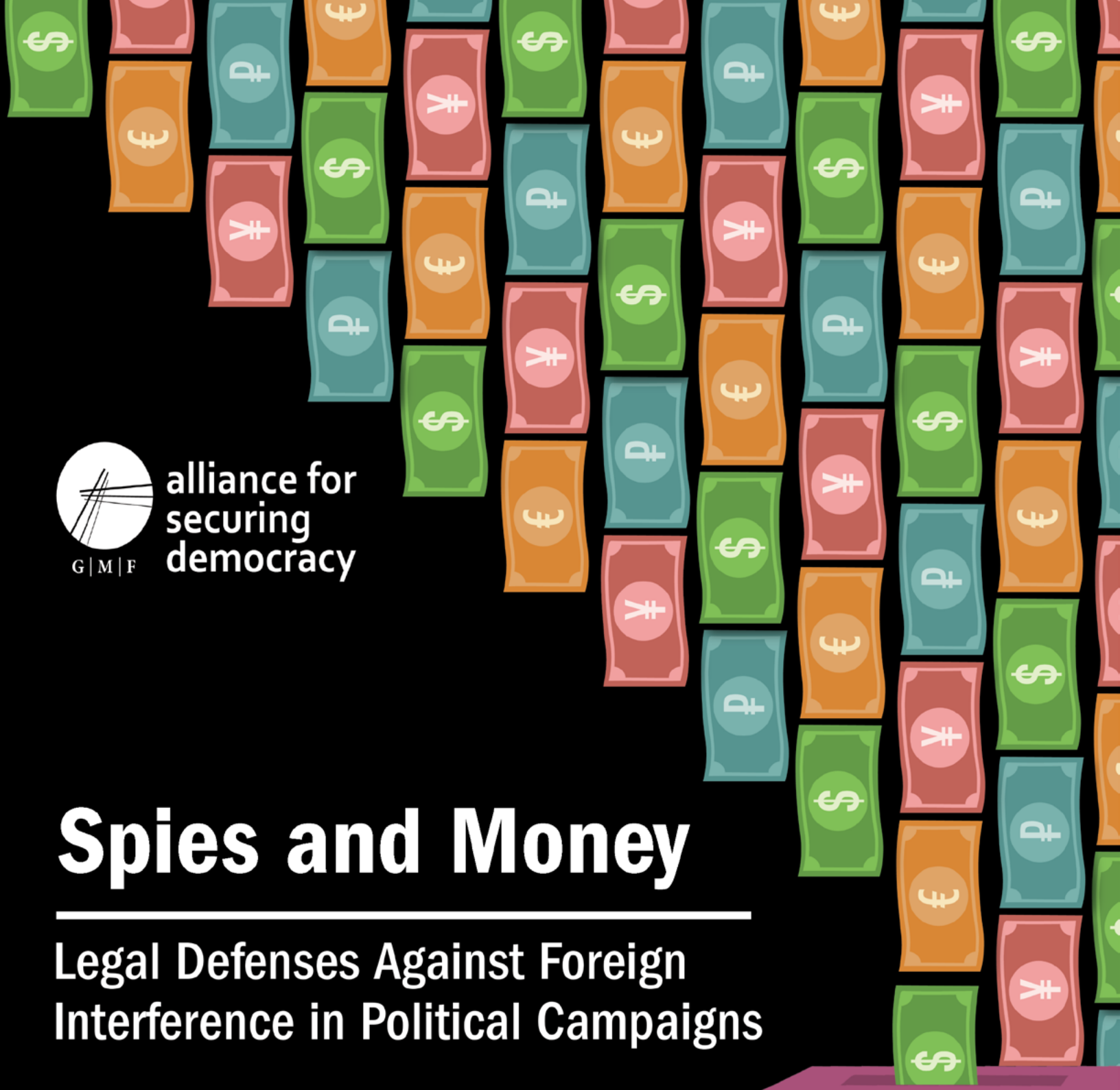

alliance for securing democracy

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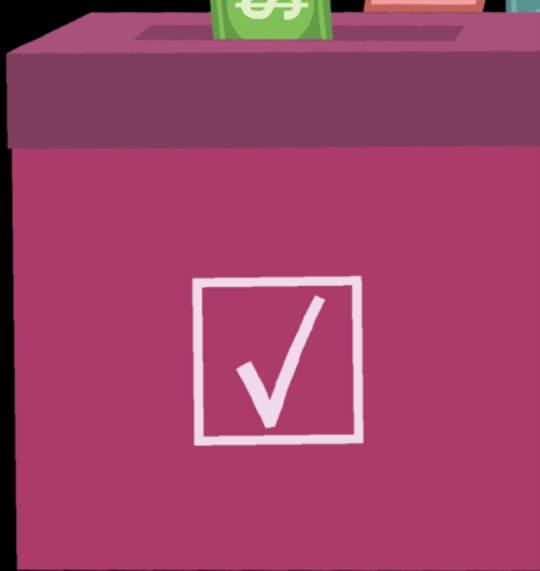
Spies and Money

Legal Defenses Against Foreign Interference in Political Campaigns

Jessica Brandt
Joshua Rudolph



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Alliance for Securing Democracy

The Alliance for Securing Democracy (ASD), a bipartisan initiative housed at the German Marshall Fund of the United States, develops comprehensive strategies to deter, defend against, and raise the costs on authoritarian efforts to undermine and interfere in democratic institutions. ASD brings together experts on disinformation, malign finance, emerging technologies, elections integrity, economic coercion, and cybersecurity, as well as regional experts, to collaborate across traditional stovepipes and develop cross-cutting frameworks.

