

THE ART OF WAR: GLOBAL SPEECH DIKTATS AND THE  
REGULATORY CHALLENGES TO ADDRESS FOREIGN  
POLITICAL CENSORSHIP

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Abstract

China’s global rise and influence is reflected in its long arm reach into many transnational sectors that shape public opinion, including media, publishing, academia and sports. However, the Chinese Communist Party (CCP) has become more emboldened to use economic incentives (or punishment) to induce foreign industries to either self-censor or advance the CCP’s political messaging. This work examines proposed and existing U.S.federal regulatory mechanisms that could potentially address extraterritorial censorship and propaganda, with particular attention paid to their application to China. This work begins with a modest review of the CCP’s adoption of “sharp power” pursuant to advancing the regime’s political agenda, before addressing the ways the CCP harnesses economic statecraft to censor and influence global political narratives. This Article will then explore both proposed and existing regulatory mechanisms that could potentially be employed to address foreign-based censorship, and finally highlight the constitutional and regulatory challenges with their enforcement.

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## INTRODUCTION

In 2020, China overtook North America to become the world's largest film market, and Chinese ticket sales have become increasingly critical to the box office fortunes of Hollywood.<sup>1</sup> Case in point: the summer 2021 release of Universal Pictures' *Fast & Furious 9 (F9)* grossed \$137 million in its opening weekend in China.<sup>2</sup> During a summer *F9* film promotional appearance on Taiwanese television, actor and *F9* star John Cena explained to viewers that Taiwan would be "the first country to watch the film."<sup>3</sup> The reference to Taiwan as a separate country—which the Chinese government regards as a rogue province—triggered a swift online backlash from Chinese social media users, prompting Cena to send out a public apology (written in Mandarin) for making "a mistake in one of my interviews."<sup>4</sup> It was the latest episode to demonstrate how foreign institutions must walk a political tightrope to maintain or gain entry to one of the world's largest consumer markets. In fact, the Chinese Communist Party (CCP) has increasingly weaponized its economic clout and lucrative consumer market to influence—and often censor—political content and speech critical of the CCP or antithetical to their favored narratives.

Former English Premier League (EPL) and Arsenal star Mesut Özil posted comments on social media in late 2019 criticizing China's treatment of their Uyghur minority community.<sup>5</sup> Days later, the EPL's state-run broadcast partners in China—including China Central Television—refused to air an Arsenal match, Özil's avatar on a popular soccer video game was removed, and Internet searches of his name brought up error messages.<sup>6</sup> The Arsenal club also quickly distanced itself from Özil's comments; Özil and his supporters believe that his posts critical of China were a decisive factor in leaving him out of Arsenal's

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1. Patrick Brzeski, *It's Official: China Overtakes North America as World's Biggest Box Office in 2020*, HOLLYWOOD REP. (Oct. 18, 2020, 9:43 PM), <https://www.hollywoodreporter.com/news/general-news/its-official-china-overtakes-north-america-as-worlds-biggest-box-office-in-2020-4078850/> [<https://perma.cc/G8M2-Q8F4>].

2. Rebecca Davis, *'F9' Star John Cena Angers Fans in China for Calling Taiwan a Country, Despite Apology*, VARIETY (May 25, 2021, 1:15 PM), <https://variety.com/2021/film/news/john-cena-taiwan-china-f9-1234981384/> [<https://perma.cc/7GGU-7TLD>].

3. Chris Murphy, *F9 Star John Cena Apologizes, in Mandarin, for Calling Taiwan a Country*, VANITY FAIR, (May 25, 2021), <https://www.vanityfair.com/hollywood/2021/05/f9-star-john-cena-apologizes-in-mandarin-for-calling-taiwan-a-country> [<https://perma.cc/ZN98-TY8E>].

4. *Id.*

5. See Rory Smith & Tariq Panja, *The Erasure of Mesut Özil*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/sports/soccer/mesut-ozil-arsenal-china.html> [<https://perma.cc/P77K-JNAF>].

6. *Id.*

2020-21 squad.<sup>7</sup> Just a few months earlier, Daryl Morey, the general manager of the National Basketball Association (N.B.A.) Houston Rockets, publicly supported anti-government protestors in Hong Kong when he tweeted an image that read, “[f]ight for freedom, stand with Hong Kong.”<sup>8</sup> Chinese state broadcasters immediately suspended broadcasts of Rockets games, while other Chinese sponsors suspended relations with the team.<sup>9</sup> Both the Rockets’ team owner and All-Star player James Harden later publicly apologized for Morey’s tweet while the N.B.A. released an initial statement expressing disappointment in Morey.<sup>10</sup>

In recent years, the CCP has become more emboldened to use economic incentives (or punishment) to induce foreign industries to either self-censor or advance the CCP’s political messaging. Such manipulation or censorship of political speech is, of course, anathema to the free speech tenets that govern liberal democracies. However, the specter of being denied access into one of the world’s largest consumer markets affords the CCP with immense economic leverage to control the global flow of information. The use of economic instruments to influence the behavior of foreign actors, however, is a long-established practice. For instance, Nazi Germany in the 1930s used economic coercion to censor unfavorable political content in Hollywood films distributed in the German market.<sup>11</sup> Yet today, China’s economic rise has enabled a long arm of influence into many transnational sectors that shape public opinion, including academia, media, publishing, and sports.

This interdependence in the information sphere has led to a growing corpus of scholarship aimed at exploring its implications. Aynne Kokas has demonstrated that the U.S. technology industry’s prioritization of market access into China has expanded the influence of Chinese digital media standards.<sup>12</sup> Other scholars have documented China’s media collaboration with other east Asian states and the expansion of China’s media and cultural presence in other parts of the world.<sup>13</sup> The CCP’s influence inside global institutions of higher learning has also

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7. See Shamoan Hafez, *Mesut Ozil: Is China a Factor in Midfielder’s Exile from Arsenal Squad?*, BBC (Oct. 23, 2020), <https://www.bbc.com/sport/football/54623161> [<https://perma.cc/ZJ5G-9DD2>].

8. Patrick Hruby, *How the NBA’s Rift with China Laid Bare the Cost of Free Speech*, THE GUARDIAN (Oct. 12, 2019, 4:00 AM), <https://www.theguardian.com/sport/2019/oct/12/how-the-nbas-rift-with-china-laid-bare-the-cost-of-free-speech> [<https://perma.cc/CWX5-JV9T>].

9. *Id.*

10. *Id.*

11. See *infra* notes 31–35.

12. See Aynne Kokas, *Chilling Netflix: Financialization, and the Influence of the Chinese Market on the American Entertainment Industry*, 23 INFO., COMM’N & SOC’Y 407 (2020).

