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### Extraterritorial Electioneering and the Globalization of American Elections

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# Extraterritorial Electioneering and The Globalization of American Elections

## Zephyr Teachout\*

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### I. INTRODUCTION

This Essay explores a fascinating new truth: because of the Internet, governments, corporations, and citizens of other countries can now meaningfully participate in United States elections. They can phone bank, editorialize, and organize in ways that impact a candidate's image, the narrative structure of a campaign, and the mobilization of base support. Foreign governments can bankroll newspapers that will be read by millions of voters. Foreign companies can enlist employees in massive cross-continental email campaigns. Foreign activists can set up offline meetings and organize door-to-

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door campaigns in central Ohio. They can, in short, influence who wins and who loses. Depending upon your intuitions, this might seem like a very good thing, or the beginning of the end of democratic self-governance. While this has yet to occur on a massive scale, signs abound that extraterritorial electioneering is beginning.

During the last two Presidential elections, foreigners made their voices heard during the election. Newspapers from around the world reflected support for one of the two candidates.<sup>1</sup> Because of the web, millions of Americans read those editorials. But the involvement of foreigners extended beyond the traditional press. Consider these existing examples of extraterritorial electioneering, reflecting the use of cross-border canvassing, cross-national volunteering, and cross-national lobbying:

1. A group of British nationals spearheaded a letter writing campaign to Iowa voters. Organized by the British left in conjunction with the American left, a simple website allowed people to download addresses of potentially sympathetic Iowa voters, and then check off “letter sent” online so that others would not send letters to the same person. The letters provided additional information about the cost of war and the corruption associated with it.<sup>2</sup>

2. A Chinese national living in San Francisco volunteered to design an open source web tool for a major presidential candidate, spending over 100 hours on creating the tool.<sup>3</sup>

3. The Pakistani government hired lobbyists to “promote the enhancement of the [Pakistani Embassy’s] dialogue with U.S. leaders and government officials.”<sup>4</sup> The lobbyists contributed heavily to political campaigns.<sup>5</sup>

These are just a few examples. This kind of out-of-area electioneering is evolutionary. Interstate influence, such as Californians campaigning for Bernie Sanders’ Senate race in Vermont, is setting a pattern for international influence. In the future, we can expect even more extraterritorial electioneering. A foreign leader like Hugo Chavez might spur a campaign around a particular candidate for office. And foreign labor groups might try a massive phone-banking effort,

1. Charles J. Levine, *The Dream Ticket McCain-Biden*, THE JERUSALEM POST, Oct. 15, 2008, available at

<http://www.jpost.com/servlet/Satellite?cid=1222017544755&pagename=JPost%2FJPArticle%2FSh owFull> (one can also see Obama ads popping up on these and other foreign news service sites).

2. See The Guardian Online, available at <http://www.guardian.co.uk/world/2004/oct/13/uselections2004.usa11> (last visited Oct. 22, 2008).

3. Author’s personal experience.

4. UNITED STATES DEP’T OF JUSTICE, EXHIBIT A TO REGISTRATION STATEMENT PURSUANT TO THE FOREIGN AGENTS REGISTRATION ACT AS AMENDED, available at <http://www.fara.gov/docs/5643-Exhibit-AB-20071004-4.pdf> (last visited Oct. 22, 2008).

5. See generally OpenSecrets.org Center for Responsive Politics, <https://www.opensecrets.org/usearch/searchresults.php?drill=Cassidy+%26+Assoc%2FInterpublic+Group&type=O> (last visited Oct. 22, 2008) (summary of candidates to whom Cassidy & Associates employees were major contributors).

using free technology like Skype, around an election.

Given the global impact of United States policy, twenty years from now massive efforts to influence United States elections—from outside its borders—will be routine. In “The Hydraulics of Campaign Finance Reform,” Pamela Karlan and Samuel Issacharoff argued that regulation does not limit the role of money in the political process; rather, it directs where the money will go. The incentives of actors with money who want to influence government are too strong to be stopped by regulations: new and permissible outlets always emerge.<sup>6</sup>

Similar hydraulics are gaining force in the international ecosystem—the desire to impact American politics is too strong for foreign interests not to try to sway the American electorate in a variety of ways. Foreign governments, with strong interests in increasing trade, military alliances, and aid, share with corporate interests the advantage of continuous personality and centralized decision-making structures, making them highly likely to follow the hydraulic principle. And they have the advantage of very deep pockets.<sup>7</sup> Moreover, in many countries, the relationship between a corporate interest and the government is less attenuated than it is in the United States. This holds not just for the partially governmental corporations like Gazprom in Russia, but non-governmental corporations headed by close allies of the party in power. Finally, foreign labor unions or organized entities and foreign individuals with the time and the means will try to impact Congressional, Senate and Presidential campaigns. For example, the Congress of South African Trade Unions, which may have different trade priorities than the South African government, might attempt to sway the electorate in key Congressional races. So too might an owner of a South African mine.

The routine nature of cross-state fundraising and mobilization in Senate elections presages this mass cross-national mobilization. While some out-of-state fundraising has been occurring for years, the scale has dramatically increased recently with the growth of the Internet, making it much easier for out-of-state donors and activist to track and support candidates. Out-of-state activists used the Internet to organize on both sides of the Senate race between Joe Lieberman and Ned Lamont. Active political blogs regularly raise money, identify issues, and encourage activism across state borders for candidates for national office. It is not only Senate and Congressional races that are influenced; for example, Hampton Dellinger, a candidate for Lieutenant Governor in North Carolina, raised money in California and New York to boost his position in the local race.

The embryonic phenomenon has enormous implications for self-government, and for democratic theory, in part because it directly raises

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6. Samuel Issacharoff and Pamela Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) (“political money, like water, has to go somewhere”).

7. Some foreign corporate interests share these characteristics as well.

questions of the capacity of meta-mass democracy, and in part because it forces us to understand and better articulate what defines the “self” in self-government. While I don’t have answers to these questions, my goal in this Essay is to introduce a difficult problem. I hope to trouble you, and in troubling you, engage you in thinking about how we should move forward. Those who instinctively welcome more foreign voices and involvement I hope to trouble with the suggestion that extraterritorial electioneering is even more prone to corruption and untrustworthy information than national electioneering. I hope to point out the tension between the ideals of self-government and more cosmopolitan ideals you may hold. I hope to trouble those who would naturally incline toward keeping foreign influences out of elections with the ways in which justice and fairness favor keeping an open ear to the world. Overall, I hope to explore the tension between the ideals of self-government and the refusal to listen to those whose lives you touch.

In Part I, I give an overview of the laws governing foreign involvement in American elections. In Part II, I introduce the tools of extraterritorial electioneering—the technical innovations that make it possible on a mass scale for the first time in world history.

In the Part III, I describe a possible future, and suggest a tentative framework for talking about these new issues. I suggest that the value of a free globalized communication system is too great a sacrifice to maintain the integrity of elections, but that the integrity of elections may not be able to withstand globalized communications. Finally, I suggest that solutions to the troubling aspects of extraterritorial electioneering are best found outside of election law: in education, limiting economic scale, and to some degree in public financing of elections.<sup>8</sup> The porous borders for elections introduce a new challenge to self-government, but the best responses are to be found in strengthening the self-governing institutions, instead of strengthening the walls that limit influence.

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8. There are two things I will not address in this essay, although I think they are profoundly important—I want to flag them here as a necessary part of any broader conversation. First, I will not address extraterritorial electioneering (including by the United States) in other countries. Principles are implicated in American elections are likely also to be implicated as citizens of other countries struggle with foreign influence in their elections; arguably, we cannot talk about self-governance in one country without considering the problem world-wide. However, I’ve chosen to limit this Essay to the peculiar American framework, and to isolate the questions of self-government, speech, freedom and deliberation to the United States. The policy implications are important enough on their own terms, and because we have relatively strong protections in other areas of political speech, we can consider questions of outside influence without the separate factor of the role of extraterritorial influence in totalitarian or fascist regimes. Second, I will not address the special question of the role of cross-border electioneering in wartime, except inasmuch as the history of laws requires it. The threats—and passions—that arise when our country is at war with another country are sufficiently unique that I want to cabin those questions. Peacetime cross-border electioneering provides sufficiently troubling questions that I want to assume peacetime for this discussion.

## II.

## THE LEGAL FRAMEWORK FOR EXTRATERRITORIAL ELECTIONEERING

I use this definition of “electioneering” for the purposes of the Essay: to campaign actively for the defeat or election of a particular candidate or party. I do not include broader attempts to persuade a polity to take different policy positions. For purposes of this discussion, assume that there is a meaningful general difference between electoral speech and political speech generally (though this difference can be difficult to parse on inspection). Electioneering includes canvassing, passing out information, blogging for candidates, talking to people, making phone calls, editorializing, and raising money to do all these things.

