

Donald Trump, Jr & the Foreign National Ban: FAQs

By Adav Noti and Brendan Fischer

What exactly did Donald Trump Jr. do that was against the law?

He asked a foreign national to contribute something valuable to an American campaign, which is illegal.ⁱ Specifically, according to Donald Trump, Jr.'s own emails and statements, he met with a lawyer whom he was told represented the Russian government, and he "pressed" her to provide the results of "political opposition research" that was generated by the Russian government's efforts to assist Donald Trump's candidacy and that would be "helpful to the campaign."ⁱⁱ

How can providing information be a "contribution"?

There are many ways in which foreign nationals might try to illegally help political campaigns. Some might try to give money, while others might try to give other valuable things, like services or information. The law prohibits all of these.

Just as it's illegal for a foreign national to give a \$100,000 check as a contribution to a politician, it's also illegal for a foreign national to give \$100,000 worth of free services as a contribution to the politician.ⁱⁱⁱ For example, the law would be meaningless if a foreign national were barred from writing a check to a candidate but could allow the candidate to use the foreigner's plane and pilot without charge.^{iv} In either case, the candidate is receiving a thing of value.

The Federal Election Commission (FEC) — which is in charge of interpreting what this law means — has made very clear that intangible contributions, including information, are covered by the law just as much as contributions of money are.^v

Is opposition research really "a thing of value"?

Absolutely. Campaigns and PACs spend tens of millions of dollars every election cycle researching their opponents in order to gain an electoral advantage.

Information does not appear out of thin air; it costs money for campaigns to pay researchers to comb through records, talk to sources and travel around the country digging up dirt on their opponents. In the 2016 cycle, campaigns and PACs spent nearly \$71 million on expenditures whose purpose was described as “research,” according to FEC records.^{vi}

If a foreign national gave a campaign money to pay for research, that would be illegal, and it would also be illegal for a foreign national to pay their own researchers and then turn the finished product over to the candidate. The value of the research product is the same.

If, as some have argued, opposition research were excluded from the definition of “contribution,” then a campaign could outsource these expensive research costs to a foreign government’s intelligence apparatus. A foreign intelligence service could target every potential U.S. candidate and dig up incriminating details (or even lure them into compromising scenarios). The foreign government then could choose which candidates they want to support and provide them info about their opponents – and it would be entirely legal.

Given the costs involved in developing opposition research and its potential value to the campaign, the support of a foreign intelligence agency is probably even more valuable to a candidate than a six-figure contribution of foreign cash.

Is it illegal for any campaign staffer to simply ask a foreign national questions? Doesn’t that violate the First Amendment?

No and no.

The law allows foreign nationals to voluntarily give personal services to campaigns *as long as no one else is paying the individuals to provide those services*.^{vii} This means that if an individual foreign national responds to questions from a campaign without being compensated by his or her employer (or anyone else) for doing so, neither the campaign nor the foreign national is violating the law.^{viii}

The FEC, for example, has allowed foreign nationals to volunteer on a campaign, or to help develop logos and websites for a PAC without pay.^{ix}

One prominent commentator has said that the law cannot prohibit Mr. Trump’s solicitation because if it did it would be too broad — it would prohibit any campaign from talking to any foreign national.^x But this is simply wrong. An individual foreign national is free to voluntarily answer personal questions from a campaign on his or her own time because those conversations are exempt under the exception for

volunteers.

Commentators have also said that prohibiting campaigns from soliciting contributions of valuable information from foreign nationals would violate the First Amendment.^{xi} But the Supreme Court has ruled that it is constitutional to ban *all* foreign involvement in American elections. Specifically, in 2012, the U.S. Supreme Court upheld a decision that it was constitutional to prohibit a foreign national from making any contributions or spending any money at all in connection with American elections — even just to print flyers supporting President Obama’s reelection.^{xii} The decision traced 40 years’ worth of court rulings that it is constitutional to ban any foreign participation in “the process of democratic self-government.”^{xiii} Summarizing these earlier cases, the court noted that:

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 that the government may bar foreign citizens . . . from participating in the campaign process that seeks to influence how voters will cast their ballots in the elections.^{xiv}

Because any action “targeted at influencing the outcome of an election” is “participation in democratic self-government,” and because foreign nationals have no right to be involved in Americans’ self-government, the complete “ban on foreign participation in the campaign process” does not violate the First Amendment.^{xv}

Is it still illegal to ask a foreign national for a contribution if you never get anything?

Yes. The law prohibits a foreign national from “making” a contribution, but it also separately prohibits *anybody* from “soliciting” a contribution from a foreign national.^{xvi}

There are many laws that make it illegal to ask for something, even if you don’t get what you ask for. For example, if a person tries hiring a hitman, but the hitman turns out to be an undercover officer, he or she has still violated the law even through the “hit” never happens.

More directly, if a foreign national had wanted to give a check to the campaign, and Trump Jr. arranged and attended an in-person meeting to accept that check, Trump Jr. would have violated the law against soliciting a contribution even if the envelope turned out to be empty.

Didn't the DNC do the same thing with Ukrainians?

Maybe—but we need more information. According to a *Politico* article from January,^{xvii} during the 2016 campaign a DNC consultant named Alexandra Chalupa met with Ukrainian embassy officials when she was investigating Trump campaign chair Paul Manafort's work for a former Ukrainian President and, eventually, the Trump campaign's ties to Russia.

