

**U.S. House Committee on the Judiciary**  
**Hearing on “Lessons from the Mueller Report, Part II: Bipartisan Perspectives”**  
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**STATEMENT OF RICHARD L. HASEN**

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Chair Nadler, Ranking Member Collins, and Members of the Judiciary Committee:

Thank you for the opportunity to appear before you today to speak about a matter that is among the greatest concerns I have had in twenty-five years of researching and teaching about American election law and campaign finance issues: the potential for continued illegal foreign interference in United States elections and a United States president’s unprecedented and ill-advised encouragement of foreign governments to meddle in our elections.

From founding fathers George Washington<sup>1</sup> and Alexander Hamilton<sup>2</sup> to former Supreme Court Justice John Paul Stevens<sup>3</sup> and current Supreme Court Justice Brett Kavanaugh, American leaders have recognized that hostile foreign nations—with, as Justice Stevens put it, “no basic investment in the well-being of the country”—may attempt to interfere in American elections in order to manipulate an election’s outcome or to curry favor with the winner.

As Justice Kavanaugh wrote in the 2011 case, *Bluman v. Federal Election Commission*, “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

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<sup>1</sup> George Washington, Washington’s Farewell Address (1796), *available at*: [https://avalon.law.yale.edu/18th\\_century/washing.asp](https://avalon.law.yale.edu/18th_century/washing.asp) (warning “[a]gainst the insidious wiles of foreign influence (I conjure you to believe me, fellow-citizens) the jealousy of a free people ought to be constantly awake, since history and experience prove that foreign influence is one of the most baneful foes of republican government.”).

<sup>2</sup> THE FEDERALIST NO. 68 (1788) (Alexander Hamilton), *available at*: [https://avalon.law.yale.edu/18th\\_century/fed68.asp](https://avalon.law.yale.edu/18th_century/fed68.asp) (“These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a creature of their own to the chief magistracy of the Union?”).

<sup>3</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 424 (2010) (Stevens, J., dissenting) (criticizing a view of the First Amendment that would afford the same protection to the propaganda of “Tokyo Rose” as to Allied commanders during World War II or that would give foreign-controlled multinational corporations the same free speech rights as individual Americans); *see also id.* at 424 n.51 (“The notion that Congress might lack the authority to distinguish foreigners from citizens in the regulation of electioneering would certainly have surprised the Framers, whose obsession with foreign influence derived from a fear that foreign powers and individuals had no basic investment in the well-being of the country.”) (internal quotations omitted); *cf. id.* at 362 (opinion of the Court) (“We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.”).

democratic self-government. It follows, therefore, that the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.”<sup>4</sup> In *Bluman*, then-D.C. Circuit Court Judge Kavanaugh’s opinion for a unanimous three-judge district court upheld the federal ban on foreign contributions and expenditures in American elections. The Supreme Court thought this conclusion was so self-evident that it summarily affirmed the ruling without even scheduling oral argument and issuing its own opinion.<sup>5</sup>

Indeed, until President Trump came along, there was broad bipartisan consensus that foreign interference in American elections undermines the idea that “we the people,” and not outsiders—and especially not outsiders from foreign governments with interests adverse to the United States—get to choose American leaders and make the case to our fellow citizens as to who deserves to be elected and why.

In the wake of unprecedented Russian interference in the 2016 presidential elections, and in light of statements made last week by President Donald Trump in an interview with ABC News’s George Stephanopoulos to the effect that he saw “nothing wrong” with taking valuable information from a foreign government about an election opponent in the 2020 elections,<sup>6</sup> it is

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<sup>4</sup> *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (three-judge court), *aff’d*, 565 U.S. 1104 (2012).

<sup>5</sup> *Bluman v. Fed. Election Comm’n*, 565 U.S. 1104 (2012) (summary affirmance).

<sup>6</sup> Here is a relevant portion of the transcript of the interview:

STEPHANOPOULOS: Your campaign this time around, if foreigners, if Russia, if China, if someone else offers you information on opponents, should they accept it or should they call the FBI?

TRUMP: I think maybe you do both. I think you might want to listen, I don’t, there’s nothing wrong with listening. If somebody called from a country, Norway, “We have information on your opponent.” Oh, I think I’d want to hear it.

STEPHANOPOULOS: You want that kind of interference in our elections?

worth considering both what current campaign finance law prohibits when it comes to foreign interference in elections and what steps Congress can and should take, consistent with the First Amendment, to insure that American self-government is preserved as we enter the 2020 election period.

