



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
Democratic National Committee)	MUR 7271
and Virginia McGregor in her official)	
capacity as treasurer)	
Alexandra Chalupa)	
Chalupa & Associates, LLC)	

**STATEMENT OF REASONS OF VICE CHAIR ALLEN DICKERSON AND
COMMISSIONERS SEAN J. COOKSEY AND JAMES E. “TREY” TRAINOR III**

I. INTRODUCTION

The Complaint in this Matter alleged that Alexandra Chalupa and her company, Chalupa & Associates, LLC (“C&A”), acting as agents of the Democratic National Committee and Virginia McGregor in her official capacity as treasurer (the “DNC”), solicited, accepted, or received foreign national contributions from Ukrainian officials in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”), by sharing disparaging information about Paul Manafort (an American political consultant who had recently joined the campaign of 2016 presidential candidate Donald J. Trump) with those officials and suggesting that then-President of Ukraine Petro Poroshenko discuss Manafort’s past activities in Ukraine during a public media appearance in the United States.¹

On July 25, 2019, the Commission found reason to believe that the Respondents had violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g), and our Office of General Counsel (“OGC”) opened an investigation. Based on that investigation, OGC reported that there was no factual basis for the allegations that the Respondents solicited, accepted, or received opposition research from Ukrainian officials.

But OGC shifted to a new legal theory neither presented to nor adopted by the Commission at the reason to believe stage. It recommended that the Commission find probable cause to believe that the Respondents solicited a prohibited foreign national in-kind contribution by requesting that Poroshenko disseminate negative information about Manafort, under the theory that a statement to the media that could be politically damaging to a candidate is a “thing of value” qualifying as a contribution under the Act.² As OGC

¹ Compl. at 8–11, MUR 7271 (DNC, *et al.*).

² Gen. Counsel’s Brief at 17–23, MUR 7271 (DNC, *et al.*).

argued, because the Act prohibits non-U.S. citizens or permanent residents from providing any “thing of value” in connection with a federal, state, or local election campaign, Chalupa violated the Act by suggesting that Poroshenko should, in his official capacity as the Ukrainian head of state, disparage Manafort (and, by extension, the Trump campaign) in response to a question from a reporter.³

After considering the available evidence, on April 8, 2021, the Commission voted 4-2 to find no probable cause to believe that the DNC, Chalupa, and C&A violated 52 U.S.C § 30121(a)(2) and 11 C.F.R. § 110.20(g). Documents obtained during the investigation showed that Chalupa communicated with a Ukrainian official about Poroshenko making a public comment on Manafort, but we determined that no probable cause existed because the available evidence did not establish that Chalupa made a request to the official, and furthermore, that Chalupa’s communication did not ask that Ukrainian officials convey a thing of value within the meaning of a “contribution” to the DNC.

This was the correct outcome for this Matter, and we further detail the reasoning for our votes in this Statement of Reasons. We also wish to address the grave constitutional and prudential concerns raised by OGC’s recommendations. As a preliminary point, we reject OGC’s suggestion that a statement made by a foreign head of state on American soil, and intended to generate coverage by American media outlets, is unlawful under the Act. Second, we write to call attention to the vagueness and overbreadth problems that would arise if speech that merely confers a benefit on a political campaign were to be considered a “thing of value” and thus a contribution, under the Act. Finally, we discuss why the official act of a foreign government should not, on these facts, be considered a “contribution,” even if it incidentally benefits an American political campaign.

II. FACTUAL BACKGROUND

The DNC is the national party committee of the Democratic Party, and Virginia McGregor is the Committee’s registered treasurer.⁴ Chalupa is a political consultant who has worked for the DNC or affiliated organizations off and on since 2005.⁵ During the 2016 election cycle, she worked as a part-time consultant for the DNC’s Ethnic Engagement Program.⁶ The DNC paid Chalupa through C&A pursuant to a series of short-term contracts and reported the payments as compensation for “political consulting.”⁷ In addition to that work, Chalupa is an activist in the Ukrainian-American community.⁸ As early as 2008, she

³ *Id.*

⁴ DNC, Amend. Statement of Org. (Jan. 29, 2021).

⁵ Chalupa DNC Work & Volunteer Timeline, Chalupa Dep., Ex. 2 at AC000062–64 (Nov. 25, 2019).

⁶ *Id.* at AC000063; Chalupa Dep. at 59:16–62:5.

