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Comrades or Foes: Did the Russians Break the Law or New Ground for the First Amendment?

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Comrades or Foes: Did the Russians Break the Law or New Ground for the First Amendment?

Artem M. Joukov* & Samantha M. Caspar**

*Freedom of Speech is a “weakness our enemies do not share.
That’s why it’s so important.”*

–Christopher Nolan¹

This Article discusses the recent decision by the United States Federal Government to indict more than a dozen Russian nationals for conspiracy to defraud the United States of America. The Government accused the Russians of staging protests, distributing false propaganda, and spreading political messages and ideologies online in an effort to affect the outcome of the 2016 Presidential Election. We argue that while the Defendants violated several other laws, the majority of the acts the Government classifies as a conspiracy to defraud the United States should not be considered criminal. Rather, these acts are protected political speech under the First Amendment of the United States Constitution because the Russians engaged in conduct that is crucial to political discourse in a Democracy and which the Founding Fathers intended to protect. Therefore, prosecution of the Russian Defendants on that basis should cease.

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1. BATMAN BEGINS (Legendary Entertainment 2005).

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Introduction

*“Congress shall make no law . . . abridging the freedom of
speech, or of the press; or the right of the people peaceably to
assemble . . .”*

–Amendment I, United States Constitution²

2. U.S. CONST. amend. I.

The words of the First Amendment concerning the freedoms of speech, press, and assembly are almost as old as the United States itself.³ Now, we must ask whether they apply to a group of thirteen Russian nationals and three corporations indicted by the United States Federal Government in February of 2018 for attempting to sway the outcome of the 2016 Presidential Election through both legal and illegal means.⁴ The Defendants stand accused of, among other things, conspiracy to defraud the United States of America, though the February Indictment may prove merely political in nature as it relates to the individual Defendants.⁵ That is because the Russians accused of conspiring to defraud the United States are in Russia, and extradition is unlikely.⁶ Yet, while the charges against these Defendants have no practical effect, they still matter from a legal and political perspective.

What legal message does the United States send by indicting these individuals for conspiracy to defraud the United States, particularly if the First Amendment of the United States Constitution might actually forbid such a charge under these circumstances? Why charge the Defendants with a twenty-seven page Indictment on Count I (the conspiracy to defraud charge),⁷ rather than merely proceeding on Counts II through VIII, which allege bank fraud and identity theft and which were adequately charged in the remaining ten pages of the document?⁸ And does the First Amendment permit the government to charge foreign nationals with an additional conspiracy to defraud charge simply because their bank fraud and identity theft activities came accompanied with political activism against the Democratic Party?

3. *Id.*

4. *See generally* Indictment, United States v. Internet Research Agency LLC, No. 1:18-cr-00032-DLF, 2018 WL 914777 (D.D.C. filed Feb. 16, 2018), <https://www.justice.gov/file/1035477/download>.

5. *Id.*; *see also* Daniel S. Goldman, *Russian Indictment and Extradition*, AM. CONSTITUTION SOC'Y: ACSBLOG (Feb.28,2018), <https://www.acslaw.org/acsblog/russian-indictment-and-extradition>.

6. Goldman, *supra* note 5.

7. Indictment, *supra* note 4, at 4–30.

8. Indictment, *supra* note 4.

This Article explores the argument that the Russian nationals involved should suffer no prosecution under the First Count of the Indictment because the charge cannot survive constitutional scrutiny.⁹ This Article will demonstrate that, unlike the other counts of the Indictment, the First Count criminalizes vast amounts of expression in violation of the constitutionally guaranteed Freedoms of Speech, Press, and Assembly.¹⁰ Even though Count I strikes against unpopular people, it is precisely unpopular people (and more precisely their speech) that the Founding Fathers intended for the First Amendment to protect.¹¹ Therefore, this Article will argue that the federal government should recognize the impropriety of this charge and announce a *nolle prosequi* even without a constitutional challenge in court. This action would show American willingness to stand by its fundamental principles at all times, no matter the political pressure to the contrary, and it would demonstrate the United States' unyielding integrity in upholding the fundamental rights of all persons, including the unpopular.

Part I of this Article will highlight portions of the vast historical background that brought both the United States of America and the Russian Federation into political conflict over the past five years, demonstrating that both sides are historically linked and addressing important political and geopolitical concerns through their actions in recent years. As the analysis will show, each country has a rational grievance to bear against the other. Part II will summarize the charges levied against the Russians involved in this case, illustrating why Count I: Conspiracy to Defraud the United States may lack strength under both the federal statute from which it arises and under the United States Constitution.

Part III will outline general free speech principles, the political speech doctrine, the freedom of the press, and the right to peaceably assemble, while also demonstrating how these legal doctrines protect many of the Russian activities that the

9. See *infra* pt. III.

10. See *infra* pt. III.

11. Suzanne Ito, *Protecting Outrageous, Offensive Speech*, AM. CIVIL LIBERTIES UNION: SPEAK FREELY (Oct. 6, 2010, 4:15 PM), <https://www.aclu.org/blog/free-speech/protecting-outrageous-offensive-speech>.

Indictment seeks to criminalize. Part IV will subsequently explain the novel nature of the Russian involvement in American politics and discuss the importance of preserving the rights of the Russian nationals, even when political pressure is to the contrary. This Part expounds on the idea that the United States should treat Russians no differently than it would treat any other political advocate, reporter, protester, or activist, because even though Russian activists became involved in American politics in a seemingly novel way, their conduct still receives constitutional protections. Only then can the United States truly stand by its democratic ideals and have the moral high ground to demand the same of the Russian Federation with respect to its citizens and residents. Finally, Part V sets forth the legal, political, and international consequences that make it so important for the United States to approach this case correctly from the very start. Part V will demonstrate that America's actions are viewed not only within its own constitutional framework, but also on the global stage as a leader of the free world. The United States, therefore, has a particular interest in upholding its Constitution even when it protects potentially adverse interests.

Part I: The History

“A lack of historical sense is the congenital defect of all philosophers.”

–Friedrich Nietzsche¹²

No account of what transpired in the American Presidential Election of 2016 and the Russian involvement therein can be complete without at least a cursory historical review. Only then can one demonstrate the motives of the parties and the history that brought Russian nationals and American Democrats into such a conflict that the First Amendment, which the Founding Fathers wisely devised to address similar controversies, must be used to resolve.

12. FRIEDRICH NIETZSCHE, HUMAN ALL TOO HUMAN: A BOOK FOR FREE SPIRITS 15 (Alexander Harvey trans., C.H. Kerr 1908) (1878).

A. In the Beginning . . .

It all began in Ukraine. But not in 2014: in 882. Kiev, the current Ukrainian capital, stood proudly as the center of a new country, the Rus, which is presently known as Russia.¹³ For centuries, Kiev remained the capital of ancient Russia, and the national entity we know as Ukraine did not exist.¹⁴ Then, the Mongols burned Kiev,¹⁵ the city lost political and economic power,¹⁶ and the capital moved to Moscow behind the stone walls of the Kremlin.¹⁷

The land where Rus once found its capital became known as Ukraine and developed a complicated relationship with its larger neighbor to the north (and east).¹⁸ The people of both countries spoke similar—and sometimes the same—languages,¹⁹ shared similar—if not identical—customs,²⁰ and were part of the same church during certain historical periods.²¹ Eventually, despite significant differences on some political matters, they became part of the Russian Empire²² and then the Union of Soviet Socialist Republics (“U.S.S.R.”) more than 1,000 years later.²³ After the formation of the U.S.S.R., Soviet Premier Nikita Khrushchev transferred the traditionally Russian Crimea to Ukraine to the protest of some,²⁴ as the region held a

13. MICHAEL HRUSHEVSKY, A HISTORY OF UKRAINE x–xi (O.J. Frederiksen ed., Yale Univ. Press 1941) (“both the Ukrainian and Russian peoples had a common period of their political and cultural life at the dawn of their respective histories”); *Kievan Rus*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Kievan-Rus> (last visited Jan. 4, 2019).

14. HRUSHEVSKY, *supra* note 13; *Kievan Rus*, *supra* note 13.

15. MORRIS ROSSABI, THE MONGOLS: A VERY SHORT INTRODUCTION 65 (Oxford Univ. Press 2012).

16. *Kievan Rus*, *supra* note 13.

17. *Kremlin*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/technology/kremlin> (last visited Jan. 4, 2019).

18. *Ukraine*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Ukraine/History> (last visited Jan. 4, 2019).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Ukraine profile - Timeline*, BBC NEWS, <http://www.bbc.com/news/world-europe-18010123> (last updated Nov. 30, 2018).

24. Mark Kramer, *Why Did Russia Give Away Crimea Sixty Years Ago?*, WILSON CTR. (Mar. 19, 2014), <https://www.wilsoncenter.org/publication/why->

strategic warm-weather seaport on the Black Sea,²⁵ served as a popular tourist destination,²⁶ and proved crucial to Soviet and Russian trade routes to countries bordering the Black Sea and the Mediterranean Sea.²⁷ The U.S.S.R. disbanded in 1991, Ukraine and Russia no longer shared an official union, and Crimea continued to be part of the Ukraine.²⁸

B. Meanwhile in America

While Ukraine and Russia struggled with their respective identities for the better part of a millennium, another nation arose across the Atlantic.²⁹ The United States of America grew from a set of humble, “New World” colonies into a confederation of states capable of defeating the British Empire in a Revolutionary War.³⁰ When its initial efforts at nationhood under the Articles of Confederation failed, the United States adopted a Constitution that strengthened the federal government and granted it broader powers to regulate the states and citizens within its borders.³¹ Yet, the Nation’s Founding Fathers felt the power too great in some respects.³² Fearing its abuse, they reached a compromise wherein the powers of the federal government would be limited not only by the original text of the Constitution, but also by a list of Amendments known as the Bill of Rights.³³ First among those rights was not life, liberty, or even the pursuit of happiness.³⁴ First, along with

did-russia-give-away-crimea-sixty-years-ago.

25. Robert Orr, *Why Crimea Matters to Russia*, FIN. TIMES (Mar. 3, 2014), <https://www.ft.com/content/514abee5-c09b-34f6-9a3a-865a64540a65>.

26. *Id.*

27. *Id.*

28. *Ukraine profile - Timeline*, *supra* note 23.

29. *Revolutionary War*, HISTORY (Oct. 29, 2009), <https://www.history.com/topics/american-revolution/american-revolution-history>.

30. *Id.*

31. *Creating the United States: Road to the Constitution*, LIBRARY CONG., <https://www.loc.gov/exhibits/creating-the-united-states/road-to-the-constitution.html> (last visited Jan. 4, 2019).

32. *Bill of Rights*, HISTORY (Oct. 27, 2009), <https://www.history.com/topics/bill-of-rights>.

33. *Id.*

34. U.S. CONST. amends. I–X.

religion, was speech.³⁵

C. All Quiet on the Eastern Front?

In 2014, Ukrainian protesters forced the democratically-elected Ukrainian President to flee for safety to Russia.³⁶ Ukraine became split between groups favoring closer ties with Europe and those favoring closer ties with the Russian Federation.³⁷ Amidst the chaos, Crimea voted to join the Russian Federation, with 97% supporting the proposition.³⁸ Russia took political and military steps to annex the region, as well as other steps to annex other regions,³⁹ and the United States imposed severe economic sanctions on the Russian Federation.⁴⁰

As a result of the sanctions, the Government of Russia perceived the United States, specifically the Democratic Party, as unfairly interfering with Russian and Ukrainian affairs.⁴¹ The Russian government decided to use a myriad of tactics to

35. U.S. CONST. amend. I.

36. Sam Frizell, *Ukraine Protestors Seize Kiev as President Flees*, TIME (Feb. 22, 2014, 11:06 AM), <http://world.time.com/2014/02/22/ukraines-president-flees-protestors-capture-kiev/>.

37. Krishnadev Calamur, *4 Things to Know About What's Happening in Ukraine*, NAT'L PUB. RADIO (Feb. 19, 2014, 1:58 PM), <https://www.npr.org/sections/parallels/2014/02/19/279673384/four-things-to-know-about-whats-happening-in-ukraine>.

38. *Official Results: 97 Percent of Crimea Voters Back Joining Russia*, CBS NEWS (Mar. 17, 2014, 10:24 AM), <https://www.cbsnews.com/news/official-results-97-of-crimea-voters-back-joining-russia/>.

39. Zvi Magen et al., *The Annexation of Crimea: International Ramifications*, INST. NAT'L SEC. STUDIES: INSS INSIGHT (Mar. 24, 2014), <http://www.inss.org.il/publication/the-annexation-of-crimea-international-ramifications/>.

40. Edward Hunter Christie, *Sanctions After Crimea: Have They Worked?*, NATO REVIEW MAGAZINE, <https://www.nato.int/docu/review/2015/russia/sanctions-after-crimea-have-they-worked/EN/index.htm> (last visited Jan. 4, 2019).

