 118–119 and accompanying text.

126. FEC, AO 1990-12, supra note 111, at 2; see also supra notes 111–114 and accompanying text.

127. See 18 U.S.C. § 201(b) (2012) (prohibiting, among other things, “corruptly giv[ing], offer[ing] or promis[ing] *anything of value* to any public official” with intent to influence an official act (emphasis added)); *id.* § 201(c) (prohibiting, among other things, “otherwise than as provided by law for the proper discharge of official duty . . . giv[ing], offer[ing], or promis[ing] *anything of value*” to public officials (emphasis added)); *id.* § 666 (prohibiting recipients of federal funds from “corruptly solicit[ing], . . . demand[ing], . . . or agree[ing] to accept, *anything of value* . . . intending to be influenced . . . in connection with any business, transaction, or series of transactions,” and prohibiting “corruptly giv[ing], offer[ing], or agree[ing] to give *anything of value*” to such entity with intent to influence (emphasis added)); see also 15 U.S.C. § 78dd-1 (2012) (prohibiting persons covered by the Foreign Corrupt Practices Act from paying or promising “*anything of value*” to a foreign official in order to influence an official decision (emphasis added)).

128. See *United States v. Moore*, 525 F.3d 1033, 1048 (11th Cir. 2008).

129. See *United States v. Fernandes*, 272 F.3d 938, 944 (7th Cir. 2001).

reduced police investigation of drug trafficking,<sup>131</sup> and incremental increases in freedom while incarcerated.<sup>132</sup> The objective value of a “thing of value” in this context is less relevant than the subjective value attached to it by the recipient.<sup>133</sup>

“Thing of value” also appears in a range of other statutory contexts in which courts have interpreted the language broadly to encompass intangibles, including federal laws prohibiting influencing trustees of employee benefit plans,<sup>134</sup> false impersonation of an officer of the United States,<sup>135</sup> conversion of federal property,<sup>136</sup> certain financial transactions between labor organizations and employer representatives,<sup>137</sup> mailing

130. See *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986).

131. See *United States v. Robinson*, 663 F.3d 265, 267 (7th Cir. 2011).

132. See *United States v. Townsend*, 630 F.3d 1003, 1011 (11th Cir. 2011).

133. See *Gorman*, 807 F.2d at 1305 (“In order to put the underlying policy of the statute into effect, the term ‘thing of value’ must be broadly construed. Accordingly, the focus of the above term is to be placed on the value which the defendant subjectively attaches to the items received.”); *United States v. Williams*, 705 F.2d 603, 623 (2d Cir. 1983) (“We think [the trial judge] correctly construed the statutes to focus on the value that the defendants subjectively attached to the items received. The phrase ‘anything of value’ in bribery and related statutes has consistently been given a broad meaning . . .”).

134. 18 U.S.C. § 1954 (2012) (prohibiting any “administrator, officer, [or] trustee . . . of any employee welfare [or pension] benefit plan . . . [from] receiv[ing] or agree[ing] to receive or solicit[ing] any fee, kickback, commission, gift, loan, money, or *thing of value*” in exchange for being influenced with respect to any matter concerning the plan (emphasis added)); see also, e.g., *United States v. Rosenthal*, 9 F.3d 1016, 1023 (2d Cir. 1993) (“We have interpreted the phrase ‘thing of value’ [in § 1954] to include both tangible and intangible things.”); *United States v. Schwartz*, 785 F.2d 673, 680–81 (9th Cir. 1986) (“Nothing in the legislative history of section 1954 suggests that Congress intended *thing of value* to be construed more narrowly than in other statutes employing the phrase . . . . The very words and purpose of the statute show that Congress clearly intended the scope of *thing of value* to include intangibles . . .”).

135. 18 U.S.C. § 912 (“Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States . . . and acts as such, or in such pretended character demands or obtains any money, paper, document, or *thing of value*, shall be fined under this title or imprisoned . . .” (emphasis added)); see also, e.g., *United States v. Sheker*, 618 F.2d 607, 609 (9th Cir. 1980) (rejecting the government’s “sweeping position that 18 U.S.C. 912 extends to anything that has value to the defendant” but acknowledging that “[i]nformation can be a thing of value” and “[i]nformation obtained for political advantage might have value apart from its worth in dollars”).

136. 18 U.S.C. § 641 (prohibiting the unauthorized sale, conveyance, or disposal of “any record, voucher, money, or *thing of value* of the United States” (emphasis added)); see also, e.g., *United States v. Collins*, 56 F.3d 1416, 1420 (D.C. Cir. 1995) (noting that “every circuit, except one, dealing with this issue has held that intangible property falls within the purview of section 641”); *United States v. Fowler*, 932 F.2d 306, 310 (4th Cir. 1991) (“[I]nformation is a species of property and a thing of value [for the purposes of § 641].”).

137. 29 U.S.C. § 186 (2012) (prohibiting any employer or employer’s representative from “pay[ing], lend[ing], or deliver[ing] . . . any money or *other thing of value*” to a labor representative and prohibiting any labor representative from demanding or accepting any such payment, loan, or delivery (emphasis added)); see also, e.g., *Mulhall v. Unite Here Local 355*, 667 F.3d 1211, 1215 (11th Cir. 2012) (applying “common sense” to determine that assistance in organizing “can be a thing of value”); *United States v. Douglas*, 634 F.3d



threatening communications,<sup>138</sup> and extortion across state lines.<sup>139</sup> As early as 1979, the Second Circuit recognized that the phrase “thing of value” could be “found in so many criminal statutes throughout the United States that [the words] have in a sense become words of art” that courts consistently construe broadly.<sup>140</sup>

To be sure, these laws occupy a different legal field than campaign finance, and there are other limitations on their scope, such as the requirements that the “thing of value” be given with corrupt intent<sup>141</sup> or in exchange for an “official act”<sup>142</sup> in the case of the bribery statutes. However, Congress should have been aware of these expansive constructions when it enacted an updated version of the foreign national spending ban in 2002 with the same “money or other thing of value” language.<sup>143</sup> Seemingly the only reason for Congress to include “thing of value” in this part of the statute would be to encompass a broader range of activities within the meanings of “contribution” and “expenditure” than simply spending money.

4. *Canons of Interpretation.* — When confronted with a statutory term that appears ambiguous, courts will sometimes apply canons of construction to aid in interpretation, such as *noscitur a sociis*<sup>144</sup> or *eiusdem*

852, 858 (6th Cir. 2011) (rejecting the argument “that the word ‘other’ in the phrase ‘money or other thing of value’ constrains ‘thing of value’ to things of *monetary* value”).

138. 18 U.S.C. § 876(b)–(d) (prohibiting mailing “any communication containing any threat to kidnap any person or any threat to injure the person [or] . . . any threat to injure the property or reputation of the addressee or of another” with “intent to extort from any person any money or *other thing of value*” (emphasis added)); see also, e.g., *United States v. Nilsen*, 967 F.2d 539, 543 (11th Cir. 1992) (per curiam) (holding that witness testimony is a “thing of value” under § 876 because “the phrase ‘thing of value’ is a clearly defined term that includes intangible objectives”).

139. 18 U.S.C. § 875(b)–(d) (prohibiting the communication of a threat to kidnap or injure a person or damage property or a person’s reputation across state lines “with intent to extort from any person . . . any money or *other thing of value*” (emphasis added)); see also, e.g., *United States v. Hobgood*, 868 F.3d 744, 747 (8th Cir. 2017) (holding that an apology can constitute a “thing of value” for the purposes of § 875(d)).

140. *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979).

141. See generally Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 *UCLA L. Rev.* 784, 796–806 (1985) (exploring the meaning of “corrupt intent” in the bribery context).

142. See *McDonnell v. United States*, 136 S. Ct. 2355, 2371–72 (2016) (clarifying the definition of “official act” in 18 U.S.C. § 201).

143. Bipartisan Campaign Reform Act of 2002, Pub L. No. 107-155, § 303, 116 Stat. 81, 96 (codified at 52 U.S.C. § 30121 (Supp. IV 2017)) (“It shall be unlawful for . . . a foreign national, directly or indirectly, to make . . . a contribution or donation of *money or other thing of value*, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election . . .” (emphasis added)).

