

BRENNAN
CENTER
FOR JUSTICE

Getting Foreign Funds Out of America's Elections

By Ian Vandewalker and Lawrence Norden
Preface by Richard A. Clarke

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Preface

By Richard A. Clarke*

There is no room for doubt that the Russian government interfered in the last U.S. presidential election. One way in which they acted was to use social media and online advertisements. It is not surprising that we had not previously noticed or moved to fix our vulnerabilities to such manipulation.

It has been less than a decade since large groups within the U.S. population began to receive the majority of their news and commentary online, particularly from social media. We, as a nation, can be forgiven for not having rules and regulations that would have prevented this Russian interference. We have no excuse, however, if we let it happen again.

What Russia was, and still is, seeking to do is nothing less than weaken our country by fomenting internal strife and distrust of institutions such as the media, democratic elections, and elected officials. It is a century old Russian tactic, now “put on steroids” by the power of the internet.

In Russian government classrooms the techniques of *disinformatia*, *kompromat*, and *agitprop* are taught as weapons of war to weaken an opponent prior to military action or as a substitute for military action. These techniques allow a weaker power to take on a nation that is militarily superior.

There is no doubt in Russia that these tactics are tools of their offensive national security program. Yet, in the U.S. some still doubt that direct foreign attacks on our electoral and democratic processes are a national security threat. They are. These tactics are as much — or more — of a national security threat to the U.S. as any Russian tank, submarine, or nuclear missile. And unlike the metal weapons, these information operations have already been used against us.

Americans may dispute the extent of the effect of the Russian attack last time, or what it may be the next time. Whatever it contributed to the results of the last presidential election, however, it should be unacceptable to all Americans. No degree of foreign interference and manipulation is tolerable.

Some things that we need to do to put an end to this threat may be expensive, such as modernizing our voting machines, hardening election related computer networks, and searching for “bots” and “trolls” online.

Passing and enforcing laws to identify the ultimate funder of internet ads and applying “know your customer” standards of transparency and reporting to prevent foreign money being disguised are not complicated or expensive measures. They are an extension of laws and regulations we have used for years.

All it takes to close these fissures in our armor is American will.

This commendable volume from the Brennan Center gives federal and state lawmakers and corporate executives an easily followed road map and action plan. Given the upcoming elections and the continuing Russian interference, time is of the essence. Action is required now.

This is not a partisan issue. There are only two sides to this debate: those who want “to preserve, protect and defend” our democracy from foreign enemies, and those who do not.¹ Not acting now, puts you in the camp of people who do not want to save our democracy from foreign enemies’ attacks.

*Mr. Clarke served in numerous, senior, national security positions for Republican and Democratic presidents at the State Department and the White House.

Introduction

In the months leading up to Election Day in 2016, a hostile foreign power attacked the United States with a multifaceted campaign designed to influence the election.² Among other things, this election interference included covert Russian spending on online political ads designed to sway public opinion. In February, a grand jury indicted 13 Russian nationals and three business entities with ties to the Kremlin for their part in this effort. Their scheme relied on internet ads to fuel divisive controversies, drive attendance at rallies held in the U.S., and attempt to influence the outcome of the presidential election.³ Yet even after the indictment, we still do not know the full extent of Russia's online influence effort.

The menace is only likely to intensify in upcoming election cycles.⁴ The 2018 Worldwide Threat Assessment of the US Intelligence Community, presented to Congress in February, predicted that Russia will “continue using propaganda, social media, false-flag personas, sympathetic spokespeople, and other means of influence to try to exacerbate social and political fissures in the United States.”⁵ We must also be ready for potential copycat interference from other states like China, Iran, or North Korea, or even non-state terrorist groups like ISIS.

Regardless of whether it affected the outcome of the election, the Kremlin's activity represents a threat to national security and popular sovereignty — the exercise of the American people's power to decide the course their government takes.⁶ Yet despite the decades-old federal ban on foreign spending on elections,⁷ 21st century upheavals — namely the rapid development of the internet and the drastic deregulation of campaign finance — have created huge weaknesses in the legal protections against foreign meddling. These loopholes must be closed to make the ban work as intended.

There are three key areas where American elections are most vulnerable to political spending directed by foreign powers: the internet, dark money groups that do not disclose their donors, and corporations and other business entities with substantial foreign ownership.

The first vulnerability stems from the quick rise of the internet as a mass medium and the failure of regulation to keep up. As the amount of time Americans spend online has jumped, so has the importance of the internet as a medium for political advocacy.⁸ Campaign spending online has increased dramatically; the \$1.4 billion spent online in the 2016 election was almost eight times higher than in 2012.⁹ It's not surprising that foreign powers would look to the internet to meddle.

Russia's interference in the 2016 election provides a stark illustration. The Kremlin's operatives bought online ads through fake accounts whose owners pretended to be Americans, and messages from the fake accounts were seen by hundreds of millions of people in the United States. The ads appeared on all the major internet platforms, including Facebook, Gmail, Google's search engine, Twitter, and YouTube.¹⁰ There is reason to believe that what has been revealed to date is just the tip of the iceberg.

The second key weakness comes from the ability of some political spending groups to hide their donors' identities. These dark money organizations have flourished since a series of Supreme Court rulings invalidated many campaign finance regulations and the Federal Election Commission (FEC) has become dysfunctional due to partisan stalemate.¹¹

While there is currently no public evidence that Russia violated the ban on foreign national spending by illegally directing funds to dark money groups, the FBI is reportedly investigating whether a Russian banker with ties to President Vladimir Putin used the National Rifle Association's dark money arm to secretly spend on the 2016 election.¹² It remains to be seen whether the scheme existed. But as a general matter it would be naïve to think that the power behind a large online influence campaign like Russia's wouldn't be willing to use other spending avenues like dark money to spend on elections — in the near future, if not already.

Third, corporations and other business entities are currently allowed to spend on American elections even when their owners would be prevented from doing so by the foreign spending ban. There are various examples of foreign nationals using domestic companies to engage in secret election spending.¹³ In fact, the St. Petersburg “troll farm” indicted for its online election interference was organized as a business corporation. And recent revelations about Cambridge Analytica, a company that allegedly made improper use of user data from Facebook in its political consulting work, raise the question of whether its election activity was directed by its corporate parent, the British firm SCL Group, or foreign employees.¹⁴

This report offers practical solutions to make it far more difficult for any foreign power to engage in political spending in American elections in each of these three areas. All these reforms are permissible under current Supreme Court doctrine. Most importantly, the Brennan Center recommends lawmakers take the following steps:

- **Update political spending laws for the internet** with the framework used for television and radio ads requiring disclosure of funding sources and explicitly banning foreign spending for ads that mention candidates before an election.
- **Eliminate dark money** by requiring any organization that spends a significant amount on elections to disclose its donors.
- **Extend the ban on foreign spending** to domestic corporations and other business entities that are owned or controlled by foreign interests.
- **Invigorate enforcement** in all these areas by reforming the Federal Election Commission.

Members of Congress have introduced bills that incorporate some of these policies.¹⁵ In this paper, we make recommendations that can bolster their proposals, offering the first comprehensive framework to defend against the threat of political spending by foreign powers in American elections.

To be sure, the 2016 election showed that American elections are vulnerable to foreign manipulation in other ways, beyond expenditures on political ads. The Brennan Center has already detailed the reforms needed to protect against hacking and other attacks on election infrastructure in a prior report.¹⁶ The Russian propaganda campaign also made extensive use of free posts on social media as well as paid ads. But, as the February indictment shows, paid ads were a lynchpin for the scheme, driving new audiences to unpaid content.¹⁷

Although the danger of interference by foreign *governments* is our primary motivation, the reforms we propose address expenditures by all foreign nationals, meaning all foreign citizens (including corporations they control) other than lawful permanent residents living in the United States. This is the line

American law has drawn to protect U.S. sovereignty for 50 years.¹⁸

This report focuses on federal policy, but state governments should also act. State elections warrant similar protections to those we recommend at the federal level. And large states have the potential to set de facto nationwide standards for internet companies, analogous to the way California's environmental regulations have induced companies to change their behavior nationwide.

The private sector also has a role to play through voluntary action. Even if Congress and the states fail to act, internet companies can and should voluntarily adopt the policies we recommend for legislation, such as maintaining a public database of all online political ads. Private action would be most effective if the platforms come together to agree on industry-wide standards. In April, Facebook announced it would take steps to verify advertisers' identities, among other changes, but such reforms are piecemeal at best, revocable at worst.

Nevertheless, if the ban on foreign election spending is to continue to have meaning, reforms by the government are necessary. The attacks by the Kremlin make that clear. As Sen. John McCain has noted, it is "more important than ever to strengthen our defenses against foreign interference in our elections."¹⁹ Former CIA Deputy Director Michael Morell and former House Intelligence Committee Chairman Mike Rogers (R-Mich.) have advocated for deterring election meddling, including social media spending, with "policies that prevent adversaries from achieving their objectives."²⁰ Most recently, Republican members of the House Intelligence Committee issued a summary conclusion of their Russia investigation that recommended improvements in "campaign finance transparency."²¹

In this report, we offer a comprehensive set of reforms that answers these calls to strengthen America's defenses against foreign powers spending on political messages.