41. Sabra Ayres, *Russia's Answer to Charges of Meddling in U.S. Elections: You're Messing with Ours, Too*, L.A. TIMES (June 23, 2017, 3:15 PM), <http://www.latimes.com/world/europe/la-fg-russia-us-meddling-20170623-story.html>; Patricia Zengerle, *U.S. Congress Passes Aid for Ukraine, Sanctions on Russia*, REUTERS (Mar. 27, 2014, 12:45 PM), <https://www.reuters.com/article/us-ukraine-crisis-usa-congress/u-s-congress-passes-aid-for-ukraine-sanctions-on-russia-idUSBREA2Q1JU20140327>.

weaken the Democratic Party's control over American politics, particularly by seeking to influence the Presidential Election of 2016.⁴² Using various techniques such as hacking the Democratic National Convention data center,⁴³ distributing propaganda adverse to the Democratic Presidential Candidate Hillary Clinton,⁴⁴ distributing propaganda favorable to the Republican Presidential Candidate Donald Trump,⁴⁵ and establishing fake social media accounts run by robots and humans alike,⁴⁶ Russian nationals attempted to sway the election toward Trump.⁴⁷

The individuals charged in Mueller's February Indictment allegedly took part in the social media and advertisement campaign,⁴⁸ and their tactics were more subtle than one would expect.⁴⁹ The Defendants certainly posted direct endorsements

42. See generally Indictment, *supra* note 4.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Tara Francis Chan & Alexandra Ma, *Here Are Some of the Russian Facebook Ads Meant to Divide the US and Promote Trump*, BUS. INSIDER (Nov. 2, 2017, 7:33 AM), <http://www.businessinsider.com/russian-facebook-ads-2016-election-trump-clinton-bernie-2017-11>; Taylor Hatmaker, *Here's How Russia Targeted Its Fake Facebook Ads and How Those Ads Performed*, TECHCRUNCH (Nov. 1, 2017), <https://techcrunch.com/2017/11/01/list-russian-ads-facebook-instagram/>; Jack Holmes, *Here Are Some of the Propaganda Facebook Ads Russia Ran During the 2016 Election*, ESQUIRE (Nov. 1, 2017), <https://www.esquire.com/news-politics/a13135811/russian-facebook-ads-2016/>; Mike Isaac & Scott Shane, *Facebook's Russia-Linked Ads Came in Many Disguises*, N.Y. TIMES (Oct. 2, 2017), <https://www.nytimes.com/2017/10/02/technology/facebook-russia-ads.html>; Issie Lapowsky, *How Russian Facebook Ads Divided and Targeted US Voters Before the 2016 Election*, WIRED (Apr. 16, 2018, 9:00 AM), <https://www.wired.com/story/russian-facebook-ads-targeted-us-voters-before-2016-election/>; Colin Lecher, *Here Are the Russia-Linked Facebook Ads Released by Congress*, VERGE (Nov. 1, 2017, 3:22 PM), <https://www.theverge.com/2017/11/1/16593346/house-russia-facebook-ads>; Alexis C. Madrigal, *What, Exactly, Were Russians Trying to Do With Those Facebook Ads?*, ATL. (Sept. 25, 2017), <https://www.theatlantic.com/technology/archive/2017/09/the-branching-possibilities-of-the-facebook-russian-ad-buy/541002/>; Donie O'Sullivan, *Russian Bots Retweeted Trump Nearly 500,000 Times in Final Weeks of 2016 Campaign*, CNNMONEY (Jan. 27, 2018, 4:08 PM), <https://money.cnn.com/2018/01/27/technology/business/russian-twitter-bots-election-2016/>; Scott Shane, *These Are the Ads Russia Bought on Facebook in*

of Donald Trump via advertisements and social media posts, but they also engaged in a subtle campaign to persuade voters to take particular positions on hot-button topics such as gun rights, holiday greetings,⁵⁰ immigration policies, religion, the Black Panthers, the Ku Klux Klan, the Confederate Flag, the Clinton Foundation, support for law enforcement, and the Black Lives Matter campaign.⁵¹ In fact, the Russian advertisements even supported a third candidate, Bernie Sanders, in ads primarily aimed at the bisexual, homosexual, and transgender community.⁵²

The advertisements and social media posts sometimes took opposing positions on various topics to stir debate and fuel voter outrage, perhaps in the hope that the effect would be to increase the presence of Trump voters at the polls.⁵³ The Russian Defendants used social media posts and advertisements essentially as reverse psychology: they directed posts and advertisements likely to infuriate conservative voters at those voters, who would then become inspired to oppose whatever agenda the posts and advertisements appeared to support.⁵⁴ Some advertisements even had the effect of creating opposing rallies on the same day at the same location.⁵⁵ Other advertisements directly endorsed Hillary Clinton, though they requested for voters to text their vote to a phone number or tweet their vote on Twitter in order to avoid standing in line on voting

2016, N.Y. TIMES (Nov. 1, 2017), <https://www.nytimes.com/2017/11/01/us/politics/russia-2016-election-facebook.html>; Craig Timberg et al., *Russian Ads, Now Publicly Released, Show Sophistication of Influence Campaign*, WASH. POST (Nov. 1, 2017), https://www.washingtonpost.com/business/technology/russian-ads-now-publicly-released-show-sophistication-of-influence-campaign/2017/11/01/d26aead2-bf1b-11e7-8444-a0d4f04b89eb_story.html?utm_term=.a4d2566e82a5; Kurt Wagner, *These Are Some of the Tweets and Facebook Ads Russia Used to Try and Influence the 2016 Presidential Election*, RECODE (Oct. 31, 2017, 8:05 PM), <https://www.recode.net/2017/10/31/16587174/fake-ads-news-propaganda-congress-facebook-twitter-google-tech-hearing>.

50. See generally Indictment, *supra* note 4 (referencing the policies adopted by some commercial establishments to greet customers with “Happy Holidays” rather than “Merry Christmas” in December of every year).

51. See sources cited *supra* note 49.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

day.⁵⁶ Needless to say, such *votes* were not counted and did not determine the presidency. So, who came up with the idea to do something as slick as organizing opposing, yet simultaneous rallies by rival political groups, using reverse psychology to rally the conservative base, and convincing unsuspecting Americans to text their vote? This is where the Defendants enter the stage.⁵⁷

D. The Unlucky Thirteen: Their Exits and Their Entrances

The Russians who face Special Counsel Robert Mueller's charges come from many walks of life, each having a part to play in the alleged conspiracy.⁵⁸ Meet Yevgeniy Prigozhin, who many

56. Wagner, *supra* note 49.

57. *Id.*

58. *Id.*; see also Press Release, U.S. Dep't of Treasury, Treasury Sanctions Russian Cyber Actors for Interference with the 2016 U.S. Elections and Malicious Cyber-Attacks (Mar. 15, 2018) (on file with the U.S. Dep't of Treasury), <https://home.treasury.gov/news/press-releases/sm0312>; Christian Berthelsen, *These Are the Russians Accused of Meddling in the 2016 Election*, BLOOMBERG (Feb. 16, 2018, 2:27 PM), <https://www.bloomberg.com/news/articles/2018-02-16/these-are-the-russians-accused-of-meddling-in-the-2016-election>; Stephen Braun et al., *How to Disrupt an Election: Fake IDs, Fraud and Facebook*, TWINCITIES.COM: PIONEER PRESS (Feb. 16, 2018, 8:22 PM), <https://www.twincities.com/2018/02/16/russian-operatives-launched-attack-on-us-election-in-2014/>; Hayes Brown & Vera Bergengruen, *13 Russians Have Been Charged with Meddling in the 2016 Election. Here's What We Know.*, BUZZFEED NEWS (Feb. 16, 2018, 4:53 PM), https://www.buzzfeed.com/hayesbrown/these-are-the-russians-charged-with-meddling-in-the-2016?utm_term=.iqX8ZaWZR#.bwgoOv5Or; Philip Bump, *Timeline: How Russian Trolls Allegedly Tried to Throw the 2016 Election to Trump*, WASH. POST (Feb. 16, 2018), https://www.washingtonpost.com/news/politics/wp/2018/02/16/timeline-how-russian-trolls-allegedly-tried-to-throw-the-2016-election-to-trump/?utm_term=.e660a373946a; Adrian Chen, *An Indicted Russian Picks Up the Phone, and Mocks the Idea that Russia Meddled*, NEW YORKER (Feb. 18, 2018), <https://www.newyorker.com/news/news-desk/an-indicted-russian-picks-up-the-phone-and-mocks-the-idea-that-russia-meddled>; D.S.O.R., *Robert Mueller Charges Russians with Election Interference*, ECONOMIST: DEMOCRACY IN AM. (Feb. 16, 2018), <https://www.economist.com/democracy-in-america/2018/02/16/robert-mueller-charges-russians-with-election-interference>; Jessica Durando et al., *Meet the 13 Russians Charged in Mueller Probe*, USA TODAY (Feb. 16, 2018, 5:02 PM), <https://www.usatoday.com/story/news/world/2018/02/16/look-13-russians-charged-mueller-probe/346101002/>; Marwa Eltagouri, *The Rise of 'Putin's Chef,' the Russian Oligarch Accused of Manipulating the U.S. Election*, WASH. POST (Feb. 17, 2018), <https://www>.

refer to as “Putin’s Chef” for his business ventures into restaurants that Russian President Vladimir Putin favors.⁵⁹ In the alleged scenario, Prigozhin can more properly be called “The

washingtonpost.com/news/worldviews/wp/2018/02/16/the-rise-of-putins-chef-yevgeniy-prigozhin-the-russian-accused-of-manipulating-the-u-s-election/?noredirect=on&utm_term=.2ec23897fb24; *Former Russian Troll Describes Night Shift as ‘Bacchanalia,’* MOSCOW TIMES (Oct. 27, 2017, 5:10 PM), <https://themoscowtimes.com/news/former-russian-troll-describes-night-shift-as-bacchanalia-59398>; Garrett M. Graff, *Inside the Mueller Indictment: A Russian Novel of Intrigue*, WIRED (Feb. 20, 2018, 7:00 AM), <https://www.wired.com/story/inside-the-mueller-indictment-a-russian-novel-of-intrigue/>; Andy Greenberg, *Russian Trolls Stole Real US Identities to Hide in Plain Sight*, WIRED (Feb. 16, 2018, 5:29 PM), <https://www.wired.com/story/russian-trolls-identity-theft-mueller-indictment/>; Nathan Hodge et al., *Putin’s ‘Chef’ Accused of Trying to Cover His Tracks*, CNN WORLD (Feb. 23, 2018, 5:02 PM), <https://www.cnn.com/2018/02/23/europe/putin-chef-yevgeniy-prigozhin/index.html>; Colin Kalmbacher, *5 Important Details You Might Have Missed in the Latest Mueller Indictment*, LAW & CRIME: A DAN ABRAMS PROD. (Feb. 17, 2018, 6:19 PM), <https://lawandcrime.com/high-profile/5-important-details-you-might-have-missed-in-the-latest-mueller-indictment/>; Neil MacFarquhar, *Inside the Russian Troll Factory: Zombies and a Breakneck Pace*, N.Y. TIMES (Feb. 18, 2018), <https://www.nytimes.com/2018/02/18/world/europe/russia-troll-factory.html>; Neil MacFarquhar, *Yevgeny Prigozhin, Russian Oligarch Indicted by U.S., Is Known as ‘Putin’s Cook,’* N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/world/europe/prigozhin-russia-indictment-mueller.html>; Nick Miriello & Alexa Liautaud, *Everything We Know About the Russian Operatives Accused of Meddling in the U.S. Election*, VICE NEWS (Feb. 16, 2018), https://news.vice.com/en_us/article/9kzqpd/everything-we-know-about-the-russian-operatives-accused-of-meddling-in-the-us-election; *Sergey Pavlovich Polozov*, MOSCOW PROJECT, <https://themoscowproject.org/players/sergeypavlovichpolozov/> (last visited Jan. 4, 2019); Will Stewart, *EXCLUSIVE: Meet the Russian Husband and Wife ‘Troll Team’ Indicted by FBI for ‘Creating Fake American Personas’ to Meddle in 2016 Election as Former Classmate Claims They ‘Chose Trump,’* DAILYMAIL.COM (Feb. 20, 2018, 11:01 AM), <http://www.dailymail.co.uk/news/article-5410053/Married-Russian-troll-team-created-fake-personas.html>; Emily Tamkin, *This Is What \$1.25 Million Dollars a Month Bought the Russians*, FOREIGN POL’Y (Feb. 16, 2018 4:25 PM), <http://foreignpolicy.com/2018/02/16/this-is-what-1-25-million-dollars-a-month-bought-the-russians/>; *Translators, Psychologists, and Inventors: Who Are the Russians Indicted for Interfering in the 2016 U.S. Presidential Election?*, MEDUZA (Feb. 18, 2018, 9:17 PM), <https://meduza.io/en/feature/2018/02/19/translators-psychologists-and-inventors>; *Vadim Vladimirovich Podkopaev*, MOSCOW PROJECT, <https://themoscowproject.org/players/vadimvladimirovichpodkopaev/> (last visited Jan. 4, 2019); *13 Russians Charged with Meddling in 2016 Presidential Race*, JAPAN TIMES (Feb. 17, 2018), <https://www.japantimes.co.jp/news/2018/02/17/world/politics-diplomacy-world/13-russians-charged-meddling-2016-presidential-race/#.WwRdtaQvyUk>.

59. Indictment, *supra* note 4, at 7; Eltagouri, *supra* note 58; Hodge et al., *supra* note 58; *Yevgeny Prigozhin*, *supra* note 58.

Money,” because he provided a significant amount of funding for the Russian enterprise of impacting the Election.⁶⁰ While he denies involvement, the Federal Government believes that his funding allowed the Internet Research Agency (“IRA”), Concord Management, and Concord Catering—the three corporations charged in the Indictment that allegedly employed some of the accused Defendants—to carry out their year-long involvement in persuading Americans to vote for Donald Trump in the presidential election.⁶¹

While Prigozhin funded the IRA, the leading corporation in the information war gambit, Mikhail Bystrov directed it.⁶² His leadership proved crucial in using social media to spread both true and false information concerning the Candidates in the 2016 Presidential Election.⁶³ Bystrov kept in close contact with Prigozhin, presumably to coordinate planning and the overall functions of the IRA.⁶⁴

Helping Bystrov run the agency was Mikhail Burchik.⁶⁵ Like many of the Defendants mentioned in the Indictment, Burchik is allegedly known by more than one name.⁶⁶ His role was to serve as the executive director for the IRA, though he, too, denies any involvement in election-meddling.⁶⁷ Burchik’s other involvements include running various news agencies of somewhat obscure origins, means, and intentions.⁶⁸ However, there appears to be no indication that Prigozhin, Bystrov, and Burchik set foot in the United States to carry out any of the activities alleged in the Indictment.⁶⁹

60. See sources cited *supra* note 58.

61. *Id.*

62. Indictment, *supra* note 4, at 8; Berthelsen, *supra* note 58; Bump, *supra* note 58; Durando et al., *supra* note 58.

63. See sources cited *supra* note 62.

64. *Id.*

65. Indictment, *supra* note 4, at 8; Chen, *supra* note 58; *Mikhail Leonidovich Burchik*, MOSCOW PROJECT, <https://themoscowproject.org/players/mikhaileonidovichburchik> (last visited Feb. 7, 2019); *Translators, Psychologists, and Inventors*, *supra* note 58.