⁷ DNC, Disbursements to C&A (2015–2016), https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00010603&recipient_name=Chalupa&two_year_transaction_period=2016; Chalupa’s Unsigned Political Consulting Agreements and Amendment with the DNC, Chalupa Dep., Ex. 3 (periods beginning Oct. 2, 2014, July 1, 2015, Jan. 1, 2016); *see also* Chalupa Dep. at 81:6–13 (confirming there were signed versions).

⁸ Chalupa Aff. at 1, 3–7 (Nov. 21, 2019).

developed a personal interest in the role that Manafort, then a U.S. political consultant, played in Ukrainian politics.⁹ Chalupa stated that she viewed Manafort, who advised former Ukrainian President Viktor Yanukovich, as a national security risk to Ukraine and the United States.¹⁰ By 2013, as part of her personal activist work, Chalupa began conducting research on Manafort and warning individuals in the Ukrainian-American community about his activities.¹¹

Chalupa stated that, in late 2015, she grew concerned that Manafort was or would be involved with Trump's 2016 presidential campaign.¹² She recalled meeting on January 12, 2016, with Lindsey Reynolds, Chief Operating Officer of the DNC, and informing Reynolds "that I was seeing strong indications that Mr. Putin was trying to impact the 2016 election and that if I was correct, Mr. Manafort was going to work to help elect Mr. Trump."¹³

On March 28, 2016, *The New York Times* reported that Manafort had joined the Trump campaign.¹⁴ Chalupa stated that soon after she heard the news of Manafort's hire, she texted Reynolds and Amy Dacey, Chief Executive Officer of the DNC.¹⁵ Chalupa does not possess the original message she sent to Reynolds, but stated under oath that she wrote "something to the effect [of], 'This is everything to take down Trump.' I included the link to the article and recall explaining to them that if Mr. Trump did not fire Manafort immediately then it was a direct indication that he was openly receiving support from Mr. Putin"¹⁶ Chalupa stated that Dacey told her to speak with Luis Miranda, the DNC's Communications Director.¹⁷

Chalupa recalled speaking the next day (March 29, 2016) with Miranda regarding her "concerns about Mr. Manafort's presence on the Trump campaign."¹⁸ Chalupa stated that Miranda asked her to brief the communications team about Manafort, which she did, and

⁹ *Id.* at 2 (arguing that Manafort worked "to further the interests of Russian President Vladimir Putin").

¹⁰ Chalupa Dep. at 102:2–103:5, 106:2–11; Chalupa Aff. at 2.

¹¹ Chalupa Dep. at 107:6–109:8, 112:10–18, 113:17–115:16, 118:14–119:14; Chalupa Aff. at 4; *see also* Chalupa Dep. at 121:4–6 (stating that her research on Manafort was "totally individual as a private citizen").

¹² Chalupa Dep. at 125:3–9.

¹³ Chalupa Aff. at 21; Chalupa Dep. at 159:18–165:13.

¹⁴ Alexander Burns and Maggie Haberman, *Donald Trump Hires Paul Manafort to Lead Delegate Effort*, N.Y. TIMES (Mar. 28, 2016), <https://www.nytimes.com/politics/first-draft/2016/03/28/donald-trump-hires-paul-manafort-to-lead-delegate-effort>; Meghan Keneally, *Timeline of Paul Manafort's Role in the Trump Campaign*, ABC NEWS (Oct. 30, 2017), <https://abcnews.go.com/Politics/timeline-paul-manafort-role-trump-campaign/story?id=50808957>.

¹⁵ Chalupa Aff. at 21.

¹⁶ *Id.*; *see* Chalupa Dep. at 181:4–189:5.

¹⁷ Chalupa Aff. at 21.

¹⁸ *Id.* at 22; Chalupa Dep. at 192:18–194:9.

asked her to send him information about Manafort.¹⁹ Later that day, Chalupa sent Miranda an email summarizing Manafort’s work in Ukraine and Trump’s business interests in Russia along with a list of related news articles.²⁰

At or around the same time that Chalupa was communicating with DNC leadership about Manafort, Poroshenko, who was then the President of Ukraine, visited Washington, D.C., to attend the 2016 Nuclear Security Summit.²¹ Chalupa stated that Miranda was aware of Poroshenko’s visit and that Miranda asked her, possibly during their discussion on March 29, 2016, to “check with someone, some of his people, maybe the embassy and some contact who was doing an event that could ask—get a question for ABC News.”²² The next day, March 30, 2016, Miranda emailed Chalupa: “Any luck getting the Pres[ident] to address this?”²³

