DEMOCRACY 21

October 23, 2019

Dear Representative:

Democracy 21 strongly supports H.R. 4617, the SHIELD Act of 2019 and urges you to vote for the legislation and to oppose all weakening or undermining amendments.

The report from Special Counsel Mueller established beyond any reasonable doubt that Russia invaded the 2016 presidential election to disrupt our democracy, harm presidential candidate Hillary Clinton and help presidential candidate Donald Trump. This finding was reaffirmed by the report issued early this month by the Republican and Democratic Senators of the Senate Intelligence Committee.

It is incumbent on Congress to take all necessary steps to ensure that cyberattacks by foreign countries on our elections – like the Russian attack in 2016 – do not occur in future elections. So far, these efforts are being blocked by Senate Majority Leader Mitch McConnell, who is singlehandedly preventing the Senate from even considering almost all legislative efforts to protect the integrity and security of our elections.

In June 2019, the House passed one very important measure to strengthen the nation's election security, H.R. 2722, the SAFE Act. The SHIELD Act is another very important measure to protect the integrity of our democracy and our elections.

The United States has long prohibited foreign governments – and other foreign nationals, including individuals and corporations – from being involved in U.S. elections.

The current statutory restrictions include a ban on any foreign national "directly or indirectly" making a contribution or donation of money to a candidate or political party in connection with any election, or making an "expenditure, independent expenditure, or disbursement for an electioneering communication." 52 U.S.C. § 30121(a)(1). The current restrictions also include a ban on any person soliciting, accepting or receiving a contribution or donation from a foreign national. *Id.* at (a)(2). (The ban was strengthened by the Bipartisan Campaign Reform Act of 2002 (McCain-Feingold)).

There are, however, major loopholes in these restrictions that allowed Russia to spend money legally to influence the 2016 presidential election. The SHIELD Act closes these loopholes and protects U.S. elections in multiple ways against a recurrence of foreign interference.

First, the bill creates a reporting requirement for a political committee (including a candidate committee, party committee, Super PAC or other committee) to notify the FBI and the FEC any time a "covered foreign national" directly or indirectly contacts the committee or its candidate,

where the contacts relate to a campaign contribution, expenditure or other disbursement, or involve coordination with a campaign or the offer of information or services.

For this purpose, a "covered foreign national" is defined as a foreign government, foreign political party, or their agents, and also any foreign national who is on a Treasury Department list of persons subject to sanctions related to the conduct of a foreign country. The bill also requires every political committee to establish an internal compliance system to ensure that the reporting requirement is met.

The bill also incorporates the Honest Ads Act, which ensures greater transparency for online political ads. It requires online ads – including paid internet or paid digital communications – to include a disclaimer identifying the sponsor of the ad, just like TV and radio ads are required to do. And it requires online platforms, like Facebook, to maintain and make public a record of each request to purchase a political ad on the platform.

In addition, the bill closes the major loopholes in the existing ban on spending by foreign nationals to influence U.S. elections.

The bill explicitly prohibits a foreign national from spending money for paid online communications that refer to a candidate within 60 days of a general election or 30 days of a primary. The law already prohibits these ads being run on broadcast and cable stations but does not cover online ads. The bill also prohibits a foreign national from spending money for ads that promote, support, attack or oppose the election of a candidate. The bill also prohibits ads paid for by foreign governments, foreign political parties or their agents, or persons on the Treasury Department's sanctions list, that discuss an issue of national legislative importance in an election year.

Finally, the bill codifies existing FEC rules to make it unlawful for a foreign national to direct, control or participate in the decision-making process of any person (such as a corporation or political committee) about that person's election-related activities. It also prohibits foreign national spending in state or local ballot initiatives and referenda, as the law already does in candidate elections.

The rationale for banning foreign involvement in our elections is straightforward: foreign interests should play no role in influencing our elections or compromising the officeholders who would benefit from any such involvement. Period. American voters, not foreign interests, should choose our elected leaders.

Past decisions establish that restrictions on foreign nationals giving or spending money to influence U.S. elections are constitutional. These decisions have upheld the existing restrictions and support the constitutionality of the additional restrictions contained in the SHIELD Act.

The key case upholding the constitutionality of the ban on foreign money in U.S. elections is *Bluman v. Federal Election Comm'n*, 800 F. Supp. 2d 281 (D.D.C. 2011) (three-judge court) *aff'd* 565 U.S. 1104 (2012).

In an opinion written by then-Judge (now Justice) Kavanaugh, a three-judge court recognized that different and broader constitutional interests are served in restricting campaign finance activities by foreign nationals in our elections than in restricting the raising or spending of money by U.S. citizens. Judge Kavanaugh's opinion stated:

> It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government. It follows, therefore, that the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of democratic self-government and in thereby preventing foreign influence over the U.S. political process.

Id. at 288 (emphasis added). It is notable that the Supreme Court summarily affirmed the unanimous three-judge court opinion on the merits.

While the court in the *Bluman* case dealt only with limitations on foreign nationals with regard to contributions to candidates and express advocacy expenditures, *id.*, Congress can reasonably conclude that all TV, radio, print, Internet or other ads paid for by foreign nationals to influence an election can also be banned on the same reasoning – that foreign nationals "do not have a constitutional right to participate in" the processes of this country's "democratic self-government," and that the Congress serves "a compelling interest" "in limiting the participation of foreign citizens in activities of democratic self-government. . . ."