Volume I of the Mueller Report<sup>7</sup> revealed that agents of the Russian government and military engaged in three sets of activities intended to disrupt the 2016 presidential elections and to support the election of Donald Trump. First, acting through the “Internet Research Agency,” the Russian government used social media platforms including Facebook and Twitter to launch “a social media campaign designed to provoke and amplify political and social discord in the United States . . . . The campaign evolved from a generalized program . . . to undermine the U.S. electoral system, to a targeted operation that by early 2016 favored candidate Trump and disparaged candidate Clinton.”<sup>8</sup> Second, the General Staff of the Russian Army, or GRU, engaged in hacking to steal emails from officials of the Democratic National Committee and Clinton campaign official John Podesta, and to release them through WikiLeaks and other sources.<sup>9</sup> Third, Russian military officials “targeted individuals and entities involved in the

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TRUMP: It’s not an interference, they have information. I think I’d take it. If I thought there was something wrong, I’d go maybe to the FBI. If I thought there was something wrong. But when somebody comes up with oppo research, right, that they come up with oppo research. Oh, let’s call the FBI. The FBI doesn’t have enough agents to take care of it, but you go and talk honestly to congressmen, they all do it, they always have. And that’s the way it is. It’s called oppo research.

*Transcript: ABC News’ George Stephanopoulos’ exclusive interview with President Trump*, ABC NEWS, June 16, 2019, <https://abcnews.go.com/Politics/transcript-abc-news-george-stephanopoulos-exclusive-interview-president/story?id=63749144&>.

<sup>7</sup> I SPECIAL COUNSEL ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (Mar. 2019) [hereinafter MUELLER REPORT]. The official version appears at <https://www.justice.gov/storage/report.pdf>, and a searchable version appears at [https://www.documentcloud.org/documents/5955379-Redacted-Mueller-Report.html#document/\[https://perma.cc/9TEW-JD3Z\]](https://www.documentcloud.org/documents/5955379-Redacted-Mueller-Report.html#document/[https://perma.cc/9TEW-JD3Z]).

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Id.* at 4-5.

administration of elections,”<sup>10</sup> including state boards of elections and voting machine companies. In Illinois, for example, they gained access “to a database containing information on millions of registered Illinois voters” and “extracted data related to thousands of U.S. voters.”<sup>11</sup>

The Department of Justice, acting through the Office of the Special Counsel, charged 13 Russian individuals and entities affiliated with the military with “participating in a conspiracy to defraud the United States by undermining through deceptive acts the work of federal agencies charged with regulating foreign influence in U.S. elections,”<sup>12</sup> including the Federal Election Commission tasked with enforcing campaign finance laws. The DOJ also brought charges related to the computer hacking, including under the federal computer-intrusion statute.<sup>13</sup>

We will never know the extent to which these Russian government military activities influenced the outcome of the 2016 elections, but there is no question of its intent to influence the election outcome and sow social discord. There also is little question that the foreign powers likely will try to interfere again in 2020 unless deterred.

The Mueller Report should be a wake-up call for all Americans to be vigilant against continued foreign interference and for Congress to pass laws to make such interference more difficult. Three key improvements would be (1) increasing cybersecurity funding; (2) extending the foreign expenditure prohibition and disclosure laws to all online advertising;<sup>14</sup> and (3)

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<sup>10</sup> *Id.* at 50.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 9.

<sup>13</sup> *Id.*

<sup>14</sup> For an explanation that much of the Russian social media activity was not illegal under current federal law and how federal law could be fixed to cover the activity and improve disclosure, see Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 218-221 (2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3017598](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3017598). Some scholars have argued that a broader foreign contribution and spending ban could violate the First Amendment, and the Mueller Report noted “First Amendment questions” with prosecuting someone for contributing, soliciting, or accepting foreign “opposition research.” See MUELLER REPORT, *supra* note 7, at 187. I argue in *Cheap Speech* that the First Amendment is generally not a bar to an extended foreign contribution and spending ban, especially if it is applied to principals of foreign governments. Hasen, *supra*, at 220 n.88; *see also id.* at 218-19 n.83 (explaining the reason for rejecting First Amendment

requiring campaigns to report contact from foreign agents attempting to influence American elections.

But President Trump not only has failed to support bipartisan measures to improve American elections; he has actively encouraged foreign meddling. In the 2016 election, Russian operatives targeted Hillary Clinton’s personal offices approximately five hours after Trump remarkably encouraged the Russian government to find Hillary Clinton’s supposed 30,000 missing emails from her time as Secretary of State.<sup>15</sup> As to the 2020 elections, Trump even more outrageously told ABC News’s George Stephanopoulos in an interview last week that he saw nothing wrong with taking “opposition research” about a 2020 opponent from a foreign government if offered to him.<sup>16</sup>

As explained in the Mueller Report, this is illegal. “[F]oreign nationals may not make—and no one may solicit, accept, or receive from them—a contribution or donation of money or other thing of value or an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election. The term contribution . . . includes any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.”<sup>17</sup>

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challenge to the extension of foreign expenditure ban based on overbreadth). Such a ban can and should include an exception for foreign journalistic activities.