66. Indictment, *supra* note 4, at 8.

67. See sources cited *supra* note 65.

68. See generally Indictment, *supra* note 4; *Translators, Psychologists, and Inventors*, *supra* note 58.

69. See generally Indictment, *supra* note 4; see also Berthelsen, *supra*

The same cannot be said for Aleksandra Krylova, however.⁷⁰ According to the Indictment, she traveled to the United States as early as 2014 to conduct reconnaissance that would help lay the groundwork for some of the Russian tactics.⁷¹ Krylova and another Defendant, Anna Bogacheva, traveled to America using travel visas and visited California, Colorado, Illinois, Louisiana, Michigan, Nevada, New Mexico, New York, and Texas.⁷² While these two individuals successfully secured passage into the United States, another Co-Defendant, Robert Bovda, failed to receive approval to travel into the country.⁷³ Instead, he allegedly operated as the deputy head translator for the Russian project.⁷⁴ His wife, Maria Bovda, allegedly served as the head translator “from at least November 2013 until at least October 2014.”⁷⁵

The Bovdas are mentioned slightly out of order with respect to their place in the style of the Indictment: Sergey Polozov precedes them on the charging document for his part in the alleged conspiracy.⁷⁶ He purportedly provided the information technology knowledge that allowed the Russian agency to mask its location by purchasing servers within the United States, thereby preventing social media sites from immediately recognizing the origin of the posts and advertisements.⁷⁷

Dzheykhun Aslanov, another Russian Defendant indicted by the Federal Government, became the first to speak openly about his involvement in the operation.⁷⁸ He described his

note 58; Bump, *supra* note 58; Chen, *supra* note 58; Durando et al., *supra* note 58; Eltagouri, *supra* note 58; Hodge et al., *supra* note 58; *Mikhail Leonidovich Burchik*, *supra* note 65; *Translators, Psychologists, and Inventors*, *supra* note 58; *Yevgeny Prigozhin*, *supra* note 58.

70. Indictment, *supra* note 4, at 8; *see also* Braun et al., *supra* note 58; Miriello & Liautaud, *supra* note 58; Tamkin, *supra* note 58.

71. *See* sources cited *supra* note 69.

72. Indictment, *supra* note 4, at 13; *see also* Braun et al., *supra* note 58; Tamkin, *supra* note 58.

73. Indictment, *supra* note 4, at 9; Graff, *supra* note 58.

74. Indictment, *supra* note 4, at 9; *see also* Brown & Bergengruen, *supra* note 58; Stewart, *supra* note 58.

75. Brown & Bergengruen, *supra* note 58; *see also* Indictment, *supra* note 4, at 9; Stewart, *supra* note 58.

76. Indictment, *supra* note 4, at 9.

77. *Id.* at 15; *see also* *Sergey Pavlovich Polozov*, *supra* note 58.

78. Indictment, *supra* note 4, at 10; *Former Russian Troll Describes Night Shift as ‘Bacchanalia,’ supra* note 58.

employment as essentially pretending to be an American from various backgrounds posting on various forums while trying to avoid being blocked.⁷⁹ Although some have described him as the head of technological support, this is an assertion Aslanov denies.⁸⁰ Aslanov, along with Gleb Vasilchenko, also apparently engaged in a fairly complex money laundering scheme involving the creation of a cryptocurrency exchange, PayPal, and other false bank accounts to fund social media advertisements and even pay for items such as buttons, banners, and flags to use at various rallies.⁸¹ These bank accounts prevented various social media sites from noticing that the advertisements originated overseas.⁸² Some of these accounts even received legitimate payments from real Americans, who wished to post various messages.⁸³

Vadim Podkopaev served as another translator who the Indictment charged for his involvement in the translation and promulgation of apparent propaganda designed to increase support for Donald Trump and decrease support for Hillary Clinton.⁸⁴ Irina Kaverzina allegedly operated with the others by creating false identities and aliases that she subsequently used to create several social media posts and monitor American reactions.⁸⁵ Vladimir Venkov joined in the effort by doing much of the same.⁸⁶ Together, the actions of these thirteen individuals and their work as a coordinated team for the three aforementioned companies led the United States Government to take evidence of this alleged misconduct to a federal grand

79. See generally Indictment, *supra* note 4; *Former Russian Troll Describes Night Shift as 'Bacchanalia,' supra* note 58.

80. *Id.*; see also *Yeugeny Prigozhin, supra* note 58.

81. Indictment, *supra* note 4, at 30–34; Greenberg, *supra* note 58.

82. Greenberg, *supra* note 58, at 3.

83. *Id.*

84. Indictment, *supra* note 4, at 10; *Vadim Vladimirovich Podkopaev, supra* note 58.

85. Indictment, *supra* note 4, at 10; *13 Russians Charged with Meddling in 2016 Presidential Race, supra* note 58; Kalmbacher, *supra* note 58; D.S.O.R., *supra* note 58.

86. Indictment, *supra* note 4, at 10; see also Press Release, U.S. Dep't of Treasury, *supra* note 58.

jury.⁸⁷ Needless to say, the grand jury returned an Indictment.⁸⁸

Part II: The Charge(s)

“To every action there is always opposed an equal reaction.”

–Isaac Newton⁸⁹

On February 16, 2018, the United States Department of Justice announced that a grand jury convened by Special Counsel Robert Mueller, the Director of the Federal Bureau of Investigation (“FBI”), indicted thirteen Russian individuals and three Russian entities in an alleged conspiracy to defraud the United States by interfering with the 2016 Presidential Election.⁹⁰ The Indictment identifies the IRA as the primary offender in the alleged conspiracy.⁹¹ The United States Government traced millions of fake social media accounts to the IRA as a result of its operations in St. Petersburg, Russia.⁹² The Indictment claims that the IRA had a monthly budget of approximately \$1.25 million by September 2016 and employed hundreds of individuals to interfere with the 2016 Election.⁹³

The American Government accused the Russian individuals named in the Indictment of funding the alleged conspiracy or otherwise taking part in furthering the alleged conspiracy’s purpose of interfering in the election by creating fake social media profiles, drafting political posts, and organizing rallies, among other actions.⁹⁴ The above accusations relate only to Count I of the Indictment, which comprises 27 of the

87. *See generally* Indictment, *supra* note 4.

88. *Id.*

89. ISAAC NEWTON, THE MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY: PHILOSOPHIAE NATURALIS PRINCIPIA MATHEMATICA (Andrew Motte trans., CreateSpace Independent Publishing Platform 2016) (1687).

90. *See generally* Indictment, *supra* note 4.; *see also* Tom McCarthy, *Ten Key Takeaways from Robert Mueller’s Russia Indictment*, GUARDIAN (Feb. 16, 2018, 2:47 PM), <https://www.theguardian.com/us-news/2018/feb/16/russians-indictment-mueller-charges-fbi-investigation-what-are-they>.

91. Indictment, *supra* note 4, at 5; *see also* McCarthy, *supra* note 90.

92. *Id.*

93. Indictment, *supra* note 4, at 7.

94. *Id.* at 2; *see also* McCarthy, *supra* note 90.

Indictment's 37 pages.⁹⁵ It is this Count where we will focus our analysis because of the large amount of political speech that it tends to criminalize and the overlapping nature of the accusations within this Count and the others, which indict the Defendants for bank fraud and identity theft.⁹⁶

Finally, while this Article focuses primarily on the impact these charges have on the individuals accused in the Indictment (because the harm a felony conviction would do to a Russian corporation may be purely theoretical), it is important to note that the corporations, unlike the human Defendants, have actually made an appearance in Court, demanding to be arraigned and to contest the charges.⁹⁷ Represented by American lawyers, they, too, claim the protections of the First Amendment—and demand voluminous discovery—making this a question that the courts may reach over the next few years.⁹⁸ So far, Mueller's prosecution has had mixed results against these corporate entities, and there is little indication that he would have more success if the Russian Defendants appeared in person, particularly when it comes to Count I of his Indictment.

A. Count I

Count I of the Indictment alleges the Russian Defendants violated 18 U.S.C. § 371 (2019), entitled “[c]onspiracy to commit offense or to defraud the United States.” Section 371 states, in

95. Indictment, *supra* note 4, at 4–30.

96. Indictment, *supra* note 4.

97. Josh Gerstein, *Judge Rejects Mueller's Request for Delay in Russian Troll Farm Case*, POLITICO (May 5, 2018, 6:37 PM), <https://www.politico.com/story/2018/05/04/mueller-russia-interference-election-case-delay-570627>; Andrew C. McCarthy, *Mueller's Tough Week in Court*, NAT'L REVIEW (May 7, 2018, 3:21 PM), <https://www.nationalreview.com/2018/05/robert-mueller-tough-week-court-manafort/>.

98. Gerstein, *supra* note 97; McCarthy, *supra* note 90. The discovery request by the corporations will undoubtedly cause another problem for the Government at trial, properly authenticating all of the expert evidence in light of the *Daubert* standard. See Artem M. Joukov, *Who's the Expert? Frye and Daubert in Alabama*, 47 CUMB. L. REV. 275, 275–76 (2017) (definitively proving that some of the methodology used to match the posts to their alleged authors may draw some significant objections as to the expert approach employed to both gather the evidence and to draw conclusions therefrom).

relevant 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. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.⁹⁹

The United States Supreme Court defined *defraud* for purposes of § 371 in the early 1900s.¹⁰⁰ The Court held that § 371 includes:

any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government . . . any conspiracy which is calculated to obstruct or impair its efficiency and destroy the value of its operations and reports as fair, impartial, and reasonably accurate, would be to defraud the United States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation.¹⁰¹

To conspire to defraud the United States, a defendant must typically conspire to deceive the government with respect to property or money, but the deception can also present as interference with or obstruction of one of the government's lawful functions by deceit, craft, trickery, or other dishonest

99. 18 U.S.C. § 371 (2012).

100. *Haas v. Henkel*, 216 U.S. 462, 479 (1910).

101. *Id.* at 479–80.

means.¹⁰² The government does not have to suffer property or pecuniary loss because of the fraud to prosecute the individual or corporate defendant.¹⁰³ Rather, Section 371 requires that the government's "legitimate official action and purpose . . . be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention."¹⁰⁴ The word *defraud* in 18 U.S.C. § 371 not only includes financial or property loss by describing a scheme to defraud, but it is also protects "the integrity of the United States and its agencies, programs and policies."¹⁰⁵ Ergo, the American government does not have to prove monetary or proprietary loss to prove conspiracy to defraud the United States of America.¹⁰⁶ Therefore, to be convicted of violating Section 371, the defendant must either (1) intend to make false or fraudulent representations to the government or its agencies for the purpose of obtaining government property, or (2) perform actions or make statements to a government agency that the defendant knows to be false, fraudulent, or deceitful, and such actions or statements must disrupt government or agency functions.¹⁰⁷

102. *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924).

103. *Id.*

104. *Id.*

105. U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL 901–99, § 923, <https://www.justice.gov/usam/criminal-resource-manual-923-18-usc-371-conspiracy-defraud-us>; *see also* *United States v. Herron*, 825 F.2d 50, 57–58 (5th Cir. 1987); *United States v. Burgin*, 621 F.2d 1352, 1356 (5th Cir. 1980), *cert. denied*, 449 U.S. 1015 (1980); *United States v. Winkle*, 587 F.2d 705, 708 (5th Cir. 1979), *cert. denied*, 444 U.S. 827 (1979).

106. U.S. DEP'T OF JUSTICE, *supra* note 105; *see also* *United States v. Del Toro*, 513 F.2d 656 (2d Cir. 1975), *cert. denied*, 423 U.S. 826 (1975); *United States v. Jacobs*, 475 F.2d 270, 283 (2d Cir. 1973), *cert. denied*, 414 U.S. 821 (1973).

107. U.S. DEP'T OF JUSTICE, *supra* note 105; *see also* *United States v. Tuohey*, 867 F.2d 534, 536–37 (9th Cir. 1989); *United States v. Puerto*, 730 F.2d 627, 630 (11th Cir. 1984), *cert. denied*, 469 U.S. 847 (1984); *United States v. Sprecher*, 783 F. Supp. 133, 156 (S.D.N.Y. 1992) ("it is sufficient that the defendant engaged in acts that interfered with or obstructed a lawful governmental function by deceit, craft, trickery, or by means that were dishonest"), *modified on other grounds*, 988 F.2d 318 (2d Cir. 1993).

B. Actus Reus?

The Indictment against the Defendants in this case alleges that thirteen Russian individuals working for three corporate entities attempted to interfere with the 2016 Election by creating social media groups focused on political and cultural issues, constructing automated social media accounts meant to spread political information and misinformation, and stealing the identity and bank account information of real Americans to achieve this goal.¹⁰⁸ The latter acts of identity theft and bank fraud are charged individually in Counts II through VIII, but the conduct seems to be included in the list of criminal acts that comprise Count I as well.¹⁰⁹ According to the Indictment, the Russian individuals created various Facebook groups focused on immigration, border security, social activism, and other political issues, often by using fake American identities and servers in order to prevent the social media outlets from recognizing that these groups were being formed by individuals outside of the United States.¹¹⁰ The accused also created images and organized public gatherings, all from abroad, meant to broadcast controversial issues.¹¹¹ The Defendants engineered more than 100 different events, which they promoted on Facebook and other social media, with more than 60,000 users indicating they would attend these events.¹¹² Furthermore, the Defendants organized political rallies and protests in various United States cities.¹¹³ To ensure as many people as possible viewed their posts and events, the Russians paid Twitter, Facebook, and Instagram to promote them, often from bank accounts that made it appear that the payments were coming from within the United States.¹¹⁴

108. Indictment, *supra* note 4, at 16–20.

109. *Id.* at 34.

110. *Id.* at 19; Philip Bump, *When We Talk About Russian Meddling, What Do We Actually Mean?*, WASH. POST (Feb. 13, 2018), https://www.washingtonpost.com/news/politics/wp/2018/02/13/when-we-talk-about-russian-meddling-what-do-we-actually-mean/?noredirect=on&utm_term=.4469803c2d59.