GETTING FOREIGN FUNDS OUT OF AMERICA'S ELECTIONS

Update Political Spending Laws for the Internet

THE THREAT:

Covert Foreign Spending Online

THE SOLUTIONS:

1. Expand Rules to Include Candidate Mentions Online
2. Extend the Period in Which Candidate Mentions Are Regulated
3. Create a Public Database of Online Political Ads
4. Broaden Disclaimer Requirements
5. Require Ad Sellers to Work to Block Foreign Purchases
6. Verify Credit Card Addresses

Internet Firms Can Lead the Way

Update Political Spending Laws for the Internet

Although candidates, political consultants, and even Russian trolls have shown they understand the power of the internet for political advocacy, the law has not kept up with the rapid technological and cultural developments of the internet age. Unlike television spots, internet ads are cheap to produce, can be disseminated widely at little or no cost, can be precisely targeted, and it's easy to hide their true source.

Yet the law fails to reflect current reality. Congress last updated campaign finance law in 2002 and the FEC's last rulemaking was 12 years ago.²² At that time, Facebook was not available to the general public, Twitter was less than one month old, and the first iPhone would not be released for more than a year.

THE THREAT:

Covert Foreign Spending Online

Russia's sprawling effort to influence the 2016 election through online ads illustrates the dangers that our proposals address. The expenditures were not publicly reported anywhere at the time. Neither the accounts nor the ads contained any outward clue as to the Russian source of the spending; on the contrary, they were made to disguise the speakers as Americans.

The Russian influence campaign included messages covering a wide range of topics such as deliberately polarizing ads about which candidates were supported by Muslims.²³ Some ads expressly called



(Left) A paid Facebook post from a Russia-linked account portrays Hillary Clinton as supported by Muslims. (Right) A paid Facebook post from a Russia-linked account depicts presidential candidate Bernie Sanders as favored by Muslims and criticizes then-candidate Donald Trump.



for a vote for or against presidential candidates.²⁴ Other ads attacked or praised candidates without explicitly mentioning the election.

Many ads took the form of paid posts, known as “promoted posts” on Facebook and “sponsored tweets” on Twitter, which can look like any other post on a social media platform, but an advertiser has paid the platform to target specific audiences.²⁵ To illustrate, Twitter users typically only see tweets from accounts they are following. But an advertiser can pay Twitter to “sponsor” a tweet, making it appear in the feeds of some set of users regardless of whether they follow the advertiser’s account.

Paid posts from accounts connected to the Kremlin reached tens of millions of Americans across multiple social networks. And it’s important to remember that unpaid, or “organic,” posts from the same accounts — which reached several times more Americans — are part of the same problem, because advertisers use paid posts to drive audiences to organic posts.²⁶

To illustrate: Facebook estimated that 11.4 million users saw Russia-linked paid ads on the platform.²⁷ But users who clicked “like” or “share” on one of an account’s promoted posts were automatically, and possibly unknowingly, subscribed to follow that advertiser’s account.²⁸ Once they were subscribed, that advertiser’s unpaid posts would appear in their news feeds. This means an advertiser who paid to get a single post in users’ feeds and enticed them to interact with it could count on those users seeing many more organic posts from the advertiser. Promoted posts routinely use exhortations such as “like if you agree” to encourage user interactions, and advertisers can gather data on clicks and likes that allow them to produce more posts similar to their most popular messages.²⁹ Over 126 million users were exposed to these organic posts on Facebook alone.³⁰

In addition to the views on Facebook, an estimated 16 million Instagram users saw Russian-driven content since October 2016 — the reach before that date is unknown.³¹ On Twitter, two accounts associated with Russian state-controlled news network RT bought promoted tweets — Twitter’s form of paid advertising — that appeared in approximately 53.5 million users’ feeds.³²

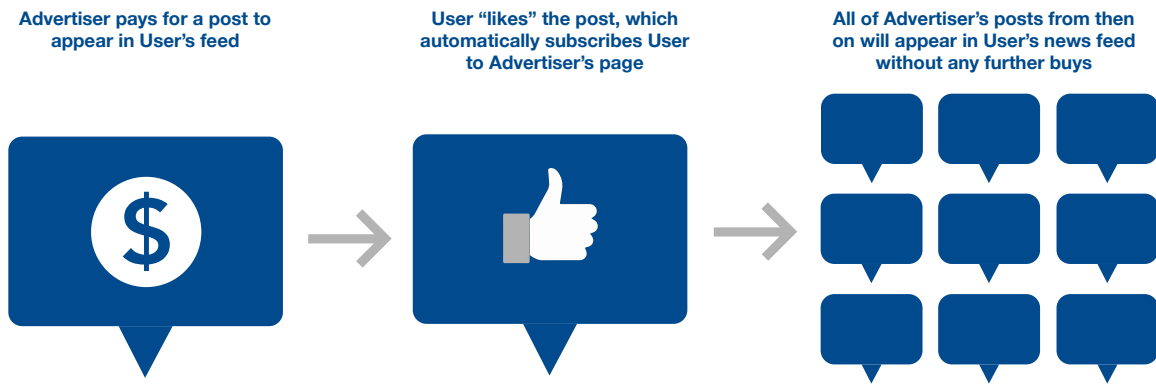
Across Facebook, Twitter, and Google, Russian groups spent at least \$400,000 on political advertising.³³ It is possible that this amount is just the tip of the iceberg, however. Facebook, Google, and Twitter told Congress in October that their investigations are ongoing, and they may uncover much more spending.³⁴

THE SOLUTIONS:

1. Expand Rules to Include Candidate Mentions Online

The bipartisan nature of the concern about online advertising is illustrated by an October 2017, publication from the George W. Bush Institute. Written by Thomas Melia, a deputy assistant secretary of state in the Obama administration, and Peter Wehner, George W. Bush’s deputy director of speechwriting, it noted, “American laws governing political advertising need to be updated so that the origins of political ads on social media are at least as transparent as those on television and in print.”³⁵

As it stands now, online expenditures on “express advocacy” that explicitly support or oppose a candidate’s election must be disclosed. Of course, the law clearly prohibits foreign nationals from engag-



ing in such advocacy. But advertisers are clever at crafting messages that skirt express advocacy. These “sham issue ads” typically attack or praise a candidate on some divisive subject without explicitly calling for a vote for or against the candidate.

The 2002 McCain-Feingold law increased transparency.³⁶ It created the category of “electioneering communications,” which requires disclosure of any expenditure of more than \$10,000 on ads that mention candidates within a specified window, such as 60 days before a general election.³⁷ The problem is that the law did not include the internet.

In the 2016 presidential contest, unknown actors used Russia-linked accounts to buy ads in the final days before both primary and general elections that mentioned candidates without expressly mentioning the election or calling for a specific vote, for example by portraying Hillary Clinton as being vulnerable to conflicts of interest or having committed crimes.³⁸ These messages, if disseminated on television or radio, would have constituted electioneering communications, but because they were on the internet, the McCain-Feingold rule simply didn’t apply. In sum, if McCain-Feingold were applied to online ads, it would have required the people behind these messages to disclose their spending and their funding sources. That might have deterred them from buying the ads or, if they flouted the rule, triggered an investigation before the election.

Congress should extend McCain-Feingold to include internet ads in the definition of “electioneering communications.” Facebook and Google have called for this change in the law,³⁹ and the Honest Ads Act, pending in Congress, would bring internet ads under the ambit of McCain-Feingold.⁴⁰

It is also time to make it crystal clear that foreign nationals cannot spend money on online political ads, which this legal reform would help accomplish. As it now stands, the law prohibits foreign nationals from spending money “for the purpose of influencing any election for Federal office.”⁴¹ Given the broad terms of the law, this prohibition should be understood to prohibit foreigners from spending on ads that mention candidates in order to influence elections, regardless of whether they contain express advocacy.⁴² Yet that interpretation is controversial in some quarters; dicta in one court opin-

ion suggest that the foreign spending ban should not apply to “issue advocacy.”⁴³ Congress should enact a bright-line rule like the electioneering communications definition that would unequivocally clarify the foreign national ban.

It would have the additional benefit of requiring source disclosure about a large and ever-increasing segment of election spending, since spending on electioneering communications must be reported along with information about the spender. That could help provide transparency about the sources of spending on social media content where a significant amount was spent on production or targeting, even if the resulting message or video was posted for a small fee.

For domestic spenders, this proposal would not stop any messages from being shared but would require financial disclosure. And because of the \$10,000 spending threshold, it would not affect the typical social media user at all.

An expansion of the electioneering communications definition would also make it easier to spot and prevent efforts by foreign governments to circumvent the ban by creating fake social media profiles. Electioneering communications reports require identifying information about the spender, like name and address, and whether they are public. Even if agents of foreign governments provide false information on FEC filings, the public record would provide clues for law enforcement and journalists to follow and find foreign influence operations. And electioneering communications being published without disclosure would alert the authorities to investigate.

