



2020

**An Era of Foreign Political Interference: Impulsive,
Overcompensation of Australia, and a Comparison of Legislative
Schemes with the United States**

Daniel Mack

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/eilr>

Recommended Citation

Daniel Mack, *An Era of Foreign Political Interference: Impulsive, Overcompensation of Australia, and a Comparison of Legislative Schemes with the United States*, 34 Emory Int'l L. Rev. 367 (2020).

Available at: <https://scholarlycommons.law.emory.edu/eilr/vol34/iss1/3>

This Comment is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory International Law Review by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

AN ERA OF FOREIGN POLITICAL INTERFERENCE: IMPULSIVE, OVERCOMPENSATION OF AUSTRALIA, AND A COMPARISON OF LEGISLATIVE SCHEMES WITH THE UNITED STATES

INTRODUCTION

In an era of “fake news,” where misinformation is spread through different types of media to intentionally deceive voters, foreign political interference and its opaqueness have become dangerous and far-reaching threats to democracy. In June 2018, Australia passed sweeping legislation to combat foreign interference in politics, resulting in the most significant counterintelligence overhaul in decades.¹ In response to events like Russia’s interference in the United States’ 2016 presidential election, the threat and fear of Chinese interference to Australia’s democratic process, and the pressure of approaching by-elections, Australia rushed to introduce and effectuate these new laws.² Some Australian national security experts praise the new legislation, deeming the measures “overdue, and necessary for an age when Russian hackers can undermine American democracy without going near a voting booth, and when China’s mingling of economic and political interests is redefining geopolitics.”³

However, a nation that impulsively and hastily drafts, introduces, and passes sweeping reform faces unintended side effects. On their face, the new laws target foreign influence and seek to create transparency for the Australian government and the public.⁴ The laws also aim to strengthen punishment against espionage, sabotage, and secrecy offenses.⁵ Lurking beneath the surface of the superficial functionality of the legislative regime are issues that cannot be concealed and will not remain dormant. Australia’s new laws: (i) fail to achieve their goal of

¹ Damien Cave & Jacqueline Williams, *Australian Law Targets Foreign Interference. China Is Not Pleased.*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/world/australia/australia-security-laws-foreign-interference.html>.

² James Elton-Pym, *Sweeping Changes to Espionage, Treason and Secrecy Laws as Foreign Interference Bills Pass*, SBS NEWS (June 28, 2018), <https://www.sbs.com.au/news/sweeping-changes-to-espionage-treason-and-secrecy-laws-as-foreign-interference-bills-pass>; Clive Hamilton, *Australia’s Fight Against Chinese Political Interference*, FOREIGN AFF. (July 26, 2018), <https://www.foreignaffairs.com/articles/australia/2018-07-26/australias-fight-against-chinese-political-interference>; *Insiders: Christian Porter Joins Insiders* (Australian Broadcasting Corporation television broadcast June 10, 2018) [hereinafter *Insiders*] <http://www.abc.net.au/insiders/christian-porter-joins-insiders/9855012>.

³ Cave & Williams, *supra* note 1.

⁴ Attorney-General Christian Porter, *Australia’s National Security Greatly Enhanced with New Laws*, ATT’Y-GEN.’S DEP’T (June 28, 2018), <https://www.attorneygeneral.gov.au/media/media-releases/australias-national-security-greatly-enhanced-new-laws-28-june-2018>.

⁵ *Id.*

preventing foreign political interference; (ii) hinder Australian civil liberties; and (iii) create additional, undesirable, and costly problems.

This Comment will analyze the failure of Australia's new legislation regarding national security and foreign political interference. Part I sets out the relevant background and history of what prompted the new Australian laws followed by a discussion of the legislation itself, including its procedural history and structure. Part II reveals that Australia's new laws fail to achieve their goal of preventing foreign political interference, hinder Australian civil liberties, and create additional, undesirable and costly problems. Part III explores the United States' historical context and legislative framework to protect against foreign political interference as compared to Australia's new laws. Finally, Part IV proposes what Australia should have done differently, and what it should do moving forward to correct its failed legislative reform.

I. AUSTRALIA'S 2018 NATIONAL SECURITY AND FOREIGN INTERFERENCE REFORM PACKAGE

A. *What Prompted the New Australian Laws?*

Often times, paranoia and fear lead to impulsivity and hastiness. This was the case in Australia's national security and foreign interference reform.⁶ The climate of international relations between Australia and China, in combination with overdramatized media and the viral spreading of "fake news," led Australia to become weak and fearful, resulting in the implementation of poorly drafted laws and disregard for potential consequences.⁷

All eyes around the globe, including Australia, rested on the 2016 U.S. presidential election. With two very flawed candidates up for election to serve as the next President of the United States, controversy filled the air just as the oxygen we breathe. Amidst all the controversy and distractions, the U.S. democratic process became the target and victim of foreign political interference.⁸ Russia successfully attacked and influenced the outcome of the

⁶ Evelyn Douek, *What's in Australia's New Laws on Foreign Interference in Domestic Politics*, LAWFARE (July 11, 2018), <https://www.lawfareblog.com/whats-australias-new-laws-foreign-interference-domestic-politics>.

⁷ Hamilton, *supra* note 2; *Insiders*, *supra* note 2.

⁸ Ellen Nakashima & Shane Harris, *How the Russians Hacked the DNC and Passed its Emails to WikiLeaks*, WASH. POST (July 13, 2018), https://www.washingtonpost.com/world/national-security/how-the-russians-hacked-the-dnc-and-passed-its-emails-to-wikileaks/2018/07/13/af19a828-86c3-11e8-8553-a3ce89036c78_story.html?noredirect=on&utm_term=.c4d1b8fc6986.

U.S. political process.⁹ The most concrete examples include, the hacking and public release of the Democratic National Committee emails to WikiLeaks and the illegal obtaining of information of over 500,000 voters in the state of Illinois.¹⁰ Australian Attorney-General Christian Porter's reference to Russia's interference in the 2016 U.S. presidential election confirms the role it played in the creation of Australia's new laws, "[t]here were Twitter bots and Russian troll farms paying for advertising on Facebook in the context of the American election. So these types of events, occurrences, behaviours that we are seeing arise in the context of democratic elections all around the Western world are not something we are immune from."¹¹

Fear of China's ability to influence Australia's political process also played a major role in Australia's decision to reform its national security and foreign interference laws.¹² In 2017, as a result of the discussion surrounding Russia's influence in the recent U.S. presidential election, Australia became increasingly concerned with threat of foreign political interference in its own political process, and began investigating whether China had interfered with Australia's political processes.¹³ Australia, as a major force in the Pacific, is an attractive target for China and because in Australia, contrary to other developed countries, foreign donations are legal, which can be very difficult to track in a highly unregulated campaign finance system.¹⁴ In June of 2017, Australian intelligence "identified two prominent businessmen of Chinese descent" who donated millions to Australia over recent years as potential agents of the Chinese government, resulting in significant political influence.¹⁵ According to a study conducted by the Melbourne Law School's Dollars and Democracy Database, approximately eighty percent of foreign political donations to Australian parties between 2000 and 2016 were received from China.¹⁶

Finally, pressure to pass the new legislation before the upcoming 2018 by-elections played a major role in creating a sense of urgency to pass reform.¹⁷ Australian Attorney-General Christian Porter addressed Australia's stance on the need to have such laws take effect as soon as possible:

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Insiders, supra* note 2.

¹² Hamilton, *supra* note 2.

¹³ Cave & Williams, *supra* note 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Joshua Kurlantzick, *Australia, New Zealand Face China's Influence*, COUNCIL ON FOREIGN REL. (Dec. 13, 2017), <https://www.cfr.org/expert-brief/australia-new-zealand-face-chinas-influence>.

¹⁷ *Insiders, supra* note 2.

