



When Mueller Concludes

If Conspiracy — by Whatever Name — Occurred,
Congress Must Ensure Accountability



DECEMBER 2018

© 2018

Protect Democracy

TABLE OF CONTENTS

	Page
<i>I. Introduction and Background: Conspiring with a Foreign Adversary to Influence an Election Violates the Law and Demands Accountability</i>	<i>1</i>
<i>II. The Investigation into Coordination Between the Trump Campaign and Russia Implicates Violations of Numerous Federal Criminal Laws</i>	<i>2</i>
A. Conspiracy: Conspiring with a Foreign Power to Undermine an Election or to Subvert the FEC’s Enforcement of Election Laws is a Crime.	2
1. Conspiracy to Commit Offense Against the United States.	4
2. Conspiracy to “Defraud” the United States and the Federal Election Commission.	4
B. Federal Election Campaign Act: Accepting a “Thing of Value” from a Foreign Source is a Crime.	5
C. Computer Fraud and Abuse Act: Aiding and Abetting the Dissemination of Unlawfully Obtained Documents for Illicit Purposes is a Crime.	10
1. The “Affirmative Act” Prong	10
2. The “Intent” Prong	11
D. Logan Act: Corresponding with Foreign Government Agents to Defeat the Measures of the United States is a Crime.	12
E. Federal Bribery Statutes and the Hobbs Act: Seeking a Thing of Value in Exchange for an Official Act is a Crime.	13
F. Misprision of a Felony	14
<i>III. The First Amendment Provides No Defense to Criminal Liability Under any of these Statutes.</i>	<i>15</i>
<i>IV. Conspiring with a Foreign Government to Win a U.S. Election Requires Accountability and Could Justify Impeachment</i>	<i>17</i>
<i>Appendix: Brief Relevant Factual Background</i>	<i>20</i>

I. Introduction and Background: Conspiring with a Foreign Adversary to Influence an Election Violates the Law and Demands Accountability

Special Counsel Robert Mueller is investigating allegations that the presidential campaign of Donald J. Trump coordinated with Russia to win the 2016 election. Even before the investigation's conclusion, a set of key facts has emerged linking Trump, the Trump Organization, and the Trump campaign to Russian interference in the 2016 presidential election. These have been documented extensively elsewhere¹ and are summarized briefly in the Appendix. In the face of a growing mountain of credible evidence that the Trump campaign coordinated with the Russian government's conduct that has already produced criminal indictments, President Trump and his legal team have sought to move the goal-posts. Rebranding conspiracy as "collusion," they have argued that coordinating with a foreign power to tilt an election and harm an opposing campaign and individual supporters isn't unlawful, or that even if it is, it is protected by the First Amendment. This memo explains why the Trump legal team's efforts to evade accountability are flawed and dangerous.

Current Department of Justice ("DOJ") policy precludes indictment of a sitting president. This policy recognizes that the key check on presidential wrongdoing is political accountability, exercised by Congress through investigation, public hearings, censure, legislative reform, and even impeachment, and by the American people, through their elected representatives and at the voting booth. Working with a foreign power to influence a federal election is a serious — and criminal — transgression that requires stringent accountability.

This memo thus makes three key points.

First, if Trump, his campaign, or his associates coordinated with Russia to influence the 2016 election, such conduct could amount to a criminal conspiracy predicated on several criminal laws. To name a few:

- Campaign officials who conspired with foreign officials to undermine a federal election would be guilty of conspiracy to defraud the United States, a felony offense.
- By accepting a "thing of value" — in this case, information hacked from a political opponent's servers — from a foreign source, President Trump or others in his campaign could have violated the Federal Election Campaign Act.
- Campaign officials also could have violated the law by aiding or abetting violations of the Computer Fraud and Abuse Act, which criminalizes unlawfully accessing and obtaining information from a protected computer (commonly known as "hacking"), and

¹ See, e.g., Max Bergmann, Jeremy Venook & Moscow Project Team, *Conspiracy Against the United States: The Story of Trump and Russia*, Center for American Progress Action Fund (Nov. 27, 2018), <https://www.americanprogressaction.org/issues/democracy/reports/2018/11/27/172558/conspiracy-united-states-story-trump-russia/>.

makes it a felony to do so “in furtherance of any criminal or tortious act” in violation of other laws, such as campaign finance violations, state tort laws, or state privacy statutes.

- Correspondence with foreign government agents to “defeat the measures of the United States” may constitute a felony under the Logan Act.
- Various federal bribery statutes would be triggered if the Trump campaign offered to engage in any “official acts” in return for any assistance with his presidential campaign.
- If campaign officials knew that others had committed these felonies and took affirmative steps to conceal that fact from authorities, they could be guilty of misprision of a felony even if they did not participate in any of these offenses.

Second, the First Amendment does not provide immunity from accountability for coordinating with a foreign government to interfere in an election. The Trump team’s invocation of the First Amendment to defend its conduct is deeply flawed; it does not provide a defense for involvement in a conspiracy with a foreign adversary to disseminate stolen emails from American citizens.

Third, the new Congress must further investigate and provide accountability for the findings that emerge from the Special Counsel’s investigation into the Trump campaign’s cooperation with Russia to interfere in the election. The new Congress must conduct its own investigation of any ties between President Trump and Russia’s attack on the 2016 election, including findings emerging from Mueller’s work. It must assess that factual record, and if the President is guilty of wrongdoing, determine how to hold him accountable, including whether to seek his impeachment for “high crimes and misdemeanors.” Cooperation with a foreign power to subvert the most foundational expression of our sovereignty — the election of our chief executive — is, perhaps, the quintessential abuse of public trust that our founders thought warranted removal from office.

II. The Investigation into Coordination Between the Trump Campaign and Russia Implicates Violations of Numerous Federal Criminal Laws

A. Conspiracy: Conspiring with a Foreign Power to Undermine an Election or to Subvert the FEC’s Enforcement of Election Laws is a Crime.

The federal conspiracy statute, 18 U.S.C. § 371,² criminalizes two types of conspiracies: conspiracies to violate another federal criminal or civil law, and conspiracies to “defraud” the

² 18 U.S.C. § 371 reads as follows, in pertinent part: “If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.”

United States or any federal agency.³ Trump campaign officials may have violated either, or both, of these clauses, depending on how the evidence of their interactions with Russian agents develops. The Supreme Court has explained that conspiracies are “offense[s] of the gravest character,” since the elements of criminal cooperation involve “educating and preparing the conspirators for further and habitual criminal practices” and are generally harder to discover than individual criminal activity.⁴

At the core of both offenses is an “agreement.”⁵ The government must prove the existence of an agreement beyond a reasonable doubt, but an agreement may be proven wholly by circumstantial evidence,⁶ and “[t]he agreement need not be shown to have been explicit.”⁷ The Special Counsel already obtained indictments against Russian officials for their involvement in a criminal conspiracy to defraud the United States.⁸ Further public findings from Mueller’s team and from Congress will tell us whether, and to what extent, Trump campaign officials also took part in this conspiracy.

The facts that have already emerged through the Mueller investigation, however, provide a circumstantial basis for proving the existence of an agreement at the core of a conspiracy given that fact-finders may “infer an agreement from concert of action” between those believed to have conspired.⁹ The Trump campaign met with Russian officials on multiple occasions with the expectation that they would discuss emails that would damage the Clinton campaign,¹⁰ and then lied to the public and to law enforcement about those meetings; Trump publicly pleaded for the Russians to hack Hillary Clinton’s email accounts, which they did for the first time the day of his request;¹¹ and the campaign took actions favorable to Russian interests and at odds with longstanding Republican party policy. WikiLeaks published the first large document dump of

³ *Id.*; see also *United States v. Kanchanalak*, 41 F. Supp. 2d 1 (D.D.C. 1999) (finding a criminal conspiracy in the election law context), *rev’d on other grounds*, 192 F.3d 1037 (D.C. Cir. 1999).

⁴ *Pinkerton v. United States*, 328 U.S. 640, 644 (1946) (quoting *United States v. Rabinowich*, 238 U.S. 78, 88 (1915)).

⁵ See *United States v. Hutto*, 256 U.S. 524, 528–29 (1921) (explaining that predecessor to 18 U.S.C. § 371 criminalized agreements to violate any federal criminal or civil law); *United States v. Tuohey*, 867 F.2d 534, 536 (9th Cir. 1989). Note that a criminal conspiracy conviction can result from violations of civil law only where a plaintiff has suffered “actual damage.” See *West v. Carson*, 49 F.3d 433, 436–37 (8th Cir. 1995).