13. See WILLING COLLABORATORS: FOREIGN PARTNERS IN CHINESE MEDIA (Michael Keane et al. eds., 2018).

raised concerns over academic freedom, and recent scholarship has revealed the failure of many campuses to identify and mitigate the threats to academic freedom from the CCP's globalized censorship campaign.<sup>14</sup> O'Connell argues that China's growing consumer base provides it with leverage to "export censorship" against firms and individuals in the entertainment and sports industry, many of whom have a large following for their personal views.<sup>15</sup> Research on the methods of CCP's economic statecraft has also emerged: DeLisle argued that China has turned to political warfare to influence U.S. policy because the effectiveness of both its hard and soft power is limited;<sup>16</sup> Chang and Yang examined China's manipulation of Taiwan to offer a theory of the CCP's economic statecraft and strategies for social penetration.<sup>17</sup>

This Article seeks to build on this body of research by exploring proposed and existing U.S. federal regulatory mechanisms that could potentially address a foreign state's extraterritorial political speech-control techniques, with particular attention paid to their application to China. The CCP's transborder censorship of political speech is of course, antithetical to the U.S. tradition of promoting and protecting political speech—a core First Amendment value. Yet as Tim Wu aptly notes, new speech-control techniques have arisen from which the First Amendment provides little relief and may, in certain contexts, enable such coercive control of political speech.<sup>18</sup> This work will begin with a modest review of the CCP's adoption of "sharp power" pursuant to advancing the regime's political agenda, before addressing the ways the CCP harnesses economic statecraft to censor and influence global political narratives. This Article will then examine both proposed and existing regulatory mechanisms that could potentially be employed to address foreign-based censorship, and then highlight the constitutional and regulatory challenges with their enforcement.

## I. CHINA'S SHARP POWER

The world that emerges from the Covid-19 pandemic will be shaped by the competing systems of government that define the United States and China. It is a contest of conflicting governing principles: one

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14. See Andreas Fulda & David Missal, *Mitigating Threats to Academic Freedom in Germany: The Role of the State, Universities, Learned Societies and China*, INT'L J. HUM. RTS. (2021); see also Rachelle Peterson, *Confucius Institutes on Campus: A New Threat to Academic Freedom*, 30 ACAD. QUESTIONS 327 (2017).

15. See William D. O'Connell, *Silencing the Crowd: China, the NBA, and Leveraging Market Size to Export Censorship*, 29 REV. INT'L POL. ECON. 1122 (2021).

16. See Jacques deLisle, *Foreign Policy Through Other Means: Hard Power, Soft Power, and China's Turn to Political Warfare to Influence the United States*, 64 ORBIS 174 (2020).

17. See Chia-Chien Chang & Alan H. Yang, *Weaponized Interdependence: China's Economic Statecraft and Social Penetration against Taiwan*, 64 ORBIS 316 (2020).

18. See Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547 (2018).

anchored in authoritarian governance and Marxism-Leninism ideology, and the other in liberal democracy and free market capitalism. The CCP's desire to promote a favored international image of China is primarily rooted in enhancing the regime's legitimacy with domestic publics as it is with international audiences.<sup>19</sup> During a speech delivered to the 19<sup>th</sup> National Congress of the Communist Party of China, Xi Jinping reiterated that while the Party exercises leadership "over all areas of endeavor" in domestic life, it must ensure the CCP's sole control of the country: "We must strengthen our consciousness of the need to maintain political integrity ... [w]e must work harder to uphold the authority and centralized, unified leadership of the Central Committee ..."<sup>20</sup> Xi also acknowledged the importance of the cultural industries to build "cultural confidence" and its capacity to engage in international communication "so as to tell China's stories well, present a true, multi-dimensional, and panoramic view of China, and enhance our country's cultural soft power"<sup>21</sup> According to several scholars, China's push for an attractive global image and greater soft power—what Joseph Nye defined as the ability to influence other states through attraction and persuasion based on a nation's values, culture and policies<sup>22</sup>—is motivated in large part to spur Chinese nationalism, cultivate a benign (or favorable) view of the CCP regime, and ultimately, to solidify the authority of the CCP.<sup>23</sup>

In recent years, however, the CCP's conduct in both domestic and foreign affairs has further undermined their image with the global body politic, particularly with the U.S. and its allies. Jacques deLisle notes that since 2019, Beijing's policies and political actions have revealed the CCP "at its most antithetical to American values," including the CCP's increased political encroachment into Taiwan's democratic system, hard line policies toward pro-democracy protestors in Hong Kong, and the lack of transparency and suppression of information regarding the Covid-19 outbreak.<sup>24</sup> The geopolitics of the CCP has ultimately led to a decline in the country's "soft power"—what Joseph Nye defined as the ability to influence other states through attraction and

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19. See MARIA REPNIKOVA, CHINESE SOFT POWER 7 (2022); See also KEVIN RUDD, THE AVOIDABLE WAR: THE DANGERS OF A CATASTROPHIC CONFLICT BETWEEN THE U.S. AND XI JINPING'S CHINA 74 (2022).

20. Xi Jinping, President of China, "Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era" 19<sup>th</sup> National Congress of the Communist Party of China, 17 (Oct. 18, 2017).

21. *Id.* at 39.

22. See JOSEPH S NYE JR., SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS 166 (2004).

23. See Anne-Marie Brady, *China Wants Face and We are Left with the Cost*, MACDONALD-LAURIER INST. FOR PUB. POL'Y (2020); See also REPNIKOVA, *supra* note 19.

24. DeLisle, *supra* note 16, at 187.

persuasion based on a nation's values, culture and policies.<sup>25</sup> DeLisle contends that the diminishment of China's soft power in the U.S. also likely reflects the rise in China's hard power, including its increased military capacity, modernization, and frequent military activities near Taiwan and disputed maritime boundaries.<sup>26</sup>

However, the decline in China's soft power and the high risk and impracticality of using its hard power limits Beijing's ability to shape U.S. policies and promote the CCP's political agenda.<sup>27</sup> Instead, the CCP has resorted to the use of "sharp power," an approach to international affairs which seeks to suppress freedom of speech, distort the political environment, and disable democratic institutions.<sup>28</sup> Not to be confused with soft power and the power of attraction, Chang and Yang point out that sharp power is qualitatively different from soft power in two ways: (1) unlike soft power, which rests on persuasion and voluntarism, sharp power rejects and eliminates voluntarism by manipulating ideas, political perceptions and electoral processes, and (2) while soft power is characterized by openness, sharp power is based on opacity, censorship, and restraints on the flow of information.<sup>29</sup> This concept is referred to as "sharp" because its approach seeks to "pierce, penetrate, and perforate the political and information environments in the targeted countries."<sup>30</sup> Recent examples of sharp power include the CCP and Russia's interference via disinformation campaigns in elections in Taiwan and the U.S. respectively, intending to degrade the health of their democratic institutions.<sup>31</sup>

Moreover, the CCP's use of sharp power has been greatly facilitated by economic globalization, including the interdependence in trade and investment in China. In fact, the global footprint of China's economic activity allows the CCP to exploit this economic dependence to further advance their cultural and political agenda, with the vision of manipulating political content and limiting the freedom of expression. One common tactic (described further below) is to economically coerce transnational entities to adopt public narratives favored by the regime and to self-censor speech critical of the state. As Walker, Kalathil and Ludwig note, autocracies aim "to make information available in a selective way,

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25. See NYE, *supra* note 22, at 166.