2. Extend the Period in Which Candidate Mentions Are Regulated

In addition to the inclusion of online media, Congress should consider strengthening the electioneering communications rule by extending the time periods it covers — currently 60 days before a general election and 30 days before a primary election.⁴⁴ When it passed the McCain-Feingold law in 2002, Congress set these periods based on empirical evidence showing that sham issue ads were common at those times.⁴⁵

An examination of today’s election advertising trends would likely show that expenditures have shifted to earlier in the election cycle.⁴⁶ At least some of the Russia-linked Facebook ads that mentioned candidates were published before the electioneering communications period, although the public knows about very few ads and their timing.⁴⁷

The electioneering communications rule should reflect the behavior of advertisers. Lawmakers should ensure that the rule covers periods when large numbers of ads are published.⁴⁸

3. Create a Public Database of Online Political Ads

Even an expanded electioneering communications rule would leave online ads unregulated if they — like the great majority of the Russian ads⁴⁹ — did not mention candidates. There is a need for further transparency. Television and radio broadcasters are currently required to maintain a public “political file” of ad purchases that discuss national political *issues*.⁵⁰ This file gives journalists the chance to fact-check claims and the public the power to hold speakers accountable for inflammatory or false rhetoric.⁵¹ Congress should craft a similar requirement for paid internet political content. The Honest Ads Act would extend the “political file” requirement to online ad sellers like Facebook

and other popular websites. The bill would require major platforms to maintain public databases of ads that discuss either a candidate or “national legislative issues of public importance.”⁵² The machine-readable database would allow the public to see crucial information, including the ad itself, the audience targeted, the timing, and payment information.⁵³

Lawmakers should add a safe harbor provision to this proposed requirement, allowing platforms to keep some identifying information out of the public file in cases where an ad buyer presents credible evidence that disclosure will likely subject them to “threats, harassment, or reprisals.”⁵⁴ The FEC should have the ability to review the reasons and evidence for such exemptions. Mere public disagreement with views expressed in an ad should not be sufficient; rather, the exemption should be limited to serious risks like losing a job or violence.

4. Broaden Disclaimer Requirements

Disclaimer requirements (sometimes called “stand by your ad” rules) put information about who paid for an ad in the content of the ad itself. Disclaimers are vital to transparency because they inform audiences about who’s speaking at the moment the communication takes place.

Under current law, only ads that are already illegal for foreign nationals to buy must contain disclaimers.⁵⁵ But these requirements still help address the problem of election meddling by foreign powers by ensuring that the public knows where *all* political messages come from. This can counteract distrust engendered by the general knowledge that foreign powers are secretly funding political ads. And even if foreign powers illegally buy political ads and lie in the disclaimer, the information can provide clues for law enforcement and others to follow.

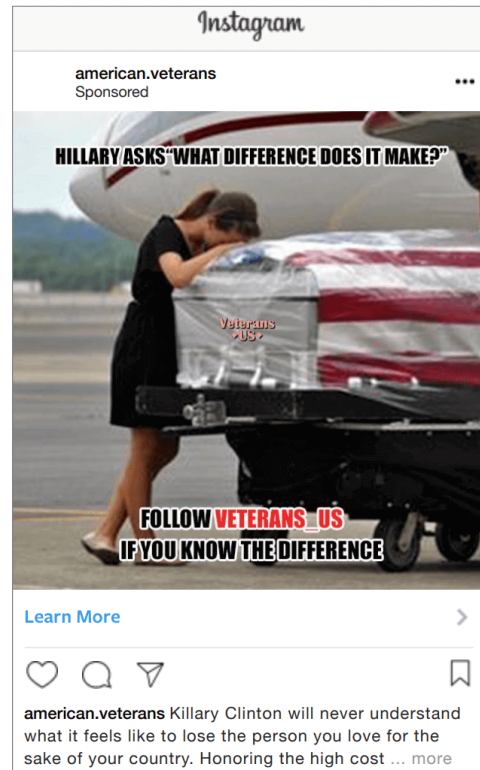
Current disclaimer requirements for online ads are insufficient in three ways:

First, the FEC has allowed some exemptions from sponsor disclosure requirements due to their small size. The same logic is applied to disclosure exemptions on campaign paraphernalia such as bumper stickers and buttons.⁵⁶ Yet the platforms face no inherent limit on the length of online ads, in contrast to a physically small item like a lapel pin — they can increase the character limit.⁵⁷

Both Congress and the FEC have the power to strengthen disclaimer requirements for online ads. The Honest Ads Act would provide that regulatory exemptions no longer apply to internet ads.⁵⁸ The FEC, for its part, voted in March to move forward with rulemaking to revise the internet disclaimers rule.⁵⁹ The agency has invited public comment on proposed regulatory language that would require disclaimers in a broader range of circumstances and give advertisers flexibility in complying, for example by allowing animated, rolling text.⁶⁰

Second, FEC regulations require disclaimers on express advocacy online only if “placed for a fee on another person’s Web site.”⁶¹ Yet social media websites allow free dissemination to vast audiences. Political operatives can make large expenditures to create content — whether production costs for filming a video or polling costs for messaging research — but pay nothing to the platforms they use to spread the content to millions. At the same time, an influence effort can involve substantial distribution costs in the form of overhead including salaries for the people who post messages online. For example, the Internet Research Agency, a Russian internet firm linked to President Vladimir Putin,⁶²

(Left) A promoted post from a Russia-linked account that requested shares and garnered 55,000; other posts from the account supported Trump. (Right) A promoted Instagram post from late August that criticized Clinton and got over 17,000 impressions for around \$50.



reportedly spent \$1.25 million a month in the fall of 2016 on U.S. influence operations, mostly to pay its more than 80 employees.⁶³

The FEC should require disclaimers on messages online that were *either* posted for a fee or had significant production or distribution costs.⁶⁴ This change would help address the problem of unpaid posts that comprised a majority of the Kremlin’s interference on social media.

Third, on Facebook and Twitter, promoted posts are flagged with small text noting the post is “promoted” or “sponsored.” But if another user shares that post, it is not flagged in their followers’ feeds. Disclaimer rules must address this loophole by ensuring that source information remains with the content of any promoted post however it is shared by users. So far, no legislative or regulatory proposal includes this important requirement.

5. Require Ad Sellers to Work to Block Foreign Purchases

Congress should enlist the help of entities in the best position to stop illegal foreign ad buys: the ad sellers themselves, whether social media platforms, search engines, other web sites, or traditional media like television. The Honest Ads Act would do this by requiring companies that sell ads to make reasonable efforts to prevent foreign nationals from purchasing political ads.

Promoted posts from Russia-linked Facebook accounts that would have come within the “electioneering communications” definition if it applied to online ads.

Born Liberal
Sponsored · 🌐

Like Page

"If you ask me about the Clinton Foundation, do I have a problem when a sitting secretary of state and a foundation run by her husband collects many millions of dollars from foreign governments, many governments which are dictatorships... yeah, I do," Sanders said in an interview with Jake Tapper on CNN.

So, Bernie has the point. I appreciate the way he maintains his independent opinion in spite of all the pressure that is on him as the "second Democratic option". Because that ... [See More](#)

124 Reactions · 5 Comments · 21 Shares

Like · Comment · Share

Heart of Texas shared their event.
Sponsored · 🌐

Fellow Texans! It's time to say a strong NO to the establishment robbers. It is unacceptable for us to see them ruin all we've been building for decades. For centuries. The establishment thinks they can treat us like stupid sheep but they are wrong. We won't put up with this anymore. The corrupt media does not talk about the crimes committed by Killary Rotten Clinton, neither does it mention the leaked emails but it would rather keep on kicking around some outdated tapes feat... [See More](#)

GET READY TO SECEDE!

NOV 5
Sat 1 PM CDT · Texas
516 people interested · 96 people going

★ Interested

1.9K Reactions · 143 Comments

Like · Comment

One concern with placing this obligation on ad sellers is that they may try to protect themselves from liability with excessively stringent requirements for ad buyers to prove that they're not foreign nationals. This could have the effect of making it harder for members of certain communities to purchase political ads, such as immigrants or Americans living abroad.

However, the prohibition on foreign nationals is difficult to enforce without help from ad sellers, since they have the most information about ad purchasers. And Facebook, Google, and Twitter have already announced that they will demand better verification of ad buyers' identities.⁶⁵ The platforms should be transparent about their procedures for identifying ineligible buyers and have a robust and transparent appeals process for buyers who are incorrectly blocked.⁶⁶

6. Verify Credit Card Addresses

Finally, Congress should consider the potential benefits of the credit card industry's address verification system (AVS), which allows merchants to fight fraud by comparing address information entered by the customer with the card holder's address on file. Although it's designed to catch fraudsters who have stolen someone's credit card number, the AVS system could be used by companies that sell political ads to verify whether the card holder has a U.S. address. An analogue can be found in pending legislation that would require political committees to check for a U.S. billing address before accepting a contribution.⁶⁷

Internet Firms Can Lead the Way

Internet firms don't need to wait for Congress to make it harder for foreign nationals to buy political ads. To their credit, the "Big Three" — Facebook, Google, and Twitter — have all announced voluntary measures to curb covert foreign election spending.⁶⁸ While these efforts constitute a step in the right direction, there is more they could do. Other giants like Verizon's Oath (which includes brands such as Yahoo!, HuffPost and TechCrunch), as well as smaller companies, will need to participate.⁶⁹ **They should take the following steps:**

1. Prohibit Foreign Purchases of Electioneering Communications.

By committing to block foreign nationals from purchasing ads that mention candidates shortly before an election, even if the ads don't explicitly discuss the election, internet companies would voluntarily adopt requirements that are imposed on broadcast media.⁷⁰ Google, for its part, has called for Congress to expand the ban in this way, so it should be willing to do this voluntarily.⁷¹ Facebook's CEO, Mark Zuckerberg, has also said the rules should be the same for the internet.⁷²