144. *Noscitur a sociis*, *Black’s Law Dictionary* (10th ed. 2014) (“[T]he meaning of an unclear word or phrase, esp[ecially] one in a list, should be determined by the words immediately surrounding it.”).

generis.<sup>145</sup> However, these canons are probably of limited utility here. The “list” in the foreign national spending ban consists only of “money or other thing of value.”<sup>146</sup> One could argue that the contextual definition of “thing of value” should be cabined by “money,” but this interpretation is problematic. Because there are only two items here, reading “thing of value” to be constrained by “money” might violate the rule against surplusage, “the presumption that every statutory term adds something to a law’s regulatory impact.”<sup>147</sup> Moreover, when a statutory “phrase is disjunctive, with one specific and one general category, . . . [t]he absence of a list of specific items undercuts the inference embodied in *ejusdem generis* that Congress remained focused on the common attribute when it used the catchall phrase.”<sup>148</sup>

Importantly, construing “thing of value” too narrowly here would undermine the regulatory regime established by FECA, since the foreign national spending ban could be easily circumvented if “thing of value” is interpreted to exclude intangible information. Under this reading, a foreign national would be prohibited from providing a cash contribution to a campaign—money which could be used to finance campaign operations, such as conducting polls—but would *not* be prohibited from providing in-kind support so long as it is intangible information, such as polling data.

#### B. “Thing of Value” and the First Amendment

This section examines the constitutional implications of a broad interpretation of “thing of value” in the foreign national spending ban context. Section II.B.1 discusses the First Amendment rights at stake. Section II.B.2 considers whether the broad reading renders the foreign national spending ban overbroad by considering potentially problematic hypothetical applications. Section II.B.3 addresses the spending ban’s application to the June 2016 meeting.

1. *The Rights at Stake.* — Almost immediately after the *New York Times* first revealed the June 2016 meeting’s existence, a debate commenced over the legality of the events that had occurred. A trio of watchdog groups soon filed a complaint with the FEC and requested that the DOJ launch a criminal investigation.<sup>149</sup> Several leading campaign finance

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145. *Ejusdem generis*, Black’s Law Dictionary (10th ed. 2014) (“[W]hen a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.”); see also *Yates v. United States*, 135 S. Ct. 1074, 1085–87 (2015) (applying *noscitur a sociis* and *ejusdem generis* to interpret an ambiguous statutory phrase).

146. 52 U.S.C. § 30121(a).

147. William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Legislation and Statutory Interpretation* 275 (2d ed. 2006).

148. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008).

149. Letter from Paul S. Ryan, Vice President, Common Cause, Brendan M. Fischer, Campaign Legal Ctr., & Fred Wertheimer, Democracy 21, to Rod J. Rosenstein, Deputy

experts asserted that Trump, Jr.'s actions certainly appeared to be a violation of the prohibition on soliciting foreign national contributions.<sup>150</sup> However, other commentators expressed skepticism that “thing of value” could be read so broadly in this context<sup>151</sup> and cautioned that if it could, then the statute was likely unconstitutionally overbroad, infringing on both foreign nationals’ free speech rights and American citizens’ rights to hear foreign nationals speak.<sup>152</sup>

Foreigners do have speech rights protected by the First Amendment. In 1945, noting that “[f]reedom of speech and of press is accorded aliens residing in this country,” the Supreme Court in *Bridges v. Wixon* blocked a permanent resident’s deportation proceedings that were initiated due to his associations with the Communist Party.<sup>153</sup> Unlike the petitioner in

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Att’y Gen., U.S. Dep’t of Justice, & Robert Mueller, Special Counsel, U.S. Dep’t of Justice (July 13, 2017), [http://www.campaignlegalcenter.org/sites/default/files/7\\_13\\_17%20DOJ%20letter%20w%20exhibits\\_0.pdf](http://www.campaignlegalcenter.org/sites/default/files/7_13_17%20DOJ%20letter%20w%20exhibits_0.pdf) [<https://perma.cc/Y6FA-NPPR>].

150. See, e.g., Bob Bauer, If “Love” Knows No Bounds: On Criminal “Intent” and the Scope of Campaign Finance Law, *Just Security* (July 25, 2017), <http://www.justsecurity.org/43537/love-bounds-criminal-intent-scope-campaign-finance-law> [<https://perma.cc/QHX6-QQVA>]; Richard L. Hasen, Donald Trump Jr.’s Free Speech Defense, *Slate* (July 12, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/07/donald\\_trump\\_jr\\_s\\_free\\_speech\\_defense\\_is\\_as\\_bogus\\_as\\_it\\_sounds.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/donald_trump_jr_s_free_speech_defense_is_as_bogus_as_it_sounds.html) [<https://perma.cc/F5JD-BA6S>] [hereinafter Hasen, Free Speech Defense].

151. See, e.g., Saikrishna Bangalore Prakash, The Russia Connections May Yet Bring Trump Down. But Right Now Critics Are Crying Wolf., *Vox* (July 17, 2017), <http://www.vox.com/the-big-idea/2017/7/17/15978574/crying-wolf-don-trump-jr-campaign-contributions-russia-law> [<https://perma.cc/H374-X7A5>] (“Reading ‘anything of value’ to cover any useful information raises a host of troublesome issues. Campaigns routinely . . . get tips, firsthand accounts, and scurrilous rumors. Is each one of these to be logged, appraised for value, and reported as a contribution?”); David M. Shapiro, Opinion, How the First Amendment Could Save Don Jr., *Hill* (Aug. 3, 2017), <http://thehill.com/blogs/pundits-blog/the-administration/345177-how-the-first-amendment-could-save-don-jr> [<https://perma.cc/Y3U3-5MZE>] (arguing that judges would likely invoke the constitutional avoidance doctrine to interpret “thing of value” narrowly in order to avoid any First Amendment conflict); Jed Shugerman, Re-Thinking the “Thing of Value” Campaign Finance Charge Against Don Jr., *Shugerblog* (July 12, 2017), <http://shugerblog.com/2017/07/12/re-thinking-the-thing-of-value-campaign-finance-charge-against-don-jr> [<https://perma.cc/6DGR-U3JG>] (arguing that an overly broad reading of “thing of value” “would criminalize a campaign official talking to foreign nationals about anything related to the opponent or even their own candidate”).

152. See Eugene Volokh, Opinion, Can It Be a Crime to Do Opposition Research by Asking Foreigners for Information?, *Wash. Post: Volokh Conspiracy* (July 12, 2017), <http://www.washingtonpost.com/news/volokh-conspiracy/can-it-be-a-crime-to-do-opposition-research-by-asking-foreigners-for-information> [<https://perma.cc/C3U7-CJ9R>] [hereinafter Volokh, Can It Be a Crime?]; Eugene Volokh, Opinion, The Strikingly Broad Consequences of the Argument that Donald Trump Jr. Broke the Law by Expressing Interest in Russian Dirt on Hillary Clinton, *Wash. Post: Volokh Conspiracy* (July 14, 2017), <http://www.washingtonpost.com/news/volokh-conspiracy/the-strikingly-broad-consequences-of-the-argument-that-donald-trump-jr-broke-the-law-by-expressing-interest-in-russian-dirt-on-hillary-clinton> [<https://perma.cc/Y47Z-SVMD>] [hereinafter Volokh, Strikingly Broad].