Supreme Court decisions upholding campaign finance restrictions generally rest on the government's interest in deterring corruption or the appearance of corruption, *e.g*, *Buckley v. Valeo*, 424 U.S. 1 (1976), but restrictions on campaign spending by foreign nationals rest on a different, and broader, interest in "preventing foreign influence over U.S. elections." *Bluman, supra.* at 288, n.3.

The national interest in preventing any "influence" by foreign nationals in our elections – not just influence that might satisfy the definition of "corruption" – supports the constitutionality of restrictions on foreign nationals that are broader than comparable restrictions that could constitutionally be applied to U.S. citizens.

A letter to the House Administration Committee dated October 16, 2019 from the ACLU, raising various objections to the SHIELD Act, entirely misses this critical distinction – indeed, the ACLU letter does not even cite the *Bluman* decision, much less evaluate the provisions of the bill in light of the "compelling interest" the nation has in restricting the election-related spending of foreign nationals, and especially of foreign governments and their agents, in order to protect "the activities of democratic self-government."

By analyzing the constitutionality of the legislation only through the traditional anti-corruption framework of *Buckley* that protects political speech by U.S. citizens, the ACLU ignores the very different set of principles that apply to measures restricting the purported speech interests of

foreign nationals and foreign governments, and that are intended to protect the integrity of U.S. elections.

The record before Congress clearly demonstrates the dangers of foreign intervention in U.S. elections. The report by Special Counsel Robert Mueller provides extensive evidence of the successful efforts by agents of Russia, a hostile foreign power, to influence the 2016 presidential elections through a variety of means.

These means include the use of Internet platforms to launch social media campaigns to inflame and divide the American electorate for purposes of influencing the election, the hacking of party and candidate email accounts to steal internal emails and documents in an effort to embarrass and discredit certain candidates, and attempts at direct interference with state and local systems that are used to administer elections.

The record also shows major gaps in the coverage of the existing statutory ban on foreign national activities in our elections, and the need for Congress to strengthen the existing laws in order to protect the country against recurrence of the efforts made by Russia to influence the 2016 election.

The SHIELD Act addresses a number of the gaps revealed by the Mueller investigation.

Provisions of the Act, for instance, would expand the categories of spending to be covered by the existing spending ban to include not just broadcast, satellite or cable electioneering communications, but also paid Internet or paid digital communications that refer to a candidate within the same immediate pre-election period. Sec. 205(a)(2).

The SHIELD Act would also expand the foreign national ban to cover not just express advocacy ads, but also ads which "promote, support, attack or oppose" (PASO) the election of clearly identified candidates, even if the ads do not contain express advocacy. Sec. 205(a)(2). It is well within the power of Congress to determine that all such ads, when sponsored or paid for by a foreign national, serve to influence the election, and thus can be included within the scope of the ban.

The PASO language is targeted to focus only on ads which support or attack the election of a clearly named candidate, thus ensuring that ads that deal with legislation, without regard to an election, are not covered.

The reason to use the PASO test is because it is well-tailored to capture ads that in reality are campaign ads, even if they do not contain express advocacy. The PASO test, by definition, covers only those ads that support or oppose the election of a candidate, no matter when such ads are run (thus broadening the scope of the ban beyond the electioneering communication test, which applies only in the immediate pre-election period). And because such PASO ads are clearly campaign related – *i.e.,* ads that support or oppose the election of a candidate – they should be included within the foreign national prohibition.

Indeed, in *McConnell v. FEC* the Supreme Court noted that "any public communication that promotes or attacks a clearly identified Federal candidate directly affects the election in which he is participating." *McConnell v. FEC*, 540 U.S. 93, 170 (2003). The Supreme Court in *McConnell* explicitly upheld the PASO test in the Bipartisan Campaign Reform Act of 2002 – the same test used in the SHIELD Act – as constitutional against a First Amendment vagueness challenge.

The Court said, "the words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision." *Id.* at 170 n.64. The Court stated that the PASO words "'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)) (emphasis added).

The proposed legislation would also prohibit ads which discuss "national legislative issues of public importance" when run in the election year. Sec. 205(a)(2). This provision is limited to cover such ads only when they are paid for by a foreign government or foreign policy party or their agents, or a foreign national who is on the Treasury Department's official sanctions list because of conduct relating to a foreign government. The provision would prevent the kinds of ads sponsored by the Russian government and its agents to influence the 2016 presidential race.

Congress has the authority to determine that foreign governments, foreign political parties and their agents (including individuals under sanction) should not be allowed to run election year ads in the United States that discuss divisive national issues as a means to influence U.S. elections.

It is important to stress that foreign governments – and foreign nationals generally – do *not* have First Amendment rights that are related "to the process of democratic self-government." *Bluman*, 800 F. Supp. 2d at 287. Thus, the proposed statutory restrictions described above do not interfere with constitutionally protected speech rights. These prophylactic protections are necessary, as the congressional record shows, to respond to an actual attack on our democracy and on the integrity of our elections that took place in the last presidential election and that may well be repeated in the 2020 elections.

The congressional power to guard against such foreign interference is, as *Bluman* concluded, based on the congressional duty to protect "democratic self-government." *Bluman*, 800 F. Supp. 2d at 287. As the court said, "[T]he government may bar foreign citizens . . . from participating in the campaign process that seeks to influence how voters will cast their ballots in the elections." *Id.* at 288. Legislative efforts to effectively bar foreign participation in U.S. elections are well within the scope of congressional authority.

Democracy 21 strongly urges you to vote for the SHIELD Act and to oppose any weakening or undermining amendments.

Sincerely,

/s/ Fred Wertheimer

Fred Wertheimer
President