We have heard from the Director-General of [Australian Security Intelligence Organisation] ASIO that the efforts by foreign countries and foreign agencies to effect changes of Australian opinion in a covert way, to influence democratic outcomes, are on the rise so it makes complete sense to have these laws in place before the next large democratic event. And I might just add that these laws, for the first time ever, will make it an offence to covertly interfere with Australian democratic processes so, of course, it's very important to have those laws in place before the next big set of democratic process.¹⁸

Fear caused by past foreign interference between other countries, fear of future foreign interference to its own democratic process, and the reality of fast-approaching by-elections prompted Australia to hastily pass a new national security and foreign political interference regime.¹⁹

B. Procedural History, Structure, and Substance of the New Australian Laws

The *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* was introduced on December 7, 2017.²⁰ Additionally, on the same day, the *Foreign Influence Transparency Scheme Bill 2017* was introduced.²¹ On June 28, 2018, the Australian government passed a legislation reform package consisting of the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2018* (NSLA) and the *Foreign Influence Transparency Scheme Bill 2018* (FITS) targeting foreign interference and foreign influence.²² These Acts received royal assent on June 29, 2018.²³

1. The National Security Legislation Amendment

According to the Revised Explanatory Memorandum of the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2018*, the NSLA aims to serve specific purposes.²⁴ Such purposes which, are

¹⁸ *Id.*

¹⁹ Elton-Pym, *supra* note 2; Hamilton, *supra* note 2; *Insiders*, *supra* note 2.

²⁰ National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Cth) (Austl.).

²¹ Foreign Influence Transparency Scheme Bill 2017 (Cth) (Austl.).

²² Kelly Buchanan, *Australia: Bills Containing New Espionage, Foreign Interference Offenses, and Establishing Foreign Agent Registry Enacted*, LIBR. CONG. (Aug. 21, 2018), <https://www.loc.gov/law/foreign-news/article/australia-bills-containing-new-espionage-foreign-interference-offenses-and-establishing-foreign-agent-registry-enacted/>.

²³ *Id.*

²⁴ Revised Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Cth) 2 (Austl.) (this 2017 Revised Explanatory Memorandum was prepared prior to the actual 2018 bill).

relevant to the scope of this Comment, include: (1) enacting new foreign interference violations targeted towards “covert, deceptive or threatening actions” by foreign parties attempting to influence or harm Australian government and democratic processes; (2) modernizing laws, such as treason, to protect government defense and democracy; (3) strengthening current espionage laws, including protecting against foreign economic espionage by enacting new laws regarding theft of trade secrets; (4) reforming secrecy laws to adequately prevent damaging information leaks while preserving freedom of speech; (5) reshaping laws against sabotage to safeguard infrastructure amidst modern tampering capabilities; (6) introducing new laws to punish giving false or misleading information in order to gain security clearance; and (7) providing law enforcement with sufficient access to telecommunications interception capabilities to investigate violations of any such laws.²⁵

The NSLA made numerous amendments to Chapter 5 of Australia’s Criminal Code Act 1995 (the Criminal Code).²⁶ Division 92 was inserted into Part 5.2 of the Criminal Code and contains Australia’s new foreign interference offenses.²⁷ These new foreign interference offenses criminalize harmful conduct of foreign principals intending to interfere with Australia’s political, governmental, or democratic processes; to support their own intelligence activities; or to otherwise compromise Australia’s national security.²⁸ For purposes of this Comment, some of the relevant changes and additions effectuated by the NSLA to the Criminal Code are listed below:

(a) Division 92.2(1) creates:

an offence to engage in conduct that is covert or involves deception, threats or menaces on behalf of a foreign principal with an intention to: influence a political or governmental process of the Commonwealth or a State or Territory, influence the exercise of an Australian democratic or political right, support intelligence activities of a foreign principal, or prejudice Australia’s national security;²⁹

(b) Division 92.2(2) creates:

an offence to engage in conduct on behalf of a foreign

²⁵ *Id.*

²⁶ *Australia Criminal Code Act 1995* (Cth) (Austl.); Buchanan, *supra* note 22.

²⁷ Buchanan, *supra* note 22.

²⁸ *Id.*

²⁹ Revised Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2018 (Cth) 191 (Austl.).

principal with an intention to influence another person (the target) in relation to a political or governmental process or the exercise of an Australian democratic or political right without disclosing to the target that they are working for a foreign principal;³⁰

- (c) Division 92.4 creates “an offence of preparing for a foreign interference offence. The offence will criminalise conduct in preparation for, or planning an offence of foreign interference;”³¹
- (d) Division 92.7 is an offense for knowingly supporting a foreign intelligence agency. It creates “an offence to provide resources or material support to an organisation or person acting on behalf of an organisation where the person knows that the organisation” is one of foreign intelligence;³²
- (e) Division 92.9 creates an offense for “knowingly funding or being funded by [a] foreign intelligence agency;”³³
- (f) Division 92A.1 creates “an offence to dishonestly receive, obtain, take, copy or duplicate, sell, buy or disclose information that is a trade secret on behalf of a foreign government principal;”³⁴ and
- (g) Division 83.4 “creates an offence that applies where a person uses force, violence, threats or intimidation to interfere with a person’s democratic or political right under the Constitution or Commonwealth law.”³⁵

2. *The Foreign Influence Transparency Scheme*

FITS aims to facilitate transparency for the Australian public and government regarding foreign influence on Australia’s political and governmental processes by utilizing a registration scheme.³⁶ While the registration scheme does not prohibit foreign actors from being involved in Australia’s political and governmental processes, it creates obligations for

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Austl. Gov’t, *Espionage, Foreign Interference and Foreign Influence*, ATT’Y-GEN.’S DEP’T, <https://www.ag.gov.au/NationalSecurity/EspionageForeignInterferenceandForeignInfluence/Pages/default.aspx> (last visited Sept. 16, 2018) [hereinafter *Espionage*].

persons or entities who have arrangements with, or perform activities or other functions on behalf of, foreign principals. The registration scheme reveals when a person is acting on behalf of a foreign actor.³⁷ Disclosure of such information permits both the Australian government and the public to accurately and sufficiently assess such foreign influence on domestic interests.³⁸

FITS will accomplish several goals and serve certain purposes relevant to the scope of this Comment.³⁹ These include: (1) mandatory registration by any persons performing certain activities on behalf of a foreign principal; (2) possible exemptions for certain types of activities or persons; (3) ability of the Secretary to issue a transparency notice; mandatory disclosures (initial and ongoing) by registrants regarding the nature of their relations with the foreign principal and any such actions taken pursuant to that relationship; and (4) additional disclosure requirements during “times of democratic significance,” such as elections and voting periods; and the availability of certain information to the public in order to promote transparency and public trust of the government.⁴⁰

According to the simplified outline of FITS, persons may become subject to registration under the scheme if they (a) “undertake[] registrable activities on behalf of a foreign principal (even if the person only does so once); or (b) if the person enters [into] an arrangement with a foreign principal to undertake registrable activities on behalf of the foreign principal (whether or not the person actually undertakes the activities).”⁴¹ Registrable activities include:

- (a) parliamentary lobbying within Australia on behalf of a foreign government;
- (b) activities within Australia for the purposes of influencing a political or governmental system or process (parliamentary lobbying on behalf of a foreign principal that is not a foreign government; general political lobbying; communications activity; and donor activity);
- (c) a former Cabinet Minister that acts on behalf of a foreign principal within 3 years of being Cabinet Minister;
- (d) a former Minister of MP that acts on behalf of a foreign principal within 3 years of being Minister of MP; and

³⁷ Revised Explanatory Memorandum, Foreign Influence Transparency Scheme Bill 2018 (Cth) 2 (Austl.).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Foreign Influence Transparency Scheme Bill 2018 (Cth) 23–24 (Austl.).

- (e) a former senior Commonwealth public official that acts on behalf of a foreign principal within eighteen months following their public role.⁴²

There are certain exemptions in place that allow a person to opt-out of registration for activities that commonly involve arrangements with foreign principals.⁴³ These include activities done for the sole purpose of providing humanitarian aid, legal advice, or representation, religious pursuits, reporting or presenting news as privately-owned media, certain business or commercial activities, and diplomatic activities of officials while performing their official duties and functions.⁴⁴

A seemingly convincing justification for this registration scheme is fear that foreign influence will compromise Australia's sovereignty and interests. This registration scheme seeks to deny the accrual of undesirable benefits for foreign countries at Australia's expense. Part II of this Comment will address how the new laws, including the registration scheme, fail to protect against foreign interference and actually create more problems than they solve.