153. 326 U.S. 135, 148, 156 (1945). But see *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491–92 (1999) (“When an alien’s continuing presence in this country

*Bridges*, however, Veselnitskaya is not a legal permanent resident.<sup>154</sup> While foreigners without permanent resident status may still retain some First Amendment protections,<sup>155</sup> the Court has recognized that the constitutional rights afforded foreigners temporarily in the country may be lesser than those afforded lawful permanent residents.<sup>156</sup> Moreover, Congress has already distinguished between these groups within this area of the law by excluding lawful permanent residents from the foreign national spending ban.<sup>157</sup> The *Bluman* court, in dismissing the plaintiffs' argument that FECA was underinclusive because it did not prohibit contributions by lawful permanent residents, held that "Congress may reasonably conclude that lawful permanent residents of the United States stand in a different relationship to the American political community than other foreign citizens do," since they, unlike temporary visitors, "have a long-term stake in the flourishing of American society" and "share important rights and obligations with citizens."<sup>158</sup> *Bluman* acknowledged that foreigners enjoy many constitutional protections, including under the First Amendment,<sup>159</sup> but nevertheless concluded that the government retains

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is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity."); *Harisiades v. Shaughnessy*, 342 U.S. 580, 582, 591-92 (1952) (holding that the First Amendment does not bar the deportation of a resident alien who is a member of an organization promoting the violent overthrow of the government and who distributes literature so advocating).

154. Brendan Pierson, Judge Denies Request to Return to U.S. by Russian Lawyer Who Met Trump Jr., Reuters (Nov. 3, 2017), <http://www.reuters.com/article/idUSKBN1D32JM> [<https://perma.cc/YJ4F-RSP6>] (describing Veselnitskaya's expired temporary permission to enter the United States).

155. See *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 365 (9th Cir. 1995) ("We conclude that the speech protections of the First Amendment at a minimum apply to all persons legally within our borders."); cf. Maryam Kamali Miyamoto, *The First Amendment After Reno v. American-Arab Anti-Discrimination Committee: A Different Bill of Rights for Aliens?*, 35 Harv. C.R.-C.L. L. Rev. 183, 184-88 (2000) (arguing that the correct interpretation of the Bill of Rights would extend the same First Amendment protections regardless of immigration status, but acknowledging that Supreme Court jurisprudence does not reflect this).

156. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-71 (1990) (finding that several cases that recognized foreigners' constitutional rights were inapposite because they granted constitutional protections "when [the foreigners] have come within the territory of the United States and developed substantial connections with this country" whereas Respondent, a foreigner, "had no previous significant voluntary connection with the United States").

157. See 52 U.S.C. § 30121(b) (Supp. IV 2017) ("[T]he term 'foreign national' means . . . an individual who is not a citizen . . . or a national of the United States . . . and who is not lawfully admitted for permanent residence . . .").

158. *Bluman v. FEC*, 800 F. Supp. 2d 281, 290-91 (D.D.C. 2011), *aff'd mem.*, 565 U.S. 1104 (2012) ("In fact, one might argue that Congress's carve-out for lawful permanent residents makes the statute more narrowly tailored to the precise interest that it is designed to serve—namely, minimizing *foreign* participation in and influence over American self-government.").

159. *Id.* at 286-87 (listing cases finding constitutional protections for foreigners).

a compelling interest in “limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.”<sup>160</sup>

Professor Eugene Volokh, a leading First Amendment scholar, contends that the decision should be understood as “limited to the restriction on spending money.”<sup>161</sup> But this reading is probably too narrow. *Bluman*’s rationale that the government has a compelling interest in preventing foreign influence over American elections would seem to apply to contributions or expenditures “in connection with a[n] . . . election”<sup>162</sup> regardless of whether they take the traditional form of money. Indeed, one of the expenditures at issue in *Bluman* was a plaintiff’s printing and distribution of flyers supporting President Obama’s reelection, not a cash contribution.<sup>163</sup> This activity would qualify as an “expenditure”<sup>164</sup> rather than a “contribution” because the flyers were not directly provided to the Obama campaign. Nevertheless, the plaintiff’s flyers are sufficiently analogous to the political opposition research that Trump, Jr. believed he would receive to be relevant to the question at hand.<sup>165</sup> The plaintiff sought to provide information to the public in the form of a pamphlet in order to influence an American election—much as Trump, Jr. sought to receive information in the form of “[p]olitical [o]pposition [r]esearch” from a foreign national in order to influence an American election<sup>166</sup>—an activity which was found to be prohibited by the foreign national spending ban in a case upheld by the Supreme Court.<sup>167</sup> Thus, *Bluman* should foreclose the foreign national’s First Amendment arguments in the context of the June 2016 meeting.

However, Americans also have a First Amendment right to seek and hear speech by foreigners. In *Lamont v. Postmaster General*, the Supreme Court held that the Post Office could neither intercept nor detain mail

160. *Id.* at 288; see also *supra* notes 81–84 and accompanying text.

161. Volokh, *Can It Be a Crime?*, *supra* note 152. Professor Volokh likely had this line in mind: “[52 U.S.C. § 30121] restrains [foreign nationals] only from a certain form of expressive activity closely tied to the voting process—providing money for a candidate or political party or spending money in order to expressly advocate for or against the election of a candidate.” *Bluman*, 800 F. Supp. 2d at 290; see also *infra* notes 185–189 and accompanying text (discussing *Bluman*’s treatment of express- and issue-advocacy expenditures).

162. 52 U.S.C. § 30121(a).

163. See *Bluman*, 800 F. Supp. 2d at 285.

164. See § 30101(9)(A)(i) (defining “expenditure” as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office”).

165. Notably, in fact, the Supreme Court has treated limits on expenditures much *more* skeptically than they have limits on contributions. See *supra* notes 40–46 and accompanying text.

166. See *supra* notes 14–20 and accompanying text.

167. *Bluman*, 800 F. Supp. 2d at 283, *aff’d mem.*, 565 U.S. 1104 (2012) (“[T]he federal ban at issue here readily passes constitutional muster.”).

deemed to be “communist political propaganda” nor require the addressee to affirmatively indicate a desire to receive the message before completing delivery.<sup>168</sup> Even though the speech originated overseas, the government could not impose this sort of affirmative obligation as a prerequisite to receiving the speech because “[t]his requirement is almost certain to have a deterrent effect.”<sup>169</sup> Thus, in *Kleindienst v. Mandel*, the Court—even as it upheld the government’s denial of a visa to a Belgian journalist due to his Marxist views—acknowledged the First Amendment interests of the Americans who invited him to hear him speak in person.<sup>170</sup> Today, it is “well established that the First Amendment protects not only the rights of people to engage in speech but also the right of audiences to receive it.”<sup>171</sup>

2. *Applying the Foreign National Spending Ban to Information.* — If a court were to strike down the foreign national spending ban as overbroad, it would have to conclude that there is a “realistic danger” that the statute would chill or prohibit constitutionally protected speech in a significant number of situations.<sup>172</sup> To flesh out this analysis, it is worth considering the foreign national spending ban’s application to several hypothetical scenarios posited by Professor Volokh.

One set of scenarios involves presidential campaign staff seeking to question foreigners to obtain potentially damaging information about their electoral opponent—for example, a Hillary Clinton campaign staffer interviewing a Slovakian student who participated in the Miss Universe pageant about her experiences with Donald Trump; a Bernie Sanders staffer seeking to interview foreigners about rumored misconduct by Hillary Clinton as Secretary of State on a trip abroad; or a Ted Cruz staffer seeking to interview undocumented immigrant employees of Mar-a-Lago about working conditions.<sup>173</sup> Would FECA prohibit these as illegal solicitations of a foreign contribution?

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168. 381 U.S. 301, 305 (1965).

169. *Id.* at 307 (“The regime of this Act is at war with the ‘uninhibited, robust, and wide-open’ debate and discussion that are contemplated by the First Amendment.” (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))). But cf. Timothy Zick, *The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. Rev. 941, 950–51 (2011) (“*Lamont* can be interpreted as a narrow decision that made no grand statement regarding the importance of cross-border communication.”).

170. See 408 U.S. 753, 763–64 (1972) (“The concern of the First Amendment is not with a non-resident alien’s individual and personal interest in entering and being heard, but with the rights of the citizens of the country to have the alien enter and to hear him explain and seek to defend his views . . . .” (internal quotation marks omitted) (quoting *Mandel v. Mitchell*, 325 F. Supp. 620, 631 (E.D.N.Y. 1971), rev’d, *Kleindienst*, 408 U.S. 753)).

171. Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. Rev. 799, 800 (2006).

172. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800–01 (1984).