2. **Adopt the Transparency Requirements in the Honest Ads Act.** Companies should voluntarily adopt source disclosure for electioneering communications-style ads, a political ad database, and disclaimers. Zuckerberg has said Facebook supports the Honest Ads Act.⁷³ The Big Three have each announced plans to build databases, but it's not clear what "political" ads they will choose to include. Twitter plans to follow the electioneering communications definition, and Facebook has announced that it will include issue ads in its public database.⁷⁴ But it is unknown whether any of the other companies will improve disclosure for pure issue ads that discuss political matters like gun control but don't mention candidates.⁷⁵

3. Increase Verification of Political Ad Buyers' Identities.

Internet companies selling political ads can use the credit card industry's address verification system to block some foreign ad purchases. They could verify buyers' addresses by requesting documents or using an information-reporting agency. Facebook will begin requiring political advertisers to submit government-issued ID and receive an access code at a physical mailing address.⁷⁶

4. Collaborate to Create an International Database of Political Ad Purchases.

Online ad sellers should work together to build a single, international database of political ad sales covering democracies with established rules requiring transparency for political spending. This would allow the public to observe trends and find expenditures by actors who interfere in multiple countries' elections. Uniformity is especially important, as former FEC Chair Ann Ravel has pointed out.⁷⁷

5. **Adopt Industry-Wide Standards for Selling and Reporting Purchases of Political Ads.** Consistency among sellers of internet political ads in the way they treat and report attempted purchases of political ads is important so that bad actors don't simply shift away from the best-protected services to others.

GETTING FOREIGN FUNDS OUT OF AMERICA'S ELECTIONS

Eliminate Dark Money

THE THREAT:

Dark Money Hiding Foreign Money

THE SOLUTION:

Strengthen Disclosure for All Political Spending

Eliminate Dark Money

There is another major loophole that applies to political expenditures of all types, not just the internet. Dark money, or spending by groups that do not have to reveal their donors, offers foreign powers ways to hide their activity from American voters and law enforcement.

As a result of deregulatory court decisions, secret spending has skyrocketed. Before a 2007 Supreme Court decision that freed nonprofits to spend on elections, dark money was virtually nonexistent; since then, secret spenders have plowed more than \$900 million into federal elections.⁷⁸ Dark money is highly concentrated in competitive elections with the chance of affecting party control of government.⁷⁹ Recently, secret spending has increased in state elections, where a single big spender may have outsized influence.⁸⁰

Improving transparency would help address the threat posed by covert foreign election spending. First, there would be fewer places for illegal foreign spending to hide.⁸¹ Second, even where foreign spenders lie to hide their identities, greater transparency would provide more information to allow the government, media, and public to investigate suspicious spending.⁸² Informing voters, a key function in a democracy, is especially important when it comes to foreign funding.⁸³ Voters may be skeptical of messages coming from a foreign power and keenly interested in holding a candidate accountable for being backed by foreign interests.

THE THREAT:

Dark Money Hiding Foreign Money

It is impossible to know whether agents of Russia or other foreign powers used dark money groups as vehicles for secret spending in American elections.⁸⁴ Yet ever since dark money began to proliferate, critics have worried that foreign money could be secretly seeping into the political system.⁸⁵ And over the years, a handful of investigations have revealed examples of dark money groups accepting money linked to foreign governments.⁸⁶ The lack of transparency makes it impossible for the public to know whether the funds were spent on elections.

The reported FBI investigation into whether Alexander Torshin, a Russian banker with ties to President Vladimir Putin, gave money to the National Rifle Association's dark money arm during the 2016 election, illustrates the potential for abuse by foreign actors.⁸⁷ The NRA has acknowledged taking foreign funds but denied spending them on elections.⁸⁸

As Juan Zarate, a deputy national security advisor in the George W. Bush administration, put it: "Given the ability of Russia and other foreign actors to fund and influence elections, campaigns, and parties in open systems, there needs to be greater, more rigorous transparency in campaign funding and reporting."⁸⁹

THE SOLUTION:

Strengthen Disclosure for All Political Spending

The DISCLOSE Act, versions of which have been introduced in Congress since 2010, would eliminate dark money.⁹⁰ At its core, the legislation would require any group that spent above a threshold

amount on elections to disclose its major donors of \$10,000 or more. This would fix a current problem with the law — it allows groups to choose to register as nonprofits rather than political committees in order to hide their donors. Under the DISCLOSE Act, the way a group organizes itself under the tax code is irrelevant; rather, it is the act of engaging in political spending that triggers disclosure requirements.⁹¹

Versions of these rules are in effect in California. The state requires all groups, including nonprofits, to report political expenditures, as well as the identities of recent donors.⁹² When one group makes significant political expenditures, other groups that have donated to it may also be required to disclose donors. Washington State enacted its own bill to address dark money in March of 2018.⁹³

GETTING FOREIGN FUNDS OUT OF AMERICA'S ELECTIONS

Ensure Spending by Businesses Is Funded Domestically

THE THREAT:

Business Expenditures Hiding Foreign Money

THE SOLUTIONS:

1. Ban Political Spending by Foreign-Owned Firms
2. Require More Public Information About Corporate Entities' Ownership

Ensure Spending by Businesses Is Funded Domestically

Allowing corporations to spend in elections opens another door for foreign money. A domestic corporation can be financed by, or be a subsidiary of, a foreign corporation or individual.⁹⁴

Although corporations can't give directly to candidates or parties, they can give to super PACs and make their own expenditures supporting or attacking candidates.⁹⁵ Under the federal foreign money ban, corporations organized or based in foreign countries are banned from spending money in American elections. Yet current law allows foreign-owned companies incorporated in the U.S. to make political expenditures as long as the money derives from domestic operations and the spending decision is not made by a foreign national.⁹⁶

This leaves open the possibility that foreign interests will secretly direct political spending through corporations they own or control.⁹⁷ The political data firm Cambridge Analytica has recently faced questions about whether its work on the 2016 presidential election was directed by its corporate parent, a British company.⁹⁸ We have seen that individuals and corporations — like Russia's Internet Research Agency, which was organized as a business corporation — can act as proxies for foreign state.⁹⁹

THE THREAT:

Business Expenditures Hiding Foreign Money

American firms have no shortage of foreign investment. Corporations with majority ownership by foreigners controlled more than \$12 trillion in assets in 2012.¹⁰⁰ Experts estimate that between 25 to 35 percent of U.S. corporate stock was owned or controlled by foreigners in the last two years.¹⁰¹

In fact, in one notorious case, a foreign national tried to circumvent the rules to curry favor with the winner of a local election. A Mexican developer, José Susumo Azano Matsura, made \$500,000 in illegal contributions to both Democrat and Republican candidates in the 2012 San Diego mayoral race in the hopes of securing a real estate development deal.¹⁰² Among other tactics, Azano hid the foreign origin of the funds by passing money through a shell company incorporated in the U.S.¹⁰³ In another possible violation of the law, a California corporation owned by citizens of China gave \$1.3 million to a super PAC supporting former Florida Governor Jeb Bush's campaign for president in 2015.¹⁰⁴

There is evidence that one particular corporate form, the limited liability corporation (LLC), is increasingly being used in political spending.¹⁰⁵ LLCs are typically set up by businesses seeking certain tax benefits, and they can be organized with little more than an anonymous name like "ABC LLC," a post office box, and a bank account, effectively masking the origin of any funds.¹⁰⁶ Investigations outside the electoral context have documented the use of LLCs to obscure ties to foreign assets.¹⁰⁷

THE SOLUTIONS:

1. Ban Political Spending by Foreign-Owned Firms

Congress should clarify and expand the breadth of the definition of "foreign national" in the statutory ban to restrict the ways that corporations with foreign ownership or control can spend on American elections.¹⁰⁸ The DISCLOSE Act of 2017 would ban a firm from election spending if a foreign national owns or controls 20 percent or more of the corporation's voting shares, or if a foreign government owns or controls five percent or more of the voting shares.¹⁰⁹

The DISCLOSE Act approach is a good one, but it can be strengthened. The risk of foreign money entering elections through business entities is not limited to corporations. Therefore, the rule should apply to other types of organizations, such as LLCs and partnerships. Any bill that would regulate corporations according to the percentage of shares with foreign ownership should make explicit that it also applies to LLCs that have publicly traded shares.¹¹⁰ More generally, LLCs and partnerships — which are governed by state laws determining the ownership interest of each member or partner¹¹¹ — can be subjected to a rule providing that 20 percent or more ownership by foreign nationals disqualifies the firm from spending in elections.¹¹²

A policy of limiting election activity based on the portion of foreign ownership is not without precedent. At least two states, Colorado and Hawaii, prohibit either direct contributions or independent expenditures by foreign-controlled corporations.¹¹³ In Colorado, a foreign national that has an interest in excess of 50 percent¹¹⁴ of a corporation can trigger a designation that the firm is foreign-controlled. Legislators have introduced new bills with bans that depend on a percentage of foreign ownership in other states.¹¹⁵