II. EFFECTS OF THE NEW AUSTRALIAN LEGISLATION: FLAWS OF THE LAWS

A. *Failure of the New Laws to Achieve Its Goals*

The new legislation was allegedly drafted and effectuated with the purpose of preventing foreign political interference.⁴⁵ Australia is one of the first countries to reform its national security laws in an effort to end foreign political interference.⁴⁶ Other democratic countries like the United States, the United Kingdom, and Germany are waiting to see how Australia's new legislation plays out.⁴⁷ However, this new legislation is an example of "reckless lawmaking for purely electoral gain."⁴⁸

⁴² Austl. Gov't, *Overview of the Foreign Influence Transparency Scheme*, ATT'Y-GEN.'S DEP'T, <https://www.ag.gov.au/NationalSecurity/EspionageForeignInterferenceandForeignInfluence/Documents/Overview-Foreign-Influence-Transparency-Scheme.pdf> (last visited Sept. 23, 2018) [hereinafter *Overview*].

⁴³ Foreign Influence Transparency Scheme Bill 2018 (Cth) 23–24 (Austl.).

⁴⁴ *Overview*, *supra* note 42.

⁴⁵ Elton-Pym, *supra* note 2.

⁴⁶ Jason Scott, *China Put on Notice by Australia's Anti-Interference Laws*, BLOOMBERG (June 26, 2018), <https://www.bloomberg.com/news/articles/2018-06-27/china-put-on-notice-by-australia-s-anti-interference-laws> (last visited Oct. 1, 2019).

⁴⁷ Sunita Bose, *People Power and Privacy Are Casualties of Australia's Foreign Interference Laws*, ACCESS NOW (July 3, 2018), <https://www.accessnow.org/people-power-and-privacy-are-casualties-of-australias-foreign-interference-laws/>.

⁴⁸ Noel Pearson, *Turnbull's Foreign Interference Laws Bad for Australian Liberties*, AUSTRALIAN

The new Australian legislation is the result of “unprincipled politics” that formulate superficial solutions.⁴⁹ Reflexively assuming that laws are the solution to every problem, as Australia has done with its national security and foreign interference reform, often results in the birth of new problems stemming from impulsive and uninformed regulations.⁵⁰ Because using fear can be an effective way of garnering public support, Australia’s government has used national security threats to create fear and garner electoral support for passage of its new laws.⁵¹ This strategy has become popular in American politics in recent years. For example, U.S. President Donald Trump rose to power through a strategy largely reliant upon utilizing fear to rally support.⁵² Trump continues to use this strategy when advocating for new laws and acquiring funds for various projects.⁵³ It seems that Australia has recognized this strategy’s effectiveness in accumulating public support and has adopted similar tactics to pass new legislation, despite any questionable ethical concerns.

Australia’s laws were designed to prevent foreign political interference and promote Australia’s democratic process.⁵⁴ However, the laws actually cause damage to many of the civil and democratic freedoms that they are designed to protect.⁵⁵ Thus, the reform has clearly failed to carry out its purpose.

B. Negatively Impact Australian Civil Liberties

“Civil liberties are a common casualty of national security measures, but rarely are they as blatantly oppressive as the Turnbull government’s [recent] espionage laws.”⁵⁶ Australia’s attempt to stop foreign political interference through legislation is so broad and overreaching that it violates the civil liberties of everyday Australian citizens by restricting their ability to advocate for better policies and laws.⁵⁷ Today, although foreign political interference is a legitimate threat to Australia and attempts should be made to fight against it, it is equally,

(July 28, 2018), <https://www.theaustralian.com.au/news/inquirer/turnbulls-foreign-interference-laws-bad-for-australian-liberties/news-story/efb27f68a54391c57441586f5aa3e026>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Alex Altman, *No President Has Spread Fear Like Donald Trump*, TIME (Feb. 9, 2017), <http://time.com/4665755/donald-trump-fear/>.

⁵³ *Id.*

⁵⁴ Elton-Pym, *supra* note 2.

⁵⁵ See discussion *infra* Section II.B.

⁵⁶ Claire O’Rourke et al., *Trusting the Government to Protect Civil Liberties? That’s a Sick Joke*, GUARDIAN (June 13, 2018), <https://www.theguardian.com/commentisfree/2018/jun/13/trusting-the-government-to-protect-civil-liberties-thats-a-sick-joke>.

⁵⁷ Bose, *supra* note 47.

if not more, important to protect and continue to facilitate Australians' democratic freedoms.⁵⁸

In a largely globalized world, many important changes to both domestic and international law come from countries connecting with one another both in support and opposition of important legal and social issues. Australia's new laws criminalize cooperative international political activities between foreign countries and organizations, which constitutes "an assault on fundamental and democratic legal rights" of Australian citizens.⁵⁹

Under the newly implemented Division 92, it may now be a crime—punishable by a maximum sentence of twenty years imprisonment—to collaborate with international groups or individuals for purposes of seeking political change for any issue, such as environmental, refugee, geo-strategic, and anti-war issues.⁶⁰ One of the most notable problems with laws established pursuant to the NSLA and FITS is poorly drafted language. Impulsively drafted and rushed legislation has left important terms either undefined or too broadly defined. Such broadly drafted laws resemble those of authoritarian governments, which attempt to oppress human rights defenders and government critics, rather than protect the freedom to advocate for new laws and policies.⁶¹

Sweeping language in Division 92 sets out the primary offense of intentional foreign interference; it criminalizes conduct "on behalf of, or in collaboration with, a foreign principal," that is intended to: (1) 'influence a political or governmental process;' (2) 'influence the exercise' of an 'Australian democratic or political right or duty;' (3) 'support intelligence activities of a foreign principal;' or (4) 'prejudice Australia's national security.'"⁶² The biggest issue with the new language is that the term *national security* has been expanded to include "the country's political, military, or economic relations with another country or other countries."⁶³

The term *collaboration* is left undefined but could mean "consultation, information-sharing, coordination, or even online communication."⁶⁴ Therefore,

⁵⁸ Elaine Pearson, *Australia's Government Must Guard Against Foreign Interference, but Not by Curbing Our Rights*, HUM. RTS. WATCH (June 13, 2018), <https://www.hrw.org/news/2018/06/14/australias-government-must-guard-against-foreign-interference-not-curbing-our-rights> [hereinafter *Government Must Guard Against*].

⁵⁹ Mike Head, *Australia's New "Foreign Interference" Laws: A Threat to Anti-War Dissent*, WORLD SOCIALIST WEB SITE (July 12, 2018), <https://www.wsws.org/en/articles/2018/07/12/inte-j12.html>.

⁶⁰ *Id.*

⁶¹ Pearson, *supra* note 58.

⁶² Head, *supra* note 59.

⁶³ *Id.*

⁶⁴ *Id.*

it is possible that an Australian citizen campaigning against the government's involvement in another country's military action would be charged criminally if contact was established with an international organization.⁶⁵

Additionally, *foreign principal* is defined to include "foreign political organisations and foreign political parties," leading to the potential imprisonment of Australians who are simply members of an international political organization.⁶⁶ The language "[i]nfluence the exercise of a democratic or political right or duty" could potentially include participation by Australians in global boycotts and other movements, or participation in the organization of counter-protests in foreign matters.⁶⁷

Under Division 92, Australians who "recklessly communicate information about Australia's political and economic relations with another country" could be sentenced to a significant amount of time in prison.⁶⁸ This damages Australians' freedom of speech, creating a chilling effect, because citizens will become too scared of incarceration to speak up and express their views or expose pertinent information.⁶⁹ In reality, while Australia has created these new laws to prevent foreign interference, especially from China, it has become more like China itself; Australia now limits reasonable and necessary access to information that is within the public interest.⁷⁰

International organizations, including the United Nations, are included in the definition of *foreign principal* under the new laws.⁷¹ Consequently, the reporting of human rights violations by the Australian government, such as war crimes or violations of refugees' rights, may now be a crime.⁷² The overly broad definition of *national security* may allow the government to charge and imprison for espionage Australians who reveal politically sensitive information.⁷³ While keeping certain information classified is essential to the public interest and for national security, this should not include information that is merely disturbing or embarrassing for the government and that poses no security threat.⁷⁴ Without

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Bose, *supra* note 47.

