

# TRUMP, TWITTER, AND THE RUSSIANS: THE GROWING OBSOLESCENCE OF FEDERAL CAMPAIGN FINANCE LAW

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## I. INTRODUCTION

The 2016 presidential campaign defied the conventional wisdom in virtually every regard. Donald Trump's surprise victory disproved the polls and embarrassed the pundits in the biggest election upset since the 1948 Truman-Dewey race.<sup>1</sup> But the 2016 election was more than a political earthquake. The campaign also made it starkly apparent that federal campaign finance law has become woefully outdated in the age of the internet, social media, and non-stop fundraising. A vestige of the post-Watergate reforms of the 1970s, the Federal Election Campaign Act ("FECA") no longer adequately regulates the campaign finance world of twenty-first century American politics. The time has come for a sweeping reform and restructuring of the law.

Since FECA's adoption in the 1970s, federal campaign finance law has been built on four pillars. The first is contribution limits on donations to candidate campaigns and political party committees. Contribution limits are designed to reduce the role of money in politics by preventing large donors from corrupting elected officials. The second is the ban on foreign contributions to American political campaigns. The prohibition is intended to prevent foreign influence on American elections and to ensure that

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<sup>1</sup> Shane Goldmacher & Ben Schreckinger, *Trump Pulls Off Biggest Upset in U.S. History*, POLITICO (Nov. 9, 2016, 2:57 AM), <http://www.politico.com/story/2016/11/election-results-2016-clinton-trump-231070>; Kevin M. Kruse, *Trump Repeats Truman? Not Quite*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/interactive/projects/cp/opinion/election-night-2016/trump-repeats-truman-not-quite>; David A. Graham, *Donald Trump's Stunning Upset*, ATLANTIC (Nov. 9, 2016), <https://www.theatlantic.com/politics/archive/2016/11/donald-trump-elected-president/507062/>.

candidates rely exclusively on American sources of support for getting their campaign messages out to voters. The third is the mandatory public disclosure of the identities of campaign contributors. Disclosure laws are intended to enable voters to evaluate the sources of a candidate's support and to guard against corruption. The fourth pillar is the Federal Election Commission ("FEC"), which is charged with enforcing the law in an effective and bipartisan manner.

But the 2016 election made clear that the four pillars of campaign finance law are no longer capable of achieving the goals that Congress identified when it enacted FECA four decades ago. First, contribution limits have not only failed to reduce the role of money in politics but have instead severely distorted our political system.<sup>2</sup> As billions of dollars flow into federal election campaigns, an officeholder's fundraising ability, not policy knowledge or legislative skills, determines committee assignments, chairmanships, and leadership positions. The rise of social media has dealt another blow to FECA's contribution limits model, rendering the law's 1970s conception of how candidates get their messages out to voters quaintly obsolete. In an age of low contribution limits, an unknown candidate of modest financial means faces a daunting task in competing against wealthy candidates who self-fund their campaigns and celebrity candidates whose high name recognition enables them to communicate with voters for free through social media outlets.

Second, the federal ban on foreign contributions failed to prevent a massive level of foreign intervention in the 2016 presidential election.<sup>3</sup> Russia's hacking of the Democratic National Committee ("DNC") computer system, which resulted in months of intensely negative coverage of the DNC's leaked emails, was undoubtedly worth millions and perhaps even billions of dollars in free media assistance to the Trump campaign, courtesy of Russian President Vladimir Putin.<sup>4</sup> In the internet age when politically-motivated espionage by hostile intelligence services and dissemination by offshore websites like Wikileaks facilitate foreign intervention in US campaigns like never before, the campaign finance system fails to sufficiently guard against foreign influence on American elections.<sup>5</sup>

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<sup>2</sup> For a full discussion of the points made in this paragraph, *see infra* Part III(A).

<sup>3</sup> *See infra* Part III(B).

<sup>4</sup> Although the precise monetary value for the Trump campaign of the Russian hacking is of course incalculable, the media coverage of the Clinton email story was massive. For example, a Harvard study found that both mainstream and social media news coverage of the Clinton email story far exceeded coverage of all other issues in the 2016 campaign. *See* Rob Faris et al., *Partisanship, Propaganda, and Disinformation: Online Media and the 2016 U.S. Presidential Election*, BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y AT HARV. UNIV., (Aug. 16, 2017) (esp. Figure 1), <https://cyber.harvard.edu/publications/2017/08/mediacloud>.

<sup>5</sup> Eric Lipton, David E. Sanger and Scott Shane, *The Perfect Weapon: How Russian Cyberpower Invaded the U.S.*, N.Y. TIMES (Dec. 13, 2016); *Intelligence Report on Russian Hacking*, N.Y. TIMES (Jan. 6, 2017), at ii-iii (assessing "with high confidence that Russian military intelligence" hacked the DNC and then "relayed material to Wikileaks"), <https://assets.documentcloud.org/documents/3254237/Russia-Hack-Report.pdf>.

Third, FECA's requirement that contributions to political committees be reported and publicly disclosed no longer keeps the public adequately informed.<sup>6</sup> Since the Supreme Court's *Citizens United* decision in 2010,<sup>7</sup> Section 501(c)(4) nonprofit organizations have poured hundreds of millions of dollars in untraceable funds into American election campaigns. In addition, "gray money" (i.e., funds transferred between political action committees ("PACs")) for the purpose of concealing the original source) proliferated in the 2016 election. Most striking of all, the dissemination of fake news by shadowy internet sites and the secret intervention of the Russian government in the 2016 campaign—which was not definitively confirmed by the FBI and CIA until after the election—demonstrated how difficult it is to promote transparency in the modern communications age.<sup>8</sup> The problems regulators face today were unimaginable when FECA was adopted, an era before the internet, social media, and 24/7 news coverage.

Fourth, FECA's foundational presumption that the FEC would enforce the law in a bipartisan and vigorous fashion has collapsed amid finger-pointing, personal acrimony, and profound ideological divisions among the commissioners.<sup>9</sup> In the 2010s it became clear that the FEC was hopelessly divided along partisan lines, a development that sharply undermined the agency's effectiveness. Matters reached a head during the 2015-16 election cycle when the FEC simply ceased functioning as a regulatory body in a whole host of areas within its jurisdiction.<sup>10</sup> The atmosphere at the FEC reached such a toxic and dysfunctional level that the agency's chair, Ann Ravel, resigned in disgust in February 2017. Thus, the bipartisan hopes that informed the agency's creation in 1974 have disintegrated amid the hyperpolarization of contemporary American politics.

The bottom line is that FECA, as currently drafted, is simply not up to the challenge of regulating twenty-first century federal elections in a sensible and effective way. Accordingly, this article proposes four major reforms to federal campaign finance law.

First, federal contribution limits on candidates and political parties should be eliminated or, at a minimum, raised dramatically.<sup>11</sup> In the age of Super PACs and social media, low contribution limits do more harm than good. The Supreme Court's *Citizens United* ruling gutted FECA's anticorruption rationale by freeing billionaires to make multi-million dollar contributions to Super PACs and other outside groups.<sup>12</sup> In addition, the internet has enabled celebrity candidates like Trump and foreign actors like the Russian intelligence services to coopt traditional news media and reach

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<sup>6</sup> See *infra* Part III(C).

<sup>7</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>8</sup> See *Intelligence Report on Russian Hacking*, *supra* note 5.

<sup>9</sup> See *infra* Part III(D).

<sup>10</sup> See *infra* Part III(D).

<sup>11</sup> See *infra* Part IV(A).

<sup>12</sup> See, e.g., *SpeechNow.org v. FEC*, 599 F.3d at 692-93 ("Because of the Supreme Court's recent decision in *Citizens United v. FEC*, the analysis is straightforward. There, the Court held that the government has no anti-corruption interest in limiting independent expenditures.").

American voters directly through social media websites like Twitter and Facebook.<sup>13</sup> Ending the era of low contribution limits will place candidates and parties on an equal footing with Super PACs and alleviate the relentless fundraising treadmill caused by skyrocketing advertising costs. Equally important, eliminating low limits will enhance the ability of candidates of ordinary means to compete against celebrity and millionaire candidates. It will also assist American candidates in fending off foreign-funded social media attacks, such as the Russian government's campaign against Hillary Clinton during the 2016 election.<sup>14</sup>

Second, Congress should designate politically-active Section 501(c)(4) nonprofit organizations as "political committees" subject to the disclosure laws that already apply to candidates, parties, and PACs.<sup>15</sup> Congress should permit such groups to establish separate segregated accounts for all funds they use in political advertising and the source of all the funds in those accounts should be disclosed to the FEC like the funds of any ordinary political committee. In addition, Congress should require *all* political committees to disclose the original source of their funds, not just the identity of the PAC that makes the final direct contribution to the committee. By doing so, Congress can finally end the dark and gray money loopholes.

Third, Congress should require federal campaigns to disclose all contacts they have with foreign government representatives on election-related matters within forty-eight hours to the FEC.<sup>16</sup> The disclosure should include the content of the communications as well as the identities of all individuals involved. Congress should also clarify the law regarding what constitutes illegal collusion with foreign governments to influence American election outcomes. The legal prohibition should focus on financial contributions and other donations that have a clear monetary value to the campaign.

Fourth, Congress should reorganize the FEC into a seven-member board.<sup>17</sup> An odd-numbered membership will end the chronic problem of tie votes that has disabled the agency and will bring the commission into line with other federal agencies, such as the Federal Reserve Board and the Securities and Exchange Commission. The requirement of partisan balance on the FEC should be eliminated as well, thus permitting the commission to experiment with innovative regulatory or deregulatory approaches to the extent permitted by federal campaign finance law. Innovation, be it regulatory or deregulatory in nature, is preferable to the perpetually deadlocked and dysfunctional status quo that currently prevails on the FEC.

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<sup>13</sup> See *infra* Part III(A) and Part III(B).

<sup>14</sup> See *infra* Part III(B).

<sup>15</sup> See *infra* Part IV(B).

<sup>16</sup> See IV(C).

<sup>17</sup> See IV(D).

## II. THE FOUR PILLARS OF FEDERAL CAMPAIGN FINANCE LAW

The modern campaign finance system first took shape in the 1970s amid the national uproar over the Watergate scandal.<sup>18</sup> Watergate is primarily remembered for the Nixon Administration's failed effort to hide its involvement in the June 1972 burglary of the Democratic National Committee headquarters, a cover-up that ultimately led to President Richard Nixon's resignation in August 1974. But the scandal also had important campaign finance dimensions, such as the revelation that the Nixon Administration had received illegal contributions from corporations.<sup>19</sup>

In response to public demand for tough new reforms, Congress in 1974 passed a series of amendments to the Federal Election Campaign Act.<sup>20</sup> The 1974 amendments placed a one thousand dollar limit on individual donations to congressional and presidential campaigns, imposed an overall cap on total campaign expenditures, created a system of public funding for presidential candidates, strengthened the disclosure requirements of federal candidates and political committees, and established the Federal Election Commission to enforce federal campaign finance law.<sup>21</sup> In adopting the amendments, Congress had three main goals: (1) prevent corruption and the appearance of corruption, (2) reduce the influence of affluent donors and thereby "equalize the relative ability of all citizens to affect the outcome of elections," and (3) place "a brake on the skyrocketing cost of political campaigns" in order to "open the political system more widely to candidates without access to sources of large amounts of money."<sup>22</sup>

In the 1976 case of *Buckley v. Valeo*, the Supreme Court struck down FECA's expenditure caps on overall expenditures but upheld the act's contribution limits.<sup>23</sup> Although the Court rejected<sup>24</sup> two of FECA's three main justifications—leveling the campaign finance playing field<sup>25</sup> and limiting the total amount of money in politics<sup>26</sup>—the Court held that the

<sup>18</sup> JULIAN E. ZELIZER, *ON CAPITOL HILL: THE STRUGGLE TO REFORM CONGRESS AND ITS CONSEQUENCES*, 1948-2000 117–21 (2004); ROBERT E. MUTCH, *BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM* 133–34 (2014).

<sup>19</sup> See Anthony J. Gaughan, *The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform*, 77 OHIO ST. L.J. 791, 795 (2016).

<sup>20</sup> See, e.g., 120 CONG. REC. 34,388 (1974) (statement of Sen. Mathias); FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* 8 (1992).

<sup>21</sup> *Buckley v. Valeo*, 424 U.S. 1, 7, 13–14, 23–24, 39–40 (1976).

<sup>22</sup> *Id.* at 25–26.

<sup>23</sup> *Id.* at 54–58.

<sup>24</sup> See *Citizens United*, 558 U.S. 310, 350 (2010) ("*Buckley* rejected the premise that the Government has an interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections.' *Buckley* was specific in stating that 'the skyrocketing cost of political campaigns' could not sustain the governmental prohibition.>").

<sup>25</sup> *Buckley*, 424 U.S. at 48–49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"), 56 ("The interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns").

<sup>26</sup> *Buckley*, 424 U.S. at 57 ("[T]he mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the

government's interest in preventing corruption justified FECA's contribution limits: "It is unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation."<sup>27</sup> In particular, the justices feared that corrupt "quid pro quo" bargains between politicians and large campaign contributors threatened to undermine "the integrity of our system of representative democracy."<sup>28</sup> The *Buckley* ruling thus created a system whereby Congress could impose limits on the amount of individual contributions to candidates and parties but could not impose caps on overall campaign spending.<sup>29</sup>

The FECA that emerged from the *Buckley* decision continues to govern campaign finance law, with only a few significant changes in the years since. Immediately after the *Buckley* decision, Congress amended FECA to impose a twenty thousand dollar contribution limit on individual donations to party committees.<sup>30</sup> In addition, Congress tasked the FEC with enforcing a 1966 amendment to the Foreign Agents Registration Act that banned foreign contributions to American political campaigns.<sup>31</sup> In 2002, Congress adopted the Bipartisan Campaign Reform Act ("BCRA"), which raised contribution limits for individual donations to candidate campaigns to two thousand dollars and to party committees to twenty-five thousand dollars, indexed the limits to inflation, and also eliminated "soft money" (i.e., funds not subject to federal contribution limits).<sup>32</sup> BCRA achieved its goal of banning soft money by, among other things, extending contribution limits to state and local parties engaged in federal election activities.<sup>33</sup> The soft money ban was upheld in *McConnell v. FEC*, a 2003 case in which the Supreme Court embraced a broad definition of corruption that encompassed not only corrupt "quid pro quo" bargains between donors and candidates, but also the "undue influence" large donors secured by "buying access" to officeholders through campaign contributions.<sup>34</sup>

However, in two decisions since 2010, the Supreme Court enormously increased the opportunities for wealthy donors to make multi-million dollar political contributions. In the 2010 case, *Citizens United v. FEC*, the Supreme Court ruled that the FEC could not impose contribution limits on corporate

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resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise.")

<sup>27</sup> *Id.* at 26.

<sup>28</sup> *Id.* at 26–27.

<sup>29</sup> Gaughan, *supra* note 19, at 804.

<sup>30</sup> Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in *THE NEW CAMPAIGN FINANCE SOURCEBOOK 27* (Anthony Corrado et al. eds., 2005).

<sup>31</sup> 52 U.S.C. § 30121 (2012); *Foreign Nationals*, FED. ELECTION COMM'N (July 2003), <http://www.fec.gov/pages/brochures/foreign.shtml#search=foreign>; *Foreign Agents Registration Act*, U.S. DEP'T OF JUST., <https://www.fara.gov/> (last visited Sep. 2, 2017).

<sup>32</sup> Corrado, *supra* note 30, at 39–43.

<sup>33</sup> *Id.*

<sup>34</sup> *McConnell v. FEC*, 540 U.S. 93, 143–44, 224 (2003).

political expenditures made independent of candidates.<sup>35</sup> The *Citizens United* decision built upon *Buckley*'s holding that the prevention of "quid pro quo" corruption was the constitutionally permissible basis for contribution limits.<sup>36</sup> Citing *Buckley*, the *Citizens United* court held that only contributions to candidates could give rise to quid pro quo corruption.<sup>37</sup> Two months later the D.C. Circuit in *SpeechNow.org v. FEC* held that the Supreme Court's reasoning in *Citizens United* meant that the FEC could no longer apply contribution limits to outside groups engaged in independent expenditures, a ruling that effectively cleared the way for the rise of Super PACs.<sup>38</sup> FECA suffered another blow in *McCutcheon v. FEC*, a 2014 case in which the Supreme Court lifted the aggregate caps on the total amount of contributions that individual donors made to all candidates and party committees combined.<sup>39</sup>

Despite the invalidation of FECA's expenditure caps in *Buckley*, the unleashing of Super PACs in *Citizens United*, and the elimination of the aggregate limits in *McCutcheon*, Congress has remained committed to the four pillars of the federal campaign finance system. The first pillar is base contribution limits on direct donations to candidate campaigns, party committees, and PACs that coordinate with candidates and parties. For the 2017-18 federal election cycle, the contribution limit for individual donations is \$2700 per candidate, per election.<sup>40</sup> The current contribution limit for individual donations to the 6 national party committees is \$33,900 per year, per committee,<sup>41</sup> and individual donations to state and local party committees are limited to \$10,000 per year.<sup>42</sup> Individual donations to ordinary (i.e. non-Super) PACs are restricted to \$5000 per year.<sup>43</sup> As the court in *Buckley* explained, the purpose of contribution limits is to prevent large campaign contributions from giving rise to corruption and the appearance of corruption.<sup>44</sup>

The second pillar is the ban on foreign contributions to American political candidates, parties, and political action committees. Federal law makes it unlawful for foreign nationals to make a contribution or donation of "money or other thing of value" in any federal, state, or local election.<sup>45</sup> The prohibition applies not only to donations to candidates and political parties but also extends to independent expenditures by outside groups.<sup>46</sup>

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<sup>35</sup> *Citizens United*, 558 U.S. at 365 ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

<sup>36</sup> *Id.* at 345.

<sup>37</sup> *Id.* at 360.

<sup>38</sup> *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010).

<sup>39</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014).

<sup>40</sup> *Contribution Limits for 2017-2018 Federal Elections*, FED. ELECTION COMM'N, <https://transition.fec.gov/info/contriblimitschart1718.pdf> (last visited Sep. 15, 2017).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Buckley*, 424 U.S. at 26–27.

<sup>45</sup> 52 U.S.C. § 30121 (2012).

<sup>46</sup> *Id.*

Americans who solicit, accept, or substantially assist foreign contributions are subject to criminal and civil penalties.<sup>47</sup> The ban is intended to prevent foreign influence on American election campaigns.<sup>48</sup>

The third pillar is mandatory disclosure of campaign contributions and campaign-related expenditures.<sup>49</sup> The 1974 FECA amendments imposed reporting obligations on all candidates and political committees that received contributions or made expenditures in excess of one thousand dollars per calendar year, including mandatory disclosure of donor identities and occupations as well as periodic audits.<sup>50</sup> The purpose of mandatory disclosure is to ensure that voters can evaluate who is supporting the candidates who appear on the ballot.<sup>51</sup> Disclosure also guards against corruption by exposing contributions and expenditures to public and government scrutiny.<sup>52</sup>

The fourth pillar is the role of the Federal Election Commission in enforcing the law.<sup>53</sup> The FECA amendments originally created an eight-member FEC to regulate federal campaign finance law.<sup>54</sup> Congress not only charged the FEC with serving as the repository of all federal campaign finance reports but also gave it authority to investigate violations and impose financial penalties.<sup>55</sup> After the court in *Buckley* ruled that the original appointment process and structure of the FEC violated Article II of the Constitution,<sup>56</sup> the FEC was reconstituted as a six-member commission. Today each of the six commissioners serves a six-year term.<sup>57</sup> FECA prohibits more than three commissioners from any one political party serving on the FEC at the same time,<sup>58</sup> thus ensuring a partisan balance on the commission.

The four pillars of federal campaign finance law—contribution limits, the ban on foreign donations, mandatory disclosure, and the FEC regulatory mandate—have stood for more than four decades. But as the 2016 election revealed, Supreme Court rulings and technological change have severely eroded the foundations on which the 4 pillars stand.

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<sup>47</sup> *Id.*; 11 C.F.R. § 110.20 (2017).

<sup>48</sup> *Foreign Nationals*, *supra* note 31.

<sup>49</sup> *Buckley*, 424 U.S. at 7.

<sup>50</sup> *Id.* at 62, 63.

<sup>51</sup> *Id.* at 66–67.

<sup>52</sup> *Id.* at 67–68.

<sup>53</sup> *Id.* at 7.

<sup>54</sup> *Id.* at 109.

<sup>55</sup> *Id.* at 109–10.

<sup>56</sup> *Id.* at 143.

<sup>57</sup> *Leadership and Structure*, FED. ELECTION COMM'N, <https://www.fec.gov/about/leadership-and-structure/> (last visited Sep. 15, 2017).

<sup>58</sup> *Id.*



### III. HOW THE 2016 ELECTION EXPOSED THE OBSOLESCENCE OF FECA

The 2016 election was historic for many reasons. Donald Trump's victory over Hillary Clinton marked only the fifth time in history that a candidate won an Electoral College majority despite losing the popular vote.<sup>59</sup> Trump was also the first president in history without any prior government or military service.<sup>60</sup> Trump's victory was particularly remarkable in light of the fact that few election experts saw it coming. On the eve of the election, the most prominent election forecasting models—including those of the New York Times, FiveThirtyEight, the Princeton Election Consortium, and the Cook Political Report—all forecasted a Clinton victory.<sup>61</sup> But they were all wrong. Although Trump lost the popular vote by nearly three million votes, he won a decisive victory margin in the Electoral College, carrying states with a total of 306 electoral votes to 232 for Clinton.<sup>62</sup>

Overlooked in the focus on Trump's stunning victory was the fact that the election revealed a broken and dysfunctional campaign finance system. The 2016 election demonstrated that federal campaign finance regulations do not keep big money out of politics, they do not prevent massive levels of foreign intervention in American election campaigns, they do not bring full transparency to the funding of American elections, and they do not even have a functional regulatory agency to enforce the law. Consequently, FECA no longer provides an effective and coherent campaign finance framework for American politics in the twenty-first century.