⁶ See, e.g., *United States v. Agofsky*, 20 F.3d 866, 870 (8th Cir. 1994); *United States v. Richardson*, 14 F.3d 666, 670 (1st Cir. 1994); *United States v. Foster*, 985 F.2d 466, 469 (9th Cir. 1993); *United States v. Bavers*, 787 F.2d 1022, 1026 (6th Cir. 1985).

⁷ *Iannelli v. United States*, 420 U.S. 770, 777 n. 10 (1975).

⁸ Indictment, *United States v. Netyksho*, No. 18-cr-215 (D.D.C. July 13, 2018) [hereinafter “Netyksho Indictment”], available at <https://www.justice.gov/file/1080281/download>.

⁹ *United States v. Sneed*, 63 F.3d 381, 386 (5th Cir. 1995).

¹⁰ See Appendix.

¹¹ Michael S. Schmidt, *Trump Invited the Russians to Hack Clinton. Were They Listening?*, N.Y. TIMES (July 13, 2018), <https://www.nytimes.com/2018/07/13/us/politics/trump-russia-clinton-emails.html>.

hacked Democratic National Committee (“DNC”) emails at a time “later in the summer”¹² that was particularly damaging to the Clinton campaign,¹³ and Roger Stone tweeted a preview of another large email dump that WikiLeaks posted hours after a tape of Trump talking crassly and boastfully about his history of sexual assault became public, dampening coverage of what was easily one of — if not the most — potentially damaging news items during his tumultuous campaign.¹⁴ Prosecutors regularly rely on this kind of circumstantial evidence to obtain convictions in court, where the standard of proof is beyond reasonable doubt.¹⁵

1. Conspiracy to Commit Offense Against the United States.

For coordination to amount to a criminal conspiracy, there must be (1) “an agreement to commit an unlawful act”; (2) evidence that participants “knowingly and intentionally became members of the conspiracy”; and (3) “commission of an overt act [by at least one coconspirator] that was committed in furtherance of the conspiracy.”¹⁶ The “knowledge” requirement is satisfied by a “general awareness of both the scope and the objective” of the enterprise.¹⁷

Trump campaign officials may have conspired to commit any number of crimes including various election laws,¹⁸ as well as the Computer Fraud and Abuse Act,¹⁹ the Logan Act,²⁰ or the Hobbs Act,²¹ which all run afoul of § 371.

2. Conspiracy to “Defraud” the United States and the Federal Election Commission.

If Trump campaign officials conspired with Russia’s attack on our election, they also may have obstructed a lawful government function (such as the completion of a federal election

¹² Jo Becker, Adam Goldman & Matt Apuzzo, *Russian Dirt on Clinton? ‘I Love it,’ Donald Trump Jr. Said*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/2017/07/11/us/politics/trump-russia-email-clinton.html>.

¹³ Schmidt, *supra* note 11 (describing WikiLeaks’ document release on July 22, 2016).

¹⁴ Marshall Cohen, *Access Hollywood, Russian Hacking and the Podesta Emails: One Year Later*, CNN (Oct. 7, 2017), <https://www.cnn.com/2017/10/07/politics/one-year-access-hollywood-russia-podesta-email/index.html>.

¹⁵ See, e.g., *United States v. Wardell*, 591 F.3d 1279, 1287-88 (10th Cir. 2009) (where court relied solely on circumstantial evidence such as “the joint appearance of defendants at transactions . . . in furtherance of the conspiracy[,] the relationship among codefendants[, and] mutual representations of defendants to third parties” to find an agreement).

¹⁶ *United States v. Gee*, 226 F.3d 885, 893 (7th Cir. 2000); see also Beth Allison Davis and Josh Vitullo, *Federal Criminal Conspiracy*, 38 AM. CRIM. L. REV. 777, 780 (2001).

¹⁷ *United States v. Pulido-Jacobo*, 377 F.3d 1124, 1130 (10th Cir. 2004) (quoting *United States v. Evans*, 970 F.2d 663, 670 (10th Cir. 1992)).

¹⁸ See *infra*, Section B; 52 U.S.C. § 30121

¹⁹ See *infra*, Section C; 18 U.S.C. § 1030

²⁰ See *infra*, Section D; 18 U.S.C. § 953.

²¹ See *infra*, Section E; 18 U.S.C. § 1951.

free from foreign interference) or the lawful functions of a government agency (such as the Federal Election Commission).

The second clause of 18 U.S.C. § 371 punishes those who “conspire . . . to defraud the United States, or any agency thereof in any manner or for any purpose.” “Defraud” in this statute does not merely refer to financial crimes, as common usage would suggest; rather, the statute criminalizes “any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.”²² The “[d]efraud” clause of § 371 “need not involve the violation of a separate statute.”²³ That is, the conspiracy need not be in furtherance of committing a crime distinct from § 371.

The statute has been applied in the election-law context. In *United States v. Hopkins*, the defendant was convicted after disguising contributions to evade FEC reporting requirements, thus subverting the lawful government functions of the agency through fraud.²⁴ If § 371 can be used to punish those who “arrange and disguise indirect corporate political contributions,”²⁵ surely those who arrange and disguise *foreign* contributions — of opposition research, meddling operations, social media attack ads, or anything else — are engaging in behavior Congress sought to prohibit.

B. Federal Election Campaign Act: Accepting a “Thing of Value” from a Foreign Source is a Crime.

The Federal Election Campaign Act (“FECA”) prohibits “foreign national[s]”²⁶ from contributing or donating any “thing of value . . . in connection with a Federal, State, or local election,”²⁷ and prohibits any person from “solicit[ing], accept[ing], or receiv[ing]” such a contribution.²⁸ There’s no legitimate room for debate that the Trump campaign’s alleged coconspirators — and several of the people and entities Mueller has already indicted — are foreign nationals. Thus any analysis of whether the campaign ran afoul of FECA would turn on whether (1) the information in question was a “thing of value,” (2) whether Trump campaign officials “solicit[ed], accept[ed], or receiv[ed]” the unlawful thing of value, and (3) whether those officials acted “knowingly and willfully,”²⁹ or put differently, whether they “kn[e]w,

²² *Tanner v. United States*, 483 U.S. 107, 128 (1987) (quoting *Dennis v. United States*, 384 U.S. 855, 861 (1966)).

²³ *United States v. Rosengarten*, 857 F.2d 76, 78 (2d Cir. 1988).

²⁴ 916 F.2d 207, 212–14 (5th Cir. 1990).

²⁵ *Id.* at 213.

²⁶ 52 U.S.C. § 30121(b).

²⁷ 52 U.S.C. § 30121(a)(1)(A).

²⁸ 52 U.S.C. § 30121(a)(2).

²⁹ 52 U.S.C. § 30109(d). The additional statutory requirement that the unlawful contribution exceed \$2,000 (or \$25,000 in the case of a felony prosecution), *see id.*, will not be discussed in detail. Opposition research of this type, in the context of a presidential campaign, is very expensive. President Trump paid Stormy Daniels \$130,000 in order to conceal valuable opposition research from the other side. *See* Jim Rutenberg & Jaclyn Peiser, *The Path of Stormy*

generally, that [their] conduct was unlawful.”³⁰ The results of the Mueller investigation will further illuminate the extent to which any campaign official may be criminally liable under this statute, but the publicly available information may already be sufficient to support a case that Trump campaign officials facilitated foreign influence of our elections — and evidence emerging from the Special Counsel’s work certainly is sufficient to warrant thorough examination by Congress.

The law bars foreign nationals from making any “contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation.”³¹ This includes “provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services.”³² In turn, the “usual and normal charge” of a good or service is “the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution.”³³

Information is a “thing of value” in the election law context, and in many other legal contexts. In *Citizens for Responsibility and Ethics in Washington*,³⁴ the FEC held that a contact list for activists constituted a “thing of value” as defined by 52 U.S.C. § 30118 (formerly 2 U.S.C. § 441b(a)).³⁵ In *U.S. v. Girard*, the Second Circuit similarly held that information — there, the names of government agents who could have been acting as informants — could serve as a “thing of value” in a conviction under 18 U.S.C. § 641, which criminalizes unauthorized sale of government property.³⁶ The court in *Girard* took care to explain that the definition of “thing” in the context of criminal statutes often encompassed “intangibles.”³⁷ “Amusement” is a “thing

Daniels’s \$130,000 Payment to Keep Quiet, N.Y. TIMES (May 3, 2018), <https://www.nytimes.com/2018/05/03/us/politics/stormy-daniels-trump-payment.html>. It stands to reason that he would have paid a similar amount in order to obtain similarly unfavorable information about his political opponent.