26. See deLisle, *supra* note 16, at 191.

27. See *id.*

28. See Christopher Walker, *What is "Sharp Power"?*, 29 J. DEMOCRACY 11, 12 (2018).

29. See Chang & Yang, *supra* note 17.

30. INT'L F. FOR DEMOCRATIC STUD., SHARP POWER: RISING AUTHORITARIAN INFLUENCE 13 NAT'L ENDOWMENT FOR DEMOCRACY (2017).

31. See Christopher Walker et al., *The Cutting Edge of Sharp Power*, 31 J. DEMOCRACY 124, 127 (2020).

something that is both integral to censorship and a key attribute of sharp power.”<sup>32</sup>

The debilitating effects of sharp power are of particular concern in the areas of culture, academia, media, and publishing—what Walker refers to as the “CAMP sectors”—because such sectors “are crucial in determining how citizens of democracies understand the world around them.”<sup>33</sup> Not only do these imports communicate values, but they are critical in shaping public opinion in the global body politic. The use of sharp power is also motivated by an agenda to promote China’s virtues and to cultivate an image of the country as a positive—and *benign*—global force. In 2016, Xi Jinping, China’s paramount leader, urged state media to become more influential on the global stage and uphold the “correct guidance of public opinion” by promoting “positive propaganda.”<sup>34</sup>

## II. ECONOMIC STATECRAFT: WEAPONIZING MARKET ACCESS TO CENSOR AND INFLUENCE POLITICAL CONTENT

During his first foreign policy speech as President, Joe Biden stopped short of calling China an adversary, and instead referred to China as the “most serious competitor” to the U.S. on issues including global governance and intellectual property.<sup>35</sup> Against the backdrop of escalating technological competition between the United States and China, a nascent informational rivalry has developed over the shaping of global public opinion. Key to the CCP’s information arsenal is the practice of economic statecraft, the use of economic instruments to influence another state’s beliefs, attitudes, and propensities to act.<sup>36</sup> David Baldwin asserts that the concept of economic statecraft emphasizes means (rather than ends) to achieve a wide variety of non-economic goals, including political goals such as weakening the leadership of another state, changing the domestic or foreign policies of another state, or promoting a particular ideology.<sup>37</sup>

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32. *Id.* at 128.

33. Walker, *supra* note 23, at 12–13.

34. Reuters Staff, *China’s Xi Urges State Media to Boost Global Influence*, REUTERS (Feb. 19, 2016, 7:59 AM), <https://www.reuters.com/article/us-china-media/chinas-xi-urges-state-media-to-boost-global-influence-idUSKCN0VS11F> [<https://perma.cc/KU6J-4S6Q>].

35. See Peter Martin & Josh Wingrove, *With Putin Behind Him, Biden Shifts to China’s Xi*, BLOOMBERG (June 17, 2021, 7:02 PM), <https://www.bloomberg.com/news/articles/2021-06-17/with-putin-behind-him-biden-s-focus-shifts-to-china-s-xi?leadSource=verify%20wall> [<https://perma.cc/JHJ5-BUNX>]; See also Reuters Staff, *Biden Says U.S. Ready to Work with China When it is in America’s Interest*, REUTERS (Feb. 24, 2021, 3:17 PM), <https://www.reuters.com/article/us-usa-china-biden/biden-says-u-s-ready-to-work-with-china-when-it-is-in-americas-interest-idUSKBN2A42RM> [<https://perma.cc/K79D-CJ9N>].

36. DAVID A. BALDWIN, *ECONOMIC STATECRAFT* 31 (2020).

37. See *id.* at 39–42.

For example, Germany in the 1930s utilized economic statecraft to manipulate political content in Hollywood films. Germany had been a very lucrative film market for Hollywood, even with an import film quota that limited the number of foreign films that could enter the German market.<sup>38</sup> Yet the major film studios—concerned about the prospect of diminished market access—entered into an arrangement with Nazi censors in order to remain in Germany: if a Hollywood film company distributed a film with anti-German content in *any* market around the world, then that company would be denied access to the German market.<sup>39</sup> Hollywood's acquiescence to Nazi censors lasted for most of the decade, even as studio executives were well aware of the Third Reich's persecution of Jews and the purging of the studios' Jewish employees.<sup>40</sup>

Today, China is the second-largest consumer market in the world, and its hybrid state-capitalist system is set up to allow the regime to manipulate and influence political content across a wide variety of transnational sectors. The CCP increasingly weaponizes market access to advance the CCP's political narratives while also discouraging public discourse critical of the CCP. As one of the world's largest economies, China expects corporations and governments to be deferential to its core interests, especially if China represents a critical source of economic activity. Gamso's work on the relationship between China's economic rise and media censorship found that governments that are heavily dependent on China for its economic prosperity often censor their local media to appease the CCP.<sup>41</sup> Democratic nations that trade intensively with China are therefore more likely to see higher rates of media censorship.<sup>42</sup> More recently, China has leveraged its economic might to influence political discourse within the information sphere, including coercing publishers and the academic community to yield to the CCP's content-based speech demands.

In 2017, Cambridge University Press blocked access in China to hundreds of scholarly articles in *The China Quarterly*, after being instructed by a Chinese customs agency to censor particular articles or face a complete ban. Many of the censored articles had titles that referenced Tibet, Taiwan, Tiananmen Square, and Hong Kong—topics deemed verboten by the CCP.<sup>43</sup> James Leibold, one of the authors whose

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38. BEN URWAND, *THE COLLABORATION* 47 (2013).

39. *Id.* at 48.

40. *Id.* at 63.

41. See Jonas Gamso, *Is China Exporting Media Censorship? China's Rise, Media Freedoms, and Democracy*, 27 *EUR. J. OF INT'L REL.* 858, 860 (2021).

42. *Id.* at 867 (the author notes that trade or economic dependency had little effect on censorship in authoritarian countries).