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This paper benefitted from the insights of group of nine leading American national security legal experts. Not all members of the advisory council agree with every argument or recommendation in these pages, which are the responsibility of the authors alone.

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Executive Summary

In recent years, U.S. government officials have normalized a damaging notion: that soliciting or participating in foreign interference in a U.S. election will not be prosecuted. Foreign governments from Beijing to Moscow and elsewhere are watching closely, and unless Congress and the new administration act quickly to close loopholes in the current U.S. legal framework governing political campaigns, every major U.S. election could be undermined by foreign interference that is not prohibited by U.S. law. A new legal framework around political campaigns is sorely needed—one that provides a proactive and holistic approach to foreign interference rooted in the need to protect U.S. national security.

Existing statutes were not designed to be the nation's primary defense against foreign interference in our elections, which has led to several notable gaps, including:

- The absence of a national security-oriented law that prohibits candidates or campaigns from collaborating with a foreign power to influence an election;
- Campaign finance laws designed to prevent quantifiable domestic corruption rather than intangible assistance from foreign adversaries;
- Shortcomings in the primary U.S. law regulating foreign interference, the Foreign Agents Registration Act (FARA), which is only a disclosure statute, is insufficiently enforced, contains loopholes, and is not scoped toward efforts to influence candidates or voters;
- The lack of a requirement for campaigns to report offers of assistance from abroad;
- Extensive financial secrecy rights in the United States, which make uncovering wrongdoing by companies and candidates difficult.

Evolving national security threats have only exacerbated these issues: the rise of the internet and social media present a new avenue for authoritarian interference and manipulation; authoritarian actors have funneled increasing amounts of foreign money into democratic politics; Russia in particular is more aggressively exercising state power through more decentralized, covert, and unattributable networks; and domestic political actors have become much more amenable to participating in foreign interference operations, ranging from active coordination to the amplification of politically advantageous narratives.

At the start of a new administration, there is new hope for bipartisan agreement to address foreign interference in U.S. elections. To this end, this analysis proposes actionable policy recommendations that focus on remedying gaps in two areas: counter-intelligence measures and campaign finance reforms.

Counter-Intelligence Recommendations

1. ***Criminalize U.S. participation in foreign interference*** by banning U.S. actors from knowingly (and potentially recklessly) playing a role—such as laundering disinformation—in interference operations on behalf of foreign powers and prohibiting candidates from forming mutually advantageous political alliances with foreign governments.
2. ***Require campaigns to report contacts with foreign powers to law enforcement***, starting with a bill like the *SHIELD Act* and expanding it to also cover intermediaries and big donors, while narrowing the scope to contacts with non-allied countries.
3. ***Strengthen FARA enforcement, close FARA's lobbying loophole, and enhance FARA disclosures*** by mitigating factors that have historically impeded FARA enforcement, removing the Lobbying Disclosure Act (LDA) exemption to FARA registration, and requiring foreign agents to more clearly disclose the name of the foreign government they ultimately represent.

4. ***Make presidential candidates disclose their tax returns and require presidents to separate themselves from business interests***, removing a potential mechanism for foreign adversaries to use undisclosed business and financial ties to support and gain leverage over presidents or presidential candidates.

Campaign Finance Recommendations

1. ***Clarify that the definition of a "thing of value" unambiguously includes intangible, difficult-to-value, uncertain, or perceived benefits,*** equipping campaign finance law to prohibit foreign assistance such as the provision of derogatory information on opponents.
2. ***Require professional service providers to know their customers*** by requiring anti-money laundering controls designed to identify ultimate beneficial owners who hide money through the services of U.S.-based lawyers, accountants, real estate agents, private equity and hedge funds, and other enablers.
3. ***Prohibit U.S. political spending by subsidiaries of foreign parent companies,*** which would address the fungibility of money between foreign and domestic operations in cross-border companies as well as difficult-to-prove or non-explicit directives from abroad as to how U.S. subsidiaries should make political donations.
4. ***Bring transparency to non-profit funding*** by requiring non-profits and other entities spending more than $10,000 advocating a political candidate to publicly disclose donor identities, and all U.S. non-profits to report the identities of their funders to law enforcement.
5. ***Prevent covert funding of online political ads and media outlets*** by requiring social media companies to maintain "ad libraries" that publicly disclose the sources of payment behind online political ads, and U.S. technology companies to maintain similar "outlet libraries" revealing the beneficial owners who fund fringe online media outlets that use U.S.-based internet services.
6. ***Revive DOJ-FEC coordination on potential campaign finance violations*** by updating guidance for enforcement coordination between the FEC and DOJ.

Introduction

A series of signals from U.S. government officials at the highest levels have normalized an idea that is detrimental to our national security—that soliciting or participating in foreign interference in a U.S. election may not be prosecuted.[1] Prosecutors have declined to pursue charges, decided not to investigate, or failed to secure convictions on several high-profile cases of possible campaign finance, conspiracy, bribery, and foreign lobbying violations.[2] Asked whether it is ever okay to invite a foreign government to become involved in an election, a sitting U.S. Senator responded, "The answer is yes, we do it all the time." Within the executive branch, President Trump himself refused to acknowledge that this is a threat, arguing that "there isn't anything wrong with listening" to information about a political opponent provided by a foreign government.[3] At least so far, Trump has faced no legal consequences for separately requesting election assistance from the governments of Russia, Ukraine, and China, though his pressure toward Ukraine did make him only the third President in U.S. history to be impeached.[4]

With foreign governments from Beijing to Moscow and elsewhere watching closely, quick action to close off clear loopholes in our current legal framework around foreign interference in political campaigns is urgent. As a new Congress and administration come to Washington, we offer a concrete, achievable plan, vetted by a bipartisan team of experts, to close the gaps that have enabled foreign interference in recent years and that, worse still, could encourage more interference in future elections as a result of a thus-far insufficient response.