³⁰ U.S. DEP’T OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES, 152–155 (8th Ed.) (Dec. 2017), available at <https://www.justice.gov/criminal/file/1029066/download> (citing *Bryan v. United States*, 524 U.S. 184 (1998), and explaining standard). See also *United States v. Whittemore*, 944 F. Supp. 2d 1003, 1006–10 (D. Nev. 2013) (using the *Bryan* standard in the context of a FECA prosecution), *aff’d*, 776 F.3d 1074 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 89 (Mem.) (2015).

³¹ 52 U.S.C. § 30121(a)(1)(A).

³² 52 § 30101(8) (providing statutory definition of “contribution”); 11 C.F.R. § 100.52(d)(1) (defining “anything of value” as employed by the FECA).

³³ 11 C.F.R. § 100.52(d)(2).

³⁴ First General Counsel’s Report at 8 n.12, MUR 5409 (FEC Sept. 1, 2004), available at <https://www.fec.gov/files/legal/murs/current/31200.pdf>.

³⁵ *Id.* at 8. 52 U.S.C. § 30118 was later held to be facially unconstitutional, but the FEC opinion cited above only purported to define “contribution or expenditure,” which the FECA defined as including “anything of value.” The language is substantially identical to the language at issue in the statute barring foreign contributions, 52 U.S.C. § 30121, and thus this case is particularly instructive.

³⁶ 601 F.2d 69, 70 (2d Cir. 1979).

³⁷ *Id.* at 71.

of value” under gambling statutes,³⁸ and bribery statutes criminalize “things of value” such as sexual intercourse,³⁹ promises to reinstate employees,⁴⁰ and promises not to run in a primary election.⁴¹

Opposition research easily meets this test. Political campaigns routinely pay large sums of money for such research, and it has an intrinsic value to a political campaign.⁴² Had the Trump campaign not been offered such information for free, it likely would have expended considerable campaign funds to collect the information itself or hire others to do so. There is a market for opposition research, and the Trump campaign solicited opposition research for less than the market value of that information: they sought the information free of charge.

The President’s son, Donald Trump Jr. in fact telegraphed the value he placed on opposition research when he said that he “love[d]” the idea of obtaining it.⁴³ When determining whether something qualifies as a “thing of value,” courts look to “the value which the defendant subjectively attaches to the items received.”⁴⁴

The Russian government likewise saw the “value” in obtaining and disseminating the information, since it had to invest considerable sums in employing computer hackers, setting up meetings with Trump campaign officials through back channels, and flying to attend meetings in the United States. FEC Advisory Opinions tie “value” to input costs such as air travel for meetings and investments of time and money into technology and research. The expenditures that the Russians made to acquire and disseminate the information would all independently qualify as “things of value.”

Campaign officials may argue that Russian assistance would be exempt from the definition of “contributions” as “volunteer personal services,” but that shouldn’t be convincing. Although a volunteer personal service would not qualify as a thing of value, Russian activities do not fit within this narrow exemption. In 2009, the FEC declined to take action against Hillary Clinton for accepting a concert performance from Elton John that helped the campaign to raise \$2.5 million, holding that his performance did not count as a “contribution.”⁴⁵ But various

³⁸ *Id.* (citing, *inter alia*, *Giomi v. Chase*, 47 N.M. 22, 25–26 (1942)).

³⁹ *Id.* (citing, *inter alia*, *McDonald v. State*, 57 Ala. App. 529, 329 (1975), *cert. denied*, 429 U.S. 834 (1976)).

⁴⁰ *Id.* (citing *People ex rel. Dickinson v. Van De Carr*, 84 N.Y.S. 461, 463–64 (1st Dep’t 1963)).

⁴¹ *Id.* (citing *People v. Hochberg*, 404 N.Y.S. 2d 161, 167 (3d Dep’t 1978)).

⁴² See Bob Bauer, *If “Love” Knows No Bounds: On Criminal “Intent” and the Scope of Campaign Finance Law*, JUST SECURITY (July 25, 2017), <https://www.justsecurity.org/43537/love-bounds-criminal-intent-scope-campaign-finance-law/>.

⁴³ Becker, Goldman & Apuzzo, *supra* note 12.

⁴⁴ *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986) (citing *United States v. Williams*, 705 F.2d 603, 623 (2d Cir. 1983), *cert. denied*, 464 U.S. 1007 (1983)).

⁴⁵ See First General Counsel’s Report at 3, MURs 5987, 5995 & 6015 (FEC Jan. 27, 2009) [hereinafter “MURs 5987, 5995 & 6015”], available at <http://eqs.fec.gov/eqsdocsMUR/10044264653.pdf>.

factors distinguish the Russian activity at issue here. As an initial matter, the volunteer services exception should not be construed so broadly as to include sharing stolen emails, which are, of course, not a “service.”⁴⁶ The sorts of pure “services” exempt under the FECA are different in character — things like musical performances,⁴⁷ soliciting contributions for a candidate,⁴⁸ writing computer code,⁴⁹ or “door to door canvassing, handing out literature at transit stations, telephone banking, and get out the vote activities.”⁵⁰

Even if some Russian activity *could* qualify as volunteer personal services, Trump campaign officials would still have committed a crime because they failed to pay back all the expenses that the Russian government incurred. Even when a foreign national provides exempted volunteer services, campaigns are barred from accepting any “thing of value” *connected* to the provision of those volunteer services. The FEC authorized the Elton John performance discussed above only because the campaign “paid for all the costs associated with the production of the concert event.”⁵¹ The Clinton campaign paid a total of over \$300,000 for expenses such as “building services, stage labor, security, wardrobe, printing, equipment, sound system and license fees,” as well as “airline travel, hotel incidentals, per diems and ground transportation.”⁵² Even if the *information* given by the Russians constitutes “volunteer personal services,” the campaign would have been obligated to reimburse all of the costs associated with obtaining and disbursing the information.

To date, there is no evidence that the Trump campaign paid Russian government officials for costs incurred by illegally penetrating the DNC’s computer network and travelling to New York for a clandestine meeting to discuss information the Russian government had about Clinton that it thought would help Trump’s election efforts. The Trump campaign certainly has not *disclosed* such a payment to the FEC, as campaign finance law would require. Reimbursing the Russians for this criminal conduct may have resulted in other legal liabilities, but that does not free Trump campaign officials from legal liability under FECA for soliciting such information

⁴⁶ See *id.* at 6 (citing FEC Advisory Op. 1981-51 (Metzenbaum) (Jan. 29, 1982)). Note that a 2015 Advisory Opinion expressly superseded Metzenbaum and explained that the FEC would no longer rely on any “distinction between the provision of volunteer services by a foreign national and the creation and donation of a tangible good.” FEC Advisory Op. 2014-20 (Make Your Laws PAC) at 3 n.5 (Mar. 19, 2015), available at [https://www.fec.gov/files/legal/aos/2014-20/AO-2014-20-\(Make-Your-Laws-PAC\)-Final-\(3.19.15\).pdf](https://www.fec.gov/files/legal/aos/2014-20/AO-2014-20-(Make-Your-Laws-PAC)-Final-(3.19.15).pdf). Notwithstanding this new interpretation of the volunteer personal services exemption, the statute itself clearly exempts only “services,” so this “goods-services” distinction should still be relevant. See 52 U.S.C. § 30101(8)(B)(i).

⁴⁷ MURs 5987, 5995 & 6015, *supra* note 45.

⁴⁸ FEC Advisory Op. 2004-26 (Weller) (Aug. 20, 2004), available at <https://fec-dev-proxy.app.cloud.gov/files/legal/aos/2004-26/2004-26.pdf>.

⁴⁹ FEC Advisory Op. 2014-20, *supra* note 46.

⁵⁰ FEC Advisory Op. 2007-22 (Hurysh) (Dec. 3, 2007), available at <http://saos.fec.gov/aodocs/2007-22.pdf>.

⁵¹ MURs 5987, 5995 & 6015, *supra* note 45, at 8.

⁵² *Id.* at 6. See also FEC Advisory Op. 2014-20, *supra* note 46, at 2 (holding that providers of computer code were providing volunteer personal services, but only where “out of pocket costs such as printing, distribution, web hosting, etc. will be paid for by [the requestor] (sic) . . .”).

free of charge. Since the Trump campaign did not disclose any payment to the FEC, it received these services at no cost in violation of the law, or paid for them without disclosing it, in violation of the law. Either way, the Trump campaign did something Congress has prohibited.