Electioneering speech is on the one hand the most precious kind of speech, the most important kind of speech because it is the most political.<sup>9</sup> It is protected because governmental intervention in anything involving the instantiation of the government is very dangerous; it can be used to insulate or institutionalize certain actors in power. It is precious because it embodies civic action at its best, and it is in the exercise of explicitly political election speech and election activity that subjects prove that they are citizens.

On the other hand, because electoral speech can be used as a tool to access candidates’ levers of power, electioneering activity can subvert some of the goals of self-governance. Well-funded election-related speech can cause candidates to misperceive the popular will (by mistaking well-funded ads for popular support), or to choose to go against an unknown popular will in favor of a known political desire of a wealthy group or individual, believing that expenditures made by the group or individual may be necessary to get elected. Both of these lead to less representative behavior on the part of elected officials.

The costs associated with electioneering are paid by people who themselves have direct personal interests in the outcome of the election, or who work for organizations (for example, law firms, media entities, and manufacturers) which have a collective stake in the outcome of elections. At best, a fraction of the country pays for electioneering costs, and that fraction then—with the threat of refusing support—wields an enormous amount of power over the range of policy positions candidates can expect to take.

Recently, a lot of electioneering is not coordinated with candidates’ campaigns for office, but rather 527s<sup>10</sup> and other organizations pay for canvassing and media campaigns intended to influence elections. But although the *strategies* are uncoordinated, these organizations clearly intend to, and do,

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9. See *Fed. Comm’n Comm’n v. League of Women Voters*, 468 U.S. 364 (1984).

10. A “527” group, so-named after the section of the tax code describing these groups, is an organization that does not directly advocate the election or defeat of a particular candidate, but is often motivated by the desire to impact elections. 527s engage in extensive “issue advocacy,” and are not governed by the FEC rules that govern direct electioneering efforts.

impact the policy proscriptions of candidates, leading to a meta-coordination of funded ideologies. A Republican candidate who wants to ridicule anti-abortion policies knows that millions of dollars may be spent electioneering against him by anti-abortion independent groups. As a result, he may decide he ought not take that position, even if he might otherwise think it would be politically expedient. A democratic candidate who chooses to support wiretapping does so with the awareness that bloggers coordinated by FireDogLake might spend tens of thousands of dollars on ads against that candidate.<sup>11</sup>

In short, electioneering implicates both the heart of the First Amendment's political protections, and also the heart of some of the distortions in representative self-government.

Until recently, it was fairly difficult to translate foreign funds and foreign interest in American policies into electioneering power. American electioneering was limited, for all intents and purposes, to people who lived within a country, and in most cases, within the region electing a representative. Fundraising efforts were largely local, organizing was almost always local (with a few exceptions where organized labor did some cross-state door-to-door campaigning), and news media was locally based. This is not to say that foreigners and out-of-staters had no role, but that in most elections, foreign involvement was episodic and very limited. Foreign governments largely conducted their affairs through their embassies. Foreign actors cared less about American domestic policy in most instances, and when they did care, they had relatively few channels to use to sway public opinion around local elections, and even around the Presidential election. As I discuss below, this is changing, and I predict much greater change to come. Of course there are massive and notorious exceptions to the historically local nature of elections, but they stand out as exceptions, not the rule.

Despite this, there is a long history of building barriers to foreign influence in political spheres. Restrictions on foreign involvement developed in a variety of distinct places. Prohibitions against foreign office holding, and foreign gifts to public officers, are found in the Constitution.<sup>12</sup> Direct contributions by foreigners to elections are now prohibited by the Federal Election Commission ("FEC"), and have been federally prohibited for the past half century. Foreign ownership of media is prohibited by the Federal Communications Commission ("FCC"),<sup>13</sup> and foreign lobbying is regulated by the Foreign Agents Registration Act ("FARA").<sup>14</sup> I discuss each of these restrictions in turn.

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11. See Jane Hamsher, *FISA: Call Your Wobbly FISA Senator*, Firedoglake, <http://firedoglake.com/2008/06/24/fisa-call-your-wobbly-fisa-senator/> (last visited Jun. 24, 2008).

12. See U.S. CONST. art. I, § 9.

13. The Federal Election Campaign Act (FECA) prohibits foreign nationals from contributing, donating or spending funds in connection with any federal, state, or local election in the United States, either directly or indirectly. 2 U.S.C. § 441(e) (2008).

14. Foreign Agents Registration Act, 22 U.S.C. §§ 611-621 (2008).

The Constitutions' founders were intensely concerned about the prospect of foreign involvement in American politics. At the time, foreign corruption was a major concern because the newly independent United States was a small and relatively poor country. It was thought that elites—especially those in appointed office or in the Senate—might be seduced by baubles and titles to put favor towards other countries before patriotism. The Constitution contains several provisions demonstrating this fear of foreign infiltration. It prohibits foreigners from holding federal office, and demands a long residential period for foreigners before they can run for Congress.<sup>15</sup> Moreover, article II of the United States Constitution mandates: "No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President."<sup>16</sup>

The concerns over foreign influence upon the affairs of the young Republic manifested themselves during the Constitutional Convention. For example, delegate Gouverneur Morris "drew the melancholy picture of foreign intrusions as exhibited in the History of Germany, & urged it as a standing lesson to other nations."<sup>17</sup> Citizenship requirements for office-holders were debated in these terms. Elbridge Gerry, the framer best known for his insistence on the Bill of Rights:

[W]ished that in the future the eligibility might be confined to Natives. Foreign powers will intermeddle in our affairs, and spare no expence to influence them. Persons having foreign attachments will be sent among us & insinuated into our councils, in order to be made instruments for their purposes. Every one knows the vast sums laid out in Europe for secret services. He was not singular in these ideas. A great many of the most influential men in Massts. reasoned in the same manner.<sup>18</sup>

In addition, the requirement that a treaty be ratified by a two-thirds vote of Congress was included in part because "[t]he power of foreign nations to obstruct our retaliating measures on them by a corrupt influence would also be less if a majority shd. be made competent than if 2/3 of each House shd. be required to Legislative acts in this case."<sup>19</sup>

At the time, people stood for offices instead of campaigning for them, and election cash—such as it was—was not regulated. Thus, Congress did not discuss the role of foreign money in elections, but did worry about the role of foreign money in foreign affairs. Hamilton's caution in the early days of the debate continued throughout: "Foreign powers also will not be idle spectators. They will interpose, the confusion will increase, and a dissolution of the Union ensue."<sup>20</sup>

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15. U.S. CONST. art. I, §§ 2, 3.

16. U.S. CONST. art. II.

17. JAMES MADISON, NOTES OF THE CONSTITUTIONAL CONVENTION JULY 5, 1787.

18. JAMES MADISON, NOTES OF THE CONSTITUTIONAL CONVENTION AUGUST 13, 1787.

19. JAMES MADISON, NOTES OF THE CONSTITUTIONAL CONVENTION AUGUST 29, 1787.

20. JAMES MADISON, NOTES OF THE CONSTITUTIONAL CONVENTION JUNE 18, 1787.



In the years between the end of the Revolutionary War and the Constitutional convention, two small gifts from the King of France caused some uproar in the newly independent colonies. Arthur Lee was given a small snuff box, and Benjamin Franklin was given a miniature portrait of Louis XVI.<sup>21</sup> The gifts seemed like expressions of politeness, but people wondered, did the French monarch have more insidious hopes? Would these gifts corrupt Lee's and Franklin's judgment in European affairs, or would others be corrupted? To protect against any such questions, the Founders inserted one of the most strongly worded sections into the United States Constitution. Article I, Section 9, Clause 8 of the U.S. Constitution was written to eliminate the threat of foreign money corrupting our domestic decisions. It forbids federal officials, without a special dispensation from Congress, from receiving gifts "of any kind whatever" from any "King, Prince or foreign state".<sup>22</sup> A contemporary explained, "[i]t was thought proper, in order to exclude corruption and foreign influence, to prohibit anyone in office from receiving or holding any emoluments from foreign States."<sup>23</sup>

These Constitutional fears presaged the post-Constitutional panic about foreign influence that permeated the early years of the new country. The Alien and Sedition Acts of 1798 were grounded in real fears that European powers—France, in particular—would conspire, or were conspiring, to undermine the new nation.<sup>24</sup> Many predicted war with France and suspected American residents of spying, encouraging war, and spreading propaganda.<sup>25</sup> The four acts were addressed to French sympathizers acting peacefully, and included: An Act to Establish an Uniform Rule of Naturalization,<sup>26</sup> An Act Concerning Aliens,<sup>27</sup> An Act Respecting Alien Enemies,<sup>28</sup> and An Act for the Punishment of Certain Crimes against the United States (Sedition Act).<sup>29</sup> As these titles reveal, Congress was deeply concerned about who was voting, and what role foreigners could play in local politics.