⁶⁹ *Id.*

⁷⁰ Pearson, *supra* note 58.

⁷¹ Head, *supra* note 59.

⁷² *Id.*

⁷³ Pearson, *supra* note 58.

⁷⁴ *Id.*

exception, no citizen should ever be criminally punished for exposing human rights violations as a result of government actions.⁷⁵

C. *Chilling Effect: “The Perfect Storm”*

Just as temperature, air pressure, humidity, and winds may fuse together in unique combinations to form a natural disaster; the combination of new, unfamiliar, and broadly drafted laws—along with a population’s fear of being criminalized—can concoct a detrimental chilling effect on transnational activism.⁷⁶

Ironically, while the new laws aim to protect democracy from foreign influence, individuals collaborating with democratic activists in a foreign country to organize rallies in Australia may actually be prosecuted for illegal foreign interference.⁷⁷ Some of the most powerful human rights movements and significant cultural change has come about through use of technology, digital communications, and people from different countries around the globe who band together and advocate for policy issues.⁷⁸ An example is the powerful #MeToo movement. This movement has empowered women and unified them, through the courage of other women around the globe, to stand and fight against sexual abuse.⁷⁹ The Internet age similarly allows people from different countries to instantly connect and cooperate to fight against domestic and foreign injustices.⁸⁰ People should be allowed, and even encouraged, to partake in such international collaboration. Rarely does any form of isolationism facilitate positive change in our increasingly globalized world.⁸¹ Collaboration between different countries and people of diverse cultures ultimately creates a more functional, integrated, and fair global society. However, the new Australian laws will likely deter Australians from participating in global advocacy as they may be subject to imprisonment for working together with foreign entities on social and political issues.⁸²

In a democratic society, where individuals may be more progressive or conservative, ideas shape, develop, and drive evolution in the pursuit of

⁷⁵ *Id.*

⁷⁶ *See* Cave & Williams, *supra* note 1.

⁷⁷ *Id.*

⁷⁸ Bose, *supra* note 47.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See* Dominique Moisi, *The Problems with Isolation*, WORLD ECONOMIC FORUM (Jan. 2, 2015), <https://www.weforum.org/agenda/2015/01/the-problems-with-isolation/>.

⁸² *See id.*

Utopia.⁸³ Ideas, responsible for innovation and progress, rely on openness.⁸⁴ “You can’t be open to new ideas yet be afraid of influence, domestic or international.”⁸⁵ Influence among nations is inevitable in a free world, and it would be impossible for the globalization of human rights and other freedoms to progress without porous borders and transnational influence.⁸⁶ The most effective way to combat improper foreign interference is through “the tried and true mechanisms of democracy: exposure, questioning, debate and criticism.”⁸⁷

Under the new laws, if a human-rights activist has a conversation with a foreign government or foreign officials who share a passion for the same cause, and takes notes or keeps any other records of that conversation, it could be illegal.⁸⁸ This means it would be dangerous for an Australian human-rights activist to communicate with American or United Nations officials.⁸⁹ Ultimately, “[c]asual conversation could become criminal if [a human-rights activist] dares to take notes about what was discussed, and if the government deems the information vital to its broadened definition of national interests.”⁹⁰

While the government argues that safeguards are in place such as requiring “[a] part’ of the conduct [to be] ‘covert’ or ‘deceptive,’” the language allows for such broad construal that too many activities may be criminalized.⁹¹ “For example, conduct may be covert if a person takes steps to conceal their communications with [a] foreign principal, such as deliberately moving onto encrypted communication platforms.”⁹² Thus, under the new laws, using an encrypted phone or Internet connection, which is a common practice in today’s highly technological and hacker-susceptible society, to communicate with a “foreign principal,” may be grounds for conviction and imprisonment.⁹³ The result is that implementing a standard means of protection over one’s privacy has the potential to become a serious criminal offense.⁹⁴

⁸³ See Pearson, *supra* note 48.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Cave & Williams, *supra* note 1.

⁸⁹ Damien Cave, *How Australia’s Espionage Laws Could Silence Whistle-Blowers and Activists*, NEW YORK TIMES (Jan. 30, 2018), <https://www.nytimes.com/2018/01/30/world/australia/australia-espionage-law.html>.

⁹⁰ *Id.*

⁹¹ Head, *supra* note 59.

⁹² Revised Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Austl.) at 205.

⁹³ Head, *supra* note 59.

⁹⁴ *Id.*

Another recent provision under the NSLA, which allows for a potential sentence of up to ten years of incarceration, criminalizes “preparing” to commit a foreign interference offense, even if such conduct does not actually occur.⁹⁵ Under this new offense, “preparation” extends criminal liability to merely discussing an idea for a possible act of foreign interference.⁹⁶ This development significantly broadens the scope of “unperformed” acts that the Australian Criminal Code criminalizes, such as attempting, aiding, or conspiring to commit foreign interference.⁹⁷

Additionally, under the NSLA, a person, either intentionally or recklessly, can neither provide “material support,” nor receive funds from a foreign intelligence agency.⁹⁸ This is yet another blow to the public that contributes to the fear of arbitrary criminalization. For example, the reckless standard could apply to someone who was unknowingly used, or tricked, by an intelligence agent to provide support or receive funds.⁹⁹

Furthermore, the Australian government presumes to deny bail to any individual charged with a new crime established by the NSLA.¹⁰⁰ In the event an individual with dual citizenship is convicted of any such crime, the home affairs minister may revoke their Australian citizenship.¹⁰¹ The Australian government argues a safeguard exists to the revocation of Australian citizenship: the attorney-general is required to personally authorize these types of prosecutions.¹⁰² However, this protection is deceitful and ineffective because “a person [may still be] arrested, charged, detained, and denied bail while [awaiting the attorney-general’s] decision.”¹⁰³ Thus, a person may still suffer from the harmful effects of these new laws even if they are not actually prosecuted for committing an offense.¹⁰⁴ As a result, can ordinary Australian citizens who choose not to exercise their so-called “protected” civil rights to advocate for change for the common good really be faulted?

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.*

D. Other Costly and Problematic Effects of the New Laws

1. Tension with China

Australia has become “the first developed country to pass sweeping laws against foreign interference, in a move aimed at reducing Chinese meddling in national affairs and [is] seen as the inspiration for legislation introduced in the U.S. Congress.”¹⁰⁵ Although the Australian government has denied that the new laws are aimed specifically towards China, the promulgation of these laws and Australia’s well-established fear of Chinese political and economic influence make the connection undeniable.¹⁰⁶ China has taken offense to the new legislation, and tension has increased between Australia and Beijing.¹⁰⁷

Australia has ratified a spinoff form of democratic government, which the author of this Comment calls: “the Hypocrisy Democracy.” Keep in mind the purpose of the new laws—to prevent foreign political interference—while considering the following interference by none other than the United States of America. Prior to the passage of Australia’s new legislation, the United States made a heavy political and military push in support of the passage of Australia’s new laws, specifically over concerns of interference by China.¹⁰⁸ Prevalent U.S. figures, including ex-Director of National Intelligence James Clapper and former presidential candidates Hillary Clinton and John McCain, visited Australia promoting the need for passage of the new laws.¹⁰⁹ Furthermore, the United States welcomed Australian advocates to testify before Congress, painting a picture of Australia standing at the frontlines of the war against Chinese “influence,” and the Australian government was happy to accommodate the U.S. invitation to testify.¹¹⁰

This seems like the exact “foreign political interference” that Australia is legislating against. Under the new laws, the Australian delegates sent to testify before the U.S. Congress to promote passage of the new laws would receive harsh criminal punishment in the form of extensive imprisonment. However, it is clear that Australia will not prosecute the U.S. agents’ overt and covert “interference.”¹¹¹ This is evidence that Australia only intended to legislate against, and more importantly, only intended to prosecute against, foreign

¹⁰⁵ Scott, *supra* note 46.