173. See Volokh, *Can It Be a Crime?*, *supra* note 152.

The answer is probably not. The activities described would most likely fall under the volunteer exemption, at least insofar as the foreigners were not otherwise compensated for their services and did not participate in campaign decisionmaking.<sup>174</sup> Notably, the volunteer services exemption can apply even in the absence of a formal “volunteering” relationship with the campaign.<sup>175</sup> In these scenarios, the campaign staffers are soliciting information that the foreign nationals already possess and have acquired in the course of their day-to-day lives without any compensation for doing so. This is unlike, say, a memorandum documenting the fruits of an opposition research operation that required substantial resources to assemble—what Professor Richard Hasen refers to as “compiled information.”<sup>176</sup> A complicating factor in this analysis could arise if the campaign staff sought to interview foreign nationals who were officials of a foreign government. If the relevant information such foreigners had was obtained in the course of performing their jobs, it is less clear that it was “uncompensated.” Additionally, there may be good reason for the law in this area to treat foreign government officials differently than other foreign nationals.<sup>177</sup>

Several other hypothetical examples involve variations of journalists seeking information from foreign nationals to write about candidates. Professor Volokh considers scenarios such as a *New York Times* reporter being approached by a Turkish businessman with damaging information about Donald Trump, or a reporter calling contacts in foreign governments and embassies for information they possess on a candidate with a diplomatic background.<sup>178</sup> If made “for the purpose of influencing” an election, then this “gift” of information could qualify as a prohibited expenditure, which the journalist would be barred from soliciting.<sup>179</sup>

As noted previously, however, the media exemption has been applied quite broadly, especially with respect to persons and institutions that are

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174. See 11 C.F.R. § 110.20(i) (2018) (“A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person . . . with regard to such person’s Federal or non-Federal election-related activities . . .”); see also *supra* notes 120–121 and accompanying text.

175. See *supra* note 75 and accompanying text.

176. See Hasen, *Free Speech Defense*, *supra* note 150.

177. See *infra* notes 219–220 and accompanying text. Professor Hasen argues that FECA distinguishes between “foreign principals,” which includes foreign governments, and other “foreign nationals”; that Congress, under *Bluman*, undoubtedly “has the power consistent with the First Amendment to bar foreign governments from contributing things of value to U.S. election campaigns”; and that therefore “[t]he part of the statute barring foreign government interference in U.S. elections is severable and not overbroad.” Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 *First Amend. L. Rev.* 200, 220 n.88 (2018) [hereinafter Hasen, *Cheap Speech*].

178. See Volokh, *Strikingly Broad*, *supra* note 152.

179. 52 U.S.C. § 30101(9)(A)(i) (Supp. IV 2017); *id.* § 30121.

unquestionably part of the media;<sup>180</sup> thus, the *New York Times* reporters Professor Volokh has in mind would almost certainly avoid liability under campaign finance law. If it is less clear that the entity in question is a member of the media, the FEC will apply its multistep analysis to determine whether the media exemption applies—but this, too, has trended toward a broad application of the exemption.<sup>181</sup>

While the media exemption would shield the media entity from liability, it appears unlikely that it would provide the same protection for the foreign national offering the information.<sup>182</sup> This outcome does raise serious First Amendment concerns. Even if prosecutions of foreign nationals are unlikely—both because of jurisdictional complications for foreigners located abroad and because of journalists' willingness to protect their sources—there may well be a chilling effect on the provision of information relevant to American elections because foreign nationals may become more reluctant to share information with American journalists. This scenario highlights the tensions inherent in balancing the need to avoid “depriv[ing] [the public] of an uninhibited marketplace of ideas”<sup>183</sup> while simultaneously “preventing foreign influence over the U.S. political process.”<sup>184</sup>

It is also possible that *Bluman* already forecloses application of the foreign national spending ban to the scenarios discussed above involving the provision of information to non-campaign recipients. Such transactions would potentially be “expenditures” rather than “contributions” like the June 2016 meeting, at least so long as they were not made “in cooperation, consultation or concert with, or at the request or suggestion of, a candidate’s campaign.”<sup>185</sup> Although *Bluman* squarely upheld application of the foreign national spending ban to one form of expenditure—express advocacy, which in that case consisted of flyers supporting President Obama’s reelection—Judge Kavanaugh explained that the

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180. See *supra* notes 69–72 and accompanying text.

181. See *supra* note 72 (describing the FEC’s test for applying the media exemption and the trend toward broader application of the exemption).

182. See 11 C.F.R. § 100.73 (2018) (“Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, is not a contribution . . . .” (emphasis added)); *id.* § 100.132 (articulating the same rule for expenditures). In other words, costs incurred by a reporter or media entity in publishing a story would be exempt, but costs incurred by a foreign national acting as a source for that same story would not be.

183. *Citizens United v. FEC*, 558 U.S. 310, 335 (2010) (internal quotation marks omitted) (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)).

184. *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff’d mem.*, 565 U.S. 1104 (2012).

185. Types of Contributions, FEC, <http://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/types-contributions/> [<https://perma.cc/J2K3-W9HT>] (last visited Sept. 19, 2018).



court interpreted the statute as *not* barring issue advocacy, “that is, speech that does not expressly advocate the election or defeat of a specific candidate.”<sup>186</sup> Given that the only expenditure at issue was express advocacy, this interpretation was unnecessary to decide the case and should therefore probably be considered dicta.<sup>187</sup> It also contrasts with the broad language of the statute itself.<sup>188</sup> Although the *Bluman* court did not elaborate on its reasoning on this point, it may well have been motivated by the same overbreadth concerns raised by Professor Volokh to apply a narrowing statutory construction.<sup>189</sup> Whether or not this is the correct reading of the statute, however, would not affect its application to a situation like the June 2016 meeting, where the recipient of the information is the campaign itself.

For the reasons discussed above,<sup>190</sup> the key interest at stake is likely to be the American audience’s First Amendment right to receive information about candidates in American elections, rather than the foreign national’s First Amendment right to make political speech. Whether the foreign national spending ban would chill enough speech to be considered substantially overbroad if construed to prohibit soliciting potentially incriminating information about political candidates is a difficult question. Thus, the executive, legislative, and judicial branches should consider taking steps to clarify or modify the law’s application. When doing so, these institutions could keep in mind Professor Fallon’s forthright balancing framework, which he acknowledges “has an irreducible component of policy”: weighing the governmental interest in preventing foreign influence over American elections against the interests of American citizens in learning and gathering information about political candidates.<sup>191</sup>

3. *Applying the Foreign National Spending Ban to the June 2016 Meeting.* — To date, the public reporting and testimony of the participants in the June 2016 meeting indicate that no physical documents were exchanged and that the conversation was limited to issues surrounding the

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186. *Bluman*, 800 F. Supp. 2d at 284. The distinction between express and issue advocacy, like the distinction between contributions and expenditures, stems from *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). See Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 Minn. L. Rev. 1729, 1735 (2001).

187. See Hasen, *Cheap Speech*, supra note 177, at 219.

188. See 52 U.S.C. § 30121 (Supp. IV 2017) (barring foreign nationals from making “contribution[s] or donation[s] of money or other thing of value . . . [and] expenditure[s], independent expenditure[s], or disbursement[s] for an electioneering communication”).

189. However, it expressly declined to reach the constitutional question on this point. See *Bluman*, 800 F. Supp. 2d at 292 (“[W]e do not decide whether Congress could prohibit foreign nationals from engaging in speech other than contributions to candidates and parties, express-advocacy expenditures, and donations to outside groups to be used for contributions to candidates and parties and express-advocacy expenditures.”).

