Two Paths Preventing Foreign Influence: Reforming Campaign Finance and Lobbying Law

Brittany M. Albaugh

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TWO PATHS TO PREVENTING FOREIGN INFLUENCE: REFORMING CAMPAIGN FINANCE AND LOBBYING LAW

Brittany Morgan Albaugh

I. INTRODUCTION

Foreign corporations have been able to influence the U.S.’ foreign and domestic policy by making campaign contributions and by hiring lobbyists with illustrious connections. But as foreign entities have continued to gain access to U.S. lawmakers, politicians and scholars in the United States have attempted to bring foreign influence to a halt. Members of Congress themselves have stated that the United States has a “compelling interest” in keeping out the potential corruption and interference with self-governance that the participation of foreign corporations could bring into the American political process. Senator Sheldon Whitehouse, who recently sponsored campaign finance reform, stated, “[y]ou can bet that wholly owned subsidiaries of foreign commercial entities have an agenda when they spend millions to sway the outcome of an election . . . . And you can bet that agenda is not promoting the interests of middle-class American voters.”

President Barack Obama, in his 2010 State of the Union speech, used imagery of ‘floodgates opening’ to describe the money that corporations would be able to spend after the U.S. Supreme Court’s decision in Citizens United v. FEC. After Citizens United, one of the fears across all branches of government was the influx of foreign influence. In front of Congress, the Supreme Court, and the whole nation, President Obama expressed his concern, stating,

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1 J.D. Candidate, 2015, Maurice A. Deane School of Law at Hofstra University. I would like to thank the staff of the Journal of International Business & Law for all of their efforts throughout the year. I owe many thanks to Professors Leon Friedman and James Sample for their advice and guidance during the writing process. I would not have been able to make it through this process without my loving family, understanding friends from back home and the wonderful new friends in New York that have become my support system. Finally, I dedicate this Note to my #1 fan and guardian angel, my Bubbie.


3 America is for Americans Act, H.R. 4510, 111th Cong. § 1 (2010).


283
With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests – including foreign corporations – to spend without limit in our elections. I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities. They should be decided by the American people. And I’d urge Democrats and Republicans to pass a bill that helps to correct some of these problems.7

The President believed that Americans deserved to know the impact that foreign corporations were having on elections in a post-Citizens United world. However, Americans also deserve to know how foreign corporations sway lawmakers through lobbying. Politicians and the media have been mostly silent on this issue when legislating and addressing the American public. The dearth of coverage explaining the logistics of foreign lobbying is alarming. Lobbying is as prevalent and as potent a means of influence on American politics as campaign finance is. From 1998 to 2004, before the words Citizens United were being whispered everywhere, corporations headquartered in foreign countries spent $520 million to lobby the U.S. government.8 Those corporations hired over 3,800 lobbyists who were employed by 550 lobbying firms.9 According to the “Foreign Agents Registration Act” (FARA) reports, “individual lobbyists working for foreign clients communicated with lawmakers or their staff 17,000 times, including 2,280 phone calls, 9,000 email correspondences, and 2,900 face-to-face meetings.”10

Lobbying and campaign finance work in tandem to the detriment of American politics. Lobbyists often donate funds to a particular Congressman following their communications with him or her.11 For example, Kristin Chadwick, considered to be one of Washington’s “power brokers” by Businessweek,12 reported dozens of meetings with Congressmen on behalf of her client, South Korea, and also reported multiple campaign contributions given to those same members.13 The lobbyists that represent foreign interests are the major players in Washington D.C.; allowing foreign entities to have great influence over lawmakers.14 Foreign corporations’ lobbying and campaign finance have a symbiotic relationship that is potentially toxic to American democracy.

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7 President Barack Obama, supra note 4 (emphasis added).
9 Id.
11 Id.; see also Froomkin supra note 1.
13 Froomkin, supra note 1.
14 Kevin Bogardus, Foreign Lobbyist Database Could Vanish, CENTER FOR PUBLIC INTEGRITY (May 19, 2014, 12:19 PM), http://www.publicintegrity.org/2004/07/28/3140/foreign-lobbyist-database-could-vanish; DiLaura, supra note 11. Elite firms such as Patton Boggs, The Livingston Group, Piper Rudnick, and the WPP Group PLC have been making contributions and gaining access for their clients that include Saudi Arabia, Qatar, the Cayman Islands, Turkey, and some major foreign owned corporations. Id.

284
TWO PATHS TO PREVENTING FOREIGN INFLUENCE

From the first ban on corporate campaign contributions in 1907\(^\text{15}\) to the most recent attempts to pass the Democracy is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act),\(^\text{16}\) Congress has worked to restrict how money is utilized as political speech through campaign finance laws. One important restriction is prohibiting foreign nationals from contributing to U.S. elections.\(^\text{17}\)

During the 1930s, Congress passed the Foreign Agents Registration Act (FARA)\(^\text{18}\) as a response to the many propaganda agents in the United States before World War I.\(^\text{19}\) FARA was not a way to limit the agents but rather an effort to “protect the integrity of the U.S. Government’s decision-making process and the public’s right to know the source of foreign propaganda, whether or not subversive.”\(^\text{20}\) Today, the purpose of FARA has changed; now instead of solely being concerned with propaganda, it is a regulatory control on lobbying activities\(^\text{21}\) completed by agents on behalf of foreign principals.\(^\text{22}\)

This Note will propose that the separation is artificial and that Congress should pass a law that bans foreign influence in the U.S.’s political process by implementing campaign finance and lobbying restrictions. After Congress passes the appropriate law, the Federal Election Commission (FEC) and the Department of Justice (DOJ) must work together to enhance enforcement practices. It will illustrate how foreign influence has penetrated the American political process, address the lack of enforcement of the current laws, and discuss how Congress should regulate this influx of money and contact with lobbyists. Section II explores the statutes and judicial decisions involving campaign finance law, including the important recent Supreme Court decisions: Citizens United and Bluman v. FEC.\(^\text{23}\) It will also analyze Congress’ attempts to pass new campaign finance legislation, including the DISCLOSE Act. Section III describes foreign lobbying laws, how they are enforced and then analyzes Congressional action regarding said laws. Section IV lays out proposals for Congressional action that will explain the current definitions, expand the scope of required reporting under current law, and enable the FEC and DOJ to more effectively enforce campaign finance regulations.