Approximately two hours after receiving the follow-up email from Miranda on March 30, 2016, Chalupa sent an email from her personal account to Oksana Shulyar, an official at the Ukrainian Embassy in Washington, D.C., with the subject: “Important Press Opportunity.”²⁴ In the email, Chalupa begins by asking Shulyar: “[I]f there is opportunity to get this message to the Ambassador and President Poroshenko’s Communication[s] Director, please do so.”²⁵ Chalupa continues:

There is a very good chance that President Poroshenko may receive a question from the press during his visit about the recent New York Times article saying that Donald Trump hired Paul Manafort as an advisor to his campaign and whether President Poroshenko is concerned about this considering Trump is the likely Republican nominee and given Paul Manafort’s meddling in Ukraine over the past couple of decades

This is a huge opportunity to alleviate political pressure on Poroshenko’s administration by directing attention to Putin/Manafort. Making it well known that the same man who

¹⁹ Chalupa Aff. at 22; Chalupa Dep. at 192:18–196:8; *see also id.* at 198:13–22 (stating that Miranda “said he would forward it to Lauren Dillon [the DNC’s opposition research director] at some point”).

²⁰ Email from Chalupa to Miranda (Mar. 29, 2016, 12:42 PM), Chalupa Dep., Ex. 6 at AC000079–88.

²¹ *Visits by Foreign Leaders in 2016*, Office of the Historian, U.S. Dep’t of State, <https://history.state.gov/departmenthistory/visits/2016> (accessed Dec. 7, 2020).

²² Chalupa Dep. at 207:13–208:7.

²³ Email from Miranda to Chalupa (Mar. 30, 2016, 1:35 PM), Chalupa Dep., Ex. 6 at AC000079; Chalupa Dep. at 213:20–21 (stating that she understood Miranda’s words to mean, “was I successful in getting him [Poroshenko] to take a question from the ABC News”).

²⁴ Email from Chalupa to Shulyar (Mar. 30, 2016, 3:19 PM), Chalupa Dep., Ex. 7 at AC000307; *see also* Chalupa Aff. at 8 (describing how Chalupa was introduced to Shulyar several weeks prior, in February or March 2016, in connection with Chalupa’s work regarding a cultural event that was planned to be held at the Ukrainian Embassy).

²⁵ Chalupa Dep., Ex. 7 at AC000307.

helped Yanukovich’s puppet government come to power and advised him throughout the Ukraine crisis is now advising a top candidate for U.S. President while also drawing attention to that fact that many are not aware of—that Manafort is back in Kyiv

It is important President Poroshenko is prepared to address this question should it come up. In a manner that exposes Paul Manafort for the problems he continues to cause Ukraine—past and present

If you are able to get this information to the Ambassador to pass along to President Poroshenko’s communications team, it is important. At the very least for them to be aware of the opportunity.²⁶

Chalupa copied ██████████, a Ukrainian-American activist whom Chalupa describes as “either an independent or a [R]epublican” and “not a [D]emocrat.”²⁷ Chalupa has contended that “I would have done this on my own regardless of ever talking to Luis Miranda, wearing my national security hat, Ukrainian-American activist, I would have sent this email.”²⁸

Four minutes after emailing Shulyar, her contact at the Ukrainian Embassy, Chalupa replied to Miranda, stating: “The Ambassador has the messaging.”²⁹ In her email, Chalupa informed Miranda about an event that Poroshenko would be attending that evening at the U.S. Capitol Visitor Center and how she planned for Poroshenko to receive a question about Manafort.³⁰ Chalupa told Miranda: “I have the organizer of tonight’s event following up with them [the Ukrainian Embassy] in person in [the] next hour. I will be at the event an hour

²⁶ *Id.*

²⁷ Chalupa Dep. at 167:10–21; *id.* at 217:7–218:1 (“I felt it was important wearing my Ukrainian-American activist hat with ██████████ ... to basically flag it for them, that it could come up, that they should be prepared.”); *id.* at 228:6–18 (explaining that she copied ██████████ to strike a “bipartisan” tone).

²⁸ *Id.* at 218:22–219:4; *see id.* at 218:7–219:12 (“And I would have done this 100 percent with or without ever talking to anyone at the DNC.”).

²⁹ Email from Chalupa to Miranda (Mar. 30, 2016, 3:23 PM), Chalupa Dep, Ex. 6 at AC000079. Chalupa confirmed that “the messaging” referred to the email she sent to the Ukrainian Embassy. Chalupa Dep. at 214:3–15, 246:22–247:6; *see also id.* at 248:4–8 (“In terms of messaging, I think it was more of like, you know, this question could come up—like with Luis Miranda, we never spoke about messaging other than it’s a Manafort-related question.”).