190. See supra notes 153–171 and accompanying text.

191. Fallon, supra note 87, at 894–95.

Magnitsky Act, rather than damaging information about Hillary Clinton.<sup>192</sup> Thus the potential violation of the foreign national spending ban would probably be based on what Trump, Jr. believed he would be receiving by attending the meeting—what he solicited,<sup>193</sup> as opposed to what he in fact received. And Trump, Jr. says he expected to receive “[p]olitical [o]pposition [r]esearch”<sup>194</sup> that was described to him as “official documents and information that would incriminate Hillary [Clinton].”<sup>195</sup>

On balance, the First Amendment rights at stake in this scenario should not trump the foreign national spending ban enacted by Congress. Opposition research, whether conducted directly by campaign staffers or purchased from professional research firms, is an important element of modern American political campaigns.<sup>196</sup> The information unearthed has value to campaigns, demonstrated by their willingness to pay for the services of professional researchers.<sup>197</sup> Professor Volokh and other commentators raise worthwhile concerns about the range of activities potentially covered by a broad interpretation of “thing of value.”<sup>198</sup> Yet it is also worth considering the consequences of too narrow an interpretation. Clearly, the spending ban prohibits a foreign national from making a cash contribution to a campaign,<sup>199</sup> money which would then be used to fund campaign activities, including opposition research. But if “thing of value” does not encompass opposition research, then a foreign national could effectively circumvent the ban by simply providing this service in-kind—and campaigns could freely solicit such services, including from foreign

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192. See *supra* notes 15–19 and accompanying text.

193. See 11 C.F.R. § 300.2(m) (2018) (“A solicitation is an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a clear message asking . . . or recommending that another person make a contribution, donation, . . . or otherwise provide anything of value. A solicitation may be made directly or indirectly.”).

194. See *supra* note 14.

195. See *supra* notes 4–10 and accompanying text.

196. See Larry J. Sabato & Howard R. Ernst, *Encyclopedia of American Political Parties and Elections* 250 (updated ed. 2007) (“Opposition research has become a staple of the modern American campaign at almost every level of government . . . . [O]pposition research has become increasingly professionalized. Firms and individuals on both sides of the political aisle peddle their sleuthing services to campaigns . . . .”); Evan Halper, *Once a Dark Art, Opposition Research Comes Out of the Shadows for 2016 Campaigns*, *L.A. Times* (May 27, 2015), <http://www.latimes.com/nation/la-na-opposition-research-presidential-election-20150521-story.html> [<https://perma.cc/BP27-AJQV>] (“Political opposition research, once a mostly unmentioned dark art, has turned into a garish, multimillion-dollar enterprise . . . . The research machines have emerged from the back office of party headquarters and into the high-stakes world of political fundraising.”).

197. See Sabato & Ernst, *supra* note 196; Halper, *supra* note 196; see also *infra* note 210.

198. See *supra* notes 151–152.

199. See 52 U.S.C. § 30121 (Supp. IV 2017).

governments and intelligence agencies, thereby undermining the purpose and efficacy of federal campaign finance law.<sup>200</sup>

Considering the “thing of value” at issue here—the “[p]olitical [o]pposition [r]esearch” or incriminating “official documents or information” that Trump, Jr. believed he would be receiving—helps ground this question in the compelling governmental interest identified in *Bluman*: “limiting the participation of foreign citizens in activities of American democratic self-government, and . . . thereby preventing foreign influence over the U.S. political process.”<sup>201</sup> *Bluman* explains that “[w]hen an expressive act is directly targeted at influencing the outcome of an election, it is *both* speech and participation in democratic self-government.”<sup>202</sup> Providing opposition research on a political opponent—which likely would have required the expenditure of resources to assemble—directly to a political campaign should be understood as such an act “directly targeted at influencing the outcome of an election.”<sup>203</sup> The compelling interest identified in *Bluman* should therefore justify the burdens on speech imposed by the foreign national spending ban in a scenario such as the June 2016 meeting, in which a campaign solicits political opposition research from a foreign national.<sup>204</sup>

### III. NEXT STEPS: COURTS, THE FEC, AND CONGRESS

This Part proposes new approaches courts, the FEC, and Congress can employ to resolve the constitutional and policy concerns raised by a broad reading of the foreign national spending ban. Section III.A con-

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200. It is worth noting that the Supreme Court has recognized preventing the circumvention of contribution limits as a justification for several kinds of restrictions on contributions. See Richard Briffault, *The Uncertain Future of the Corporate Contribution Ban*, 49 *Val. U. L. Rev.* 397, 437 (2015) (“The Supreme Court first recognized an anti-circumvention justification for restricting campaign finance activity in *Buckley* . . .”). Although recent precedent indicates that courts “will more closely probe the fit between the seriousness of a circumvention problem and the restriction intended to prevent it, there is nothing in the Court’s recent campaign finance jurisprudence that suggests that [anti-circumvention] . . . is no longer a constitutionally substantial interest capable of justifying a campaign finance restriction.” *Id.* at 439.

201. *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff’d mem.*, 565 U.S. 1104 (2012).

202. *Id.* at 289 (emphasis added).

203. *Id.*

204. However, even if the First Amendment concerns are insufficient to prevent application of the foreign national spending ban to the June 2016 meeting, there may be other considerations that would point toward avoiding criminal liability. See, e.g., *id.* at 292 (“[W]e caution the government that seeking criminal penalties for violations of this provision—which requires that the defendant act ‘willfully’—will require proof of the defendant’s knowledge of the law.” (citation omitted) (quoting 2 U.S.C. § 437g(a)(5)(C), (d)(1)(A) (2006))); see also *United States v. Santos*, 553 U.S. 507, 514 (2008) (“The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.”).

siders narrowing constructions courts could apply to avoid striking down the ban if they consider a broad reading substantially overbroad. Section III.B discusses steps the FEC could take to clarify application of the foreign national spending ban. Section III.C considers legislative changes that could improve this area of the law.

A. *Judicial Approaches*

Section III.A.1 discusses narrowing constructions courts could apply to the foreign national spending ban to avoid applications that pose constitutional problems. Section III.A.2 proposes a framework for balancing the competing interests at stake.

1. *Narrowing Constructions.* — One method by which courts avoid administering the “strong medicine” of striking down a law for being unconstitutionally overbroad is to construe it narrowly so as to reduce the number of situations in which constitutionally protected speech is chilled.<sup>205</sup> Nevertheless, courts are not legislatures and cannot simply rewrite legislation as they see fit.<sup>206</sup> In theory, one approach to limiting the law’s application might be to focus on foreign governments and agents thereof, or to narrow the ban on solicitation from covering any person to solely agents of political campaigns. But terms such as “foreign national,” “person,” and “solicit” are clearly defined, leaving very little ambiguity or room for alternative constructions.<sup>207</sup>

Courts might then focus instead on constraining the scope of the term “thing of value” itself, perhaps by requiring there to be an existing market upon which a good or service is commercially available and sold for it to qualify as a “thing of value.” While the FEC has previously suggested that “a lack of a market . . . does not necessarily equate to a lack of value,” that language comes from a footnote in a general counsel’s report rather than a formal decision by the commissioners.<sup>208</sup> The fact that the regulatory definition of “anything of value” references a departure from the “usual and normal charge” seems to presuppose the existence of some kind of market, even if the good or service is not something that is sold frequently.<sup>209</sup> Such a definition would probably still cover the June 2016 meeting, since opposition research—which Donald Trump, Jr. says he

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205. See *supra* note 100 and accompanying text.

206. See *William W. Bierce, Ltd. v. Hutchins*, 205 U.S. 340, 347 (1907) (“[C]ourts are not legislatures and are not at liberty to invent and apply specific regulations according to their notions of convenience.”).

207. See 52 U.S.C. § 30101(11) (Supp. IV 2017) (defining “person” for FECA purposes); *id.* § 30121(b) (defining “foreign national”); 11 C.F.R. § 110.20(a)(6) (2018) (referencing and incorporating the definition of “solicit” in 11 C.F.R. § 300.2(m)); *id.* § 300.2(m) (defining “solicit”).