By the mid-nineteenth century, explicit fears of a foreign takeover of American politics had become less prevalent, but fears of intermeddling continued. The early-nineteenth century Monroe Doctrine, a policy of American non-interference in European affairs, was conditional upon European non-

21. LETTERS OF WILLIAM LEE, Vol. III, 774-775 (Worthington Chauncy Ford ed., 1891); Sydney George Fisher, THE TRUE BENJAMIN FRANKLIN (J. B. Lippincott Company 1899).

22. U.S. CONST. art. I, § 9.

23. David K. Watson, THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY, APPLICATION AND CONSTRUCTION 758 (Callaghan & Company 1910).

24. THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES: 1789-1800 233 (Maeva Marcus & James R. Perry eds., 1985).

25. See Geoffrey R. Stone, WAR AND LIBERTY 304 (W. W. Norton & Company 2007).

26. Naturalization Act of 1798, ch. 54, 1 Stat. 566 (1798).

27. Act Concerning Aliens, 1 Stat. 570 (1798).

28. An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798).

29. Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 596 (1798).

interference in the Americas. At the same time, massive numbers of people were immigrating to the country, provoking calls to keep these new immigrants from the vote. Some argued that new immigrants were “insufficiently tutored in American values and the workings of American democracy; others feared that Catholics were controlled by the Pope and would seek to undermine Protestant society.”<sup>30</sup> Feminists used the fear of the foreign vote to argue for enfranchising women, as it would lead to a greater weighting of the American vote.<sup>31</sup>

The world wars, the Russian Revolution, and massive changes in telecommunications led to a new focus on limiting foreign involvement in elections. The federal government did not begin to directly legislate against foreign agent involvement in elections until the early 20<sup>th</sup> century. The first restriction on foreign agent influence in political elections came during World War I, as Americans worried about the use of their new airwaves to transmit enemy signals, or to jam American transmissions.<sup>32</sup> The Radio Act of 1912 forbade foreign nationals from owning radio stations. After the Act was passed, several incidents instigated fear and expanded restrictions. In particular, two radio stations in the eastern United States independently communicated with foreign vessels at the outset of World War I, causing concern that ownership alone would not prohibit foreign control.<sup>33</sup> In addition, German nationals applied for radio stations under the auspices of a United States company, leading to concern that foreigners could play a shell game with our laws.<sup>34</sup> These incidents, among others, led to an expansion of the foreign ownership restriction in 1927, which limited buyers where 20% or more of the underlying ownership was foreign.<sup>35</sup> The Radio Act of 1927 “was intended to preclude any foreign dominance in American radio.”<sup>36</sup>

The initial impulse, derived from the fear that American technology would be used to spy—akin to the concern of American guns being used to shoot—shifted to a concern about foreign use of the airwaves to communicate to the public on political issues. “Espionage and propaganda” were the twin concerns

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30. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 83 (2001).

31. ALAN P. GRIMES, *THE PURITAN ETHIC AND WOMAN SUFFRAGE* 94 (1967).

32. See NAT'L TELECOMMUNICATIONS & INFO. ADMIN., U.S. DEP'T OF COMMERCE, SPECIAL PUB. NO. 93-290, *GLOBALIZATION OF THE MASS MEDIA*, 78-79 (1993); James G. Ennis & David N. Roberts, *Foreign Ownership in U.S. Communications Industry: The Impact of Section 310*, 19 INT'L BUS. LAW. 243 (1991).

33. Rita Zajacz, *Liberating American Communications: Foreign Ownership Regulations from the Radio Act of 1912 to the Radio Act of 1927*, 48 J. BROAD. & ELEC. MEDIA 157-178 (2004), available at [http://pdfserve.informaworld.com/491836\\_731558509\\_789375103.pdf](http://pdfserve.informaworld.com/491836_731558509_789375103.pdf).

34. *Id.*

35. Communications Act of 1934: Hearings on H.R. 8301 Before the House Comm. on Interstate and Foreign Commerce, 73d. Cong., 2d Sess. 26 (1934), reprinted in *A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934* at 343, 372 (Max D. Paglin ed., 1989).

36. *Id.*

arising from “the foreign dominance of the cables.”<sup>37</sup> The law not only forbade this kind of ownership, but also put great pressure on the Communications Commission “to discover and prevent any alien, criminal or other improper control of radio broadcasting stations.”<sup>38</sup> The FCC’s current rule allows the Commission to refuse to license companies where more than 25% of the stock is held by foreigners if, in its judgment, foreign ownership does not “serve[] the public interest.”<sup>39</sup>

As World War II began, the focus on foreign influence expanded to include a concern over Nazi activities in the United States. The investigations of the House Un-American Activities Committee of 1934, formed to probe Nazi activities in the United States, resulted in the passage of the Foreign Agents Registration Act.<sup>40</sup> Enacted in 1938, FARA was designed to protect Americans from foreign propaganda by requiring foreign agents to identify themselves, identify who they worked for, disclose their activities, and file and label political propaganda.<sup>41</sup> FARA covered:

[P]ersons in the United States representing foreign governments or foreign political groups, who are supplied by such foreign agencies with funds and other materials to foster un-American activities, and to influence the external and internal politics of this country, thereby violating both the letter and the spirit of international law, as well as the democratic basis of our own American institutions of government.<sup>42</sup>

In 1942, the Act was amended to require “political propaganda,” as defined in the Act, to be labeled and identified.<sup>43</sup> The goal was to give people the capacity to “appraise [foreign agents] and the purposes for which they act.”<sup>44</sup> The Act, still in effect, also requires an agent to register propaganda and to submit it to the Attorney General.<sup>45</sup> The Act has a broad scope; there is no need to show that the foreign agent controls the editorial content in order to trigger

37. *Id.*

38. *Heitmeyer v. Fed. Comm’n Comm’n.*, 95 F. Supp. 2d 91, 99 (App. D.C. 1937).

39. 47 U.S.C. § 310(b)(4) (2000).

40. H.R. Res 198 73d Cong., 2d Sess. (1934), 78 Cong. Rec. 13-14 (1934).

41. *See* Am. Jur. 2d, Lobbying §§ 12, 13. *See also Att’y Gen. v Irish Northern Aid Comm.*, 346 F. Supp. 1384, 1388-1390 (SDNY 1972), *aff’d without opinion*, 465 F.2d 1405 (2d Cir. 1972).

42. H. R. Rep. No. 1381, 75th Cong., 1st Sess., 1-2 (1937).

43. An Act to authorize the Secretary of the Navy to proceed with the construction of certain public works, and for other purposes, Pub. L. No. 77-531, ch. 263, §§ 1, 4, 56 Stat. 248 (1942).

44. H.R. Rep. No. 1470, 89th Cong., 2d. Session. (1966); 1966 U.S.C.C.A.N. 239-8 (1966); *Viereck v. United States*, 318 U.S. 236, 241 (1943) (“The general purpose of the legislation was to identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda, and to require them to make public record of the nature of their employment. But the means adopted to accomplish that end are defined by the statute itself, which, as will presently appear more in detail, followed the recommendations of a House Committee which had investigated foreign propaganda. These means included the requirement of registration of agents for foreign principals-with which it appears that petitioner complied-and the requirement that the registrant give certain information concerning his activities as such agent.”).

45. 22 U.S.C. § 614.

the filing and labeling requirements.<sup>46</sup>

Foreign involvement in elections became a major concern in the 1960s. As the role of money in federal campaigns mushroomed, the locus of fear switched from propaganda to lobbying. The cost of television ads and the professionalization of election campaigns led to an enormous need for big money in political campaigns,<sup>47</sup> and some foreign governments were willing to supply that money.<sup>48</sup> In the mid-60's, William Fulbright held hearings on how foreigners were indirectly funding Nixon's campaigns by funneling contributions through American counterparts.<sup>49</sup> The hearings focused on sugarcane growers from the Philippines who were interested in lobbying Congress on agriculture policy, and also on Israeli interests lobbying on behalf of the Israeli government.