#### A. CONTRIBUTION LIMITS

When Congress enacted FECA's contribution limits on federal candidates and parties in the 1970s, it had 3 specific objectives: (1) prevent corruption, (2) ensure that the wealthy did not have a larger voice in elections than other citizens, and (3) reduce the cost of federal election campaigns.<sup>63</sup> Although the Supreme Court in *Buckley* and in *Citizens United* rejected the latter two goals,<sup>64</sup> the justices have consistently upheld contribution limits

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<sup>59</sup> Drew Desilver, *Trump's Victory Another Example of How Electoral College Wins Are Bigger Than Popular Vote Ones*, PEW RES. CTR. (Dec. 20, 2016), <http://www.pewresearch.org/fact-tank/2016/12/20/why-electoral-college-landslides-are-easier-to-win-than-popular-vote-ones/>.

<sup>60</sup> Jesse Yomtov, *Where Trump Ranks Among Least Experienced Presidents*, USA TODAY (Nov. 8, 2016, 7:49 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2016/11/08/donald-trump-experience-president/93504134/>.

<sup>61</sup> Josh Katz, *Who Will Be President?*, N.Y. TIMES (Nov. 8, 2016), <https://www.nytimes.com/interactive/2016/upshot/presidential-polls-forecast.html?mcubz=2>.

<sup>62</sup> Richard Pérez-Peña, *Donald Trump Completes Final Lap, Electoral College, to White House*, N.Y. TIMES (Dec. 19, 2016), <https://www.nytimes.com/2016/12/19/us/politics/electoral-college-vote.html>.

<sup>63</sup> *Buckley*, 424 U.S. at 25–26.

<sup>64</sup> *Id.* at 48–49 (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”); *Id.* at 56 (“The interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns”); *Id.* at 57 (“[T]he

on the grounds that the government's interest in preventing quid pro quo corruption justified FECA's limits.<sup>65</sup> But as the 2016 campaign revealed, contribution limits no longer achieve any of the goals Congress set for them in the 1970s. Instead of preventing big money donations from influencing federal election campaigns, FECA's contribution limits have warped the political system by making fundraising an all-encompassing obsession of candidates and officeholders alike. Worse yet, as a product of the pre-internet age, contribution limits fail to account for the impact of social media, which increasingly dominates campaign discourse. The result is a campaign finance system that places candidates of ordinary means and low name recognition at a distinct disadvantage.

### 1. Big Money Politics

When Congress enacted FECA's contribution limits in 1974, its central goal was to curtail the influence of large campaign donors on American elections.<sup>66</sup> During the Senate debate in the 1970s, Senator Hubert Humphrey explained that the FECA reforms were necessary because "[b]ig money, large private contributions, and the amount of money a politician can raise should not be permitted to continue as a key to election day success."<sup>67</sup>

But FECA did not keep big money out of the 2016 election. Multi-million-dollar donations flooded into Super PACs—including sixty six million dollars from Tom Steyer, over fifty million dollars from Miriam & Sheldon Adelson, and over thirty-six million dollars from Donald Sussman.<sup>68</sup> In all, just ten donors accounted for over \$1.1 billion in donations to Super PACs in 2016, an all-time record.<sup>69</sup> The massive level of donations represented the inevitable consequence of the Supreme Court's 2010 *Citizens United* ruling, which gave rise to Super PACs.<sup>70</sup> In the six years after *Citizens United*, the total amount of independent expenditures by outside groups exceeded three billion dollars.<sup>71</sup> In contrast, in the two *decades* before

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mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." See also *Citizens United*, 558 U.S. at 350 ("Buckley rejected the premise that the Government has an interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections.' Buckley was specific in stating that 'the skyrocketing cost of political campaigns' could not sustain the governmental prohibition.").

<sup>65</sup> *Buckley*, 424 U.S. at 26–27.

<sup>66</sup> *Id.* at 25.

<sup>67</sup> See 120 CONG. REC. 8453 (1974).

<sup>68</sup> Anu Narayanswamy, Aaron Williams & Matea Gold, *Meet the Wealthy Donors Who Are Pouring Millions Into the 2016 Elections*, WASH. POST (Nov. 2, 2016), <https://www.washingtonpost.com/graphics/politics/superpac-donors-2016/>.

<sup>69</sup> Matea Gold & Anu Narayanswamy, *How 10 Mega-donors Already Helped Pour a Record \$1.1 Billion Into Super PACs*, WASH. POST (Oct. 5, 2016), [https://www.washingtonpost.com/politics/how-10-mega-donors-already-helped-pour-a-record-11-billion-into-super-pacs/2016/10/05/d2d51d44-8a60-11e6-875e-2c1bfe943b66\\_story.html?utm\\_term=.7b7fd82b31cd](https://www.washingtonpost.com/politics/how-10-mega-donors-already-helped-pour-a-record-11-billion-into-super-pacs/2016/10/05/d2d51d44-8a60-11e6-875e-2c1bfe943b66_story.html?utm_term=.7b7fd82b31cd).

<sup>70</sup> See generally *Citizens United*, 558 U.S. 310 (2010).

<sup>71</sup> *Total Outside Spending by Election Cycle, Excluding Party Committees*, CTR. FOR RESPONSIVE POL., [https://www.opensecrets.org/outsidespending/cycle\\_tots.php](https://www.opensecrets.org/outsidespending/cycle_tots.php) (last visited Sep. 15, 2017).

*Citizens United*, the total amount of independent expenditures by outside groups was only \$330 million.<sup>72</sup>

In *Citizens United*, the Supreme Court minimized the political value of large donations to outside groups by claiming that “there is only scant evidence that independent expenditures even ingratiate” donors with officeholders.<sup>73</sup> Likewise, in *McCutcheon* the Court asserted, “Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties, does not give rise to such quid pro quo corruption.”<sup>74</sup>

But the evidence is compelling that the Supreme Court underestimated the importance of outside groups to candidates and parties. The reality is Super PACs have now become as important to candidates as their own campaign committees. In 2016, for example, Florida Governor Jeb Bush assigned his top political adviser, Mike Murphy, to lead a pro-Bush Super PAC rather than Bush’s own campaign committee.<sup>75</sup> The significance of Bush’s Super PAC was also seen in the fact that it raised \$121 million in the 2016 GOP presidential race, whereas Bush’s own campaign committee only raised \$34 million.<sup>76</sup> Bush was far from alone in relying heavily on Super PACs. In the 2016 presidential primaries and general election, candidates raised a combined total of \$1.5 billion for their campaigns, and Super PACs supporting those campaigns raised \$618 million.<sup>77</sup> Large donations thus funded a major portion of the 2016 election.

Moreover, although the *Citizens United* Court insisted that donor influence on officeholders did not constitute corruption,<sup>78</sup> the influence of campaign donors was precisely what concerned Congress when it adopted FECA’s contribution limits in 1974. As the Supreme Court explained in *Buckley*, Congress adopted contribution limits to prevent “the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office.”<sup>79</sup>

It does not take an express quid pro quo agreement for officeholders to know precisely how donors would like them to vote on certain issues. For

<sup>72</sup> *Id.*

<sup>73</sup> *Citizens United*, 558 U.S. at 360.

<sup>74</sup> *McCutcheon*, 134 S. Ct. at 1450–51.

<sup>75</sup> Mary Jordan, *Mike Murphy Plots a Win for Jeb Bush in the Land of Hollywood Liberals*, WASH. POST (June 12, 2015), [https://www.washingtonpost.com/politics/jeb-bushs-man-in-hollywood/2015/06/12/febca268-0584-11e5-a428-c984eb077d4e\\_story.html?utm\\_term=.4c5fc985e667](https://www.washingtonpost.com/politics/jeb-bushs-man-in-hollywood/2015/06/12/febca268-0584-11e5-a428-c984eb077d4e_story.html?utm_term=.4c5fc985e667); Ashley Parker & Maggie Haberman, *As Jeb Bush Struggles, Some Allies Blame His ‘Super PAC’*, N.Y. TIMES (Jan. 21, 2016), [https://www.nytimes.com/2016/01/22/us/politics/jeb-bush-right-to-rise-super-pac.html?\\_r=0](https://www.nytimes.com/2016/01/22/us/politics/jeb-bush-right-to-rise-super-pac.html?_r=0); Jason Zengerle, *Why the Hottest Gig in Politics is Suddenly Not With a Campaign*, GQ, July 13, 2015, <http://www.gq.com/story/politics-hottest-jobs-election-2016>.

<sup>76</sup> *Jeb Bush Fundraising Totals*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/pres16/candidate?id=N00037006> (last visited Sep. 15, 2017).

<sup>77</sup> *2016 Presidential Race*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/pres16> (last visited Sep. 15, 2017).

<sup>78</sup> *Citizens United*, 558 U.S. at 359 (“The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt . . .”), 360 (“[I]ngratiation and access . . . are not corruption . . .”).

<sup>79</sup> *Buckley*, 424 U.S. at 25.

example, the libertarian philosophy of conservative Super PAC donors like Charles and David Koch<sup>80</sup> are well-known, as are the pro-environmental regulation views of liberal Super PAC donors like Tom Steyer.<sup>81</sup> During the 1973 Senate debate over amending FECA, Senator Joseph Biden warned that even when candidates did not explicitly promise anything in return for donations, a candidate's sense of gratitude to the donor could influence the candidate's votes in Congress.<sup>82</sup> As Biden explained, the "high cost of running places even the most innocent candidate in the position of being in the pocket" of large donors.<sup>83</sup> Accordingly, when Congress adopted the FECA amendments in 1974, it imposed spending limits on independent expenditures.<sup>84</sup> Although *Buckley* ultimately struck down FECA's one thousand dollar cap on independent expenditures,<sup>85</sup> the fact that Congress included independent expenditures within FECA's contribution limits framework demonstrated that Congress understood that the limits would not be effective without applying them to outside groups as well as candidate campaigns.

The *Citizens United* ruling thus struck at the heart of the congressional purpose in adopting FECA, effectively ending the effort to keep big money out of politics. Moreover, since the 2014 *McCutcheon* decision, the influence of large contributors is no longer limited to Super PACs and other independent expenditure groups. When FECA's contribution limits first went into effect in 1976, the total aggregate amount of contributions to all candidates and parties that an individual donor could make was \$25,000.<sup>86</sup> Although the aggregate limits rose modestly after BCRA's adoption in 2002, the aggregate total that an individual donor could contribute to parties and candidates was still only about \$123,000 during the 2012 election cycle.<sup>87</sup> But when the Supreme Court struck down FECA's aggregate limits in *McCutcheon*,<sup>88</sup> it freed wealthy donors to contribute far more to candidates and parties than any time since FECA's contribution limits took effect in 1976. Consequently, during the 2016 election cycle, forty donors made aggregate contributions of over one million dollars to candidates and

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<sup>80</sup> Emily Cadei, *How Charles and David Koch Plan to Remake the Republican Party*, NEWSWEEK (Sept. 28, 2016), <http://www.newsweek.com/2016/10/07/charles-david-koch-donald-trump-afp-503496.html>.

<sup>81</sup> Jaime Fuller, *Tom Steyer's long road to becoming the environment's donor-in-chief*, WASH. POST (Feb. 27, 2014), [https://www.washingtonpost.com/news/the-fix/wp/2014/02/27/tom-steyers-long-road-to-becoming-the-environments-donor-in-chief/?utm\\_term=.176e37165745](https://www.washingtonpost.com/news/the-fix/wp/2014/02/27/tom-steyers-long-road-to-becoming-the-environments-donor-in-chief/?utm_term=.176e37165745).

<sup>82</sup> 119 CONG. REC. 25880, 25984 (1973) (statement of Sen. Biden).

<sup>83</sup> *Id.*

<sup>84</sup> *Buckley*, 424 U.S. at 7.

<sup>85</sup> *Id.* at 143 ("We conclude, however, that the limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from his personal funds are constitutionally infirm.").

<sup>86</sup> *Id.* at 38.

<sup>87</sup> See Anthony J. Gaughan, *In Defense of McCutcheon v. Federal Election Commission*, 24 KAN. J.L. & PUB. POL'Y 221, 234 (2015).

<sup>88</sup> *McCutcheon*, 134 S. Ct. at 1462.

parties.<sup>89</sup> For example, Sheldon Adelson made contributions to Republican candidates and parties in a total amount of over \$3.2 million; Fred Eychaner made aggregate contributions of more than \$2.4 million to Democratic candidates and parties; and James Pritzker made total donations of more than \$2.3 million to Democratic candidates and parties.<sup>90</sup> Although none of the individual donations exceeded FECA's base contribution limits, the enormous size of the aggregate totals clearly illustrated that large donors exerted a major influence on both Democratic and Republican candidates' campaigns in the 2016 election.

Not surprisingly, therefore, FECA's contribution limits have failed to allay public concern over the appearance of corruption, which was the other constitutional justification the *Buckley* Court cited in upholding contribution limits in 1976.<sup>91</sup> During the 2015-2016 election cycle, Americans of all political backgrounds expressed strong dissatisfaction with the current campaign finance system. For example, a 2015 Rasmussen poll found that 59% of Americans believe most members of Congress "sell" their votes to campaign contributors.<sup>92</sup> Likewise, a 2016 *Economist*-YouGov Poll found that 76% of Americans believe that Super PAC donors expect the candidates they support to reward them with "something big in return" after the candidate is elected.<sup>93</sup> Most remarkable of all, a 2015 New York Times-CBS News poll found that 84% of Americans believe there is too much money in political campaigns and 85% believe that officeholders enact policies that benefit campaign contributors.<sup>94</sup> As the polling data shows, FECA has completely failed to prevent the "appearance of corruption" in federal election campaigns.

Contribution limits have also failed to control campaign costs, which was another key goal of FECA. As the Supreme Court noted in *Buckley*, FECA's drafters hoped that contribution limits would "act as a brake on the skyrocketing cost of political campaigns."<sup>95</sup> However, campaign costs have ballooned in the years since FECA's contribution limits went into effect in 1976. Although many blame *Citizens United* for soaring campaign costs, the historical record reveals that the increase began decades before the 2010 Supreme Court decision. Even accounting for inflation, presidential campaign costs were four times higher in 2008 than in 1972.<sup>96</sup> For example,

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<sup>89</sup> *Top Individual Contributors: Hard Money, by Individual, 2016 Cycle*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/overview/topindivs.php?view=hi&cycle=2016> (last visited Aug. 30, 2017).

<sup>90</sup> *Id.*

<sup>91</sup> *Buckley*, 424 U.S. at 26.

<sup>92</sup> *Is Congress for Sale?*, RASMUSSEN REPORTS (July 9, 2015), [http://www.rasmussenreports.com/public\\_content/archive/mood\\_of\\_americaarchive/congressionalperformance/is\\_congress\\_for\\_sale](http://www.rasmussenreports.com/public_content/archive/mood_of_americaarchive/congressionalperformance/is_congress_for_sale).

<sup>93</sup> Kathy Frankovic, *Too much money in politics, too much damage to democracy*, YOUGOV (Jan. 11, 2016, 6:23 A.M.), <https://today.yougov.com/news/2016/01/11/too-much-money-politics-too-much-damage-democracy/>.

<sup>94</sup> *American's Views on Money in Politics*, N.Y. TIMES, (June 2, 2015),

<https://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politicspoll.html?mcubz=2>.

<sup>95</sup> *Buckley*, 424 U.S. at 26.

<sup>96</sup> Gaughan, *The Forty-Year War on Money in Politics*, *supra* note 19, at 810.

in 2000 the presidential and congressional campaigns cost a then-record amount of \$3.8 billion; by 2008 they rose to a new high of \$5.9 billion dollars;<sup>97</sup> and in 2016 they amounted to \$6.4 billion dollars.<sup>98</sup> According to the FEC, since the 1980s federal campaign spending has increased by over 550 percent, outpacing even the growth in health care costs and college tuition during the same time period.<sup>99</sup>

The increase is not limited to presidential campaigns. In the 2016 election, the average House incumbent spent almost \$1.5 million and the average Senate incumbent spent nearly ten million dollars.<sup>100</sup> But those figures include uncompetitive races. In closely contested Senate and House elections, campaign costs routinely soar into the tens of millions of dollars. For example, the 2016 Florida Senate race cost over fifty-nine million dollars, the Pennsylvania Senate race cost over fifty-two million dollars, and the Wisconsin Senate race cost over forty-four million dollars.<sup>101</sup> The most competitive House races in 2016 were also extremely expensive. Maryland's 8th District race cost over twenty million dollars, Florida's 18th District race cost over eighteen million dollars, and the race for Wisconsin's 1st District cost over fourteen million dollars.<sup>102</sup> In June 2017, a special election for an open House seat in Georgia cost more than fifty-five million dollars, making it the most expensive House race of all-time.<sup>103</sup>

There are no legislative "fixes" that will drive big money out of politics. The Supreme Court rulings in *Buckley*, *Citizens United*, and *McCutcheon* make clear that the big money politics of the 2016 election are here to stay. *Buckley* bars Congress from containing campaign costs through expenditure caps. *Citizens United* prohibits Congress from restricting the right of wealthy donors to contribute tens of millions to outside groups. And *McCutcheon* enjoins Congress from restricting the right of individual donors to make aggregate contributions in the millions of dollars to candidates and parties. The fact that each ruling was based on the First Amendment means that Congress lacks the constitutional authority to reverse those decisions. Even if a pro-reform Congress takes office in a future election, the Supreme Court's campaign finance rulings comprehensively bar Congress from applying contribution limits to outside groups or reestablishing aggregate limits. Thus, regardless of one's view on the wisdom of the Court's rulings in *Buckley*, *Citizens United*, and *McCutcheon*, it is an undeniable fact that in

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<sup>97</sup> DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW* 642 (5th ed. 2012).

<sup>98</sup> *Cost of Election*, CTR FOR RESPONSIVE POL., <https://www.opensecrets.org/overview/cost.php>.

<sup>99</sup> Michael Scherer, Pratheek Rebala, & Chris Wilson, *The Incredible Rise in Campaign Spending*, TIME (last updated Oct. 23, 2014, 12:39 P.M.), <http://time.com/3534117/the-incredible-rise-in-campaign-spending/>.

<sup>100</sup> 2016 *Election Overview*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/overview/index.php?cycle=2016&display=A&type=R>.

<sup>101</sup> *Most Expensive Races: 2016*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/overview/topraces.php?cycle=2016&display=allcands>.

<sup>102</sup> *Id.*

<sup>103</sup> Alicia Parlapiano & Rachel Shorey, *Who Financed the Georgia Sixth, the Most Expensive House Election Ever*, N.Y. TIMES (June 20, 2017), <https://www.nytimes.com/interactive/2017/06/20/us/politics/georgia-6th-most-expensive-house-election.html?mcubz=2>.

light of those rulings, FECA's contribution limits are no longer capable of preventing big money donations from profoundly shaping federal election campaigns.

## 2. An Outdated and Severely Distorted Campaign Finance Model

When the *Buckley* Court upheld FECA's contribution limits in 1976, the majority expressly conditioned its ruling on the notion that contribution limits were constitutional as long as they did not distort the campaign system as a whole. In a crucial passage, the Court warned, "[g]iven the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy."<sup>104</sup> Writing in 1976, the Court concluded that there was "no indication" that FECA's contribution limits would "have any dramatic adverse effect on the funding of campaigns and political associations."<sup>105</sup>

But as the 2016 election demonstrated, the fact that federal candidates must raise millions of dollars in small increments of only \$2,700 has had a dramatic adverse effect on how Congress functions. When Congress adopted the FECA amendments in the 1970s, advocates defended them on grounds that they would *reduce* the need to fundraise. As Senator Hubert Humphrey explained, "[i]t is time we stopped making candidates for Federal office spend so much of their time, energy and ultimately their credibility, on the telephone calling friends or committees, meeting with people, and oftentimes begging for money."<sup>106</sup> Congress also sought to make it easier for candidates of modest means to compete in electoral politics. By adopting contribution limits, therefore, Congress intended to not only prevent corruption but also to "open the political system more widely to candidates without access to sources of large amounts of money."<sup>107</sup>

The last four decades, however, provide overwhelming evidence that FECA's contribution limits have completely backfired. Fundraising consumes a larger share of federal officeholders' time now than in the pre-FECA era. Indeed, prior to the 1970s, it was rare for members of Congress to raise money in non-election years.<sup>108</sup> But FECA's low contribution limits combined with skyrocketing campaign costs forced officeholders to raise money on an ever increasing basis.<sup>109</sup> By the 1990s, the average member of Congress raised about seven thousand dollars per week in campaign contributions even in non-election years.<sup>110</sup> When candidates must raise

<sup>104</sup> *Buckley*, 424 U.S. at 21.

<sup>105</sup> *Id.* at 22.

<sup>106</sup> 120 CONG. REC. 8383, 8453 (Mar. 27, 1974) (statement of Sen. Humphrey).

<sup>107</sup> *Buckley*, 424 U.S. at 26.

<sup>108</sup> Anthony Corrado, *Running Backward: The Congressional Money Chase*, THE PERMANENT CAMPAIGN AND ITS FUTURE 77 (Norman J. Ornstein & Thomas E. Mann, eds., 2000); Gaughan, *The Forty-Year War*, *supra* note 19, at 816.

<sup>109</sup> Corrado, *supra* note 108, at 75–77, 82–83, 87; Gaughan, *supra* note 19, at 818–19.