43. Elizabeth Redden, *Outrage Over University Press Caving in to Chinese Censorship*, *INSIDE HIGHER ED* (Aug. 21, 2017), <https://www.insidehighered.com/news/2017/08/21/>

work was censored by Chinese authorities, offered a simple explanation behind the growing frequency of capitulation to the CCP's speech demands: "[c]learly, they put their economic interests ahead of their principles."<sup>44</sup> China has also influenced political discourse on university campuses by wielding the economic might that comes with the large influx of overseas Chinese students and institutional funding. Such influence is particularly concerning, because as the U.S. Supreme Court has recognized, universities play a distinct and critical role in our public discourse.<sup>45</sup>

From 2003 to 2014, Chinese student enrollment represented 90% of the total increase in foreign students,<sup>46</sup> and students from China—who usually pay full tuition—have been a critical source of revenue for many colleges. Yet such financial reliance can be leveraged to affect public discourse and satisfy the CCP's diktats regarding political speech on university campuses. Universities in Australia and New Zealand—which are heavily reliant on tuition from Chinese students—are facing a crisis of self-censorship both by academics and students, threatening academic freedom and public discourse on China-sensitive topics.<sup>47</sup> The CCP's influence on Australian and New Zealand campuses range from encouraging Chinese student counter-protests against speech critical of the Chinese government, to direct influence with university administrators.<sup>48</sup> In 2017, the University of California San Diego (where students from China represent 14% of the student body) invited the Dalai Lama to speak at the university's commencement. The Chinese government, who view the exiled leader of Tibet as a supporter of terrorism, responded by barring funding to Chinese students and scholars who wanted to study at the San Diego campus.<sup>49</sup>

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cambridge-university-press-blocks-access-300-plus-articles-request-chinese-censors [https://perma.cc/N5H4-MMH7].

44. *Id.*

45. Michael K. Park, *Sovereignty and First Amendment Rights of Higher Education Institutions: An Affirmative and Institutional Approach*, 54 *FIRST AMEND. STUD.* 110, 115 (2020), <https://doi.org/10.1080/21689725.2020.1743197> [https://perma.cc/GZ9H-57VX].

46. John Bound et al., *A Passage to America: University Funding and International Students*, 12 *NAT'L BUREAU OF ECON. RSCH.* 97, 99 (2020).

47. See A. Odysseus Patrick & Emanuel Stoakes, *China's Influence on Campus Chills Free Speech in Australia, New Zealand*, *WASH. POST* (Aug. 9, 2019, 8:04 AM), [https://www.washingtonpost.com/world/asia\\_pacific/chinas-influence-on-campus-chills-free-speech-in-australia-new-zealand/2019/08/09/3dad3a3c-b9f9-11e9-8e83-4e6687e99814\\_story.html](https://www.washingtonpost.com/world/asia_pacific/chinas-influence-on-campus-chills-free-speech-in-australia-new-zealand/2019/08/09/3dad3a3c-b9f9-11e9-8e83-4e6687e99814_story.html) [https://perma.cc/357M-8XTW].

48. See Sophie McNeil, *"They Don't Understand the Fear We Have": How China's Long Reach of Repression Undermines Academic Freedom at Australia's Universities*, *HUM. RTS. WATCH* (June 29, 2021), <https://www.hrw.org/report/2021/06/30/they-dont-understand-fear-we-have/how-chinas-long-reach-repression-undermines> [https://perma.cc/5GNJ-3WHQ].

49. See Elizabeth Redden, *Is China Punishing an American University for Hosting the Dalai Lama?*, *INSIDE HIGHER ED* (Sept. 20, 2017), <https://www.insidehighered.com/news/>

Furthermore, foreign corporations with strong commercial aspirations in China have also been subject to the CCP's aggressive political discourse campaigns in recent years. After Marriott, the world's largest hotelier, listed Hong Kong, Taiwan, Tibet, and Macau as stand-alone countries on a 2018 email questionnaire to its loyalty program members, Chinese regulators demanded that Marriott shut down its Chinese websites and applications.<sup>50</sup> Marriott not only yielded to the regulators' demands but issued a formal apology asserting that Marriott "respects and supports the sovereignty and territorial integrity of China."<sup>51</sup> Chinese regulators have also pressured global commercial airline fleets to conform to the CCP's geopolitical vision: regulators demanded that all references to Taiwan as a separate country be removed from airlines' websites.<sup>52</sup> Although the U.S.-based airlines did not initially acquiesce to Beijing's demands, the prospect of losing market access to the world's largest (or soon-to-be largest) aviation market was perhaps too great of a financial risk; Delta, United, and American Airlines ultimately removed all references to Taiwan on their respective websites.<sup>53</sup>

The CCP has also employed its economic coercion strategy to manipulate political content within the U.S. film industry. Home to one of the world's most lucrative film audiences, foreign studios primarily access the Chinese market either by securing a spot under the CCP's 34-import film quota or by entering co-production deals with Chinese companies; co-productions are a means to circumvent the import film quota and obtain market access.<sup>54</sup> Yet all films distributed in China are subject to Chinese censorship, and this asymmetrical relationship with Hollywood allows the CCP to manipulate content so that it aligns with the CCP's political messaging. Hollywood's acquiescence to the demands of the CCP manifests with film studios engaging in "self-censorship; agreeing to provide a censored version of a movie for screening in China; and in some instances, directly inviting Chinese government censors onto their film sets to advise them on how to avoid

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2017/09/20/china-punishing-american-university-hosting-dalai-lama [https://perma.cc/MX42-2CDW].

50. Abha Bhattarai, *China asked Marriott to Shut Down its Website. The Company complied*, WASH. POST (Jan. 19, 2018, 7:24 AM), <https://www.washingtonpost.com/news/business/wp/2018/01/18/china-demanded-marriott-change-its-website-the-company-complied/> [https://perma.cc/B2GG-3X8E].

51. *Id.*

52. See Sui-Lee Wee, *Giving in to China, U.S. Airlines Drop Taiwan (in Name at Least)*, N.Y. TIMES (July 25, 2018), <https://www.nytimes.com/2018/07/25/business/taiwan-american-airlines-china.html#:~:text=Bowing%20to%20pressure%20from%20China,country%20from%20their%20websites%20Wednesday> [https://perma.cc/3PSW-2M5W].