Adversarial foreign government plots to undermine U.S. democratic processes will not be stopped by continuing to treat them as technical matters to be addressed by campaign finance rules or other domestically-oriented laws. None of our existing statutes were built to function as the nation's primary defenses against foreign interference, which is both an election integrity challenge and a national security threat. Recent experience has provided several important lessons about gaps in existing law (and the way the rules are perceived), which could constrain the ability to prosecute future participation in foreign interference:

- The United States does not have a national security-oriented law to prohibit candidates or campaigns from collaborating with a foreign power to influence an election. Instead, Special Counsel Robert S. Mueller III focused his investigation on (and did not establish) possible violations of conspiracy law, which would have required proof that co-conspirators entered into an actual agreement to defraud the United States, as well as possible campaign finance violations that are difficult to prosecute criminally because they require extensive evidence of the violator's mental state and the monetary value of the violations.

- U.S. campaign finance laws were written mainly to prevent quantifiable domestic corruption aimed at enrichment, not to protect U.S. national security from intangible foreign interference meant to undermine the entire democratic process. Even when drafting the ban against foreign-sourced donations, Congress meant to motivate campaigns to avoid unwittingly taking foreign money by failing to sufficiently invest in robust vetting procedures. Lawmakers did not consider the need to deter campaigns from wittingly collaborating with a foreign power to secretly influence an election.[5]

- The primary U.S. law regulating foreign influence—FARA—is only a disclosure statute. It is insufficiently enforced and suffers from gaping loopholes. Moreover, FARA is scoped toward operations to influence the U.S. government rather than candidates or voters.

- In addition to challenges associated with encrypted technologies and private conversations that defendants lie about, it is hard for law enforcement to obtain a broad picture of foreign interference if campaigns are under no obligation to report offers of assistance from abroad. A duty to report would give law enforcement leverage against would-be violators, while potentially deterring foreign actors from reaching out in the first place.

- Given the ability of U.S. companies and even presidential candidates to keep their finances secret, it is possible for a determined and crafty foreign power to funnel support to U.S. political actors without getting caught. Extensive legal rights to financial secrecy in the United States preclude investigations by journalists and watchdogs that can uncover wrongdoing. The process of criminal investigators using subpoena power and other techniques to compel production of financial documents for opaque real estate dealings over 30 to 40 years would have become public and elevated the risk of Trump firing Mueller—an unfortunate dynamic that could recur in these types of politically sensitive election-focused investigations.[6]

The failure of U.S. laws to keep up with evolving national security threats is particularly problematic in light of at least four troubling developments within the last decade:

- The emergence of the internet and the expansion of social media have provided authoritarian regimes with a new avenue for potentially potent manipulation across national borders.

- The amount of covert foreign money that authoritarian regimes funnel into the politics of democracies has jumped by a factor of 10 over the past five years.[7] Recent research shows that 83 percent of malign finance flows through legal loopholes, while U.S. officials similarly warn that "Russia has sought to take advantage of countries that have perceived loopholes in laws preventing foreign campaign assistance."[8] U.S. officials also warned in early 2020 and that beyond reusing its 2016 tactics the Kremlin might also channel funding to candidates or parties, use economic or business levers to influence a campaign or administration, or provide secret advice to political candidates and campaigns.[9]

- Russia now exercises state power through more decentralized, covert, unattributable networks of oligarchs and criminals whose communications with the Russian government are limited to in-person meetings not formally recorded (whether they take place in the Kremlin or on some private yacht). By contrast, when the Soviet Union offered financial assistance to U.S. presidential candidates in the 1960s—Hubert Humphrey and Adlai Stevenson, both of whom turned down the money—instructions were wired from Moscow and the offer was relayed directly by the Soviet ambassador.[10]

- Most importantly, domestic political actors have become much more willing to participate in foreign interference operations, and that participation can take many forms, from active coordination to amplification of politically advantageous narratives. In 2016, Trump and his associates made at least 140 contacts with Russian nationals and WikiLeaks while the Trump campaign "expected it would benefit electorally from information stolen and released through Russian efforts" and "was planning a press strategy, a communications campaign, and messaging based on the possible release of Clinton emails by WikiLeaks."[11] As the Trump administration signaled that participation in foreign interference would not be prosecuted, Trump separately asked the presidents of China and Ukraine for favors in the summer of 2019 that would have helped him win re-election in 2020.[12] Domestic participation has extended to the president's allies, including efforts by President Trump's personal lawyer (Rudolph W. Giuliani) and the Senate Homeland Security Committee Chairman (Ron Johnson) to publicize unsubstantiated allegations about Trump's electoral opponent—information sometimes flagged by the U.S. law enforcement and intelligence comunities as coming from Russian intelligence agents.[13]

The United States is not alone in facing these challenges. Recognizing the emerging threats to the integrity of elections, other democracies have conducted comprehensive audits and enacted whole-of-government reforms. This report occasionally cites their efforts.

In the United States, however, remarkably little has been done to update the regime to meet the moment, not least as a result of partisan fissures. With the 2020 election behind us, there is renewed hope for bipartisan agreement on an approach to address foreign interference in elections.

We need a new framework—one that is proactive, holistic, and addresses the threat as a matter of national security. That's because our election laws were designed to ensure fairness, not to protect national security. Like financial institutions handling dirty money or political campaigns contacting foreign officials, social media companies bear responsibility for what happens on their platforms, and there is ample room for improvement in their performance. But ultimately, it is asking too much to expect them to single-handedly ward off hostile foreign nations and protect U.S. national security.[14] That is a job for government. It is therefore incumbent upon Congress to consider legislative measures that would close our vulnerabilities, shore up our defenses, and provide a method of deterrence—measures that recognize that foreign interference comes in many forms, not all of them online. At the same time, it will be important to ensure that any new framework is consistent with the values of an open society, and that it neither closes off space for conventional foreign relations and free expression nor creates precedents authoritarian regimes can point to as justification for eliminating foreign support for non-political civil society activity.