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\(^{16}\) DISCLOSE, H.R. 5175, 111th Cong. (2011).

\(^{17}\) 2 U.S.C. § 441e (2012).


\(^{21}\) 2 U.S.C. § 1602(7) (2012). The term “lobbying activities” means lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others. Id.


\(^{23}\) The most recent case decided by the U.S. Supreme Court was McCutcheon v. FEC, 134 S. Ct. 1434 (2014) (this case is not relevant to this issue because it involves the aggregate limits of domestic individuals).
II. CAMPAIGN FINANCE

A. History

Congress began altering the face of campaign finance laws with the “Federal Election Campaign Act of 1971” (FECA). FECA increased reporting requirements, and limited expenditures and contributions by making it unlawful for any corporation to make an expenditure or contribution in connection with an election to any political office. It also provided for an exception that would allow corporations to contribute to campaigns through separate segregated funds, today known as PACs. Senator Lloyd Bentsen authored an amendment that prohibited foreign nationals from contributing to campaigns; this amendment was passed and codified as 2 U.S.C. § 441e. In 1971, the Senator showed concern about foreign nationals contributing to American elections.

25 Id. at § 431(9)(A).
26 The term “expenditure” includes—
   (i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and
   (ii) a written contract, promise, or agreement to make an expenditure. Id.
27 See generally § 431.
29 120 CONG. REC. 7, 8783 (1974) (statement of Sen. Bentsen). On the record, Senator Bentsen said that foreign nationals do not “have any business in our political campaigns. They cannot vote in our elections why should we allow them to finance our elections? Their loyalties lie elsewhere; they lie with their own countries and their own governments.” Id.

(a) Prohibition
It shall be unlawful for—
(1) a foreign national, directly or indirectly, to make—
(A) 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;
(B) a contribution or donation to a committee of a political party; or
(C) an expenditure, independent expenditure, or disbursement for an electioneering communication (within the meaning of section 304(f)(3)); or
(2) a person to solicit, accept, or receive a contribution or donation described in subparagraph (A) or (B) of paragraph (1) from a foreign national.

(b) “Foreign national” defined
As used in this section, the term “foreign national” means—
(1) a foreign principal, as such term is defined by section 611 (b) of title 22, except that the term “foreign national” shall not include any individual who is a citizen of the United States; or
(2) an individual who is not a citizen of the United States or a national of the United States (as defined in section 1101 (a)(22) of title 8) and who is not lawfully admitted for permanent residence, as defined by section 1101 (a)(20) of title 8.
Id. See also 22 U.S.C. § 611(b) (2012).
TWO PATHS TO PREVENTING FOREIGN INFLUENCE

corporations being able to use subsidiaries and PACs to circumvent campaign finance laws in order to influence elections, an issue that is still prevalent decades later.\(^{31}\) FECA and the various amendments faced their first serious challenge in *Buckley v. Valeo*.\(^{32}\) This case is the first time the Supreme Court equated speech with money.\(^{33}\) The Court sustained the law’s restrictions on direct contributions to candidates, but overturned restrictions on independent expenditures.\(^ {34}\) In *Buckley*, the Court acknowledged a “sufficiently important” governmental concern in “the prevention of corruption and the appearance of corruption.”\(^{35}\) The Court did not address any restrictions on corporations. However, shortly after *Buckley* was decided, Congress passed 2 U.S.C. § 441(b), which prohibited corporations from making contributions and expenditures.\(^{36}\)

In *First National Bank of Boston v. Bellotti*, the Supreme Court extended the First Amendment right of political speech to corporations by ruling that they could make campaign contributions.\(^{37}\) It further held that political speech is “indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.”\(^{38}\) Overall, the Court upheld restrictions on direct contributions and extended rights to corporations.\(^ {39}\)

In 2002, Congress signed into law the “Bipartisan Campaign Reform Act” (BCRA).\(^{40}\) The Act set out to limit soft money\(^{41}\) but also extended prohibitions on foreign

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31 Martin Tolchin, *Foreign Role In U.S. Politics Questioned*, N.Y. TIMES (Jan. 8, 1986), http://www.nytimes.com/1986/01/08/us/foreign-role-in-us-politics-questioned.html. When interviewed, Senator Bentsen said that the amendments to FECA were important because “[i]f you have a PAC from a subsidiary of a foreign company, it certainly seems to me that you open the door to foreign influence in our elections.” *Id.*


34 *Buckley*, 424 U.S. at 29, 39.


36 2 U.S.C. § 441b(a) (2012). It is “unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office. . . .”


38 *Id* at 777.

39 *Id.*


41 *Campaign Finance Law Quick Reference for Reporters, supra* note 40.
nationals and foreign-based groups. In *Austin v. Michigan Chamber of Commerce*, the Supreme Court, for the first time, sustained a law limiting independent expenditures spent for the purpose of influencing elections. The Court found a compelling governmental interest in evading “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and have little or no correlation to the public’s support for the corporation’s political ideas.”

In *Citizens United v. FEC*, the Supreme Court held that 2 U.S.C. § 441b was unconstitutional under the First Amendment and in turn overruled *Austin* and parts of *McConnell v. FEC*. In striking down § 441b, the Court declared, “political speech must prevail against law that would suppress it.” The Court avoided the loaded question regarding foreign influence and foreign monies by solely focusing on § 441b and reserving judgment on § 441e. Thus, the Court did not change the law banning foreign corporations from contributing to the American political system.