<sup>110</sup> Corrado, *supra* note 108, at 80; Gaughan, *supra* note 19, at 819.

millions of dollars in \$2,700 increments, and when there are no overall caps on campaign expenditures, fundraising inevitably becomes officeholders' principal activity. Indeed, today both the Democratic and Republican congressional leaders demand that their members spend at least twenty hours a week raising money.<sup>111</sup>

The fundraising obsession has distracted Congress from legislative business, forcing members to spend their time with donors rather than developing policy expertise or building personal connections with their colleagues.<sup>112</sup> For example, Democratic Representative Rick Nolan of Minnesota told *The Hill* newspaper in the summer of 2016 that serving in Congress today is akin to becoming a telemarketer.<sup>113</sup> Nolan's observations are particularly revealing because he served in Congress in the 1970s when FECA was adopted, retired in the early 1980s, and then returned to Congress in 2013, giving him a unique historical perspective on how Congress has changed since the FECA amendments were adopted.<sup>114</sup> Similarly, Senator Tom Harkin, a forty-year veteran of Congress, observed that while members of Congress used to socialize frequently in the 1970s and 1980s, they no longer do so because they must spend all of their spare time fundraising.<sup>115</sup> Academic studies confirm the change in congressional work habits. A study by the political scientist Marian Currinder found that members of Congress must now "devote time and energy to cultivating relationships with potential donors. As a result, members have less time to spend on policy."<sup>116</sup> Likewise, a study by the political scientists Craig Volden and Alan Wiseman revealed that the percentage of majority-party senators who shepherd at least one bill into enactment has fallen from 80% in the 1970s to only about 50% in the 2010s.<sup>117</sup> Not coincidentally, the average number of days that the House meets has fallen sharply, declining from 323 days in the 1970s to 250 days

<sup>111</sup> Norah O'Donnell, *Are Members of Congress Becoming Telemarketers?*, CBS NEWS (Apr. 24, 2016), <http://www.cbsnews.com/news/60-minutes-are-members-of-congress-becoming-telemarketers/> (quoting Rep. Rick Nolan: "30 hours a week, that's a lot of telemarketing. Probably more than most telemarketers do."); Ezra Klein, *The Most Depressing Graphic for Members of Congress*, WASH. POST (Jan. 14, 2013), [https://www.washingtonpost.com/news/wonk/wp/2013/01/14/the-most-depressing-graphic-for-members-of-congress/?utm\\_term=.a82fd32730a4](https://www.washingtonpost.com/news/wonk/wp/2013/01/14/the-most-depressing-graphic-for-members-of-congress/?utm_term=.a82fd32730a4); Fredreka Schouten, *Colorado Rep. Ken Buck Pens Tell-All Book on Washington's 'Swamp'*, USA TODAY (Apr. 10, 2017), <https://www.usatoday.com/story/news/politics/2017/04/10/colorado-rep-ken-buck-writes-drain-the-swamp-book-republicans-washington/100298958/>.

<sup>112</sup> JAMES M. CURRY, *LEGISLATING IN THE DARK: INFORMATION AND POWER IN THE HOUSE OF REPRESENTATIVES* 8, 26-27 (2015); LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS AND A PLAN TO STOP IT* 142 (2011).

<sup>113</sup> Cyra Master, *'60 Minutes': Fundraising Demands Turning Lawmakers into Telemarketers*, THE HILL (Apr. 24, 2016), <http://thehill.com/blogs/blog-briefing-room/news/277462-60-minutes-fundraising-demands-turning-lawmakers-into>.

<sup>114</sup> RICHARD E. COHEN ET AL., *THE ALMANAC OF AMERICAN POLITICS 2016* (2015), at 1008, 1010.

<sup>115</sup> Klein, *supra* note 111.

<sup>116</sup> MARIAN CURRINDER, *MONEY IN THE HOUSE: CAMPAIGN FUNDS AND CONGRESSIONAL PARTY POLITICS* 8 (2009).

<sup>117</sup> Craig Volden & Alan Wiseman, *Senators Used to Excel at Lawmaking. Now, Not So Much. Here's What Needs to Change*, WASH. POST (June 29, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/29/senators-used-to-excel-at-lawmaking-now-not-so-much-heres-what-needs-to-change/?utm\\_term=.b44c7a217674&wpsrc=nl\\_politics&wpm=1](https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/29/senators-used-to-excel-at-lawmaking-now-not-so-much-heres-what-needs-to-change/?utm_term=.b44c7a217674&wpsrc=nl_politics&wpm=1).



in 2008.<sup>118</sup> Ironically, therefore, members of Congress now have far less policy expertise than the typical member of Congress had forty years ago when FECA was first enacted.<sup>119</sup>

The disheartening reality is that fundraising so deeply monopolizes members' time that it has become a powerful disincentive from holding office.<sup>120</sup> For example, in January 2016 Democratic Congressman Steve Israel, a highly regarded centrist Democrat and former chairman of the DCCC,<sup>121</sup> surprised Washington by announcing his decision not to run for reelection.<sup>122</sup> He explained that fundraising made the job too distasteful to continue in politics: "I don't think I can spend another day in another call room making another call begging for money," he explained. "I always knew the system was dysfunctional. Now it is beyond broken."<sup>123</sup> Fundraising skills, not policy expertise, now determine who serves in the congressional leadership and who receives the most important committee assignments.<sup>124</sup> Indeed, Republican Congressman Ken Buck recently revealed that members essentially must pay for committee assignments by raising money for colleagues.<sup>125</sup> In an April 2017 interview with *USA Today*, Buck explained that "[t]he critical criteria for getting ahead is fundraising, and it's a reality that the people you are going to raise money from want something."<sup>126</sup> The impact is also felt at the presidential level. One of the reasons why Vice President Joe Biden decided not to enter the Democratic nomination race late in 2015 was because he lacked the time to raise the funds necessary to mount a serious challenge to Hillary Clinton.<sup>127</sup> As the Biden example shows, low contribution limits require candidates of ordinary means to devote years to fundraising.

In the ultimate irony of the era of low contribution limits, the wealthy have come to dominate federal office-holding. A 2014 study by the Center for Responsive Politics found that for the first time in American history a

<sup>118</sup> CURRINDER, *supra* note 116, at 206.

<sup>119</sup> Corrado, *Running Backward*, *supra* note 108, at 104.

<sup>120</sup> PETER J. WALLISON & JOEL M. GORA, *BETTER PARTIES, BETTER GOVERNMENT: A REALISTIC PROGRAM FOR CAMPAIGN FINANCE REFORM* 12–13 (2009); SORAUF, *supra* note 20, at 188; Corrado, *Running Backward*, *supra* note 108, at 103.

<sup>121</sup> Steve Israel, *Confessions of a Congressman*, N.Y. TIMES (Jan. 8, 2016), <https://www.nytimes.com/2016/01/09/opinion/steve-israel-confessions-of-a-congressman.html>.

<sup>122</sup> Carl Hulse, *Steve Israel of New York, a Top House Democrat, Won't Seek Reelection*, N.Y. TIMES (Jan. 5, 2016), <http://www.nytimes.com/2016/01/06/us/politics/steve-israel-house-democrat-new-york.html>.

<sup>123</sup> *Id.*

<sup>124</sup> CURRINDER, *supra* note 116, at 6, 16, 61–90; Corrado, *Running Backward*, *supra* note 108, at 97.

<sup>125</sup> Schouten, *supra* note 111. See also KEN BUCK, *DRAIN THE SWAMP: HOW WASHINGTON CORRUPTION IS WORSE THAN YOU THINK* (2017).

<sup>126</sup> Schouten, *supra* note 111.

<sup>127</sup> Gloria Borger et al., *Inside Biden's Decision Not to Run*, CNN (Oct. 22, 2015, 11:18 AM), <http://www.cnn.com/2015/10/21/politics/joe-biden-2016-decision-timeline/> ("Biden concluded there was simply not sufficient time left to raise enough money.").

majority of members of Congress are millionaires.<sup>128</sup> While the net worth of the average American is \$56,000, the average net worth of members of Congress is \$1.03 million.<sup>129</sup> Former Democratic Senator Eugene McCarthy, one of the plaintiffs in *Buckley v. Valeo*, warned decades ago that low contribution limits would lead to precisely that outcome. Writing in 1987, Senator McCarthy observed, “[u]nless the election law is changed to allow larger contributions to candidates who are neither wealthy nor supported by corporate or labor groups, the prospect is that the number of the very rich in Congress will continue to grow. . . . The names of members of Congress will begin to read like a list of *Fortune*’s Five Hundred.”<sup>130</sup> McCarthy’s prophetic warning has come to pass.

The rise of social media places candidates of modest means and low name recognition at an even greater disadvantage. FECA was predicated on the notion that by keeping contribution limits low, federal candidates would be playing by the same set of campaign finance rules. But Donald Trump’s 2016 campaign showed that such reasoning simply no longer applies. Celebrities and individuals with high name recognition have enormous advantages in the modern communications era. For example, during the Republican primaries, Trump spent only \$4.62 per vote, the least amount of any GOP presidential candidate.<sup>131</sup> Jeb Bush, in contrast, spent \$498.05 per vote.<sup>132</sup> Similarly, in the general election Hillary Clinton outspent Trump by an almost two-to-one margin, spending \$768 million to Trump’s \$398 million.<sup>133</sup>

Yet, Trump went on to win both the Republican nomination and the general election. How did he do it? The answer is he used his global celebrity and his mastery of modern communications platforms such as Twitter to reach tens of millions of voters virtually for free. Post-election analysis revealed that Trump received nearly six billion dollars in free media coverage.<sup>134</sup> In contrast, his Democratic opponent Hillary Clinton only

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<sup>128</sup> Russ Choma, *Millionaires’ Club: For First Time, Most Lawmakers are Worth \$1 Million-Plus*, CTR. FOR RESPONSIVE POL. (Jan. 9, 2014), <https://www.opensecrets.org/news/2014/01/millionaires-club-for-first-time-most-lawmakers-are-worth-1-million-plus/>.

<sup>129</sup> Alan Rappoport, *Making It Rain: Members of Congress Are Mostly Millionaires*, N.Y. TIMES (Jan. 12, 2015), <https://www.nytimes.com/politics/first-draft/2015/01/12/making-it-rain-members-of-congress-are-mostly-millionaires/>.

<sup>130</sup> EUGENE MCCARTHY, UP ‘TIL NOW: A MEMOIR 222–23 (1987).

<sup>131</sup> Robert Schroeder, *Donald Trump Spent the Least to Win Votes, Delegates*, MARKETWATCH, (May 4, 2016), <http://www.marketwatch.com/story/donald-trump-spent-the-least-to-win-votes-delegates-2016-05-04>.

<sup>132</sup> *Id.*

<sup>133</sup> Niv Sultan, *Election 2016: Trump’s Free Media Helped Keep Cost Down, But Fewer Donors Provided More of the Cash*, CTR. FOR RESPONSIVE POL. (Apr. 13, 2017), <https://www.opensecrets.org/news/2017/04/election-2016-trump-fewer-donors-provided-more-of-the-cash/>.

<sup>134</sup> Jonathan Mahler, *CNN Had a Problem. Donald Trump Solved It*, N.Y. TIMES MAG. (Apr. 4, 2017), [https://www.nytimes.com/2017/04/04/magazine/cnn-had-a-problem-donald-trump-solved-it.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=photo-spot-region&region=top-news&WT.nav=top-news&\\_r=0](https://www.nytimes.com/2017/04/04/magazine/cnn-had-a-problem-donald-trump-solved-it.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=photo-spot-region&region=top-news&WT.nav=top-news&_r=0).

received about \$2.9 billion in free media.<sup>135</sup> Trump's commanding free media advantage more than made up for Clinton's fundraising lead.<sup>136</sup>

Trump's deft use of social media allowed him to reach the electorate in ways unimaginable when FECA was adopted in the 1970s. Although all of the candidates used Twitter and social media to some extent in 2016,<sup>137</sup> no candidate generated the attention or the following that Trump did. By November 2016, Trump had thirteen million Twitter followers, millions more than any other candidate.<sup>138</sup> In all, Trump estimated that he had twenty-eight million followers on Twitter, Facebook, and Instagram combined.<sup>139</sup> Trump realized that he could gain free advertising for his campaign by routinely calling into live interviews on cable and network television and by saying controversial and offensive things on his Twitter account, which the cable, broadcast network, and print media rebroadcast without charging Trump a dime.<sup>140</sup> For example, Trump used Twitter's 140 characters to launch demeaning, attention getting attacks on his opponents, such as calling his opponents names such as "Lyin' Ted," "Low Energy Jeb," "Little Marco," "Crazy Bernie," and "Crooked Hillary."<sup>141</sup> By capitalizing on his pre-existing celebrity to use Twitter as a negative advertising attack platform,<sup>142</sup> Trump's tweets reached a far larger audience than the Twitter accounts of any of his rivals, including Hillary Clinton.<sup>143</sup>

As Trump's campaign demonstrated, social media allows candidates with high levels of pre-existing name recognition to circumvent normal

<sup>135</sup> *Id.*

<sup>136</sup> Sultan, *supra* note 133.

<sup>137</sup> The most retweeted Tweet of the 2016 campaign was a June 9, 2016 Tweet by Clinton telling Trump to "Delete your account," which generated more than 500,000 retweets and almost 700,000 likes. See Gabrielle Levy, *Twitter Wins Big in 2016 Campaign*, U.S. NEWS (Nov. 8, 2016), <https://www.usnews.com/news/politics/articles/2016-11-08/more-than-1-billion-tweets-were-sent-about-the-election>. Clinton had 10 million followers on Twitter by the end of the campaign. See Jennifer Earl, *Donald Trump and Hillary Clinton's Most Popular Tweets of 2016*, CBS NEWS (Nov. 7, 2016), <http://www.cbsnews.com/news/donald-trump-and-hillary-clintons-most-popular-tweets-of-2016/>.

<sup>138</sup> Jessica Guynn, *Forget Trump: Election's Big Winner was Twitter*, USA TODAY (Nov. 8, 2016), <https://www.usatoday.com/story/tech/news/2016/11/08/election-winner-twitter/93509896/>. See also Oren Tsur, Katherine Ognyanova, & David Lazer, *The Data Behind Trump's Twitter Takeover*, POLITICO (Apr. 29, 2016), <http://www.politico.com/magazine/story/2016/04/donald-trump-2016-twitter-takeover-213861>.

<sup>139</sup> Rebecca Morin, *Trump Says Social Media was Key to Victory*, POLITICO (Nov. 12, 2016), <http://www.politico.com/story/2016/11/donald-trump-social-media-231285>.

<sup>140</sup> Gabriel Sherman, *Operation Trump, Inside the Most Unorthodox Campaign in Political History*, N.Y. MAG., Apr. 3, 2016, <http://nymag.com/daily/intelligencer/2016/04/inside-the-donald-trump-presidential-campaign.html> ("To break out of the pack, he made what appears to be a deliberate decision to be provocative, even outrageous.").

<sup>141</sup> Paola Chavez & Veronica Stracqualursi, *From 'Crooked Hillary' to 'Little Marco,' Donald Trump's Many Nicknames*, ABC NEWS (May 11, 2016), <http://abcnews.go.com/Politics/crooked-hillary-marco-donald-trumps-nicknames/story?id=39035114>.

<sup>142</sup> See generally Jasmine C. Lee & Kevin Quealy, *The 363 People, Places and Things Donald Trump Has Insulted on Twitter: A Complete List*, N.Y. TIMES (Mar. 28, 2017), <https://www.nytimes.com/interactive/2016/01/28/upshot/donald-trump-twitter-insults.html>.

<sup>143</sup> See Shontavia Johnson, *Donald Trump Tweeted Himself Into the White House*, THE CONVERSATION (Nov. 10, 2016), <https://theconversation.com/donald-trump-tweeted-himself-into-the-white-house-68561>.

advertising channels by reaching voters directly. Indeed, Trump himself credited his victory in part to social media.<sup>144</sup> In a post-election interview on *60 Minutes*, he explained that social media enabled him to make up for the spending gap with his rivals: “I think it helped me win all of these races where they’re spending much more money than I spent.”<sup>145</sup> Debra Lee, a Twitter board member and Trump critic, agreed, lamenting that Twitter “helped him win the election” because “[h]e was able to use Twitter and to use social media to get around conventional media and not deal with having to buy time on media or deal with newspapers or whoever he didn’t like.”<sup>146</sup> Academic studies have confirmed that analysis. A study by David Robinson, a data scientist, concluded that Trump’s controversial “celebrity-style” Tweets attracted more attention than other candidates and helped him build interest in his campaign.<sup>147</sup> Likewise, a study by Ohio University concluded that Trump was by far the most Googled candidate and the most frequent subject of searches on Twitter and Facebook.<sup>148</sup> Election day further underscored the extent to which social media has supplanted the commercial-driven traditional media. On election night, more than seventy-five million election-related Tweets were sent and over 115 million people “discussed the election on Facebook.”<sup>149</sup>

The social media world will only grow in importance in future campaigns. According to the Pew Research Center, 62% of Americans get their news from social media<sup>150</sup> and 44% of Americans get their news from just one social media source: Facebook.<sup>151</sup> The demographics of social media are particularly telling: 56% of those who get their news from social networking sites are under age 50.<sup>152</sup> Those figures make clear that social media is here to stay as a critical component of American election campaigns.

Above all, the 2016 election demonstrated that celebrity candidates can leverage their high name recognition through the use of social media. The

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<sup>144</sup> Rebecca Morin, *Trump Says Social Media was Key to Victory*, POLITICO (Nov. 12, 2016), <http://www.politico.com/story/2016/11/donald-trump-social-media-231285> (“I think that social media has more power than the money they spent, and I think maybe to a certain extent, I proved that.”).

<sup>145</sup> Jessica Guynn, *Trump: Facebook and Twitter Helped Me Win*, USA TODAY, (Nov. 14, 2016), <https://www.usatoday.com/story/tech/news/2016/11/14/trump-facebook-and-twitter-helped-me-win/93804688/>.

<sup>146</sup> Maya Kosoff, *Trump Helped Trump Win, Twitter Board Member Says, Hive*, VANITY FAIR (Dec. 1, 2016), <http://www.vanityfair.com/news/2016/12/twitter-helped-trump-win-board-member-says>.

<sup>147</sup> May Bulman, *Donald Trump's 'Celebrity-Style' Tweets Helped Him Win US Presidential Election, Says Data Scientist*, INDEP. (Nov. 28, 2016), <http://www.independent.co.uk/news/world/americas/donald-trump-twitter-account-election-victory-president-elect-david-robinson-statistical-analysis-a7443071.html>.

<sup>148</sup> See Laeeq Khan, *Trump Won Thanks to Social Media*, THE HILL (Nov. 15, 2016), <http://thehill.com/blogs/pundits-blog/technology/306175-trump-won-thanks-to-social-media>.

<sup>149</sup> Ivana Kottasova, *Trump's Win Smashes Social Media Records*, CNN (Nov. 9, 2016), <http://money.cnn.com/2016/11/09/technology/election-trump-social-media-records/>.

<sup>150</sup> Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RES. CTR. (May 26, 2016), <http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/>.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

halls of Congress already include many candidates who enjoyed high name recognition before entering office, such as the former comedian Al Franken, the reality television star Sean Duffy, and the scions of famous political families, such as Joseph Kennedy III and Tom and Mark Udall. But Trump's success has sparked speculation that a wide range of Hollywood celebrities and prominent billionaires may be inspired to enter politics and run for office, including movie star Dwayne "The Rock" Johnson and Dallas Mavericks owner and reality television star Mark Cuban.<sup>153</sup> In the summer of 2017, the musician Kid Rock tweeted that he was considering running for Senate as a Republican, a possibility that Democrats took very seriously.<sup>154</sup> As the Democratic Senate Minority Leader Chuck Schumer explained, "In the Trump era, we can't afford to take this tweet as a joke."<sup>155</sup> And in July 2017, a committee supporting Dwayne Johnson's potential candidacy for president filed with the Federal Election Commission.<sup>156</sup> Tad Devine, 2016 campaign manager for Bernie Sanders, recently observed that Trump's success could mark a turning point in political history, observing, "I don't doubt that billionaires will start seeing presidents in the mirror, the way senators do now."<sup>157</sup> Similarly, The Hill newspaper observed that Trump's victory "could encourage more celebrities to step into politics—and encourage more parties not to rely on the usual pool of figures when looking for candidates."<sup>158</sup> But while billionaires and celebrities thrive in the current political landscape, candidates of modest means and low name recognition face a more difficult uphill climb than ever before.

When Congress adopted contribution limits, it had high hopes that they would reduce the importance of fundraising and make it possible for ordinary Americans to run for office. As the 2016 campaign demonstrated, however, FEC's contribution limits have given rise to a campaign finance landscape in which the only candidates freed from the demands of full-time fundraising are millionaires and celebrities. The "dramatic adverse effects" of contribution limits that the Supreme Court warned about in *Buckley* have arrived.

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<sup>153</sup> Lisa Hagen, *The 43 People Who Might Run Against Trump in 2020*, THE HILL (May 8, 2017), <http://thehill.com/homenews/campaign/332156-the-43-people-who-might-run-against-trump-in-2020>; James B. Stewart, *With Trump in White House, Some Executives Ask, Why Not Me?*, N.Y. TIMES (Mar. 9, 2017), [https://www.nytimes.com/2017/03/09/business/bloomberg-iger-business-executives-president.html?mcubz=2&\\_r=0](https://www.nytimes.com/2017/03/09/business/bloomberg-iger-business-executives-president.html?mcubz=2&_r=0).

<sup>154</sup> Jennifer Hansler, *Senate Dems on Kid Rock Run: We Can't Afford to Treat This as a Joke*, CNN (July 16, 2017), <http://www.cnn.com/2017/07/15/politics/elizabeth-warren-kid-rock/index.html>.

<sup>155</sup> *Id.*

<sup>156</sup> Andrea Park, *Committee Files to Draft Dwayne Johnson for President*, CBS NEWS (July 12, 2017), <http://www.cbsnews.com/news/dwayne-johnson-for-president-committee-files-with-fec/>.

<sup>157</sup> Karen Tumulty & John Wagner, *The Trump Effect: Everyone's Thinking of Running for President*, WASH. POST (June 6, 2017), [https://www.washingtonpost.com/politics/the-trump-effect-everyones-thinking-of-running-for-president/2017/06/05/51ff27a8-46f5-11e7-bcde-624ad94170ab\\_story.html?hpid=hp\\_hp-top-table-main\\_dem-president-810a%3Ahomepage%2Fstory&utm\\_term=.702c37b19df1](https://www.washingtonpost.com/politics/the-trump-effect-everyones-thinking-of-running-for-president/2017/06/05/51ff27a8-46f5-11e7-bcde-624ad94170ab_story.html?hpid=hp_hp-top-table-main_dem-president-810a%3Ahomepage%2Fstory&utm_term=.702c37b19df1).