<sup>15</sup> See I MUELLER REPORT, *supra* note 7, at 49 (“On July 27, 2016, Unit 26165 targeted email accounts connected to candidate Clinton’s personal office. Earlier that day, candidate Trump made public statements that included the following: ‘Russia, if you’re listening, I hope you’re able to find the 30,000 emails that are missing. I think you will probably be rewarded mightily by our press.’ The ‘30,000 emails’ were apparently a reference to emails described in media accounts as having been stored on a personal server that candidate Clinton had used while serving as Secretary of State. Within approximately five hours of Trump’s statement, GRU officers targeted for the first time Clinton’s personal office.”) (footnote and paragraph break omitted).

<sup>16</sup> See ABC NEWS, *supra* note 6.

<sup>17</sup> MUELLER REPORT, *supra* note 7, at 184 (quoting 52 U.S.C. §§ 30121(a)(1)(A)–(a)(2), 30101(8)(A)(i) (internal citations and quotation marks omitted). Federal law does not prohibit the use of foreign vendors paid at market rates for goods or services, so long as a foreign national is not put in a policymaking position. 11 C.F.R. § 111.20(i) (2014). As the Republican-led House Permanent Select Committee on Intelligence concluded in its *Report on Russian Active Measures* 127 (Mar. 22, 2018), [https://docs.house.gov/meetings/IG/IG00/20180322/108023/HRPT-115-1\\_1-p1-U3.pdf](https://docs.house.gov/meetings/IG/IG00/20180322/108023/HRPT-115-1_1-p1-U3.pdf), “Under current federal election law, foreigners are prohibited from making contributions or

To be clear: the Mueller Report cited Federal Election Commission authority for the view that opposition research and other such information counts as a “thing of value” under the federal law that bars foreign governments and other foreign entities and people from contributing a “thing of value” to a federal campaign.<sup>18</sup> While measuring the value of opposition research precisely could be difficult for a prosecutor to do in a particular case should someone be charged with conspiring to violate the foreign contribution ban,<sup>19</sup> the Mueller Report did not question the government’s compelling interest in self-government to justify the law prohibiting foreign in-kind contributions to American campaigns.<sup>20</sup> As the report stated, “[a] foreign entity that engaged in such research and provided resulting information to a campaign could exert a greater effect on an election, and a greater tendency to ingratiate the donor to the candidate, than a gift of money or tangible things of value.”<sup>21</sup>

The Mueller Report also made it clear that to be charged criminally with violating the foreign contribution prohibition, it is necessary to prove that a person violated the law “willfully,” knowing of the foreign contribution ban and violating it nonetheless.<sup>22</sup> While some may question whether American campaign officials understood that a foreign donation of opposition research to a campaign was illegal in 2016, everyone, including the President, now is

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donations in connection with any campaign in the United States. However, it is not illegal to contract with a foreign person or foreign entity for services, including conducting opposition research on a U.S. campaign, so long as the service was paid for at the market rate.” (footnote omitted). The Clinton campaign during the 2016 election apparently paid market rates to a foreign national, former British spy Christopher Steele, for the so-called “Steele Dossier” containing supposed opposition research about Trump, which would make such payments legal. Adam Entous, Devlin Barrett, & Rosalind S. Helderman, *Clinton Campaign, DNC Paid for Research that Led to Russian Dossier*, WASH. POST, Oct. 24, 2017, <https://wapo.st/2WQrVsm>.

<sup>18</sup> MUELLER REPORT, *supra* note 7, at 187-88. The report, however, noted that there was no judicial decision so holding. *Id.* at 188.

<sup>19</sup> *Id.* at 187.

<sup>20</sup> *See id.* at 184 (citing *Bluman* for the proposition that the interest in “self-government” justifies the foreign contribution and spending ban).

<sup>21</sup> *Id.* at 187.

<sup>22</sup> *Id.* at 187-88 (explaining lack of proof of willfulness beyond a reasonable doubt as one reason why Special Counsel declined to prosecute members of the Trump campaign that attended the June 2016 Trump Tower meeting with agents of the Russian government).

on notice for 2020 that this conduct is illegal, and that acceptance of such information can be a crime. And yet the President's statements appear to be another invitation to foreign governments to provide valuable information on his opponents, either to help keep him in office or to curry favor with him while he remains in office.

Even if it were not illegal, calling for foreign government interference in American elections undermines American democracy and self-government. And while the Russian government supported the Republican candidate in 2016, it could well support a Democrat in 2020 or beyond. The Russian government's goal is to foment discord, something which should worry every American regardless of political party.

The Mueller Report reveals that American democracy and self-government indeed came under unprecedented attack in 2016. Things stand to get much worse in 2020 unless Congress acts, especially given the dangerous statements of the President welcoming foreign interference in 2020.

Thank you for the opportunity to present these views. I welcome your questions.