Additionally, “solicit[ation]” of information from Russians could trigger criminal liability under FECA.⁵³ By regulation, “to solicit means to ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value,” and a solicitation may be made “directly or indirectly.”⁵⁴ Merely accepting the meeting with the Russian government attorney under the pretense that the source would provide opposition research could qualify as solicitation. While it is unclear whether Trump Jr. “accepted” anything of value during his June 2016 Trump Tower meeting with Russian agents, he need not have accepted anything to be guilty of solicitation. By accepting the meeting, writing in an email that he “love[d]” the idea of obtaining damaging information on Hillary Clinton, and explaining that such information would be even more valuable “later in the summer,” he signaled to foreign sources that he was interested in what they offered and prepared to receive it.⁵⁵

Violating FECA doesn’t require perfect knowledge of the entire illegal election scheme, only that someone “know, generally, that his conduct was unlawful.”⁵⁶ Trump campaign officials will have a difficult time alleging lack of knowledge. For instance, Paul Manafort — President Trump’s campaign manager when the June 2016 Trump Tower meeting took place — had worked on federal elections in the past and must have known about the general prohibition on foreign assistance.⁵⁷ Other campaign officials certainly acted as if they knew they were doing something wrong. Inconsistent statements, implausible stories, and attempted coverups after the fact, as alleged in the Mueller team’s recent filings,⁵⁸ have long been associated with consciousness of guilt.⁵⁹

⁵³ 52 U.S.C. § 30121(a)(2) (making it unlawful for any person to “solicit, accept, or receive a contribution or donation” from a foreign national) (emphasis added).

⁵⁴ 11 C.F.R. § 300.2(m).

⁵⁵ Becker, Goldman & Apuzzo, *supra* note 12.

⁵⁶ U.S. DEP’T OF JUSTICE, *supra* note 30 (citing *Bryan v. United States*, 524 U.S. 184, 195-196 (1998) and explaining “knowledge” standard for prosecution of election offenses).

⁵⁷ Barry H. Berke, Dani R. James, Noah Bookbinder & Norman L. Eisen, *Considering Collusion: A Primer on Potential Crimes*, BROOKINGS INSTITUTE (Oct. 31, 2018), at 26–27, https://www.brookings.edu/wp-content/uploads/2018/10/GS_10.31.2018_Collusion-Primer.pdf.

⁵⁸ Zoe Tillman, *Prosecutors Claim Paul Manafort Lied To Mueller’s Office And The FBI After Signing His Plea Deal*, BUZZFEED NEWS (Nov. 26, 2018), <https://www.buzzfeednews.com/article/zoetillman/paul-manafort-lied-mueller-cooperation-sentencing>.

⁵⁹ See, e.g., *United States v. Diaz-Carreón*, 915 F.2d 951, 955 (5th Cir. 1990).

C. Computer Fraud and Abuse Act: Aiding and Abetting the Dissemination of Unlawfully Obtained Documents for Illicit Purposes is a Crime.

Depending on what the evidence shows, Trump campaign officials may have “aided and abetted” violations of the Computer Fraud and Abuse Act (“CFAA”). The CFAA criminalizes “intentionally access[ing] a computer without authorization” and thereby obtaining “information from any protected computer.”⁶⁰ This behavior becomes a felony if “committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.”⁶¹

Some recent reports suggest Trump campaign officials may have been aware of Russian hacks of Democratic party officials before they occurred,⁶² but any coordination in weaponizing those emails after the fact also could amount to “aiding and abetting” the secondary “criminal or tortious act” after the initial hacking.⁶³ The hacked information was used in connection with multiple criminal and tortious acts, under both state and federal law. The only question for our purposes is whether, and to what extent, Trump campaign officials knew about — and participated in — these secondary violations. Repeated — and publicly documented — acts, such as Trump campaign contacts with Russian officials offering “dirt” on Clinton, campaign statements calling for Russian hacking and promoting leaked stolen documents, and Stone’s presaging release of Podesta’s emails could point to that awareness.

Those tangling with the federal “aiding and abetting” statute are just as guilty as “principals”⁶⁴ “if (and only if) [they] (1) take[] an *affirmative act* in furtherance of that offense, (2) with the *intent* of facilitating the offense’s commission.”⁶⁵ The facts here are suggestive of both.

1. The “Affirmative Act” Prong

As a preliminary matter, one need only take an “affirmative act” toward committing one element of a criminal offense in order to incur § 2 liability.⁶⁶ The felony CFAA offense in question here requires that a person: (1) obtain information from a protected computer by

⁶⁰ 18 U.S.C. § 1030(a)(2), (a)(2)(C).

⁶¹ *Id.* § 1030(c)(2)(B)(ii).

⁶² Luke Harding & Dan Collyns, *Manafort Held Secret Talks with Assange in Ecuadorian Embassy, Sources Say*, GUARDIAN (Nov. 27, 2018), <https://www.theguardian.com/us-news/2018/nov/27/manafort-held-secret-talks-with-assange-in-ecuadorian-embassy>.

⁶³ 18 U.S.C. § 2(a) (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”); *see also United States v. Auernheimer*, 748 F.3d 525, 534-35 (3d Cir. 2014) (explaining how defendant could have become liable for a felony violation of the CFAA, but dismissing the case for improper venue).

⁶⁴ 18 U.S.C. § 2(a).

⁶⁵ *Rosemond v. United States*, 572 U.S. 65, 71 (2014) (emphasis added).

⁶⁶ *See id.* at 72–74.

unlawfully accessing it, and (2) use such information in furtherance of another crime. Importantly, one need only actively participate in one element in order to be guilty of the “affirmative act” prong of § 2 liability.⁶⁷ Here, that means that a Trump campaign official could be aiding and abetting a CFAA felony offense if he or she took an affirmative act in furtherance of the secondary “criminal or tortious act,” even if he or she played no part in the computer hacking that preceded it.

If a Trump campaign official used the unlawfully obtained information to take an “affirmative act” in furtherance of another crime, that official would be just as liable as if he committed every single element of the offense.⁶⁸ The sufficiency of various “affirmative acts” depends on the nature of the secondary “criminal or tortious act” involved.⁶⁹ Public information suggests that the actions of Trump campaign officials could have constituted violations of any of the following laws: (1) the tort of Public Disclosure of Private Facts, (2) the tort of Intentional Infliction of Emotional Distress, (3) state privacy statutes, (4) federal election-law violations, (5) Logan Act violations, or (6) Hobbs Act violations. This list is by no means exhaustive.

2. The “Intent” Prong

Trump campaign officials could be “aiders and abettors” of a CFAA crime if they also “intended” to commit *both* elements of the offense (i.e. the computer hacking *plus* the secondary criminal or tortious violation). The “intent” prong would be satisfied so long as they generally knew about the general “extent and character” of the crime.⁷⁰

Trump associates would struggle to argue they lacked knowledge that the materials were hacked — the hacks were front-page news and the campaign discussed them publicly. Knowledge of that act is sufficient to satisfy the intent under the CFAA. Just as “[a]n active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun,”⁷¹ an active participant in a criminal or

⁶⁷ *Id.* *Rosemond* concerned another “two-element offense,” the crime of “‘us[ing] or carr[ying] a firearm’ when engaged in a ‘crime of violence or drug trafficking crime.’” *Id.* at 71 (quoting 18 U.S.C. § 924(c)). Thus, the two elements of the offense would be (1) engaging in a crime of violence or a drug trafficking crime, and (2) using or carrying a firearm while committing the offense. The defendant in that case knowingly and actively participated in the drug-trafficking crime but did not know that one of his accomplices was armed during the commission of the offense. *Id.* at 72. Regardless, the Supreme Court agreed with the settled law of “almost every court of appeals” and determined that the defendant’s participation in the first element was sufficient to fulfill § 2’s “affirmative act” prong. *Id.* at 73. The CFAA offense is similarly a two-element offense.

⁶⁸ See *United States v. Johnson*, 319 U.S. 503, 515 (1943) (explaining that although defendants had different roles and responsibilities, “all who shared in [the crime’s] execution have equal responsibility before the law”).

⁶⁹ See 18 U.S.C. § 1030(c)(2)(B)(ii).

⁷⁰ *Rosemond*, 572 U.S. at 77.

⁷¹ *Id.* at 77.

tortious act that *relies on hacked materials* has the intent needed to aid and abet a § 1030(c)(2)(B)(ii) violation when he knows that the *materials were unlawfully obtained*, via hacking. Here, the unlawful provenance of the hacked materials likely was obvious to all involved.