2. Require More Public Information About Corporate Entities' Ownership

In addition, incorporation laws could be made to require more public information about the individuals behind corporate entities. There is little, if any, legitimate purpose for an anonymous shell corporation or LLC. Following the example of the European Union, Congress and the states should consider increasing transparency in incorporation.¹¹⁶ Former Deputy National Security Advisor Juan Zarate has argued that the response to Russia's interference should include legal changes to “make the ownership of shell companies in the United States transparent.”¹¹⁷ This prophylactic rule would make it harder to use corporations to hide foreign election spending, in addition to hindering various forms of financial corruption that have nothing to do with elections.¹¹⁸

GETTING FOREIGN FUNDS OUT OF AMERICA'S ELECTIONS

Invigorate Enforcement

Invigorate Enforcement

By failing to vigorously enforce campaign finance rules, the FEC has contributed to weakened defenses against foreign powers' election spending. Lax enforcement can make foreign powers confident in their ability to interfere without getting caught, whether they seek to influence politics through the internet, dark money groups, or business firms. Amid reports that foreign employees of the political data firm Cambridge Analytica illegally provided strategic guidance to political campaigns, one former worker said, "We knew that everything was not above board, but we weren't too concerned about it. . . . It was the Wild West."¹¹⁹

The FEC has not done enough to require politically active groups to register as committees, contributing to the proliferation of dark money.¹²⁰ The agency has not given the foreign ban sufficient teeth, either.¹²¹ In 2017, for example, the FEC declined to even investigate a complaint alleging a scheme to funnel money from Chinese nationals through LLCs and a Florida super PAC to help Democrat Patrick Murphy's unsuccessful 2016 Senate campaign.¹²²

In part in response to revelations about Russian operatives buying ads on social media, the FEC has reopened a rulemaking concerning the scope of regulations governing disclaimers about who's paying for online election ads. It has been more than a decade since the FEC fully grappled with the regulation of internet spending, and Commissioner Ellen Weintraub has argued strenuously for revisiting the agency's regime.¹²³ But the recent history of partisan deadlocks and lax enforcement leaves little cause for optimism that the agency is up to the task of addressing foreign influence.¹²⁴

The FEC's problems are structural. The agency has an even number of commissioners, no more than three of whom may be from the same party.¹²⁵ These commissioners control every aspect of the FEC's substantive operations, including whether to investigate potential violations of the law. Although the commissioners are appointed by the president, presidents traditionally defer to party leaders in Congress, allowing partisan battle lines to infect the agency's decision making. Any significant action requires a majority. This leads to partisan deadlocks. Declining FEC enforcement in recent years has coincided with lockstep voting by a bloc of Republican commissioners ideologically opposed to aggressive enforcement or stronger rules.¹²⁶

Reforming the agency could greatly benefit protections against election spending from foreign adversaries.¹²⁷ Even under the current regime, the president can make appointments in a nonpartisan fashion, basing decisions on expertise or leadership rather than party loyalty. But structural reforms are warranted.¹²⁸ For example, there could be a nonpartisan enforcement official within the agency with the power to investigate potential violations and implement penalties, subject to override by the Commission, such as the Commission's general counsel or its assistant general counsel for enforcement. Consideration should also be given to creating an odd number of commissioners, including at least one nonpartisan member, to eliminate deadlocks.¹²⁹

GETTING FOREIGN FUNDS OUT OF AMERICA'S ELECTIONS

What the States Can Do

What the States Can Do

Under the federalist Constitution, states can regulate their own elections, but not federal contests. And while states can impose disclosure and disclaimer requirements on broadcast and print media for state and local elections, those requirements are unlikely to have an impact on the way that national media deals with political ads.¹³⁰

State and local regulation of political advertisements on the internet may be an exception, however. If enough states — or even a single large state like California — were to enact substantial transparency reforms, internet companies might change the way they deal with political advertisements throughout the country. Once a social media platform learns to identify electioneering communications in California, or add disclaimer language to advertisements purchased in Florida, or maintain a public database of state political ads purchased in New Jersey, it may be easiest for them to perform these functions for state and local political ads nationwide.

There are three reforms that states should consider:

- Update campaign finance laws to regulate internet spending like other media, most importantly by including online ads that mention state and local candidates before an election.¹³¹
- Require major digital platforms to create a “public file” of any internet advertisement that mentions a candidate or state legislative issues of public importance.
- Require ad sellers to make reasonable efforts to identify foreign purchases of state and local political ads.

In March, Washington State updated its campaign finance laws to include online ads in its disclosure rules, including a requirement that ad sellers maintain a file of ads available for public inspection.¹³² The change came shortly after Seattle began enforcing a decades-old public file requirement against online ad sellers like Facebook and Google.¹³³ New York strengthened its disclosure requirements in April, bringing online ads into the regime and requiring the State Board of Elections to maintain a public database of online ads.¹³⁴ More states are likely propose such regulations in the future.

Conclusion

Politicians across the ideological spectrum, from George W. Bush and Newt Gingrich to Sherrod Brown and Barack Obama, have warned of the dangers of foreign nationals spending in U.S. elections.¹³⁵ These admonitions were often framed in national security terms. Indeed, in his dissent in *Citizens United*, Justice John Paul Stevens summoned the ghost of World War II's "Tokyo Rose" and the dangers of enemy propaganda when cautioning that the decision could lead to foreign corporations spending freely in elections.¹³⁶

And yet, despite these warnings, including recent ones from the intelligence community, Congress has failed to act. Yes, foreign nationals remain technically banned from spending money in connection with any election. But the ban is out-of-date and not sufficient to counter today's threats.

These reforms will not only provide desperately needed reinforcement to the now-flimsy foreign spending ban, they will bring add transparency to spending that remains hidden.

Congress must take the lead. States and major internet companies also have a role to play. There is no silver bullet, but taken together, these efforts can greatly reduce the ability of a foreign government to manipulate the sovereign right of the U.S. to conduct its democracy without interference.

Endnotes

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- 28 Jonathan Albright, personal communication, November 15, 2017; Mike Isaac, “At Facebook, Hand-Wringing Over a Fix for Fake Content,” *New York Times*, October 27, 2017, <https://www.nytimes.com/2017/10/27/technology/facebook-fake-content-employees.html>. For example, one Facebook ad from “Stop All Invaders” portrayed burqa-wearing women as a threat and said, “Like and share if you want burqa banned in America.” Scott Shane, “These Are the Ads Russia Bought on Facebook in 2016,” *New York Times*, November 1, 2017, <https://www.nytimes.com/2017/11/01/us/politics/russia-2016-election-facebook.html>. Users who liked the post would then likely see other posts from the “Stop All Invaders” account, some of which expressly supported Donald Trump’s campaign for president. They have been collected on *Medium*. UsHadrans repository for content from “Stop All Invaders,” *Medium*, <https://medium.com/@ushadrans/stop-the-invasion-f8c93d774f97>.
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- 30 Mike Isaac and Daisuke Wakabayashi, “Russian Influence Reached 126 Million Through Facebook Alone,” *New York Times*, October 30, 2017, <https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html>; Craig Timberg, “Russian propaganda may have been shared hundreds of millions of times, new research says,” *Washington Post*, October 5, 2017, <https://www.washingtonpost.com/amphhtml/news/the-switch/wp/2017/10/05/russian-propaganda-may-have-been-shared-hundreds-of-millions-of-times-new-research-says/>. Although the upper bound of the number of interactions with the Russian pages estimated by that study is in the billions, it likely overcounts due to the fact that the Russians also created many fake accounts to follow their pages, inflating their apparent influence. David Karpf, “People are hyperventilating over a study of Russian propaganda on Facebook. Just breathe deeply,” *Washington Post*, October 12, 2017.
- 31 Kelly Cohen, “Facebook: Millions more saw Russian ads through Instagram,” *Washington Examiner*, November 28, 2017, <http://www.washingtonexaminer.com/facebook-millions-more-saw-russian-ads-through-instagram/article/2639249>; Alex Pasternack, “Instagram Played a Much Bigger Role in Russia’s

Propaganda Campaign,” *Fast Company*, November 11, 2017, <https://www.fastcompany.com/40493677/instagram-russia-secret-weapon>. Jonathan Albright, research director at the Tow Center for Digital Journalism at Columbia University, has collected evidence that the reach is much higher than Facebook’s estimates. Jonathan Albright, “Instagram, Meme Seeding, and the Truth about Facebook Manipulation, Pt. 1,” *Medium*, November 8, 2017, <https://medium.com/berkman-klein-center/instagram-meme-seeding-and-the-truth-about-facebook-manipulation-pt-1-dae4d0b61db5>.

