AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers: Immunity from Judicial Process

Robert S. Mueller, **“Report on the Investigation into Russian Interference in the 2016 Presidential Election (Volume I)** (2019)

*Evidence emerged during the summer and fall of 2016 election that the Russian government was attempting to interfere with the presidential election in the United States. Russian entities conducted a social media campaign that favored Republican candidate Donald Trump and sought to discredit Democratic candidate Hillary Clinton. Russian intelligence services hacked the computers of persons involved in the Clinton campaign and, through the intermediary of Wikileaks, released information damaging to the Democratic Party and Clinton. Evidence also emerged that links existed between the Russian campaign operation and the Trump campaign. In May 2017, the Trump administration agreed to appoint Robert S. Mueller III as a special counsel to investigate “the Russian government’s efforts to interfere in the 2016 presidential election, including any links or coordination between the Russian government and individuals associated with the Trump campaign.”*

*The excerpts below are from the first volume of the two volume report Mueller issued in April 2019. The uncontroversial sections of the Mueller report documented extensive and illegal Russian efforts to influence the 2016 national election. Few persons disputed Mueller’s conclusion that “numerous links” existed “between the Russian government and the Trump Campaign.” Partisan controversy erupted over the nature of those links. Volume I of the Mueller Report concluded,*

*Although the investigation established that the Russian government perceived it would benefit from a Trump presidency and worked to secure that outcome, and that the Campaign expected it would benefit electorally from information stolen and released through Russian efforts, the investigation did not establish that members of the Trump Campaign conspired or coordinated with the Russian government in its election interference activities.*

*Did this finding exonerate President Trump? Did Mueller conclude only that his investigation failed to find enough evidence to meet a reasonable doubt standard? Is the presidential behavior described in the first part of the Muller report impeachable even if not a crime, or should a president be impeached only if there is evidence the president has committed a crime and the evidence is convincing beyond a reasonable doubt?*

**Executive Summary to Volume I**

The Internet Research Agency (IRA) carried out the earliest Russian interference operations identified by the investigation- a social media campaign designed to provoke and amplify political and social discord in the United States. . . . The IRA later used social media accounts and interest groups to sow discord in the U.S. political system through what it termed "information warfare." The campaign evolved from a generalized program designed in 2014 and 2015 to undermine the U.S. electoral system, to a targeted operation that by early 2016 favored candidate Trump and disparaged candidate Clinton. . . . At the same time that the IRA operation began to focus on supporting candidate Trump in early 2016, the Russian government employed a second form of interference: cyber intrusions (hacking) and releases of hacked materials damaging to the Clinton Campaign. The Russian intelligence service known as the Main Intelligence Directorate of the General Staff of the Russian Army (GRU) carried out these operations. In March 2016, the GRU began hacking the email accounts of Clinton Campaign volunteers and employees, including campaign chairman John Podesta. In April 2016, the GRU hacked into the computer networks of the Democratic Congressional Campaign Committee (DCCC) and the Democratic National Committee (DNC). The GRU stole hundreds of thousands of documents from the compromised email accounts and networks. Around the time that the DNC announced in mid-June 2016 the Russian government's role in hacking its network, the GRU began disseminating stolen materials through the fictitious online personas "DCLeaks" and "Guccifer 2.0." The GRU later released additional materials through the organization WikiLeaks.

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 The social media campaign and the GRU hacking operations coincided with a series of contacts between Trump Campaign officials and individuals with ties to the Russian government. The Office investigated whether those contacts reflected or resulted in the Campaign conspiring or coordinating with Russia in its election-interference activities. Although the investigation established that the Russian government perceived it would benefit from a Trump presidency and worked to secure that outcome, and that the Campaign expected it would benefit electorally from information stolen and released through Russian efforts, the investigation did not establish that members of the Trump Campaign conspired or coordinated with the Russian government in its election interference activities.

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 In reaching the charging decisions described in Volume 1 of the report, the Office determined whether the conduct it found amounted to a violation of federal criminal law chargeable under the Principles of Federal Prosecution. The standard set forth in the Justice Manual is whether the conduct constitutes a crime; if so, whether admissible evidence would probably be sufficient to obtain and sustain a conviction; and whether prosecution would serve a substantial federal interest that could not be adequately served by prosecution elsewhere or through non-criminal alternatives.

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 First, the Office determined that Russia's two principal interference operations in the 2016 U.S. presidential election-the social media campaign and the hacking-and-dumping operations violated U.S. criminal law. . . .

 Second, while the investigation identified numerous links between individuals with ties to the Russian government and individuals associated with the Trump Campaign, the evidence was not sufficient to support criminal charges. Among other things, the evidence was not sufficient to charge any Campaign official as an unregistered agent of the Russian government or other Russian principal. . . .

Third, the investigation established that several individuals affiliated with the Trump Campaign lied to the Office, and to Congress, about their interactions with Russian-affiliated individuals and related matters. Those lies materially impaired the investigation of Russian election interference. The Office charged some of those lies as violations of the federal false statements statute. Former National Security Advisor Michael Flynn pleaded guilty to lying about his interactions with Russian Ambassador Kislyak during the transition period. George Papadopoulos, a foreign policy advisor during the campaign period, pleaded guilty to lying to investigators about, inter alia, the nature and timing of his interactions with Joseph Mifsud, the professor who told Papadopoulos that the Russians had dirt on candidate Clinton .in the form of thousands of emails. Former Trump Organization attorney Michael Cohen pleaded guilty to making false statements to Congress about the Trump Moscow project. [*material redacted*] And in February 2019, the U.S. District Court for the District of Columbia found that Manafort lied to the Office and the grand jury concerning his interactions and communications with Konstantin Kilimnik about Trump Campaign polling data and a peace plan for Ukraine.