³⁰ Email from Chalupa to Miranda (Mar. 30, 2016, 3:23 PM), Chalupa Dep, Ex. 6 at AC000079; *see* Chalupa Dep. at 230:11–231:6; *see also* The U.S.-Ukraine Foundation, 2016 Annual Report at 14, <https://usukraine.org/wp-content/uploads/2019/07/2016-Annual-Report-Final.pdf> (identifying an event held on March 30, 2016, at the U.S. Capitol Visitor Center titled “Ukraine in Washington 2016, Forum: Ukraine’s Battle for Freedom Continues,” with “500–600 attendees,” including Poroshenko).

early to help follow up in person.”³¹ Later that evening, on March 30, 2016, Chalupa sent another email to Miranda explaining that the event would involve a “Q&A session with about ten media outlets at this event with the President” and that she had “secured about a dozen people to ask the question so hoping one hits.”³² However, at the event, Shulyar told Chalupa that Poroshenko would not take questions on Manafort.³³ Chalupa recalled that Shulyar indicated “that they [the Ukrainian government] did not want to get involved at all ... [regarding] anything related to Paul Manafort or the U.S. election.”³⁴ Shulyar states that she and the Embassy “ignored this request” for Poroshenko to answer a question about Manafort at the event, “and, realizing the risks, arranged a Q&A session in the manner of written cards, so that such politically sensitive questions would never reach the President.”³⁵

The next morning, on March 31, 2016, Miranda emailed Chalupa to ask whether her efforts to get Poroshenko to answer a question about Manafort were successful, writing: “I pitched ABC on it last night. If he said something is it on video or recorded? If you got it asked and he said anything I’ll pass it along to ABC.”³⁶ Chalupa informed Miranda that the organizer “didn’t select that question from the stack he received from the audience and there was no press Q and A opportunity.”³⁷ She added, moreover, that she “spoke to Poroshenko’s team after the event and ... he [Poroshenko] definitely isn’t comfortable bringing up the issue.”³⁸ There is no record of Poroshenko receiving a question on Manafort at the U.S. Capitol Visitor Center event or otherwise conveying the message about Manafort that Chalupa communicated.

III. APPLICABLE LAW

The Act and Commission regulations prohibit any “foreign national” from directly or indirectly making a contribution or donation of money or other thing of value, or an expenditure, independent expenditure, or disbursement, in connection with a federal, state, or local election.³⁹ Moreover, the Act prohibits any person from soliciting, accepting, or receiving any such contribution or donation from a foreign national.⁴⁰ The Act’s definition of “foreign national” includes an individual who is not a citizen or national of the United States

³¹ Email from Chalupa to Miranda (Mar. 30, 2016, 3:23 PM), Chalupa Dep., Ex. 6 at AC000079.

³² Email from Chalupa to Miranda (Mar. 30, 2016, 7:12 PM), Chalupa Dep., Ex. 8 at AC000089.

³³ Chalupa Aff. at 22; Chalupa Dep. at 229:19–22, 241:2–17.

³⁴ Chalupa Dep. at 242:1–9; *see id.* at 241:9–14 (“I mean, she just seemed like ... dismissing it, they’re not taking any questions about Paul Manafort and doing any media.”).

³⁵ Shulyar Written Statement at 3 (June 9, 2020).

³⁶ Email from Miranda to Chalupa (Mar. 31, 2016, 9:40 AM) Chalupa Dep., Ex. 8 at AC000089.

³⁷ Email from Chalupa to Miranda (Mar. 31, 2016, 9:52 PM), Chalupa Dep., Ex. 8 at AC000089.

³⁸ *Id.*

³⁹ 52 U.S.C. § 30121(a)(1); 11 C.F.R. § 110.20(b), (c), (e), (f).