<sup>158</sup> Lisa Hagen, *10 Celebrities Who Could Run for Office*, THE HILL (Dec. 31, 2016), <http://thehill.com/homenews/campaign/311716-10-celebrities-who-could-run-for-office>.

## B. RUSSIAN INTERVENTION ON TRUMP'S BEHALF

The second pillar of federal campaign finance law is the principle that foreign governments must not be permitted to exercise influence over American elections. Federal campaign finance law states that it shall be unlawful for “a foreign national, directly or indirectly, to make a contribution or donation of money *or other thing of value*, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election.”<sup>159</sup> The law also makes it a crime to “solicit, accept, or receive a contribution or donation” from a foreign national.<sup>160</sup>

On a stunning scale, FECA's anti-foreign influence pillar crumbled in 2016 as the Russian government launched an unprecedented and highly successful campaign<sup>161</sup> to defeat the presidential candidacy of Hillary Clinton.<sup>162</sup> On March 19, 2016, Russian hackers sent a phishing email to John Podesta, chairman of the Clinton campaign, informing him that his Google email account was compromised and that he needed to immediately change his password.<sup>163</sup> When Podesta clicked on the phishing email, he inadvertently made the 60,000 emails on his Google account instantly available to the Russian hackers.<sup>164</sup> Besides Podesta, the Russians also gained access to the emails of 100 Democratic Party officials, fundraising organizations, and voter analytics programs.<sup>165</sup>

The internet played a critical role not only in giving the Russian government access to the DNC emails, but also in facilitating the public dissemination of the stolen information. After gaining access to the DNC files, Russian intelligence operatives working under the name of “Guccifer 2.0” shared the leaked emails and documents with Wikileaks.<sup>166</sup> The documents included excerpts of private speeches Clinton gave to Wall Street firms,<sup>167</sup> internal campaign emails analyzing Clinton's struggles during the

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<sup>159</sup> 52 U.S.C. § 30121(a)(1) (emphasis added); *see also* 11 C.F.R. § 110.20(b).

<sup>160</sup> 52 U.S.C. § 30121(a)(2).

<sup>161</sup> *See Intelligence Report on Russian Hacking*, N.Y. TIMES (Jan. 6, 2017), at ii, <https://assets.documentcloud.org/documents/3254237/Russia-Hack-Report.pdf>.

<sup>162</sup> *See* Jim Sciutto & Manu Raju, *Democrats Want Russian Hacking Intelligence Declassified*, CNN (Dec. 2, 2016), <http://www.cnn.com/2016/12/02/politics/democrats-russian-hacking-intelligence/>.

<sup>163</sup> Eric Lipton, David E. Sanger & Scott Shane, *The Perfect Weapon: How Russian Cyberpower Invaded the U.S.*, N.Y. TIMES (Dec. 13, 2016), <https://www.nytimes.com/2016/12/13/us/politics/russia-hack-election-dnc.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=a-lede-package-region&region=top-news&WT.nav=top-news>.

<sup>164</sup> *Id.*

<sup>165</sup> Eric Lichtblau & Eric Schmitt, *Hack of Democrats' Accounts Was Wider Than Believed, Officials Say*, N.Y. TIMES (Aug. 10, 2016), <https://www.nytimes.com/2016/08/11/us/politics/democratic-party-russia-hack-cyberattack.html?module=Promotron&region=Body&action=click&pgtype=article> (“A Russian cyberattack that targeted Democratic politicians was bigger than it first appeared and breached the private email accounts of more than 100 party officials and groups...”).

<sup>166</sup> *Intelligence Report on Russian Hacking*, N.Y. TIMES (Jan. 6, 2017), at ii-iii, 3, <https://assets.documentcloud.org/documents/3254237/Russia-Hack-Report.pdf>.

<sup>167</sup> Amy Chozick, Nicholas Confessore & Michael Barbaro, *Leaked Speech Excerpts Show a Hillary Clinton at Ease with Wall Street*, N.Y. TIMES (Oct. 7, 2016), <https://www.nytimes.com/2016/10/08/us/politics/hillary-clinton-speeches-wikileaks.html?action=click&contentCollection=Politics&module=RelatedCoverage&region=EndOfArticle&pgtype=article>.

Democratic primaries,<sup>168</sup> and emails discussing Clinton campaign strategy.<sup>169</sup> The sheer volume of email and documents disclosed was enormous. On one day alone, July 22, 2016, WikiLeaks published over 44,000 DNC emails that included over 17,000 attachments.<sup>170</sup> The Russians' efforts to intervene in the campaign were not limited to hacking emails. During the election, the Russian government launched a cyberattack on voter registration databases in at least 39 states<sup>171</sup> and spread anti-Clinton fake news stories in key swing states.<sup>172</sup> At least 126 million Americans viewed Russian-generated fake news stories and election-related content on Facebook during the 2016 campaign.<sup>173</sup>

There was no doubt that Moscow was behind the hacking and fake news attacks on Clinton's campaign. After an extensive investigation, the CIA, NSA, FBI, and the Office of the Director of National Intelligence announced in January 2017 that Russian President Vladimir Putin personally ordered the hacking in order "to help President-elect Trump's election chances when possible by discrediting Secretary Clinton and publicly contrasting her unfavorably to him."<sup>174</sup> American intelligence officials further warned that the success of the Russian intervention in the 2016 campaign would embolden Moscow to intensify its efforts to influence American politics in

<sup>168</sup> See Amy Chozick & Nicholas Confessore, *Hillary Clinton's Campaign Strained to Hone Her Message, Hacked Emails Show*, N.Y. TIMES, (Oct. 10, 2016), <https://www.nytimes.com/2016/10/11/us/politics/hillary-clinton-emails.html>.

<sup>169</sup> See Amy Chozick, Nicholas Confessore, Steve Eder, Yamiche Alcindor & Farah Stockman, *Highlights from the Clinton Campaign Emails: How to Deal with Sanders and Biden*, N.Y. TIMES (Oct. 10, 2016), <https://www.nytimes.com/2016/10/10/us/politics/hillary-clinton-emails-wikileaks.html>.

<sup>170</sup> Lipton, Sanger & Shane, *The Perfect Weapon*, *supra* note 163.

<sup>171</sup> Michael Riley & Jordan Robertson, *Russian Cyber Hacks on U.S. Electoral System Far Wider Than Previously Known*, BLOOMBERG POLITICS (June 13, 2017), <https://www.bloomberg.com/politics/articles/2017-06-13/russian-breach-of-39-states-threatens-future-u-s-elections>.

<sup>172</sup> Rachel Roberts, *Russia Hired 1,000 People to Create Anti-Clinton 'Fake News' in Key US States During Election, Trump-Russia Hearings Leader Reveals*, INDEP. (Mar. 30, 2017), <http://www.independent.co.uk/news/world/americas/us-politics/russian-trolls-hilary-clinton-fake-news-election-democrat-mark-warner-intelligence-committee-a7657641.html>.

<sup>173</sup> Olivia Solon and Sabrina Siddiqui, *Russia-backed Facebook posts 'reached 126m Americans' during US election*, GUARDIAN (Oct. 30, 2017), <https://www.theguardian.com/technology/2017/oct/30/facebook-russia-fake-accounts-126-million>; Ned Parker, Jonathan Landay & John Walcott, *Putin-Linked Think Tank Drew up Plan to Sway 2016 U.S. Election—Documents*, REUTERS (Apr. 20, 2017), <http://www.reuters.com/article/us-usa-russia-election-exclusive-idUSKBN17L2N3>; Craig Timberg, *Russian Propaganda Effort Helped Spread 'Fake News' During Election, Experts Say*, WASH. POST (Nov. 24, 2016), [https://www.washingtonpost.com/business/economy/russian-propaganda-effort-helped-spread-fake-news-during-election-experts-say/2016/11/24/793903b6-8a40-4ca9-b712-716af66098fe\\_story.html?utm\\_term=.7a1ed437dee2](https://www.washingtonpost.com/business/economy/russian-propaganda-effort-helped-spread-fake-news-during-election-experts-say/2016/11/24/793903b6-8a40-4ca9-b712-716af66098fe_story.html?utm_term=.7a1ed437dee2).

<sup>174</sup> *Intelligence Report on Russian Hacking*, N.Y. TIMES (Jan. 6, 2017), at ii, <https://assets.documentcloud.org/documents/3254237/Russia-Hack-Report.pdf>; Eric Lichtblau, *C.I.A. Had Evidence of Russian Effort to Help Trump Earlier Than Believed*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/trump-russia-cia-john-brennan.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news>; Matthew Rosenberg, *Trump Misleads on Russian Meddling: Why 17 Intelligence Agencies Don't Need to Agree*, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/06/us/politics/trump-russia-intelligence-agencies-cia-fbi-nsa.html?mcubz=1>.

the future.<sup>175</sup> Former FBI Director James Comey bluntly predicted that the Russians “will be back” in future elections.<sup>176</sup>

The Russian intervention represented an invaluable gift to the Trump campaign. By hacking into the DNC computer system and sharing the hacked emails with Wikileaks, the Russians generated months of intensely negative coverage of the Clinton campaign. Even more directly, the Russian government’s spread of anti-Clinton fake news stories reached swing voters in key states. By any measure, therefore, the Russian efforts to defeat Clinton’s candidacy contributed massively to the Trump campaign. The success of Russian intervention powerfully demonstrated the failure of federal campaign finance law to prevent foreign influence on presidential campaigns. The Russians used a technology unimaginable when FECA was adopted—global cyber mass communications—to intervene on Trump’s behalf,<sup>177</sup> and neither Congress, nor the intelligence community, nor the FEC, offered any effective response to the foreign intrusion on the presidential election.

Equally remarkable was FECA’s failure to deter Trump campaign officials from actively seeking Russian assistance.<sup>178</sup> For example, in July 2017, it was revealed that Paul Manafort, the Trump campaign chairman, Jared Kushner, the president’s son-in-law, and Donald Trump Jr., the president’s son, met at Trump Tower in June 2016 with a Kremlin-connected Russian lawyer and a former Russian counterintelligence officer to discuss the Russian government’s opposition research on Hillary Clinton.<sup>179</sup>

<sup>175</sup> See Laura Reston, *Russia Has Weaponized Fake News to Sow Chaos*, THE NEW REPUBLIC, May 12, 2007, <https://newrepublic.com/article/142344/russia-weaponized-fake-news-sow-chaos>.

<sup>176</sup> Peter Baker & David E. Sanger, *Trump-Comey Feud Eclipses a Warning on Russia: ‘They Will Be Back’*, N.Y. TIMES (June 10, 2017), <https://www.nytimes.com/2017/06/10/us/politics/trump-comey-russia-fbi.html?mcubz=2>.

<sup>177</sup> See Lipton, Sanger & Shane *supra* note 163; see also *Press Release*, U.S. DEP’T OF HOMELAND SECURITY, Joint Statement from the Dep’t Of Homeland Security and Off. of the Director of Nat’l Intelligence on Election Security (Oct. 7, 2016), <https://www.dhs.gov/news/2016/10/07/joint-statement-department-homeland-security-and-office-director-national>.

<sup>178</sup> See generally Matt Apuzzo, Matthew Rosenberg & Emmarie Huetteman, *F.B.I. Is Investigating Trump’s Russia Ties, Comey Confirms*, N.Y. TIMES (Mar. 20, 2017), <https://www.nytimes.com/2017/03/20/us/politics/fbi-investigation-trump-russia-comey.html>; Bonnie Berkowitz, Denise Lu & Julie Vitkovskaya, *Here’s What We Know so Far About Team Trump’s Ties to Russian Interests*, WASH. POST (Apr. 11, 2017), [https://www.washingtonpost.com/graphics/national/trump-russia/?utm\\_term=.551d492a50df](https://www.washingtonpost.com/graphics/national/trump-russia/?utm_term=.551d492a50df); Ellen Nakashima, Devlin Barrett & Adam Entous, *FBI Obtained FISA Warrant to Monitor Trump Adviser Carter Page*, WASH. POST (Apr. 11, 2017), [https://www.washingtonpost.com/world/national-security/fbi-obtained-fisa-warrant-to-monitor-former-trump-adviser-carter-page/2017/04/11/620192ea-1e0e-11e7-ad74-3a742a6e93a7\\_story.html?utm\\_term=.da292b5eeb5b](https://www.washingtonpost.com/world/national-security/fbi-obtained-fisa-warrant-to-monitor-former-trump-adviser-carter-page/2017/04/11/620192ea-1e0e-11e7-ad74-3a742a6e93a7_story.html?utm_term=.da292b5eeb5b); Scott Shane, Mark Mazzetti & Adam Goldman, *Trump Adviser’s Visit to Moscow Sent the F.B.I. Digging*, N.Y. TIMES (Apr. 19, 2017), [https://www.nytimes.com/2017/04/19/us/politics/carter-page-russia-trump.html?action=Click&contentCollection=BreakingNews&contentID=65183557&pgtype=Homepage&\\_r=0](https://www.nytimes.com/2017/04/19/us/politics/carter-page-russia-trump.html?action=Click&contentCollection=BreakingNews&contentID=65183557&pgtype=Homepage&_r=0).

<sup>179</sup> Tom Hamburger & Rosalind S. Helderman, *Trump Jr. Says He, Kushner and Manafort Met with Lawyer Tied to Kremlin*, WASH. POST (July 8, 2017), [https://www.washingtonpost.com/politics/trump-jr-says-he-kushner-and-manafort-met-with-lawyer-tied-to-kremlin/2017/07/08/18b86d36-6439-11e7-a4f7-af34fc1d9d39\\_story.html?utm\\_term=.f93e5c38d8d9](https://www.washingtonpost.com/politics/trump-jr-says-he-kushner-and-manafort-met-with-lawyer-tied-to-kremlin/2017/07/08/18b86d36-6439-11e7-a4f7-af34fc1d9d39_story.html?utm_term=.f93e5c38d8d9); Rosalind S. Helderman & Tom Hamburger, *Russian American Lobbyist was Present at Trump Jr.’s Meeting with Kremlin-Connected*



Moreover, emails discovered by the New York Times showed that, in response to the Russians' offer of damaging information on Clinton, Trump Jr. responded enthusiastically, writing, "If it's what you say I love it especially later in the summer."<sup>180</sup>

The June 2016 meeting at Trump Tower was not the only Trump-related connection to foreign actors that raised eyebrows. After the election, Roger Stone, a Trump adviser, seemed to suggest that during the campaign he had communicated with Guccifer 2.0 as well as with Julian Assange, the Australian founder of WikiLeaks.<sup>181</sup> Although Stone denied prior knowledge of the Russian hacking, and Congressional investigators found no evidence to contradict his denial, the fact remained that during the 2016 campaign he publicly predicted the disclosure of embarrassing information about Podesta before WikiLeaks published Podesta's emails.<sup>182</sup> More concrete evidence came in October 2017 when George Papadopolous, a Trump campaign adviser, pled guilty to lying to the FBI about his efforts to solicit "dirt" on Hillary Clinton from the Russian government during the election.<sup>183</sup> Most troubling of all, circumstantial evidence suggests that the Russian fake news campaign targeted voters on Twitter and Facebook with such precision that it potentially could have had assistance from American sources.<sup>184</sup>

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*Lawyer*, WASH. POST (July 14, 2017), [https://www.washingtonpost.com/politics/russian-american-lobbyist-was-present-at-trump-jrs-meeting-with-kremlin-connected-lawyer/2017/07/14/1b96f25a-68aa-11e7-9928-22d00a47778f\\_story.html?hpid=hp\\_hp-top-table-main\\_trumptowermeeting-101pm%3Ahomepage%2Fstory&utm\\_term=.46b98db4e625](https://www.washingtonpost.com/politics/russian-american-lobbyist-was-present-at-trump-jrs-meeting-with-kremlin-connected-lawyer/2017/07/14/1b96f25a-68aa-11e7-9928-22d00a47778f_story.html?hpid=hp_hp-top-table-main_trumptowermeeting-101pm%3Ahomepage%2Fstory&utm_term=.46b98db4e625); see also Jo Becker, Matt Apuzzo & Adam Goldman, *Trump's Son Met with Russian Lawyer After Being Promised Damaging Information on Clinton*, N.Y. TIMES (July 9, 2017), <https://www.nytimes.com/2017/07/09/us/politics/trump-russia-kushner-manafort.html>; Aaron Blake, *Another Shoe Drops in the White House's Burgeoning Russia Scandal*, WASH. POST (July 14, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/07/14/another-shoe-drops-in-the-white-houses-burgeoning-russia-scandal/?hpid=hp\\_hp-top-table-main\\_trumptowermeeting-101pm%3Ahomepage%2Fstory&utm\\_term=.432cae8ac45](https://www.washingtonpost.com/news/the-fix/wp/2017/07/14/another-shoe-drops-in-the-white-houses-burgeoning-russia-scandal/?hpid=hp_hp-top-table-main_trumptowermeeting-101pm%3Ahomepage%2Fstory&utm_term=.432cae8ac45).

<sup>180</sup> Peter Baker, *Conspiracy or Coincidence? A Timeline Open to Interpretation*, N.Y. TIMES (July 12, 2017), <https://www.nytimes.com/2017/07/12/us/politics/trump-russia-election-meeting.html>; Jo Becker, Adam Goldman & Matt Apuzzo, *Russian Dirt on Clinton? 'I Love It,' Donald Trump Jr. Said*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/2017/07/11/us/politics/trump-russia-email-clinton.html>; David A. Graham, *Donald Trump Jr.'s Reply to an Offer of Russian Government Attorney: 'I Love It'*, ATLANTIC (July 11, 2017), <https://www.theatlantic.com/politics/archive/2017/07/from-russia-with-love/533235/>.

<sup>181</sup> Matthew Rosenberg & Maggie Haberman, *Trump Adviser Had Twitter Contact with Figure Tied to Russians*, N.Y. TIMES (Mar. 11, 2017), <https://www.nytimes.com/2017/03/11/us/politics/roger-stone-trump-adviser-russia.html?mcubz=3&mtref=undefined&gwh=E7BD996C1D5BDBF067BB4AECB52389B6&gwt=pay>.

<sup>182</sup> See Andrew Kaczynski, Nathan McDermott & Chris Massie, *Trump Adviser Roger Stone Repeatedly Claimed to Know of Forthcoming WikiLeaks Dumps*, CNN (Mar. 20, 2017), <http://www.cnn.com/2017/03/20/politics/kfile-roger-stone-wikileaks-claims/>; Patricia Zengerle, *Trump ally Stone denies collusion with Russia*, REUTERS (Sept. 25, 2017), <https://www.reuters.com/article/us-usa-trump-russia-stone/trump-ally-stone-denies-collusion-with-russia-idUSKCN1C103S>.

<sup>183</sup> Matt Apuzzo and Michael S. Schmidt, *Trump Campaign Adviser Met With Russian to Discuss 'Dirt' on Clinton*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/us/politics/george-papadopoulos-russia.html>.

<sup>184</sup> See Peter Stone & Greg Gordon, *Trump-Russia Investigators Probe Jared Kushner-Run Digital Operation*, MCCLATCHY (July 12, 2017), <http://www.mcclatchydc.com/news/nation-world/national/article160803619.html>.

But far and away the most stunning aspect of the DNC hacking story was Donald Trump's own response to the Russian effort to influence the election. Throughout the presidential campaign, Trump lavished praise on the Russian hacking effort.<sup>185</sup> Referring to State Department emails that were deleted from Hillary Clinton's private email server, Trump announced at a campaign press conference: "Russia, if you're listening, I hope you're able to find the 30,000 emails that are missing . . . I think you will probably be rewarded mightily by our press."<sup>186</sup> One month before the election, Trump announced: "I love Wikileaks."<sup>187</sup> Trump clearly understood that the Russian hack was politically beneficial to his campaign. Indeed, a study by Politifact found that Trump referred to Wikileaks a total of 124 times during the last month of the campaign.<sup>188</sup>

Yet, it was far from clear whether FECA even applied to the Trump campaign's contacts with Moscow. A case in point was the intense debate over the legal implications of the June 2016 Trump Tower meeting. Some legal experts suggested that Manafort, Kushner, and Trump Jr. violated FECA's prohibition on soliciting a "*thing of value*" from foreign nationals by meeting with the Russians at Trump Tower.<sup>189</sup> Among the most prominent was the highly regarded election lawyer Bob Bauer, who contended that both the Trump Tower meeting and President Trump's encouragement of Russian hacking may have violated FECA.<sup>190</sup> As Bauer explained, the critical question "is whether the Trump campaign's communications about the hacked emails—through both public statements and private contacts—constituted in effect, for legal purposes, a request or suggestion that funds be spent to acquire the stolen emails."<sup>191</sup> Bauer was not the only expert to see potential FECA violations in the Trump team's conduct. Many other legal commentators asserted that the meeting could be construed as an unlawful solicitation of a foreign contribution.<sup>192</sup> Norman Eisen, a former ethics

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<sup>185</sup> See Ashley Parker & David E. Sanger, *Donald Trump Calls on Russia to Find Hillary Clinton's Missing Emails*, N.Y. TIMES (July 27, 2016), <https://www.nytimes.com/2016/07/28/us/politics/donald-trump-russia-clinton-emails.html>.

<sup>186</sup> *Id.*

<sup>187</sup> David Jackson, *Trump Continues to Push Back on Russia Hacking Claims*, USA TODAY (Dec. 15, 2016), <https://www.usatoday.com/story/news/politics/2016/12/15/donald-trump-russia-hacking-election-putin/95463530/>.

<sup>188</sup> Gabrielle Healy, *Did Trump Really Mention WikiLeaks over 160 Times in the Last Month of the Election Cycle?*, POLITIFACT (Apr. 21, 2017), <http://www.politifact.com/truth-o-meter/statements/2017/apr/21/jackie-speier/did-trump-really-mention-wikileaks-over-160-times-/>.