D. Logan Act: Corresponding with Foreign Government Agents to Defeat the Measures of the United States is a Crime.

The Logan Act makes it unlawful for any private U.S. citizen (1) acting without authority from the government (2) to correspond with foreign governments or agents thereof (3) “with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States” or to “defeat the measures of the United States.”⁷² Trump campaign officials, including Michael Flynn, Manafort, and Trump Jr., corresponded with agents of the Russian government, apparently without any authority from any branch of the U.S. government.⁷³ Whether their actions run afoul of the Logan Act would turn on whether they intended, by such contacts, to influence Russian conduct in relation to any “disputes or controversies with the United States” or to defeat the measures of the United States.

The Trump campaign’s correspondence may have been prohibited by the Logan Act’s in various ways. Flynn, acting under the direction of a “very senior member” of the Trump campaign, called the Russian ambassador on December 21, 2016 to urge Russia to vote against a UN Security Council resolution regarding Israeli settlements.⁷⁴ Flynn’s encouragement in the context of a long-standing dispute with Israel over settlements may have transgressed the Logan Act, even if the resolution cannot be properly termed a “measure” of the United States.⁷⁵

⁷² 18 U.S.C. § 953. The statute, in its entirety, reads as follows: “Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined under this title or imprisoned not more than three years, or both. This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.”

⁷³ See Appendix; see also Bergmann & Venook, *supra* note 1.

⁷⁴ Statement of the Offense at 3–4, *United States v. Flynn*, No. 1:17-cr-232 (D.D.C. Nov. 30, 2017) [hereinafter “Flynn Plea Documents”], available at <https://assets.documentcloud.org/documents/4318156/Flynn-Statement-of-Offense.pdf>. Flynn pleaded guilty for lying to the FBI about this conversation.

⁷⁵ Daniel J. Hemel and Eric A. Posner, *The Logan Act and its Limits*, LAWFARE (Dec. 7, 2017), <https://www.lawfareblog.com/logan-act-and-its-limits> (explaining that this episode should be considered a “dispute” under Logan Act’s definition).

More central to election-related coordination with Russia, on December 29, 2016, Flynn again called the Russian ambassador following then-President Barack Obama’s imposition of sanctions on Russia to urge the Russian ambassador not to retaliate or “escalate” the situation.⁷⁶ By suggesting that an incoming President Trump would lessen the impact of the sanctions imposed by Obama on December 28,⁷⁷ Flynn’s correspondence had the effect of lessening the deterrent effect of those sanctions — in other words, he may have worked to “defeat” a “measure” of the United States.

E. Federal Bribery Statutes and the Hobbs Act: Seeking a Thing of Value in Exchange for an Official Act is a Crime.

Federal law prohibits “public official[s]” from “corruptly demand[ing], seek[ing], receiv[ing], accept[ing], or agree[ing] to receive or accept anything of value” in exchange for an “official act.”⁷⁸ This statute bars traditional quid pro quo agreements. The electoral assistance provided by Russia — the hacking and dissemination of emails and the pro-Trump social media campaign carried out by the Internet Research Agency — may qualify as a “thing of value,” just as it would in the election-law context.⁷⁹ The “official act” on the other side of the quid pro quo is not yet clear. Any liability under this section will depend on facts not yet confirmed to the public. For example, Trump’s shift of Republican party — and eventually, U.S. government — policies in a pro-Russia direction⁸⁰ and Trump Jr.’s promise that an incoming Trump administration would revisit the Magnitsky Act during his Trump Tower meeting with Russian agents⁸¹ may serve as the “official act[s]” necessary to trigger the statute.⁸²

⁷⁶ Flynn Plea Documents, *supra* note 74, at 2–3.

⁷⁷ See Exec. Order 13757, *Taking Additional Steps to Address the National Emergency with Respect to Significant Malicious Cyber-Enabled Activities*, 82 Fed. Reg. 1 (Dec. 28, 2016) (imposing sanctions on Russia for election interference).

⁷⁸ 18 U.S.C. § 201(b)(2) (criminalizing, in pertinent part, the following conduct: “(b) [w]hoever . . . (2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for: (A) being influenced in the performance of any official act; (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (C) being induced to do or omit to do any act in violation of the official duty of such official or person.”)

⁷⁹ See *supra* notes 32–44 and accompanying text. Even intangible “things” such as information can satisfy this element of the statute. *Girard*, 601 F.2d 70–71.

⁸⁰ See, e.g., Natasha Turak, *Here’s Where Trump Has Been Tough on Russia — and Where He’s Backed Down*, CNBC (July 16, 2018), <https://www.cnbc.com/2018/07/16/heres-where-trump-has-been-tough-on-russia--and-where-hes-backed-do.html>.

⁸¹ Irina Reznik & Henry Meyer, *Trump Jr. Hinted at Review of Anti-Russia Law, Moscow Lawyer Says*, BLOOMBERG (Nov. 6, 2017), <https://www.bloomberg.com/news/articles/2017-11-06/trump-jr-said-anti-russia-law-may-be-reviewed-moscow-lawyer-says>.

⁸² See, e.g., *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998) (explaining that prosecutors can prove the existence of a quid pro quo arrangement without proving that the bribe was satisfied by any *specific* official act and that the quid pro quo requirement would be satisfied

The Hobbs Act applies to essentially the same set of conduct as the federal bribery statute. However, the Hobbs Act reaches a broader set of actors than § 20.⁸³ “[C]ourts have held that the Hobbs Act can be applied to past *or future* public officials.”⁸⁴ Section 1951 criminalizes “extortion,” as it was defined at common law. At common law, extortion was virtually indistinguishable from “taking a bribe.”⁸⁵ Thus, if President Trump took some official act to benefit Russia — such as sanctions relief or forbearance — as a means of repaying the Russians for their substantial election support, he could come within the ambit of the Hobbs Act. If other campaign officials participated in a conspiracy to accomplish the same, or “aided and abetted” such a violation, they could also incur liability.⁸⁶

F. Misprision of a Felony

If Trump campaign officials took active steps to conceal felonious conduct, they may have committed misprision of a felony, even if they took no part in the felonious conduct itself.⁸⁷ Misprision of a felony occurs when a person (1) learns that a felony has been committed by

by “a course of conduct of favors and gifts flowing to a public official in exchange for a *pattern* of official actions favorable to the donor” (quoting *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976) (emphasis omitted; emphasis added); *see also United States v. Menendez*, 291 F. Supp. 3d 606, 614 (D.N.J. 2018) (holding that this “stream of benefits” theory is still valid after *McDonnell v. United States*, 136 S. Ct. 2355 (2016), which somewhat narrowed the definition of “official act”).

⁸³ 18 U.S.C. § 1951(b)(2) (criminalizing “extortion,” defined in part as “the obtaining of property from another, with his consent . . . under color of official right”).

⁸⁴ U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, CRIMINAL RESOURCE MANUAL § 2404, available at <https://www.justice.gov/jm/criminal-resource-manual-2404-hobbs-act-under-color-official-right> (citing *United States v. Meyers*, 529 F.2d 1033, 1035–38 (7th Cir.), cert. denied, 429 U.S. 894 (1976)) (emphasis added).

⁸⁵ *Evans v. United States*, 504 U.S. 255, 260 (1992) (“At common law, extortion was an offense committed by a public official who took ‘by colour of his office’ money that was not due to him for the performance of his official duties Extortion by the public official was the rough equivalent of what we would now describe as ‘taking a bribe’” (footnotes omitted)). Courts will most likely require proof of a quid pro quo arrangement, making liability under the Hobbs Act essentially coterminous with § 201 in this instance, except for the broader definition of “public official.” *See United States v. Martinez*, 14 F.3d. 543, 553 (11th Cir. 1994).

⁸⁶ *See supra* Sections II.A (discussing conspiracy liability) and II.C (discussing aiding and abetting liability).

⁸⁷ 18 U.S.C. § 4 (which provides that “[w]hoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.”).

another, (2) fails to notify the authorities, and (3) takes an affirmative action to conceal the crime.⁸⁸ “[V]erbal acts of concealment” are sufficient to trigger the statute.⁸⁹

Two particular sets of facts potentially constitute misprision, given that public reporting suggests campaign officials had knowledge of the crimes committed and took affirmative steps to conceal them. First, recent media reports suggest that Trump campaign advisor Stone may have learned that Russian agents stole emails at various points before the election and failed to report the theft.⁹⁰ The theft of these emails constituted a felony,⁹¹ and if any of Trump’s associates took any affirmative act to conceal the commission of that crime, they could be guilty of misprision. Second, if Trump Jr. unlawfully solicited a campaign contribution from a foreign source, any acts to conceal that fact — such as, for instance, the drafting of a false statement regarding the contents of meetings where the solicitation occurred⁹² — also could serve as the basis for criminal liability. Misprision of any of the other crimes discussed in this report — or any others found to have been committed — is subject to the same prohibitions.