⁴⁰ 52 U.S.C. § 30121(a)(2). The Commission’s implementing regulation at 11 C.F.R. § 110.20(g) provides a narrowing construction—*i.e.*, “no person shall *knowingly* solicit ...”—and, as relevant here, “knowingly” is defined to include “actual knowledge” that the target of the solicitation is a foreign national, *see id.* § 110.20(a)(4).

and who is not lawfully admitted for permanent residence,⁴¹ as well as a “foreign principal” as defined at 22 U.S.C. § 611(b), which, in turn, includes “a government of a foreign country.”⁴² Federal courts have upheld the foreign national prohibition because of the government’s “compelling interest ... in limiting the participation of foreign citizens in activities of American democratic self-government.”⁴³

However, these holdings are limited in application to items that qualify as “contributions” or “expenditures” under the Act, and the Commission itself has concluded that Congress limited the scope of the foreign national prohibition to items within the meaning of the term “contribution.”⁴⁴ A “contribution” includes “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.”⁴⁵ Under Commission regulations, “anything of value” includes all in-kind contributions, which include “the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services.”⁴⁶

Commission regulations also provide that to “solicit” means to “ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value.”⁴⁷ Furthermore, [a] solicitation is an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a clear message asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value. A solicitation may be made directly or indirectly. The context includes the conduct of persons involved in the communication.⁴⁸ The Commission has “emphasized that the definition ... is not tied in any way to a candidate’s use of particular ‘magic words’ or specific phrases.”⁴⁹ The Commission has also explained that communications must be reasonably construed in context, such that “the Commission’s objective standard hinges on whether the recipient should have reasonably understood that a solicitation was made.”⁵⁰

⁴¹ 52 U.S.C. § 30121(b)(2).

⁴² 52 U.S.C. § 30121(b)(1); 22 U.S.C. § 611(b)(1).

⁴³ *See Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 288–89 (D.D.C. 2011), *aff’d* 132 S. Ct. 1087 (2012); *United States v. Singh*, 924 F.3d 1030, 1041–44 (9th Cir. 2019).

⁴⁴ Advisory Opinion 1987-25 (Otaola). The Commission has determined that this prohibition extends to a foreign national’s uncompensated contribution of information to a political campaign in certain instances, including providing polling information and written opposition research reports. Gen. Counsel’s Brief at 85, MURs 4568, 4633, 4634 and 4736 (Cone).

⁴⁵ 52 U.S.C. § 30101(8)(A).

⁴⁶ 11 C.F.R. § 100.52(d).

⁴⁷ *Id.* § 110.20(a)(6) (cross-referencing 11 C.F.R. § 300.2(m)).

⁴⁸ *Id.* § 300.2(m).

⁴⁹ Definitions of “Solicit” and “Direct,” 71 Fed. Reg. 13,926, 13,928 (Mar. 20, 2006) (“Solicitation E&J”).

⁵⁰ Solicitation E&J, 71 Fed. Reg. at 13,929 (“[I]t is necessary to reasonably construe the communication in context, rather than hinging the application of the law on subjective interpretations of the Federal

IV. LEGAL ANALYSIS

In its analysis, OGC asserted that the DNC, through its agent Chalupa, solicited the Ukrainian government and then-President Poroshenko to publicly disseminate the allegation that Manafort, a recently hired Trump campaign official, previously helped to advance Russian interests in Ukraine.⁵¹ OGC reasoned that Chalupa's efforts to make Poroshenko aware of her personal concerns about Mr. Manafort's presence on the Trump campaign, and the DNC's awareness of those efforts, represented the solicitation of a prohibited foreign national in-kind contribution.⁵² Accordingly, OGC recommended that the Commission find probable cause to believe that the Respondents violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g).⁵³

We concluded that Chalupa's March 30, 2016 email to the Ukrainian Embassy does not support a probable cause finding. Among other considerations, the text of the email does not clearly indicate a request or solicitation for Poroshenko to take a certain action. Chalupa only advised Shulyar of the "very good chance" that a question on Manafort would be asked at the event and expressed that it was important that Poroshenko be "aware of the opportunity" and be prepared for the question "should it come up."⁵⁴

However, even if Chalupa had requested that Poroshenko make a statement disparaging Manafort, the implication that such a request constitutes solicitation of a "thing of value" under the Act carries pernicious implications for speech that is clearly protected by the First Amendment. We reject this interpretation outright.

A. Prohibiting Speech by Foreign Nationals, on American Soil, in Response to Questions from the American Press, Would Pose Insurmountable Constitutional Difficulties

It bears repeating that OGC, and at least two of our colleagues, believe that a statement made by a foreign leader, on American soil, to the American press, can qualify as an unlawful contribution if it is intended to benefit a candidate's campaign. Enforcement on this theory would have raised insurmountable constitutional difficulties. No matter how the facts are portrayed, the "thing of value" in this Matter is pure speech protected by the First Amendment, not a "contribution" under the Act.