- 32 *Extremist Content and Russian Disinformation Online: Working with Tech to Find Solutions, Before the Subcomm. on Crime and Terrorism*, 115th Cong. (2017) (statement of Sean J. Edgett, Acting General Counsel of Twitter, Inc.). Twitter estimates that unpaid tweets from Russian-linked automated accounts achieved approximately 288 million impressions between September and November of 2016. Mike Isaac and Daisuke Wakabayashi, “Russian Influence Reached 126 Million Through Facebook Alone,” *New York Times*, October 30, 2017, <https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html>.
- 33 Kanyarkeit Vongkiatkajorn, “The Crazy Flood of Tech Revelations in the Russia Investigation,” *Mother Jones*, October 17, 2017, <http://www.motherjones.com/politics/2017/10/the-crazy-flood-of-tech-revelations-in-the-russia-investigation/> (reporting \$100,000 worth of Facebook ads linked to Russian operatives and another \$50,000 suspected); Carol D. Leonnig, Tom Hamburger, and Rosalind S. Hellderman, “Russian firm tied to pro-Kremlin propaganda advertised on Facebook during election,” *Washington Post*, September 6, 2017; Elliot Schrage, “Hard Questions: Russian Ads Delivered to Congress,” Facebook, last modified October 6, 2017, <https://newsroom.fb.com/news/2017/10/hard-questions-russian-ads-delivered-to-congress/>.
- 34 Facebook has a history of revising its reach estimates upward. The company at first denied having any evidence of Russian ads for months after *Time* had reported that intelligence officials were aware of the Facebook ads, and since its first announcement has increased its estimates of the ads’ reach multiple times. Issie Lapowsky, “Did Trump’s Data Team Help Russians? Facebook Might Have the Answer,” *Wired*, July 14, 2017, <https://www.wired.com/story/trump-russia-data-parscale-facebook/>.
- 35 Thomas O. Melia and Peter Wehner, *The Spirit of Liberty: At Home, In the World*, The George W. Bush Institute, 2017, 20, <http://www.bushcenter.org/publications/resources-reports/reports/spirit-of-liberty.html>. George W. Bush endorsed the paper. Mallory Shellbourne, “George W. Bush: US must confront ‘new era of cyber threats,’” *The Hill*, October 19, 2017, <http://thehill.com/homenews/news/356220-former-president-george-w-bush-us-must-confront-cyber-threats>.
- 36 The three-judge district court decision upholding the electioneering communications rule found that sham issue ads were used to influence elections. *McConnell v. FEC*, 251 F. Supp. 2d 176, 248 (D.D.C. 2003) (“[T]he record before the Court clearly demonstrates that . . . the evolving present use of issue advertisements, specifically the use of ‘issues’ to cloak supportive or negative advertisements clearly identifying a candidate for federal office, ‘threaten the purity of elections.’”).
- 37 52 U.S.C. § 30104(f). The definition excludes news stories. 52 U.S.C. § 30104(f)(3)(B)(i).
- 38 Dan Keating, Kevin Schaul, and Leslie Shapiro, “The Facebook Ads Russians Targeted at Different Groups,” *Washington Post*, November 1, 2017, https://www.washingtonpost.com/graphics/2017/business/russian-ads-facebook-targeting/?utm_term=.ef2260243a10.
- 39 Letter from Colin S. Stretch, General Counsel, Facebook, to Neven F. Stipanovic, Acting Assistant General Counsel, FEC, November 13, 2017, 4-5 (“Facebook supports policymakers’ efforts to extend the disclaimer requirement to include digital or online communications”); Comments of Google

LLC re: Internet Communication Disclaimers, November 9, 2017, 7 (“Congress should extend the definition of electioneering communication for purposes of the Foreign National Ban so that it applies to communications placed for a fee on another person’s web site.”). Both comments can be found by searching “2011-02” at <http://sers.fec.gov/fosers/>.

- 40 Honest Ads Act of 2017, S.1989, 115th Cong. (2017).
- 41 52 U.S.C. § 30101(9)(A)(1).
- 42 See Ellen Weintraub, “Our elections are facing more threats online. Our laws must catch up.” *Washington Post*, September 14, 2017 (“Whether Russian bots are engaging in express advocacy (think ‘Vote for Hillary’), issue advertising (think ‘Build the wall’) or even disseminating news stories (think ‘Pizzagate’), if the effort involves any money spent by a foreign national in connection with a U.S. election, it’s in the FEC’s jurisdiction, and it’s illegal.”).
- 43 Bluman v. FEC, 800 F. Supp. 2d 281, 292 (D.D.C. 2011) (three-judge court), *aff’d*, 565 U.S. 1104 (2012); see also Rick Hasen, “Would Russian Paid Facebook Ads to Help Elect Trump Be Illegal?” *Election Law Blog*, September 6, 2017, <https://electionlawblog.org/?p=94626>.
- 44 52 U.S.C. § 30104(f)(3)(A)(II).
- 45 148 Cong. Rec. S2096-02, S2141 (2002) (statement of Sen. McCain) (“This attempt to put teeth back into our campaign finance laws is carefully crafted to pass constitutional muster. According to the Brennan Center’s “Buying Time 2000” study, less than one percent of the group-sponsored soft-money ads covered by this provision of the bill were genuine issue discussion, more than 99 percent of these ads were campaign ads.”). As the Supreme Court put it when it upheld the regime, the conclusion that the sham issue ads of the day “were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election.” *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 127 (2003).
- 46 This is difficult to measure because early election spending that avoids express advocacy is not required to be reported to the FEC, and therefore data is hard to come by. But there is evidence of substantial early spending. In the high-profile 2014 Senate contest in North Carolina, a Brennan Center analysis found evidence of \$23.5 million in outside spending that was not reported to the FEC. Ian Vande-walker, *Election Spending 2014: 9 Toss-Up Senate Races*, Brennan Center for Justice 18 (2014), <http://www.brennancenter.org/publication/election-spending-2014-9-toss-Senate-races>. It is impossible to accurately date these expenditures, but most of the money was likely spent on ads mentioning candidates that were aired outside the electioneering communications period—otherwise they would show up in FEC reports.
- 47 For example, one ad quoting Bernie Sanders criticizing the Clinton Foundation first ran June 8, 2016, well outside the window of 60 days before the general election and after the conclusion of most states’ presidential primaries. Dan Keating, Kevin Schaul, and Leslie Shapiro, “The Facebook Ads Russians Targeted at Different Groups,” *Washington Post*, November 1, 2017, https://www.washingtonpost.com/graphics/2017/business/russian-ads-facebook-targeting/?utm_term=.ef2260243a10.
- 48 The DISCLOSE Act of 2017 extends the period to January 1 of the election year for Congress and 120 days before the first primary for president. Democracy Is Strengthened by Casting Light On Spending in Elections (DISCLOSE) Act of 2017, S.1585, 115th Cong. (2017).
- 49 Alex Stamos, “An Update On Information Operations on Facebook,” Facebook, September 6, 2017,

- <https://newsroom.fb.com/news/2017/09/information-operations-update/>. The ads were “dark posts,” which are only seen by the targeted audience, so journalists, law enforcement, and the broader public don’t know what’s being said, never mind how much is spent or by whom. See Garrett Sloane, “No More ‘Dark Posts’: Facebook to Reveal All Ads,” *AdAge*, October 27, 2017, <http://adage.com/article/digital/facebook-drag-dark-posts-light-election/311066/>.
- 50 The file includes information about the content of the ad, when and where it was aired, the cost, and the buyer’s identity. 47 C.F.R. § 73.1212.
- 51 See Christopher S. Elmendorf, Ann Ravel and Abby Wood, “Open up the black box of political advertising,” *San Francisco Chronicle*, September 22, 2017, <http://www.sfchronicle.com/opinion/openforum/article/Open-up-the-black-box-of-political-advertising-12221372.php>; Daniel Kreiss and Shannon McGregor, “Forget Russian Trolls. Facebook’s Own Staff Helped Win The Election.” *BuzzFeed*, October 3, 2017, <https://www.buzzfeed.com/danielkreiss/forget-russian-trolls-facebooks-own-staff-did-more>; Siva Vaidhyanathan, “Facebook Wins, Democracy Loses,” *New York Times*, September 8, 2017, <https://www.nytimes.com/2017/09/08/opinion/facebook-wins-democracy-loses.html>.
- 52 Honest Ads Act of 2017, S.1989, 115th Cong. (2017), sec. 8.
- 53 Honest Ads Act of 2017, S.1989, 115th Cong. (2017). The FEC could set forth a standard format in regulations since consistency will make the data most useful for industry-wide analyses. Regulations could also provide standards for when different versions of the same ad are similar enough that only one needs to be included in the database. Online advertisers frequently make small changes to things like font or background color; not all variations need be captured in the database. Stephen Spaulding, personal communication, February 5, 2018.
- 54 *Buckley v. Valeo*, 424 U.S. 1, 74 (1976).
- 55 Campaign finance law requires source disclaimers on anything paid for by a campaign committee, messages that include express advocacy, and electioneering communications.
- 56 In 2011, the agency deadlocked on a request from Facebook for an exemption from disclaimer requirements on ads the length of which is limited to a certain number of characters. With the FEC unable to muster a majority in favor of disclaimers, advertisers gained a de facto exemption for character-limited ads. Cynthia L. Bauerly, “The Revolution Will Be Tweeted and Tmbl’d and Txt’d: New Technology and the Challenge for Campaign-Finance Regulation,” *University of Toledo Law Review* 44 (2013): 533.
- 57 *Ibid.* at 532 (citing draft FEC Advisory Op. 2011-09 (Facebook), Agenda Document No. 11-32-B (June 15, 2011)).
- 58 Honest Ads Act of 2017, S.1989, 115th Cong. (2017).
- 59 Federal Election Commission, “FEC approves a Draft Notice of Proposed Rulemaking on Internet Communication Disclaimers and the Definition of ‘Public Communication,’” March 14, 2018, <https://www.fec.gov/updates/fec-moves-draft-notice-proposed-rulemaking-internet-communication-disclaimers/>. In December, the FEC issued a narrow advisory opinion requiring disclaimers on paid Facebook ads, but the commissioners didn’t agree on a legal rationale, and the opinion stresses that it’s limited to the facts of that specific case. FEC Advisory Op. 2017-12, available at <http://saos.fec.gov/aodocs/2017-12.pdf>.
- 60 Federal Election Commission, Draft Notice of Proposed Rulemaking, March 14, 2018, https://www.fec.gov/resources/cms-content/documents/mtgdoc_18-12-a.pdf.