After the hearings, Congress amended FARA. The amendments prohibited foreigners or their agents from funding any election campaigns.<sup>50</sup> FARA also required foreign agents who hired lobbyists to register, and in so doing, to indicate what the lobbyist is hired to do. The 1966 amendments also limited FARA's focus to political or semi-political activities.<sup>51</sup> Notably, FARA applies to governments and insurgent groups, even those not recognized by the United States.<sup>52</sup>

In short, the current restrictions on extraterritorial electioneering derive from four very different sources: Constitutional limitations, the FCC and fear of foreign use of media for electioneering, FARA and the fear of foreign lobbying, and the FEC and the fear of foreign use of money for election influence. It is an interesting regulatory blend, and one without a particularly coherent ideological core. More importantly, these four siloed efforts to control extraterritorial influence in elections are about to be severely strained by new technologies.

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46. See *Irish Northern Aid Comm.*, 346 F. Supp. 1384; FED. R. EVID. 366.

47. GARY ROSE, *CONTROVERSIAL ISSUES IN PRESIDENTIAL SELECTION* 135 (1991).

48. See RANDALL BENNETT WOODS, *FULBRIGHT: A BIOGRAPHY* 302-310 (1995); *Activities of Nondiplomatic Representatives of Foreign Principals in the United States: Hearings Before the Committee on Foreign Relations, United States Senate*, 88th Cong. 30-40 (1963).

49. WOODS, *supra* note 48, at 308-09.

50. Act to Amend the Foreign Agents Registration Act of 1938, Pub. L. No. 89-486, 80 Stat. 3, §§ 244-50. (1966).

51. S. Rep. No. 875, 88th Cong., 2d. Session, I (1964).

52. There are many other statutory limitations on foreign ownership that might bear upon these points, many falling under the bailiwick of the Committee on Foreign Investment in the United States ("CFIUS"). See, for example, the creation of the Department of Homeland Security, and the publication of both the National Strategy for the Physical Protection of Critical Infrastructures and Key Assets, and the National Strategy to Secure Cyberspace, 31 C.F.R. § 800.601 (2008) (allowing the President to deny banking if there is national security concern about foreign ownership or control).

### III. THE TECHNOLOGICAL FRAMEWORK

New technologies enable new kinds of politics. This was true for radio (FDR's fireside chats), trains (Truman's whistlestop tours), telephones (phone-banking), airplanes (Lyndon Johnson), and television (Jack Kennedy); and is now true for the new technologies associated with the Internet. Free online phone calls, email, cheap text messages, a world wide web, and newspapers accessible from anywhere have enabled a world in which people from other countries can access some of the most important tools in election organizing. As the Internet becomes the hub for both fundraising and organizing, people living 1,000 miles away from a congressional district have nearly equal access to a given hub as that district's constituents do. This particular suite of technologies changes who can read political news, who can write it, and who can organize to change it. The Internet enables international and cross-national political electioneering to a greater degree than any prior technological development.

There are certain elements of the political process that cannot be directly performed by people outside of the country. These include activities such as precinct walking, purchasing television ads, and controlling the opinion page and slant of a locally owned paper. Most importantly, people outside the country may not give money to political candidates.<sup>53</sup> Nonetheless, almost all other political tools are accessible to people around the globe. Individuals worldwide have the capacity to read the political news (therefore making it more likely they can effectively respond to it and impact the political conversation); the capacity to write political news for a local blog or a newspaper that is available in the United States; the capacity to make essentially free phone calls and emails; and the capacity to create miniature news services (like Moveon.org) from an international, political perspective.

In this section I provide an overview of some of the new technologies and the ways in which they will directly change the political environment of American elections.

#### *A. Broadcast Media and Blogs*

Newspapers have traditionally played a central role in political campaigns, from the front page where stories are told, to the editorial page where vitriol and praise are shared. Local papers closely track candidates, and their editorializing can make or break an election. Newspaper politics are a national political tradition, and are deeply intertwined with the history of our mass democracy. In the first federal election, "anonymous political pamphlets and newspaper articles remained the favorite media for expressing views on candidates."<sup>54</sup> Newspapers

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53. 2 U.S.C. § 441(e) (2008).

54. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 369 (1995).

have played a “unique role” in “informing and educating the public, offering criticism, and providing a forum for discussion and debate.”<sup>55</sup> Elections are won, as the Supreme Court explained in 1941, through “the meeting-hall, the radio, and the newspaper.”<sup>56</sup>

Today, newspapers are increasingly read online and written for online readership. One in three Americans now regularly reads news online,<sup>57</sup> and this number is likely to increase. While as of 2006, “the discrete online-only newspaper audience [was] quite modest in size,” it is growing rapidly.<sup>58</sup> Many Americans read their news both online and offline, suggesting that we are in a transition period.<sup>59</sup> For people under 35, more read the online version of the newspaper than the paper version.<sup>60</sup> Major portals like Yahoo and Google that aggregate news from multiple newspapers and blogs are increasingly becoming the source of contemporary news. Moreover, the role of traditional newspapers is clearly declining. “Of the 23% who got news on the Internet yesterday, only a minority visited newspaper websites. Instead, websites that include quick updates of major headlines... dominate the web-news landscape.”<sup>61</sup> Aggregators regularly take content from newspapers around the world.

Two powerful implications follow from this trend toward online news consumption. First, the source of local political news can be extraterritorial. Second, people outside the country can read local news. I discuss each in turn.

While people may still be inclined to read news about local issues, readers are not limited to local writers and publishers. Facts and opinions generated by foreigners are an increasing fraction of the news landscape, and are only likely to become more so. This changes the local reader’s experience.

Imagine a Detroit woman reading about the potential closing of a Ford plant in her city. Twenty years ago, she would get the paper version of the paper and watch the news, receiving reports of the closing from local writers whose agendas were somewhat shaped by local newspaper and TV owners. Now, she might go online and type “Ford closing Detroit” into Google. She will likely find some local stories, but if people in other parts of the world have an interest in the closing, she may also find stories by them. Foreign sources may have interviewed local workers using cheap, Internet based phone services and email.

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55. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 781 (1978). See also *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”).

56. *Bridges v. California*, 314 U.S. 252 (1941).

57. PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS: NEWS CONSUMPTION AND BELIEVABILITY STUDY, p. 9 (2006), available at <http://people-press.org/reports/pdf/282.pdf> (hereinafter PEW NEWS 2006).

58. *Id.*

59. *Id.* This coincides with a general trend away from news readership altogether.

60. PEW NEWS 2006, *supra* note 57.

61. *Id.*

Those stories may read much like a local story. The reader can experience foreign and local perspectives relatively seamlessly.

On the national news level, this is both more plausible and more pronounced. A random visit to Google News<sup>62</sup> revealed several headlines from U.S. papers, but also headlines from the United Kingdom's Guardian, a top headline from Canadian National news, as well as headlines from Aljazeera, Prensa Latina, VietnamNetBridge,<sup>63</sup> the Economist, the Financial Times, the Sydney Morning Herald, Xinhua, Toronto Star, the Ukrainian ForUm, the Times of India, and Russia Today. When it comes to the United States' presidential politics, all of these papers have something to say, and they may be nearly as easy to find as articles in domestic papers.

People are being exposed to new and different media perspectives. Among the foreign voices represented in online sources are those of individuals, governments, organized activist groups, and companies. Many foreign newspapers are directly subsidized or controlled by government entities, or by corporate entities with their own political agendas. Many include voices or perspectives that, previously, would have been impossible to hear.

Nine percent of individuals between the ages of eighteen and twenty-four regularly read blogs that cover news related issues<sup>64</sup> and while news readership is declining among young people, the percentage of the news that is read on blogs is increasing.<sup>65</sup> Blogs, like most online newspapers, are freely available to anyone who has an Internet connection (and is not censored by the local government). Many blogs have developed in an international context, and the line between local and foreign blogs is often indiscernible because blogs are grouped by topic-area more than by place.<sup>66</sup>

Citizens of other countries can read, comment on, and contribute to political blogs that are widely read by political junkies, news reporters, and voting citizens. Boing-Boing, one of the most popular blogs in the country, is co-edited by Canadian Cory Doctorow.<sup>67</sup> Global Voices, another popular blog that brings together voices of activists and writers all over the world, was set up

62. This particular visit was 11:17 AM EST (August 28, 2007).

63. VietnamNet, a project of VSAC, a State-owned enterprise under the Vietnam Post & Telecommunications Corporation, gets over 300 million hits every month. See <http://english.vietnamnet.vn/utills/aboutus.html>.

64. PEW NEWS 2006, *supra* note 57.

65. *Id.*

66. Of course, topic and place overlap, but they need not. For example, a Jordanian very interested in United States affairs can easily join the United States' political discussion by blogging about it.