It is well-established that non-U.S. citizens in the United States have broad First Amendment rights. Accordingly, the Supreme Court has stated that neither the First

candidate's or officeholder's communications or on the varied understandings of the listener. The revised definition reflects the need to account for the context of the communication and the necessity of doing so through an objective test.").

⁵¹ PC Br. at 1–2 (DNC); PC Br. at 1–2 (Chalupa, *et al.*).

⁵² PC Br. at 26–27 (DNC); PC Br. at 26 (Chalupa, *et al.*).

⁵³ Office of General Counsel's Notice to the Commission Following the Submission of Probable Cause Briefs at 2 (Mar. 23, 2021) (DNC); Office of General Counsel's Notice to the Commission Following the Submission of Probable Cause Briefs at 2 (Mar. 23, 2021) (Chalupa, *et al.*).

⁵⁴ Chalupa Dep., Ex. 7 at AC000307.

Amendment nor the Fifth Amendment “acknowledges any distinction between citizens and resident aliens.”⁵⁵ U.S. citizens also have the right to obtain information from speakers who are non-U.S. citizens, including foreign governments, and statutes that place unjustifiable burdens on the right to receive such speech are unconstitutional.⁵⁶ And, as this Commission well knows, discussions of governmental affairs and candidates for office must be afforded the broadest possible protection.⁵⁷

If Petro Poroshenko had chosen to comment negatively to reporters about the Trump campaign’s hiring of Paul Manafort at the 2016 Nuclear Security Summit in Washington, DC, he would have been within his rights to do so. OGC’s assertion that such speech would be unlawful is, simply put, at odds with any reasonable interpretation of the First Amendment.

B. Information as a “Thing of Value”

Given the clear constitutional shoals into which this case would thrust us, it is worth asking how we got to this point. The answer can be found, as it often is, in the problems of

⁵⁵ See *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (“Freedom of speech and of press is accorded aliens residing in this country.”); *Underwager v. Channel 9 Australia*, 69 F.3d 361, 365 (9th Cir. 1995) (“We conclude that the speech protections of the First Amendment at a minimum apply to all persons legally within our borders.”).

⁵⁶ See, e.g., *Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965) (invalidating a statute directing the Postmaster General to regulate the flow of “communist political propaganda” through the mail). In his concurring opinion in *Lamont*, Associate Justice William J. Brennan made explicit what was implicit in the majority opinion, declaring that “the right to receive publications is ... a fundamental right,” the protection of which is “necessary to make the express guarantees [of the First Amendment] fully meaningful.” Although the “right to receive” was only referenced explicitly in Brennan’s concurrence, it was clearly acknowledged by the entire Court because the majority holding was premised on the receiver’s, rather than the foreign speaker’s, constitutional claim. Notably, although the Foreign Agents Registration Act, 22 U.S.C. § 611 *et seq.*, mandates registration of foreign agents and disclosure and labeling for informational materials that they disseminate within the United States on behalf of foreign principals, it does not prohibit any particular activities by foreign nationals or those serving as their agents. See *Meese v. Keene*, 481 U.S. 465, 478 (1987) (noting that FARA “neither prohibits nor censors the dissemination of advocacy materials by agents of foreign principals” in considering a First Amendment challenge to the labeling of certain materials as political propaganda); *United States v. Auhagen*, 39 F. Supp. 590, 591 (D.D.C. 1941) (“The dissemination of foreign political propaganda is not prohibited by statute and Congress did not intend to deprive citizens of the United States of political information even if such information be the propaganda of a foreign Government or foreign principal.”).

⁵⁷ *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (*per curiam*) (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)) (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order ‘to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”); see also *Mills v. Ala.*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates....”).

vagueness and overbreadth identified by the Supreme Court at this agency’s inception. Here, the culprit is the term “thing of value.”

Commission regulations provide a non-exhaustive list of examples of goods and services that qualify as a “thing of value,” which includes “[s]ecurities, facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists.” OGC’s view is that the existence of this non-exhaustive list “conveys that anything provided to a campaign that may confer a benefit, and thus potentially spare the campaign’s own resources, is conceivably a thing of value.”⁵⁸

This approach fails to heed the warning sounded by the Supreme Court in *Buckley v. Valeo*. There, the Court noted that the ambiguity of the phrase “for the purpose of influencing any election for Federal office,” which modifies the term “thing of value” in the Act’s definition of “contribution,” “poses constitutional problems.”⁵⁹ But the Court also assumed—correctly, in our view—that the Act would not be interpreted to reach *anything* of *any* conceivable value, but instead would be subject to the “limiting connotation created by the general understanding of what constitutes a political contribution.”⁶⁰ And the Court was clear in explaining what that “general understanding” included: “funds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary” and “dollars given to another person or organization that are earmarked for political purposes.”⁶¹