<sup>189</sup> See Bob Bauer, *Campaign Finance Law: When "Collusion" with a Foreign Government Becomes a Crime*, JUST SECURITY (June 2, 2017), <https://www.justsecurity.org/41593/hiding-plain-sight-federal-campaign-finance-law-trump-campaign-collusion-russia-trump/>.

<sup>190</sup> See Bob Bauer, *Open Door to Moscow? New Facts in the Potential Criminal Case of Trump Campaign Coordination with Russia*, JUST SECURITY (July 10, 2017), <https://www.justsecurity.org/42956/open-door-moscow-facts-potential-criminal-case-trump-campaign-coordination-russia/>.

<sup>191</sup> *Id.*

<sup>192</sup> See, e.g., Dahlia Lithwick, *Is Donald Trump Jr. Guilty of Treason? Probably Not, but He Likely Committed this Other Crime*, SLATE (July 11, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/07/donald\\_trump\\_jr\\_isn\\_t\\_guilty\\_of\\_treason\\_but\\_he\\_likely\\_committed\\_this\\_other.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/donald_trump_jr_isn_t_guilty_of_treason_but_he_likely_committed_this_other.html) ("it now appears the elements for a criminal violation of this [FECA] statute have been met.");

lawyer for Barack Obama, and Richard Painter, a former ethics lawyer for George W. Bush, argued that the Russian opposition research on Clinton potentially constituted a “priceless” and “illegal campaign contribution from a foreign government.”<sup>193</sup> The public advocacy group Common Cause even went so far as to file a complaint with the FEC<sup>194</sup> alleging that the Trump Tower meeting violated the law.

Yet, many other scholars and criminal lawyers disagreed. As Professor Orin Kerr told the *New York Times*:

The phrase “contribution or donation” sounds like a gift to help fund the campaign or give them something they otherwise would buy. . . . If that is the standard, that doesn’t seem to be met, based on what we know so far, because this wasn’t something that someone else could have gathered that was for sale in a market or would be otherwise purchasable.<sup>195</sup>

Professor Robert Weisberg also expressed doubts when he spoke to Slate Magazine, observing: “I could imagine the statutory argument that ‘thing of value’ can extend to damaging oppo[sition] research. . . . So the case could be made, but it’s a stretch.”<sup>196</sup> Likewise, former New York prosecutor Paul Callan concluded that the idea that Trump Jr. committed a campaign finance violation “doesn’t fly.”<sup>197</sup> In addition, Professor Eugene Volokh warned that a broad approach to the term “other thing of value” threatened First Amendment rights. Volokh explained:

[I]t seems to me that restrictions on providing information to the campaigns—or on campaigns seeking such information—can’t be constitutional. Can it really be that the Clinton campaign could be legally required to just ignore credible allegations of misconduct by Trump, just because those allegations were levied by foreigners?<sup>198</sup>

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Richard L. Hasen, *Donald Trump Jr.’s Free Speech Defense, It’s as Bogus as it Sounds*, SLATE (July 12, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/07/donald\\_trump\\_jr\\_s\\_free\\_speech\\_defense\\_is\\_as\\_bogus\\_as\\_it\\_sounds.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/donald_trump_jr_s_free_speech_defense_is_as_bogus_as_it_sounds.html).

<sup>193</sup> Norman L. Eisen & Richard W. Painter, Opinion, *Did Donald Jr. Break the Law?*, N.Y. TIMES (July 11, 2017), [https://www.nytimes.com/2017/07/11/opinion/donald-trump-jr-treason-emails-russia.html?em\\_pos=small&emc=edit\\_ty\\_20170712&nl=opinion-today&nl\\_art=3&nlid=69180613&ref=headline&te=1](https://www.nytimes.com/2017/07/11/opinion/donald-trump-jr-treason-emails-russia.html?em_pos=small&emc=edit_ty_20170712&nl=opinion-today&nl_art=3&nlid=69180613&ref=headline&te=1).

<sup>194</sup> Complaint at 1-7, *Common Cause v Donald J. Trump for President et al.*, <http://www.commoncause.org/press/press-releases/doj-fec-complaints-filed-against-donald-trump-jr-and-trump-campaign-for-illegal-solicitation-of-contribution-from-foreign-national.pdf>.

<sup>195</sup> Charlie Savage, *Donald Trump Jr. and Russia: What the Law Says*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/2017/07/11/us/politics/collusion-trump-russia-campaign.html?mcubz=2&r=0>.

<sup>196</sup> Lithwick, *Is Donald Trump Jr. Guilty of Treason?* *supra* note 192.

<sup>197</sup> Paul Callan, Opinion, *Meeting Russians for Dirt on Clinton? It may be Immoral but it’s Not Illegal*, CNN (July 11, 2017), <http://www.cnn.com/2017/07/11/opinions/trump-jr-russia-meeting-not-illegal-callan/index.html>.

<sup>198</sup> Eugene Volokh, Opinion, *Can It Be a Crime to Do Opposition Research by Asking Foreigners for Information?*, WASH. POST: THE VOLOKH CONSPIRACY (July 12, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/07/12/can-it-be-a-crime-to-do-opposition-research-by-asking-foreigners-for-information/?utm\\_term=.1b1a58d30611](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/07/12/can-it-be-a-crime-to-do-opposition-research-by-asking-foreigners-for-information/?utm_term=.1b1a58d30611).

The disagreement ultimately stems from the fact that the FEC has provided very little guidance on what “other thing of value” means. In a 2001 case, the FEC’s general counsel concluded that opposition research can constitute a “thing of value,”<sup>199</sup> but it is far from clear that the current FEC commissioners would reach the same conclusion.<sup>200</sup> In recent years the agency has stepped back from aggressive interpretations of the prohibition on foreign contributions. For example, in 2009 the FEC rejected a claim that the British musician Elton John’s performance at a Hillary Clinton fundraiser violated the foreign national ban.<sup>201</sup>

The federal courts have provided the strongest basis for reading the statute narrowly. In the 2012 case of *Bluman v. FEC*, which the Supreme Court summarily affirmed, a federal district court ruled that the prohibition on foreign contributions to American election campaigns:

[D]oes not restrain foreign nationals from speaking out about issues or spending money to advocate their views about issues. It restrains them only from a certain form of expressive activity closely tied to the voting process—providing money for a candidate or political party or spending money in order to expressly advocate for or against the election of a candidate.<sup>202</sup>

As Professor Daniel Tokaji noted, *Bluman* suggests that FECA’s ban is limited to “monetary donations” and not information sharing.<sup>203</sup>

In contrast, a broad reading of the statute would potentially criminalize a wide range of conduct, including virtually any foreign trip a presidential candidate undertakes. For example, during the 2008 presidential campaign, Barack Obama buttressed his foreign policy credentials by giving a speech in Berlin, Germany to “tens of thousands” of cheering Germans.<sup>204</sup> The Obama campaign paid \$700,000 to a German company for staging the event.<sup>205</sup> But Obama derived far more benefits from Germany than merely sound and lighting services. As the *Guardian* newspaper observed of the speech:

By common consent, tonight and the entire Obama week has been a huge success, generating priceless images for TV consumption back home and helping Obama cross the credibility gap—making it easier for Americans to

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<sup>199</sup> Hasen, *Donald Trump Jr.’s Free Speech Defense*, *supra* note 192; FEC MURs 4568, 4633, 4634 & 4736, <http://eqs.fec.gov/eqsdocsMUR/28044192498.pdf>.

<sup>200</sup> See Section III(D) below.

<sup>201</sup> FEC MURs 5987, 5995 & 6015, <https://www.fec.gov/files/legal/murs/current/78811.pdf>.

<sup>202</sup> *Bluman v. FEC*, 800 F. Supp. 2d 281, 290 (D.D.C. 2011), *aff’d* 132 S. Ct. 1087 (2012) (emphasis added).

<sup>203</sup> Daniel P. Tokaji, *What Trump Jr. Did Was Bad, But It Probably Didn’t Violate Federal Campaign Finance Law*, JUST SECURITY (July 14, 2017), <https://www.justsecurity.org/43116/trump-jr-bad-didnt-violate-federal-campaign-finance-law/>.

<sup>204</sup> Jonathan Freedland, *US Elections: Obama Wows Berlin Crowd with Historic Speech*, GUARDIAN (July 24, 2008), <https://www.theguardian.com/global/2008/jul/24/barackobama.uselections2008>.

<sup>205</sup> Jerry Seper, *Obama Berlin Speech Cost \$700K*, WASH. TIMES (Nov. 1, 2008), <http://www.washingtontimes.com/news/2008/nov/1/citizen-of-the-world-speech-cost-obama-tour-700000/>.

imagine him as a player on the world stage. . . . Tonight's pictures from Berlin will have further discomfited Obama's Republican opponent, John McCain, who has struggled for media oxygen during a week of near-constant coverage of the Democrat's grand tour.<sup>206</sup>

In light of the obvious political ramifications of the speech, which Obama delivered to a massive crowd in the heart of Berlin, it is undeniable that German Chancellor Angela Merkel gave the Obama campaign an enormous boost. At the time, Obama was a first-time senator with virtually no track record in foreign affairs. The Berlin stage afforded the senator an opportunity to position himself as a world leader. By any measure, therefore, the extraordinary public platform that the German government extended to Obama was worth millions of dollars in free advertising for his presidential campaign. But in accepting the invitation to speak in Germany, did Obama violate FECA's "other thing of value" provision?

Common sense suggests the answer must be no. If "other thing of value" means absolutely "anything" of value, then the scope of potentially criminal conduct during American elections would expand dramatically. It seems highly unlikely that the Supreme Court would agree to such a sweeping expansion of FECA. As the justices warned in a recent public corruption case, "we cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'"<sup>207</sup> In *McDonnell v. United States*, the Court unanimously overturned the corruption conviction of a former Virginia governor on the grounds that federal prosecutors had defined the term "official act" too broadly.<sup>208</sup> As the justices explained in their opinion, "There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless interpretation of the federal bribery statute."<sup>209</sup>

The Court therefore seems unlikely to construe FECA to cover any and all benefits conferred by foreign governments. But where will it draw the line? What does "other thing of value" mean? However the courts ultimately answer those questions, one point is crystal clear: FECA failed to prevent a massive level of foreign intervention in the 2016 election. At a time when foreign governments have the power to shape American election campaigns like never before, FECA provides inadequate protection against foreign influence and insufficient guidance to candidates.

### C. DARK MONEY GROUPS

FECA also failed to bring full transparency to the funding of electioneering communications during the campaign. Congress intended for FECA to bring money out of the shadows so that voters would know who was funding election campaigns. Accordingly, federal law provides for

<sup>206</sup> Freedland, *supra* note 204.

<sup>207</sup> *McDonnell v. United States*, 136 S. Ct. 2355, 2372-73 (2016).

<sup>208</sup> *Id.* at 2375.

<sup>209</sup> *Id.*

comprehensive disclosure of all campaign contributions over \$200 made to candidate campaigns and political committees, which include political party committees and PACs.<sup>210</sup>

Crucially, however, FECA's disclosure rules do not apply to Section 501(c)(4) nonprofit social welfare organizations.<sup>211</sup> Even when they engage in election-related political advertising, Section 501(c)(4) groups are not required to disclose publicly the identities of their contributors.<sup>212</sup> The reason is because federal law permits nonprofit organizations to file as Section 501(c)(4) groups with the Internal Revenue Service, rather than as political committees with the Federal Election Commission, if they operate "exclusively for the promotion of social welfare."<sup>213</sup> Although the word "exclusively" would seem to preclude political advocacy by social welfare organizations, the IRS has taken a more lenient interpretation of the law.<sup>214</sup> It has ruled that Section 501(c)(4) groups may engage in political campaign activities without jeopardizing their nonprofit status as long as they are "primarily engaged in activities that promote social welfare."<sup>215</sup> In other words, as long as political advocacy constitutes less than half the organization's activity, it retains its status as a Section 501(c)(4) organization and is not required to file as a political committee with the FEC.<sup>216</sup>

Consequently, Section 501(c)(4) groups have become the ideal option for donors who do not want their identities revealed to the public. The reason is because donations to Super PACs are publicly disclosed by the FEC,<sup>217</sup> whereas donations to Section 501(c)(4) groups are not.<sup>218</sup> Moreover, because Section 501(c)(4) organizations only engage in independent expenditures, they may accept unlimited donations under *Citizens United*. Not surprisingly, outside spending by non-disclosing groups has skyrocketed. In 2006 non-disclosing groups accounted for only about \$5 million in federal election spending, but by 2012—the first post-*Citizens United* election—-independent expenditures by Section 501(c) organizations reached \$308 million.<sup>219</sup>

<sup>210</sup> See 52 U.S.C. § 30101(4); 11 C.F.R. § 100.5(e) (Dec. 29, 2014); Fed. Election Comm'n, *The FEC and the Federal Campaign Finance Law* (Feb. 2017), <http://www.fec.gov/pages/brochures/fecfeca.shtml#Disclosure>.

<sup>211</sup> See 26 U.S.C. § 6104(d)(3); *McCutcheon*, 134 S. Ct. at 1460.

<sup>212</sup> 26 U.S.C. § 6104(d)(3).

<sup>213</sup> See I.R.C. § 501(c)(4)(A).

<sup>214</sup> See Ellen P. Aprill, *The Section 527 Obstacle To Meaningful Section 501(C)(4) Regulation*, 13 PITT. TAX REV. 43, 44 (2015).

<sup>215</sup> Treas. Reg. § 1.501(c)(4)-1 (emphasis added).

<sup>216</sup> On the ambiguity of the term "primary activity" see Aprill, *The Section 527 Obstacle To Meaningful Section 501(C)(4) Regulation*, *supra* note 214, at 44; Rev. Rul. 81-95, 1981-1 C.B. 332 at \*2, <https://www.irs.gov/pub/irs-tege/rr81-095.pdf>. See also Raymond Chick & Amy Henchey, *M. Political Organizations and IRC 501(c)(4)*, 1995 EO CPE Text, at \*6, <https://www.irs.gov/pub/irs-tege/eotopicm95.pdf>.

<sup>217</sup> Philip Elliott, *A Guide to Political Money: Campaigns, PACs, Super PACs*, PBS NEWSHOUR (Apr. 21, 2015), <http://www.pbs.org/newshour/rundown/a-guide-to-political-money-campaigns-pacs-super-pacs/>.

<sup>218</sup> *McCutcheon*, 134 S.Ct. at 1460.

<sup>219</sup> *Political Nonprofits (Dark Money)*, CTR. FOR RESPONSIVE POL., [https://www.opensecrets.org/outsidespending/nonprof\\_summ.php](https://www.opensecrets.org/outsidespending/nonprof_summ.php).

Although overall spending by non-disclosing groups dipped to about \$183 million during the 2016 election,<sup>220</sup> several individual organizations made massive expenditures. For example, the National Rifle Association made over \$33 million in independent expenditures in 2016 and the United States Chamber of Commerce spent over \$29 million in independent expenditures.<sup>221</sup> In all, Section 501(c) organizations have spent more than \$800 million on election campaigns since the *Citizens United* decision in 2010.<sup>222</sup>

But “dark money” expenditures by Section 501(c) groups are not the only threat to transparency. Super PACs are increasingly receiving donations from other PACs, a phenomenon known as “gray” money because it makes it difficult to track the original source of the funds.<sup>223</sup> Limited liability corporations have also become a vehicle for donors to avoid disclosure. For example, during the 2016 Republican presidential primaries, limited liability corporations (“LLCs”) gave \$6 million to former Florida Gov. Jeb Bush’s Super PAC; \$5.5 million to Florida Sen. Marco Rubio’s Super PAC, and \$2.2 million to Ohio Gov. John Kasich’s Super PAC.<sup>224</sup> In all, LLCs contributed more than \$32 million to Super PACs in the 2016 election.<sup>225</sup> Only the name of the LLC is reported on disclosure forms, not the wealthy individuals behind the LLC.

Even the Russian intervention in the campaign represented a form of dark money. The financial cost to Moscow of hacking the DNC and spreading fake news was undoubtedly considerable. For example, the U.S. government estimated that Moscow employed at least 1,000 IT experts to disseminate anti-Clinton fake news on social media outlets.<sup>226</sup> But unlike a direct contribution to a candidate campaign, none of the Putin Government’s expenditures are publicly accessible. Even more troubling, the full extent of Moscow’s involvement in the campaign did not come to light until after the November 8th election. Although the federal government released a report in October on the Russian hacking of the DNC computers, it was not until January 2017 that the U.S. intelligence community publicly confirmed that

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<sup>220</sup> *Id.*

<sup>221</sup> 2016 Outside Spending, by Group, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/outsidespending/summ.php?cycle=2016&chrt=D&disp=O&type=U>.

<sup>222</sup> *Outside Spending by Disclosure, Excluding Party Committees*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/outsidespending/disclosure.php>.

<sup>223</sup> Chisun Lee, Katherine Valde, Benjamin T. Brickner, and Douglas Keith, *Secret Spending in the States*, BRENNAN CTR FOR JUST., 2016, at \*3, [https://www.brennancenter.org/sites/default/files/analysis/Secret\\_Spending\\_in\\_the\\_States.pdf](https://www.brennancenter.org/sites/default/files/analysis/Secret_Spending_in_the_States.pdf).

<sup>224</sup> Ashley Balcerzak, “Surge in LLC contributions brings more mystery about true donors,” CTR. FOR RESPONSIVE POL. (April 27, 2017), <https://www.opensecrets.org/news/2017/04/surge-in-llc-contributions-more-mystery/>.

<sup>225</sup> *Id.*

<sup>226</sup> Rachel Roberts, *Russia Hired 1,000 People to Create Anti-Clinton 'Fake News' in Key US States During Election, Trump-Russia Hearings Leader Reveals*, INDEP. (Mar. 30, 2017), <http://www.independent.co.uk/news/world/americas/us-politics/russian-trolls-hilary-clinton-fake-news-election-democrat-mark-warner-intelligence-committee-a7657641.html>.

Russian President Vladimir Putin himself directed the Russian intervention in the 2016 election.<sup>227</sup>

Consequently, throughout the campaign, Donald Trump was able to get away with vociferously denying that the Russian government was assisting him. For example, during the first presidential debate, Trump insisted that Hillary Clinton's allegations of Russian involvement were unproven:

"I don't think anybody knows it was Russia that broke into the DNC. She's saying Russia, Russia, Russia, but I don't—maybe it was. I mean, it could be Russia, but it could also be China. It could also be lots of other people. It also could be somebody sitting on their bed that weighs 400 pounds, okay?"<sup>228</sup>

The result was American voters went to the polls without a complete picture of the shadowy forces that shaped the 2016 election. From Section 501(c) donations to LLC contributions to foreign government hackers, FECA's disclosure laws proved inadequate to the task of ensuring a transparent presidential election.

#### D. DYSFUNCTIONAL FEC

Far less prominent in the national discussion but important in its own right was the FEC's failure to function as a competent regulatory agency during the 2015-16 election cycle. The commission's structure lay at the heart of the problem. A 6-member commission with a partisan balance of 3 Democrats and 3 Republicans, the FEC may only take an enforcement action if a majority of commissioners support it.<sup>229</sup>

In the 2010s, however, the FEC commissioners increasingly divided along partisan lines, which meant that enforcement actions plummeted accordingly.<sup>230</sup> For example, in 2006 the FEC levied \$5.9 million in fines for campaign finance violations, but by 2016 enforcement penalties fell to just

<sup>227</sup> *Intelligence Report on Russian Hacking*, N.Y. TIMES (Jan. 6, 2017), at \*2, <https://www.nytimes.com/interactive/2017/01/06/us/politics/document-russia-hacking-report-intelligence-agencies.html>; Eric Lichtblau, *C.I.A. Had Evidence of Russian Effort to Help Trump Earlier Than Believed*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/trump-russia-cia-john-brennan.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news>; *Full transcript: FBI Director James Comey Testifies on Russian Interference in 2016 Election*, WASH. POST (Mar. 20, 2017), [https://www.washingtonpost.com/news/post-politics/wp/2017/03/20/full-transcript-fbi-director-james-comey-testifies-on-russian-interference-in-2016-election/?utm\\_term=.7b45e470bfca](https://www.washingtonpost.com/news/post-politics/wp/2017/03/20/full-transcript-fbi-director-james-comey-testifies-on-russian-interference-in-2016-election/?utm_term=.7b45e470bfca).

<sup>228</sup> Philip Bump, *The Answer That Best Exemplifies How Badly Donald Trump Was Out of His Depth in the Debate*, WASH. POST (Sept. 27, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/09/27/the-answer-that-best-exemplifies-how-badly-donald-trump-was-out-of-his-depth-in-the-debate/?utm\\_term=.64e91e9a6416](https://www.washingtonpost.com/news/the-fix/wp/2016/09/27/the-answer-that-best-exemplifies-how-badly-donald-trump-was-out-of-his-depth-in-the-debate/?utm_term=.64e91e9a6416); Tal Kopan, *Is Trump Right? Could a 400-Pound Couch Potato Have Hacked the DNC?*, CNN (Sept. 27, 2016), <http://www.cnn.com/2016/09/27/politics/dnc-cyberattack-400-pound-hackers/>.

<sup>229</sup> See Michael M. Franz, *The Federal Election Commission as Regulator: The Changing Evaluations of Advisory Opinions*, 3 U.C. IRVINE L. REV. 735, 739 (2013).