Prior to *Citizens United*, it was easy to exclude a foreign citizen from contributing, but with domestic corporations being able to donate, the distinction of what is or is not foreign money is more complicated to determine. Justice Stevens, in his dissent to *Citizens United*, said that the Court’s decision “would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans.” He discussed how the Framers of the Constitution feared foreign influence and how we cannot trust foreign nationals to have any “investment in the well-being of the country.”

In 2012, the Supreme Court upheld the district court’s decision in *Bluman v. FEC* and the federal law banning foreign individuals from contributing money to U.S. elections. The Court discussed the importance of American self-governance and the significance of limiting foreign nationals from participating in the political process. In a *N.Y. Times* debate, held just prior to the *Bluman* decision, one campaign finance expert said:

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42 § 431.
44 Id. at 660. (acknowledging interest to be an “anti-distortion interest” which was used by the court to sidestep Buckley and Bellotti).
45 Citizens United, 558 U.S. 310, 312 (2010).
46 Id. at 340.
47 Id. at 362. Justice Kennedy said that “[w]e need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.”
48 Id. at 362 “We need not reach the question whether the Government has a compelling interest in preventing foreign individuals our Nation’s political process.” Id.
51 Citizens United, 558 U.S. at 424 (Stevens, J., dissenting)
54 See generally § 441e.
55 Bluman, 800 F. Supp. 2d at 288. “Spending money to contribute to a candidate or party or to expressly advocate for or against the election of a political candidate is participating in the process of democratic self-government.” Id.
TWO PATHS TO PREVENTING FOREIGN INFLUENCE

It’s difficult to imagine a greater threat to American democracy — or to our national security — than a decision enabling foreign corporations to influence our elections. If the plaintiffs win in Bluman, it opens the door to foreign companies — potentially even companies owned and operated by foreign governments — spending billions to change the makeup of Congress or to elect a president favorable to their interests.56

Although Bluman held that foreign individuals are banned from making contributions, this Note will discuss how foreign nationals are still able to participate in the American political process by hiring high-powered lobbyists.

B. DISCLOSE Act and Other Legislation

The DISCLOSE Act was proposed in the 111th, 112th and 113th Congresses as an attempt to combat the effects of Citizens United. In 2010, Congress created a large bill that included regulations of political spending (including banning contributions and expenditures from foreign entities), disclosure requirements of independent expenditures and electioneering communications, disclosure requirements for corporations and other organizations, and reporting requirements for lobbyists under the Lobby Disclosure Act.57 A major regulation Congress hoped to pass was a “ban on contributions and expenditures by foreign nationals to foreign-controlled domestic corporations.”55 The legislation was an amendment to 2 U.S.C. § 441e(b), which makes it illegal for foreign nationals to contribute or give independent expenditures to campaigns.59 The ban proposed in the DISCLOSE Act applies to corporations that have foreign nationals that own or control voting shares, and increases the limitations if (1) the foreign national is owned or controlled by the government, (2) the corporations’ board of directors is made up of a majority of foreign nationals, and (3) the corporation is one where foreign nationals have “the power to direct, dictate, or control the decision-making process of the corporation with respect to activities in connection with a Federal, State, or local election.”50 The House of Representatives passed the bill in June 2010,61 but the Republicans in the Senate blocked it.

Campaign finance legislation has been a very hot political issue and has elicited numerous comments from high-profile politicians. The Democrats have argued that the bill would bring disclosure.63 Senator Russ Feingold, a major player in campaign finance reform, described the DISCLOSE Act as the “best chance to provide voters with adequate information

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57 DISCLOSE Act, H.R. 5175, 111th Cong. (2010). “To amend the Federal Election Campaign Act of 1971 to prohibit foreign influence in Federal elections, to prohibit government contractors from making expenditures with respect to such elections, and to establish additional disclosure requirements with respect to spending in such elections, and for other purposes.” Id. at 1.
58 H.R. 5175 § 102.
60 H.R. 5175 § 102.
63 Id.
about exactly who is behind the onslaught of political ads they can expect to see this fall.”

On the other side of the aisle, Republican leader, Mitch McConnell, described the bill as “117 pages of stealth negotiations in which Democrats pick winners and losers, either through outright prohibitions or restrictions so complex that they end up achieving the same result.” Speaking in support of the DISCLOSE Act, President Obama stated that “[a] vote to oppose these reforms is nothing less than a vote to allow corporate and special interest takeovers of our elections” and encouraged Congress to pass the bill. He commended the House for passing the DISCLOSE Act and deemed the Senate’s failure to pass it “a victory” for those special interests, corporations and potential foreign interests. However, discussion about foreign influence in campaign finance was absent: not one of the many interest groups or organizations talked about the bans on foreign nationals and foreign corporations. The quarrels and arguments in Congress and the other branches of government have never been about foreign influence.

When the bill was reintroduced as DISCLOSE 2.0 in 2012, it included language to increase disclosure for corporations and other entities, but there was no section regarding foreign nationals or corporations. The bill maintained the same fate as its predecessor, failing in the Senate. Following the Senate’s failure to advance the legislation to a vote, the Senate Majority Leader, Harry Reid, said, “the Citizens’ United decision opened the door for big corporations and foreign entities to secretly spend hundreds of millions of dollars to undermine elections, undermining the fairness and integrity of the process.” Both sides of the political spectrum have expressed fear about foreign entities’ campaign dollars and have spoken about ways to keep foreign money out of elections. Their words have so far been empty, as they have failed to pass legislation that limits spending or would expand the definition of foreign national.