III. The First Amendment Provides No Defense to Criminal Liability Under any of these Statutes.

In its only courtroom defense of allegations that it conspired with the Russian government to win the 2016 presidential election, Trump’s legal team contends that the First Amendment creates an absolute right for the campaign to act as alleged.⁹³ That approach likely presages arguments Trump, his campaign, and his associates will make in defending against any indictments brought by Mueller and in congressional investigations and public hearings. But that argument has no basis in the Constitution.

⁸⁸ See, e.g., *United States v. Wilkes*, 972 F.2d 344, 1992 WL 188133, at *2 (4th Cir. 1992).

⁸⁹ *United States v. Baumgartner*, 581 F. App’x 522, 526–527 (6th Cir. 2014) (citing *United States v. Williams*, 2009 WL 579332 (6th Cir. Mar. 9, 2009)).

⁹⁰ Anna Schecter, *Mueller Has Emails from Stone Pal Corsi About WikiLeaks Dem Email Dump*, NBC News (Nov. 27, 2018), <https://www.nbcnews.com/politics/justice-department/mueller-has-emails-stone-pal-corsi-about-wikileaks-dem-email-n940611>. For instance, campaign aide George Papadopoulos apparently learned in March or April of 2016 that the Russians possessed “thousands of emails.” Statement of the Offense at 2, *United States v. Papadopoulos*, No. 17-cr-182 (D.D.C. Oct. 5, 2017) [hereinafter “Papadopoulos Plea Documents”], available at <https://www.justice.gov/file/1007346/download>. There is no evidence in the public record that Trump campaign officials ever reported the theft of the emails.

⁹¹ This theft broke a number of federal laws. See, e.g., 18 U.S.C. § 1030 (Computer Fraud and Abuse Act); *id.* § 2511 (Federal Wiretap Act).

⁹² Becker, Goldman & Apuzzo, *supra* note 12.

⁹³ Def’s Br. in Supp. Mot. to Dismiss at 4–9, *Cockrum v. Trump Campaign*, No. 18-cv-484 (E.D.V.A. Oct. 8, 2018) [hereinafter “Cockrum MTD”], available at <https://protectdemocracy.org/resource-library/document/cockrum-v-trump-campaign-motion-to-dismiss/>.

Even if some of the relevant conduct in this scheme could be characterized as speech (and much of it cannot) free speech rights are not absolute — they fall in the face of a compelling government interest, and the Supreme Court has identified such a compelling government interest in FECA’s prohibition on foreign contributions to federal campaigns. As then-Judge Brett Kavanaugh wrote in 2011, the Supreme Court’s campaign finance case law makes it “plain — indeed, beyond rational debate — that the government may bar foreign contributions” to presidential campaigns.⁹⁴ Foreign governments and foreign nationals have no First Amendment right to participate in the domestic political process. “The government may exclude foreign citizens from activities ‘intimately related to the process of democratic self-government.’”⁹⁵ Such restrictions are inherent in the very idea of sovereignty. “[A] democratic society is ruled by its people,”⁹⁶ and it is therefore “fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government.”⁹⁷

The Trump campaign focused its argument in court on two Supreme Court cases: *New York Times v. United States* and *Bartnicki v. Vopper*.⁹⁸ Neither case excuses offering policy favors in exchange for the dissemination of opponent’s stolen, private information. *New York Times v. United States*⁹⁹ is the famous Pentagon Papers case, in which the Supreme Court held that the federal government could not block the *New York Times* and *Washington Post* from publishing portions of leaked government documents showing the extent to which the federal government had misled the American people about conduct of the Vietnam War. The Campaign suggests that because the Supreme Court permitted the *Times* and *Post* to publish excerpts of the Pentagon Papers, the Trump campaign had a right to coordinate with a hostile foreign government on the release of entire inboxes of emails stolen from its political opponent. To state the facts of the two cases is to highlight the extraordinarily different government interests at stake, and there’s no wonder that then-Judge Kavanaugh and his current Supreme Court colleagues have viewed the government’s interest in gagging unfavorable press differently than they have viewed preserving the American people’s right to choose their leaders free of foreign influence.

The Trump campaign also relies on *Bartnicki v. Vopper*,¹⁰⁰ to no more avail. *Bartnicki* considers the constitutionality of a statute imposing liability for the disclosure of illegally intercepted communications as applied to circumstances. In particular, a radio station played a single tape of union officials discussing a potential plan to engage in terrorist acts against school board officials. While the conversation was unlawfully intercepted, the radio station acquired the tape entirely lawfully: a friend to the radio station found it in his mailbox and passed it

⁹⁴ *Bluman v. FEC*, 800 F. Supp. 2d 281, 289 (D.D.C. 2011) (Kavanaugh, J., writing for a three-judge panel), *aff’d*, 565 U.S. 1104 (2012).

⁹⁵ *Id.* at 287 (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)); *see also Sugarman v. Dougall*, 413 U.S. 634, 647–49 (1973) (asserting, in dicta, the constitutionality of various restrictions on the rights of foreign nationals to participate in elections).

⁹⁶ *Foley v. Connelie*, 435 U.S. 291, 296 (1978).

⁹⁷ *Bluman*, 800 F. Supp. 2d at 288.

⁹⁸ *See Cockrum MTD*, *supra* note 93, at 4–9.

⁹⁹ 403 U.S. 713 (1971).

¹⁰⁰ 532 U.S. 514 (2001).

along. The Supreme Court held that, under the “novel and narrow” circumstances of *Bartnicki*, “a law abiding possessor of information” couldn’t be civilly liable for publishing information on a topic that was “unquestionably a matter of public concern.”

Here, we’re not talking about law abiding possessors of information but about a conspiracy including foreign government adversaries to steal information and deploy that stolen information so as to harm one candidate for the U.S. presidency and help another. There’s no doctrinal or practical reason to assume that the First Amendment requires the government to permit candidates for office in the United States to coordinate with foreign agents to turn stolen property into a political weapon, even if that stolen property contains words, *i.e.*, speech.

This conclusion is unsurprising. The Framers, after all, designed the United States Constitution to *resist* foreign influence over the United States government. That’s why, for example, the Constitution banned federal officer holders from accepting emoluments, offices, or titles from “king, prince, or foreign state.”¹⁰¹ It would make no sense to conclude that they meant the First Amendment to allow presidential campaigns to become indebted to foreign leaders.

Furthermore, Supreme Court precedents show definitively that private citizens have no constitutional privilege to subvert the U.S. government’s interests in a foreign-affairs context, even where private citizens are engaging in conduct that would traditionally be protected in a domestic context.¹⁰² The deference traditionally owed to the political branches in the context of foreign relations suggests that prohibitions on interference with U.S. foreign policy towards Russia would defeat the Trump campaign’s novel First Amendment arguments. Second, as to the Logan Act in particular, it can be read to narrow its application to certain types of egregious conduct¹⁰³ — those actions that could truly jeopardize the Executive’s constitutional privilege to speak with “one voice” for the whole of the nation on matters related to foreign affairs.¹⁰⁴

The criminal statutes discussed above bar a narrow range of conduct, leaving political campaigns free to engage in a wide range of legitimate political advocacy. The rules in place strengthen our democracy and our political expression by barring foreign interference in the context of our foremost expression of sovereignty — the election of our leaders.

IV. Conspiring with a Foreign Government to Win a U.S. Election Requires Accountability and Could Justify Impeachment

Cooperating with a foreign government in order to manipulate the choices of the polity in our highest election would call into question our leader’s legitimacy and fitness for office. It is hard to imagine a more direct assault on our democracy, and allowing those guilty of such an assault to escape liability would severely undermine the rule of law and our constitutional order.

¹⁰¹ U.S. CONST. art. I, § 9, cl. 8 (Emoluments Clause). .

¹⁰² See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–34 (2010).

¹⁰³ See Hemel & Posner, *supra* note 75 (demonstrating how the Logan Act could, and should, be read narrowly so as to avoid constitutional problems).

¹⁰⁴ See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2079 (2015).

Whether a sitting president may be criminally charged is a hard constitutional question. But the Constitution certainly provides for accountability for presidential wrongdoing. Congress has the power to investigate that wrongdoing, expose it publicly, censure it, and if warranted, remove a president from office for it.