53. *See id.*

54. AYNNE KOKAS, *HOLLYWOOD MADE IN CHINA* 63–68 (2017).

tripping the censors' wires."<sup>55</sup> Moreover, Kokas notes that the lack of an extensive U.S. state-level media policy, combined with Hollywood's influential lobbying power, "has created a dynamic in which Hollywood's economic needs are at the forefront of the U.S. side of Sino-U.S. media industry development."<sup>56</sup>

Recent examples of Hollywood yielding to the CCP's political content-based demands include a scene in the 2019 DreamWorks film *Abominable*, which depicts a propaganda-laden map of China's "nine-dash-line"—the CCP's territorial claims demarcated in the South China Sea—a border disputed by neighboring countries such as Malaysia, Vietnam, the Philippines, and Taiwan.<sup>57</sup> The map was included in the final release despite the fact that in 2016, an international tribunal in the Hague rejected China's claim of sovereignty over the South China Sea.<sup>58</sup> The 2020 trailer to *Top Gun: Maverick*, the Paramount Pictures sequel to the 1986 box office hit *Top Gun*, conspicuously removed the flags of Taiwan and Japan from Maverick's iconic leather jacket. The likely explanation for the removal: the sequel is produced, in part, by a Chinese film distributor.<sup>59</sup>

Based on the numerous examples aforementioned, the high importance the CCP places on dictating global political narratives, especially in the CAMP sectors, is abundantly clear. Even comments critical of the Chinese government by a Chinese-born Oscar winner can trigger a coordinated censorship campaign by state authorities. Chinese state media initially praised 2021 Academy Award-winner Chloé Zhao as "the pride of China" when she became the first woman of color to win Best Director for her work in *Nomadland*.<sup>60</sup> But after a 2013 interview surfaced, in which Zhao referred to China as a place "where there are lies everywhere," Chinese authorities deleted all social-media celebrations of her Oscar win and cancelled the Chinese release of *Nomadland*.<sup>61</sup>

Moreover, perhaps the greater threat to public discourse and the free flow of information involves speech that is preemptively silenced (i.e., self-censorship) to appease the CCP's political agenda. For example, in

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55. James Tager, *Made in Hollywood, Censored in Beijing*, PEN AMERICA (2020), <https://pen.org/report/made-in-hollywood-censored-by-beijing/> [<https://perma.cc/4SJL-Y735>].

56. KOKAS, *supra* note 49, at 27.

57. See Bethany Allen-Abrahamian, *Hollywood is Paying an 'Abominable' Price for China Access*, FOREIGN POL'Y (Oct. 23, 2019, 11:16 AM), <https://foreignpolicy.com/2019/10/23/abominable-china-dreamworks-propaganda-hollywood/> [<https://perma.cc/JG93-DTQQ>].

58. *Id.*

59. Sarah Whitten, *Tom Cruise's Leather Jacket in the 'Top Gun' Sequel Shows Just How Crucial China is as a Movie Market*, CNBC (July 19, 2019, 8:16 PM), <https://www.cnbc.com/2019/07/19/tom-cruises-top-gun-jacket-shows-how-key-china-is-to-film-industry.html>.

60. Shirley Li, *How Hollywood Sold Out to China*, THE ATL. (Sept. 10, 2021), <https://www.theatlantic.com/culture/archive/2021/09/how-hollywood-sold-out-to-china/620021/>.

61. *Id.*

2018, two academics contributing to a special issue of *The China Quarterly*, had concerns about publishing their work alongside James Leibold's study on the Belt and Road Initiative's impact on ethnic minorities in China. Ultimately, the two academics did not submit their work over fears of offending the CCP, and concerns over the allowance of travel visas to China.<sup>62</sup> In addition to academia, media firms increasingly self-censor content that is perceived to be critical of the CCP or offensive to the regime, and sports organizations or prominent sports figures silence their views to maintain their market appeal in China. But these institutions—part of the CAMP sectors defined by Walker—are more than just providers of goods: they are important purveyors of *ideas* and *values* that shape global public opinion. Unfortunately, the censorship choke points prevalent in authoritarian states like China are migrating across borders by exploiting the very openness and pro-free speech environment fostered by liberal democratic systems.

### III. FEDERAL REGULATION AND THE CHALLENGES TO PREVENT FOREIGN POLITICAL CENSORSHIP

Unlike the speech restrictions found in autocratic states, the United States enjoys a healthy political speech environment bolstered by a constitutional commitment to the freedom of expression. Under the Free Speech Clause of the First Amendment, the government has no power to restrict expression because of its ideas, subject matter, or viewpoint.<sup>63</sup> Speech related to the shaping of public opinion is afforded “especially strong pro-speech presumptions.”<sup>64</sup> According to free speech scholar Alexander Meiklejohn, the core purpose of the First Amendment is to promote public discourse on public issues so that citizens can produce informed opinions.<sup>65</sup> Under the American free speech framework, many forms of expressive activity are vital in establishing an informed citizenry, including expression in education, literature, science and the arts, and as Meiklejohn noted, “[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said.”<sup>66</sup> Yet America's strong free speech protections that enable a robust and free political environment also limit the speech-control measures to address foreign efforts at political content manipulation. Recent proposed legislation highlights the challenges of regulating domestic acts of

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62. Phila Siu, *What's the 'Dirty Secret' of Western Academics Who Self-Censor Work on China?*, S. CHINA MORNING POST (Apr. 21, 2018, 8:00 AM), <https://www.scmp.com/week-asia/politics/article/2142643/whats-dirty-secret-western-academics-who-self-censor-work-china>.

63. *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002).

64. STEPHEN BREYER, *ACTIVE LIBERTY* 23 (2005).

65. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (2014).

66. *Id.* at 25.

political censorship under the First Amendment doctrine, even when such acts are induced by foreign entities like China. Furthermore, existing federal laws under the Foreign Agents Registrations Act and the Foreign Corrupt Practices Act offer potential mechanisms to address foreign-based acts to suppress political speech, but they also come with constitutional and regulatory challenges with their enforcement.

#### A. *Preventing Foreign Censorship in America Act*

In 2020, Congress introduced legislation to prevent Chinese and other foreign efforts from extraterritorially censoring Americans for their political speech. The extended title of the Preventing Foreign Censorship in America Act (PFCAA) reads in pertinent part: “[t]o protect American workers and enterprises from Chinese and other foreign efforts to extraterritorially censor free speech and inhibit lawful advocacy . . . .”<sup>67</sup> Although the PFCAA did not advance beyond committee review in 2020, the proposed law signals the U.S. government’s intent on combatting foreign-based censorship and the prospect of similar proposals becoming law in the future. Thus, what follows will be a modest review of the PFCAA and an analysis of the regulatory challenges facing the PFCAA.

The PFCAA prohibits U.S. employers from retaliating against employees and contractors who speak out on political topics that foreign governments seek to censor.<sup>68</sup> The prohibition on retaliation is defined as:

[A] domestic entity may not discharge, suspend, cease contracting with . . . or take *any other adverse action* against any such employee or contractor on the basis of protected activity . . . because a designated foreign government or entity explicitly or implicitly requests . . . such an adverse action, or the domestic entity *presumes* that a designated foreign authority would prefer an adverse action . . . .<sup>69</sup>

Under the PFCAA, “protected activity” includes specific categories of speech content, including any speech related to current or future “gross violation of internationally recognized human rights,” any speech related to political or social matters that foreign governments censor, and “China-related” speech content.<sup>70</sup> The sweeping language of the law targets a certain class of speakers: any business or employer in the U.S.,<sup>71</sup>

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67. The Preventing Foreign CENSORSHIP in America Act, H.R. 5830, 116th Cong. § 2 (2020).