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65 Id.
66 Id.
68 Beckel, supra note 64. Groups that oppose the bill include the Center for Competitive Politics, the American Civil Liberties Union and the U.S. Chamber of Commerce. The President of the Chamber of Commerce made a statement saying, “Congress should not be wasting its time on an ‘Incumbent Protection Act.’” Those in support of the bill include Campaign Legal Center, Common Cause, Democracy 21, the League of Women Voters, People for the American Way, Public Citizen, U.S. PIRG and Sunlight Foundation. A lobbyist for Sunlight Foundation said “By opposing transparency, it seems that Senate Republicans and their special interest allies are trying to boost their own fortunes in November by ensuring that Republican-leaning corporate coffers can be opened up to help Republican candidates without leaving any fingerprints behind.” Id.
72 Helderman, supra note 71. (emphasis added).
Two Paths to Preventing Foreign Influence

The House Democrats did not give up on reform and introduced the DISCLOSE Act 2013 in the 113th Congress; the Republicans have stopped it.73 Again, the mention of foreign influence in the bill was nil.74

Few members of Congress who were concerned about the threat of foreign contributions, made efforts to pass legislation that was specific to campaign finance amendments regarding foreign money. Before the DISCLOSE Act was proposed, the “America is for Americans Act” died in committee in January 2010.75 The act proposed to amend 2 U.S.C. § 441e(b) by altering the definition of foreign national to include, “a corporation (other than a foreign principal, as so defined) in which one or more foreign principals directly or indirectly has an ownership interest.”76

Congress again tried to pass a bill that included more people in the designation of foreign national. The “Prohibiting Foreign Influence in American Elections Act” was introduced in January 2010 and sought to “prohibit any subsidiary of a foreign principal, as well as corporations with one or more foreign principals from (a) serving on the board of directors, (b) having a direct or indirect ownership interest, or (c) directly or indirectly holding its debt.”77 In the “American Elections Act of 2010,” the ban in 2 U.S.C. 441e(a) was to be extended to those corporations that have a foreign principal controlling over twenty percent of the voting shares, a majority of the board, and have power over decision-making regarding elections.78

Congress has recognized the problem of foreign influence in campaign finance. Their intentions are clear after looking at the “Findings” section of the America is for Americans Act, where the House states that:

(1) The Government has a compelling interest in preventing foreign individuals and associations from influencing our Nation’s political process. Such entities neither enjoy nor deserve any legal or constitutional right to such influence.

(2) The presence of foreign individuals or associations within domestic associations, to any degree, creates an unacceptable risk of foreign influence over our Nation’s political process.79

The concerns and risks that Congress has addressed can be combated with a bipartisan and unified effort in implementing the multiple, but simple, solutions that this Note will recommend.

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74 As this Note was going to publishing Sen. Whitehouse reintroduced the 2013 version of the DISCLOSE Act.
75 CONG. RESEARCH SERV., H.R. 4510 CRS SUMMARY (2010).
76 America is for Americans Act, H.R. 4510, 111th Cong. §2(3) (2010).
77 Scott L. Friedman, First Amendment and “Foreign Controlled” U.S. Corporations: Why Congress Ought to Affirm Domestic Subsidiaries Corporate Political Speech Rights, 46 VAND. J. TRANSNAT’L L. 613, 653 (2013).
79 H.R. 4510.
A. History

Congress made headway in their efforts to curtail the effects of foreign influence in the United States with the passage of the Foreign Agents Registration Act (FARA) in 1938.\footnote{22 U.S.C. § 611 (2012).} FARA was passed for the purpose of “protect[ing] the national defense, internal security, and foreign relations of the United States by requiring public disclosure... [of] activities for or on behalf of foreign governments.”\footnote{Id. at Policy and Purpose of Subchapter.} The Act requires that an agent “must make periodic public disclosure of their relationship with the foreign principal, as well as activities, receipts and disbursements in support of those activities.”\footnote{FARA, U.S. DEP’T JUST., http://www.fara.gov/ (last visited May 28, 2014).} An agent must meet two criteria: first, they must have a relationship with a foreign principal, and second, they must perform certain activities for the principal.\footnote{§ 611(c). The term “agent of a foreign principal” as defined in subsection (c): (c) [Except] as provided in subsection (d) of this section, the term “agent of a foreign principal” means— (1) any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person. (i) engages within the United States in political activities or in the interests of such foreign principal; (ii) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal; (iii) within the United States solicits, collects, disburse, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or (iv) within the United States represents the interests of such foreign principal before any agency or official of the Government of the United States; and (2) any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1) of this subsection. Id.} This relationship is established “when that person acts, or purports to act, under the direction or control\footnote{See Perry, supra note 20 at 137 (arguing that the definition is flawed because the term control is not clear).} of a foreign principal or person connected with a foreign principal.”\footnote{Id.} Activities that take place outside of the United States do not have to be reported.\footnote{Kevin Bogardus, Justice Amps Up Enforcement on Foreign Advocacy, THE HILL (Oct. 28, 2011; 10:00 AM), http://thehill.com/business-a-lobbying/190379-officials-turn-up-enforcement-of-foreign-lobby-law.}

To be compliant with the requirements of FARA, agents of foreign principals need to register with the FARA Registration Unit\footnote{U.S. Gov’T ACCOUNTABILITY OFFICE, GAO/NSIAD-90-250, FOREIGN AGENTS REGISTRATION JUSTICE NEEDS TO IMPROVE PROGRAM ADMINISTRATION 3 (1990). “The Registration’s Units responsibilities include: (1) identifying unregistered agents, (2) ensuring that agents file reports on time, (3) rendering advisory opinions interpreting the act, (4) reviewing reports to ensure proper form and completeness, and (5) requesting report corrections when errors are found.” Id.} and then continue to file semiannual
TWO PATHS TO PREVENTING FOREIGN INFLUENCE

statements. 88 Once submitted these documents become public record. 89 The registration statements must include:

(1) a description of their income from the foreign principal and who those foreign principals are; (2) a detailed account of their expenditures on behalf of the foreign principal; (3) a list of their activities, such as meetings with member of Congress; and (4) the level of control the foreign principal had in those activities. 90

The structure of FARA emphasizes that agents must disclose their connections with foreign principals. 91 For this arrangement to fulfill its purpose, there must be proper disclosure and the information must be accessible to the public. 92 However, FARA’s enforcement is substandard because the Registration Unit is restricted to the powers of inspections and injunction and those limited measures are not used often. 93