208. FEC, MUR 5409, *supra* note 119, at 8 n.12.

209. 11 C.F.R. § 100.52(d).

believed he would be receiving—is frequently purchased by campaigns.<sup>210</sup> It might exclude, however, the broadest, fully subjective constructions of “thing of value,” which courts have applied in other statutory contexts, encompassing “things” like apologies.<sup>211</sup>

Even with a broad definition of “thing of value,” courts could look to other elements of the foreign national spending ban to avoid unconstitutional applications. Some of the more potentially problematic scenarios Professor Volokh posited involved communications between foreigners and journalists.<sup>212</sup> These scenarios involve “expenditures” rather than “contributions,” since the recipient of the “thing of value,” the journalist, is not a campaign or political committee—nonetheless, expenditures are still prohibited by the foreign national spending ban.<sup>213</sup> Yet the law defines an expenditure as being “made by any person *for the purpose of influencing any election* for Federal office,”<sup>214</sup> and it is not clear that simply discussing damaging information about a candidate would necessarily qualify. Furthermore, criminal penalties in this context require “knowing and willful” violations.<sup>215</sup> Courts could strictly interpret these additional elements even while maintaining a broad construction of “thing of value.” This would mirror the approach taken in other areas of the law involving the same phrase, where “thing of value” is understood broadly but other elements are considered narrowly.<sup>216</sup>

2. *Balancing Competing Interests.* — Courts might also view potential violations of the foreign national spending ban as residing on a continuum that considers when the following two elements are strongest and

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210. See Larry J. Sabato & Glenn R. Simpson, *Dirty Little Secrets: The Persistence of Corruption in American Politics* 154–64 (1996) (describing the emergence of political opposition research as a multimillion-dollar industry beginning in the early 1990s). Glenn Simpson, then a *Wall Street Journal* reporter, would go on to found Fusion GPS, a small firm that conducts opposition research and gathers intelligence for both corporate and political clients. See Jack Gillum & Shawn Boburg, ‘Journalism for Rent’: Inside the Secretive Firm Behind the Trump Dossier, *Wash. Post* (Dec. 11, 2017), <http://www.washingtonpost.com/journalism-for-rent-inside-the-secretive-firm-behind-the-trump-dossier/8d5428d4-bd89-11e7-af84-d3e2ee4b2af1> [<https://perma.cc/AG7M-VMP2>]. Fusion GPS was responsible for compiling the now-infamous “Steele Dossier” alleging that the Russian government possessed compromising information on Donald Trump and was coordinating to assist his campaign. *Id.* Fusion GPS’s client was Perkins Coie, the law firm representing both Hillary Clinton’s presidential campaign and the Democratic National Committee, which paid Fusion \$1.02 million in 2016—perhaps indicative of just how valuable political opposition research can be. *Id.*

211. See, e.g., *United States v. Hobgood*, 868 F.3d 744, 747 (8th Cir. 2017).

212. See *supra* section II.B.2.

213. See 52 U.S.C. § 30121(a)(1)(C) (Supp. IV 2017).

214. *Id.* § 30101(9)(A)(i) (emphasis added).

215. *Id.* § 30109(d).

216. See, e.g., *United States v. Collins*, 56 F.3d 1416, 1419–21 (D.C. Cir. 1995) (holding that “thing of value” in 18 U.S.C. § 641 includes intangibles like computer time but noting that the government failed to establish that “*serious interference*” with federal ownership rights occurred).

weakest: (1) the government's interest "in limiting the participation of foreign citizens in activities of American democratic self-government . . . [to] prevent[] foreign influence over the U.S. political process";<sup>217</sup> and (2) the First Amendment interests in protecting speech. This approach would reflect Professor Fallon's "forthright judicial balancing" framework for questions of overbreadth.<sup>218</sup>

One dimension would consist of the nature of the foreign "speaker." When the foreign national providing a "thing of value" is a principal or agent of a foreign government, the government's interest in regulating speech is likely strongest because this is when the concerns regarding foreign influence articulated in *Bluman* should be greatest. Considering the speaker's relationship with a foreign government would be in keeping with the history and text of the statute, which originated with the 1966 FARA Amendments and continues to define "foreign national" with reference to FARA's definition of "foreign principal."<sup>219</sup> However, such a consideration would need to consist of a fact-based, case-by-case inquiry for courts, rather than rote application of a statutory definition, since in many countries, entities can be under de facto government control without obvious formal relationships or statuses.<sup>220</sup>

Another dimension could be the nature of the solicitor of a foreign national contribution and the solicitor's relationship to a political campaign. The compelling interest justifying the foreign national spending ban—"namely, preventing foreign influence over the U.S. government"<sup>221</sup>—is likely strongest when the solicitor is a member or agent of a campaign and may go on to serve in that government. When the foreign speech is directed at, say, a journalist, rather than a campaign, the fear of foreign influence over government officials and policy may be lessened.

Much remains unknown about Veselnitskaya's relationship with the Russian government, but given what is known about the June 2016 meeting's timing and the context of the broader Russian influence operation during the 2016 presidential campaign,<sup>222</sup> it seems plausible that the June

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217. *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd mem.*, 565 U.S. 1104 (2012).

218. See Fallon, *supra* note 87, at 894; see also *supra* note 99 and accompanying text.

219. See 52 U.S.C. § 30121(b).

220. See, e.g., Jon Jordan, *U.S. v. Esquenazi*: U.S. Appellate Court Defines "Instrumentality" Under the Foreign Corrupt Practices Act for the First Time, 6 Wm. & Mary Bus. L. Rev. 663, 669–80 (2015) (surveying the challenges and factors to consider in defining "government instrumentality" under the Foreign Corrupt Practices Act).

221. *Bluman*, 800 F. Supp. 2d at 290.

222. See generally Indictment, *United States v. Butina*, No. 1:18-cr-00218-TSC (D.D.C. filed July 17, 2018), 2018 WL 3455963 (alleging a Russian conspiracy to develop relationships with and influence Republican-aligned interest groups); Indictment, *United States v. Netyksho*, No. 1:18-cr-00215-ABJ (D.D.C. filed July 13, 2018), <http://www.justice.gov/file/1080281/download> [<https://perma.cc/ZS9Q-2ALM>] (alleging a Russian military intelligence effort to hack and release Democratic Party officials' emails and campaign

2016 meeting would fall on the more searching side of the spectrum. Similarly, while Donald Trump, Jr. did not hold an official title with the Trump campaign, he was deeply involved in the campaign's activities<sup>223</sup> and also invited Paul Manafort and Jared Kushner, two senior campaign officials, to participate.<sup>224</sup> Thus, with respect to the June 2016 meeting,

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information); Indictment, United States v. Internet Research Agency LLC, No. 1:18-cr-00032-DLF (D.D.C. filed Feb. 16, 2018), <http://www.justice.gov/file/1035477/download> [<https://perma.cc/SFY7-T7XZ>] (alleging Russian efforts to spread propaganda to influence the 2016 election via social media); U.S. Office of the Dir. of Nat'l Intelligence, Assessing Russian Activities and Intentions in Recent US Elections (2017), [http://www.dni.gov/files/documents/ICA\\_2017\\_01.pdf](http://www.dni.gov/files/documents/ICA_2017_01.pdf) [<https://perma.cc/LU23-DNMA>] (providing the declassified U.S. Intelligence Community assessment of Russian government activities and intentions to influence the 2016 election).