¹⁰⁶ Cave, *supra* note 1.

¹⁰⁷ *Id.*

¹⁰⁸ Head, *supra* note 59.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

interference when it inconveniences or goes against the government's interests.

2. *Too Much Executive Power Creates Potential for Abuse*

Under the new laws, the Attorney-General ultimately has the power and discretion to prosecute.¹¹² This provides little comfort. Imagine in the United States, a police officer tells an individual—who is a member of a minority group—“under the law, it is illegal to smoke marijuana, but I give you permission to smoke marijuana, and I will not arrest you for it.” Considering the police officer still has the power to arrest, how much faith will the minority individual have that he can now smoke marijuana without being arrested? Now consider that an Australian journalist, who is actually trying to benefit the public interest, is told by the government, “[it may be illegal under the new laws for you to report certain information in the public interest, but] the attorney general has veto power over prosecutions and will choose not to prosecute journalists and community groups.”¹¹³ Will the journalist rely on this statement, even though the law says otherwise? This creates fear in the reporting of such information, and rightfully so. “Asking Australians to trust this government to safeguard the civil liberties of its critics, when it is doing everything it can to silence them, is a sick joke. Speaking for future governments is even more treacherous.”¹¹⁴

The extremely broad definition of “national security” gives the Attorney-General room to argue that such reporting of information or campaigning against certain policies harms trust, confidence, and economic and political relations with foreign countries.¹¹⁵ This creates a compelling incentive for the government to use its discretion “to pursue politically motivated prosecutions,” rather than to protect against imminent national security of foreign interference.¹¹⁶ Not only will these laws enable the government to take advantage of its access to information via intelligence entities and discredit ordinary Australian citizens by claiming they may be involved in a form of foreign political interference, but it also creates circumstances that can allow the government to misuse such access to information to discredit their political opponents, either directly or by association.¹¹⁷

¹¹² Pearson, *supra* note 58.

¹¹³ O'Rourke et al., *supra* note 56.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Pearson, *supra* note 58.

¹¹⁷ Pearson, *supra* note 48.

Another issue is whether Australia is undermining diplomacy by targeting covert activity that security officials claim exist but do not fully disclose justifications to the public.¹¹⁸ In a sense, Australian citizens must simply accept the Australian government's unverified claims regarding the necessity of these new laws as truth.¹¹⁹

3. *Damage to International Business Relations*

As a result of the new laws, Australia's economy will incur incalculable expenses on transacting international business, particularly with China.¹²⁰ The methods and mechanisms required to carry out and enforce the new laws will be detrimentally expensive, and the likelihood of harm to Australia's reputation as a result of the new ill-conceived reform will deter and constrain enterprise.¹²¹ "These laws will create illegal activity where before them the activity would have been perfectly legal business intercourse in a global economy."¹²²

4. *Damage to Australia's Image and Reputation in the Global Community*

Another effect the new laws will have is reviving an "anti-Chinese suspicion," or racism.¹²³ The laws will make it close to impossible for a Chinese-Australian to hold political office without being suspected of acting as a "Manchurian candidate."¹²⁴ The rest of the world will look upon Australia as being a paranoid, xenophobic, and quite plainly, a weak nation.¹²⁵ This is comparable to the climate created in the United States regarding Muslims, or any individual of Middle-Eastern descent.¹²⁶ Recent laws such as the travel ban, or "Muslim Ban," implemented by the Trump Administration out of fear have led the United States to be viewed as racist, paranoid, and weak.¹²⁷ It is likely the same will hold true in regards to Australia's new legislation and its effect on people of Chinese descent.

¹¹⁸ Cave & Williams, *supra* note 1.

¹¹⁹ *Id.*

¹²⁰ Pearson, *supra* note 48.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Hatem Bazian, *The 'Muslim Exclusion Act' and America's rising xenophobia*, DAILY SABAH (July 10, 2018), <https://www.dailysabah.com/columns/hatem-bazian/2018/07/11/the-muslim-exclusion-act-and-americas-rising-xenophobia>.

¹²⁷ *Id.*

III. UNITED STATES' FOREIGN POLITICAL INTERFERENCE LAWS: A COMPARATIVE APPROACH

Foreign political interference in the 2016 U.S. presidential election played an integral role in influencing Australia to reform its national security and foreign political interference laws.¹²⁸ The United States is long regarded as the golden standard for a sound democratic government. Thus, it is imperative to analyze and compare the U.S. legislative framework regarding foreign political interference to gain a better understanding of how it has shaped and influenced Australia's new laws.

A. *Historical Precedence of Foreign Political Interference in the United States*

A brief comparison of two instances occurring at different times in U.S. history brings to light how foreign political interference evolves with technology and how developed countries, like the United States and Australia, may deal with such atrocities. Foreign political interference in the United States dates back to the very first contested presidential election of 1796, between Thomas Jefferson and John Adams.¹²⁹

A French agent, Pierre-Auguste Adet, released private information to the American public to sway voters to elect Jefferson.¹³⁰ Adet hoped that Jefferson would be elected and turn the United States against Great Britain, which would be seen as a win for France.¹³¹ Adet simultaneously released a series of signed letters to the U.S. Secretary of State, and to a large Philadelphia newspaper for publishing.¹³² The letters asserted that France would declare war against the United States if Jefferson was not elected as president, which struck fear among American voters.¹³³

In the 2016 presidential election, Russia hacked emails from the Democratic National Convention and released this private information to the American public with the intent to diminish trust in Hilary Clinton and garner support for Donald Trump.¹³⁴ In this recent act of foreign political interference, the rapid

¹²⁸ Elton-Pym, *supra* note 2.

¹²⁹ Alden Fletcher, *Foreign Election Interference in the Founding Era*, LAWFARE (Oct. 25, 2018), <https://www.lawfareblog.com/foreign-election-interference-founding-era>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

spread of information to a wider audience via the Internet, television, and social media amplified the damage.¹³⁵ The two instances of interference are distinguishable because the act of foreign interference in the 2016 presidential election was covert.¹³⁶ Leading up to the election, it was unclear who released the harmful information, yet news channels and websites still distributed the leaks.¹³⁷ It was not until after Donald Trump was elected that the leak was traced to Russia.¹³⁸

In the aftermath of the 1796 presidential election, U.S. leaders issued political prescriptions in response to foreign political interference, rather than enacting new legislation.¹³⁹ Creating public awareness and attributing such interference to France was an effective technique to combat future foreign political interference for many years.¹⁴⁰ After the 2016 presidential election, it became necessary for the United State to utilize existing legislation and to effectuate new laws to deter further foreign interference in the future. This was a more conservative approach than Australia's complete overhaul of national security legislation. The following is not an exhaustive collection of U.S. law on foreign political interference, but rather an overview of some of the significant laws and regulations which combat such interference—some of which have come into effect quite recently.

B. Foreign Agents Registration Act 1938

1. What is FARA?

Congress passed the Foreign Agents Registration Act of 1938 (FARA) to:

insure that the U.S. Government and the people of the United States are informed of the source of information (propaganda) and the identity of persons attempting to influence U.S. public opinion, policy, and laws.¹⁴¹

Prior to WWII, to combat the prevalent numbers of German propaganda agents in the United States, Congress enacted FARA.¹⁴² FARA:

¹³⁵ *See id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See id.*

¹⁴¹ United States Gov't, *FARA Frequently Asked Questions*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/nsd-fara/general-fara-frequently-asked-questions#1> (last visited Jan. 13, 2019) [hereinafter *FARA FAQ*].