- 61 11 C.F.R. § 100.26 (defining “public communication” as limited to paid placements online); § 110.11(a)(2) (requiring disclaimers for public communications that include express advocacy).
- 62 *Assessing Russian Activities and Intentions in Recent U.S. Elections*, ICA 2017-01D, Office of the Director of National Intelligence, 2017, 4 https://www.dni.gov/files/documents/ICA_2017_01.pdf.
- 63 Indictment, *United States v. Internet Research Agency LLC, et al.*, No. 1:18-cr-00032-DLF, 2018 WL 914777 (D.D.C. Feb. 16, 2016), *available at* <https://www.justice.gov/file/1035477/download>; *see also* Max de Haldevang, “Russia’s troll factory also paid for 100 activists in the US,” *Quartz*, October 17, 2017, <https://qz.com/1104195/russian-political-hacking-the-internet-research-agency-troll-farm-by-the-numbers/> (giving an estimate of \$2.3 million for the operation).
- 64 The issue of whether distribution costs like salaries for workers in a troll farm should be considered is an open one; it has not yet been taken up by the FEC.
- 65 *Extremist Content and Russian Disinformation Online: Working with Tech to Find Solutions, Before the Subcomm. on Crime and Terrorism*, 115th Cong. (2017) (statements of Colin Stretch, General Counsel of Facebook; Richard Salgado, Senior Counsel, Google; and Sean J. Edgett, Acting General Counsel of Twitter, Inc.).
- 66 A joint report from Harvard’s Berkman Center for Internet & Society and the Center for Democracy & Technology provides a set of recommendations for adequate appeals processes. Erica Newland et al., *Account Deactivation and Content Removal: Guiding Principles and Practices for Companies and Users*, Berkman Center for Internet & Society and the Center for Democracy & Technology, 2011, https://www.cdt.org/files/pdfs/Report_on_Account_Deactivation_and_Content_Removal.pdf.
- 67 Stop Foreign Donations Affecting Our Elections Act, S.1660, 115th Cong. (2017).
- 68 The Big Three have announced new ways for users to learn which accounts are responsible for political ads as well as promises to increase verification procedures to identify attempts to buy ads by foreigners. *See, e.g., Security and disinformation in the U.S. 2016 election: Our work going forward*, Google, 2017. https://storage.googleapis.com/gweb-uniblog-publish-prod/documents/google_US2016election_work_going_forward_1_WPKcAUQ.pdf; Paul Blumenthal, “Facebook Reveals New Details About Its Self-Imposed Political Ad Disclosure Policy,” *HuffPost*, October 27, 2017, https://www.huffingtonpost.com/entry/facebook-ad-disclosure_us_59f3894ce4b03cd20b81907d; *Extremist Content and Russian Disinformation Online: Working with Tech to Find Solutions, Before the Subcomm. on Crime and Terrorism*, 115th Cong. (2017) (statement of Sean J. Edgett, Acting General Counsel of Twitter, Inc.).
- 69 Tony Romm, “Snap hasn’t found any Russia-backed ads on its platform — but others in tech, like Reddit and Yahoo, are saying little,” *Recode*, October 2, 2017, <https://www.recode.net/2017/10/3/16410932/snapchat-reddit-yahoo-russia-congress-investigation-2016-election>.
- 70 The Big Three have not explicitly committed to doing this. Twitter has said it will use the electioneering communications definition to categorize ads as political, but the announcement did not say that it would block foreigners from buying those ads. Bruce Falck, “New Transparency For Ads on Twitter,” *Twitter Blog*, October 24, 2017, https://blog.twitter.com/official/en_us/topics/product/2017/New-Transparency-For-Ads-on-Twitter.html.
- 71 Comments of Google LLC re: Internet Communication Disclaimers, November 9, 2017, 7 (commenting on FEC REG No. 2011-02), available by searching “2011-02” at <http://sers.fec.gov/fosers/>.

- 72 Charles Riley, “This is the regulation Mark Zuckerberg wants for Facebook,” *CNN*, March 22, 2018, <http://money.cnn.com/2018/03/22/technology/regulation-political-ads-facebook-zuckerberg/index.html>.
- 73 Nicholas Thompson, “Mark Zuckerberg Talks to Wired about Facebook’s Privacy Problem,” *Wired*, March 21, 2018, <https://www.wired.com/story/mark-zuckerberg-talks-to-wired-about-facebooks-privacy-problem/>.
- 74 Rob Goldman and Alex Himel, “Making Ads and Pages More Transparent,” Facebook, April 6, 2018, <https://newsroom.fb.com/news/2018/04/transparent-ads-and-pages/>. Twitter publicly announced plan to use the electioneering communications definition. Bruce Falck, “New Transparency For Ads on Twitter,” *Twitter Blog*, October 24, 2017, https://blog.twitter.com/official/en_us/topics/product/2017/New-Transparency-For-Ads-on-Twitter.html.
- 75 Twitter pledged to consider how to do deal with issue ads. Bruce Falck, “New Transparency For Ads on Twitter,” *Twitter Blog*, October 24, 2017, https://blog.twitter.com/official/en_us/topics/product/2017/New-Transparency-For-Ads-on-Twitter.html. There has been no evidence that the company has yet done so, however, and a transparency center Twitter promised was weeks away in October 2017, has still not appeared.
- 76 “Hard Questions: What is Facebook Doing to Protect Election Security?” Facebook, March 29, 2018, <https://newsroom.fb.com/news/2018/03/hard-questions-election-security/>.
- 77 Ann Ravel, personal communication, January 8, 2018.
- 78 “Dark Money Basics,” Center for Responsive Politics, last visited February 21, 2018, <https://www.opensecrets.org/dark-money/basics?range=tot#outside-spending> (chart showing outside spending with no disclosure of donors since 2008 election). Although *Citizens United* contributed, the trend began with a 2007 decision that freed nonprofits to engage in more political activity. Fed. Election Comm’n v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007). Decreased transparency has resulted from the Court’s deregulatory decisions even though the Court has consistently upheld laws requiring disclosure of political spending. Daniel I. Weiner, *Citizens United Five Years Later*, Brennan Center for Justice, 2015, 7, <https://www.brennancenter.org/publication/citizens-united-five-years-later>.
- 79 “Political Nonprofits (Dark Money),” Center for Responsive Politics, accessed April 5, 2017, https://www.opensecrets.org/outsidespending/nonprof_summ.php; Ian Vandewalker, *Election Spending 2014: Outside Spending in Senate Races Since Citizens United*, Brennan Center for Justice, 2015, 13-14, <https://www.brennancenter.org/publication/election-spending-2014-outside-spending-senate-races-citizens-united> (finding significant percentages of money spent in competitive Senate races coming from secret spending groups: 28 percent in 2014 and 21 percent in 2016).
- 80 Chisun Lee, Katherine Valde, Benjamin T. Brickner, and Douglas Keith, *Secret Spending in the States*, Brennan Center for Justice, 2016, 3, <http://www.brennancenter.org/publication/secret-spending-states>.
- 81 *Cf.* SpeechNow v. FEC, 599 F.3d 686, 698 (D.C. Cir. 2010) (“[R]equiring disclosure of [contribution] information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals.”).
- 82 *See* Independence Inst. V. FEC, 216 F. Supp. 3d 176, 191 (D.D.C. 2016) (“[L]arge-donor disclosures help the Commission to enforce existing regulations and to ensure that foreign nationals or foreign governments do not seek to influence United States’ elections.”).