A statement at a press conference does not fall within that “general understanding.” If a campaign would otherwise spend money to obtain a good or service, it is reasonable to say that a third party providing that good or service to the campaign is making a “contribution” under the Act. But this only makes sense if the item contributed is something for which a campaign would otherwise pay. To be clear, the Commission has said on various occasions that certain types of information (such as opposition research services and reports,⁶² donor lists,⁶³ and internal political poll results⁶⁴) qualify as a “thing of value” for the purposes of the Act, and in issuing this Statement of Reasons, we do not contradict that history. Information, however, does not always fit neatly into the “goods” or “services” category—especially if it does not take a form that can be commercially distributed or made

⁵⁸ Gen. Counsel’s Brief at 15, MUR 7271 (DNC, *et al.*).

⁵⁹ *Buckley*, 424 U.S. at 77.

⁶⁰ *Id.* at 23 n.24.

⁶¹ *Id.*

⁶² Factual & Legal Analysis at 13–20, MUR 6414 (Carnahan) (a committee’s receipt of opposition research services without paying the usual or normal charge may result in an in-kind contribution).

⁶³ Advisory Opinion 2010-30 (Citizens United) (an organization’s rental of its email list to political committees is a thing of value, absent payment by the committee of the usual and normal rental charge).

⁶⁴ 11 C.F.R. § 106.4(b); Advisory Opinion 2006-04 (Tancredo) (providing access to polling data is a “thing of value”); Factual & Legal Analysis at 4–6, MUR 5480 (Levetan for Congress) (committee accepted an in-kind contribution that it failed to disclose when it accepted a state campaign committee’s transfer of polling data without payment).

available for purchase or sale, and especially not when the “information” concerned is purely speech.

Consider a hypothetical scenario. A candidate’s campaign reaches out to a political opponent’s former business partner who happens to be a foreign national, and she in turn provides the campaign with an oral account indicating that the political opponent engaged in illegal business practices. Under OGC’s rationale, the former business partner would have made—and the campaign would have solicited, accepted, and received—a foreign national contribution in violation of the Act. Such a prohibition would directly undermine the First Amendment rights of both the speaker and the listener. It also raises prudential concerns: if the Act requires political actors to refrain from calling newsworthy information or credible allegations of misconduct by an opponent to the attention of the press, simply because those allegations were made by foreigners rather than Americans, it would hamstring the ability of the press to investigate and report candidate misconduct involving foreign nationals.

Finally, determining whether the sort of information described above has “value,” and what that value might be, is an inherently subjective exercise. Allegations of foreign business shenanigans could be a race-ending bombshell for one campaign, and a mere blip in the news cycle for another. The *Buckley* Court expressly recognized that the Act must be construed “to avoid the shoals of vagueness”⁶⁵ and interpreted it precisely, objectively, and through the lens of the definitions of “contribution” and “expenditure.”⁶⁶ If the Commission serves as arbiter in matters where the information in question cannot be reliably valued, it will run aground in short order, as it nearly did here.

C. Official Government Acts Are Not Inherently Contributions or Expenditures

The Act includes “a government of a foreign country”⁶⁷ in the definition of “foreign principal.” There may be cases where an official act of a foreign country would give rise to contribution under the Act. For instance, although a check drawn on a foreign treasury and delivered to a campaign would presumably involve official acts of the relevant foreign government, it would also clearly be “a gift of money” and hence a contribution under the Act.

No such scenario is present here. The “official act” of a government official—domestic or foreign—will often fall outside the *Buckley* Court’s “general understanding of what constitutes a political contribution.”⁶⁸ The Act itself acknowledges this in the context of the official acts of U.S. federal government officials by expressly exempting federal government spending from the definitions of “contribution” and “expenditure.”⁶⁹ In other words, in passing the Act, Congress was clearly aware that U.S. officials’ policy decisions involving the disbursement of federal government funds—*e.g.*, a Member of Congress’s vote to authorize or

⁶⁵ 424 U.S. at 78.

⁶⁶ *Id.*

⁶⁷ 52 U.S.C. § 30121(b)(1); 22 U.S.C. § 611(b)(1).

⁶⁸ *See supra* n.61 and accompanying text.

⁶⁹ 52 U.S.C. § 30101(11).

appropriate spending that would benefit his constituents, or a President signing appropriations legislation—could bear electoral fruit for those officials.