¹⁴² *Id.*

requires every agent of a foreign principal, not otherwise exempt, to register with the Department of Justice and file forms outlining its agreements with, income from, and expenditures on behalf of the foreign principal. These forms are public records and must be supplemented every six months. [FARA] also requires that informational materials ... be labeled with a conspicuous statement that the information is disseminated by the agents on behalf of the foreign principal. The agent must provide copies of such materials to the Attorney General.¹⁴³

2. *Australia's Registration Scheme versus FARA*

The Australian registration scheme established by the Foreign Interference Transparency Scheme, is largely based on FARA, but differs in numerous ways.¹⁴⁴ On the whole, Australia's scheme is narrower than FARA, but it is broader in some ways.¹⁴⁵ For example, FARA more broadly defines the term, "foreign principal," to include any non-U.S. person, while Australia's scheme defines the same term only to include foreign governments, political organizations, and related entities and individuals.¹⁴⁶ However, after recent review of a U.S. Justice Department report FARA enforcement issues were revealed due to high evidentiary hurdles and a lack of power and resources to produce records.¹⁴⁷ As a result, Australia's government decided to draft its scheme more broadly.¹⁴⁸ For example, Australia's registration scheme does not include registration exemptions for persons already registered as lobbyists.¹⁴⁹ It also includes provisions that give more power to the Australian government to compel the submission of records and information.¹⁵⁰

3. *FARA Related Statutes*

There are a number of related statutes that interact with FARA by setting out exceptions or additional requirements for the registration of agents.¹⁵¹ FARA does not require agents of foreign principals who engage in lobbying activities, other than agents of foreign governments or political parties, to register if they

¹⁴³ *Id.*

¹⁴⁴ Douek, *supra* note 6.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *FARA FAQ, supra* note 141.

have already registered under the Lobbying Disclosure Act of 1995 (LDA).¹⁵² It is a crime for a public official of the United States, in any branch of government, to act as an agent of a foreign principal required to register under FARA.¹⁵³ Unless, that public official registers under FARA and receives permission from the head of the U.S. employing agency that they are employed by.¹⁵⁴ Any person who has knowledge or has received instruction or assignment in espionage or sabotage tactics of a foreign country or foreign political party must register with the Attorney-General.¹⁵⁵

C. Executive Order 13848 and the DETER Act

On September 12, 2018, President Trump issued Executive Order 13848 (E.O.), which serves as a deterrent of foreign political interference by imposing discretionary sanctions to keep foreign nations from interfering with the American democratic process.¹⁵⁶ The E.O. defines “foreign interference” broadly to include a wide array of acts such as cyber-hacking, tampering with voter registration lists and voting systems, manipulating vote counts, and spreading disinformation in an attempt to undermine the U.S. democratic and electoral processes.¹⁵⁷ The E.O. grants power to the Treasury Department allowing it to suspend the assets of any foreign actor that either directly interfered with an election—like illegally accessing election and campaign infrastructure—or provided material support to or acted as an agent for those directly involved in an act of foreign political interference—like covert, widespread distribution of false information via social or traditional media channels.¹⁵⁸

The E.O. is a tool that prevents further foreign political interference. This provides the United States with a level of short-term protection to buy some time to carefully draft and pass any additional legislation that may be necessary. However, the E.O. is not free of flaws.

¹⁵² 2 U.S.C. § 1601 (1995); Foreign Agents Registration Act, Dep’t of Justice, <https://www.justice.gov/nsd-fara/fara-related-statutes> (last visited Jan. 13, 2019) [hereinafter *Related Statutes*].

¹⁵³ *Id.*

¹⁵⁴ 18 U.S.C. § 219 (1995); *Related Statutes*, *supra* note 152.

¹⁵⁵ 50 U.S.C. § 851 (1956); *Related Statutes*, *supra* note 152.

¹⁵⁶ David Salvo & Joshua Kirschenbaum, *No Time for Complacency: How to Combat Foreign Interference After the Midterms*, GERMAN MARSHALL FUND OF U.S. (Dec. 2, 2018), <https://securingdemocracy.gmfus.org/no-time-for-complacency-how-to-combat-foreign-interference-after-the-midterms/>.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*; Richard Burke et al., *United States Imposes Sanctions Targeting Foreign Interference in US Elections*, WHITE & CASE LLP (Sept. 13, 2018), <https://www.whitecase.com/publications/alert/united-states-imposes-sanctions-targeting-foreign-interference-us-elections>.

Separate from the E.O., a new pending piece of legislation, the Defending Elections from Threats by Establishing Redlines Act of 2018 (DETER Act), has gathered bipartisan support in the United States.¹⁵⁹ Under this act, mandatory sanctions would be imposed against Russia if the U.S. Director of National Intelligence concludes that Russia has interfered with a United States election.¹⁶⁰ Sanctions would affect Russian financial institutions, energy companies, defense and intelligence sectors, Russian-owned entities, debt-transactions, and certain Russian political figures and oligarchs.¹⁶¹ The key distinction between the E.O. and the DETER Act is the implementation of harsh, *mandatory* sanctions.¹⁶² Under the E.O., the President has vast discretion as to whether to impose certain sanctions on Russia.¹⁶³ This is problematic because during a time when the American people are politically-split, and when so many lack confidence and trust in President Trump's intentions due to the ongoing investigation of the Trump administration's potential collusion with Russia, discretionary punishment toward Russia for interfering with U.S. elections is not enough.

It is worth raising questions about the effectiveness of the DETER Act in attaining its goals. As with the enactment of any legislation, there may be unintended side effects. For example, blocking financial transactions with Russia in multiple sectors may actually hurt U.S. companies as much as or more than Russian entities.¹⁶⁴ Russia may even welcome such treatment in certain industries, such as energy.¹⁶⁵ For example, if transactions with Russian energy companies are blocked, some of which are joint ventures that have received massive American funding, U.S. companies may be forced to withdraw as partners.¹⁶⁶ This would result in a major financial blow to the U.S. economy and workforce, and Russian companies would benefit by taking over these energy firms upon American exit and exploiting all of the financial gains for themselves.¹⁶⁷ Thus, while narrowly tailored sanctions can be an effective deterrent to foreign political interference, if the sanctions are overly broad they

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Ed Stein, *The Deter Act: Congress's Latest Effort to Discourage Election Interference*, LAWFARE (Aug. 1, 2018), <https://www.lawfareblog.com/deter-act-congresss-latest-effort-discourage-election-interference>.

¹⁶² Burke et al., *supra* note 158.

¹⁶³ *Id.*

¹⁶⁴ Christopher Summers, *The DETER Act is Meant to Stop Russian Meddling; It Will Hurt US Companies Instead*, WASHINGTON EXAMINER (Aug. 23, 2018), <https://www.washingtonexaminer.com/opinion/op-eds/the-deter-act-is-meant-to-stop-russian-meddling-it-will-hurt-us-companies-instead>.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

can potentially reward the meddling state that they are intended to punish.

D. Other United States Statutes and Acts Relevant to Foreign Political Interference

1. Honest Ads Act

As a result of outdated laws that did not evolve with new technologies, Russia influenced the 2016 presidential election by spreading propaganda and false information through purchased advertisements on social media platforms and search engines such as Facebook, Twitter, and Google.¹⁶⁸ U.S. leaders introduced a bill to Congress in direct response to Russian interference in the 2016 presidential election called the Honest Ads Act (HAA).¹⁶⁹ The bill's purpose is to prevent foreign interference in future elections and improve the transparency of online political advertisements.¹⁷⁰ The HAA attempts to introduce new laws aimed at limiting foreign interference that would require political advertisements sold online to fall under the same laws as advertisements sold on television and radio stations.¹⁷¹

2. Countering America's Adversaries Through Sanctions Act

In 2017, the Trump administration enacted new laws targeting Russia, among other countries, within the Countering America's Adversaries Through Sanctions Act (CAATSA).¹⁷² The section of CAATSA aimed at Russia, known as the Countering Russian Influence in Europe and Eurasia Act of 2017 (CRIEEA), imposes numerous mandatory sanctions against Russia and requires congressional review if the President opts to lift or waive such sanctions.¹⁷³ An example of such mandatory sanctions CRIEEA imposes are "Cyber Sanctions," which are blocking sanctions (property blocked by the Office of Foreign Assets Control) on any person who knowingly engages in significant activities that undermine cybersecurity against a democratic government on behalf of the Russian government.¹⁷⁴ Additionally, CRIEEA requires evaluations,