- 83 Cf. *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (articulating the interest in disclosure to inform voters). *Citizens United* and other recent decisions by the Roberts Court have strongly approved of requirements to disclose the sources of political money. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 366 (2010).
- 84 There is evidence of Russia spending on other countries’ politics. A Russian bank with links to the Kremlin provided the French far-right party Front National with a \$10 million loan. Henry Samuel, “Marine Le Pen’s links to Russia under US scrutiny,” *The Telegraph* (London), December 21, 2016, <http://www.telegraph.co.uk/news/2016/12/21/marine-le-pens-russian-links-us-scrutiny/>. The Kremlin also reportedly funded a far-right party in Germany through below-market gold sales. Andrew Rettman, “Illicit Russian Money Poses Threat to EU Democracy,” *EUobserver*, April 21, 2017, <https://euobserver.com/foreign/137631>.
- 85 As a *Mother Jones* article put it in 2012: “These outfits ... can take money from foreign citizens, foreign labor unions, and foreign corporations, and they don’t have to tell voters about it.” Andy Kroll, “How Secret Foreign Money Could Infiltrate US Elections,” *Mother Jones*, August 8, 2012, <http://www.motherjones.com/politics/2012/08/foreign-dark-money-2012-election-nonprofit/>.
- 86 For example, the American Petroleum Institute, an oil industry trade association, is financed in part by member dues from a Saudi Arabian state-run oil company. The institute gave almost half a million dollars to politically active nonprofits in 2011. Lee Fang, “Saudi-Led Oil Lobby Group Financed 2012 Dark Money Attack Ads,” *The Nation*, November 29, 2012, <https://www.thenation.com/article/saudi-led-oil-lobby-group-financed-2012-dark-money-attack-ads/>. The U.S. Chamber of Commerce, a nonprofit trade organization, was put on the defensive when a 2010 report revealed it took dues payments from many foreign firms, including state owned or run companies in Bahrain, India, and Abu Dhabi. Lee Fang, “Exclusive: Foreign-Funded ‘U.S.’ Chamber Of Commerce Running Partisan Attack Ads,” *Think Progress*, October 5, 2010, <https://thinkprogress.org/exclusive-foreign-funded-u-s-chamber-of-commerce-running-partisan-attack-ads-413586f28207/>. The Chamber, which has spent around \$30 million in support of GOP candidates in every federal election cycle since 2010, responded that foreign money is segregated and not used for political spending but refused to discuss how the money is kept separate. Viveca Novak, “The Chamber and Foreign Contributions,” *FactCheck.org*, October 8, 2010, <http://www.factcheck.org/2010/10/the-chamber-and-foreign-contributions/>. And the American Chemistry Council, a major money spender in federal elections, announced this month that a state-owned Chinese firm, Wanhua Chemical, will become a dues-paying member. Lee Fang, “Chinese State-Owned Chemical Firm Joins Dark Money Group Pouring Cash into U.S. Elections,” *The Intercept*, February 15, 2018, <https://theintercept.com/2018/02/15/chinese-state-owned-chemical-firm-joins-dark-money-group-pouring-cash-into-u-s-elections/>.
- 87 Peter Stone and Greg Gordon, “FBI investigating whether Russian money went to NRA to help Trump,” *McClatchy*, January 18, 2018, <http://www.mcclatchydc.com/news/nation-world/national/article195231139.html>.
- 88 Tim Mak, “NRA Says It Receives Foreign Funds, But None Goes To Election Work,” *NPR*, March 27, 2018, <https://www.npr.org/2018/03/27/597279176/nra-says-it-receives-foreign-funds-but-none-goes-to-election-work>.
- 89 Juan C. Zarate, “The Cyber Attacks on Democracy,” *The Catalyst: A Journal of Ideas from the Bush Institute* 8 (2017), <http://www.bushcenter.org/catalyst/democracy/zarate-cyber-attacks-on-democracy.html>.
- 90 See, e.g., Democracy Is Strengthened by Casting Light On Spending in Elections (DISCLOSE) Act of 2017, S.1585, 115th Cong. (2017).

- 91 In addition, the bill would crack down on the use of intermediary organizations to hide funding sources. Current law invites donors to hide their identity by funneling money through a secretive organization before it ends up in the account of the group that actually spends on politics. The DISCLOSE Act addresses this problem by providing that certain transfers of funds to political spending groups trigger donor disclosure. If one group gives funds to another with reason to know they will be spent on elections, the donor group is required to reveal the major sources of its funding.
- 92 Cal. Gov't Code § 84222; Linda Sugin, Politics, "Disclosure, and State Law Solutions for 501(c)(4) Organizations," *Chicago-Kent Law Review* 91 (2016): 895, 904-07. The state uses a last-in-first-out system of identifying donors to be disclosed; organizations must disclose donations in reverse chronological order until the disclosed contributions are sufficient to account for the political expenditure. Cal Gov't Code § 84222(e)(1)(C). Donors of less than \$1000 or who indicate that their contributions may not be used for politics are exempt from disclosure.
- 93 "New Bills Are Intended to Spur Voting in Washington," *KXRO News*, March 20, 2018, <http://www.kxro.com/new-bills-are-intended-to-spur-voting-in-washington/>.
- 94 Jon Schwarz and Lee Fang, "Cracks in the Dam: Three Paths Citizens United Created for Foreign Money to Pour into U.S. Elections," *The Intercept*, August 3, 2016, <https://theintercept.com/2016/08/03/citizens-united-foreign-money-us-elections/>.
- 95 Super PACs, made legal by a lower court decision interpreting *Citizens United* in 2010, are allowed to take contributions of any amount, including from corporations and unions, in contrast to the contribution limits imposed on other political committees, including candidate committees. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). They are supposed to operate independently of candidates and parties.
- 96 "Foreign Nationals," FEC, June 23, 2017, <https://www.fec.gov/updates/foreign-nationals/>; Federal Election Commission, Advisory Opinion 2006-15, May 19, 2006.
- 97 This especially so given the fiduciary duty of a subsidiary's managers to pursue the best interests of the owners. Memorandum from Ellen L. Weintraub, Commissioner, Federal Elections Commission, September 28, 2016, https://beta.fec.gov/resources/about-fec/commissioners/weintraub/statements/Foreign_National_2_Memo_28_Sept_2016.pdf.
- 98 Matthew Rosenberg, Nicholas Confessore, and Carole Cadwalladr, "How Trump Consultants Exploited the Facebook Data of Millions," *New York Times*, March 17, 2018 ("The firm was effectively a shell. According to the documents and former employees, any contracts won by Cambridge, originally incorporated in Delaware, would be serviced by London-based SCL and overseen by Mr. Nix, a British citizen who held dual appointments at Cambridge Analytica and SCL."); Carole Cadwalladr and Emma Graham-Harrison, "Staff claim Cambridge Analytica ignored US ban on foreigners working on elections," *The Guardian*, March 17, 2018, <https://www.theguardian.com/uk-news/2018/mar/17/cambridge-analytica-non-american-employees-political>.
- 99 See Alina Polyakova et al., *The Kremlin's Trojan Horses*, Atlantic Council, 4 (Nov. 2016) (discussing the utility to the Kremlin of obscuring financial ties with proxies). Russia has a widely recognized practice of employing proxy entities in other countries. See, e.g., Orysia Lutsevych, *Agents of the Russian World: Proxy Groups in the Contested Neighbourhood*, Chatham House, The Royal Institute of International Affairs, 2016, <https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2016-04-14-agents-russian-world-lutsevych.pdf>; Brad D. Williams, "How Russia adapted KGB 'active measures' to cyber operations, Part II," *Fifth Domain Cyber*, March 20, 2017, <https://www.fifthdomain.com>.

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- 104 One of the Chinese owners may have directed the contributions, according to reporting in *The Intercept*. John Schwarz and Lee Fang, “How a Top GOP Lawyer Guided a Chinese-Owned Company Into U.S. Presidential Politics,” *The Intercept*, August 3, 2016, <https://theintercept.com/2016/08/03/gop-lawyer-chinese-owned-company-us-presidential-politics>. Although super PACs are supposed to operate independently of candidate campaigns, Jeb Bush relentlessly fundraised for the group before he officially declared his candidacy, and it was run by one of his most closely trusted advisers. Ian Vandewalker, *Shadow Campaigns: The Shift in Presidential Campaign Funding to Outside Groups*, Brennan Center for Justice, 2015, 11-12, <https://www.brennancenter.org/publication/shadow-campaigns-shift-presidential-campaign-funding-outside-groups>.

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- 109 Democracy Is Strengthened by Casting Light On Spending in Elections (DISCLOSE) Act of 2017, S.1585, 115th Cong. (2017). There are other factors that can make a corporation subject to the ban, such as a foreign national having the power to direct the decision-making process of the firm. By limiting the triggering percentage to five percent or more, the bill minimizes the compliance burden, since purchases of five percent or more, along with the buyer's citizenship, must already be reported to the Securities and Exchange Commission within 10 days of the purchase. 17 C.F.R. § 240.13d-101. "When a person or group of persons acquires beneficial ownership of more than 5% of a voting class of a company's equity securities registered under Section 12 of the Securities Exchange Act of 1934, they are required to file a Schedule 13D with the SEC." "Schedule 13D," Securities and Exchange Commission, accessed January 29, 2018, <https://www.sec.gov/fast-answers/answerssched13htm.html>.
- 110 The FEC's regulations treat LLCs as corporations if they have publicly traded shares or chose to file with the IRS as corporations. Other LLCs with multiple members are treated as partnerships. 11 C.F.R. § 110.1(g).

- 111 An LLC's operating agreement determines the ownership interest of each of its members. A partnership agreement typically sets the ownership of each partner, with default rules set by statute in cases where there is no agreement. Ciara Torres-Spelliscy, personal communication, February 5, 2018.
- 112 The feasibility of such a rule is supported by existing regulations from other areas of law hinge on percentages of ownership for entities like LLCs and partnerships. Louisiana's ban on contributions from casino interests hinges in part on a test of ownership "of an interest which exceeds ten percent of any legal entity." La. Stat. Ann. § 18:1505.2(L)(3)(b)(i). New York's charitable trust governance prevents entities with any individual trustee, affiliate, or relative of the trustee who holds more than 35 percent ownership interest from participating in certain activities. N.Y. Est. Powers & Trusts Law § 8-1.9. The Small Business Administration runs a business development program for firms owned by socially and economically disadvantaged individuals. 13 C.F.R. § 124.105. Firms are eligible if disadvantaged individuals own at least 51 percent of the business. "Ownership Eligibility," U.S. Small Business Association, accessed January 30, 2018, <https://www.sba.gov/contracting/government-contracting-programs/8a-business-development-program/eligibility-requirements/ownership-eligibility>.
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