111. Bump, *supra* note 110.

112. *Id.*

113. *Id.*

114. *Id.*; Kevin Roose, *Russian Trolls Came for Instagram, Too*, N.Y.

The accused also used their numerous social media accounts to disseminate information and increase the popularity of specific hashtags and threads.¹¹⁵ In January of 2018, Twitter reported that it discovered 50,000 accounts connected to Russians, which reached approximately 700,000 Americans, including several members of the Trump campaign team, who actually engaged with Russian-linked accounts prior to and after the election.¹¹⁶ However, there is “little evidence that the [accounts] significantly influenced either voting or the national conversation on a day-to-day basis. When discussing the scale of the [accounts’] reach — hundreds of thousands of views — it’s worth remembering that, on Twitter and nationally, that’s a small drop in a big bucket.”¹¹⁷ *The Washington Post* further explains that “[s]ixty thousand people is about two-hundredths of a percent of the . . . population [of the United States]. There’s still little evidence that the social-media efforts did much.”¹¹⁸ These statistics raise the question of whether there was sufficient interference with a government function like the 2016 Presidential Election to justify prosecution at all.

However, the Defendants’ influence on Facebook proved far more widespread.¹¹⁹ While this Article will ultimately demonstrate that this should not change the analysis, Russian Facebook advertisements reached an estimated 11,400,000 Americans, while Russian social media posts reached as many as 126,000,000 (although estimates vary regarding the number of voters who actually saw the post advertisements).

TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/technology/russian-interference-instagram.html>.

115. Bump, *supra* note 110.

116. Jon Swaine, *Twitter Admits Far More Russian Bots Posted on Election Than It Had Disclosed*, GUARDIAN (Jan. 19, 2018, 7:46 PM), <https://www.theguardian.com/technology/2018/jan/19/twitter-admits-far-more-russian-bots-posted-on-election-than-it-had-disclosed>; *see also* Philip Bump, *At Least Five People Close to Trump Engaged with Russian Twitter Trolls from 2015 to 2017*, WASH. POST (Nov. 2, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/11/02/at-least-five-people-close-to-trump-engaged-with-russian-twitter-trolls-from-2015-to-2017/>.

117. Bump, *supra* note 110.

118. *Id.*

119. Holmes, *supra* note 49; Lapowsky, *supra* note 49; Timberg et al., *supra* note 49.

Nevertheless, these numbers do not demonstrate the effect of the advertisements or posts, and Facebook advertisements and comments vary as to how many minds they actually change. The results do not show whether every American reached was a registered voter, a likely voter, or a voter who the advertisement or post actually affected, but they do suggest that the Defendants were able to spend their reported \$100,000 advertisement budget in a way that optimized their influence.¹²⁰

The Russian corporations, in some sense, acted similarly to a political campaign or interest group: they hired individuals to raise support for a candidate or a particular political stance on various issues.¹²¹ While some may cite to the false information promulgated by the Russian “campaign,” it should be noted that not all political campaigns that originate in the United States are entirely honest. Additionally, when it comes to evaluating this “campaign,” it is important to keep its actual reach in perspective. Employing hundreds of people to write political advertisements and make political comments on social media pales in comparison to the massive scale of the Clinton and Trump campaigns.¹²² For example, the Clinton Campaign and super political action committees (“PACs”) supporting it spent a combined \$1.2 billion leading up to the Election.¹²³ The Trump Campaign and super PACs supporting it spent \$616.5 million.¹²⁴ Furthermore, hundreds of people, at most, worked for the IRA, compared with the 4,200 paid Clinton staffers and 880 paid Trump staffers.¹²⁵ The Campaigns of both Presidential Candidates had ample resources to respond to the Russian posts on social media with advertisements of their own and had more than enough opportunity to convince the viewing public to vote for their respective Presidential Candidate.

120. Madrigal, *supra* note 49.

121. Indictment, *supra* note 4, at 3.

122. Nate Silver, *How Much Did Russian Interference Affect the 2016 Election?*, FIVETHIRTYEIGHT (Feb. 16, 2018, 6:26 PM), <https://fivethirtyeight.com/features/how-much-did-russian-interference-affect-the-2016-election/>.

123. Bill Allison et al., *Tracking the 2016 Presidential Money Race*, BLOOMBERG (Dec. 9, 2016), <https://www.bloomberg.com/politics/graphics/2016-presidential-campaign-fundraising/>.

124. *Id.*

125. Silver, *supra* note 122.

In some sense, the Indictment begs the question: would the federal prosecutors have charged a conspiracy to defraud the United States at all if the same activity had been carried out by domestic groups, perhaps without the identity theft and bank fraud?¹²⁶ After all, the campaigning described above mirrors closely the campaigning that politicians, parties, and special interest groups engage in quite frequently. Yet, if the only difference is the identity theft and bank fraud, why not indict the Russians on those charge exclusively? Conversely, if making false statements to prospective voters can be considered defrauding the United States, why are American politicians never prosecuted under this statute? United States representatives may have to provide an answer to this question in the months to come, but the most obvious reason false statements in campaigns cannot be prosecuted is the First Amendment.

C. Does the Glove Fit?

Already, the Indictment's First Count seems shaky at best, even without considering the potential First Amendment implications of illegalizing political speech that happens to coincide with illegal activity. As previously mentioned, to conspire to defraud the United States, the Russians had to conspire to either deprive the United States Government of some value or to impede its functions.¹²⁷ Even a detailed survey of their activities shows that this is not what they did.¹²⁸ The facts may show that these individuals engaged in bank fraud and identity theft of *United States citizens*, but surely these crimes alone are not enough to defraud the *United States Government*; while these actions certainly impact the Americans whose identities were stolen, such acts do not greatly impact the

126. See, e.g., Scott Shane & Alan Blinder, *Secret Experiment in Alabama Senate Race Imitated Russian Tactics*, N.Y. TIMES (Dec. 19. 2018), <https://www.nytimes.com/2018/12/19/us/alabama-senate-roy-jones-russia.html> (the authors know of no federal indictments that have come from the similar tactics used by the Democrats in the Alabama Senate Race).

127. See *supra* Part II(A); see also U.S. DEP'T OF JUSTICE, *supra* note 105.

128. See *generally* Indictment, *supra* note 4.

American government as a whole. If identity theft and bank fraud were enough to defraud the federal government, many more American citizens would face similar charges to those faced by the Russians.¹²⁹

Perhaps the activities that revolve around rally organization, the favoritism shown to Donald Trump over Hillary Clinton, and the appeals to the instincts of the voters to oppose certain agendas push the Russians' actions over the line? Once again, closer analysis reveals the contrary. First, opposing the Democratic Party or the Democratic candidate does not interfere with the federal government: the Democratic Party is not a federal government entity.¹³⁰ It is a privately formed party.¹³¹ The Party certainly works closely with the federal government, but expressed opposition to Democratic candidates hardly deprives the federal government of its ability to function as intended. The Democratic Party could, conceivably, disappear altogether—as many American political parties have done in the past—and the American government could still function quite well.¹³²

If mere expression opposing private organizations that benefit the government (of which there are many) constitutes defrauding the United States, many Americans might be guilty, some without any knowledge that they had done anything wrong.¹³³ This is especially true when it comes to interference by way of Facebook posts, social media advertisements, or rallies. Many Americans take part in this type of “interference” with the objectives or goals of their particular party, but surely this should not result in a federal indictment against them as well. In fact, the two main parties in American politics, the

129. U.S. DEP'T OF JUSTICE, *supra* note 105.

130. Roger Pilon, *Political Parties Belong to Their Members*, CATO INST.: CATO LIBERTY (Apr. 9, 2016, 12:15 PM), <https://www.cato.org/blog/political-parties-belong-their-members>.

131. *Id.*

132. Todd Phillips, *Political Parties Were Never Meant to Be*, HUFF POST (Oct. 31, 2012), https://www.huffingtonpost.com/todd-phillips/political-parties-were-ne_b_1846903.html.

133. Under this standard, workers on strike at a weapon's manufacturing company, or even at a government facility, might find themselves defrauding the United States of their contract labor despite their earlier agreement to carry out the work.

Republican Party and the Democratic Party, oppose each other at seemingly every step, even to the point of threatening (or achieving) government shutdowns and opposing each other's legislation.¹³⁴ If that does not defraud the United States Government and is sometimes even embraced as democracy at work, then why would a fringe party like Russian *trolls* or political advocates (depending on your agreement or disagreement with their position) pose a greater threat by simply arguing for the election of one candidate over another?

Some individuals may point to the rallies, the false advertisements, and the backing of one candidate over another by a foreign nation as problematic.¹³⁵ However, even if these were not constitutionally protected speech activities, one could hardly make the argument that lying to the public in high volume and supporting one politician over another constitutes a federal felony. Countless political pundits make a career of these actions without any threat of prosecution.¹³⁶ If Special Counsel Mueller's Indictment satisfies the elements of the conspiracy to defraud statute, it does so only barely, and that only weighs further on his attempt to take a detour around the First Amendment. If the evidence that Special Counsel Mueller directs at the First Count of the Indictment falls so short of showing criminal activities (other than those already charged in the remaining counts of the Indictment), then little argument can be made that this is an extraordinary situation where First Amendment scrutiny should be lessened or where a compelling government interest might justify silencing the Defendants' speech activities. The Supreme Court of the United States, if the case proceeds that far, should analyze the matter squarely

134. Dylan Matthews, *Here Is Every Previous Government Shutdown, Why They Happened and How They Ended*, WASH. POST: WONKBLOG (Sept. 25, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/09/25/here-is-every-previous-government-shutdown-why-they-happened-and-how-they-ended/?noredirect=on&utm_term=.8eea8f49429b; Tom Murse, *All 21 Government Shutdowns in U.S. History*, THOUGHTCO. (Jan. 28, 2019), <https://www.thoughtco.com/government-shutdown-history-3368274>.

135. See sources cited *supra* note 49.

136. Jeff Jacoby, *When Lies Are Told in Political Campaigns, Prosecution Isn't the Remedy*, BOS. GLOBE (Sept. 29, 2017), <https://www.bostonglobe.com/opinion/2017/09/29/when-lies-are-told-political-campaigns-prosecution-isn-remedy/wN1D8aVt1ASM05FRwkPcEM/story.html>.

within the framework of the First Amendment and its interpretation.

Part III: The Freedoms of Speech, Press, and Assembly

“If liberty means anything at all, it means the right to tell people what they do not want to hear.”

–George Orwell¹³⁷

Freedom of speech, specifically freedom of *political* speech, is one of the central ideas behind the First Amendment.¹³⁸ Arguably, the Founding Fathers intended to protect this type of speech most of all because it relates directly to the promulgation of ideas that Congress may later incorporate in its laws, the Executive Branch may include in its orders, and the Judicial Branch may adopt in its jurisprudence. After all, it was the ability of the Founding Fathers to promulgate their own ideas, including those in the Declaration of Independence, throughout the colonies that gave birth to the American Revolution.¹³⁹ With the passage of the Bill of Rights, the Founding Fathers sought to ensure the preservation of this freedom for future generations, including with it the freedom of the press and the freedom of assembly, which proved vital to the spread of Revolutionary ideas in the late eighteenth century.¹⁴⁰

Freedom of political speech has come under constitutional scrutiny many times and has frequently protected citizens and noncitizens alike from the limitations local, state, and even federal laws imposed upon them.¹⁴¹ Freedom of political speech

137. George Orwell, *The Freedom of the Press: Orwell's Proposed Preface to 'Animal Farm,'* TIMES LITERARY SUPPLEMENT (Sept. 15, 1972), http://orwell.ru/library/novels/Animal_Farm/english/efp_go.

138. Roger Pilon, *The First Amendment and Restrictions on Political Speech*, CATO INST. (May 5, 1999), <https://www.cato.org/publications/congressional-testimony/first-amendment-restrictions-political-speech>.

139. Martin Kelly, *The Root Causes of the American Revolution*, THOUGHTCO. (Apr. 20, 2018), <https://www.thoughtco.com/causes-of-the-american-revolution-104860>.

140. Doug Brooking, *The Role of the Press During the Revolutionary Period*, XAVIER UNIV. (1988), <https://pdfs.semanticscholar.org/2254/bf9e4058d4ee789a90ed771f791fbd6e87e.pdf>.

141. Ellada Gamreklidze, *Political Speech Protection and the Supreme*

became particularly important when the speech involved proved unpopular or controversial.¹⁴² In fact, these are often the situations where the First Amendment must protect the speaker most of all, because it is unpopular speech that usually attracts government censorship.¹⁴³ At least one reason for offering protections to unpopular speech is that protecting unpopular ideas may lead to the promulgation of unpleasant or previously unknown truths in the community, help educate the people about various political matters that the government might prefer remain unexamined, and ultimately lead to better decision-making as part of the democratic process.¹⁴⁴ Therefore, one of the chief fundamental functions of the First Amendment is to protect this kind of speech, whether it comes from American citizens, American residents, or even overseas.¹⁴⁵ If speech helps American citizens and politicians reexamine, criticize, and improve their government, why should its source lead to censorship?¹⁴⁶

A. The Unalienable Rights of Everyone.

Noncitizens have an expansive range of rights under the Constitution.¹⁴⁷ The Bill of Rights, which includes the First

Court of the United States, NAT'L COMM'N ASS'N (Oct. 1, 2015), <https://www.natcom.org/communication-currents/political-speech-protection-and-supreme-court-united-states>.

142. Erwin Chemerinsky, *First Amendment's Role Is to Protect Unpopular Speech*, ORANGE COUNTY REGISTER (Mar. 19, 2015, 12:00 AM), <https://www.ocregister.com/2015/03/19/first-amendments-role-is-to-protect-unpopular-speech/>.

143. *Id.*

144. U.S. DEP'T OF STATE BUREAU OF INT'L INFO. PROGRAMS, *Why Protect Offensive Speech?*, SHARE AMERICA (Aug. 14, 2017), <https://share.america.gov/why-protect-offensive-speech/>.