<sup>230</sup> Eric Lichtblau, *F.E.C. Data Shows Campaign Fines Hit Record Low in 2014*, N.Y. TIMES (May 5, 2015), <https://www.nytimes.com/2015/05/06/us/politics/fec-says-campaign-fines-hit-record-low-in-2014.html>.



under \$788,000.<sup>231</sup> The average fine for major violations also fell, from over \$179,000 in 2006 to only \$19,848 in 2016.<sup>232</sup> In May 2016, the highly regarded Republican campaign finance lawyer Robert Kelner told the *Washington Post*: “We are in an environment in which there has been virtually no enforcement of the campaign finance laws.”<sup>233</sup>

The FEC has become so dysfunctional that intensely personal and partisan divisions have flared out into the open.<sup>234</sup> In April 2014 Commissioner Ann Ravel, vice chair of the commission, publicly criticized her Republican colleagues for voting “against pursuing investigations into potentially significant fund-raising and spending violations” and accused them of disregarding “clear facts and law.”<sup>235</sup> In May 2015 the *New York Times* reported that the Republican and Democratic commissioners were “barely on speaking terms” and that any pretense of bipartisanship had evaporated.<sup>236</sup> That same month Ravel, who by then had become the FEC’s chairwoman, publicly described the FEC as “worse than dysfunctional” and warned that “[t]he likelihood of the [campaign finance] laws being enforced is slim.”<sup>237</sup> In contrast, Lee Goodman, a Republican commissioner, praised the deadlock, explaining that “Congress set this place up to gridlock.”<sup>238</sup>

The 2016 election saw the partisan divide within the FEC only grow worse. In November 2016 Ravel and her fellow commissioner, Ellen Weintraub, issued an extraordinary public statement accusing the Republican commissioners of allowing a Section 501(c)(4) organization, “Carolina Rising,” to flout the law.<sup>239</sup> Ravel and Weintraub cited the statistic that Carolina Rising devoted 97% of its total spending to supporting Thom Tillis, a successful Republican Senate candidate,<sup>240</sup> even though federal law prohibits Section 501(c)(4) organizations from spending more than 49% of their funds on electioneering activity.<sup>241</sup> In its own defense, Carolina Rising claimed its advertisements were “issue ads” not electioneering communications, but as Ravel and Weintraub pointed out, there was no doubt

<sup>231</sup> FEC Enforcement Statistics 1977-2017, FED. ELECTION COMM’N, <http://classic.fec.gov/press/bkgnd/EnforcementStatistics.shtml>, (last visited Oct. 31, 2017).

<sup>232</sup> *Id.*

<sup>233</sup> Matea Gold, *Trump’s deal with the RNC shows how big money is flowing back to the parties*, WASH. POST (May 18, 2016), [https://www.washingtonpost.com/politics/trumps-deal-with-the-rnc-shows-how-big-money-is-flowing-back-to-the-parties/2016/05/18/4d84e14a-1d11-11e6-b6e0-c53b7ef63b45\\_story.html?utm\\_term=.9e807eb6bead](https://www.washingtonpost.com/politics/trumps-deal-with-the-rnc-shows-how-big-money-is-flowing-back-to-the-parties/2016/05/18/4d84e14a-1d11-11e6-b6e0-c53b7ef63b45_story.html?utm_term=.9e807eb6bead).

<sup>234</sup> Eric Lichtblau, *F.E.C. Can’t Curb 2016 Election Abuse, Commission Chief Says*, N.Y. TIMES (May 2, 2015), <https://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html>.

<sup>235</sup> Ann Ravel, *How Not to Enforce Campaign Laws*, N.Y. TIMES (April 2, 2014), <https://www.nytimes.com/2014/04/03/opinion/how-not-to-enforce-campaign-laws.html>.

<sup>236</sup> Lichtblau, *F.E.C. Can’t Curb 2016 Election Abuse, Commission Chief Says*, *supra* note 234.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> Statement of Reasons of Commissioners Ann M. Ravel and Ellen L. Weintraub, *In the Matter of Carolina Rising*, MUR 6880 (Nov. 18, 2016), <http://eqs.fec.gov/eqsdocsMUR/16044403093.pdf>.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

that the advertisements were intended to assist Tillis's election.<sup>242</sup> Nevertheless, despite the obvious need for an investigation into Carolina Rising's electioneering activities, the FEC took no action.<sup>243</sup> Ravel and Weintraub concluded that the "Republican commissioners have turned a blind eye to the reality before us. They have once again failed to adhere to the law and Commission precedent and blocked any investigation into possible violations of the Federal Election Campaign Act."<sup>244</sup>

In early 2017, Ravel resigned from the FEC,<sup>245</sup> publicly lamenting the fact that the commission failed to enforce federal disclosure laws.<sup>246</sup> Upon announcing her resignation, she asserted that "the Republican commissioners are unwilling to vote to investigate groups that are clearly not disclosing who is behind campaign contributions."<sup>247</sup> Before leaving the commission, Ravel issued a report that detailed the FEC's partisan deadlock and its resulting inability to enforce FECA.<sup>248</sup> She warned that "the anti-enforcement bloc has unilaterally imposed higher requirements" for finding violations of the law, which "has stymied the Commission's ability to even open an investigation and uphold the law in major cases."<sup>249</sup>

The high hopes of bipartisanship that accompanied the FEC's creation in the 1970s have evaporated. The FEC has become a politically-polarized institution like other government boards and commissions. But unlike other agencies, the FEC's structure makes polarization particularly debilitating. The partisan balance required by FECA has ironically undermined the agency's capacity to function as a competent regulatory body. Indeed, by the commissioners' own account, the FEC is no longer capable of implementing its statutory mandate to regulate the campaign finance system.<sup>250</sup>

#### IV. FOUR REFORMS TO MODERNIZE FEDERAL CAMPAIGN FINANCE LAW

In a variety of ways, therefore, the 2016 election made clear that the federal campaign finance system is dysfunctional and outdated. Crafted 40 years ago in the pre-internet age, FECA's current structure is simply inadequate for the challenges that face it in the twenty-first century.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> Eric Lichtblau, *Democratic Member to Quit Election Commission, Setting Up Political Fight*, N.Y. TIMES (Feb. 19, 2017), [https://www.nytimes.com/2017/02/19/us/politics/fec-elections-ann-ravel-campaign-finance.html?\\_r=0](https://www.nytimes.com/2017/02/19/us/politics/fec-elections-ann-ravel-campaign-finance.html?_r=0).

<sup>246</sup> *Ann Ravel Resigns Her Seat On The Federal Election Commission*, NAT'L PUB. RADIO (Feb. 21, 2017), <http://www.npr.org/2017/02/21/516375469/ann-ravel-resigns-her-seat-on-the-federal-election-commission>.

<sup>247</sup> *Id.*

<sup>248</sup> ANN RAVEL, COMM'R, DYSFUNCTION AND DEADLOCK: THE ENFORCEMENT CRISIS AT THE FEDERAL ELECTION COMMISSION REVEALS THE UNLIKELIHOOD OF DRAINING THE SWAMP, FED. ELECTION COMM'N (Feb. 2017), [http://classic.fec.gov/members/former\\_members/ravel/ravelreport\\_feb2017.pdf](http://classic.fec.gov/members/former_members/ravel/ravelreport_feb2017.pdf).

<sup>249</sup> *Id.* at 7.

<sup>250</sup> *Id.*

Accordingly, this article proposes four major reforms to modernize federal campaign finance law:

A. ELIMINATE—OR AT LEAST SUBSTANTIALLY RAISE—CONTRIBUTION LIMITS ON FEDERAL CANDIDATES AND PARTY COMMITTEES

FECA's 40-year-long experiment with low contribution limits must come to an end. To modernize campaign finance law in the age of the internet and social media, Congress should eliminate the limits on the amount that individual donors may give to candidates and parties. Although it may seem like a radical measure, doing away with contribution limits is far from unprecedented. Many states are already leading the way. Currently, 12 states have no contribution limits on individual donations to candidates in state elections, and 27 states have no limits on individual donations to state party committees.<sup>251</sup> The states run the gamut of the partisan and ideological spectrum, including swing states like Iowa and Pennsylvania, red states like Mississippi and Texas, and blue states like Oregon and Virginia.<sup>252</sup> Most important of all, there is no evidence that states without contribution limits have a higher incidence of public corruption cases than do states with low contribution limits.<sup>253</sup>

Eliminating contribution limits in federal elections would have several immediate benefits. First and foremost, allowing federal candidates to receive unlimited donations would effectively end the era of Super PACs. The whole appeal of a Super PAC resides in the fact that it may accept unlimited contributions whereas donations to candidates and parties are strictly limited by FECA. For example, at the state level, Super PAC activity concentrates on states with low contribution limits,<sup>254</sup> a fact that has led many states to raise their contribution limits in response.<sup>255</sup> But if Congress repealed FECA's contribution limits entirely, it would have the effect of denying Super PACs the rationale for their existence. Indeed, it would make little sense for a wealthy donor to contribute to a candidate's Super PAC when the donor could instead make unlimited donations directly to

<sup>251</sup> *State Limits on Contributions to Candidates: 2017-2018 Election Cycle*, NAT. CONF. OF ST. LEGISLATURES (updated June 27, 2017), [http://www.ncsl.org/Portals/1/Documents/Elections/Contribution\\_Limits\\_to\\_Candidates\\_2017-2018\\_16465.pdf](http://www.ncsl.org/Portals/1/Documents/Elections/Contribution_Limits_to_Candidates_2017-2018_16465.pdf).

<sup>252</sup> *Contribution Limits Overview: Individual Contribution Limits*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 5, 2008), <http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx>; *Limits on Contributions to Political Parties*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 5, 2008), <http://www.ncsl.org/research/elections-and-campaigns/limits-on-contributions-to-political-parties.aspx>.

<sup>253</sup> See, e.g., PETER J. WALLISON & JOEL M. GORA, *BETTER PARTIES, BETTER GOVERNMENT: A REALISTIC PROGRAM FOR CAMPAIGN FINANCE REFORM* (2009) ("there is no evident or prevalent pattern of corruption in . . . no-limit states."); Gaughan, *supra* note 19, at 826–29.

<sup>254</sup> Derek Willis, *The Special Powers of Super PACS, and Not Just for Federal Elections*, N.Y. TIMES (Dec. 8, 2014), <https://www.nytimes.com/2014/12/09/upshot/the-special-powers-of-super-pacs-and-not-just-for-federal-elections.html?mcubz=2>.

<sup>255</sup> Adam Wollner, *State Campaign Contribution Limits On the Rise*, CTR. FOR PUB. INTEGRITY (Jul. 1, 2013), <https://www.publicintegrity.org/2013/07/01/12901/state-campaign-contribution-limits-rise>; NAT. CONF. OF ST. LEGISLATURES, *supra* note 251.

candidates and parties. Although some might argue that a better solution would be to ban Super PACs, the *Citizens United* decision forecloses that possibility. The most sensible long-term response to *Citizens United* is to repeal FECA's contribution limits and thereby give candidates and parties the financial resources they need to reclaim their proper place on the campaign finance landscape.

There are many additional benefits to following the lead of the states that have abolished contribution limits on candidates and parties. Ending the era of federal contribution limits will enhance the ability of candidates of ordinary means and low name recognition to compete against celebrity and billionaire candidates. Even modest increases in contribution limits can have positive effects. The career of Barack Obama is a case in point. As Professor Kate Shaw explains in a new article, Obama benefited from the fact that at a key moment in his career, he was able to raise funds in amounts above FECA's low contribution limits.<sup>256</sup> Although Obama is a household name today, that was not always the case. When Obama began a long-shot campaign for the 2004 Democratic U.S. Senate nomination in Illinois, he was an obscure state legislator known mostly for having lost a race for Congress four years earlier.<sup>257</sup> The frontrunners for the nomination were the wealthy businessman Blair Hull and the well-known, high-profile state Comptroller, Dan Hynes.<sup>258</sup>

But for a brief time in 2003, BCRA included a short-lived Millionaire's Amendment, which raised federal contribution limits from \$2,000 to \$12,000 for candidates who faced wealthy, self-funding opponents.<sup>259</sup> Thus, when Hull spent \$29 million of his own money during the primary campaign, it triggered BCRA's Millionaire's Amendment.<sup>260</sup> Thanks in part to Obama's connections as a Harvard graduate, he had a strong network of wealthy donors, which enabled him to raise \$2 million from contributions made at the higher levels permitted by the Millionaire's Amendment.<sup>261</sup> As Shaw explains, "this particular confluence of circumstances seems to have played some role in his eventual Senate victory—which positioned him, four years later, to win the presidency."<sup>262</sup> Without the higher contribution limits briefly permitted by BCRA's Millionaire's Amendment, it is entirely possible that Barack Obama would today be a largely unknown law professor at the University of Chicago, rather than a former two-term president of the United States.

Repealing contribution limits will also reduce the amount of time candidates must devote to fundraising. Before FECA's contribution limits were adopted in the 1970s, candidates of all partisan and ideological stripes

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<sup>256</sup> Kate Shaw, *The Lost History of the Millionaire's Amendment*, 16 ELECTION L.J. 1 (2017).

<sup>257</sup> *Id.* at 174.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 175.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

received huge contributions from wealthy donors.<sup>263</sup> For example, in the 1968 presidential election two Democratic candidates, Robert Kennedy and Eugene McCarthy, and two Republican candidates, Richard Nixon and Nelson Rockefeller, each accepted individual donations of \$500,000 or more to their campaigns.<sup>264</sup> The huge donations of the pre-FECA era enabled Congress to spend much less time fundraising than it does today.<sup>265</sup> But once FECA's low contribution limits went into effect, members had no choice but to raise funds from far more donors than ever before, which in turn meant the length of the Congressional work week shrunk to accommodate fundraising schedules.<sup>266</sup> By reducing the time necessary for fundraising, therefore, the elimination of contribution limits will allow Congress to spend more time legislating, which in turn will attract better quality candidates to Washington, individuals more interested in committee meetings than donor meetings.

An obscure federal regulation will further enhance the efficiency of candidate fundraising in a post-contribution limits era. Federal Communications Commission rules provide that broadcasters must charge federal candidates the “lowest unit” rate “for the same class and amount of time for the same period” during the 45 days before primary elections and the 60 days before general elections.<sup>267</sup> The regulation further provides that:

A candidate shall be charged no more per unit than the station charges its most favored commercial advertisers for the same classes and amounts of time for the same periods. Any station practices offered to commercial advertisers that enhance the value of advertising spots must be disclosed and made available to candidates on equal terms.<sup>268</sup>

In other words, the “lowest unit charge” rule gives candidates a significant discount in advertising rates.<sup>269</sup> Moreover, the rule only applies to candidates, not to Super PACs, which typically means that candidate campaigns pay only about a third of the rates charged to outside groups.<sup>270</sup>

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<sup>263</sup> CLIFFORD W. BROWN, JR. ET AL., *SERIOUS MONEY: FUNDRAISING AND CONTRIBUTING IN PRESIDENTIAL NOMINATION CAMPAIGNS* 19 (1995) (observing that prior to 1974 amendments, federal candidates “received much, and in many cases most, of their revenues from very large contributions”); FRANK SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* 3 (1992).

<sup>264</sup> HERBERT E. ALEXANDER, *FINANCING POLITICS: MONEY, ELECTIONS, AND REFORM* (2d ed. 1980), at 49.

<sup>265</sup> BROWN ET AL., *supra* note 263, at 24; Corrado, “Running Backward,” *supra* note 108, at 75–78, 80–83, 87.

<sup>266</sup> BROWN ET AL., *supra* note 263, at 19–24; Corrado, “Running Backward,” *supra* note 108, at 75–78.

<sup>267</sup> See 47 CFR §73.1942 (a)(1).

<sup>268</sup> See 47 CFR §73.1942 (a)(1)(i).

<sup>269</sup> On the lowest unit charge rule, see also 47 U.S.C. §315(b) (limiting lowest unit charge rule to candidates who stand by their advertisements), and *McConnell*, 540 U.S. at 226, 236–37.

<sup>270</sup> Walter Shapiro, *How Super Are the Super PACs?* COLUM. JOURNALISM REV. (Sep. 14, 2012), [http://archives.cjr.org/united\\_states\\_project/how\\_super\\_are\\_the\\_super\\_pacs.php](http://archives.cjr.org/united_states_project/how_super_are_the_super_pacs.php); Ed Kilgore, *The Super PAC Tax*, WASH. MONTHLY (Jul. 6, 2015), <http://washingtonmonthly.com/2015/07/06/the-super-pac-tax/>; but see also Elizabeth Flock, *How Super PACs Will Drive Up Ad Costs for Down-Ticket Candidates*, US NEWS (Aug. 7, 2012), <https://www.usnews.com/news/blogs/washington-whispers/2012/08/07/how-super-pacs-will-drive-up-ad-costs-for-down-ticket-candidates>; see also Sarah Moshary, *Price*

Under the lowest unit charge rule, therefore, a million dollar contribution to a federal candidate would buy far more broadcast time for campaign advertisements than an identical contribution to a Super PAC. The critical point is the potent combination of unlimited contributions with the lowest unit rule will permit federal candidates to raise the campaign funds they need far more quickly and efficiently than ever before.

The counter-argument, of course, is that unlimited contributions will enable large donors to exercise improper influence on the policy decisions of the candidates whose campaigns they support. But there are four reasons to believe such concerns are overstated. First, large donors already exercise enormous influence on federal election campaigns. They do so through the tens of millions they are permitted to contribute to Super PACs as a consequence of the 2010 *Citizens United* decision, and through the millions they are permitted to contribute in aggregate amounts to federal candidates and party committees as a consequence of the 2014 *McCutcheon* decision.

Second, all contributions over \$200 to federal candidates and parties are disclosed by the FEC and the internet has made such disclosure far more accessible and timely than ever before.<sup>271</sup> Real time disclosure of candidate and party contributions empowers the press and the public to monitor whether an officeholder has been compromised by a donor's contributions. Moreover, the elimination of contribution limits on parties and candidates will redirect funds away from non-disclosing outside groups. The Supreme Court made precisely that point in the *McCutcheon* decision when it noted that contribution limits on candidates may lead donors to "turn to other avenues for political speech" such as Section 501(c) organizations, which the court pointedly noted, "are not required to publicly disclose their donors."<sup>272</sup>

Third, the history of American politics prior to FECA's adoption in the 1970s suggests that the concern that donors will wield excessive control over the politicians they support is greatly overstated. As a result of the non-enforcement of pre-FECA campaign finance laws, huge donations to individual candidates were a routine feature of American politics from the late 1800s through the early 1970s.<sup>273</sup> Yet, it did not result in plutocracy. Quite the reverse, in fact. The most sustained period of progressive legislation in American history was the 40-year period that stretched from the 1930s through the early 1970s. During that period, Congress established Social Security, the Glass-Steagall Banking Act, the Federal Deposit Insurance Corporation, the Civil Rights Act of 1964, the Voting Rights Act, Medicare, Medicaid, Affirmative Action, and the Environmental Protection Agency.<sup>274</sup> Even more remarkably, corporate and marginal tax rates during

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*Discrimination across PACs and the Consequences of Political Advertising Regulation*, (Nov. 10, 2014), <http://economics.mit.edu/files/10195>.

<sup>271</sup> *McCutcheon*, 1434 S.Ct. at 1460.

<sup>272</sup> *Id.*

<sup>273</sup> Gaughan, *supra* note 19, at 815–16.

<sup>274</sup> DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945* (1999) at 153 (Glass-Steagall Banking Act), 271 (Social Security), 285 (FDIC); JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES 1945-1974* (1996) at 546 (1964 Civil Rights

the effectively unregulated campaign finance era of the mid-twentieth century were the highest in American history.<sup>275</sup> In contrast, during the four decades since FECA's low contribution limits took effect, an era in which campaign finance practices have been much more closely regulated than ever before, individual and corporate tax rates have fallen well below the 1970s levels and a small government deregulatory ethos has largely dominated political discourse since Ronald Reagan's presidency in the 1980s.<sup>276</sup> Ironically, since the 1980s America has looked much more like a plutocracy than it did in the decades before FECA's contribution limits were adopted.<sup>277</sup> In short, the connection between campaign contributions and government policy is far more complicated and nuanced than the conventional wisdom would suggest.

Fourth, recent studies suggest that the emphasis placed on small donors by low contribution limits may have accelerated the process of hyperpolarization.<sup>278</sup> The trend toward hyperpolarization began in the mid-1970s,<sup>279</sup> just as FECA's contribution limits took effect. The timing is probably not coincidental. Small donors tend to be highly ideological,<sup>280</sup>

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Act), 584 (Voting Rights Act of 1965), 572 (Medicare and Medicaid), 642 (Affirmative Action), and 727 (EPA).

<sup>275</sup> See MARK P. KEIGHTLEY & MOLLY F. SHERLOCK, CONG. RESEARCH SERV., R42726, THE CORPORATE INCOME TAX SYSTEM: OVERVIEW AND OPTIONS FOR REFORM 12 (2014); STEVEN R. WEISMAN, THE GREAT TAX WARS 352–67 (2002); U.S. Federal Individual Income Tax Rates History, 1862–2013 (Nominal and Inflation-Adjusted Brackets), TAX FOUNDATION (Oct. 17, 2013), <http://taxfoundation.org/article/us-federal-individual-income-tax-rates-history-1913-2013-nominal-and-inflation-adjusted-brackets>.

<sup>276</sup> See generally RICK PERLSTEIN, THE INVISIBLE BRIDGE: THE FALL OF NIXON AND THE RISE OF REAGAN (2014); STEVEN F. HAYWARD, THE AGE OF REAGAN: THE CONSERVATIVE COUNTERREVOLUTION, 1980–1989 (2010); C. EUGENE STEUERLE, CONTEMPORARY U.S. TAX POLICY (2d ed. 2008).

<sup>277</sup> See generally DAVID CAY JOHNSTON, DIVIDED: THE PERILS OF OUR GROWING INEQUALITY (2014); DENNIS GILBERT, THE AMERICAN CLASS STRUCTURE IN AN AGE OF GROWING INEQUALITY (9th ed. 2014).