68. *Id.* at § 3(a) (the law also includes a prohibition on contractual limitations that may limit “protected activity” under subsection (b)).

69. *Id.* at § 3(a)(1) (emphasis added).

70. *Id.* at §§ 5(2)–(4).

71. *Id.* at § 5(10).

yet employers—as businesses and corporations—have free speech rights of their own. In *Citizens United v. Federal Election Commission*, the Supreme Court recognized that the protection of the First Amendment extends to corporations and their political speech.<sup>72</sup> Although the Court specifically addressed electioneering communications, the Court asserted that “the Government may not suppress political speech on the basis of the speaker’s corporate identity.”<sup>73</sup> In other words, with regard to political speech, the government must treat corporations like natural persons under the First Amendment. Thus, employers and other “domestic entities” have political speech rights of their own, even the right to make false political statements; the Supreme Court has rejected the notion that false speech, as a general category, receives no First Amendment protection.<sup>74</sup> U.S.-based firms could assert a constitutional challenge against the PFCAA’s content-based regulations that restrict the corporations’ own political speech.

Considering that the PFCAA regulates explicit speech content such as “internationally recognized human rights” and “China-related” political speech, the law is likely to be subject to strict scrutiny review and presumed constitutionally invalid. Strict scrutiny requires that the government “prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”<sup>75</sup> Although the government may be able to show a compelling interest in the extraterritorial suppression of speech that poses long-term threats to American democracy and national interests, the means to serve that interest is not likely to be found narrowly tailored. In fact, many of PFCAA’s provisions are incredibly broad. For instance, PFCAA § 5(4)(A) prohibits retaliatory action for employee speech that relates to “actions of the government or ruling party of the People’s Republic of China . . . to restrict, limit, or otherwise inhibit freedom of speech.”<sup>76</sup> In other words, employers are prohibited from taking adverse action against employees for speech that is related to any kind of speech that is restricted or limited by the CCP. For example, it would be unlawful for an employer to demote or terminate an employee because of a personal tweet of a picture of Winnie the Pooh (from the 2018 film *Christopher Robin*—which was banned by China) or for bemoaning China’s strict censorship policy regarding online child pornography.

Moreover, the language under PFCAA § 5(4)(B) prohibits any adverse action for speech that relates to “any aspect of a public policy debate within the United States which can reasonably be understood to

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72. See *Citizens United v. FEC*, 558 U.S. 310, 319 (2010).

73. *Id.* at 365.

74. See *United States v. Alvarez*, 567 U.S. 709, 722 (2012).

75. *Reed v. Gilbert*, 576 U.S. 155, 171 (2015).

76. H.R. 5830, 116th Cong. § 2 (2020).

predominantly pertain to China . . . .”<sup>77</sup> For instance, employers would be barred from reprimanding or terminating employees who, on social media, praised the genocide and China’s human rights violations against the Uyghurs. Not only is legislation similar to PFCAA not likely to survive strict judicial review, but its incredibly sweeping language could subject it to a constitutional challenge under the overbreadth doctrine (defined in the next section). Future iterations of similar legislation aimed at combating foreign efforts to censor speech will need to be drafted with greater precision in order to place as few restrictions on speech as possible.

### B. *Foreign Agents Registration Act*

The Foreign Agents Registration Act (FARA) is an expansive public-disclosure law that governs the activities of agents of foreign principals in the United States.<sup>78</sup> FARA was enacted to hinder foreign propaganda, and while FARA prosecutions had remained dormant for the past several decades, registrations and prosecutions have seen an uptick in recent years.<sup>79</sup> However, FARA does not prohibit any specific activities per se and instead requires individuals who represent foreign entities to register as “agents,” and comply with disclosure requirements, including the requirement that “any informational materials” transmitted on behalf of a foreign principal include a “copious statement” on such materials affirming the agent-principal relationship.<sup>80</sup> In *Meese v. Keane*, one of the few Supreme Court cases to address provisions of FARA, the Court addressed the narrow issue of pejorative labeling requirements, holding that the term “political propaganda” is constitutionally permissible in reference to activities for or on behalf of foreign governments.<sup>81</sup> Under FARA’s broad language, a “foreign principal” includes not only officials of a foreign government or political party, but any partnership or entity organized under foreign law, and any person outside the U.S., unless they are citizens of and domiciled in the U.S.<sup>82</sup> In other words, “foreign principal” under the Act is *any* foreign person or entity. An “agent” is widely defined to encompass representatives, and any person who acts “at the order, request, or under the direction” of a foreign principal.<sup>83</sup> Regardless of if American media and film companies are directly or

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77. *Id.*

78. Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611–621.

79. See Joshua R. Fattal, *FARA on Facebook: Modernizing the Foreign Agents Registration Act to Address Propagandists on Social Media*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 903, 912–14 (2019).

80. 22 U.S.C. §§ 612(a); 614(b).

81. See *Meese v. Keane*, 481 U.S. 465, 480–85 (1987) (explanatory parenthetical needed).

82. 22 U.S.C. § 611(b).

83. *Id.* at § 611(c)(1).

indirectly controlled by the CCP, this expansive definition would likely label them as foreign agents if they distribute film or other content in the U.S. and co-produce with Chinese companies.

Activities that trigger FARA requirements include engaging in “political activities” in the interests of a foreign principal, acting as a publicity agent or information-service employee, or soliciting, collecting or disbursing money, or “other things of value” in the interests of a foreign principal.<sup>84</sup> As Nick Robinson points out, the scope of “political activities” is wide enough to include not just lobbying U.S. public officials, but to include almost any advocacy efforts that reach the public.<sup>85</sup> For instance, if the N.B.A., at the request of a Chinese government agency, categorized Taiwan as the “Taiwan Province” (of China) on their websites or in emails to their subscribers in the U.S., the N.B.A. could conceivably be categorized as a foreign agent, acting in the political interests of the CCP. Furthermore, a “publicity agent” under FARA is defined as any person who disseminates oral, visual, written, or pictorial information, including periodicals, broadcasts, and motion pictures.<sup>86</sup> Conceivably, U.S.-based academic journals that removed articles on their websites addressing China-sensitive political topics at the request of government officials or intermediaries would be required to register as a “publicity agent.” FARA does include exemptions from registration for “bona fide” religious, academic, or fine arts pursuits, but this exemption does not apply to persons engaged in “political activities.”<sup>87</sup>

Although there is sparse case law addressing First Amendment challenges to FARA, like the PFCAA, FARA’s expansive language leaves it vulnerable to a constitutional challenge under the overbreadth doctrine. In the First Amendment context, a law is overbroad if it deters people from engaging in constitutionally protected speech “in relation to the statute’s plainly legitimate sweep.”<sup>88</sup> While FARA’s core aim is to expose the sources of foreign political influence,<sup>89</sup> it is not clear how limited or broad the scope of enforcement entails. U.S. Department of Justice advisory opinions reiterate that registration is required when a foreign government or political party primarily benefits from the agent’s work.<sup>90</sup> But the definition of a foreign principal, as described earlier, is

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84. *Id.*

85. See Nick Robinson, “Foreign Agents” in an Interconnected World: FARA and the Weaponization of Transparency, 69 DUKE L. J. 1075, 1098 (2019).