This report provides a path forward, proposing actionable policy recommendations to ensure that the United States closes off avenues for foreign interference in its elections. Because legal protections against this threat should be grounded in national security, the first half of our analysis covers counter-intelligence measures, including reforms to FARA, disclosure requirements that would help reduce vulnerabilities to espionage, and new statutory recommendations to prohibit U.S. participation in foreign interference. Given the prominence of vulnerabilities in campaign finance law revealed by Mueller's analysis, as well as new evidence that covert foreign money is the most active offline vector of authoritarian interference in democracies, the second half involves reforms to campaign finance.

§I: Counter-Intelligence

Protecting U.S. democracy from malign interference perpetrated by foreign governments—whether conducted by formal intelligence services, non-traditional proxies such as oligarchs and organized crime groups, adjuncts to a Party-State, or some combination thereof—has become a top U.S. counter-intelligence priority. However, U.S. laws have not kept pace with this evolving threat. A bipartisan Senate investigation into Russian interference in the 2016 election concluded the following in its report on the counter-intelligence threat:

> *The Committee's inquiry highlighted several ways in which hostile actors were able to capitalize on gaps in laws or norms and exert influence. Those areas included unclear laws regarding foreign advocacy, flawed assumptions about what intelligence activity looks like, and a campaign's status as a private entity intertwined with the structures of democracy.*[15]

We have adopted some of the reforms recommended by the Senate Select Committee on Intelligence, while also surveying other proposals by legal scholars on both sides of the aisle and reforms recently enacted by other democracies.

1. Criminalize U.S. Participation in Foreign Interference

Congress should ban U.S. actors from knowingly (and potentially recklessly) playing a role in malign foreign influence operations. We see the spectrum of measures to consider as being bookended by two models, which are not mutually exclusive. In our view, Congress should enact the first option immediately while also embarking on a more deliberative process to follow up with a version of the second option that fits within the U.S. political, institutional, and constitutional context.

The limited and minimal option is to prohibit presidents, candidates, and campaigns from collaborating with foreign nationals to influence an election. The leading proposal is set out in *After Trump*, a new book by Bob Bauer and Jack Goldsmith, who served as senior officials in the Obama and Bush administrations, respectively.[16] They recommend outlawing political alliances between campaigns and foreign states by amending and extending the scope of Section 219 of the U.S. criminal code, which currently prohibits "public officials" from entering FARA reportable relationships.[17] "Public officials" currently includes members of Congress and other government employees, but on its face does not include the president and certainly does not cover presidential candidates who are private citizens. In addition to expanding the definition of a "public official," Section 219 should be amended to cover communications with foreign nationals in service of a mutual goal of influencing an election (meaning that Section 219 reporting requirements would be triggered by broader definitions of an "agent" receiving a foreign principal's "request" for "political activity," as compared to narrower existing definitions of those terms under FARA, a law that addresses those who serve as agents of foreign principals aiming to influence the U.S. government and does not expressly include collaborations aiming to influence voters). This reform would prohibit future activities like those that occurred at the 2016 Trump Tower meeting and in the 2019 case of Trump "pleading with Xi to ensure he'd win" by underscoring the importance of "increased Chinese purchases of soybeans and wheat in the electoral outcome."[18]

The more expansive model is a set of new counter-espionage criminal offenses that Australia enacted in response to reports that the Chinese government has been covertly seeking to influence every layer of the Australian government, compromise its political parties, and subvert elements of civil society ranging from academia to the media.[19] The British government pointed to this 2018 Australian law as an approach worth considering as the United Kingdom updates its own espionage and treason legislation to address Russian malign influence in London.[20] The Australian law prohibits any person from participating in foreign interference against any Australian "political or governmental process" or "democratic or political right or duty" (terms that are left undefined), as well as a range of conduct that could "prejudice national security" such as stealing trade secrets, sabotaging public infrastructure, or spying for a foreign principal. Such sweeping legislation could help constrain the behaviors of professional service providers functioning as enablers of malign authoritarian influence, including some lawyers, lobbyists, public relations consultants, and other professional service providers (which will be

discussed further in the context of money laundering). The law also bifurcates different statutory penalties for different *mens rea* standards, such as 20 years of imprisonment if the foreign interference was intentional versus 15 years if done recklessly. This revamp of counter-espionage laws around foreign interference should also plug gaps in intelligence authorities, such as expanding the *Foreign Intelligence Surveillance Act* to explicitly allow for surveillance if there is probable cause to believe that a political campaign may be receiving foreign assistance. This broader approach could outlaw a range of future foreign interference activities like some witnessed in recent years, from Rudy Giuliani and his associates injecting into U.S. politics what they know may well be Russian disinformation to Senator Ron Johnson and his staff taking information from collaborators of Ukrainians linked to Russian intelligence services.[21] At the same time, this expansive approach could raise difficult concerns about whether such a law infringes on constitutionally protected expression and association or could be weaponized by an unscrupulous administration against political opponents.[22]