145. *Id.*

146. If the Russians are right in their propaganda, Americans can adjust accordingly. If the Russians are wrong, then Americans can ascertain that through a diligent search for truth (something electors should frequently engage in) and be wiser for it.

147. See *Do Noncitizens Have Constitutional Rights?*, SLATE (Sept. 27, 2001, 5:47 PM), <https://slate.com/news-and-politics/2001/09/do-noncitizens-have-constitutional-rights.html>; see also Note, "Foreign" Campaign Contributions and the First Amendment, 110 HARV. L. REV. 1886 (1997); Daniel

Amendment, applies—or *should* apply—to citizens and noncitizens within the United States.¹⁴⁸ In certain instances, the freedom of speech applies to citizens abroad and, in it is truly a fundamental right, it may even apply to noncitizens abroad.¹⁴⁹ This is a crucial point when it comes to Special Counsel Mueller’s Indictment, because the Russians who face felony charges in federal court carried out their expressive activities overseas and merely sent the resulting speech to the United States, mostly by way of the internet.¹⁵⁰ Yet, the First Amendment’s language and the literature exploring its reach beyond United States borders demonstrates that the American Constitution can protect speech by foreign nationals, even when those nationals are located thousands of miles away and when their political speech activities are carried out online far more than in person.¹⁵¹ This

Fisher, *Does the Constitution Protect Non-Citizens? Judges Say Yes*, FORBES (Jan. 30, 2017, 12:08 PM), <https://www.forbes.com/sites/danielfisher/2017/01/30/does-the-constitution-protect-non-citizens-judges-say-yes/#3b02de7e4f1d>; Ilya Somin, *The Constitutional Rights of Noncitizens*, LEARN LIBERTY: A PROJECT OF IHS (April 30, 2017), <http://www.learnliberty.org/blog/t-he-constitutional-rights-of-noncitizens/>.

148. See *Do Noncitizens Have Constitutional Rights?*, supra note 147; see also Michael Kagan, *Do Immigrants Have Freedom of Speech?*, 6 CAL. L. REV. CIR. 84 (2015); Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237 (2016) (urging for the extension of free speech protections to immigrants); Fisher, supra note 147; Somin, supra note 147.

149. *Do Noncitizens Have Constitutional Rights?*, supra note 147; see also Somin, supra note 147.

150. Indictment, supra note 4, at 3.

151. See TIMOTHY ZICK, *THE COSMOPOLITAN FIRST AMENDMENT: PROTECTING TRANSBORDER EXPRESSIVE AND RELIGIOUS LIBERTIES* (Cambridge Univ. Press 2014) [hereinafter ZICK, *THE COSMOPOLITAN FIRST AMENDMENT*]; “Foreign” Campaign Contributions and the First Amendment, supra note 147; Anna Su, *Speech Beyond Borders: Extraterritoriality and the First Amendment*, 67 VAND. L. REV. 1373 (2014); Timothy Zick, *Falsely Shouting Fire in a Global Theater: Emerging Complexities in Transborder Expression*, 65 VAND. L. REV. 125 (2012) [hereinafter Zick, *Falsely Shouting Fire*]; Timothy Zick, *First Amendment Cosmopolitanism, Skepticism, and Democracy*, 76 OHIO ST. L.J. 705 (2015) [hereinafter Zick, *First Amendment Cosmopolitanism*]; Timothy Zick, *The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941 (2011) [hereinafter Zick, *Trans-Border Perspective*]; Timothy Zick, *Territoriality and the First Amendment: Free Speech At—And Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543 (2010) [hereinafter Zick, *Territoriality*] (citing *Haig v. Agee*, 453 U.S. 280, 308 (1981)) (assuming, arguendo, that the First Amendment applied overseas); *Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991) (concluding that the First Amendment’s Establishment Clause “should apply extraterritorially”);

concept of extraterritoriality of various provisions within the United States Constitution is not without its ambiguity and selectivity regarding which rights apply abroad.¹⁵² However,

Nikolas Bowie & Leah Litman, *The First Amendment Belongs Only to Americans? Wrong*, TAKE CARE BLOG (Mar. 29, 2017), <https://takecareblog.com/blog/the-first-amendment-belongs-only-to-americans-wrong>; *Do Noncitizens Have Constitutional Rights?*, *supra* note 147; Somin, *supra* note 147; Timothy Zick, *The First Amendment and the World*, WASH. MONTHLY (Jan. 23, 2016), <https://washingtonmonthly.com/2016/01/23/the-first-amendment-and-the-world/> [hereinafter Zick, *The First Amendment and the World*]; *see also* Richard L. Hasen, *Will the Supreme Court's Understanding of the First Amendment Thwart Laws Aimed at Limiting Foreign Influence in U.S. Elections?*, JUST SECURITY (June 12, 2018), <https://www.justsecurity.org/57624/supreme-courts-understanding-amendment-thwart-laws-aimed-limiting-foreign-influence-u-s-elections/>; *see generally* Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200 (2017).

152. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205 (2013); Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 115 (2013) ("Respondents contend that claims under the ATS do not [reach actions outside of the United States], relying primarily on a canon of statutory interpretation known as the presumption against extraterritorial application. That canon provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none.") (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010)); Boumediene v. Bush, 553 U.S. 723 (2008); Small v. United States, 544 U.S. 385, 388 (2005); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Foley Bros. v. Filardo, 336 U.S. 281, 287 (1949); Ross v. McIntyre, 140 U.S. 453 (1891); DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275 (D.C. Cir. 1989); *see also* LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE OPEN: A FREE PRESS FOR A NEW CENTURY (Oxford Univ. Press 2010); RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH (N.Y.U. Press 2006); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION (Princeton Univ. Press 1996); KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (Oxford Univ. Press 2009); RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY (Knopf 1992); ZICK, THE COSMOPOLITAN FIRST AMENDMENT, *supra* note 151; Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004); Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427 (2009); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973 (2009); Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225 (2010); "Foreign" Campaign Contributions and the First Amendment, *supra* note 147; Louis Henkin, *The Constitution as Compact as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11 (1985); Ronald J. Krotoszynski, Jr., *Free Speech Paternalism and Free Speech Exceptionalism: Pervasive Distrust of Government and the Contemporary First Amendment*, 76 OHIO ST. L.J. 659, 665–73, 678 (2015); Michael J. Lebowitz, *'Terrorist Speech': Detained*

when it comes to something as critical as the ability to express ideas, the First Amendment should apply extraterritorially.¹⁵³

The First Amendment reads: “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble.”¹⁵⁴ This language from the First Amendment is not simply a *right* that belongs to Americans.¹⁵⁵ Rather, it is also a *limit* on what Congress can do.¹⁵⁶ For example, Congress may regulate commerce with foreign nations, but it cannot regulate commerce while “abridging the freedom of speech.”¹⁵⁷ The First Amendment’s language does not allow an abridgement of speech rights that affect only noncitizens or that only occurs abroad, because doing so would constitute the passage of a statute that abridges the freedom of speech.¹⁵⁸

The Bill of Rights contains other similar limitations that reinforce the First Amendment’s application to noncitizens

Propagandists and the Issue of Extraterritorial Application of the First Amendment, 9 FIRST AMEND. L. REV. 573 (2011); Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE J. INT’L L. 307 (2011); Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259 (2009); Su, *supra* note 151; Zick, *Falsely Shouting Fire*, *supra* note 151; Zick, *First Amendment Cosmopolitanism*, *supra* note 151; Zick, *Territoriality*, *supra* note 151; Zick, *Trans-Border Perspective*, *supra* note 151; Bowie & Litman, *supra* note 151; *Do Noncitizens Have Constitutional Rights?*, *supra* note 147; Somin, *supra* note 147; Zick, *The First Amendment and the World*, *supra* note 151.

153. See ZICK, THE COSMOPOLITAN FIRST AMENDMENT, *supra* note 151; “Foreign” Campaign Contributions and the First Amendment, *supra* note 147; Su, *supra* note 151; Zick, *Falsely Shouting Fire*, *supra* note 151; Zick, *First Amendment Cosmopolitanism*, *supra* note 151; Zick, *Territoriality*, *supra* note 151; Zick, *Trans-Border Perspective*, *supra* note 151; Bowie & Litman, *supra* note 151; *Do Noncitizens Have Constitutional Rights?*, *supra* note 147; Somin, *supra* note 147; Zick, *The First Amendment and the World*, *supra* note 151.

154. U.S. CONST. amend. I.

155. See Su, *supra* note 151; Bowie & Litman, *supra* note 151.

156. See Su, *supra* note 151; Bowie & Litman, *supra* note 151; see also *Citizens United v. FEC*, 558 U.S. 310, 376 (2010) (stating “[t]he text and purpose of the First Amendment point in the same direction: Congress may not prohibit political speech”).

157. See Su, *supra* note 151; Bowie & Litman, *supra* note 151.

158. *Id.*; see also *Citizens United*, 558 U.S. 310. The text of the First Amendment does not limit its prohibition on speech-abridging laws by stating that such prohibitions can occur so long as the laws concern alien speech. The prohibition on anti-speech laws is absolute, regardless of the origin of speech, and any statute construed to illegalize foreign political speech should usually run afoul of this prohibition by the Federal Constitution.

abroad by defining more narrowly the classes of people who are entitled to other constitutionally-protected rights.¹⁵⁹ For example, the Fifth Amendment provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”¹⁶⁰ This Amendment uses the language no *person*, as opposed to no *citizen* or no *American*. The Supreme Court has observed that “an alien is surely a ‘person’ in any ordinary sense of that term,”¹⁶¹ which led the Court to extend important protections to unnaturalized and even undocumented residents of the United States.¹⁶² Although Russians are not aliens so long as they are on Russian soil, there are strong arguments, despite the Supreme Court’s apparent silence on the matter, that demonstrate foreign nationals are, or should be, entitled to many of the same Constitutional protections that apply to United States citizens.¹⁶³

The textual argument that the First Amendment should extend extraterritorially would also result from a reasonable consideration of the plain language of other portions of the

159. U.S. CONST. amend. V.

160. *Id.*

161. *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *see also* Bowie & Litman, *supra* note 151.

162. *See Plyler*, 457 U.S. at 230.

163. *See* ZICK, THE COSMOPOLITAN FIRST AMENDMENT, *supra* note 151; “Foreign” Campaign Contributions and the First Amendment, *supra* note 147; Su, *supra* note 151; Zick, *Falsely Shouting Fire*, *supra* note 151; Zick, *First Amendment Cosmopolitanism*, *supra* note 151; Zick, *Territoriality*, *supra* note 151; Zick, *Trans-Border Perspective*, *supra* note 151; Bowie & Litman, *supra* note 151; *Do Noncitizens Have Constitutional Rights?*, *supra* note 147; Somin, *supra* note 147; Zick, *The First Amendment and the World*, *supra* note 151. There are authors who oppose us at least in part in this matter. *See, e.g.*, Robert D. Kamenshine, *Embargoes on Exports of Ideas and Information: First Amendment Issues*, 26 WM. & MARY L. REV. 863 (1985); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463 (2007). In fact, old Supreme Court precedent in *Ross v. McIntyre*, 140 U.S. 453 (1891), strikes directly against the idea of extraterritorial right. Without rehashing the debate between these authors and the proponents of First Amendment extraterritoriality, or between *Ross* and *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 570 U.S. 205 (2013), against *Boumediene v. Bush*, 553 U.S. 723 (2008), we would simply state that the plain language of the Constitution should guide the analysis because this is usually a court’s first approach, and policy implications of exporting the First Amendment leave too much to imagination to be useful in resolving the propriety of protecting foreign expression.

United States Constitution.¹⁶⁴ The Constitution contains provisions that make distinctions based on citizenship.¹⁶⁵ For example, only *citizens* may become president of the United States.¹⁶⁶ Moreover, only *citizens* have an amendment specifically protecting their right to vote.¹⁶⁷ However, that language is absent from the First Amendment,¹⁶⁸ perhaps indicating an intent to extend the Amendment to protect foreigners abroad as well. Some may argue that “We the People” in the Preamble of the United States Constitution might limit the application of the First Amendment to individuals within the United States.¹⁶⁹ The problem with this argument is that the Preamble, read together with the First Amendment, indicates that “We the People” forbid our elected representatives in Congress to pass laws restricting both foreign and domestic speech. In the alternative, the First Amendment can be viewed as a modification—which, after all, it was—to the Constitution, extending the protection from the federal government’s attempts to criminalize speech. Either approach casts heavy doubt on the idea that an expansive prohibitory clause in the Constitution such as the First Amendment only prohibits the government from doing the prohibited acts to United States residents.

Thus, the counterarguments in favor of limiting the First Amendment’s reach cannot hold. In 2016, the Supreme Court reaffirmed that First Amendment protections apply equally to noncitizens and citizens alike, although the Court once more left unanswered the question of whether American citizens and

164. See Su, *supra* note 151; Bowie & Litman, *supra* note 151.

165. U.S. CONST. art. II, § 1; *id.* amend. XV.

166. U.S. CONST. art. II, § 1 (stating “[n]o person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen years a resident within the United States”).

167. U.S. CONST. amend. XV (stating “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude”).

168. U.S. CONST. amend. I.

169. U.S. CONST. pmbl. The proponents of this argument may state that the document intends to cover only those who would fall under the umbrella of “We the People,” which would certainly have excluded hired Russians sending online messages to unsuspecting American voters. See *generally* Kent, *supra* note 163.

foreigners receive the protection of the First Amendment extraterritorially.¹⁷⁰ It is not a long stretch, though, to apply these fundamental protections to the political speech of both citizens and noncitizens abroad.¹⁷¹ This may be particularly true when foreign speakers direct their speech at Americans, because Americans have the right to hear speech from abroad under the First Amendment, too.¹⁷²

By extension, then, the presence of these Defendants outside the legal jurisdiction of the United States hardly lessens the speech protections the American Constitution affords them.¹⁷³ If the activities of the accused persons fall within the realm of political speech, freedom of the press, and freedom of assembly, then the Defendants' presence outside American borders should not nullify those protections.¹⁷⁴ If federal prosecutors rely on United States statutes to prosecute the Defendants for such speech and this turns out to be the proper interpretation of the statute, then Congress will have effectively made a law abridging the freedom of speech, assembly, and press, which the Constitution clearly states the federal government cannot do.¹⁷⁵ If, on the other hand, the prosecutors improperly utilize a federal statute to prosecute speech from abroad, then the federal prosecutors should cease prosecution via voluntary dismissal because the statute does not apply to the Defendants. As previously demonstrated, this may actually be

170. *Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016), *remanded and modified on other grounds*, *Heffernan v. City of Paterson*, 668 Fed. App'x 435 (2016) and *Heffernan v. City of Paterson*, No. 14-1610, 2016 WL 7118432 (Dec. 7, 2016).