86. 22 U.S.C. § 611(h).

87. See Robinson, *supra* note 80, at 1106 (citing 28 C.F.R. § 5.304(d)).

88. United States v. Stevens, 559 U.S. 460, 473 (2010).

89. See Fattal, *supra* note 74.

90. See Lydia Dennett, *Justice Department Reveals (Some) of How It Interprets Foreign Influence Law*, PROGRAM ON GOV’T OVERSIGHT (June 15, 2018), <https://www.pogo.org/>

much more expansive. In theory, since the CCP has ultimate authority in politics and business, any U.S. entity working with the assistance from a Chinese company on advocacy work directed in the U.S. could be required to register under FARA. Facially, the sweeping language for many of FARA's provisions have no clear limiting principle. In fact, the extensive reach of FARA casts a potential chill on speech, whereby academics, publishers, and filmmakers may avoid certain subject matter and cross-border collaboration or partnerships for fear of FARA enforcement.

Moreover, FARA arguably infringes on an entity's political speech. As the Supreme Court has articulated, "political speech is at the core of First Amendment protections,"<sup>91</sup> and recent scholarship points out that the courts have privileged speech on matters of public concern.<sup>92</sup> Like the PFCAA, FARA would be subject to strict judicial review for infringing on a speaker's political speech. In order to survive strict scrutiny, the government would need to make a strong showing that FARA's language and application is not so overly broad that it sweeps up a substantial amount of protected activity in order to serve the compelling government interest of exposing and deterring foreign influence. Furthermore, some commentators have suggested that FARA's compelled speech requirements (e.g., labeling "informational materials" with an affirmation of the agent-principal relationship) leave it vulnerable to a constitutional challenge, especially when compelled speech has recently become disfavored by federal courts.<sup>93</sup>

### C. *Foreign Corrupt Practices Act*

The primary legal mechanism that governs corruption in the U.S. is the Foreign Corrupt Practices Act (FCPA) and compared to the PFCCA and FARA, the FCPA may offer the most promising tool to address extraterritorial political censorship. The FCPA makes it unlawful for persons and entities to bribe foreign government officials to assist in obtaining or retaining business.<sup>94</sup> More specifically, the FCPA's provisions prohibit any person, resident, or company organized under

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investigation/2018/06/justice-department-reveals-some-of-how-it-interprets-foreign-influence-law/.

91. *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016).

92. See Michael K. Park, "Stick to Sports"? *First Amendment Values and Limitations to Student-Athlete Expression*, J. & MASS COMM'N Q. 515, 517 (2021), <https://doi.org/10.1177/10776990211018757>; See also Clay Calvert, *Defining Public Concern After Snyder v. Phelps: A Pliable Standard Mingles with News Complicity*, 19 VILLANOVA SPORTS & ENT. L. J. 39 (2012).

93. See Monica Romero, *How Far Will FARA Go? The Foreign Agents Registration Act and the Criminalization of Global Human Rights Advocacy*, 96 WASH. L. REV. 695 (2021); Robinson, *supra* note 80 at pincite.

94. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, *et seq.* (1977).

U.S. law from making (1) an offer, payment, promise to pay, or anything of value; (2) to any foreign official, foreign political party, official or candidate; and (3) in order to obtain or retain business.<sup>95</sup> A few Circuit Courts have also held that the FCPA does not require knowledge that a person or entity specifically violated the FCPA; rather, only knowledge of the facts that constitute the offense is sufficient.<sup>96</sup>

As more U.S. CAMP sectors expand their reach into China, they face a greater risk of undue influence and may be subject to greater investigative scrutiny under the FCPA. For instance, in 2012, the Securities and Exchange Commission announced an industry-wide investigative sweep into U.S. entertainment and media firms at the Beijing Film Festival; particular focus was paid toward the U.S. media companies' dealings with Chinese officials, including state-owned or operated entities.<sup>97</sup> Kokas notes that unlike Euro-American film co-productions that are predicated on official treaties, co-productions in China are governed by agreements administered by the China Film Co-Production Corporation on behalf of the CCP's propaganda department.<sup>98</sup> Given that many of the provisions of the FCPA have not been well developed in the courts, there is considerable scholarly debate as to the meaning of "foreign official" and "anything of value."<sup>99</sup> How courts construe such terms are not only germane to the development of the FCPA's reach, but could be determinative as to whether film companies, sports organizations, publishers, and other entities could be found in violation of the FCPA for capitulating to a foreign state's political content demands in exchange for market access.

A "foreign official" under the FCPA is any officer, employee of a foreign government, instrumentality thereof, or any person acting in an official capacity on behalf of a foreign government.<sup>100</sup> The FCPA does not define the term "instrumentality" and only one U.S. Circuit Court—in *U.S. v. Esquenazi*—has attempted to do so: to qualify as an "instrumentality," an "entity must be under the control or dominion of the

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95. *Id.* at § 78dd-2(a).

96. *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 181 (2d Cir. 2003); *United States v. Kay*, 513 F.3d 432, 450 (5th Cir. 2007).

97. *See* US-China, Hollywood's Script in China, *THE CHINA BUS. REV.* (Christina Nelson ed., 2012) (July 1, 2012), <https://www.chinabusinessreview.com/hollywoods-script-in-china/>.

98. *See* KOKAS, *supra* note 49, at 67.

99. *See* Daniel Chow, *China Under the Foreign Corrupt Practices Act*, 2012 *WIS. L. REV.* 573 (2012); *See also* Katherine M. Morgan, *The Foreign Corrupt Practices Act: Toward a Definition of "Foreign Official"*, 38 *BROOKLYN J. INT'L L.* (2012); *See also* Eric M Pederson, *Foreign Corrupt Practices Act and Its Application to U.S. Business Operations in China*, 7 *J. INT'L BUS. & L.* 13 (2008); *See also* Joel M. Cohen et al., *Under the FCPA, Who is a Foreign Official Anyway?*, 63 *BUS. LAW.* 1243 (2008).