<sup>278</sup> See generally RAYMOND J. LA RAJA AND BRIAN F. SCHAFFNER, CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL (2015); Adam Bonica & Jenny Shen, *How Wealthy Campaign Donors May Reduce Political Polarization and Weaken the Tea Party*, WASH. POST (Apr. 24, 2014), [https://www.washingtonpost.com/news/monkey-cage/wp/2014/04/24/how-wealthy-campaign-donors-may-reduce-political-polarization-and-weaken-the-tea-party/?utm\\_term=.2321a5c47556](https://www.washingtonpost.com/news/monkey-cage/wp/2014/04/24/how-wealthy-campaign-donors-may-reduce-political-polarization-and-weaken-the-tea-party/?utm_term=.2321a5c47556); see also Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM. J. OF POL. SCI. 367 (2014), [http://web.stanford.edu/~bonica/papers/bonica\\_ajps\\_mimp\\_2014.pdf](http://web.stanford.edu/~bonica/papers/bonica_ajps_mimp_2014.pdf). See also Michael Barber, *Which Kinds of Campaign Donations Lead to More Polarized Legislatures? You'll Be Surprised By the Answer*, WASH. POST (Oct. 23, 2015), [https://www.washingtonpost.com/news/monkey-cage/wp/2015/10/23/which-kinds-of-campaign-donations-lead-to-more-polarized-legislatures-youll-be-surprised-by-the-answer/?utm\\_term=.ea5027d141f0](https://www.washingtonpost.com/news/monkey-cage/wp/2015/10/23/which-kinds-of-campaign-donations-lead-to-more-polarized-legislatures-youll-be-surprised-by-the-answer/?utm_term=.ea5027d141f0) (describing the implications of low contributions limits on political polarization).

<sup>279</sup> KEITH T. POOLE & HOWARD ROSENTHAL, IDEOLOGY & CONGRESS 106 (2d ed. 2007); William A. Galston & Pietro S. Nivola, Delineating the Problem, in RED AND BLUE NATION?: CHARACTERISTICS AND CAUSES OF AMERICA'S POLARIZED POLITICS 20 (William A. Galston and Pietro S. Nivola, eds., 2006); Nolan McCarthy, *What We Know and Don't Know About Our Polarized Politics*, WASH. POST (Jan. 8, 2014), [https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/08/what-we-know-and-dont-know-about-our-polarized-politics/?utm\\_term=.d59b951c63db](https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/08/what-we-know-and-dont-know-about-our-polarized-politics/?utm_term=.d59b951c63db).

<sup>280</sup> RAYMOND J. LA RAJA, SMALL CHANGE: MONEY, POLITICAL PARTIES AND CAMPAIGN FINANCE REFORM 156 (2008). See also Raymond J. La Raja, *Campaign Finance and Partisan*

whereas large donors tend to support moderate candidates.<sup>281</sup> For example, a fascinating study by the political scientists Adam Bonica and Jenny Shen found that “[t]he most conservative Republicans have raised only a small fraction from top donors compared to their less conservative counterparts. The top donors similarly favor more moderate Democrats to those who are more extreme, but the differences are less stark.”<sup>282</sup> Along similar lines, the political scientist Raymond La Raja has pointed out that “fund-raising success among small donors depends considerably on a highly polarized environment that motivates ardent partisans to give money.”<sup>283</sup> Consequently, he warns, “Given these dynamics, the middle ground of American politics should become increasingly difficult to locate, as parties refuse to compromise for fear of losing the support of the key ideological factions that provide them with small donations in bulk.”<sup>284</sup>

To be sure, some advocates of campaign finance reform dispute the notion that contribution limits have exacerbated political polarization. In July 2017, the Campaign Finance Institute, a Section 501(c)(3) organization that studies campaign finance data,<sup>285</sup> produced a report that found no correlation between party contribution limits and political polarization at the state level.<sup>286</sup> The authors of the study, Michael Malbin and Charles Hunt, concluded that “whether a political party was allowed to make or receive unlimited contributions had no independent effect on the level of polarization in state legislatures.”<sup>287</sup>

But it should come as no surprise that some studies find no correlation between *party* contribution limits and polarization. The bulk of party expenditures occur in the general election, when the party’s nominee has already been determined, rather than in primary elections when polarization within parties occurs. Candidate contribution limits, therefore, not party contribution limits, are where we are most likely to find the polarizing effects of low limits. A perfect example was the Bernie Sanders campaign in 2016.

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*Polarization in the United States Congress*, 9 DUKE J. OF CONST. L. & PUB. POL’Y 223 (2014); Bonica, *supra* note 278, at 367–386; SORAUF, *INSIDE CAMPAIGN FINANCE*, at 4 (noting that candidates who rely on small donors tend to run “ideological campaigns of the left or right” and citing the campaigns of George Wallace, Barry Goldwater, and George McGovern). However, for a counterargument, see Michael J. Malbin, *Small Donors: Incentives, Economies of Scale, and Effects*, FORUM Vol. 11, Issue No. 3 (Oct. 2013) pp. 385–411. See also “Section 5: Political Engagement and Activism,” PEW RES. CTR. (Jun. 12, 2014) (a 2014 Pew Research Center analysis finding that liberals and conservatives were “considerably more likely” to make campaign donations than moderates), <http://www.people-press.org/2014/06/12/section-5-political-engagement-and-activism/>.

<sup>281</sup> Bonica & Shen, *supra* note 278.

<sup>282</sup> *Id.*

<sup>283</sup> RAYMOND J. LA RAJA, *SMALL CHANGE: MONEY, POLITICAL PARTIES AND CAMPAIGN FINANCE REFORM* 156 (2008) (“In appealing to donors, parties advertise their differences, while donors simultaneously exert pressure on party leaders to tow the line on policy issues.”).

<sup>284</sup> LA RAJA, *SMALL CHANGE*, at 156; La Raja, *supra* note 278, at 225.

<sup>285</sup> Campaign Finance Institute, *BALLOTEDIA: THE ENCYCLOPEDIA OF AMERICAN POLITICS*, [https://ballotpedia.org/Campaign\\_Finance\\_Institute](https://ballotpedia.org/Campaign_Finance_Institute) (last visited Sep. 12, 2017).

<sup>286</sup> Michael J. Malbin and Charles R. Hunt, *Party Contribution Limits and Polarization*, THE CAMPAIGN FINANCE INSTITUTE (Jun. 2017), [http://www.cfinst.org/pdf/papers/PartyContributionLimits\\_Polarization.pdf](http://www.cfinst.org/pdf/papers/PartyContributionLimits_Polarization.pdf).

<sup>287</sup> *Id.* at 6.



Running on a socialist progressive platform,<sup>288</sup> without the support of a Super PAC, Sanders raised over \$200 million from 7 million donors (roughly \$28 per donor), a fundraising total that surpassed that of the centrist Democrat Hillary Clinton.<sup>289</sup> The success of Sanders's reliance on small donors exemplified the long-standing phenomenon that highly ideological candidates tend to resonate strongly with small donors. For example, in 1964 the right-wing Republican nominee Barry Goldwater generated nearly \$6 million from over 400,000 contributors, a far larger donor base than most candidates of the day relied on.<sup>290</sup> Similarly, in 1968 the segregationist independent candidate George Wallace received 75% of his contributions in sums of \$100 or less, and in 1972 the left-wing Democratic nominee George McGovern received an average donation of \$20 from more than 650,000 contributors.<sup>291</sup> In contrast, most mainstream candidates relied on large donors during the pre-FECA era.<sup>292</sup>

Whatever the underlying causes of political polarization may be, it is undeniably clear that in the *Citizens United* era outside groups have tremendous fundraising advantages over candidates and parties, which is not a healthy development for the American political system. As Samuel Issacharoff and Pamela Karlan powerfully warned two decades ago, campaign finance reforms that limit the fundraising abilities of candidates and parties undermine “coalitional politics” and weaken “institutional buffers.”<sup>293</sup> In a 1999 law review article, they wrote, “We are particularly worried that [campaign finance] reforms would exacerbate the already disturbing trend toward politics being divorced from the mediating influence of candidates and political parties.”<sup>294</sup> The influence of money, Issacharoff and Karlan emphasized, was “profoundly qualified by the give and take of candidates who must stake out positions across a variety of issues and by political parties that have strong institutional interests in hewing to a middle course.”<sup>295</sup> Consequently, they warned, “the effect of money may be greatest when politics is pushed away from candidates and parties. Without mediating institutional buffers, money becomes the exclusive coin of the realm as

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<sup>288</sup> Clare Foran, *Bernie Sanders Makes His Pitch for Socialism*, ATLANTIC (Nov. 20, 2015), <https://www.theatlantic.com/politics/archive/2015/11/bernie-sanders-makes-his-pitch-for-socialism/416913/>.

<sup>289</sup> Seema Mehta, Anthony Pesce, Maloy Moore & Christine Zhang, *Who Gives Money to Bernie Sanders?*, L.A. TIMES (Jun. 3, 2016), <http://www.latimes.com/projects/la-na-pol-sanders-donors/>; Peter Overby, *Will The Millions Of People Who Gave Money To Bernie Sanders Give To Democrats?*, NAT'L PUB. RADIO (Jun. 15, 2016), <http://www.npr.org/2016/06/15/482206235/will-future-candidates-be-able-to-raise-money-the-sanders-way>; Clare Foran, *Bernie Sanders's Big Money*, ATLANTIC (Mar. 1, 2016), <https://www.theatlantic.com/politics/archive/2016/03/bernie-sanders-fundraising/471648/>.

<sup>290</sup> FRANK SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* 3–4 (1992).

<sup>291</sup> *Id.* at 4.

<sup>292</sup> *Id.* at 3–4.

<sup>293</sup> Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1714 (1999).

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

politics pushes toward issue advocacy by groups not engaged in the give and take of party and coalitional politics.”<sup>296</sup>

Political and legal developments in the two decades since Issacharoff and Karlan’s article was published make their warnings more prophetic than ever. FECA and BCRA’s low contribution limits, combined with the post-*Citizens United* emergence of Super PACs and other outside groups, have severely eroded the mediating institutional buffers of candidates and parties. Although it will certainly not be a panacea to the polarized politics of contemporary America, eliminating contribution limits on candidates and parties would at least restore candidates and parties to their rightful role at the center of the campaign finance landscape.

To be sure, eliminating contribution limits will be deeply unpopular with voters, who in polls consistently lament the outsized role of money in politics. Accordingly, an interim step that may be more politically feasible in the short run is to raise contribution limits, rather than eliminate them entirely. Even the most fervent defender of contribution limits must admit that FECA’s \$2,700 limit on individual donations to candidates is extremely low at a time when federal elections routinely cost tens of millions of dollars.<sup>297</sup> One need look no further than the states to see how low federal contribution limits are by comparison. For example, gubernatorial candidates in New York are permitted to accept contributions of up to \$44,000, and state senate candidates may accept contributions up to \$11,000,<sup>298</sup> and states like Virginia, Texas, Missouri, and Pennsylvania impose no contribution limits at all in state elections.<sup>299</sup>

Making matters worse, FECA’s one-size-fits-all approach to federal contribution limits fails to account for the tremendous variations in the nation’s population. The uniform nature of FECA’s contribution limits ignores the fact that the cost of elections varies enormously depending on the particular state and federal office. For example, the same \$2,700 limit applies to presidential candidates running in a nation of 320 million people, to Senate candidates running in states with populations that range from a low of 585,000 (Wyoming) to a high of thirty-nine million (California), and to House candidates running in districts ranging from 525,000 (the size of each

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<sup>296</sup> *Id.* See also, e.g., Raymond J. LaRaja & Jonathan Rauch, *The State of State Parties—And How Strengthening Them Can Improve Our Politics*, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS (Mar. 2016), at 12, <https://www.brookings.edu/wp-content/uploads/2016/07/states.pdf>; Daniel I. Weiner & Ian Vandewalker, *Stronger Parties, Stronger Democracy: Rethinking Reform*, BRENNAN CTR. JUST. (Sep. 16, 2015), [https://www.brennancenter.org/sites/default/files/publications/Stronger\\_Parties\\_Stronger\\_Democracy.pdf](https://www.brennancenter.org/sites/default/files/publications/Stronger_Parties_Stronger_Democracy.pdf).

<sup>297</sup> Soo Rin Kim, *The Price of Winning Just Got Higher, Especially in the Senate*, CTR. FOR RESPONSIVE POL. (Nov. 9, 2016), <https://www.opensecrets.org/news/2016/11/the-price-of-winning-just-got-higher-especially-in-the-senate/>.

<sup>298</sup> *Candidate Contribution Receipt Limits*, N.Y. ST. BD. OF ELECTIONS, <https://www.elections.ny.gov/CFContributionLimits.html>.

<sup>299</sup> See *State Limits on Contributions to Candidates, 2015-2016 Election Cycle*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/Portals/1/documents/legismgt/elect/ContributionLimitstoCandidates2015-2016.pdf>; *Contribution Limits Overview*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx>.

of Rhode Island's two seats) to one million (the size of Montana's single district).<sup>300</sup> It goes without saying that a congressional candidate in Wyoming faces far lower advertising costs than a Senate candidate in California. So why make them both raise money in the same low increments of \$2,700?

A sensible short-term solution therefore is for Congress to raise contribution limits to account for both the increasing cost of campaigns and the wide variation in the size of federal constituencies. At a minimum, Congress should adopt a \$15,000 per election contribution limit for House candidates in districts of less than 600,000 people and a \$20,000 per election limit for candidates in districts of 600,000 or more. Likewise, a significant reform would be to increase contribution limits to \$50,000 per election for Senate candidates in states with populations of five million or fewer (Iowa, South Dakota, Wyoming, etc.), \$60,000 for Senate candidates in states with populations of five million to ten million (New Jersey, Virginia, Massachusetts, Missouri, etc.), \$70,000 for states with populations of ten million to fifteen million (Michigan, Georgia, Ohio, Pennsylvania, Illinois), and \$80,000 for states with populations above fifteen million (California, Texas, New York, and Florida).<sup>301</sup> Similarly, raising the presidential contribution limit to at least \$100,000 per donor would better reflect the high cost of running a nationwide campaign in a country of 320 million people.

If it becomes politically feasible to raise those limits even higher, or better yet eliminate them entirely, Congress would be wise to do so. There are growing indications that a bipartisan consensus to raise contribution limits is possible. In December 2014 Congress dramatically raised the contribution limits on national party committee accounts that pay for convention expenses, party headquarters buildings, and the legal proceedings associated with election recounts and contests.<sup>302</sup> Accordingly, an individual may now donate \$101,700 per year to each of those party accounts.<sup>303</sup> But that is only a partial step in the right direction. Parties, like federal candidates, still face significant fundraising disadvantages. Until contribution limits are raised or eliminated, candidates and parties will remain second-class citizens in the world of campaign finance law.

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<sup>300</sup> *Annual Estimates of the Resident Population: 2016 Population Estimates*, UNITED STATES CENSUS BUREAU (July 1, 2016), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

<sup>301</sup> *Id.*

<sup>302</sup> Matea Gold, *Fundraising Expansion Slipped into Spending Deal Could Power Financial Bonanza for Parties*, WASH. POST (Dec. 10, 2014), [https://www.washingtonpost.com/news/post-politics/wp/2014/12/10/fundraising-expansion-slipped-into-spending-deal-could-power-financial-bonanza-for-parties/?utm\\_term=.afa9b80d1869](https://www.washingtonpost.com/news/post-politics/wp/2014/12/10/fundraising-expansion-slipped-into-spending-deal-could-power-financial-bonanza-for-parties/?utm_term=.afa9b80d1869); Matea Gold, *Spending Deal Would Allow Wealthy Donors to Dramatically Increase Giving to National Parties*, WASH. POST (Dec. 9, 2014), [https://www.washingtonpost.com/news/post-politics/wp/2014/12/09/spending-deal-would-allow-wealthy-donors-to-dramatically-increase-giving-to-national-parties/?utm\\_term=.a69efa1974ce](https://www.washingtonpost.com/news/post-politics/wp/2014/12/09/spending-deal-would-allow-wealthy-donors-to-dramatically-increase-giving-to-national-parties/?utm_term=.a69efa1974ce); R. Sam Garrett, *Increased Campaign Contribution Limits in the FY2015 Omnibus Appropriations Law: Frequently Asked Questions*, CONG. RES. SERV. (Mar. 17, 2015) at \*1, <https://fas.org/sgp/crs/misc/R43825.pdf>; *FEC Announces 2017-2018 Campaign Cycle Contribution Limits*, FED. ELECTION COMM'N (Feb. 2, 2017), [http://www.fec.gov/press/press2017/news\\_releases/20170202release.shtml](http://www.fec.gov/press/press2017/news_releases/20170202release.shtml).

<sup>303</sup> *Contribution Limits for 2017-2018 Federal Elections*, FED. ELECTION COMM'N, <http://www.fec.gov/info/contriblimitschart1718.pdf>.

## B. END THE DARK AND GRAY MONEY LOOPHOLES

In addition to addressing FECA's contribution limits, Congress should end the Section 501(c)(4) loophole by requiring non-profit organizations that engage in electioneering communications to register as political committees with the FEC. To that end, such groups should be required to establish separate segregated accounts for their electioneering communications. The identities of donors to those accounts would be fully disclosable as with any other political committee. And as a further measure to promote transparency, Congress should mandate that all LLCs and PACs that contribute to other PACs disclose the original source of the funds used for their political donations.

It will not be easy to persuade Congress to bring transparency to outside group funding. Powerful forces oppose reform. For example, Congress considered a bill to impose mandatory disclosure on non-profits in 2012, but the effort failed as the result of a Senate filibuster.<sup>304</sup> The DISCLOSE Act, sponsored by Senator Sheldon Whitehouse of Rhode Island, would have provided for mandatory disclosure by all non-profits, unions, and corporations that made \$10,000 or more in independent expenditures in federal elections.<sup>305</sup> In particular, Whitehouse's bill would have required such groups to identify the names of donors who gave \$10,000 or more for electioneering communications.<sup>306</sup> Fierce opposition from lobbying groups defeated the bill. As the bill floundered, Senator Mitch McConnell quipped, "It has managed to generate opposition from everybody from the ACLU to NRA. That's quite an accomplishment."<sup>307</sup> McConnell saw the ideologically diverse nature of the bill's opponents as a sign of its weakness, but any disclosure bill with teeth will generate intense opposition from across the ideological spectrum. The fact that liberal and conservative lobbying groups alike viewed the DISCLOSE Act as a threat is compelling evidence that if such a bill were adopted, it would indeed increase transparency in federal elections.

Although the DISCLOSE Act failed in 2012, experience at the state level shows that it is possible to build sufficient political support to enact mandatory disclosure laws. For example, California,<sup>308</sup> New York,<sup>309</sup>

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<sup>304</sup> Tarini Parti, DISCLOSE Act Dies Again, POLITICO (July 17, 2012), <http://www.politico.com/blogs/on-congress/2012/07/disclose-act-dies-again-129235>.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Governor Signs Legislation to Close 'Dark Money' Loopholes*, ST. CAL. FAIR POL. PRAC. COMM'N (May 14, 2014), <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/MediaCenter/2014/2014-05-14.pdf>.

<sup>309</sup> Linda Sugin, *Politics, Disclosure, and State Law Solutions for 501(c)(4) Organizations*, 91 CHI. KENT. L. REV. 895, 907 (2016).

Connecticut,<sup>310</sup> and Montana<sup>311</sup> require nonprofit groups to disclose the identities of their contributors when they engage in independent expenditures in state elections. The California law is particularly important as a federal model because it requires disclosure of the original funding sources.<sup>312</sup> Mandatory disclosure of sources is critical because it allows the money to be traced through intermediary PACs to the real donor. States like California provide a blue print for Congress to one day adopt when it finally gets serious about closing the dark and gray money loopholes. As Professor Linda Sugin explains, “A federal resolution will ultimately be necessary to solve the problem of dark money in politics, but the states may be very helpful in preparing the federal government for that day. At the very least, state regulation might pave the way, politically, for the federal government to do something.”<sup>313</sup>

But even without adopting a new disclosure statute, it would be a constructive step if the FEC would simply enforce the laws already on the books. For example, FECA prohibits contributions “made in the name of another,”<sup>314</sup> a measure Congress adopted in order “to ensure the complete and accurate disclosure of the contributors who finance federal elections.”<sup>315</sup> Unfortunately, however, the FEC’s political gridlock has undermined its ability to investigate, let alone prosecute, allegations of straw donors. Frustrated by the FEC’s inaction, the Campaign Legal Center (the “CLC”) recently filed suit to force the commission to penalize LLCs that use straw donors to avoid disclosure laws.<sup>316</sup> The CLC alleges that “various individuals had made political contributions to super PACs using limited liability companies and other corporate entities as ‘straw donors,’ thereby concealing the true source of the contributions from public disclosure.”<sup>317</sup> Whether the CLC’s strategy will succeed remains to be seen, but a federal district court denied the FEC’s motion to dismiss the complaint in March 2017, a good sign that the court takes the plaintiff’s argument seriously.<sup>318</sup>

If and when Congress acts to close the dark and gray money loopholes, the Supreme Court is likely to uphold such legislation. The legal standard for imposing disclosure requirements is relatively deferential to Congress. Campaign finance disclosure requirements on election-related speech are

<sup>310</sup> Chisun Lee and Douglas Keith, *How Semi-Secret Spending Took Over Politics*, ATLANTIC (June 28, 2016), <https://www.theatlantic.com/politics/archive/2016/06/the-rise-of-gray-money-in-politics/489002/>; *24 Hour Reporting of Independent Expenditures for Statewide and General Assembly Candidates*, CONN. OFFICE GOV’T ACCOUNTABILITY, <http://www.ct.gov/seec/cwp/view.asp?a=3563&Q=550054>.

<sup>311</sup> Charles S. Johnson, *Bullock Signs Montana Campaign Finance Bill Into Law*, BILLINGS GAZETTE (April 22, 2015), [http://billingsgazette.com/news/government-and-politics/bullock-signs-montana-campaign-finance-bill-into-law/article\\_c8a0cc59-a7bf-5381-9136-ae118d9a13ff.html](http://billingsgazette.com/news/government-and-politics/bullock-signs-montana-campaign-finance-bill-into-law/article_c8a0cc59-a7bf-5381-9136-ae118d9a13ff.html).

<sup>312</sup> Sugin, *supra* note 309, at 905.

<sup>313</sup> *Id.* at 936.

<sup>314</sup> 52 U.S.C. § 30122.

<sup>315</sup> *United States v. O’Donnell*, 608 F.3d 546, 553 (9th Cir. 2010).

<sup>316</sup> *Campaign Legal Center v. FEC*, 2017 WL 1185187 (U.S.D.C. for D. of Columbia March 29, 2017).

<sup>317</sup> *Id.* at \*2.