67. According to Alexa, a web information company that tracks the global popularity of websites, on August 28, 2007, Boing-Boing was one of the top 700 most read websites in the United States, of any kind. *Available at*

[http://www.alexa.com/site/ds/top\\_sites?cc=US&ts\\_mode=country&lang=none](http://www.alexa.com/site/ds/top_sites?cc=US&ts_mode=country&lang=none).

to encourage greater international content in the blogosphere.<sup>68</sup>

Political bloggers regularly encourage cross-jurisdictional campaigning, and report on cross-jurisdictional issues. The Daily Kos, a popular liberal blog, actively encourages people from across the country to support specific candidates in local elections, and the shift to international support is likely to happen soon. When Stanford law professor Larry Lessig announced that he was considering a run for Congress, several commenters on his blog said that they did not live in the United States but would be happy to help; some commenters said they did not live in his district.<sup>69</sup>

Relatedly, online video is a major new tool for extraterritorial electioneers. Whether on Youtube.com or on the site of a newspaper or television station, video that was once accessible only for local consumers or constituents is now available for anyone anywhere—and can be uploaded from anywhere. It is less likely that foreign video will seem to be part of the same landscape as domestic video, but it can still have profound impact. In some cases, there will be a more profound impact because of the power of strange and unlikely images. A Chinese company can videotape images of factories and put them online—perhaps even on the website of the candidates' local newspaper—as part of support for a new free trade pact, or in support of candidates who support that pact. But Chinese labor union activists can include graphic images of beatings in response to that support, introducing emotional foreign video into a domestic political fight.

The accessibility of these forms of international broadcast changes the political media experience in a few important ways. First, it means that anyone anywhere in the world, if they can speak English, and have access to high speed Internet, can closely follow a political race in the middle of the United States. This puts a foreign reader in a much better position to influence the race. Ten years ago, the Shanghai resident who wanted to support an American free trade candidacy for Congress would have had to pay for daily newspaper access (which can be quite expensive), and would have only been able to follow what was written about in his newspaper of choice. The deeper information available by being able to go to local blogs, reading comments, and using search functions allows that same Shanghai resident to—if he so wishes—follow the race as closely as any citizen in the representative region. He will miss only two key ways of gathering candidate information: (1) going to a candidate forum (which few do, regardless, and which is increasingly videotaped); and (2) gossiping about the candidate with local friends who may know information and have insights that do not make it online. If the candidate of interest is at the state

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68. <http://globalvoicesonline.org>.

69. On his blog, [lessig.org](http://lessig.org), Lawrence Lessig wrote that he was considering a run for Congress and, over a period of several weeks, hundreds of commentators chimed in. While some are from his district, several announce that they are not. See Lawrence Lessig, "On Why I'm Not Running," <http://lessig.org/blog/2008/02/> (February 25, 2008).



level in a larger state, or the national level, the amount of knowledge accessible by the Shanghai resident and the New York resident is barely distinguishable, because so much of the political gossip makes it online quickly, and even at high attendance rates, a small percentage of residents actually attend live forums.

Moreover, foreign newspapers and foreign bloggers are now in a position to directly influence a campaign. Ten years ago, an editorial by an Indonesian paper on a presidential candidate would have been difficult to find using an English-language Internet search engine. Now, that same editorial will get prominence related to its interest on the website aggregators.<sup>70</sup> Indonesians can read about American candidates; Americans can read about Indonesian attitudes. While for many, the Indonesian papers' editorials may not seem pertinent, we are still a nation with a substantial immigrant population, and if a foreign opinion piece is written with an American domestic audience in mind, it may well reach it.<sup>71</sup>

Finally, although foreigners cannot advertise on U.S. websites, they can advertise online through non-U.S. sites. A Japanese company can buy up anti-McCain spots on Guardian.com, a British news source that is not filtered in the United States. The old logistics of advertising—and the legality of advertising—in another country around election time made it functionally impossible for someone or some company from outside the country to pay for political advertisements that would be read. Now, a company can easily buy political ads that will reach other countries through their readership.

In sum, the most common ways in which people learn about political news—broadcast media and blogs—are not restricted by national borders. This expands the scope of electoral information available to local residents from non-local residents, ranging from news to opinion to spin to analysis, and simultaneously expands the opportunities for non-residents to keep close tabs on—and therefore be in a position to influence—elections in other parts of the world.

### *B. Email, Text, Instant Message*

Email has become the favorite fundraising tool of candidates and a new kind of activist journalism. Candidates create email lists of millions of supporters, and then use those lists to distribute openly biased news, to garner support for the candidate, to raise funds, and to organize support. These weekly broadsheet-like missives, collectively, shape the narrative of the political campaign. At the same time, activist groups and individuals have developed

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70. An aggregator is a website that does not itself produce content but aggregates syndicated content from other websites. For example, Yahoo's home page, is an aggregator, as is the Google News website. See <http://www.yahoo.com>; <http://news.google.com>.

71. In 2003, eleven percent of Americans were foreign born. Luke J. Larsen, *The Foreign Born Population in the United States: 2003*, U.S. CENSUS BUREAU, (August 2004), available at <http://www.census.gov/prod/2004pubs/p20-551.pdf>.

massive email lists around particular ideologies or interests. Moveon.org is paradigmatic, but not alone: there are dozens of email lists with millions of members, hundreds of political email lists with more than 10,000 members, and thousands of political email groups of 10-10,000 members.

Email lists raise millions of dollars for campaigns and get out the vote efforts, but they also change the way Americans talk about candidates. The narrative arch of the campaign and the language used to describe candidates is taken from a campaign directly into an intimate email box, where people think, read, write, and shape their own internal monologues about the day. The casual, insecure gossip of politics, such as, "I hear that Bill Richardson might be a little shady," may increasingly come from activist email, not from TV ads (which have great capacity to shape the images populating our political world, but more limited capacity to shape the grammar of our political thought).

But the existence of massive email lists (and their relatives, instant message lists and text message lists), also changes who can write—and who can read—American electoral and political narratives.

Anyone with access to the Internet can sign up for email updates from candidates, and learn the candidates' own narratives. Like tracking the political blog of a candidate, these emails give supporters and detractors alike a window into the candidates' own strategies and make it easier to support (or contradict) those strategies. The email lists also allow recipients to respond, and campaigns make some effort to categorize and use those responses. However, since neither an ISP nor an email address tells you who is an American national, out-of-country responses can easily be lumped in with domestic responses (this is true for blog comments as well). Inasmuch as candidates are sensitive to Internet responses as a proxy for Internet support (and therefore fundraising), an active foreign effort, at least in the early years, can conceivably impact a candidate's approach to particular policy issues.

When you move outside of candidate email lists to the growing powerhouses of non-candidate email lists, the potential role of foreigners is even greater. A Spaniard can start an anti-gun activist email list that millions of Americans then join, and can regularly update the readership on related issues. A foreign airline can solicit millions of email addresses of passengers, and then use those names to share political messages.<sup>72</sup> As American activists on the left and right cast about for online communities, including massive email lists to join, they can cast across the whole world, and anyone can cast back at them.

In sum, activist communities that have constituted themselves using email are not geographically limited, and enable foreigners to closely follow, and even

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72. As this article was being written, a consortium of Airlines, including several dozen American airlines and foreign airlines such as Alma de Mexico, created a massive online email campaign. They asked members on their email list, which probably includes over a hundred million customers, to contact members of Congress.

[http://www.stopoilspeculationnow.com/site/page/sos\\_now\\_supporters](http://www.stopoilspeculationnow.com/site/page/sos_now_supporters).

influence, campaign strategies, while simultaneously allowing foreigners to start political activist email or news groups themselves.

### *C. Skype and One-on-One Email*

Email, VOIP and Skype, free online conference calling, and instant messaging, have all reduced the cost of one-on-one or small-group cross-border conversations. Prior to the development of these new technologies, communicating one-on-one with people from other countries took much more time, was much more costly, and was difficult to expand to small groups.

In prior decades, the possibilities for two-person and small-group action across countries were fairly limited. That is no longer true. An interested individual in India can easily communicate with conspirators and like-minded people in the United States, be that individual a company owner, a politician, or a human rights activist. As Margaret Mead famously noted—and Mancur Olson persuasively modeled—small groups are often the most important agents of political change.<sup>73</sup> Before the Internet, it was possible but extremely difficult for small cross-border groups to form and have enough interaction to create a true locus of power. Because of the Internet, for example, seven people from different countries can regularly meet and plan means of change within the United States.

Together, email, free phone services, conference calling and instant messaging that together form a vibrant space that enables cross-border group formation. Initial contacts can be made through email, as people try to get to know each other and can be followed up through instant messaging and Skype. Then small groups can regularly stay in touch and scheme (much like many home-based Internet companies, with people living in several different states) to plan campaign ads, campaign events, and organizing efforts.