100. 15 U.S.C. §§ 78dd-2(h)(2)(A).

government.”<sup>101</sup> Whether state-owned enterprises (SOE) qualify under this standard is unclear.

In *U.S. v. Aguilar*, a federal district court concluded that the legislative history of the FCPA is “inconclusive” as to whether SOE entities fall within the ambit of the statute.<sup>102</sup> Some scholarship contends that the position of U.S. prosecutors appears to be that all SOEs, regardless of the degree of state ownership in the SOE, are instrumentalities of the state.<sup>103</sup> Given the precedent set in *Esquenazi*, if the foreign government exercises control over a SOE, it would likely qualify as an instrumentality. For example, suppose a U.S. publishing company enters a joint venture with a Chinese state-owned publishing company and both enterprises own an equal 50% stake in the venture. U.S. courts may consider this joint venture to be a state-owned enterprise and an instrumentality of the Chinese government under the FCPA, even though the venture is not wholly owned by the government. Conceivably, any payments or *anything of value* (discussed further below) provided to the joint venture by other U.S. entities to obtain or retain business could be considered a violation of the FCPA.

In addition to the corrupt offer, payment, or promise to pay, the FCPA prohibits the giving of *anything of value* to a foreign official.<sup>104</sup> Although the FCPA does not define “anything of value,” Daniel Chow contends that the U.S. Department of Justice has interpreted the term broadly in its non-prosecution and deferred-prosecution agreements.<sup>105</sup> Examples of “anything of value” include providing an internship for a daughter of a Chinese official, or a charitable donation to a foundation where the foreign official receives no financial benefit, but a benefit “measured only in subjective terms.”<sup>106</sup> Even giving foreign officials a cameo in a movie could fall within the “anything of value” definition if the cameo is used to induce a favorable business arrangement.<sup>107</sup> Based on the broad interpretations just outlined, it is not difficult to see how political content, both the inclusion and the censoring of such content, could fall under “anything of value”—especially for authoritarian states that govern by speech diktats. In order for a regime like the CCP to stave off criticisms and challenges to its authority, it must not only restrict speech domestically, but manipulate global narratives in its attempt to shape public opinion.

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101. *U.S. v. Esquenazi*, 752 F.3d 912, 920–22 (2014).

102. *United States v. Aguilar*, 783 F. Supp. 2d 1108 (2011).

103. *See* Chow, *supra* note 94, at 578–81.

104. 15 U.S.C. § 78dd-2(a).

105. *See* Chow, *supra* note 94, at 589–90.

106. *Id.*

107. Danielle Siegel, *Lights, Cameras, and FCPA Actions: The Problem of Foreign Corrupt Practices by Hollywood*, 27 N.Y. ST. BAR. ASS’N ENT., ARTS AND SPORTS L. J. 35, 42 (2016).

Political messaging, or any speech content that reflects on the legitimacy or image of a regime like the CCP is therefore of considerable value to the government and could be ripe for FCPA enforcement. Although intangible, the value placed on the CCP's global political narratives is made apparent by the numerous examples of political content manipulation through economic coercion outlined throughout this Article. U.S. entities that censor or capitulate to the political content demands by foreign states in exchange for market access could be found in violation of the FCPA. Of course, the reality is that this quid pro quo dynamic—yielding to a foreign state's political messaging requests in exchange for market access—is generally not accounted for in an entity's book and accounting records, and such intangible benefits are difficult to police. A 2014 cyberattack on Sony Pictures did, however, provide a rare glimpse into internal discussions about content decisions regarding China. Leaked emails revealed that studio executives removed content from Sony's film *Pixels*, including a scene that showed partial destruction to the Great Wall of China, references to a "Communist-conspiracy brother" hacking an email server, and all references to China as a potential culprit behind an attack.<sup>108</sup> In one leaked email, a studio executive explained the desire to deflect accusations of self-censorship by creating a single version of the film that was palatable to Chinese censors: "if we only change the China version, we set ourselves up for the press to call us out for this when bloggers invariably compare the versions and realize we change the China setting just to pacify the market."<sup>109</sup>

The leaked emails underscore a common practice, albeit a reluctant one, by the CAMP sectors eager to maintain or enter the expansive Chinese market: self-censorship. However, acts of self-censorship are rarely communicated publicly. The grim reality is that the frequency and scope of self-censorship by academics, publishers, and media content creators are unquantifiable. If there is no direct or indirect communicated exchange of an offer, payment, or the giving of "anything of value" to a foreign official to obtain business, there is no bribe and no violation of the FCPA. For example, if a U.S. film company, on their own accord, removed scenes from a movie addressing the CCP's hardline response to pro-democracy protestors in Hong Kong—even though the company is aware such content is disfavored by the CCP—in order to secure distribution in the Chinese market, the FCPA is likely inapplicable. Self-censorship is beyond the reach of the FCPA, but its detrimental effect is

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108. Clare Baldwin & Kristina Cooke, *How Sony Sanitized Adam Sandler Movie to Please Chinese Censors*, REUTERS (July 24, 2015, 10:07 AM), <https://www.reuters.com/article/us-china-film-specialreport/special-report-how-sony-sanitized-adam-sandler-movie-to-please-chinese-censors-idUKKCN0PY1OJ20150724>.

109. *Id.*

that certain topics, themes, and narratives are either promoted to appease foreign officials or avoided altogether. As a byproduct of the CCP's strategic use of economic statecraft to influence political messaging, the growing practice of self-censorship poses not only a significant regulatory challenge to combat extraterritorial censorship, but also poses a serious threat to global information flows and democratic institutions.

#### CONCLUSION

In June 2021, Congress introduced legislation to monitor and report on China's censorship strategies. The bill to establish the China Censorship Monitor and Action Group (CCMAG), calls for the President to establish an interagency task force to develop a federal strategy to monitor and address censorship and intimidation effects by the Chinese government.<sup>110</sup> Like the PFCAA, the proposed legislation reiterates the serious threat posed by the CCP's strategic use of economic statecraft to shape global political discourse, and it also signals the need to develop effective action plans to combat the scourge of extraterritorial censorship. The proposed PFCAA and existing federal mechanisms like the FARA and FCPA offer potential tools to address extraterritorial influence on political speech, but they are imperfect, unproven, and are shadowed by concerns with their enforcement under the First Amendment. The analysis of these legal mechanisms provided above highlights the current regulatory challenges and the need for more legislation like the CCMAG, in order to scrutinize the CCP's statecraft methods and develop effective strategies to address its manipulation of global political narratives.

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110. H.R. 3695, 117th Cong. § 1 (2021).