171. See ZICK, *THE COSMOPOLITAN FIRST AMENDMENT*, *supra* note 151; "Foreign" Campaign Contributions and the First Amendment, *supra* note 147; Su, *supra* note 151; Zick, *Falsely Shouting Fire*, *supra* note 151; Zick, *First Amendment Cosmopolitanism*, *supra* note 151; Zick, *Territoriality*, *supra* note 151; Zick, *Trans-Border Perspective*, *supra* note 151; Bowie & Litman, *supra* note 151; *Do Noncitizens Have Constitutional Rights?*, *supra* note 147; Somin, *supra* note 147; Zick, *The First Amendment and the World*, *supra* note 151.

172. Su, *supra* note 151 (citing *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965)).

173. See *Do Noncitizens Have Constitutional Rights?*, *supra* note 147; see also Somin, *supra* note 147.

174. *Do Noncitizens Have Constitutional Rights?*, *supra* note 147; see also Somin, *supra* note 147.

175. U.S. CONST. amend. I.

the case.¹⁷⁶

To truly see why the First Amendment should protect foreign speech, it may be helpful to consider some reasons potentially offered by opponents of such protection. Challengers to foreign speech protections may argue that speech from overseas may damage the American political process, inspire disloyalty among American citizens, and even lead to opposition of United States governmental authority. However, there can be little doubt that there is already plenty of legal speech from inside United States borders meeting these qualifications. That speech, coming from American residents and citizens themselves, has not unhinged the nation, so how would foreign speech—which may arguably be received by listeners with even more skepticism—cause any greater harm? Is it simply because of its geographical origins?

If the Founding Fathers drafted the First Amendment with the inherent belief that the public could handle radical speech about radical ideas, then surely the origin of the speech does not make the ideas any more or less radical. Either these ideas can be tolerated by our society or they cannot, but that determination must be based on an analysis of the ideas themselves, not their origin. Upon closer inspection, the argument against foreign speech really takes on a protectionist nature, discriminating against speech from other nations purely because the speech is coming from other nations. Even if there was no constitutional prohibition for this kind of discrimination, following through with such prohibition is not sound policy. It only makes sense that the accused, who find themselves indicted under United States law, receive the benefits of its protections, too, regardless of their national origin. Therefore, whether the Constitution protects the Defendants should hinge only on whether the Russians' speech activities described in Count I of the Indictment constituted a type of protected speech, not the physical global location where the speech originated.

176. *See supra* Part II.

B. What is Protected Speech?

Constitutional protections for political speech outlined above do have their limits.¹⁷⁷ Few would argue that those in the United States or abroad could engage in political speech at any time, any place, and in any manner which the speaker(s) so desires. Protections this broad might lead to chaos. Therefore, the government can base speech regulations, political or otherwise, on the content of the regulated speech or on neutral grounds such as the time, place, and manner of the expressive activity.¹⁷⁸ Because the restrictions in this case appear to have little to do with time, place, and manner, and much to do with the content of the Defendants' expression, this Article will focus on the constitutional jurisprudence concerning content-based restrictions on expression.¹⁷⁹

Content-based restrictions commonly “restrict expression because of its message, its ideas, its subject matter, or its content.”¹⁸⁰ The restriction is either motivated or justified by “reference to an audience’s responses to the content of the speech in question, where those responses are mediated in a sufficient way by the audience’s cognitive and emotional processes.”¹⁸¹ According to Justice Sandra Day O’Connor, “[t]he normal inquiry that [the Freedom of Speech doctrine] dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply

177. See KATHLEEN ANN RUANE, CONG. RESEARCH SERV., 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 1 (2014), <https://fas.org/sgp/crs/misc/95-815.pdf>.

178. R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 333 (2006).

179. If the restrictions were neutral time, place, and manner restrictions, then the government would theoretically take issue with the *way* the Russian Defendants engaged in their expression rather than the content of that expression (presumably punishing others involved in similar expressive conduct). However, the federal government does not seek to prosecute either the Russians or anyone else for using social media or organizing rallies at particular times and places: it is the content of the expressive activity—and its origin—that drives the prosecution in this case.

180. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

181. Wright, *supra* note 178, at 334 (footnotes omitted).

the proper level of scrutiny.”¹⁸²

In scenarios of content-based speech restrictions other than *fighting words* or *true threats*, the Supreme Court applies strict scrutiny to the restriction, meaning the Court will uphold the content-based restriction only if the restriction is necessary “to promote a compelling interest” and is the “least restrictive means to further the articulated interest.”¹⁸³ As we have mentioned earlier, the Government in this case is highly unlikely to demonstrate a compelling state interest to regulate the speech at issue because federal authorities struggle to even articulate in twenty-seven pages how the Defendants conspired to defraud the United States at all.¹⁸⁴

In the absence of a compelling interest, the government generally may not favor one type of content or idea by suppressing another type of content or idea.¹⁸⁵ For example, it is unconstitutional for a state to prevent a newspaper from publishing the name of a crime victim if the newspaper lawfully obtained the victim’s name.¹⁸⁶ On the other hand, “[n]o one would question . . . that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”¹⁸⁷

Even when it comes to the military, though, government authority to restrict speech is not absolute, as authorities discovered when trying to silence opposition to conscription during the Vietnam War era and to the Vietnam War itself.¹⁸⁸ The Supreme Court of the United States forbade silencing opposition even when the opposition occurred within government buildings, such as a school, noting that freedom of speech does not stop at the schoolhouse door, and perhaps

182. *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O’Connor, J., concurring).

183. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

184. Indictment, *supra* note 4.

185. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

186. *Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1989); *see also* RUANE, *supra* note 177, at 5.

187. *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

188. *See generally* Thomas I. Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975 (1968).

leading foreigners to ponder whether it stops at the border.¹⁸⁹ Hence, the government may restrict speech based on its content only when the restriction satisfies the highest level of scrutiny.¹⁹⁰ Because this level of scrutiny “is almost always fatal,”¹⁹¹ this should be the case regardless of whether the speech comes from domestic or alien sources.

Content-based restrictions receive strict scrutiny because “content-based restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate.”¹⁹² This censorship is precisely what the Founding Fathers saw fit to avoid because they believed that political speech is crucial to a healthy democracy, as it allows debate and proper scrutiny of government actions.¹⁹³ To permit the very government whose actions are questioned to regulate the questioning presents too great of a threat of government censorship.¹⁹⁴ Thus, “content-based discriminations are subject to strict scrutiny because they place the weight of government behind the disparagement or suppression of some messages, whether or not with the effect of approving or promoting others.”¹⁹⁵ The United States Supreme Court considers restrictions on political speech as content-based restrictions, and political speech therefore warrants the highest level of scrutiny against the laws that regulate it.¹⁹⁶

While political speech analysis hardly ends the scrutiny of Count I of the Indictment, notice that the First Amendment

189. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); *see also* *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

190. RUANE, *supra* note 177, at 6.

191. Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 596 (2003).

192. *Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1155 (9th Cir. 2003) (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994)).

193. *See Great American Thinkers on Free Speech*, SATURDAY EVENING POST (Jan. 16, 2015), <http://www.saturdayeveningpost.com/2015/01/16/history/great-american-thinkers-free-speech.html>.

194. *Id.*; P.A. Madison, *Original Meaning: Freedom of Speech or of the Press*, FEDERALIST BLOG (Oct. 18, 2008), http://www.federalistblog.us/2008/10/freedom_of_speech_and_of_the_press/.

195. *Hill v. Colorado*, 530 U.S. 703, 735 (2000) (Souter, J., concurring).

196. Gamreklidze, *supra* note 141.

seems to apply almost directly to protect some of the activities that the federal Indictment against the Russians seeks to prosecute. The Indictment cites advocacy against the Democratic Party as part of the proof that the Russians conspired to defraud the United States government.¹⁹⁷ Yet, criminalizing or seeking to criminalize such speech as part of a conspiracy to defraud charge inherently penalizes the Russian Defendants for taking a political position through speech.¹⁹⁸ That is the precise embodiment of a content-based restriction.¹⁹⁹ The First Amendment gives the Russians the right to advocate for voting Trump over Clinton, for Clinton over Trump, or for any other political candidate or action whether they do so from United States soil or from abroad.²⁰⁰ In fact, based on the American government's response to such advocacy, some might even argue that carrying it out from abroad is perhaps the only safe option for the Defendants, because doing so while on a visa in the United States might lead to a felony indictment *and* the potential of incarceration before and after trial.

C. The First Amendment Protects Advocacy for Illegal Action

The Defendants' decision to engage in advocacy favoring Donald Trump over Hillary Clinton seems quite innocent when compared to other types of advocacy that the First Amendment permits and protects.²⁰¹ For example, the First Amendment actually protects a significant amount of speech that advocates for or has a tendency to inspire illegal action, despite the fact that such speech is often non-political.²⁰² Sometimes, the

197. Indictment, *supra* note 4, at 14.

198. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198–99 (1983).

199. *Id.*

200. *Right of Association*, JUSTIA, <https://law.justia.com/constitution/us/amendment-01/10-right-of-association.html> (last visited Jan. 5, 2019).

201. *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (“[The idea that the government may restrict] speech expressing ideas that offend . . . strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

202. See *Watts v. United States*, 394 U.S. 705, 708 (1969).

protected speech is so flagrant that it simultaneously advocates for illegal conduct and actually serves to intimidate the potential victims of that conduct.²⁰³ Even in cases where the First Amendment does not necessarily offer complete protections, the Supreme Court has typically required proof of additional elements to those required by a particular statute that would demonstrate a compelling government interest to curtail the speech.²⁰⁴ For example, the Court required proof that the speakers had the ill intent to harm or intimidate at the very moment they engaged in the expressive activity.²⁰⁵

While some of the cases above cannot be specifically classified as political speech but rather potential advocacy for violence, the freedom of speech still extends to such expression.²⁰⁶ In general, the First Amendment permits punishment only for statements calculated to produce “imminent lawless action” and which will likely produce such action.²⁰⁷ According to the Supreme Court in *Brandenburg v. Ohio*, the “constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²⁰⁸

The Court applied this test in *Hess v. Indiana* to reverse a demonstrator’s conviction when a police officer overheard Hess saying: “[w]e’ll take the fucking street later.”²⁰⁹ The Court held that the demonstrator did not intend imminent lawless conduct, but rather intended lawless conduct at a future time.²¹⁰ The Court further upheld the imminent lawless action test in *NAACP v. Claiborne Hardware Co.*²¹¹ In *Claiborne*, the National Association for the Advancement of Colored People (“NAACP”) wrote down names of African Americans who violated a boycott

203. *Id.*

204. *Id.*

205. *Id.*

206. *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

207. *Id.* at 447.

208. *Id.* (footnote omitted).

209. 414 U.S. 105, 107 (1973).

210. *Id.* at 108.

211. 458 U.S. 886, 927–28 (1982).

of white businesses, and then read the names aloud at NAACP meetings.²¹² The NAACP further stated that “[i]f we catch any of you going in any of them racist stores, we’re gonna break your damn neck.”²¹³ The Court held that the statement was not a direct threat or a ratification of violence and, therefore, the Constitution protected it.²¹⁴

Brandenburg and *Claiborne* provide the standard for protecting speech that calls for both violence and illegal action, and they are joined by a significant body of case law that demonstrates how far the protections of the First Amendment reach.²¹⁵ Precedents have established that expressive activity supporting violence against African Americans can receive protection even when intimidation of the intended victims is involved.²¹⁶ On two occasions, the Supreme Court upheld speech of this sort against legal curtailment.²¹⁷ This raises the question of how the Russians’ political advocacy, which was far easier to disregard, could truly be worse than burning a cross in the front yard of an African-American family.

It is true that the right to advocate for illegal action is not limitless.²¹⁸ For example, the famous “Bong Hits 4 Jesus” case, which involved apparent advocacy for the consumption of marijuana at a school assembly, demonstrates that schools can regulate disruptive student speech.²¹⁹ However, the Court held

212. *Id.* at 909.

213. *Id.* at 902.

214. *Id.* at 929.

215. *See generally* *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Wooley v. Maynard*, 430 U.S. 705 (1977); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Whitney v. California*, 274 U.S. 357 (1927); *Interactive Dig. Software Ass’n, v. St. Louis Cty.*, 329 F.3d 954 (8th Cir. 2003); *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996 (W.D. Ark. 2003); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979).

216. *See, e.g.*, *Virginia v. Black*, 538 U.S. 343 (2003); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

217. *Black*, 538 U.S. at 343; *Brandenburg*, 395 U.S. at 445.

218. *See Morse v. Frederick*, 551 U.S. 393, 396–97 (2007); Jeff Howard, *The ‘Brandenburg Test’ for Incitement to Violence*, FREE SPEECH DEBATE (April 29, 2013), <http://freespeechdebate.com/case/the-brandenburg-test-for-incitement-to-violence/>; Gabe Rottman, *A “Foreign Policy Exception” to the First Amendment?*, ACLU (Sept. 28, 2012, 2:07 PM), <https://www.aclu.org/blog/free-speech/foreign-policy-exception-first-amendment>.