### *D. Social Networking Tools and Organizing Tools*

Similarly, social networking tools and organizing tools allow people not in the country or region to set up meetings and allow for looser groups. The Internet allows a kind of long-distance organizing with the capacity to set up and advertise events in foreign countries. In the run-up to the 2004 presidential election, a Connecticut grassroots organizer told a story of planning an event in Seattle using online organizing tools, and about 150 people showed up. Slightly confused that the organizer was not there, they nonetheless went forward with the event.<sup>74</sup> An event organizer needs to coordinate times, pull together (and

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73. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 52 (1971).

74. Aldon Hynes, *A Coder Becomes a Political Activist*, in *MOUSEPADS, SHOELEATHER & HOPE: LESSONS FROM THE HOWARD DEAN CAMPAIGN FOR THE FUTURE OF INTERNET POLITICS* 94 (Z. Teachout and T. Streeter eds.) (2008).

email) materials, and contact the local press. All of these tasks are possible from afar.

Similarly, several political campaigns and advocacy organizations have used the Internet to do long-distance phone-banking. Within the country, distributed phone banking and distributed letter and email writing are becoming a norm for national campaigns. These distributed tools allow people to call or write letters from a list they download online, and then report back to the campaign the result of the call or missive. Most campaigns, and many nonprofits, have used their email lists and web audiences to engage in systematic calling in increasingly sophisticated ways. By 2004, we saw systems set up wherein California mothers were calling mothers in Iowa, and Texas Latinos were calling Latinos in Michigan; these systems enabled real connections to be made by matching undecided voters to superficially similar activists who had no vote.<sup>75</sup> We can anticipate that cross-border phone banking or whatever its contemporary analog will become normal within a few decades.

Such strategies are already routine within the United States. Again, when Larry Lessig announced that he was running for Congress in California's 12<sup>th</sup> district, a Cambridge, Massachusetts resident set up a Facebook group, which 4,000 people joined within three days.<sup>76</sup> The group used a free conference call service to connect 100 people on three occasions, and established a fundraising arm, a media arm, and an organizing arm. Fundraising events and local, intra-district events were set up by these key organizers, none of whom lived in that district.

### *E. Extraterritorial Lobbying*

The technological advances discussed above are happening as the lobbying industry gains unheard-of strength in our political system. People from outside the country have learned how to transform foreign money into American political support. While foreigners cannot directly contribute to election campaigns, they can hire lobbyists who themselves contribute to campaigns in order to gain access on behalf of their foreign clients. They can pay for extensive research that supports their position, pay for conferences that tend towards their position, and pay for newspaper and television support for their position.<sup>77</sup>

A total of 426 active Foreign Agent lobbying registrations, representing

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75. Author's own experience.

76. Author's own experience.

77. Increasingly little shame is associated with American elites aggressively using their positions to further these foreign interests. Bob Dole, for one, has sold his services—his access, that is—to Oleg Deripaska, a Russian oligarch with close ties to Putin. Dole's wife, the Senator Elizabeth Dole, has barely been rebuked by her constituency in North Carolina for these influences, underlining what seems obvious: we expect, and therefore condone, people with public power selling that public power to foreign bidders.

591 foreign principals, were filed in the first six months of 2007.<sup>78</sup> There were ninety-one new agreements during that time alone. Randomly picking from that six month sample, Angola spent over a million dollars; Algeria just under \$100,000, and the President of the Republic of Congo spent \$250,000 explicitly for cultivating Members of Congress. The Cote D'Ivoire spent over \$300,000 on Congressional lobbying. Equatorial Guinea spent over \$500,000 to make sure members of Congress knew about their progress on human rights. The fees are tied to assurances of access, and often to people who have reason, through contributions and contacts, to be able to promise that access. Cassidy & Associates represented Pakistan in a \$1.2 million per year contract.<sup>79</sup> For that money, Cassidy agreed to “target audiences [who] will be identified for critical message reception,” and to move beyond pushing pieces in the mainstream media to a focus on blog outreach.<sup>80</sup> Pakistan's lead lobbyist was Robin Raphel, who served in the Clinton administration.<sup>81</sup>

Lobbyists and lawyers for African dictators and Middle Eastern sheiks donate heavily to Presidential campaigns. DLA Piper, a massive campaign contributor, represents the President of the Cote D'Ivoire, the Prime Minister of the United Arab Emirates, the Government of Ethiopia, and the Government of Turkey in the United States. For a fee of \$1.2 million per year, DLA Piper agreed to provide Turkey with lobbying and governmental relations services including, but not limited to, “[p]reventing the introduction, debate, and passage of [domestic] legislation that harms Turkey's interest or image.”<sup>82</sup> The lawyers who work for the firm give heavily to campaigns. Presumably, they bias their giving towards candidates who, at a minimum, are not radically opposed to their clients. All told, DLA Piper staff has given over half a million dollars to candidates in the 2008 election cycle.<sup>83</sup> Even if the staff are not seeking out candidates who actively support Turkey's diplomatic goals, it's a fair guess that attorneys working on the contract are not likely to give to candidates who openly oppose them.

Extraterritorial lobbying will substantially increase over the next several years, as foreign governments, companies, and countries study the ways which lobbying can help their trade and image aims in the United States. Given the amount of money the law firms who work for these clients make on the contracts, and the amount of money the lawyers then give to candidates, there is almost surely some kind of impact on elections from these foreign clients.

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78. <http://www.usdoj.gov/criminal/fara/reports/June30-2007.pdf>.

79. <http://www.fara.gov/docs/5643-Exhibit-AB-20071004-4.pdf>.

80. *Id.*

81. Kevin Bogardus, *Cassidy withdraws Pakistan lobbying contract*, THE HILL, Nov. 8, 2007, (Online ed.) available at <http://thehill.com/leading-the-news/cassidy-withdraws-pakistan-lobbying-contract-2007-11-08.html>.

82. <http://www.fara.gov/docs/5643-Exhibit-AB-20071004-4.pdf>.

83. This is a very conservative estimate, based on searches in Open Secrets for donations by DLA Piper employees. [www.opensecrets.org](http://www.opensecrets.org).

## IV.

## THE FUTURE OF EXTRATERRITORIAL ELECTIONEERING

Until now, the legal regime limiting extraterritorial influence was able to manage the strategies and technologies available to potential political actors. While foreign agents interested in influencing elections could design complicated ways to influence particular elections, the basic structure—limited lobbying, limited paid television advertising, forbidden direct contributions, and constrained media ownership—worked, in the sense that foreign interests were not a major part of American elections.

If the current regulatory regime persists, this will change. Two facts interact to make this almost inevitable: the first is the importance of American policy—trade policy, subsidies, tax policy, military policy, alliances, nuclear policy, energy policy—to billions of people and most nations. The second fact is that described in the previous section: the Internet enables many new channels through which energy and money can be poured from outside the country to impact the framing, message, and mobilization of local campaigns. We don't need to assume that foreign actors are particularly brilliant or only interest-maximizing to suppose that billions of dollars and substantial political energy will be spent attempting to influence American elections at the federal and state levels.

What will this new election ecosystem look like? Foreign private interests will put substantial money into viral videos about candidates; foreign newspapers will editorialize with an eye to actually influencing elections, not merely expressing opinions; foreign television stations, broadcasting online, will do the same. Foreign unions will fund cross-national phone banking, literature drops, and door-to-door canvassing around issues that are likely to influence elections. Foreign governments will funnel money into organizations that do all of these kinds of electioneering. While some of this is already happening, it is at a small level. However, in twenty years, a third of all the money spent on some key elections for Senate, Congress, and governorships will come from non-American interests.

Charges of foreign ties will be used by candidates from both sides, but just as charges of ties to "shadowy 527s" have not deterred the 527s from actively attempting to shape the stories around elections, these charges will probably not deter the foreign groups.

The vast majority of these activities will either be legal or, if illegal, their prohibitions unenforceable. In cases where foreign countries violate American election law, the United States' government will have to determine what impact these violations should have on other diplomatic relations. In cases where foreign countries' governments have indirect connections, or there is a company or group inside a country, the response of the American government will be even trickier. Can you really punish a country for "harboring election law

violators?" What might that punishment look like? This will put an enormous strain on the Federal Election Commission, which has already been stressed by the advent of the Internet.<sup>84</sup>

At the most pedestrian level this change will require institutional cooperation. Lobbying, media influence, and door-to-door canvassing are all very different activities of course, but their difference depends somewhat on the perspective of the person thinking about them. The FEC lawyer and the FCC lawyer are likely to view their jobs very differently, and therefore the activities that they are regulating very differently. To them, tactics matter; an editorial is governed by the FCC, a campaign ad by the FEC.