223. Trump, Jr. was reimbursed for over \$30,000 in travel expenses by the Trump presidential campaign. See Donald J. Trump for President, Inc., Disbursements to Donald Trump, Jr., 2015–2016, FEC, [http://www.fec.gov/data/disbursements/?two\\_year\\_transaction\\_period=2016&data\\_type=processed&recipient\\_name=donald+trump+jr.&min\\_date=01-01-2015&max\\_date=12-31-2016](http://www.fec.gov/data/disbursements/?two_year_transaction_period=2016&data_type=processed&recipient_name=donald+trump+jr.&min_date=01-01-2015&max_date=12-31-2016) (on file with the *Columbia Law Review*) (last visited July 26, 2018). He also headlined fundraisers and served as a campaign surrogate throughout 2016. See, e.g., Joey Garrison, Donald Trump Jr. Visits Franklin for Private Fundraiser, *Tennessean* (Sept. 2, 2016), <http://www.tennessean.com/story/news/2016/09/02/89770806> [<https://perma.cc/8VWW-BPFE>] (describing Trump, Jr.'s participation at a campaign fundraiser in Franklin, Tennessee); Maggie Haberman, Donald Trump's Son Calls Interview with White Nationalist Inadvertent, *N.Y. Times* (Mar. 2, 2016), <http://www.nytimes.com/politics/first-draft/2016/03/02/donald-trumps-son-calls-interview-with-white-nationalist-inadvertent> (on file with the *Columbia Law Review*) (“[Donald Trump, Jr.] has been a top surrogate for his father . . .”); Patrick Svitek, Donald Trump Jr. Coming to Texas to Raise Money for Father's Campaign, *Tex. Trib.* (July 20, 2016), <http://www.texastribune.org/2016/07/20/trump-jr-raise-money-dad-texas> [<https://perma.cc/K2GY-79G9>] (describing Trump, Jr.'s presence headlining campaign fundraisers in Dallas and Houston). Trump, Jr. also reportedly participated in major campaign decisions, including the selection of Mike Pence as a running mate, see Stephen Collinson, Trump Pick Shows Power of Family Brain Trust, *CNN* (July 15, 2016), <http://www.cnn.com/2016/07/14/politics/donald-trump-mike-pence-vice-president-children/index.html> [<https://perma.cc/3V4T-VEPH>], and the decision to fire campaign manager Corey Lewandowski, see Noah Bierman & Mark Z. Barabak, Donald Trump Booted His Campaign Manager to Boost His White House Bid. But It Hasn't Reassured a Lot of People., *L.A. Times* (June 20, 2016), <http://www.latimes.com/politics/la-na-pol-trump-campaign-manager-20160620-snap-story.html> [<https://perma.cc/S48V-QT2S>].

Trump, Jr. explained his involvement in the campaign in a prepared statement before the U.S. Senate Judiciary Committee in this manner: “From the moment he announced his candidacy, my siblings and I worked day in and day out to support our father. I had never worked on a campaign before and it was an exhausting, all encompassing, life-changing experience.” Amber Phillips, Donald Trump Jr.'s Testament to His Own Naivete on Russia, *Annotated*, *Wash. Post* (Sept. 7, 2017), <http://www.washingtonpost.com/news/the-fix/i-believed-that-i-should-at-least-hear-them-out-donald-trump-jr-s-testament-to-his-own-naivete-on-russia-annotated> [<https://perma.cc/7TR2-8DEZ>]. He continued: “Every single day I fielded dozens, if not hundreds, of emails and phone calls . . . [W]e had a very modest staff and were forced to learn as we went along. Every day presented numerous challenges and required my attention to many different issues.” *Id.*

224. See *supra* note 11 and accompanying text.

both factors in this framework weigh in favor of the governmental interest at stake.

B. *Regulatory Approaches*

The FEC should consider clarifying some gray areas that remain in the application of the foreign national spending ban. One such area is the scope of the volunteer services exemption vis-à-vis the spending ban. In recent years, the FEC has found an increasing range of foreign election-related activities to be covered by the volunteer exemption.<sup>225</sup> Indeed, the volunteering exemption is a key reason the foreign national spending ban would probably not reach many of the troubling hypotheticals proposed by Professor Volokh.<sup>226</sup> Therefore, if the exemption itself were construed too narrowly, it might mean a much broader range of speech is prohibited by the foreign national spending ban, such that the ban could become substantially overbroad.

While there are circumstances that clearly do or do not fall under the umbrella of uncompensated volunteer services, exactly where the line is drawn is uncertain. This difficulty is exemplified by the FEC's apparent inconsistency and somewhat tortured attempts to distinguish its 1982 advisory opinion prohibiting a foreign artist from donating an original work of art to a campaign fundraiser<sup>227</sup> from later opinions interpreting the intersection of the foreign national spending ban and volunteer services exemption,<sup>228</sup> before finally giving up and superseding the 1982 opinion in 2015.<sup>229</sup> The 2015 AO was quite broad, holding that foreign volunteers could develop website code and logos for a political action committee (PAC) on an "*ad hoc*, continuous basis" given that the foreigners would use their own equipment, pay their own out-of-pocket expenses, would not be compensated by anyone, and would not participate in any of the PAC's operational decisions.<sup>230</sup> The FEC held that because this activity fell within the volunteer exemption, it did not count as a "contribution" and therefore did not run afoul of the foreign national spending ban.<sup>231</sup> The FEC made this determination even though

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225. Compare FEC, AO 2014-20, *supra* note 110, at 3 (allowing foreigners to develop website code, logos, and trademarks for a PAC), with FEC, AO 1981-51, *supra* note 109, at 1-2 (prohibiting a foreign artist from donating an original work of art to a campaign fundraiser).

226. See *supra* section II.B.2.

227. FEC, AO 1981-51, *supra* note 109.

228. FEC, MURs 5987, 5995 & 6015, *supra* note 121; FEC, AO 2004-26, *supra* note 121; FEC, AO 1987-25, *supra* note 110.

229. See FEC, AO 2014-20, *supra* note 110, at 3 n.5.

230. *Id.* at 2-3 (internal quotation marks omitted) (quoting Letter from the President & Treasurer, Make Your Laws PAC, Inc., to the Comm'rs, FEC 4 (Nov. 22, 2014), <http://www.fec.gov/files/legal/aos/2014-20/1308601.pdf> [<https://perma.cc/EG32-J6YK>]).

231. *Id.* at 4.



the PAC would obtain intellectual property rights in the items created by the volunteers, since the PAC would “receive only benefits that result directly and exclusively from the provision of volunteer services by foreign nationals.”<sup>232</sup>

This determination raises questions about prior FEC opinions, such as its 2007 ruling that a U.S. congressional candidate could not receive printed campaign materials free of charge from Canadian political candidates.<sup>233</sup> If the Canadian campaign is considered the foreign “person”—and it presumably paid the costs associated with producing the campaign materials itself—why would the reasoning of the 2015 AO not similarly apply? The answer cannot simply be the distinction between a tangible good (the printed materials) and an intangible service (developing website code), since AO 2014-20 explicitly rejects this reasoning.<sup>234</sup> As the FEC’s understanding of the scope of the volunteer exemption has expanded, greater clarity is needed with respect to its interaction with the foreign national spending ban, “particularly in light of the broad scope of the prohibition on contributions from foreign nationals.”<sup>235</sup>

The relationship between the foreign national spending ban and the media exemption could also use clarification. Because an expenditure is defined in part as “anything of value” made for the purposes of influencing an election,<sup>236</sup> information about a candidate provided by a foreign national to a news organization could probably qualify. The news organization itself would likely be protected from any liability based on the media exemption, but it is not clear the same protection would extend to the other party to the transaction, the foreign national.<sup>237</sup> The result might well be to “chill[] political speech, speech that is central to the meaning and purpose of the First Amendment.”<sup>238</sup> Just as the FEC enacted the substantial assistance ban as “necessary” to enforcement of the ban on solicitation of foreign contributions,<sup>239</sup> the agency should also consider a rule clarifying that the provision of information to a media organization is exempt from the foreign national spending ban as “necessary” for implementing the media exemption pursuant to its authority under 52 U.S.C. § 30107(a)(8).

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232. *Id.*

233. See *supra* notes 116–119 and accompanying text.

234. See FEC, AO 2014-20, *supra* note 110, at 3 n.5 (“[T]o the extent that [previous FEC opinions] sought to . . . mak[e] a distinction between the provision of volunteer services by a foreign national and the creation and donation of a tangible good, the Commission does not adopt that reasoning.”).

235. FEC, AO 2007-22, *supra* note 116, at 6.

236. See *supra* note 164 and accompanying text.

237. See *supra* notes 178–191 and accompanying text.

238. *Citizens United v. FEC*, 558 U.S. 310, 329 (2010).