2. Require Campaigns to Report Contacts with Foreign Powers

The ability of law enforcement to detect in real time a fuller matrix of foreign interference would be greatly enhanced by legislation like the *SHIELD Act*, requiring U.S. political campaigns to report to law enforcement offers of assistance from foreign powers. The *SHIELD Act* would require campaigns to notify the FEC and FBI (which would in turn have to share the notification with the two Congressional intelligence committees) within a week of any foreign government, party, or agent offering the campaign help in connection with an election. One case the drafters had in mind was the offer of assistance that proxies of the Russian government offered to senior Trump campaign officials in advance of the Trump Tower meeting in June 2016. The disclosure requirements should also cover future cases like the discussions with foreign powers about assistance with the 2020 election, ranging from President Trump reportedly asking Chinese President Xi for help to Trump's lawyer (Rudy Giuliani) serving as a conduit for Russian intelligence officers to provide disinformation about then-candidate Joe Biden.[23]

After the *SHIELD Act* passed in the House of Representatives in October 2019, a corresponding version in the Senate known as the *FIRE Act* was watered down in several ways to get some bipartisan support. Specifically, the *FIRE Act* would only apply to presidential (not Congressional) campaigns, would not apply to super PACs, removed the requirement that law enforcement pass the notification along to Congress, and defined several terms in more lenient language.[24] The only change in the *FIRE Act* that we would maintain is removing the *SHIELD Act's* exemption for contacts with foreign election observers (which Russia has reportedly used to carry out interference campaigns).[25] We would also expand the *SHIELD Act* by clarifying a broad scope of U.S. campaign "agents" to cover all manner of intermediaries, expanding the scope of reporting entities to also cover donors contributing more than $200,000 in an election cycle, and narrowing the scope of countries for which the broadest part of the bill applies (that is, campaigns should only have to report "information or services to or from, or persistent and repeated contact with" nationals of countries that are neither NATO members nor major non-NATO allies).[26]

3. Strengthen FARA Enforcement, Close FARA's Lobbying Loophole, and Enhance FARA Disclosures

The Senate Select Committee on Intelligence (SSCI)'s multi-volume report on election interference highlighted the fact that DOJ failed to pursue criminal charges for "even the most flagrant violations of the [FARA] statute."[27] Despite a recent uptick in FARA prosecutions following the Mueller investigation, SSCI still found numerous incidents where FARA registrations were excessively delayed, retroactive, incomplete, inaccurate, or otherwise insufficient to accomplish the law's objectives—but no criminal prosecution followed. This report thus echoes SSCI's recommendation that DOJ should increase enforcement of FARA and enhance the resources available to its foreign-influence unit.

Congress and the executive branch should work together to mitigate the factors that have historically impeded adequate FARA enforcement. A 2016 Inspector General audit of DOJ's FARA regime demonstrated that FARA

registrations peaked in the 1980s, fell sharply in the 1990s, and never recovered.[28] Officials within DOJ's National Security Division (NSD) speculate that the decline was due, at least in part, to the passage of the Lobbying Disclosure Act of 1995 (LDA).[29] The LDA allows foreign agents registering as lobbyists under the LDA to avoid FARA registration, so long as they are not representing a foreign government or foreign political party.[30] However, LDA disclosure requirements are not as comprehensive as those under FARA and even those foreign agents who are not formally affiliated with a foreign government can exercise significant influence in carrying out that government's interests.[31] Moreover, prosecutors have difficulty meeting the *mens rea* standard of FARA violations because defendants have considerable legal latitude to claim they believed themselves to be covered under the LDA exemption. For all these reasons, we concur with the recommendation by NSD officials that the LDA exemption should be removed. The new FARA unit within NSD could be harnessed to drive in these directions.[32]

DOJ should also follow the lead of the FCC in making foreign agents more clearly disclose the name of the foreign government they ultimately represent. For example, when Radio Sputnik reads its hourly disclosure statement required by the DOJ and the FCC, it says its "programming is distributed by RM Broadcasting, LLC on behalf of the Federal State Unitary Enterprise Rossiya Segodnya International News Agency" and that additional information is on file with the Department of Justice. Similarly, RT identifies as "ANO TV-Novosti" and China's CGTN America claims to broadcast on behalf of "CCTV."[33] No listener can be expected to know that these disclaimers indicate they are hearing government-funded propaganda. A bipartisan group of FCC commissioners recently proposed a rule that would fix this for broadcasters, requiring them to identify the name of the country behind programming.[34] DOJ should similarly promulgate regulations clarifying that when a foreign principal is in turn associated with a government, the "conspicuous statement" should name that government in terms that are recognizable by most Americans. DOJ should also go further than the FCC by reducing the minimum frequency of such on-air disclosures from 60 minutes to 20 minutes (which is sufficiently below the 27-minute average American commute time that it would air at least once for roughly two thirds of commuters) and by extending FARA disclosures to cover foreign agent communications in U.S. media outlets (for example, in the form of opinion columns).[35]

4. Make Presidential Candidates Disclose Their Tax Returns and Require Presidents to Disclose and Separate Themselves from Their Business Interests

Corruption and undisclosed financial vulnerabilities provide opportunities to foreign intelligence services and oligarch proxies of kleptocratic regimes to cultivate or gain leverage over U.S. presidents and presidential candidates. To defend against this threat of foreign financial subversion, we recommend three reforms proposed by Bauer and Goldsmith: disclose tax returns, prohibit participation in private business while in office, and disclose foreign emoluments.