The Constitution provides for the removal of the president upon impeachment in the House and conviction in the Senate for commission of “treason, bribery, or other high crimes and misdemeanors.”¹⁰⁵ This constitutional standard is notably flexible, but the Framers intended the standard to require more than a mere political disagreement.¹⁰⁶ Alexander Hamilton described the set of offenses meeting the “high crimes and misdemeanors” standard as “those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust.”¹⁰⁷ Most constitutional scholars assume that non-criminal conduct could be grounds for impeachment, so long as the conduct is “grossly incompatible with the office held” and would “constitute[] a substantial breach of [an official’s] oath of office.”¹⁰⁸

The Founders were particularly concerned with the prospect of foreign interference and intended that facilitation of such interference be impeachable. At North Carolina’s ratifying convention, future Supreme Court justice James Iredell addressed the Anti-Federalist charge that the President might escape the Senate’s retribution because they shared the power to make treaties.¹⁰⁹ Iredell explained that “the president could not be removed from office simply for negotiating an unwise treaty,” but assured his opponents that “if bribery or some ‘other corrupt motive’ had induced [the president] to make such a treaty . . . , then they would happily remove him from office once his ‘villainy’ was revealed”¹¹⁰

Allowing foreign influence over who leads the nation strikes at the very core of our system based on democratic self-rule. Our nation was founded on the principle that “we the people” get to decide the course of our government. The Founders thus structured the Constitution to

¹⁰⁵ U.S. CONST. art. II, § 4.

¹⁰⁶ See Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CAL. L. REV. 1278, 1280 (2018).

¹⁰⁷ THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁰⁸ Frank O. Bowman, III. & Stephen L. Sepinuck, “*High Crimes & Misdemeanors*”: *Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517, 1547 (1999). See also CHARLES L. BLACK, JR. & PHILIP BOBBITT, IMPEACHMENT: A HANDBOOK, NEW EDITION 30-33 (1974). Black forcefully illustrates that an impeachable offense need not necessarily be criminal: “Suppose a president were to announce and follow a policy of granting full pardons, in advance of indictment or trial, to all federal agents or police who killed anybody in line of duty, in the District of Columbia, whatever the circumstances and however unnecessary the killing Could anybody doubt that such conduct would be impeachable?” *Id.* at 31.

¹⁰⁹ MICHAEL J. KLARMAN, THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 373 (2016) (internal citations omitted).

¹¹⁰ *Id.* (internal citations omitted).

confront the grave challenges posed by foreign influences.¹¹¹ George Washington cited “foreign influence” as “one of the most baneful foes of a republican government,”¹¹² and Alexander Hamilton described it as a “Grecian horse.”¹¹³ Surely, with such a clear view of the dangers that foreign interference would pose to our republic, the Founders intended to impose a remedy. The question of what remedy to impose is a political one entrusted to Congress to weigh. Impeachment is Congress’s most powerful tool, and any decision to invoke it must include consideration of both the factual record regarding a president’s wrongdoing, as well as the consequences of his or her removal. If the extraordinary allegations regarding our current President’s coordination with a foreign foe to assume the nation’s highest office are true, no one could fault Congress for determining that the most extreme form of political accountability is justified.

¹¹¹ See, e.g., U.S. CONST. art. I, § 9, cl. 8 (Emoluments Clause).

¹¹² President George Washington, Farewell Address (Sept. 19, 1796), *available at* http://avalon.law.yale.edu/18th_century/washing.asp.

¹¹³ Alexander Hamilton, *Pacificus No. 6* (July 17, 1793), *available at* <https://founders.archives.gov/documents/Hamilton/01-15-02-0081>.

Appendix: Brief Relevant Factual Background

Even before the conclusion of the Special Counsel’s investigation, a set of key facts has emerged linking Donald Trump, the Trump Organization, and the Trump campaign to Russian efforts to interfere in the 2016 presidential election. These have been documented extensively elsewhere,¹¹⁴ so we summarize them here briefly for context.

In January 2017, the United States intelligence community concluded that (1) the Russian government had directed the hacking and dissemination of the DNC and Clinton campaign emails, that (2) Vladimir Putin and the Russian government had “developed a clear preference for President-elect Trump,” and (3) that the goal of their illicit activity was to “undermine public faith in the democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency.”¹¹⁵ In an initial bipartisan report on its investigation into Russian election interference, the Senate Select Committee on Intelligence came to the same conclusion.¹¹⁶

The Special Counsel investigation already has amassed numerous criminal charges, guilty pleas, and jury verdicts of conviction.¹¹⁷ Some of these charges have alleged the existence of a broad conspiracy to violate federal laws and unlawfully assist the Trump campaign. The Special Counsel secured indictments against Russian intelligence officers for conducting “large-scale cyber operations to interfere with the 2016 U.S. presidential election”¹¹⁸ by hacking the computer networks of the DNC and Podesta. The complaint alleged that the Russian government officials “knowingly and intentionally conspired to commit offenses against the United States” in violation of the federal conspiracy statute, 18 U.S.C. § 371.¹¹⁹ The Special Counsel has also indicted the Internet Research Agency for its role in election interference.¹²⁰ The Special Counsel’s investigation of election interference and the Trump campaign’s participation in it continues.

¹¹⁴ See, e.g., Bergmann & Venook, *supra* note 1.

¹¹⁵ OFF. OF THE DIR. OF NAT’L INTELLIGENCE, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS, at ii (Jan. 6, 2017), available at https://www.dni.gov/files/documents/ICA_2017_01.pdf.

¹¹⁶ Karoun Demirjian, *Senate Report Affirms Intelligence Community’s Conclusion That Russia Favored Trump Over Clinton*, WASH. POST (July 3, 2018), https://www.washingtonpost.com/powerpost/senate-report-affirms-intelligence-communitys-conclusion-that-russia-favored-trump-over-clinton/2018/07/03/4f0f03a2-7ef7-11e8-bb6b-c1cb691f1402_story.html.

¹¹⁷ The Special Counsel has brought 191 charges against 35 individuals to date. See Berke, James, Bookbinder & Eisen, *supra* note 57, at 26.

¹¹⁸ Netyksho Indictment, *supra* note 8, at ¶ 1.

¹¹⁹ *Id.* at ¶¶ 51–53.

¹²⁰ Indictment, *United States v. Internet Research Agency*, No. 1:18-cr-32 (D.D.C. Feb. 16, 2018) [hereinafter “Internet Research Agency Indictment”], available at <https://www.justice.gov/file/1035477/download>.

Trump Business Interests Create Leverage for Moscow. The Trump Organization and family, as well as several top-ranking officials on the Trump campaign, had longstanding financial ties to Russia, including to people close to the Kremlin.¹²¹ In fact, despite many public statements disclaiming ongoing business there,¹²² the Trump Organization, with the knowledge of Trump and his family, continued to negotiate with the Kremlin to build a Trump Tower in Moscow after Trump became the presumptive Republican nominee for president.¹²³ These facts alone — sworn to under oath by Trump’s former attorney Michael Cohen — mean that the Russian government had leverage over Trump’s business interests while he was running for the highest office in the U.S. government and continued to have leverage over him politically as Russian President Vladimir Putin and his associates knew that Trump and Trump campaign officials lied to the American people about their ties to a foreign adversary. This is exactly the sort of foreign influence over American government officials that the Founders sought to prevent when drafting our constitution that established self-rule by and for the American people.¹²⁴ (We may have struggled to ensure all Americans are fully included in the “American people,” but we’ve never seen any serious debate about whether citizens of foreign countries are among those who collectively exercise American popular sovereignty; they are not.)

Trump campaign involvement in efforts to influence the election. The basic contours of the Russian attack are now clear. Sometime in 2015, Russian government hackers penetrated the computer network of the Democratic National Committee, gaining access to email correspondence between high-level officials in the Clinton campaign and insight into the campaign’s opposition research on President Trump.¹²⁵ In a separate attack, in March of 2016, Russian hackers also gained access to Clinton campaign manager John Podesta’s email account.¹²⁶

¹²¹ Michael Crowley, *All of Trump’s Russia Ties, in 7 Charts*, POLITICO MAGAZINE (March/April 2017), <https://www.politico.com/magazine/story/2017/03/connections-trump-putin-russia-ties-chart-flynn-page-manafort-sessions-214868>.

¹²² Meg Kelly, *The President’s Misleading Statements on Trump Tower Moscow: A Timeline*, WASH. POST (Dec. 3, 2018), <https://www.washingtonpost.com/politics/2018/12/03/president-trumps-misleading-statements-trump-tower-moscow-timeline/>.