There are many exemptions under FARA that an agent may use to justify failing to file. 94 When an agent believes he is eligible for an exemption, he may proceed to act on behalf of his principal without filing FARA paperwork and without any notification to the DOJ. 95 Lawyers are also exempt from FARA registration. 96 Corporations are excused from FARA and, instead register under the Lobbying Disclosure Act (LDA). 97 For example, foreign companies, in contrast to foreign states, do not have to file under FARA but instead file with the Senate Office of Public Records, which requires substantially less information than FARA. 98

FARA is more restrictive than the LDA because of the fear of what agents of foreign entities could do. 99 There is the potential that the interests of the foreign principal

88 Id at 4. “[E]ach supplemental statement must contain information on (1) the nature and status of the registrants business, (2) foreign principals represented, (3) activities performed for foreign principals, (4) related financial data, (5) dissemination of political propaganda, and (6) the filing of certain required exhibits and short form registration statements.” Id.
89 FARA Frequently Asked Questions, supra note 19.
91 Atieh, supra note 22 at 1061.
92 Id. at 1062.
93 Perry, supra note 20 at 143.
94 22 U.S.C. § 613 (2012). The filing requirement under 22 U.S.C. § 612(a) does not apply to the subsequent agents of foreign principals:
(a) Diplomatic or consular officers…
(b) Official of foreign government…
(c) Staff members of diplomatic or consular officers…
(d) Private and nonpolitical activities; solicitation of funds…
(e) Religious, scholastic, or scientific pursuits…
(f) Defense of foreign government vital to United States defense…
(g) Persons qualified to practice law…
(h) Agents required to register under Lobbying Disclosure Act of 1995. Id.
95 Perry, supra note 20 at 133.
96 § 613(g).
97 § 613(h).
98 Bogardus, supra note 14.
99 Atieh, supra note 22 at 1066.
could be in conflict with the preference of U.S. citizens and harmful to American democracy overall. Additionally, the burden of proof for the government is higher in cases brought under FARA because the DOJ can only bring criminal charges,\textsuperscript{100} while violators of the LDA can be punished with civil penalties.\textsuperscript{101}

The times have changed since FARA was first passed in 1938, the threat of propaganda has escalated to action and FARA needs to adjust to meet the risks of foreign influence.

B. Proposed Amendments, Recommendations and Issued Reports

Senator John Heinz proposed five amendments to FARA in 1988.\textsuperscript{102} The first modification was made to the definition of “foreign principal.”\textsuperscript{103} He recommended a bright line rule that would help determine whether a domestic entity was under the control of a foreign principal.\textsuperscript{104} The next proposed change was to eliminate the exception for lawyers and to require them to register under FARA.\textsuperscript{105} The third amendment was to aid the Registration Unit by setting a filing date for all agents.\textsuperscript{106} The final proposals increased the administrative powers of the DOJ under FARA.\textsuperscript{107} Senator Heinz suggested implementing civil fines and giving authority to the administrators to subpoena entities to appear, testify and produce records.\textsuperscript{108}

In June of 2008, Senator Claire McCaskill and Senator Charles Schumer proposed the ‘Closing the Foreign Lobbying Loophole Act’, that would strike § h\textsuperscript{109} of FARA.\textsuperscript{110} By striking § h all lobbyists representing foreign clients would be required to file under FARA, and there would no longer be an exception for those lobbyists registered under LDA.\textsuperscript{111} Senator Schumer was concerned that “too many lobbyists are able to operate in the shadows because of loopholes in the law. Our bill would seal the cracks in the law.”\textsuperscript{112} The bill would

\textsuperscript{100} 22 U.S.C. § 618 (a) (2012).
\textsuperscript{101} 2 U.S.C. § 1606 (a) (2012).
\textsuperscript{102} 134 Cong. Rec. 28285, 28864 (statement of Sen. Bentsen). Senator Bentsen reasoned “[the bill I am introducing today will not empty those [agent’s] pockets, but it will help us count how much is in them and what nation’s currency they contain. By doing so, we will bring transparency to the governing and legislative processes... .” Id.
\textsuperscript{103} Id. at 28863.
\textsuperscript{104} Id. The rules would define “over 50 percent foreign ownership of a U.S. entity as control; between 20 percent and 50 percent as control subject to rebuttal evidence; and less than 20 percent as presumptively not controlling.” Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} 22 U.S.C. § 613(h) (2012). (stating once agents are registered under the LDA they do not have to register under FARA).
\textsuperscript{110} Closing the Foreign Lobbying Loophole Act, S. 3123, 110th Cong. (2008).
\textsuperscript{112} Id.
have also required agents to report their lobbying activities that took place outside of the United States.\footnote{113}

The ‘Ethics in Foreign Lobbying Act of 2013’ (EFLA) proposed that a new section titled, “Prohibition of Contributions and Expenditures by Multicandidate Political Committees Sponsored by Foreign-Controlled Corporations and Associations,” be added to 2 U.S.C. § 441e.\footnote{114} The bill restricted foreign-controlled corporations’ PACs from making contributions and expenditures, and established a definition for ‘foreign-owned’ to be used in the context of the bill.\footnote{115} It specifically set out to amend FARA by “(1) revis[ing] foreign agents’ supplemental reporting requirements, and (2) provid[ing] civil penalties for specified reporting violations.”\footnote{116}

The Government Accountability Office (GAO) issued reports regarding foreign influence in 1980,\footnote{117} 1990\footnote{118} and 2008.\footnote{119} The GAO recommended that the DOJ receive subpoena powers and that agents be required to notify the FARA Registration Unit if they believe they qualify for an exemption.\footnote{120} These recommendations were given after the initial investigation in 1980\footnote{121} and were repeated in the 1990 and 2008 findings.\footnote{122}