219. *Morse*, 551 U.S. at 396–97. This is despite the fact that the

that prohibitions on such speech are constitutional only because the speech disrupts a school function, not because it advocates for the consumption of cannabis at some future time.²²⁰ The political speech of the Defendants in this case, carried out over the internet and through organizational rallies and assemblies, hardly justifies such regulation. In fact, the speech did not actually call for any illegal conduct at all; it merely persuaded American citizens to exercise their right to vote against Hillary Clinton and in favor of Donald Trump.²²¹ The First Amendment surely protects the Defendants if it protects speakers seeking to intimidate prospective victims and call for violence against them at some future time.²²²

Some may view the application of the First Amendment to this case as unjust, arguing that the Russians did not play fair and essentially mocked American laws and American democracy with their actions.²²³ Individuals may also argue that the prosecution of the Russians for a conspiracy to defraud is proper because of the voluminous amounts of misinformation the Russians provided to the American people, thus swaying the vote and impacting the outcome of a very close election in swing states.²²⁴ However, a more detailed analysis reveals that the closeness of an election or the broad sweep of the speech is not a factor when evaluating content-based regulations of political speech, whether it originates domestically or abroad.²²⁵ As government authorities found out when trying to prosecute other individuals for providing misinformation, the First

legalization of marijuana was then, and is now, a controversial political topic that involved a significant amount of political discourse. See generally Samantha M. Caspar & Artem M. Joukov, *The Implications of Marijuana Legalization on the Prevalence and Severity of Schizophrenia*, 28 HEALTH MATRIX 175 (2018).

220. *Id.* at 399.

221. See Matt Apuzzo & Sharon LaFraniere, *13 Russians Indicted as Mueller Reveals Effort to Aid Trump Campaign*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/us/politics/russians-indicted-mueller-election-interference.html>.

222. See Howard, *supra* note 218; Rottman, *supra* note 218.

223. Brian Klaas, *Russia Is at War with Our Democracy; Will We Defend It?*, DENVER POST (Feb. 22, 2018, 3:07 PM), <https://www.denverpost.com/2018/02/22/russia-is-at-war-with-our-democracy-will-we-defend-it/>.

224. *Id.*

225. See RUANE, *supra* note 177, at 5.

Amendment protects lies.²²⁶

D. The First Amendment Protects Political and Apolitical Lies

Long ago, the Supreme Court extended First Amendment protections to false statements.²²⁷ In *New York Times v. Sullivan*, *The New York Times* ran a one-page advertisement sponsored by civil rights activists that criticized the Montgomery, Alabama Police Department for its treatment of civil rights protestors.²²⁸ Many of the advertisement's allegations were accurate, but the advertisement also included false statements.²²⁹ The Police Commissioner sued *The New York Times* for libel, arguing the advertisement damaged the Commissioner's reputation.²³⁰ The Supreme Court ruled unanimously in favor of *The New York Times*, holding that the First Amendment protects the right to publish the false statements.²³¹ The Court explained that to prove libel and to simultaneously abide by the First Amendment, a public official must allege that the defendant spoke his or her words with *actual malice*—knowledge the statement was false or with reckless disregard for the truth.²³² Because *The New York Times* did not publish the false statements against the Commissioner with such malice, the Court held that the Constitution protected the statements.²³³

The similarities between *The New York Times* in *Sullivan* and the Defendants accused of defrauding the United States are important to note. In the same way that *Sullivan* included both true and false statements of fact regarding Sullivan in *The New York Times*' advertisements,²³⁴ the Russians included both true and false statements in various online advertisements,

226. See generally *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

227. *Id.*

228. *Id.* at 256.

229. *Id.* at 258.

230. *Id.* at 256, 258.

231. *Id.* at 271–72.

232. *Sullivan*, 379 U.S. at 279–80.

233. *Id.* at 285–86.

234. *Id.* at 258.

statements, comments, Twitter, and Facebook postings.²³⁵ Many of the posts that the Russians wrote—or perhaps even programmed computers to display, retweet, or repost political messages to certain individuals—were also re-posted, re-tweeted, and otherwise adopted and repeated by American citizens and legal residents.²³⁶ Should they face criminal punishment as well? *Sullivan* would suggest not.²³⁷

While the Russian effort to spread negative news about Hillary Clinton proved far more voluminous than *The New York Times*' advertisements in *Sullivan*,²³⁸ it is unlikely that volume alone would shift the analysis. If speech is protected, it should be protected regardless of repetition. Thus, in the same way that *The New York Times* would have been protected if it re-printed its inaccurate advertisements far more often, the Government cannot vilify the Defendants in this case simply because they used multiple forms of media, multiple methods, and a variety of messages to persuade American voters to vote one way or another.²³⁹

A more recent United States Supreme Court case further expanded on the First Amendment's protections of lies, particularly in the course of a political campaign.²⁴⁰ In *United States v. Alvarez*, Xavier Alvarez, a newly elected member of a California water board, claimed that he played professional hockey, served in the Marines, and rescued an American ambassador during the Iranian hostage crisis.²⁴¹ All of these claims were false, yet the United States did not prosecute Alvarez for all of them.²⁴² Rather, the Prosecution addressed the question of whether the First Amendment protected Alvarez's lie that he was a 25-year Marine veteran who had received the Congressional Medal of Honor.²⁴³ The United States prosecuted Alvarez under the Stolen Valor Act, which permits

235. Indictment, *supra* note 4, at 15–17.

236. *Id.*; see also sources cited *supra* note 49.

237. See *Sullivan*, 376 U.S. at 254.

238. See generally sources cited *supra* note 49.

239. See Indictment, *supra* note 4, at 1–3.

240. *United States v. Alvarez*, 567 U.S. 709 (2012).

241. *Id.* at 713, 754.

242. *Id.*

243. See *id.* at 754.

imprisonment for any person who “falsely represents himself or herself . . . to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.”²⁴⁴ The United States obtained a conviction, but the Ninth Circuit set it aside on First Amendment grounds.²⁴⁵ The Supreme Court affirmed the Ninth Circuit’s decision overturning Alvarez’s conviction.²⁴⁶ The Court applied strict scrutiny to the Stolen Valor Act, holding that content-based speech restrictions are usually unconstitutional, including restrictions on lies, even if those lies concern distinguished military service.²⁴⁷

In its decision, the Court rejected the claim that false speech should be in a presumptively unprotected category.²⁴⁸ The Court held that allowing the government to punish false speech would have a chilling effect on expression.²⁴⁹ After all, if the government could punish any speech it could construe as inaccurate, even if in reality its accuracy is up for debate, it would create the possibility for very costly litigation for ordinary people who could ill-afford to be charged with a federal offense.²⁵⁰ This would place even ordinary citizens in fear of making a statement the United States Government may consider inaccurate.²⁵¹ Even if an accused citizen is later exonerated at trial, a federal indictment and subsequent prosecution can have a tremendously negative and prolonged economic and emotional impact on the citizen, causing many to avoid free speech at all for fear of this consequence.²⁵²

United States v. Alvarez is one of the Supreme Court’s most “emphatic statements that false speech is generally protected by the First Amendment and it is for the marketplace of ideas, and not for the government, to decide what is true and what is

244. *Id.* at 715–16.

245. *United States v. Alvarez (Alvarez II)*, 617 F.3d 1198, 1218 (9th Cir. 2010), *aff’d*, 567 U.S. 709 (2012).

246. *Alvarez*, 567 U.S. at 730.

247. *Id.* at 724.

248. *Id.* at 722.

249. *Id.* at 733 (Breyer, J., concurring).

250. *See id.*

251. *Alvarez*, 567 U.S. at 733 (Breyer, J., concurring).

252. *See generally Alvarez*, 567 U.S. at 709.

false.”²⁵³ Although there may still be liability for defamation and false advertising, the United States may not punish speech simply because it is false.²⁵⁴ “Put most simply, *Alvarez* stands for the proposition that there really is a First Amendment right to lie.”²⁵⁵

Once again, the comparison of these cases to the current situation seems to favor the Russian Defendants. *Alvarez*, an elected member of a California water board, clearly lied about several aspects of his personal and professional experience, which undoubtedly carried favor with the voters and led to his election.²⁵⁶ He stood in direct violation of the Stolen Valor Act as it was written.²⁵⁷ His actions did not require a complicated survey of the meaning of the word *defraud* as defined in the criminal code and subsequent case law and did not require an analysis regarding whether the United States Government lost something tangible or suffered interference with its key functions.²⁵⁸ Plainly, *Alvarez* claimed to be a decorated soldier when he was not.²⁵⁹ If that is not Stolen Valor, what is?

Yet, despite the blatant nature of his lie and the inherent benefit that this gave him in an election over his opponent, the First Amendment shielded *Alvarez* from prosecution despite a federal statute to the contrary.²⁶⁰ Going even further than *Sullivan*, where at least many of the statements published in *The New York Times* were true,²⁶¹ the Supreme Court of the United States protected solely false speech that directly influenced an election.²⁶² How, then, can the United States justify prosecuting the Russians for lying about the qualifications of various presidential candidates? Or, for

253. Erwin Chemerinsky, *The First Amendment and the Right to Lie*, ABA JOURNAL (Sept. 5, 2012, 1:57 PM), http://www.abajournal.com/news/article/the_first_amendment_and_the_right_to_lie.

254. *See Alvarez*, 567 U.S. at 719.

255. Chemerinsky, *supra* note 253.

256. *See generally Alvarez*, 567 U.S. at 709.

257. *Id.* at 715.

258. *See id.*

259. *See id.*

260. *Id.* at 729–30.

261. *See generally id.*

262. *See Alvarez*, 567 U.S. at 709.

offering statistics that were not true? Or, for misleading American citizens when that is exactly what Alvarez did?²⁶³ The Russians may have spread misinformation and disinformation through novel methods in truly unexpected and infuriating ways,²⁶⁴ but a close comparison of their conduct to that of other defendants under similar circumstances shows if they were ever apprehended and brought to trial, they should win a dismissal of Count I.

E. The First Amendment Protects the Right of the People to Peaceably Assemble

The right to engage in political speech leads naturally to the freedom of assembly.²⁶⁵ This right, specifically mentioned in the First Amendment, also encompasses the freedom of association.²⁶⁶ It is quite common to find political speech at assemblies.²⁶⁷ Before the advent of technologies such as radio, television, and the internet, assemblies were likely some of the only places where political speech occurred. The Supreme Court of the United States has held that the First Amendment's plain language protects the right to plan and conduct peaceful public assemblies;²⁶⁸ however, the right to assemble is not absolute.²⁶⁹ Government officials may not simply prohibit a peaceful public assembly, but the government may impose time, place, and manner restrictions on the assembly if the restrictions satisfy constitutional safeguards.²⁷⁰ Time, place, and manner restrictions must be "justified without reference to the content of the regulated speech . . . [and be] narrowly tailored to serve a significant government interest, and . . . leave open ample

263. *See id.*

264. Indictment, *supra* note 4, at 14.

265. *See* U.S. CONST. amend. I.

266. *Id.*; *see generally* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

267. *Freedom of Assembly*, NEW WORLD ENCYCLOPEDIA (Nov. 15, 2013, 6:27 PM), http://www.newworldencyclopedia.org/entry/Freedom_of_Assembly.

268. *See generally* Hague v. Comm. Indus. Org., 307 U.S. 496 (1939).

269. Andrew M. Winston, *Right to Peaceful Assembly: United States*, LIBRARY CONG. (Aug. 24, 2016), <https://www.loc.gov/law/help/peaceful-assembly/us.php>.

270. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

alternative channels for communication of the information.”²⁷¹

For example, the Supreme Court has held it constitutional for the government to require groups to obtain permits in advance of assemblies.²⁷² The government may also impose requirements for assemblies that occur near major public events.²⁷³ The First Amendment does not permit a group to conduct an assembly where there is a “clear and present danger of riot, disorder, or interference with traffic on public streets, or other immediate threat to public safety or order.”²⁷⁴ However, where there is no threat of such conduct, the government must permit the assembly and cannot punish either its participants or its organizers.²⁷⁵

In addition to the freedom of assembly, the freedom of association is a fundamental right that the Constitution protects.²⁷⁶ In *NAACP v. Alabama*, the United States Supreme Court held that the NAACP did not have to reveal the names and addresses of NAACP members in the State of Alabama to the Alabama Attorney General because that would violate the members’ freedom of association.²⁷⁷ The Supreme Court recognized that “inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”²⁷⁸ Theoretically, then, if members of an association have a right to anonymity, they should have the right to adopt aliases to protect that anonymity.

Once again, the First Amendment seems to protect the Russian Defendants. Not only does it protect their efforts to organize assemblies in the United States through various social media groups, but it also protects their right to participate in those groups, spread their political message in those groups, and

271. *Id.* (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

272. *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

273. Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 551–52 (2009); *see also* Winston, *supra* note 269.

274. Winston, *supra* note 269 (footnote omitted).

275. *See id.*

276. U.S. CONST. amend. I.

277. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958).

278. *Id.* at 462.

encourage other members to support one presidential candidate over another.²⁷⁹ The First Amendment may also protect their right to use false names and accounts in their efforts because individuals have the right to anonymity within certain assemblies²⁸⁰ and, therefore, may even have the right to operate under aliases. This protection begs the question of why the federal Indictment even attempts to bolster Count I with evidence of assembly and association activities when those activities are so obviously safeguarded by the United States Constitution.²⁸¹ Unless Special Counsel Mueller has a compelling reason for criminalizing these activities simply because they occurred with independent crimes of bank fraud and identity theft, it would be difficult for Count I to survive a constitutional challenge.²⁸²

Part IV: Applying the Freedoms of Political Speech, Press, and Assembly

*“The penalty . . . for indifference to public affairs is to be ruled
by evil men.”*
—Plato²⁸³

As demonstrated above, the Defendants did not do anything extraordinary in the grand scope of American political history except take interest in the political process that would impact both Russia and the world profoundly for at least the next four years.²⁸⁴ They took an active political stance in an American election,²⁸⁵ just as many American citizens and residents had done before them in much of the same manner. The Russian Defendants used both true and false statements to further their

279. U.S. CONST. amend. I.

280. *Patterson*, 357 U.S. at 462; Winston, *supra* note 269.

281. U.S. CONST. amend. I; Indictment, *supra* note 4, at 17.

282. Wright, *supra* note 178.

283. Attributed to Plato on the letterhead of the Constitution Party (the party by this name existing between 1952 and 1968).