To suggest that no such line exists in the foreign context is at best incongruous, and at worst legally and diplomatically fraught. True, President Poroshenko declined to involve himself in the 2016 election by discussing Paul Manafort—but other foreign actors may not be so circumspect. There are many scenarios in which an official act engaged in by, or relating to, a foreign government can be beneficial or detrimental to a candidate for office, but the mere implication of electoral impact does not transform that act into a “thing of value” for the purposes of the Act.

For example, scholars have surmised that in 2018, in response to then-President Trump’s trade policy vis-à-vis China, the Chinese government issued tariffs systematically targeting U.S. goods produced in closely-contested Republican-supporting congressional districts in order to turn voters in those districts against Republican candidates.⁷⁰ The European Union adopted a similar strategy nearly twenty years ago, targeting President Bush’s political vulnerabilities in advance of the 2002 midterm elections.⁷¹ In 2012, President Obama and his Russian counterpart at the time, Dmitry Medvedev, directly acknowledged the electoral impact of official acts during a private exchange overheard by journalists.⁷² And journalists and filmmakers have implied that the Cuban government’s demand that Elián González be returned to that country, and the Clinton administration’s response, mobilized a “revenge vote” among Cuban-Americans in Florida that led to Vice President Al Gore’s defeat in the 2000 presidential election.⁷³ Future elections will undoubtedly provide additional examples.⁷⁴ There is no indication that Congress intended for us to police these actions, let alone the speech at issue here, as a contribution under the Act.

⁷⁰ Sung Eun Kim and Yotam Margalit, *Tariffs As Electoral Weapons: The Political Geography of the US–China Trade War*, 75 INT’L ORG. 1 (2021).

⁷¹ Geoff Winestock and Neil King Jr., *EU to Target GOP’s Swing State in Payback for Bush Steel Tariffs*, WALL ST. JOURNAL (March 22, 2002), <https://www.wsj.com/articles/SB101674938851653120> (“EU Trade Commissioner Pascal Lamy, who is preparing the hit list, said his strategy is to get the White House to change course by hurting regions and companies the Bush administration needs politically.”).

⁷² J. David Goodman, *Microphone Catches a Candid Obama*, N.Y. TIMES (Mar. 26, 2012), <https://www.nytimes.com/2012/03/27/us/politics/obama-caught-on-microphone-telling-medvedev-of-flexibility.html> (according to reports, then-President Obama was overheard telling then-President of Russia Medvedev that he would have “more flexibility” to negotiate on missile defense issues after the 2012 presidential election, which Obama anticipated he would win).

⁷³ *See, e.g.*, William Schneider, *Elián González Defeated Al Gore*, THE ATLANTIC (May 1, 2001), <https://www.theatlantic.com/politics/archive/2001/05/elian-gonzalez-defeated-al-gore/377714/>; 537 VOTES (HBO Documentary Films, 2020).

⁷⁴ As will American foreign policy efforts abroad. *See* David Shimer, *Election Meddling in Russia: When Boris Yeltsin asked Bill Clinton for Help*, WASH. POST (June 26, 2020) (while Clinton administration determined “direct [financial] support to an individual candidate would have marked an inappropriate intervention in the Russian political process,” the United States provided diplomatic advantages to then-President Yeltsin by ensuring the G8 conference produced “only positive stories for [him] right before the election runoff”).

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Ultimately, wherever the line may need to be drawn in future cases, this Matter is not a close call. But in a world where foreign policy developments can, and should, impact how Americans vote, the Commission should be wary of establishing a legal standard that would invite complaints and litigation whenever a complainant plausibly alleges that a foreign government has taken an action that may impact an American election.

V. CONCLUSION

A finding of probable cause in this Matter was unsupported by the record. Moreover, it would have risked significant harm to the First Amendment rights of Americans, read the Act in a manner which would have invited (likely successful) vagueness and overbreadth challenges, and risked steering the Commission into an inadvertent role bearing an outsize impact on American foreign policy—a role for which we are obviously ill-suited.

Accordingly, and based on the available information in this Matter, we found no probable cause to believe that Chalupa, C&A, and the DNC violated the foreign national prohibition at 52 U.S.C § 30121(a)(2) and 11 C.F.R. § 110.20(g).

June 10, 2021

Date



Allen Dickerson
Vice Chair

June 10, 2021

Date



Sean J. Cooksey
Commissioner

June 10, 2021

Date



James E. "Trey" Trainor III
Commissioner