¹²³ Benjamin Weiser, *Why Michael Cohen, Trump’s Fixer, Confessed to It All*, N.Y. TIMES (Dec. 3, 2018), <https://www.nytimes.com/2018/12/03/nyregion/michael-cohen-trump-strategy.html>.

¹²⁴ See Asha Rangappa, *Trump’s Moscow Deal Is Exactly What the Framers Worried About*, POLITICO MAGAZINE (Dec. 3, 2018), <https://www.politico.com/magazine/story/2018/12/03/donald-trumps-moscow-deal-framers-222752>.

¹²⁵ See Ellen Nakashima, *Russian Government Hackers Penetrated DNC, Stole Opposition Research on Trump*, WASH. POST (Jun. 14, 2016), https://www.washingtonpost.com/world/national-security/russian-government-hackers-penetrated-dnc-stole-opposition-research-on-trump/2016/06/14/cf006cb4-316e-11e6-8ff7-7b6c1998b7a0_story.html.

¹²⁶ Raphael Satter, *Inside Story: How Russians Hacked the Democrats’ Emails*, AP NEWS (Nov. 4, 2017), <https://apnews.com/dea73efc01594839957c3c9a6c962b8a>.

Around the same time, a Russian agent and London-based professor, Josef Mifsud, connected with George Papadopoulos, a foreign policy adviser on Trump's campaign, and began meeting and corresponding with him about the campaign.¹²⁷ Papadopoulos kept campaign officials informed about his interactions with Mifsud and their collective efforts to arrange meetings between the campaign and Russian government officials, including a potential meeting between Trump and Putin.¹²⁸ Papadopoulos pleaded guilty to lying to the FBI about his interactions with Mifsud in October of 2017, and at that time, stated under oath that Mifsud offered him damaging information about Clinton in the form of "thousands of emails."¹²⁹

While Papadopoulos was learning about Russian-sourced "dirt" on Clinton from Mifsud, another set of Russian agents reached Trump campaign officials through longtime Trump family Russian contacts with a similar offer. On June 3, 2016, one of these contacts sent an email to Donald Trump Jr. stating that the "Crown prosecutor of Russia" was offering "the Trump campaign [] some official documents and information that would incriminate Hillary and her dealings with Russia and would be very useful to [Mr. Trump]."¹³⁰ This offer, the contact wrote, was "part of Russia and its government's support for Mr. Trump."¹³¹ Trump Jr. wrote back: "if it's what you say I love it especially later in the summer."¹³² High ranking campaign officials — Trump Jr., Trump's son-in-law Jared Kushner, and campaign chairman Paul Manafort — took the meeting with the Russian agents at Trump Tower on June 9, 2016.¹³³

The first stolen DNC emails became public, via WikiLeaks, in late July just as the Democratic party began its national convention to nominate Clinton — in other words "later in the summer."¹³⁴ The release took place only days after Trump campaign officials met with the Russian Ambassador to the United States at the Republicans' convention and orchestrated a starkly pro-Kremlin turn in the party's platform, years of Republican hawkishness on Russia notwithstanding.¹³⁵

¹²⁷ Robert Mendick, Alec Luhn & Ben Riley-Smith, *Revealed: London Professor at Centre of Trump-Russia Collusion Inquiry Says: 'I Have Clear Conscience'*, TELEGRAPH (Oct. 31, 2017), <https://www.telegraph.co.uk/news/2017/10/30/revealed-london-professor-centre-trump-russia-inquiry-says-have/>.

¹²⁸ Manu Raju & Marshall Cohen, *Exclusive: Top Trump Aide's Email Draws New Scrutiny in Russia Inquiry*, CNN (Aug. 24, 2017), <https://www.cnn.com/2017/08/23/politics/donald-trump-rick-dearborn-email-russia-investigation/index.html>.

¹²⁹ Papadopoulos Plea Documents, *supra* note 90, at 2.

¹³⁰ *Read the Emails on Donald Trump Jr.'s Russia Meeting*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/interactive/2017/07/11/us/politics/donald-trump-jr-email-text.html>.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Dan Merica, *Recreating June 9: A Very Consequential Day in the 2016 Campaign*, CNN (July 12, 2017), <https://www.cnn.com/2017/07/11/politics/trump-campaign-june-9/index.html>.

¹³⁴ Joe Uchill, *WikiLeaks Posts 20,000 DNC Emails*, HILL (July 22, 2016), <https://thehill.com/policy/cybersecurity/288883-wikileaks-posts-20000-dnc-emails>.

¹³⁵ Conor Friedersdorf, *President Trump's Untruths Are Piling Up*, ATLANTIC (Mar. 3, 2017), <https://www.theatlantic.com/politics/archive/2017/03/the-untruths-of-president-trump-are-piling-up/518490/>.

Just after the party conventions, on July 27, 2016, Trump held a press conference and asked Russia to hack Clinton again: “Russia, if you’re listening, I hope you’re able to find the 30,000 emails that are missing.”¹³⁶ Hours later, according to Mueller’s indictment of the Russian intelligence officers responsible for the hacking operation, the hackers attempted to access Clinton’s own server for the first time.¹³⁷

Around the same time, two Republican party operatives closely connected to the Trump campaign exchanged correspondence — reportedly now possessed by Mueller — about the contents of other stolen emails Russia had provided to WikiLeaks.¹³⁸ Roger Stone, a one-time Trump campaign official and longtime Trump confidant, reached out to conspiracy theorist Jerome Corsi directing him to seek information from WikiLeaks about what other material helpful to Trump it received from Russia.¹³⁹ Corsi conveyed information from WikiLeaks to Stone a few days later, and on August 2, 2016, Stone tweeted that Podesta would be WikiLeaks’s next target.

WikiLeaks began publishing emails stolen from Podesta in batches starting on October 7, 2016 — just hours after the *Washington Post* published an explosive recording of Trump boasting about sexually assaulting women — and continued to release emails through the election.¹⁴⁰ Concurrently, a Russian group called the “Internet Research Agency” disseminated political content on social media to sow discord in the American electorate and damage Hillary Clinton.¹⁴¹ When then-President Obama sanctioned Russia for this assault on our election, Trump campaign official and eventual National Security Adviser, Michael Flynn, called the Russian Ambassador and asked that Russia not retaliate because U.S. policy towards Russia would change under Trump.¹⁴² Flynn informed high-ranking Trump transition team officials of his conversations with the Russian Ambassador while those officials were meeting at Trump’s Florida resort, Mar-a-Lago.¹⁴³ Flynn later lied to federal officials about those conversations, and he pleaded guilty to charges based on that lying in December 2017.¹⁴⁴

¹³⁶ Schmidt, *supra* note 11.

¹³⁷ Z. Byron Wolf, *Trump Asked Russia to Get Clinton’s Emails and They Immediately Started Trying*, CNN (Jul. 14, 2018), <https://www.cnn.com/2018/07/13/politics/trump-asked-russians-to-get-clinton-emails-they-immediately-started-trying-/index.html>.

¹³⁸ Sonam Sheth, *Mueller Reportedly Has Potentially Damning Emails Between Roger Stone and Jerome Corsi That Throw a Wrench in Their Claims About WikiLeaks*, BUSINESS INSIDER (Nov. 27, 2018), <https://www.businessinsider.com/mueller-emails-roger-stone-jerome-corsi-wikileaks-dump-russia-2018-11>.

¹³⁹ *Id.*

¹⁴⁰ Netyksho Indictment, *supra* note 8, at ¶ 49.

¹⁴¹ Internet Research Agency Indictment, *supra* note 120, at ¶¶ 1–2.

¹⁴² Flynn Plea Documents, *supra* note 74, at 3; *see also* Gov’t’s Sentencing Mem., *United States v. Flynn*, No. 17-232 (D.D.C. Dec. 4, 2018), available at <https://www.documentcloud.org/documents/5425878-Gov-Uscourts-Dcd-191592-46-1-2.html>.

¹⁴³ Flynn Plea Documents, *supra* note 74, at 2.

¹⁴⁴ *Id.* at 6.

These are a sampling of the Trump campaign's meetings, phone calls, and other interactions with agents of the Russian regime over the course of the campaign. Many campaign officials made misleading, and sometimes demonstrably false, statements about their connections to Russia under oath or in interviews with or official paperwork submitted to federal officials.¹⁴⁵

¹⁴⁵ Ryan Goodman, *Perjury Chart: Trump Associates' Lies, False, or Misleading Statements on Russia to Federal Officials*, JUST SECURITY (Dec. 3, 2018), <https://www.justsecurity.org/61682/perjury-chart-trump-associates-lies-false-statements-russia-federal-authorities/>.