If Ukraine spent money to conduct research on Paul Manafort or Trump for the purpose of influencing the U.S. election, and provided that research to the DNC for free, it would be a violation of the law. But we do not know, for example, whether the consultant was representing the DNC when she spoke with the Ukrainians, or whether Ukraine produced any research to influence the 2016 election, or whether the DNC knew that any information it received had come from the Ukrainian government. Further inquiry may show that the DNC also violated the law—but either way, it does not change the illegality of Trump Jr.'s conduct.

If Donald Trump Jr. didn't know that he was breaking the law, is what he did still illegal?

Yes. Because Donald Trump Jr. knew that the person he was asking for a contribution was a foreign national, his solicitation was illegal.^{xviii} And because he knew that the contribution was coming from the Russian government, the solicitation was also separately illegal for that reason.^{xix} But if he did not know that he was breaking the law by soliciting a foreign national, the maximum penalty for his actions would be a fine — he would not be subject to imprisonment.^{xx}

What are the penalties for illegally asking foreign nationals for a contribution?

As with any campaign finance violation, the FEC can seek to impose fines, and the Department of Justice can pursue criminal charges if the person who violates the law knows he is doing so and does it willfully. Potential criminal penalties depend on the value of the solicited contribution involved. If the value exceeds \$25,000, a person who violates the law could be subject to up to five years in prison;^{xxi} if between \$2,000 and \$25,000, up to one year. Fines for a knowing and willful violation can reach up to \$40,000 or 200% of the contribution or expenditure involved in the violation, whichever is greater.^{xxii}

The 2002 Bipartisan Campaign Reform Act (also known as the McCain-Feingold law) strengthened the

penalties for campaign finance violations involving foreign nationals. Under federal sentencing guidelines, the prison sentence for an illegal campaign transaction—including a solicitation—is increased by 2 sentencing levels if the crime involves a foreign national, and by 4 levels if it involves a foreign government.^{xxiii} As a point of comparison, a kidnapping offense is increased by 4 levels if the victim sustained permanent or life-threatening bodily injury.^{xxiv} This is a serious violation.

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ⁱ 52 U.S.C. § 30121(a); see also 11 C.F.R. §§ 110.20(a)(6), 300.2(m) (defining “to solicit”).

ⁱⁱ See sources cited in Complaint, *Common Cause v. Donald J. Trump for President, Inc.*, ¶¶ 1-24 & Exh. A (July 13, 2017), available at <http://www.campaignlegalcenter.org/document/fec-complaint-requesting-investigation-donald-trump-jr-foreign-national-contribution>.

ⁱⁱⁱ See 11 C.F.R. § 100.52(d)(1) (providing that “anything of value includes all in-kind contributions,” such as “the provision of any goods or services without charge”).

^{iv} *Id.*

^v See *id.*; see also sources cited in Complaint, *supra* n.4, ¶ 36 & n.37.

^{vi} Federal Election Commission, 2015-2016 Disbursements for “research” (all committees), (accessed July 24, 2017),

https://www.fec.gov/data/disbursements/?two_year_transaction_period=2016&data_type=processed&min_date=01%2F01%2F2015&max_date=12%2F31%2F2016&disbursement_description=research.

^{vii} See 52 U.S.C. § 30108(8)(B)(i).

^{viii} See, e.g., FEC Advisory Op. 2014-20 (Make Your Laws) (applying volunteer exception to services provided by foreign nationals); FEC Matter Under Review 5987, <http://eqs.fec.gov/eqsdocsMUR/29044230266.pdf>.

^{ix} *Id.*

^x Eugene Volokh, *The strikingly broad consequences of the argument that Donald Trump Jr. broke the law by expressing interest in Russian dirt on Hillary Clinton*, WASH. POST (July 14, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/07/14/the-strikingly-broad-consequences-of-the-argument-that-donald-trump-jr-broke-the-law-by-expressing-interest-in-russian-dirt-on-hillary-clinton/>; Eugene Volokh, *Can it be a crime to do opposition research by asking foreigners for information?*, WASH. POST (July 12, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/07/12/can-it-be-a-crime-to-do-opposition-research-by-asking-foreigners-for-information/>.

^{xi} Volokh, *supra* n.xi.; Pete Kasperowicz, *Alan Dershowitz destroys Democrats' 'unconstitutional' argument against Donald Trump Jr.*, WASH. EXAMINER (July 16, 2017), <http://www.washingtonexaminer.com/alan-dershowitz-destroys-democrats-unconstitutional-argument-against-donald-trump-jr/article/2628810>.

^{xii} *Bluman v. FEC*, 800 F. Supp. 2d 281, 285 (D.D.C. 2011), *aff'd mem.*, 132 S. Ct. 1087 (2012).

^{xiii} *Id.* at 288 (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)).

^{xiv} *Id.*

^{xv} *Id.* at 289, 291, 292.

^{xvi} 52 U.S.C. § 30121(a).

^{xvii} Kenneth P. Vogel and David Stern, *Ukrainian Efforts to Sabotage Trump Backfire*, POLITICO (Jan. 11, 2017), <http://www.politico.com/story/2017/01/ukraine-sabotage-trump-backfire-233446>.

^{xviii} See 11 C.F.R. § 110.20(a)(4), (g).

^{xix} See *id.*

^{xx} See 52 U.S.C. § 30109(d) (setting criminal penalties for “knowing and willful” violations); 11 C.F.R. § 111.24 (civil penalties).

^{xxi} 52 U.S.C. § 30109(d)(1)(A)(i).

^{xxii} 11 C.F.R. § 111.24.

^{xxiii} U.S.S.G. § 2C1.8.

^{xxiv} U.S.S.G. § 2A4.1.