The report done by the GAO investigating the government’s administration of FARA in 1990 reaffirmed the 1980 recommendations and made new suggestions for actions that Congress could take to expand the DOJ’s authority, such as civil fines.\footnote{123} During their inquiry the GAO asked the FARA Registration Unit’s Chief to list the inadequacies found in disclosures.\footnote{124} The inadequacies mentioned include: “(1) agents are not specific in reporting information, (2) questions on the supplemental statement forms are not specific, and (3) caseworkers lack effective methods to obtain additional information.”\footnote{125}

The 2008 report characterized the difficulties in enforcing FARA as “information, legal, and resource challenges.”\footnote{126} The most recent GAO report suggests that Congress should consider “(1) granting the Department of Justice civil investigative demand authority to inspect the records of persons Justice believes should be registered as agents of foreign principals and (2) requiring persons claiming certain exemptions to provide advance written

113 Id.
115 H.R. 195.
120 GAO-80-51, supra note 117 at 1.
121 Id.
122 GAO/NSIAD-90-250, supra note 118 at 5; GAO-08-855, supra note 119 at 2.
123 GAO/NSIAD-90-250, supra note 118 at 7. The report suggests giving the DOJ the power to: 1) Subpoena foreign agents to appear, testify, or produce records at administrative hearing. 2) Impose administrative fines for minor violations against those who, after being directly informed of their obligation to report, still fail to do so. Id.
124 Id. at 5.
125 Id.
126 GAO-08-855, supra note 119 at 12.
notification to Justice before engaging in the exempt activities.” 127 The DOJ responded to the 2008 GAO report stating

We cannot say at this time the GAO’s suggested revisions to the FARA statute would be helpful in addressing the articulated concerns, or indeed, the extent to which they actually might compromise FARA enforcement efforts. The Department would look forward to working with Congress if it chooses to move forward with the legislation. 128

The Attorney General’s office has admitted to lacking the necessary power to properly monitor FARA compliance. 129 An Assistant Attorney General testified that they needed to be able to inspect the records of those they thought should be registered and could only do so if those taking exemptions notified the Attorney General. 130 The DOJ previously reported that they believed that there are agents who have improperly taken exemptions, leaving more acting agents than there are registered. 131 Another reason the DOJ cites for trouble in enforcement is the decrease in resources, as their staff has been downsized. 132

IV. SOLUTIONS

In order to thwart foreign influence from penetrating the U.S. political system, all branches of government need to work together to help clarify the laws, increase disclosure requirements and implement enforcement policies. It is important to remember that each necessary step in the process of barring foreign influence is intertwined. If the law is clearer, then the enforcement will improve. If the necessary disclosure is required then, enforcement will be easier. It may seem that these solutions overlap in many ways, but that overlap will make it difficult for foreign entities to penetrate the political system.

A. Clarify

The major problem in preventing foreign influence from infiltrating the U.S. political system lies in the confusion and uncertainty created by the definitions of foreign national and foreign principal in FECA and FARA. These laws can be strengthened by increasing the clarity with descriptive definitions of foreign national and foreign principal.

Congress should use the definition of “foreign national” that passed the House in the DISCLOSE Act of 2010133 because it addressed the important elements of control and decision-making. The definition takes steps to further define what level of control the foreign entity must maintain to be characterized as foreign under the laws. Control can be measured or quantified by analyzing factors such as voting shares, ownership interest, the number of board members and by understanding who is making the decisions regarding elections. 134

127 Id at 15.
128 Id at 29-30.
129 Id. at 14.
130 Id.
131 Id. at 2; GAO-80-51 at 1 (1980).
134 Id.
Companies need to know if they are considered foreign nationals in violation of the FECA. This confusion has created problems for both corporations and the agencies enforcing the laws. One of the headlines during the 2012 presidential election cycle was “A Foreign Corporation May Have Made An Illegal $1 Million Contribution To the Pro-Romney Super PAC.” The corporation had foreign connections including a foreign-born CEO and a foreign parent; however, the law is not clear if those foreign connections make a foreign national.

There is difficulty with how subsidies should be considered for the purposes of campaign finance. For example, Koch Industries, owned by the very politically active Koch brothers, settled with the FEC in 2011 after they internally discovered they had illegally contributed thousands of dollars to candidates. The contribution came from INVISTA’s a.r.l., a subsidiary of Koch Industries, which is headquartered in Kansas but registered in Luxembourg. The FEC reported that the company admitted “the violations resulted from a general lack of knowledge among company personnel of either the nature of INVISTA’s legal structure or of the restrictions that applied to it as a foreign company.” Section 441e does not explain how to handle situations of foreign parents, but adopting the language used in the DISCLOSE Act will lessen the confusion. The language gives guidelines for the level of control, ownership, and decision-making that will allow subsidiaries to determine whether they qualify as under the control of a foreign national for the purposes of the FECA.

Many companies have submitted requests to the FEC for advisory opinions for interpretations of the FECA. The FEC ruled that Congress did not intend to expand the ban on foreign nationals’ contributions to include U.S. subsidiaries of foreign corporations. In a 2006 Advisory Opinion, the FEC reported that the political donations of a corporation would not be prohibited “because the domestic subsidiaries would ensure that no foreign national participates in making decisions concerning non-Federal election-related activities.” The opinion also went on to explain that the monies used for the donations must be generated by U.S. operations only. Congress, in collaboration with the FEC, must pass an amendment to

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135 § 441e.
136 Hickey, supra note 50. See also Beckel, supra note 3. The Connecticut company that made the large contribution is a subsidiary of a Canadian corporation that is ran by an Indian born CEO who serves as the chairman of the board of the subsidiary. Id.
138 Id.
139 Id.
141 Id. at 3. The Commission based its decision on the lack of Congressional intent and on the advisory opinions over more than two decades that have affirmed the participation of such subsidiaries in elections in the United States, either directly in states where state law permits, or through separate segregated funds with regard to Federal elections, so long as there is no involvement of foreign nationals in decisions regarding such participation. Id.
142 Id. at 2 (explaining foreign participants as to be “individuals who are U.S. citizens or permanent residents”).
143 Id. at 1.
144 Id. at 2. Both subsidiaries had U.S. bank accounts from which they deposited their receipts and paid their expenses, and made potential political contributions. Id.
the FECA that will provide a clear guideline for corporations regarding the treatment of subsidiaries. The amendment should contain the language used by the FEC in their decision. The FEC stated that domestic subsidiaries:

may make corporate donations and disbursements in connection with State and local elections to the extent permitted by State and local law, provided that: (1) the donations and disbursements derive entirely from funds generated by the Subsidiaries’ U.S. operations; and (2) all decisions concerning the donations and disbursements will be made by individuals who are U.S. citizens or permanent residents, except for setting overall budget amounts.\(^\text{146}\)