A foreign state or actor, however, may be more likely to see continuity between these different tactics. From the perspective of the foreign entity seeking to block or promote a candidate's election, electioneering has less to do with the particular strategy used than with the ultimate goal. Instead of understanding actions as tactics, they understand them in the context of campaigns: the Senate/tariff campaign, the subsidies campaign, or the environmental standards campaign, for example. In order to effectively regulate a foreign actor in American electioneering, the campaigns must be approached and regulated in a more unified way, and information gathered by the FEC, the FCC, and other departments must be coordinated.

But the institutional challenge masks the more serious question; how ought we, collectively, think about foreign influence on domestic elections? What are the root concerns, or best reasons for celebration? Ought our response depend upon the size of a campaign, the nature of the speaker, the nature of the campaign, the nature of the issue, the connection between the actor and the issue, the accuracy of information, or something else?

Is it possible to craft a regulatory response that balances the competing aims of self-government and the important practical role of protecting sovereignty?

#### *A. The Interest in Self-Government*

The center of the democratic promise is the idea that people control the rules of their own community and collectively direct their laws. They make decisions about the way they want their community to look and then attempt to implement those decisions through a set of rules, punishments, and actions. Whether or not expressed negatively (the freedom from others' domination) or positively (the freedom to control one's own actions), self-government describes a state of affairs where the people have control over the institutions that coerce and constrain or enable their behavior. Of course this is not a binary condition (either you have it or you don't), but something that is necessarily a matter of

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84. See, e.g., ANTHONY CORRADO ET AL., *THE NEW CAMPAIGN FINANCE SOURCEBOOK* 248 (2005).

degree.<sup>85</sup> Self-government requires ongoing intimacy between people who are governed and the levers of power. Representative democracy, unlike direct democracy, includes a barrier between citizens and representatives, but gives citizens enough leverage to hold their representatives accountable: when representative democracy works, citizens can still captain the enterprise. That closeness to the levers of power must exist in two ways: in the relationship of an individual to new laws that govern her or him, and over time. People must have means of exercising power over decisions that govern them; if there are barriers to exercising this power, such as exorbitant fees for voting, inadequate information, or lack of transparency in the decision-making process, self-government cannot be achieved.

One might argue that self-government is best served when only those people who are directly subject to a country's laws are responsible for promoting and electing their representatives. Therefore, the right to electioneer would depend upon the degree to which laws impact someone's life. Under this framework, if just one-tenth of the 5.5 billion people outside the United States are directly affected by American policy, there would be almost as many non-Americans as American citizens who would be entitled to contribute to the conversation about U.S. policy. This immediately gets tricky, however, because "impact" is not easily quantifiable. Does an Iraqi who is killed because of the American invasion of Iraq have a greater or lesser "impact" on his life than the soldier who killed him? What is the relative "impact" experienced by a Nigerian farmer who loses his job, a Hungarian worker who starts working for an American company, or a Chinese entrepreneur who can sell to the United States because of American policy? Do you measure "impact" by numbers of encounters? What is the baseline from which you measure impact—is impact measured by how much a life has been changed as an adult (which would privilege foreign speakers) or by how much a life has been shaped (which would privilege American speakers)?

Self-government is a hedge against violence, a natural law right, a low-risk approach towards achieving happiness for the greatest number, a way to cause empathy, and create more mature and interesting people, and a way to enable the highest form of human achievement in politics. It is a constitutional promise, a part of our political mythology, and the basis of America's favorite hope: freedom. It is a protection against the material abuses that easily follow from one or a small group of people exercising arbitrary power over others. The non-dominated individual is less likely to go hungry or be tortured, because he has some say in the matter. The completely dominated individual could arbitrarily be given all kinds of material goods, but also could be used as a body, a work-horse, a symbol, or ignored and left to starve. He has no power or voice in the future of his own body. In this material story of self-government, the primary

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85. Absolute self-government is impossible. Self-government only exists in pure form as a single individual who controls his own fate, completely un-coerced by others.)



way in which we understand its value is the physical life of the individual. Self-government protects the dignity of individuals against the humiliation of another's control. The positive, dignity-based justification for self-government focuses more on the powerful, positive, personal and psychic effects of having power in the world. The ideal is much more the personal dignity that flows from self-mastery than the material gains that are likely to come from not being dominated.

But the ideals of self-government necessarily cut both ways when it comes to extraterritorial electioneering. How should the American people respond to a series of videos about Candidate John McCain's personal life made by Hugo Chavez's government? Venezuelans in general are directly impacted by the foreign policy preferences of the American Government. Hugo Chavez has been popularly elected there, though with some troubling distortions of the media in the elections. In this hypothetical, Chavez's government chooses to use personal attacks because they are effective, even though the real reason for the attack might relate to a preference for an Obama trade policy. Does this set of attacks enhance self-government?

### *B. The Sovereignty Interest*

The other most prominent concern in extraterritorial electioneering is the interest in state sovereignty.

Sovereignty is the right of a government to control its own affairs within its own territory. It assumes states' political independence and territorial integrity. It is presumptively perpetual and inalienable and it is part of the very meaning of statehood. The initial expression of the idea was monarchic; it was implicated, for example, when kings in the Peace of Westphalia promised not to invade each other. Generally, sovereignty is still thought to exist regardless of the form of government, assuming that there is some form of government beyond anarchy. The recognition of sovereignty by other nations is a critical moment in a nation's role in the international sphere, because along with recognition comes the commitment to outrage—if not action—if that country's borders are violated.

The Internet raises a host of new questions about the scope of sovereignty. For example, accusations that the Russian government was behind cyber attacks on the Georgian Internet infrastructure has led to questions about how, in international affairs, to code such behavior. Less violently, use of the Internet for cross-border electioneering also raises issues of sovereignty.

While there are many exceptions, the assumption of sovereignty remains a key to relatively peaceful international affairs. The outrage and condemnation of states that violate other states' sovereignty provides a powerful and helpful disincentive to incite war, anarchy, and various other things generally regarded as bad and violent. Therefore, whether sovereignty is a true "right" in an absolute sense or a well-established habit, it plays an overwhelmingly useful

role in keeping the world from destroying itself.

A nation's sovereignty gives rise to legal and military disputes. Foreign planes flying without permission over a country's airspace can be shot. Foreign submarines entering another nation's waters can be torpedoed. But words entering foreign space demand a different kind of defense: sometimes they are censored, and sometimes that censorship is defended upon grounds of sovereignty. It is one of the "most fundamental postulate[s] underlying the state system" that "one does not try to control political developments in foreign societies."<sup>86</sup> Political sovereignty has been assumed to be "basic," "fundamental," and "essential."

Until the middle of the twentieth century, the norm of non-intervention was presumed to be about one country not invading another.<sup>87</sup> In the middle of the century, that changed, presumably in part due to increased interdependency making economic leveraging more plausible, and improved telecommunications making cross-border political propaganda much easier. In this broadened context, the principle of sovereignty demanded that one country not attempt to directly influence elections in another.<sup>88</sup> This commitment is reflected in international agreements.<sup>89</sup>

Many treaties include provisions making clear that states can exclude foreigners from participating in local politics.<sup>90</sup> However, the practice of states, which show "a substantial pattern of governmental involvement in transnational electoral assistance" at a minimum "cast[s] doubt on the proposition" that states consider extraterritorial electioneering unlawful per se.<sup>91</sup>

In January 1989, less than a year before the Berlin wall fell, Professor Lori Damrosch wrote an important piece about sovereignty, international law, and politics across borders.<sup>92</sup> In the context of the cold war, both the Soviet Union and the United States were both actively engaged in the elections of border-countries. The international law community tended to react with either support or anger, depending upon the nature of the engagement. Damrosch argued that

86. Richard Falk, *An Alternative to Covert Intervention*, 69 ASIL PROC. 195, 197 (1975).

87. Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 A.J.I.L. 1, n.8 (1989).

88. *Id.*

89. For example, the Charter for Organization of American States, to which the United States is a signatory, states a strong view of the non-intervention norm:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements. *Charter of the Organization of American States*, art. 19, Apr. 30, 1948, Org. Am. States T.S. Nos. 1-C, 61, available at

<http://www.oas.org/juridico/English/charter.html>.