239. See *supra* note 68.

*C. Legislative Considerations*

Congress might also consider legislative changes to achieve its intended goals more effectively than it has done so far through the existing regime. Like the FEC, it could address the potential chilling effect on foreign sources who provide information about political candidates to media organizations either by enacting legislation that directly extends the media exemption to the foreign source or through a federal reporters' privilege statute, which would probably have the same effect.<sup>240</sup>

More broadly, however, an oddity arises in applying the foreign national spending ban to situations like the June 2016 meeting involving the provision or solicitation of in-kind contributions such as opposition research. The campaign finance violation could seemingly be avoided by simply paying the "usual and normal charge" for any goods or services received. The FEC itself suggests this work-around in the 2007 AO discussed above, which disallowed a congressional candidate from receiving printed materials used in a Canadian election free of charge but explained that the candidate could legally use campaign or personal funds to purchase the materials instead.<sup>241</sup> If personal funds were used, they would then constitute a legal, in-kind contribution to the campaign.<sup>242</sup>

This result is mostly unobjectionable in the innocuous context of a congressional candidate wanting to learn from Canadian counterparts, but more difficult to countenance in the context of something like the June 2016 meeting. Can it really be that Trump, Jr. could have avoided

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240. Many states and federal circuits recognize at least some form of "reporters' privilege"—a right to refuse to testify as to the identity of a confidential source. See *The Reporters' Privilege Compendium: An Introduction*, Reporters Comm. for Freedom of the Press, <http://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/introduction> [<https://perma.cc/33QL-YD8S>] (last visited July 26, 2018). However, there is no robust federal "shield law" protecting journalists in this manner. *Id.* Debate over the wisdom and scope of a federal reporters' shield law remains ongoing and beyond the scope of this Note. See generally Sandra Davidson & David Herrera, *Needed: More than a Paper Shield*, 20 *Wm. & Mary Bill Rts. J.* 1277, 1290–96 (2012) (calling for passage of a federal absolute shield law for the press); Paul Brewer, *Note, The Fourth Estate and the Quest for a Double Edged Shield: Why a Federal Reporters' Shield Law Would Violate the First Amendment*, 36 *U. Mem. L. Rev.* 1073, 1075 (2006) (arguing that proposed federal press shield legislation would violate the First Amendment since categorical designations of members of the press would be tantamount to unconstitutional press licensing); Ryan C. Stevens, *Note, Keeping the News Domestic: Why a Toxic Environment for the American Press and Ready Access to Foreign Media Organizations Like WikiLeaks Compel the Rapid Adoption of a Federal Reporters' Privilege*, 66 *Hastings L.J.* 1463, 1478 (2015) (arguing that the U.S. Supreme Court should exercise its authority under Federal Rule of Evidence 501 to recognize a reporters' privilege).

241. See FEC, AO 2007-22, *supra* note 116, at 6 (explaining that while receiving campaign materials free of charge is prohibited, the candidate may "expend campaign funds to purchase such materials because such use of campaign funds would be an otherwise authorized expenditure in connection with [the candidate's] campaign . . . [and, in addition, the candidate] may also use personal funds").

242. *Id.*

liability by offering to pay the usual and normal charge for whatever information Veselnitskaya had to offer? The answer, seemingly, is yes, at least as it pertains to this particular question of campaign finance law, since the information would no longer be considered a contribution.<sup>243</sup> Yet this appears to be at odds with the government interest furthered by the foreign national spending ban and recognized in *Bluman*—“preventing foreign influence over the U.S. government.”<sup>244</sup> It defies common sense to think that whatever influence might be gained by providing such information is diminished by the campaign paying for it, even setting aside the practical challenges inherent in identifying the market value of discrete pieces of opposition research to determine whether a campaign finance violation occurred.

A law prohibiting all contacts between foreigners—or even just representatives of foreign governments—and campaigns would pose substantial First Amendment problems and would likely be bad policy.<sup>245</sup> However, the distastefulness of the June 2016 meeting seems to stem in part from its clandestine nature and the evasive explanations provided by members of the Trump campaign when it was publicly revealed over a year later.<sup>246</sup> Perhaps, then, Congress might consider enacting a robust disclosure regime for foreign contacts during a campaign. This sort of

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243. Even if the specific June 2016 meeting did not qualify as a solicitation of a “thing of value,” some experts have argued that the meeting could support a theory of liability based on aiding and abetting, or providing “substantial assistance” to, the broader Russian influence operation, which included potential violations of the foreign national spending ban, such as the purchase of election-related social media advertisements. See, e.g., Bob Bauer, Donald Trump Jr.’s Messages with WikiLeaks Point to Campaign-Finance Violations, *Atlantic* (Nov. 16, 2017), <http://www.theatlantic.com/politics/archive/2017/11/donald-trump-jrs-messages-with-wikileaks-point-to-campaign-finance-violations/545903> [<https://perma.cc/M6NN-YSQR>]; Bob Bauer, Open Door to Moscow? New Facts in the Potential Criminal Case of Trump Campaign Coordination with Russia, *Just Security* (July 10, 2017), <http://www.justsecurity.org/42956> [<https://perma.cc/9B3B-N69M>]; see also Mike Isaac & Scott Shane, Facebook’s Russia-Linked Ads Came in Many Disguises, *N.Y. Times* (Oct. 2, 2017), <http://www.nytimes.com/2017/10/02/technology/facebook-russia-ads.html> (on file with the *Columbia Law Review*) (describing Russian-bought social media advertisements in the 2016 election); Georgia Wells & Deepa Seetharaman, New Facebook Data Shows Russians Targeted Users by Race, Religion, Politics, *Wall St. J.* (Nov. 1, 2017), <http://www.wsj.com/articles/russian-ads-targeted-facebook-users-by-profile-1509563354> (on file with the *Columbia Law Review*) (describing how Russian-bought social media advertisements targeted groups, often on opposite sides of hot-button issues, to amplify social divisions).

244. *Bluman v. FEC*, 800 F. Supp. 2d 281, 290 (D.D.C. 2011), *aff’d mem.*, 565 U.S. 1104 (2012).

245. See Daniel P. Tokaji, What Trump Jr. Did Was Bad, but It Probably Didn’t Violate Federal Campaign Finance Law, *Just Security* (July 14, 2017), <http://www.justsecurity.org/43116> [<https://perma.cc/JN89-A2RU>] (“[I]t would seriously restrict the flow of political information if campaigns were prohibited even from speaking [to] foreign nationals in pursuit of information about their opponents . . . Denying candidates the opportunity to interview foreign nationals would thus be detrimental to th[is] central First Amendment interest . . .”).

246. See *supra* notes 13–14 and accompanying text.

disclosure is already required for federal officials seeking a security clearance;<sup>247</sup> it could be extended to federal campaigns and incorporated into the campaign finance reporting already required to be submitted to the FEC, so that campaigns would be forced to publicly acknowledge foreign contacts in not-quite-real time.<sup>248</sup> Such a proposal is far from a perfect solution given the challenges involved in ensuring compliance and the reality that the possibility of inappropriate discussions or exchanges would remain. However, the increased public and media scrutiny on such contacts that might result from disclosure may help deter undesirable contacts and further the governmental interest in reducing foreign influence.

#### CONCLUSION

Although the fear of foreign influence in American elections is as old as the U.S. constitutional system itself, it has received renewed attention following the events of the 2016 election. Much of the current language in campaign finance law that addresses this issue dates back to the 1970s but has not historically received significant attention. Most of the legislative debate around these provisions has centered on the definition of “foreign national”—particularly, whether the definition should include legal permanent residents, or whether it would inadvertently chill or prohibit the speech of American citizens living abroad or employed by foreign-owned corporations. Relatively little attention has been given to the potential scope of speech that could be considered a prohibited contribution or expenditure when such terms encompass “anything of value.” In the age of social media, as the lines demarcating traditional categories like “media” and “nonmedia” continue to blur and campaigns increasingly revolve around viral posts rather than expensive broadcast advertisements, these questions will become only more urgent.

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247. See U.S. Office of Pers. Mgmt., Standard Form 86: Questionnaire for National Security Positions 59–83 (2010), [http://www.opm.gov/forms/pdf\\_fill/sf86-non508.pdf](http://www.opm.gov/forms/pdf_fill/sf86-non508.pdf) [<https://perma.cc/BD3Q-WD3L>].

248. Professor Anthony Gaughan suggests a forty-eight-hour reporting requirement for contacts with foreign governments. See Anthony J. Gaughan, *Trump, Twitter, and the Russians: The Growing Obsolescence of Federal Campaign Finance Law*, 27 *S. Cal. Interdisc. L.J.* 79, 126–27 (2017).