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**V. PROSECUTION AND DECLINATION DECISIONS**

**C. Russian Government Outreach and Contacts**

1. Potential Coordination: Conspiracy and Collusion

. . . This Office evaluated potentially criminal conduct that involved the collective action of multiple individuals not under the rubric of "collusion," but through the lens of conspiracy law. In so doing, the Office recognized that the word "collud[e]" appears in the Acting Attorney General's August 2, 2017 memorandum; it has frequently been invoked in public reporting; and it is sometimes referenced in antitrust law. But collusion is not a specific offense or theory of liability found in the U.S. Code; nor is it a term of art in federal criminal law. To the contrary, even as defined in legal dictionaries, collusion is largely synonymous with conspiracy as that crime is set forth in the general federal conspiracy statute. For that reason, this Office 's focus in resolving the question of joint criminal liability was on conspiracy as defined in federal law, not the commonly discussed term "collusion." . . . The investigation did not establish any agreement among Campaign officials or between such officials and Russia-linked individuals-to interfere with or obstruct a lawful function of a government agency during the campaign or transition period.

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1. Potential Coordination: Foreign Agent Statutes . . .

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Under 18 U.S.C . § 951, it is generally illegal to act in the United States as an agent of a foreign government without providing notice to the Attorney General. . . . The investigation uncovered extensive evidence that Paul Manafort's and Richard Gates's pre -campaign work for the government of Ukraine violated the Foreign Agents Registration Act (FARA).

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The investigation did not, however, yield evidence sufficient to sustain any charge that any individual affiliated with the Trump Campaign acted as an agent of a foreign principal within the meaning of FARA or, in terms of Section 951, subject to the direction or control of the government of Russia, or any official thereof. In particular, the Office did not find evidence likely to prove beyond a reasonable doubt that Campaign officials such as Paul Manafort, George Papadopoulos , and Carter Page acted as agents of the Russian government-or at its direction control, or request-during the relevant time period.

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1. Campaign Finance

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"[T]he United States has a compelling interest ... in limiting the participation of foreign citizens in activities of democratic self-government, and in thereby preventing foreign influence over the U.S. political process.” To that end, federal campaign finance law broadly prohibits foreign nationals from making contributions, donations, expenditures, or other disbursements in connection with federal, state, or local candidate elections, and prohibits anyone from soliciting, accepting, or receiving such contributions or donations. As relevant here, foreign 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 Office considered whether to charge Trump Campaign officials with crimes in connection with the June 9 meeting. . . . The Office concluded that, in light of the government's substantial burden of proof on issues of intent ("knowing" and "willful") , and the difficulty of establishing the value of the offered information, criminal charges would not meet the Justice Manual standard that "the admissible evidence will probably be sufficient to obtain and sustain a conviction."

In brief, the key facts are that, on June 3, 2016, Robert Goldstone emailed Donald Trump Jr., to pass along from Emin and Aras Agalarov an "offer" from Russia's "Crown prosecutor" to "the Trump campaign" of "official documents and information that would incriminate Hillary and her dealings with Russia and would be very useful to [Trump Jr.'s] father." . . . This series of events could implicate the federal election-law ban on contributions and donations by foreign nationals. Specifically, Goldstone passed along an offer purportedly from a Russian government official to provide "official documents and information" to the Trump Campaign for the purposes of influencing the presidential election. Trump Jr. appears to have accepted that offer and to have arranged a meeting to receive those materials. . . .

The Office considered whether this evidence would establish a conspiracy to violate the foreign contributions ban. There are reasonable arguments that the offered information would constitute a "thing of value" within the meaning of these provisions, but the Office determined that the government would not be likely to obtain and sustain a conviction for two other reasons: first, the Office did not obtain admissible evidence likely to meet the government's burden to prove beyond a reasonable doubt that these individuals acted "willfully," i.e., with general knowledge of the illegality of their conduct; and, second, the government would likely encounter difficulty in proving beyond a reasonable doubt that the value of the promised information exceeded the threshold for a criminal violation.

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On the facts here, the government would unlikely be able to prove beyond a reasonable doubt that the June 9 meeting participants had general knowledge that their conduct was unlawful. The investigation has not developed evidence that the participants in the meeting were familiar with the foreign-contribution ban or the application of federal law to the relevant factual context. The government does not have strong evidence of surreptitious behavior or efforts at concealment at the time of the June 9 meeting. While the government has evidence of later efforts to prevent disclosure of the nature of the June 9 meeting that could circumstantially provide support for a showing of scienter, that concealment occurred more than a year later, involved individuals who did not attend the June 9 meeting, and may reflect an intention to avoid political consequences rather than any prior knowledge of illegality. Additionally, in light of the unresolved legal questions about whether giving "documents and information" of the sort offered here constitutes a campaign contribution, Trump Jr. could mount a factual defense that he did not believe his response to the offer and the June 9 meeting itself violated the law.