<sup>318</sup> *Id.*

subject “to exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.”<sup>319</sup> That is not a difficult standard for disclosure statutes to meet. The conservative majority on the Supreme Court has consistently viewed mandatory disclosure laws favorably even as it has struck down other campaign finance regulations.<sup>320</sup> For example, in *Citizens United*, the majority held that “disclosure is a less restrictive alternative to more comprehensive regulations of speech” and “the public has an interest in knowing who is speaking about a candidate shortly before an election.”<sup>321</sup> Writing for the majority, Justice Kennedy praised the public policy justifications for disclosure, observing that “prompt disclosure of expenditures can provide . . . citizens with the information needed to hold . . . elected officials accountable for their positions and supporters . . . [A]nd citizens can see whether elected officials are ‘in the pocket’ of so-called moneyed interests.”<sup>322</sup>

In the Roberts Court’s other major campaign finance case of recent years, *McCutcheon v. FEC*, the justices once again took a highly favorable view of mandatory disclosure. Writing for the plurality, Chief Justice Roberts observed that “disclosure of contributions minimizes the potential for abuse of the campaign finance system.”<sup>323</sup> He further noted that although “[d]isclosure requirements burden speech . . . they do not impose a ceiling on speech. For that reason, disclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech.”<sup>324</sup> Like Kennedy, Roberts emphasized the role of technology in making disclosure highly effective:

Today, given the Internet, disclosure offers much more robust protections against corruption. Reports and databases are available on the FEC’s Web site almost immediately after they are filed, supplemented by private entities such as OpenSecrets.org and FollowTheMoney.org. Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time Buckley, or even McConnell, was decided.<sup>325</sup>

Even the late Justice Antonin Scalia, who consistently voted to strike down contribution limits, defended disclosure laws. In *Doe v. Reed* Scalia concurred with the majority that the First Amendment permitted the State of Washington to make referendum petitions, including the names of the signers, available to the public under the state’s public records act. As Scalia observed in his concurrence, “For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously . . . and even

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<sup>319</sup> *Citizens United*, 558 U.S. at 366–67.

<sup>320</sup> *Eliminate Secret, Unaccountable Money*, BRENNAN CTR. FOR JUST. (Feb. 4, 2016), [https://www.brennancenter.org/analysis/eliminate-secret-unaccountable-money#\\_ftnref4](https://www.brennancenter.org/analysis/eliminate-secret-unaccountable-money#_ftnref4) (“Disclosure is one of the few campaign finance regulations embraced by the anti-regulatory Roberts Court.”).

<sup>321</sup> *Citizens United*, 558 U.S. at 369.

<sup>322</sup> 558 U.S. at 370.

<sup>323</sup> *McCutcheon*, 134 S.Ct. at 1459.

<sup>324</sup> *Id.* at 1459–60.

<sup>325</sup> *Id.* at 1460.

exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.”<sup>326</sup>

Congress should take Justice Scalia’s words to heart. There is nothing unreasonable about requiring donors to have the courage to stand by their financial contributions during an election campaign. As the Supreme Court has emphasized time and again, a healthy democracy is a transparent democracy.

### C. REQUIRE DISCLOSURE OF FOREIGN CONTACTS

In order to truly be effective, FECA’s disclosure laws should extend to the foreign government contacts of federal campaigns. During the 2016 election, the Trump campaign’s contacts with Moscow underscored both the ambiguities in the existing law and the pressing need for enhanced disclosure requirements. Accordingly, any comprehensive reform of federal campaign disclosure law must include within its jurisdiction the foreign government contacts of American campaign officials.

There is no doubt that Congress has broad leeway to strengthen the ban on foreign participation in American elections.<sup>327</sup> The Supreme Court has consistently emphasized that the federal and state governments may prohibit foreign nationals from participating in American elections.<sup>328</sup> In a 1973 case, the justices observed that aliens lack “a constitutional right to vote or to hold high public office” because “citizenship is a permissible criterion” for states to limit voting rights.<sup>329</sup> In a 1982 case the Court explained, “Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community.”<sup>330</sup> Most recently, in the 2012 *Bluman* case, which was summarily affirmed by the Supreme Court, a 3-judge federal panel in the District of Columbia concluded: “It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government.”<sup>331</sup>

The primary tool Congress has relied on to exclude aliens from participating in American elections is FECA’s ban on foreign contributions. But the 2016 election demonstrated that FECA’s foreign contributions ban was both too weak and too vague. By not requiring campaign officials to

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<sup>326</sup> See, e.g., *Doe #1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring).

<sup>327</sup> *Ambach v. Norwick*, 441 U.S. 68, 75 (1979) (“It is because of this special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens.”).

<sup>328</sup> *Bernal v. Fainter*, 467 U.S. 216, 220 (1984) (holding that the government has the right to “exclude aliens from positions intimately related to the process of democratic self-government”). See also David Fontana, *The Geography of Campaign Finance Law*, S. CAL. L. REV. (forthcoming 2017).

<sup>329</sup> *Sugarman v. Dougall*, 413 U.S. 634, 648–49 (1973).

<sup>330</sup> *Cabell v. Chavez-Salido*, 454 U.S. 432, 439–40 (1982).

<sup>331</sup> *Bluman*, 800 F.3d. at 288.

disclose foreign contacts, and by not clearly defining when such contacts violated the law, FECA failed to deter Trump campaign officials from soliciting Russian assistance in gathering opposition research on Hillary Clinton.

Congress must therefore both clarify and strengthen the law. First, Congress should enact legislation that requires presidential and congressional campaigns to disclose all contacts that campaign representatives have with foreign government representatives during primary and general elections. The law should cover not only paid staffers but also all individuals authorized to speak on behalf of the campaign. Disclosure should include the identities of everyone involved in the communications as well as the content of the communication itself. For example, in the case of the Trump Tower meeting in June 2016, federal law should have required Donald Trump, Jr., Jared Kushner, and Paul Manafort to file a timely report of their meeting with the FEC. In addition, the law should have mandated that the report list all the meeting's attendees, American and foreign alike, as well as a detailed summary of the discussions themselves.

Timely reporting of foreign government contacts is particularly crucial. To that end, Congress should require that campaigns file a report of all foreign government communications with the FEC within 48 hours of such contacts. Those communications, meetings, and contacts should then be publicly disclosed on the FEC's website. A 48-hour reporting requirement is consistent with pre-existing FEC regulations. FECA requires campaigns to file regular financial reports during election cycles,<sup>332</sup> which means every federal campaign already has a reporting system in place. Moreover, current FEC regulations mandate that candidate committees report within 48 hours of receipt all contributions over \$1,000 that the campaign receives in the final 20 days before an election.<sup>333</sup> The same 48-hour reporting obligation should apply to all foreign government contacts of campaign officials, but not just in the final 20 days of a campaign. The reporting obligations should begin from the moment the federal candidate first registers with the FEC.

Real-time disclosure is critical for voters to evaluate the foreign contacts of presidential and congressional campaigns. Disclosures made after an election are of no value to voters. For example, the Trump Tower meeting occurred in June 2016 but did not come to light until July 2017, months after the election.<sup>334</sup> The lack of timely disclosure meant that Donald Trump was able to deny throughout the election that he had contacts with the Russian

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<sup>332</sup> *Quarterly Reports*, FED. ELECTION COMM'N, <https://www.fec.gov/help-candidates-and-committees/filing-reports/quarterly-reports/>.

<sup>333</sup> See 11 C.F.R. § 104.5(f) ("If any contribution of \$1,000 or more is received by any authorized committee of a candidate after the 20th day, but more than 48 hours, before 12:01 a.m. of the day of the election, the principal campaign committee of that candidate shall notify the Commission, the Secretary of the Senate and the Secretary of State, as appropriate, within 48 hours of receipt of the contribution"); *48-Hour Notices*, FED. ELECTION COMM'N, <https://www.fec.gov/help-candidates-and-committees/filing-reports/48-hour-notices/>.

<sup>334</sup> See Hamburger & Helderman *supra* note 179.



government even as his top campaign officials privately met with Kremlin-linked lawyers and former Russian intelligence officers.<sup>335</sup> A 48-hour reporting requirement would have alerted federal regulators as well as the general public to the problematic contacts between Trump's team and the Russian government long before election day.

Second, Congress should amend FECA to make clear that "other thing of value" means an in-kind contribution such as those which campaigns traditionally pay private vendors for during elections.<sup>336</sup> As Professor Daniel Tokaji explains, "the ban on in-kind contributions should be understood to reach the sorts of campaign commodities that have a determinate monetary value in the marketplace."<sup>337</sup> For example, the FEC has previously ruled that both polling data and contact lists constitute things of value for FECA purposes.<sup>338</sup> But the ambiguous nature of the statute makes it unclear whether the term "other thing of value" also includes foreign assistance such as opposition research, photo opportunities, state visits, and the like. It is critically necessary therefore that Congress resolve the issue by clearly defining the exact meaning of the term and the precise scope of the statute. A sensible approach for Congress to take would be to limit the statute to in-kind contributions that have a clear monetary value, as Professor Tokaji recommends. But simply receiving information from a foreign source should not constitute an illegal campaign contribution. Although contacts with foreign government representatives and intermediaries should be reported to the FEC, as discussed above, the underlying flow of information from foreign sources should not be criminalized.

Third, the FEC should investigate and propose new policies for protecting American elections from improper foreign influence.<sup>339</sup> As FEC Commissioner Ellen Weintraub recently recommended, the FEC should "[e]ngage in fact-finding to determine whether we need to tighten up existing regulations or write new ones to prevent foreign influence in our elections."<sup>340</sup> To that end, she has proposed that the FEC hold hearings, subpoena documents and witnesses, and develop ideas for potential legislative recommendations to Congress.<sup>341</sup> The commission should follow

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<sup>335</sup> Rosalind S. Helderman, *Here's What We Know About Donald Trump and His Ties to Russia*, WASH. POST (July 29, 2016), [https://www.washingtonpost.com/politics/heres-what-we-know-about-donald-trump-and-his-ties-to-russia/2016/07/29/1268b5ec-54e7-11e6-88eb-7dda4e2f2aec\\_story.html?utm\\_term=.c47c3f3c2512](https://www.washingtonpost.com/politics/heres-what-we-know-about-donald-trump-and-his-ties-to-russia/2016/07/29/1268b5ec-54e7-11e6-88eb-7dda4e2f2aec_story.html?utm_term=.c47c3f3c2512).

<sup>336</sup> Daniel P. Tokaji, *What Trump Jr. Did Was Bad, But It Probably Didn't Violate Federal Campaign Finance Law*, JUST SECURITY (July 14, 2017), <https://www.justsecurity.org/43116/trump-jr-bad-didnt-violate-federal-campaign-finance-law/>.

<sup>337</sup> *Id.*

<sup>338</sup> See also Sean Strub, *Advisory Opinion 1990-12*, FED. ELECTION COMM'N, <https://cg-519a459a-0ea3-42c2-b7bc-fa1143481f74.s3-us-gov-west-1.amazonaws.com/legal/aos/72021.pdf>; FED. ELECTION COMM'N, MUR 5409 (2004), <http://eqs.fec.gov/eqsdocsMUR/00002BF9.pdf> (ruling that contact lists could constitute a "thing of value").

<sup>339</sup> Tokaji, *supra* note 336 ("The FEC could help clarify the line through rules, advisory opinions, or enforcement decisions.")

<sup>340</sup> *Memorandum of Commissioner Ellen L. Weintraub to the Federal Election Commission*, Jun. 20, 2017, <https://www.documentcloud.org/documents/3870729-FEC-Foreign-Money.html>.

<sup>341</sup> *Id.*

Weintraub's advice. Although the FEC's internal divisions will make the rulemaking process difficult, the extraordinary nature of the threat posed by the Russian intervention creates an opportunity for the commissioners' patriotism to overcome their partisanship, even if only on this one issue. As Commissioner Weintraub emphasized, "we can be united in finding foreign influence in our elections to be totally unacceptable . . . [T]his Commission can indeed rise to the challenge of understanding what happened in the 2016 election and plugging any legal or procedural holes that allowed foreign actors to interfere with our presidential election."<sup>342</sup>

To be sure, in the modern era, no law will ever be able to completely purge American elections of foreign influences. Hacking is an inevitable part of the internet age. Accordingly, it is impossible to prevent foreign governments from exercising some degree of influence on American election campaigns. There will always be embarrassing emails to disclose and false rumors to circulate on social media. But the United States has faced grave challenges from foreign threats before and has always eventually found a way to respond effectively and decisively. It can do so again by extending disclosure laws to cover campaign contacts with foreign governments and by clarifying the nature and extent of FECA's ban on foreign contributions.

#### D. REFORMING THE FEC

Finally, Congress must fundamentally change the structure of the FEC in two key respects. The first and most important structural change is to expand the commission's membership to seven. The current 6-member format is simply not a functional arrangement at a time of entrenched and intractable political polarization. As former Commissioner Ravel pointed out, the Commission's structure "provides ample opportunity for commissioners to block action by splitting 3-to-3."<sup>343</sup> Although a partisan balance on the commission understandably struck Congress as a sensible idea in 1974, the polarized political climate of the late 2010s has rendered the agency incapable of carrying out its regulatory mandate in its current structure.<sup>344</sup>

The Supreme Court itself demonstrates the need for an odd-number of decision-makers on judicial and quasi-judicial bodies tasked with adjudicating difficult cases. The vacancy created by Justice Scalia's death in February 2016 resulted in the Supreme Court deadlocking 4-4 on a number of major constitutional cases during the 2016-17 term,<sup>345</sup> and prompted the

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<sup>342</sup> *Id.*

<sup>343</sup> Office of the Commissioner Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp*, FED. ELECTION COMM'N (Feb. 2017), at \*7, [http://classic.fec.gov/members/former\\_members/ravel/ravelreport\\_feb2017.pdf](http://classic.fec.gov/members/former_members/ravel/ravelreport_feb2017.pdf).

<sup>344</sup> See Ravel, *supra* note 327; Taylor Gee, *Will Donald Trump Upend the FEC?*, POLITICO (Mar. 9, 2017), <http://www.politico.com/magazine/story/2017/03/fec-ann-ravel-donald-trump-money-politics-214893>.

<sup>345</sup> Robert Barnes, *Reality of a Divided Supreme Court: A Split Decision and a Search for Compromise*, WASH. POST (Mar. 29, 2016), [https://www.washingtonpost.com/politics/courts\\_law/](https://www.washingtonpost.com/politics/courts_law/)

justices to refuse to hear many important constitutional issues until Neil Gorsuch took his seat as the ninth justice in April 2017.<sup>346</sup> As Justice Ruth Bader Ginsburg explained, “Eight, as you know, is not a good number for a multi-member court.”<sup>347</sup> Although Chief Justice John Roberts emphasized that consensus normally prevailed on the court, he also conceded that “there are reasons most appellate courts have an odd number of judges.”<sup>348</sup>

Similarly, the addition of a seventh member to the FEC is a necessary step to revitalize the commission. Like the Supreme Court itself, it is common for federal agencies to have odd-numbered memberships. For example, the Federal Reserve System’s Board of Governors consists of seven members,<sup>349</sup> and the Federal Communications Commission,<sup>350</sup> the Federal Energy Regulatory Commission,<sup>351</sup> the National Transportation Safety Board,<sup>352</sup> the Securities and Exchange Commission,<sup>353</sup> and the Nuclear Regulatory Commission<sup>354</sup> all have five member boards. If the United States can entrust its financial, transportation, and nuclear regulatory systems to odd-numbered boards, it certainly can trust its campaign finance regulations to an odd-numbered board as well.

Second, Congress should end the requirement of a partisan balance on the FEC and permit 4 members of the same political party to serve on the commission. It is not unusual for a partisan or ideological majority to control a federal agency. The FCC is a case in point. Federal law permits up to 3 of the FCC’s 5-members to be members of the same political party.<sup>355</sup> Consequently, the FCC’s policy direction may change at any one time depending on the make-up of the commission. For example, President Trump’s appointment of Ajit Pai as FCC Chairman led to immediate policy changes at the commission, ranging from Net Neutrality Rules to internet

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supreme-court-seeks-alternative-ways-to-deal-with-contraceptives-coverage/2016/03/29/4b6129f2-f5d7-11e5-9804-537defcc3cf6\_story.html?utm\_term=.c4d6318b344e.

<sup>346</sup> Adam Liptak, *A Cautious Supreme Court Sets a Modern Record for Consensus*, N.Y. TIMES (June 27, 2017), <https://www.nytimes.com/2017/06/27/us/politics/supreme-court-term-consensus.html?mcubz=2>.

<sup>347</sup> Robert Barnes, *Eight ‘Is Not a Good Number’ for the Supreme Court, Ginsburg Says*, WASH. POST (May 26, 2016), [https://www.washingtonpost.com/politics/courts\\_law/eight-is-not-a-good-number-for-the-supreme-court-ginsburg-says/2016/05/26/3fa51666-237f-11e6-aa84-42391ba52c91\\_story.html?utm\\_term=.d3cf612c2328](https://www.washingtonpost.com/politics/courts_law/eight-is-not-a-good-number-for-the-supreme-court-ginsburg-says/2016/05/26/3fa51666-237f-11e6-aa84-42391ba52c91_story.html?utm_term=.d3cf612c2328).

<sup>348</sup> *Id.*

<sup>349</sup> Board of Governors of the Federal Reserve System, *Board Members*, FED. RESERVE, <https://www.federalreserve.gov/aboutthefed/bios/board/default.htm>.

<sup>350</sup> FCC Leadership, FED. COMMS. COMM’N, <http://www.connectwithglobal.com/leadership.html>.

<sup>351</sup> Commission Members, FED. ENERGY REG. COMM’N, <https://www.ferc.gov/about/com-mem.asp>.

<sup>352</sup> The NTSB Board, NAT’L TRANSP. SAFETY BOARD, <https://www.nts.gov/about/board/Pages/default.aspx>.

<sup>353</sup> Current SEC Commissioners, UNITED STATES SEC. AND EXCHANGE COMM’N, <https://www.sec.gov/Article/about-commissioners.html>.

<sup>354</sup> The Commission, UNITED STATES NUCLEAR REG. COMM’N, <https://www.nrc.gov/about-nrc/organization/commfuncdesc.html>.

<sup>355</sup> FED. COMMS. COMM’N., *supra* note 350.

privacy rules.<sup>356</sup> The crucial point, however, is that the FCC is accountable to the president, who in turn is accountable to the electorate.

The Supreme Court itself offers another example. Five of the current justices were appointed by Republican presidents and 4 were appointed by Democratic presidents. Yet, the partisan imbalance on the Court does not render it illegitimate or irresponsible. Quite the reverse. The changing partisan and ideological mix of justices on the Court has allowed it to experiment with different approaches to campaign finance law. Sometimes the Court has upheld campaign finance laws, such as the 2003 *McConnell* decision, and other times it has invalidated them such as the 2014 *McCutcheon* decision.<sup>357</sup> The point is the Court is a dynamic institution capable of responding effectively to new challenges and new conditions.

If the Supreme Court itself can chart different constitutional courses at different times, it makes sense to allow partisan majorities on the FEC in order to experiment with regulatory approaches. The FEC will always be accountable to the other branches of government, and as long as the commissioners' terms are staggered in two-year intervals, presidents can remake the composition of the agency on a regular basis. Moreover, it is a crucial fact that the FEC does not register voters, administer elections, or supervise recounts.<sup>358</sup> Instead, the FEC has a much narrower mandate, one that only extends to the enforcement of campaign finance laws.<sup>359</sup> The potential for partisan mischief is thus much more limited than in election administration areas such as redistricting and voter registration, and the room for policy innovation is much greater.

The bottom line is that a bipartisan agency structure is simply not feasible or desirable in the current political environment. In light of political realities, the only viable option is to end the requirement of partisan balance on the FEC and empower a majority of the commissioners to chart a competent regulatory course. As the FCC demonstrates, it is not unreasonable for Republicans and Democrats on government agencies to take turns with different regulatory approaches within the confines of existing federal law. But what is unreasonable is for the FEC to simply stop functioning altogether.

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<sup>356</sup> Mike Snider, *6 Changes the FCC Has Made in Just Six Weeks*, USA TODAY (March 9, 2017), <https://www.usatoday.com/story/tech/news/2017/03/08/fcc-ajit-pai-net-neutrality-cable-box/98894350/>; Harper Neidig, *GOP Expects Sweeping Change at Trump's FCC*, THE HILL (Jan. 26, 2017), <http://thehill.com/policy/technology/316203-gop-expects-sweeping-change-at-trumps-fcc>.

<sup>357</sup> *McConnell v. FEC*, 540 U.S. 93 (2003); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014).

<sup>358</sup> On the decentralized nature of American election administration, see, e.g., Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 752 (2016) ("The Constitution initiates decentralization by placing the primary responsibility for holding elections with states. States have further decentralized election administration by delegating most election administration responsibilities to local governments.").

<sup>359</sup> *Mission and History*, FED. ELECTION COMM'N, <https://www.fec.gov/about/mission-and-history/> (last visited Nov. 11, 2017) ("The Federal Election Commission (FEC) is the independent regulatory agency charged with administering and enforcing the federal campaign finance law. The FEC has jurisdiction over the financing of campaigns for the U.S. House, Senate, Presidency and the Vice Presidency.").

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## V. CONCLUSION

The 2016 election saw the emergence of a new and increasingly volatile campaign finance landscape. The Supreme Court's *Citizens United* and *McCutcheon* decisions have empowered wealthy donors to pour millions of dollars into election campaigns. At the same time, the internet has fundamentally transformed how candidates communicate with voters. Yet, federal elections are still governed by 1970s-era campaign finance regulations, a set of laws that Congress enacted in the age of 8-track tapes, rotary telephones, and floppy disks. The time has come for Congress to modernize federal campaign finance law. FECA's modernization can be achieved by eliminating contribution limits, closing the dark and gray money loopholes, clarifying and expanding the regulation of foreign influences, and restructuring the FEC. By adopting those reforms, FECA will finally be brought out of the 1970s and into the age of the internet, iPhones, Twitter, and Facebook.