¹⁶⁸ *The Honest Ads Act*, MARK R. WARNER U.S. SENATOR FROM COMMONWEALTH OF VIRGINIA, <https://www.warner.senate.gov/public/index.cfm/the-honest-ads-act> (last updated May 2019).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Peter Jeydel et al., *A Detailed Look at the Countering America's Adversaries Through Sanctions Act*, STEPTOE (Aug. 10, 2017), <https://www.stepto.com/en/news-publications/a-detailed-look-at-the-countering-america-s-adversaries-through-sanctions-act.html>.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

assessments, and reports analyzing effects of exposure to Russian-related risks on the U.S. economy.¹⁷⁵ For example, CRIIEA mandates a report on the exposure of key U.S. economic sectors to Russian politically exposed persons and entities, which include the banking, securities, insurance, and real estate sectors, along with the probable economic outcomes of placing capital funding restrictions and other sanctions on Russian parastatal entities.¹⁷⁶ In the aftermath of the 2016 U.S. presidential election—doubts may exist as to President Trump’s personal interests and relations with Russia—CAATSA and CRIIEA serve as checks on Trump’s ability to provide favorable treatment to Russia at U.S. expense.

3. *Computer Fraud and Abuse Act*

Congress enacted the Computer Fraud and Abuse Act (CFAA) in 1986, with its main purpose is to grant the U.S. government authority to prosecute anyone that “knowingly accessed a computer without authorization or exceeding authorized access.”¹⁷⁷ However, as the law currently stands, it is unclear if the CFAA extends to the hacking of voting machines, like the Russian tampering that took place in the 2016 U.S. presidential election.¹⁷⁸ The CFAA prohibits hacking computers that are connected to the Internet, but electronic voting machines are generally offline and not subject to CFAA regulation.¹⁷⁹ There has been a recent push to introduce legislation that would include voting machines under CFAA, but as of now the issue remains unresolved.¹⁸⁰

E. Recent United States Focus on Election Infrastructure and Security

Not only has the United States taken steps to protect against foreign political interference through legislation, but individual states have also taken steps to protect election security through improvements to infrastructure and implementing procedures to reduce successful voting machine hacking or

¹⁷⁵ Peter Jeydel et al., *A Detailed Look at the Countering America’s Adversaries Through Sanctions Act*, STEPTOE (Aug. 10, 2017), <https://www.steptoel.com/en/news-publications/a-detailed-look-at-the-countering-america-s-adversaries-through-sanctions-act.html>.

¹⁷⁶ *Id.*

¹⁷⁷ Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (1986); Derek B. Johnson, *Does the CFAA Apply to Voting Machine Hacks?*, FEDERAL COMPUTER WEEK (Aug. 30, 2018), <https://fcw.com/articles/2018/08/30/cfaa-voting-hacks-johnson.aspx>; Computer Fraud and Abuse Act, National Association of Criminal Defense Lawyers, <https://www.nacdl.org/cfaa/> (last visited Feb. 10, 2019).

¹⁷⁸ Johnson, *supra* note 177.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

malfunction.¹⁸¹ Since the 2016 presidential election, all fifty U.S. states have implemented variations of new standards, procedures, or practices to protect against foreign hacking or interference in voting processes.¹⁸² These include, but are not limited to, setting minimum cybersecurity standards for voter registration systems, using voter-verified paper ballots, conducting post-election audits that test election results, performing ballot accounting and reconciliation, returning voted paper absentee ballots, requiring voting machine certification requirements, and conducting pre-election logic and accuracy testing.¹⁸³ These types of solutions will likely serve as effective short-term or quick-fix solutions to foreign political interference in democratic elections.

III. TO LEGISLATE, OR NOT TO LEGISLATE ... THAT IS THE QUESTION

Though often it is, law is not the answer to everything. It is important for a nation to consider the consequences of reacting too quickly, out of fear, when attempting to reform a complex and sensitive field of law, especially with regards to national security. After examining U.S. law on political interference, it is clear that some things work and other things do not, illustrating that there are inevitably pros and cons to all laws. Hastily drafted, sweeping reform is not the answer to Australia's fear of foreign political interference, especially when weighing-in the damage dealt to its citizens' civil liberties.

The proposed purpose for Australia's new laws is to protect against foreign political interference. Therefore, it is important to understand why foreign political interference can be detrimental to a democracy. A democracy is "a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections."¹⁸⁴ States that aim to interfere with another's democratic processes have one goal: to affect elections in ways that benefit themselves. Thus, the number one goal when trying to protect against foreign political interference should be to protect against interference with elections. It is important for a democratic government to put faith in its citizens and to believe that they can sift through what is real and what is fake or altered by other countries and make important political decisions for itself. The

¹⁸¹ Danielle Root et al., *Election Security in All 50 States*, CENTER FOR AMERICAN PROGRESS (Feb. 12, 2018), <https://www.americanprogress.org/issues/democracy/reports/2018/02/12/446336/election-security-50-states/>.

¹⁸² *Id.*

¹⁸³ Root et al., *supra* note 181.

¹⁸⁴ *Democracy*, MERRIAM-WEBSTER LAW DICTIONARY (2019), <https://www.merriam-webster.com/dictionary/democracy#legalDictionary>.

government's job, simply put, is to put faith in its citizens, do everything it can to secure elections, and to the extent possible limit the spreading of damaging, misinformation by foreign actors. This is why a complete overhaul of Australia's national security regime was not necessary and did more harm than good because it was done so reactively and impulsively.

A. Improving Election Infrastructure to Alleviate Short-Term Concerns

Australia's new laws do not protect against or solve any problems regarding foreign states hacking elections. Instead of reactively passing this sweeping new scheme, Australia could have worked to make its election infrastructure more secure and resistant to hacking and privacy breaches, rather than reform its national security as a whole. Part of a democratic process is allowing access to information, promoting the ability to advocate for change, and voluntarily working with others—even foreign states—who share different beliefs. So long as procedures exist to reasonably limit the distribution of misinformation, governments should allow their citizens to believe what they want, be exposed to different ideas, and exercise their democratic right to vote. The most important thing is ensuring that the public can trust that the actual voting process is secure and uncompromised.

When garnering support for passage of its new laws, the Australian government seemed to be leaning on the concerns of the public about the short-term effects of foreign political interference in its upcoming elections.¹⁸⁵ Australia should have first focused on quick practices to secure its election infrastructure and procedures, which would have bought it some time to consider the need for new laws.

While Australia may have been hesitant to follow the lead of the United States since the United States fell victim to foreign political interference, Australia should have looked to how the United States reacted and combatted against future interference. Australia could have benefitted by looking to state practice within the United States, following the 2016 presidential election, regarding methods individual states adopted to strengthen voting infrastructure. Implementing just a few baseline standards and protocols—for example, using voter-verified paper ballots, conducting post-election audits to assess accuracy of election results, or requiring voting machine certification requirements and minimum cybersecurity standards—could have abolished many of the immediate concerns of foreign political interference in Australia's upcoming

¹⁸⁵ *Insiders*, *supra* note 2.

elections.¹⁸⁶

If and once government officials concluded sweeping reform of national security laws was necessary, such strengthened infrastructure would have been just the effective, quick-fix solution that would yield the requisite time needed to draft more targeted national security and foreign political interference legislation. As a result, its language would be more precise and less broad and encompassing than it stands in its current form. It is equally important to protect the rights of citizens as it is to protect against foreign political interference, so such laws should be well-reasoned and painstakingly drafted. Patching up vulnerabilities in election infrastructure will likely only remain effective protections against foreign interference until foreign meddlers find a way around these solutions. Improvements to voting infrastructure merely buy time for a nation to put into place effective long-term solutions to foreign political interference.