The current Commissioner of the FEC, Ellen Weintraub, stated, “[b]y not addressing [these issues] in rulemaking, we’re leaving uncertainty out there . . . . And when there’s uncertainty, there’s always a risk that folks may try to use that uncertainty to their own advantage.”\(^\text{147}\) Foreign entities are using the weak and unclear campaign finance laws to their advantage in a large way. Foreign-connected PACs have already reported over $9.2 million in contributions in 2014.\(^\text{148}\)

FARA provides a definition of foreign principal that is then used to demonstrate what a foreign national is in FECA § 441e.\(^\text{149}\) Under FARA, a lobbyist must determine whether he is an agent working for a ‘foreign principal.’\(^\text{150}\) The current system places the burden on the agent himself to register properly as an agent of a foreign principal.\(^\text{151}\) If the agent does not fully understand what a foreign principal is, he may be punished for unknowingly failing to file the proper registration. Senator Heinz’s proposal to create a bright line rule for determining whether a foreign entity is a “foreign principal” should be implemented.\(^\text{152}\)

B. Disclosure

Legislation needs to be passed that will merge regulating disclosure of both campaign finance and lobbying. Once a law is passed merging these two actions, it will also combine the power of the FEC and DOJ, doubling the force available to investigate and prosecute foreign influence.

Congress has been attempting to increase disclosure in campaign finance.\(^\text{153}\) Disclosure has been a topic of contention and the source of most disagreement amongst

\(\text{146}\) Id.
\(\text{147}\) Beckel, supra note 3.
\(\text{149}\) 2 U.S.C. § 441e(b) (2012); 22 U.S.C. § 611(b) (2012).
\(\text{151}\) Atieh, supra note 22 at 1061.
\(\text{152}\) 134 Cong. Rec. 28285, 28863 (statement of Sen. Bentsen). The rules would define “over 50 percent foreign ownership of a U.S. entity as control; between 20 percent and 50 percent as control subject to rebuttal evidence; and less than 20 percent as presumptively not controlling.” Id.
\(\text{153}\) The name of the bill they tried to pass numerous times was an acronym for disclose, Democracy is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act).
Two Paths to Preventing Foreign Influence

The political feasibility of passing comprehensive reform to campaign finance, that includes substantial changes to disclosure, has proved to be nearly impossible. Congress, instead, should focus on passing legislation that is tailored to the disclosure of foreign influence in campaign finance. By singling out regulations on foreign entities the bill will have an easy time getting passed and not get stuck in the mud that is bipartisanship. Companies must give accurate and detailed information about their funds and activities in their reports filed with the FEC. The FEC has allowed a subsidiary to donate when it was clear that the money was made in the United States and that the decision makers were American. All of the pertinent information needs to be filed each quarter so that the FEC can adequately monitor those corporations that have potential of violating § 441e.

The current system breeds insufficient disclosure and lackadaisical reports due to the fact that an agent faces about a four-percent chance of audit. The GAO suggested that the questions on the paperwork be changed, a change that was not implemented; yet should be. This is an easy, one-time, inexpensive fix that can help with disclosure problems. The forms should clearly state what is requested from the agents and ask for enough information that will allow the FARA Registration Unit to thoroughly do their job. By having a very clear form for agents to submit, the process will be standardized and not allow agents to slip through the cracks due to an oversight by caseworkers or confusion. Further, in order to increase uniformity, the FARA Registration Unit should implement a set filing date for all agents.

To best solve the problems that arise from subsidiaries, Congress should amend FARA to include provisions requiring agents of domestic entities to disclose their contractual agreements so that the nature of their relationship can be fully determined. By evaluating the relationship between the domestic and foreign entities, the DOJ will be able to understand the full nature of the affiliation and share it with the American public, thus fulfilling the true purpose of FARA. The amendment set forth in the Closing the Foreign Lobbying Loophole Act should be added to FARA, thus expanding the activity that needs to be reported to include activity that is outside of the United States.

C. Enforcement

To prevent the influence of foreign entities in the political process, agencies need to look at enforcement as a combined effort. By passing the aforementioned legislation, Congress can create an environment of cooperation between the FEC and DOJ, encouraging them to coordinate in the monitoring of foreign agents and contributions.

The overall enforcement of campaign finance laws by the FEC is lacking. In an article written by the Center for Responsible Politics, they called the FEC “ineffective” and

154 Beckel, supra note 64.
said that the “[e]nforcement of campaign laws is weak.”

Two flaws of the system are that the penalties the FEC typically impose are minor and the FEC is left to bring violators to civil court in order to collect fines. A major cause of the FEC’s ineffectiveness is that the Commission has six voting members, which allows for situations of stalemates in votes. These stalemates have allowed for no action to take place, meaning no enforcement.

The legislation that has been before Congress regarding foreign influence in campaign finance has only looked at the restrictions and not at the enforcement element. The enforcement of § 441e can be improved once the law is clarified and the troublesome aforementioned definitions are modified. The FEC must continue to monitor subsidiaries and those corporations that have substantial foreign connections by requiring them to report their relationships.