Trump broke two norms that had consistently held for decades: that all major-party presidential nominees voluntarily disclose their tax returns and all presidents isolate themselves from private business interests. Without suggesting any wrongdoing or bad intentions, reporting on his personal and business tax filings by The New York Times raises a number of possible counter-intelligence questions: To whom does Trump owe $421 million?[36] How did his company with a secret Chinese bank account come by a $15 million windfall that was quickly withdrawn by Trump in his first year in office?[37] What came of FBI concerns about his lucrative property sales to Chinese elites in 2016?[38] Who secretly funneled Trump more than $21 million through a Las Vegas hotel and various shell companies when he was strapped for cash in 2016?[39] Did an Egyptian state bank fund Trump's $10 million self-donation after he met President Abdel Fattah el-Sisi when his campaign was out of money in 2016?[40] Risks of foreign government support and influence have also surrounded Ivanka Trump's trademarks fast-tracked by China, Jared Kushner's real estate financing needs, and cash flowing through Trump Organization properties around the world.[41] Upon seeing Trump take Putin's side over the U.S. intelligence community at the Helsinki press conference, Mueller voiced his suspicions that if Trump is subservient to Putin "it would be about money."[42]

While Mueller and New York Times reporters with access to Trump's tax returns were unable to answer these questions, many of the situations would not have even come to public light without access to his taxes. These ex-

amples illustrate a compelling national security interest in a federal requirement for presidents and presidential candidates to publicly disclose their tax returns. As introduced in *H.R. 1*, the legislation would apply to sitting presidents as well as presidential and vice-presidential nominees from major political parties. We also support a proposal like that of Bauer and Goldsmith to expand the *H.R. 1* version to also cover independent and third-party candidates, as well as any of the president's or vice president's family members who have senior executive branch positions, and to grant Congress the clear authority to compel the disclosure by Treasury in the event of non-compliance.[43]

In addition to mandatory tax disclosures, presidents should be prohibited from performing any role in managing their business interests while serving in office.[44] Presidents should have to certify annually—subject to criminal punishment for lying—that they have not been in direct or indirect communication with anyone operating or potentially supporting their businesses, from staff to prospective investors. Such a law would have prohibited Trump from calling employees at Trump properties for business updates and receiving private quarterly briefings from his son Eric.[45] Moreover, any businesses in which the president holds a major stake should have to publicly report details of their financial position (including amounts owed and the identities of creditors), and those disclosures or any other public data or press reports should be the only information that the president is allowed access to about his business interests. We would add that this set of rules should also apply to family members of the president serving in senior executive branch positions.

Finally, even with presidents prohibited from making private business decisions while in office, foreign governments could still just directly enrich presidents or their businesses. While that would violate the foreign emoluments clause of the U.S. constitution, the U.S. legal code lacks practical and actionable transparency and enforcement mechanisms that would make the emoluments clause a useful deterrent and disciplinary device for prosecutors, Congress, or the public. Bauer and Goldsmith propose amending the Foreign Gifts and Decorations Act to require presidents and any businesses in which they hold a financial interest to publicly disclose (through reports to Congress and the Office of Government Ethics) the details of any income received or reasonably anticipated that would ultimately come from foreign governments or their proxies.[46] Within 60 days of any such disclosure, unless Congress then votes to affirmatively consent to the foreign emolument, the president or their business would have to hand it over to the U.S. Treasury. This should enable the public to hold both presidents and Congress accountable for upholding the foreign emoluments clause, which is the main U.S. constitutional protection against foreign government financial influence over U.S. presidents

§II: Campaign Finance

Campaign finance and corporate secrecy rules are being called upon to play a greater role in protecting U.S. politics from foreign interference than they were designed for. On the one hand, the U.S. legal framework to stop foreign interference should be rooted in rules designed to protect national security, which is one reason why this report covered counter-intelligence gaps first. On the other hand, campaign finance laws and regulations can be retooled to serve important supporting functions. Indeed, this is particularly crucial given recent research showing that authoritarian regimes aggressively stepped up the pace of covert financial interference over the past five years, funneling more than $300 million into 33 countries to interfere in democratic processes more than 100 times.[47]

1. Clarify that the Definition of a "Thing of Value" Unambiguously Includes Intangible, Difficult-to-value, Uncertain, or Perceived Benefits

The Federal Election Campaign Act (FECA) prohibits foreign nationals from contributing any "money or other thing of value" in connection with an election. However, DOJ has repeatedly declined to prosecute cases involving solicitation of intangible foreign assistance such as negative information about opponents (for example, at the June 2016 Trump Tower meeting), distribution of such information (for example, through WikiLeaks), hacking services (for instance, Trump's famous public request, "Russia, if you're listening…"), investigations into political opponents (for example, as Trump requested of Ukraine), and agricultural purchases in swing states (for example, as Trump reportedly requested of China).[48] From Mueller's conclusions to the response to Trump's request of Ukraine, DOJ officials have reasoned that such benefits cannot be quantified as a "thing of value."[49]

The definition of "thing of value" should be clarified to spell out that it unambiguously includes intangible, difficult-to-value, uncertain, or perceived benefits. The most robust form this reform could take would be new legislation, although a similar result could be achieved by DOJ or the FEC enforcing existing law more broadly. There is reasonable debate about whether this broader legal scope should apply to Americans or only foreign nationals. The House Intelligence Authorization Act for Fiscal Year 2021 would extend it to everyone, expanding the definition of a "thing of value" to include "opposition research, polling, or other non-public information relating to a candidate … for the purpose of influencing the election … regardless of whether [the information] has monetary value," unless it is "the mere provision of an opinion about a candidate."[50]

By contrast, Special Counsel Mueller and President Trump's legal team in the impeachment trial separately raised the possibility that the courts could treat information as protected First Amendment speech.[51] The concern is whether it would impinge upon the rights of Americans (such as a victim of abuse or someone with legal access to tax records) from providing campaigns with information about their opponents. Bauer and Goldsmith recommend avoiding this spillover effect on U.S. citizens and domestic politics by amending only the portion of FECA that bans donations from foreign nationals.[52]

If Congress takes this more limited, foreign-only approach, it should ensure that the new language is broad enough to cover U.S.-based intermediaries, even if they are only acting recklessly with regard to the risk that the source of their information might be tied to a foreign government.[53] This is important, in light of recent cases where foreign disinformation was apparently laundered through official Senate investigations or candidates' personal lawyers.