90. Damrosch, *supra* note 87, at 43-44.

91. *Id.*

92. *Id.*

this context-based judgment was appropriate in international law. She considered two contexts of election interference: economic meddling intended to impact the outcome of an election, and direct campaign contributions intended to influence an election. She concluded that there was a norm of nonintervention in political affairs, with the notable limitation that the norm depended upon the political rights of citizens. When “subjugated people look outside the boundaries of the state for non-forcible assistance in asserting their own political independence,” outside countries should be able to “assist” them.<sup>93</sup> For our purposes, however, the most important part of her conclusion was that countries like the United States should, under international law, be able to pass and enforce laws restricting foreign involvement in elections.<sup>94</sup>

The resistance to foreign involvement is justified, she argues, because foreign involvement risks undermining the “political rights of the citizenry.” She describes it as a right to be free from “distortion:”

Human rights values could be in jeopardy if foreign participation were of such an extent or effectiveness as to distort what would otherwise be the free choice of the polity. The possibility is especially acute in the case of big-power attempts to influence the politics of small states; but it is not limited to that case, as small states may occasionally be able to achieve such distortion through covert or corrupt payments. [ . . . ] Observance of these principles may also serve the state system value of preventing tension between influenced and influencing states that might otherwise develop into interstate conflict.<sup>95</sup>

Sovereignty protects the political rights of the citizens, and enables much smoother interstate interaction, because there is a basic commitment that states will not try to manipulate each others’ elections. Conversely, if states always had the right to influence other states’ affairs, they might feel pressure to exercise this right, leading to convoluted internal affairs and conflict-ridden external relations.

When another government is the primary force behind extraterritorial electioneering efforts, it could destabilize relations between the two countries. As posited in the prior hypothetical, Chavez might plausibly attempt to sway the American electorate. This would only exacerbate the existing tensions between the United States and Venezuela by creating uncertainty and opening new channels of extraterritorial influence.

On the whole, concerns about sovereignty, unlike concerns about self-government, will tend to militate against extraterritorial electioneering.

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93. *Id.* at 19.

94. Sovereignty is generally understood as a right that one state can enforce against another, but not against individuals. But, I will assume for now that the same rule applies for non-state actors.

95. Damrosch, *supra* note 87, at 21, 44.

### C. The Problem of Agency

Finally, questions of agency will necessarily arise in the expansion of extraterritorial electioneering. As explained below, foreign involvement in electioneering has been extensively litigated over the past several decades. Inasmuch as there is a theme in the court decisions, it involves courts' struggles to determine who is a "foreign agent" under United States' law: a question that is both philosophically important and in need of resolution for practical, statutory purposes.

For example, one case involved a small weekly Irish newspaper, prosecuted for failing to register as an agent of a foreign principal under the Foreign Agents Registration Act.<sup>96</sup> The question was whether the publisher was acting under the direction of the Irish Republican Army, the I.R.A. The Second Circuit held that an "agent," for purposes of determining foreign agency, is defined more broadly than in the law of agency. Agency can be established without a formal written or oral contract with a foreign principal and can be found when there has been a general request for action. "Once a foreign principal established a particular course of conduct to be followed, those who responded to its request for complying action could properly be found to be agents under the Act."<sup>97</sup> This statutory question needed to be resolved in order to determine whether the publication needed to register under FARA, and the Court's logic was driven by the statutory language.

This case highlights the gravity and difficulty of resolving questions of agency in the foreign context. On the one hand, the fact that a group hopes to represent foreign interests cannot possibly be cause for labeling that group as foreign. People regularly, and promisingly, advocate positions on behalf of others that might otherwise be voiceless and unrepresented. On the other hand, once foreign money enters the equation, it is translated into domestic advocacy, and the use of levers of democracy to pursue foreign ends.

In the FEC context, several scandals and court cases have involved questions of agency, as poor and middle class donors made magnificent donations that appear to be coming from foreign interests. In 1996, a middle class Indonesian couple donated more than \$400,000 to the DNC, sparking questions about whether they, as legal permanent residents, were being used as proxies—basically to launder foreign money—by foreign business interests. The scandal led to investigations, and the DNC returned millions of dollars.<sup>98</sup> Chinese interests were also accused of laundering money through legal donors. In 1996, Democrats raised \$100,000 in donations after Al Gore visited a Buddhist temple. The temple and other donors reimbursed the monks, who make

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96. *Att'y Gen. v. Irish Northern Aid Comm.*, 668 F.2d 159 (2d Cir. 1982).

97. *Id.* at 162.

98. Bruce Brown, *Alien Donors: The Participation of Non Citizens in the U.S. Campaign Finance System*, 15 YALE L. & POL'Y REV. 503, 505 (1997).

a pittance, for their donations, channeling the money through them.<sup>99</sup>

Relatedly, major news organizations have attempted to avoid the citizenship question by becoming American corporations—raising questions about the purpose of the citizenship requirement. In 1985, Rupert Murdoch became a United States citizen in order to get around this requirement,<sup>100</sup> again calling into question the nature of agency and who is a foreign agent. If Murdoch's purpose—self-announced—was to avoid the FCC's requirements, then it calls into question what it means to be a citizen for these purposes. Although he took the oath of citizenship, he has given no indication that this oath changed his perspectives on obligations of the news reporting agency that he runs.

#### *D. Towards a New Framework*

These issues—self-government, sovereignty, and agency—are not so much competing considerations as confusing ones. They are, in sum, almost paralyzing. If six billion people are engaged in the election of 2030, the 500 million Americans will be much further from the levers of power than they were in 2004, and therefore less self-governing. At the same time, the six billion engaged people will be closer to those levers of power, and more self-governing. Individuals around the world are massively impacted by the United States' foreign policy, trade policy, environmental policy, intellectual property policy, and energy policies, just to name a few. We must find a way to responsibly consider those impacts, while allowing for meaningful, active local engagement.

This Essay is intended to be more descriptive than proscriptive, and to spark discussion about how we should think about this coming future. That said, I suggest that when we talk about extraterritorial electioneering, we give weight and thought to these six important interests as we craft policy and fumble for rhetoric to talk about self-government in a global, interconnected world:

- Self-government. The degree to which the speakers are impacted by American policy, with more solicitousness towards those who are hurt than those who are helped by the policy;
- Sovereignty. The degree to which electioneering undermines sovereignty or promotes stability;
- Communication. The degree to which it enables the flow of true information that is not otherwise known;
- Accountability. The degree to which it limits corruption, or leads to corruption;

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99. Christopher Drew and Don Van Natta, Jr., *Early Warnings on Gore's Temple Visit*, NEW YORK TIMES (June 12, 1997).

100. *See Murdoch win on Fox*, SYDNEY MORNING HERALD (July 31, 1995).

- Transparency. The degree to which the electioneers' true identities and interests are known; and
- Practicality. The degree to which a limitation on such electioneering would be difficult to enforce.

These considerations can start to provide some guidelines for how to respond to the coming wave of clever ways to bring foreign power into the election processes, without defaulting to either a libertarian or jingoist framework.

## V. CONCLUSION

Different stories of extraterritorial electioneering lead to radically different intuitions. When it comes to Al Qaeda's actual attempts to intervene in the 2004 election campaign, we recoil; when it comes to Chinese labor activists attempting to gain a voice in American foreign policy toward China, we might cheer them on. While the perceived legitimacy of each of these groups' interests varies a great deal, they take similar approaches to extraterritorial electioneering. In each case, a group represents foreign interests that are not necessarily represented by a foreign government. In both cases the foreign policy preferred by these groups is not the contemporary foreign policy of the United States. The interests cutting in favor of allowing extraterritorial electioneering and those opposed are very similar: interests in self-government and free speech.

Extraterritorial electioneering by NGOs both enables and undermines self-government. It allows people who are directly affected by American policy to have a voice in the decision of who will control their fate. At the same time, it dilutes the power and self-determination of American voters, who are directly represented by elected officials and are governed by the laws and policies those officials adopt.

The possibilities for foreign involvement in local American elections are great and growing, largely due to the Internet. These new forces require us to return to basic principles, and identify those that we want to credit and weigh moving forward. The regulatory framework is completely unprepared for this influx, but we are also unprepared as Americans in how to think and talk about it responsibly.

I have suggested an outline of how to begin to talk about these issues, but I mean it truly as an introduction, as the tensions between different ideals of self-government may be intractable. In conclusion, I'd like to suggest one final thought: that the most important protection against the dangers of extraterritorial electioneering might be stronger democratic institutions at home, instead of barriers to foreign intervention. By stronger institutions I do not just mean a working voting booth, but a deeper, societal commitment to education and good, reliable, information. The best way to ensure that we are self-governing may be

to figure out ways, collectively, to keep ourselves *generally* educated and aware, so that election-time persuasion efforts have less impact. This is no menial task.

Time will force us to find ways of talking about extraterritorial electioneering. The question is whether we will face it responsibly, and whether we can establish a dialogue to talk about reasons to exclude some, and engage others, in our electoral processes in a way that is neither jingoistic nor naïve: a way fit for a strange new world of cross-national elections.