The FEC must take a close look at PACs, as foreign connected PACs have already contributed over $9.1 million in the 2014 election cycle. The former chairman of the FEC, Thomas E. Harris, said, “The PAC is always controlled by the top management of the corporation.” One of the important elements of keeping out foreign influence is looking at where the control stems from and who are the decision-makers. Even before Chairman Harris expressed his issues with PACs, Senator Bentsen discussed issues with PACs and stressed that they needed to be addressed to prevent them from circumventing the laws. As previously mentioned campaign contributors must fully disclose the source of their monetary contributions and must identify the party responsible for making such decisions. Additionally, there should be audits on this information, so that those making false claims can be discovered and prosecuted.

Arguably, the biggest problem with FARA is the way it is currently being enforced. In 2011, the DOJ increased their enforcement efforts by being more proactive in finding lobbyists that have not registered. However, this is not enough. Congress needs to work with the DOJ to increase their enforcement power. Therefore, FARA should be expanded to give the FARA Registration Unit the power to subpoena, as well as the ability to levy civil penalties.

While FARA is known to be stricter than the LDA because of the criminal penalties, adding civil penalties would help with enforcement. The difficulty of proving intent has discouraged administrators from using criminal penalties when enforcing FARA. Lowering

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161 Id.
162 Id; Top 10 Things Every Voter Should Know About Money in Politics, supra note 161.
165 Id.
166 Bogardus, supra note 14.
167 GAO/NSIAD-90-250, supra note 87 at 15.
168 Perry, supra note 20 at 144.

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the burden of proof for the prosecution will make it easier for them to prosecute and, in turn, increase the likelihood that they bring a case against violators.

Implementation is difficult because of the Foreign Agents Registration Unit’s lack of staff\textsuperscript{169} and proper facilities.\textsuperscript{170} The staff has seen a decrease from thirteen members down to eight, however, the Registration Unit’s responsibilities have not changed.\textsuperscript{171} FARA currently has a database online, but it is out of date and at risk of ruin.\textsuperscript{172} By combining efforts with the FEC the Registration Unit could increase their manpower and resources. The Sunlight Foundation has a “Foreign Lobbying Influence Tracker”\textsuperscript{173} that is much more up-to-date and a similar system could be adopted by the Registration Unit at low cost.

The process by which agents may be exempted needs to be altered. In the past it had been suggested that the exemption process should require “prior clearance” or “prior notification.” Prior clearance “would require agents of foreign principals to clear their reliance on an exemption with FARA administrators before they could ignore FARA’s registration requirements.”\textsuperscript{174} In a system of prior notification, the “agents could rely on a FARA exemption once they notified FARA administrators of their reliance on that statutory section.”\textsuperscript{175}

Due to the impracticalities of agents having to receive prior clearance, a system of notification, where an agent would be required to notify the FARA Registration of their exemption, would help to fix the problem of self-determination. The requirement of notification would also deter those that do not qualify from improperly exempting themselves. The notification system would increase the awareness of foreign agents of the FARA Registration Unit, helping in their efforts of enforcing the law while not seriously inconveniencing the agents.

Congress should pass the amendment suggested by Senator McCaskill and Senator Schumer that will mandate all foreign agents to register under FARA, including those with corporations as clients. Corporations should not be subject to any exception, and their agents should be obligated to register. By allowing the agents to reveal less information, they are acting in direct conflict with the true purpose of FARA and the protection it provides.

V. CONCLUSION

Influence and access are the reasons that millions of dollars move through the American political system. These goals can be achieved by directly contributing to campaigns or by hiring lobbyists. However, these two ways of reaching the same outcome are regulated independently, and this independence hinders their enforcement. If Congress is able to pass a law that tightens restrictions on foreign influence through campaign finance measures, foreign corporations are likely to increase their lobbying efforts. The separation between lobbying

\textsuperscript{169} GAO/NSIAD-90-250, supra note 87 at 14. Over the last 17 years the number of staff has decreased from 13 (9 professional and 4 administrative) in 1990 to 8 (6 professional and 2 administrative) in 2008. \textit{Id.}

\textsuperscript{170} Bogardus, supra note 14. The ancient computers the public and staff use often break down, however, and the printers malfunction.

\textsuperscript{171} GAO/NSIAD-90-250, supra note 87 at 14.

\textsuperscript{172} Bogardus, supra note 14.


\textsuperscript{174} Perry, supra note 20 at 158.

\textsuperscript{175} \textit{Id.}
and making contributions is minimal, and the FEC and DOJ must work together to ensure that foreign entities are not circumventing campaign finance laws through lobbyists. The closed-door nature of lobbying, where those with money can barter for the policy that they want, can present a greater risk than other contributions and expenditures. The DOJ and FEC must work together to make sure that the reports made by lobbyists are honest and complete, and to ensure corporations are not using loopholes to get money into U.S. elections.

Politicians have agreed that the “government has a compelling interest” in precluding foreign entities from manipulating U.S. elections and the political process. The DOJ and FEC must work together to ensure that the reports made by lobbyists are honest and complete, and to ensure corporations are not using loopholes to get money into U.S. elections.

Scholars have been so bold to write that campaign contributions from foreign corporations “serve no purpose other than to corrupt and distort the political process in the U.S. in furtherance of the foreign corporation interest.” If foreign corporations have the ability to influence elections through their dollars, politicians may feel pressured to fulfill the wishes of their large foreign donors and, therefore, putting the interests of American citizens to the side.

The changes proposed in this Note are not drastic, nor are they original ideas. However, what is innovative is the proposal to combine revisions to campaign finance and lobbying in one law. This necessary change starts on Capitol Hill. Congress needs to pass meaningful legislation that will give substance to the current law by fleshing out important classifications and eradicating commonly known loopholes. In order to help the FEC, the DOJ and other agencies implementing the bans on foreign contributions and lobbying, the legislation also needs to increase disclosure measures and give enforcement agencies the power necessary to appropriately enforce the policies. After Congress passes this much needed reform, the agencies must increase their resources to have the ability to execute the law zealously. The result will be a better system protecting our valued elections and our prized democracy.

176 America is for Americans Act, H.R. 4510, 111th Cong. § 1 (2010).