2. Require Professional Service Providers to Know their Customers

Authoritarian governments like Russia, and even their proxies such as extremely wealthy oligarchs, are only able to carry out malign influence operations in Western politics because they buy assistance from private industries legally based within the target countries. This includes U.S.-based lawyers, real estate agents, accountants, bankers, lobbyists, public relations professionals, and company formation agents. This industry of enablers is also very problematic in London, where Bill Browder describes them as a "buffer" of Westerners set up by Moscow

to serve as "de facto Russian state agents."[54] In some cases, their promotion of nefarious foreign plots against democracies is witting or at least reckless, bad behavior that should be outlawed by new criminal offenses mentioned previously as the Australia model. In many other cases, however, it would be difficult for prosecutors to establish a *mens rea* standard because enablers simply handle the accounts of large numbers of entities without any legal obligation to identify the ultimate customers. All of these professional enablers should have to establish anti-money laundering controls designed to identify ultimate beneficial owners, similar to requirements for U.S. banks, although the regulatory approach differs for various types of industries.[55]

The easiest group to regulate is made of up ten sectors that are listed in the Bank Secrecy Act's definition of a "financial institution" but have continually received "temporary" exemptions from the U.S. Treasury Department ever since 2001, when the requirements were enacted in the Patriot Act. These ten exemptions range from real estate professionals to sellers of yachts and airplanes.[56] A 2010 Senate investigation into foreign corruption recommended that Treasury repeal all ten exemptions, which could and should be done with new rulemaking.[57]

Regulating sectors not named among the 24 types of financial institutions in the Bank Secrecy Act would involve the Treasury Secretary determining that they engage in activities that are similar to those of financial institutions (authorized by 31 USC § 5312(a)(2)(Y)) or involve cash transactions useful for criminal, tax, or regulatory matters (authorized by 31 USC § 5312(a)(2)(Z)). In some cases, this argument is straightforward. For example, Treasury proposed a rule in 2015 that would have determined that registered investment advisors, including private equity and hedge funds, act similarly to financial institutions, and thus must establish anti-money laundering controls.[58] Treasury should finalize this rule immediately.

However, actors in several other important relevant professional sectors would likely mount vigorous political and legal resistance to any such move by Treasury. These include lawyers, accountants, company formation agents, and art dealers. While it is possible that these groups could be regulated through executive action, the legal regime would be more robust if Congress did it by writing them into the Bank Secrecy Act, as it did with antiquities dealers in the NDAA. In the meanwhile, Treasury could take a more limited step of requiring financial institutions to obtain certifications from lawyers and accountants that bank accounts they control are not being used by their clients to circumvent regulation or enable suspicious transactions.[59]

The recent legislative success of outlawing anonymous shell companies offers an important roadmap for how long-stalled financial integrity reforms can be advanced by a broad political coalition, extending from the banks and human rights groups to the law enforcement and national security communities.[60] This unlikely political alliance got beneficial ownership reform enacted through bipartisan and bicameral work that involved steady negotiations over legislative text that reached compromises to bring on board key interest groups one at a time without creating loopholes that could be exploited by bad actors.[61]

3. Prohibit U.S. Political Spending by Subsidiaries of Foreign Parent Companies

One of the most gaping financial loopholes through which foreign influence can enter U.S. politics involves contributions from U.S. companies owned by foreign entities, such as donations to super PACs by U.S. subsidiaries of foreign parent companies. While foreign nationals may not fund or direct U.S. contributions, money is often fungible between foreign and domestic operations. Moreover, directives from abroad as to how U.S. subsidiaries should make political donations are usually difficult to prove or not explicitly communicated.

This vector of foreign influence is a favorite of some Chinese billionaires, who have used it to buy favor with U.S. presidential candidates, interfere in local ballot measures, and support their business empires looking to expand into highly regulated markets such as real estate and horse racing.[62] This loophole was also used by Citgo, the Houston-based subsidiary of Venezuelan state-run oil giant PDVSA, which contributed $500,000 to Trump's inaugural committee soon after the 2016 election when Venezuela was looking to court U.S. investment and repair relations with Washington.[63] In each of these cases, it is difficult to distinguish the extent to which the objective of foreign-owned companies leaned toward political interference as a form of state-directed hostility versus the corrupt enrichment of elites, but in any case it is a substantial vulnerability that can and should be addressed through legislation.[64]

The best way to close this loophole is to prohibit U.S. companies with more than a certain threshold of foreign ownership from spending money in U.S. elections. In our view, the most reasonable foreign ownership thresholds for this prohibition are those that have appeared in legislation introduced in Congress, which would bar donations by U.S. companies that are owned at least 5 percent by a foreign government, 20 percent by any given foreign person, or 50 percent by a combination of foreign persons.[65] Some cities such as Seattle have gone even further, prohibiting local political contributions by companies owned more than 1 percent by an individual foreign entity or more than 5 percent in aggregate by multiple foreign entities.[66] We would not opt for those lower threshold levels, as they would block all political spending by roughly 98 percent of the largest 500 U.S. companies, which would be viewed less as a protection from foreign interference than a controversial backdoor measure to kill *Citizens United*.[67]