B. Treaty: A Long-Term Solution

Australia's passing of such broad reform that is obviously and blatantly directed towards China has inevitably caused tension and strain in relations between the two countries.¹⁸⁷ A powerful and resentful enemy is a dangerous enemy. Thus, Australia is probably more vulnerable to political interference from China than ever before, even with the passage of recent legislation.

There is no changing the past, but moving forward, Australia should attempt to mend relations with China by proposing a treaty. However, this will not be an easy feat. China will likely be very hesitant, and even hostile at first, if Australia introduces talks of a treaty. That is why Australia should utilize a "carrot and stick" approach.¹⁸⁸ Australia should threaten sanctions as sticks and offer attractive incentives to China as carrots.

Successfully proposing and enacting a treaty with China achieves a few goals: (1) it places a strong deterrent on China to refrain from any form of political interference through use of costly sanctions; (2) it provides a record of clear and written laws as security for Australia against foreign political interference; (3) it creates business and social incentives for China to refrain

¹⁸⁶ Root et al., *supra* note 181.

¹⁸⁷ Cave & Williams, *supra* note 1.

¹⁸⁸ *Carrot and Stick Approach of Motivation*, COLLINS DICTIONARY (2019), <https://www.collinsdictionary.com/us/dictionary/english/carrot-and-stick> (defines carrot and stick approach as offering people things in order to persuade them to do something and punishing them if they refuse to do so).

from acts of interference; and (4) it begins the road to repairing relations between Australia and China, which in turn will reduce China's desire to interfere with Australia's democratic process.

1. Deterrence Through Imposing Sanctions

Sanctions may prove to be an effective means of deterring foreign political interference. Imposing sanctions against China unilaterally, and prior to enacting its new legislative regime, may have been an effective short-term tool for preventing interference in Australia's fast-approaching elections. Such an approach could have bought Australia some time to properly draft new laws and protect its elections in the meantime. However, now that Australia has already reformed its laws, unilateral sanctions are no longer a smart option to further protect against interference from China, as this would only be adding fuel to the fire.

As the current situation stands, Australia should impose sanctions on China by treaty, rather than unilaterally. It is logical to think imposing any kind of sanctions will only anger China and further damage international relations. However, if Australia chooses to utilize a sanctions strategy, the benefits of doing so by treaty, rather than unilaterally, outweighs the potential consequences. By proposing and negotiating a treaty, China will have some say in the outcome, which may help to alleviate any ill-will or hostility that may otherwise result from Australia imposing sanctions without giving China a voice. Whichever type of sanctions strategy Australia chooses to employ, it should base the substantive provisions off of the U.S. DETER Act and CAATSA. However, the penalties should be more narrowly targeted to ensure that Australia's own economy is not detrimentally affected.

2. Tangible Record of Clear, Written Laws as Security

Perhaps one of the most underestimated and overlooked features of enacting laws by treaty, is that a treaty creates a tangible record of what the law is. In the event a state party violates foreign political interference provisions in a treaty, Australia can literally point to the law, bring a claim in court, and seek reparations. Specifying prohibited acts of foreign political interference by treaty—a process that is inherently governed by international law and agreed upon by consenting parties—would effectively eliminate China's ability to claim that Australia's unilaterally-passed domestic laws are biased, unjust, or do not apply to them.

Simply put, codifying illegal acts of foreign political interference by treaty

would make it much harder for China to reasonably commit such violations. Not only are treaties recognized as law in international courts, but also China could face backlash from other states upon interfering with Australia's democratic process. Such backlash could take the form of a damaged reputation and a reduction in the willingness of other states to enter into agreements with China.

3. *Incentives to Abstain from Foreign Political Interference*

Not only can a treaty serve to deter a state from certain conduct, but also its contractual nature and elements can allow for incentives. To maximize a treaty's underlying strategy and intent, Australia should consider including provisions that give China incentives to refrain from foreign political interference, rather than rely solely on punishment and penalties.

Statistics from the 2018 Global Wealth Migration Review show that in 2017, "Australia was the world's [number one] migration destination for millionaires ... More than 10,000 high-worth individuals migrated to Australia last year, mostly from China, India and the UK."¹⁸⁹ Furthermore, an estimated 90% of the visas issued in Australia to these wealthy investors were for Chinese nationals.¹⁹⁰ On par with these facts is the proposition that "[f]or China's growing class of ultra rich, Australia has become the go-to destination for investment, leisure and, in many cases, establishing a second home."¹⁹¹ Australian real estate has escalated in value in recent years making this real estate a particularly promising investment opportunity.¹⁹² Over \$15 billion Australian dollars have been invested by Chinese investors in Australian real estate in 2017, which is over double the amount invested by any other foreign nation.¹⁹³

Additionally, a high-quality education in an English-speaking state is another major attraction for the Chinese.¹⁹⁴ Over 170,000 Chinese students were enrolled in Australian educational institutions in 2017, earning them the title of the biggest contributor to Australia's \$28 billion international education sector.¹⁹⁵

¹⁸⁹ John Power, *Why China's Richest Flock to Australia – Even if They're not Always Welcome*, SOUTH CHINA MORNING POST (last updated Sept. 30, 2018), <https://www.scmp.com/week-asia/society/article/2163540/why-chinas-richest-flock-australia-even-if-theyre-not-always>.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

Australia possesses resources that are so attractive to Chinese individuals with large net-worths, some of who may have made large political contributions to influence Australian government. Australia should use that leverage to negotiate terms in a treaty offering favorable treatment to China regarding foreign investment, specifically in real estate and education. This may accomplish a number of objectives, such as limiting foreign political interference, improving friendly relations between Australia and China, and continuing stimulation and growth of Australia's economy.

4. Repair Damaged Relations Between Australia and China

When Australia passed its new reform regarding foreign political interference, it did not take any measures to draft the reform in a way that did not make it seem directly aimed at China. Further, it failed to consider the resulting backlash. China is such a powerful nation with incredible influence in the global community. If Australia feared China's influence on its government, the worst thing Australia could have done was stir up hostility between the two nations. By passing its new legislation in such an accusatory manner, it gave China even more incentive to interfere with the Australian government out of animosity. Working with China as partners, rather than adversaries, in the creation of a treaty is a smarter and less risky technique for reaching a symbiotic solution.

C. Laws to Directly Regulate Misinformation Being Spread via Social Media

Finally, Australia's new laws do not seem to directly address one of the easiest and most effective ways that foreign states can interfere with democratic processes: distribution of misinformation through posts and paid advertisements on social media.¹⁹⁶ While it is possible that some social media companies might be required to register under FITS, Australia should have addressed this problem directly by including explicit language similar to the Honest Ads Act which the United States is attempting to pass.¹⁹⁷ If the purpose of the new laws are to prevent foreign political interference, this is too significant an issue to leave to chance or to rely on ambiguity in the hopes that social media companies will end up having to register under FITS.

¹⁹⁶ Douek, *supra* note 6.

¹⁹⁷ *Id.*

CONCLUSION

Foreign political interference aimed at democratic nations is undoubtedly a growing concern in a largely globalized and modernized society. Australia's sweeping national security reform, aimed at preventing foreign political interference, serves as a real-time experiment to all other democratic nations. While certainly not perfect, the United States, a pioneer of democracy, has taken a more well-reasoned and conservative approach to preventing against further foreign political interference in future elections. Australia's overhaul of its national security laws is impulsive, counterproductive in many ways, and ineffective as to its ultimate goal. Moving forward, to effectively begin reducing foreign political interference and countering the unintended side effects of its new laws, it is essential for Australia to strengthen its election infrastructure through minimum standards and common-sense techniques and to begin working towards better relations with China. Also, Australia should introduce talks of treaty negotiations with China, utilizing sanctions and incentives to reduce China's motive for interfering with Australian democratic processes. Impulsive and hastily drafted legislation is not the answer to concerns of foreign political interference and national security.

DANIEL MACK*

* Managing Editor, *Emory International Law Review*, Vol. 34. Bachelor of Science, University of North Carolina at Greensboro. Juris Doctor Candidate, Emory University School of Law. The author would like to thank Bob and Cathy Mack for their unconditional love and support. "I would not be where I am today without you."