4. Bring Transparency to Non-profit Funding

Similar to straw donors and corporations, authoritarian regimes have utilized foundations, associations, charities, religious organizations, and other non-profits as handy vehicles for malign finance, because many legal systems treat them as third parties allowed to spend on politics without meaningfully disclosing the identities of their donors. Far-right parties in Europe such as Alternative for Germany, the Freedom Party in Austria, and the League in Italy have non-profit conduits that can secretly bring foreign money into politics.[68] Russia covertly funds non-profits serving as bespoke fronts to carry out specific jobs, like a Dutch think tank campaigning against a Ukrainian trade deal with the European Union, a Delaware "adoptions" foundation lobbying against sanctions on Russia, environmental groups opposing U.S. hydraulic fracking, and a Ghanaian nonprofit employing trolls pretending to be African Americans.[69] Lastly, non-profits are used as vehicles for elite capture, such as bribery conducted by CEFC China Energy, Dmytro Firtash's use of his British Ukrainian Society to influence London elites, and Russian secret agents and money launderers working to cultivate top U.S. politicians through the National Rifle Association.[70]

The bill in Congress that would bring transparency to the funding behind non-profits spending money on politics is the *DISCLOSE Act*. It would require non-profits and other entities that spend at least $10,000 advocating a political candidate to publicly disclose the identities of their donors. Such a bill would be helpful, but insufficient, due to its strict focus on political activity narrowly defined. It would not cover issue ads, such as those run by the Internet Research Agency to fan the flames of socially divisive issues like race, immigration, and Second Amendment rights. The *DISCLOSE Act* would also not apply to 501(c)(3)s, which represents a gap because they can spend money on work that influences policy as well as on transfers to 501(c)(4)s that engage in explicit political activity.

Congress should require all U.S. non-profits—whether they spend on politics or not—to report the identities of all their funders to law enforcement, similar to beneficial ownership reform for corporations.[71] Compared to the *DISCLOSE Act*, this proposal should include 501(c)(3)s, exclude corporations, look through to ultimate beneficial owners, include forms of income beyond just donations, and require reporting of financial audits.[72] Congress should also consider requiring non-profits to publicly disclose the identities of foreign funders, in ways that do not become too onerous for small organizations operating in good faith that do not have the resources to complete lengthy disclosure forms.[73]

5. Prevent Covert Funding of Online Political Ads and Media Outlets

In addition to funneling money directly to campaigns and parties, authoritarian regimes secretly spend money on political advertisements and fringe media outlets in target countries in order to influence political outcomes. Covert purchases of online political ads would be addressed by the *Honest Ads Act*, which would require social media companies to maintain "ad libraries" publicly disclosing the sources of payment behind online political ads, similar to rules that have long applied to traditional ad mediums.[74] Legislation like the *PAID AD Act* would expand the foreign-source ban to apply to ad purchases at any time (not just the period when U.S. buyers are regulated a month or two before elections), while also prohibiting foreign governments from buying issue ads in election years to influence the election.[75]

These steps would be welcome, but there is more to do. For example, Russia's preferred medium of covert media spending appears to have shifted over the past four years from ads to outlets. In the fall of 2020, FBI tips and social media takedowns repeatedly involved far-right or far-left online outlets secretly created by individuals associated with the Russian government or its proxies, often luring in unwitting U.S.-based freelance journalists.[76] This evolution in tactics must be met with new transparency requirements modeled after the *Honest Ads Act*, except requiring "outlet libraries" instead of "ad libraries."[77]

Specifically, U.S. technology companies should have to maintain publicly accessible archives of the beneficial owners who fund online media outlets using the U.S. technology company's internet services.[78] Similar to how U.S. banks are employed to enforce sanctions and are responsible for collecting and verifying beneficial ownership information, the legal obligation to operate these proposed outlet libraries should fall to U.S. web hosting providers, domain registrars, search engines, advertising technology firms, and social network platforms. Online media outlets wanting to use these services would need to provide tech companies with the identities of their funders—including equity owners, advertisers, and donors—for inclusion in the library. Covered outlets should include news organizations whose websites receive more than 100,000 unique monthly visitors or social media engagements while excluding publicly traded companies and other outlets already required to disclose ownership.[79] The scope could be further limited to outlets receiving at least 10 percent of their financial support from abroad and require disclosure only of those foreign funders.

6. Revive DOJ-FEC Coordination on Potential Campaign Finance Violations

According to a 1977 memorandum of understanding, the Justice Department is required to alert the FEC when it is investigating potential campaign finance violations. The FEC has a wide range of tools at its disposal to enforce federal elections law—tools DOJ does not have or leaves to the FEC. The memo obligates DOJ to notify the FEC "at the earliest opportunity" when information comes to its attention suggesting a "probable violation" of FECA.[80] The practice appears not to have been followed in one recent high-profile case: Trump's solicitation of election assistance from the government of Ukraine.[81] Enforcement coordination should be revived, so we concur with a recent GAO recommendation that the FEC and the DOJ review and update their guidance for coordination, including the 1977 memo.[82]

Conclusion

When it comes to structuring and carrying out malign influence campaigns, authoritarian regimes tend to be creative, opportunistic, and situation-dependent. No two interference operations are alike. For this reason, U.S. policies to build resilience to, catch, punish, and deter participation in foreign interference must be comprehensive and nuanced. Some more brazen conduct can be prohibited, while other behaviors should be publicly reported. Others still should be shared with law enforcement alone. Prosecutors should have a number of potentially overlapping legal tools to investigate and prosecute different types of foreign interference. In other words, our policy defenses must be, to borrow a phrase from Mueller, sweeping and systematic.

As the new administration and Congress come into office, they face a multitude of challenges. This is one that demands urgent action. Fortunately, there are concrete, achievable steps with support from both sides of the aisle that they can take to quickly close off clear loopholes in our current legal framework around political campaigns. Doing so can help build resilience to foreign interference, shoring up the integrity of our democracy long into the future.

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