284. Philip Ewing, *The Russia Investigations: What You Need to Know About Russian ‘Active Measures,’* NPR (July 20, 2018), <https://www.npr.org/2018/04/25/586099619/the-russia-investigations-what-you-need-to-know-about-russian-active-measures>.

285. *Id.*

cause, a tactic they share with the past and present presidents of the United States, members of Congress, and political commentators, as well as the United States Government in foreign elections and a virtually inexhaustible list of individuals with political leanings.²⁸⁶ They formed associations and gathered assemblies,²⁸⁷ just like an inexhaustible list of private and public interest groups. The accused also relied on the freedom of the press, to the extent that their news posts and advertisements on social media can be classified as press.²⁸⁸ As mentioned earlier, the expressive activities of the Defendants were rather innocuous when compared to the activities of Americans that have received protections from the First Amendment in the past, though these activities did have the disadvantage of being somewhat novel, somewhat disquieting to the American people, and far more voluminous, concentrated, and organized in nature.²⁸⁹

A. The First Amendment Protects the Russians and Everyone Else

It may seem disquieting to some that foreigners engage in so much advocacy aimed at Americans, particularly when the foreigners hail from a country with a contentious diplomatic relationship with the United States.²⁹⁰ However, it is important to remember that speech is only speech; when made over the internet, it is only as forceful, compelling, and influential as the reader allows it to be. American voters who viewed Russian advertisements, even without knowing their true origin, have the choice whether to believe them. They may choose to disbelieve them. They may even choose to adopt them in part

286. *Id.*; Daniel Bush, *The History of Lies on the Campaign Trail*, PBS: NEWS HOUR (Dec. 4, 2015, 4:23 PM), <https://www.pbs.org/newshour/politics/the-history-of-lies-on-the-campaign-trail>.

287. Ewing, *supra* note 284.

288. Indictment, *supra* note 4.

289. *Id.*; *see also* sources cited *supra* note 49.

290. Alexander Smith, *U.S.-Russian Relations Worst Ambassador Antonov Can Remember*, NBC NEWS (Mar. 30, 2018, 7:11 AM), <https://www.nbcnews.com/news/world/u-s-russian-relations-worst-ambassador-antonov-can-remember-n861391>.

and reject them in part after a cursory or thorough search for the truth.

These choices can be made in an informed manner after independent research or consultation with friends or acquaintances. Just like almost any speech, the listener can, if he or she wishes, verify its veracity and decide to vote one way or another. The listener can also entirely ignore it. After all, the Russian expressive activities occurred in a political context. Even an inexperienced voter should know that political advertisements, regardless of their origin, should be considered with a grain of salt. Just like “mere puffery” does not constitute an express warranty in a contract,²⁹¹ various political claims by candidates, interest groups, and foreign nationals posing as Americans should not create a guarantee that the information is true. Most, if not all, voters should be aware of this, as the history of American elections is not necessarily one where verified and verifiable facts always carry the day.²⁹²

What is most frustrating about the Indictment’s conspiracy to defraud count is that it relies significantly on the Grand Jury’s finding that the Russians masqueraded as Americans and misrepresented information to favor one candidate in particular instead of simply spreading misinformation to favor or disfavor both sides equally. The reliance on these allegations is misplaced because the First Amendment protects masquerading on Facebook, Twitter, and many other social media applications. Recall Alvarez, who masqueraded as a highly decorated American soldier,²⁹³ and the freedom of association ruling that protected the NAACP from having to divulge its membership.²⁹⁴ What makes the Defendants’ conduct disquieting in this case is not that they misrepresented their identity, but rather is because their message sometimes sounded suspiciously like the truth. When Russian propaganda about America’s political

291. Mary K. Newman, *UCC Article 2 Express Warranties (OH)*, THOMAS REUTERS: PRACTICAL LAW, <http://www.dinsmore.com/content/uploads/2017/06/ucc20article20220express20warranties20oh20w-001-7823.pdf>.

292. Bill Adair, Opinion, *Keep on Fact-Checking!*, N.Y. TIMES (Nov. 8, 2016, 12:09 PM), <https://www.nytimes.com/interactive/projects/cp/opinion/election-night-2016/keep-on-fact-checking>.

293. See generally *United States v. Alvarez*, 567 U.S. 709 (2012).

294. See generally *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

leaders starts to sound suspiciously like the truth, perhaps it is time to place some of the responsibility on the politicians rather than metaphorically shooting the messenger.

It is true that the messengers in this case did not reveal their true identity to avoid voter suspicion by operating under false names.²⁹⁵ However, this action also does not justify prosecution for their speech activities.²⁹⁶ By comparison, American citizens and residents have several accounts on social media, many of which do not represent their true identity.²⁹⁷ Some Americans have accounts that misrepresent their height, weight, gender, and appearance, along with a myriad of other personal details, including political beliefs.²⁹⁸ Presumably, these Americans also post information that federal investigators might find false. It appears that the right to have accounts like this is probably the logical extension of the First Amendment,²⁹⁹ yet Special Counsel Robert Mueller has insisted on prosecuting a charge arising out of ownership of such accounts by the accused that likely cannot survive a constitutional challenge.³⁰⁰ If that is the path that the United States Government continues to take, then all individuals, both foreign and domestic, should think twice about a political Facebook status or off-hand Tweet, lest the federal government catch wind of it and consider it an attempt to defraud the United States.

Some may argue that this is not a fair comparison. They may suggest that there is a significant difference between a college student posting a false political statement on his or her social media account and the targeted political advocacy in which the accused engaged. We would suggest the difference is not so clear because of the similarities the Defendants' speech

295. Indictment, *supra* note 4.

296. After all, they are already being prosecuted for identity theft and bank fraud in other counts of the Indictment.

297. Cristen Conger, *Do People Lie More on the Internet?*, ABC NEWS (Mar. 5, 2011), <https://abcnews.go.com/Technology/people-lie-internet/story?id=13060797>.

298. *Id.*

299. Louis W. Tompros et al., *The Constitutionality of Criminalizing False Speech Made on Social Networking Sites in a Post-Alvarez, Social Media-Obsessed World*, 31 HARV. J.L. & TECH. 65, 68 (2017).

300. See generally Indictment, *supra* note 4.

bears to the regular speech of Americans, political pundits, and even politicians themselves. The fact that many individuals confused the Russian messages for messages posted by regular Americans attests to this. What really made the accused different, and a target of American prosecution, is the geopolitical conflict between the United States and Russia,³⁰¹ the novel way in which the Russians carried out their expressive activities, and the fact that evidence suggests the commission of identity theft and bank fraud crimes alongside the free speech activities.³⁰²

B. Nothing New Under the Sun

As mentioned earlier in this Article, the geopolitical conflict has already received a significant amount of news coverage, but just what makes the Russians' speech activities unique? The Russians engaged in so many political activities online that there is little precedent for any other foreign government doing anything of the sort to persuade United States voters.³⁰³ These activities included voluminous posting on social media,³⁰⁴ engaging in arguments with real American posters,³⁰⁵ and the programming of robots to make social media posts that either reposted political comments or started internet conversation threads favoring Donald Trump over Hillary Clinton.³⁰⁶

The accused maximized their social media influence by using data-gathering techniques that helped them spot prospective voters that might be particularly susceptible to their advocacy.³⁰⁷ In effect, the Russians did what marketing firms

301. John Solomon, *Mueller May Have a Conflict — And It Leads Directly to a Russian Oligarch*, HILL (May 14, 2018, 3:30 PM), <http://thehill.com/opinion/white-house/387625-mueller-may-have-a-conflict-and-it-leads-directly-to-a-russian-oligarch>.

302. Indictment, *supra* note 4, at 31–34.

303. *See id.*

304. *Id.* at 16–19.

305. *Id.*

306. *Id.*; O'Sullivan, *supra* note 49. It may be interesting to inspect to what extent the First Amendment protects computer speech because it protects speech of corporations, but we will presume that the speech of a robot, being an extension of its programmer, is protected to the same extent as the speech of the programmer.

307. Indictment, *supra* note 4, at 12–15.

have been doing for the better part of a decade when targeting consumers: they used the information social media sites gathered about their users to target voters and inspire them to vote Republican.³⁰⁸ We should note that this tactic is not uncommon to both the Democratic Party and the Republican Party.³⁰⁹ What made the tactic innovative is its application by a foreign power under the guise of being American.³¹⁰

Nevertheless, this sort of unique foreign advocacy, even when combined with the geopolitical conflicts that still rage in Ukraine and Syria and which have come to involve both Russia and the United States, is no justification for charging the Russian Defendants with conspiracy to defraud the United States.³¹¹ The application of the First Amendment should be even-handed, regardless of the speakers or their national origin.³¹² Not only is this a crucial tenant of equal protection jurisprudence,³¹³ but it is also plain common sense. If the United States wants to lead the democratic world and present democracy as the stable political system that should be adopted everywhere, then it should not simultaneously pretend that its own democratic republic can be unhinged by a mere set of committed “internet trolls.” People should not be facing potentially significant prison sentences for this behavior, particularly when evidence shows that these “trolls” likely had little influence on the actual outcome of the democratic process.³¹⁴

Rather than maintaining its current prosecution, the Justice Department should consider the political and worldwide impact of its actions when it issues indictments against

308. *See id.*

309. Ana Radelat, *Facebook Is for Republicans; Twitter Is for Democrats*, ADAGE (Oct. 30, 2014), <http://adage.com/article/campaign-trail/facebook-republicans-twitter-democrats/295643/>.

310. *See generally* Indictment, *supra* note 4.

311. *See* Wright, *supra* note 178, at 345.

312. Malika Saada Saar, *The First Amendment Must Be Upheld Consistently, or It Can't Be Upheld at All*, HUFFPOST (May 7, 2015, 9:35 AM), https://www.huffingtonpost.com/greta-van-susteren/the-first-amendment-must-_b_7231806.html.

313. U.S. CONST. amend. XV, § 1.

314. Silver, *supra* note 122.

defendants that have not, and likely will not, ever be apprehended.³¹⁵ If such documents are issued, then it should represent the true moral sensibilities of the United States. When the reflected sensibilities are fear of foreign speech despite the protection of that speech by the United States Constitution, perhaps the message should be adjusted. This is particularly true when the type of political involvement the United States seeks to punish proves novel and unique in character. The government action may very well set a precedent for the future, and it would be beneficial if the precedent was one that survived the scrutiny of both the Constitution and history.

The Justice Department and American politicians and courts should take the position that the United States is a country where the voters can sustain political speech, no matter how false, partisan, unexpected, or novel in nature. The Justice Department on its own accord should *nolle prosequi* Count I of the Indictment because it improperly punishes the Defendants twice for allegations of bank fraud and identity theft simply by combining the criminal activities that give rise to those allegations with free speech activities to arrive at the conspiracy to defraud charge. This moment presents an excellent historical opportunity for the United States Executive Branch to take the correct action on its own volition, not because a court told it to do so and not because international or diplomatic pressure required it, but because it is the just action to take.

C. Guilty by Association?

Those who oppose the *nolle prosequi* of Count I may argue that the existence of other criminal conduct in combination with the free speech activities justifies the conspiracy to defraud the United States charge. They may point out that some activities, while independently innocent, may combine with other criminal acts to form the basis for a new crime. For example, a request for money is innocent in itself, but is made criminal if

315. Josephine Wolff, *What Good Is an Indictment for Online Election Meddling?*, SLATE (Feb. 16, 2018, 4:12 PM), <https://slate.com/technology/2018/02/the-russians-indicted-for-election-meddling-will-never-face-consequences.html>.

accompanied by proximity and a drawn gun.³¹⁶ By the same logic, Special Counsel Mueller might make the argument that the Russians' free speech activities may be protected by the First Amendment, but that protection fades when the free speech activities are combined with the bank fraud and identity theft activities conducted by the Russians. However, this should not be how the courts, or even federal prosecutors, interpret the freedom of expression or the conspiracy to defraud statute. In fact, the First Amendment jurisprudence should be expanded to forbid a charge that combines protected speech with an independently criminal act only to arrive at yet another charge.³¹⁷

First, it is important to realize that while some innocent conduct can be combined with other criminal acts to form a new crime, this theory of criminal prosecution must have its limits. For example, the innocent conduct and the criminal acts usually have to be somewhat contemporaneous to form the basis of a crime. Thus, a request for money cannot be combined with the presence of a firearm *one month later* to constitute a charge of armed robbery.³¹⁸ The request for money and the presentation of the firearm must occur in very close temporal proximity, otherwise there is little reason to believe that the two actions are linked.

Furthermore, when criminal conduct is accompanied by speech, the speech must generally relate to the criminal conduct. An assault with a firearm would not escalate to a greater crime if the assailant happened to wear a t-shirt with the slogan "I support Donald Trump!" during the commission of the crime. The individual in this example surely deserves punishment for assaulting another with a deadly weapon, but to punish him for supporting President Trump would be overreaching indeed.³¹⁹

316. See *Robbery*, JUSTIA, <https://www.justia.com/criminal/offenses/theft-crimes/robbery/> (last visited Jan. 6, 2019).

317. Assuming, of course, that the Supreme Court's jurisprudence does not implicitly or explicitly forbid such a charge already.

318. See *Robbery (Armed Robbery with a Firearm, Armed Robbery with a Deadly Weapon, Strong Arm Robbery)*, SHORSTEIN, LASNETSKI, & GIHON, <https://www.slgattorneysflorida.com/armed-robbery.html> (last visited Jan. 6, 2019).

319. *Protection of Core Political Speech*, USLEGAL, <https://civilrights>

Thus, while speech that might solicit individuals to provide sensitive information for purposes of identity theft and bank fraud may be criminalized, speech that proves unrelated to engaging in these activities and merely supports a political candidate should not.³²⁰

Even criminals have the right to voice their support for a political candidate; it would be somewhat disquieting if such support earned them additional charges from the government. Applying these principles to the conduct of the accused underscores the need for the Federal Government to voluntarily remove Count I from the Indictment. First, the allegations show that the bank fraud and identity theft did not necessarily occur in contemporaneous manner with many of the free speech activities conducted by the Russian Defendants.³²¹ While a conspiracy can take a long time to carry out, and criminal acts may occur along the way to further that conspiracy despite being temporally removed from its completion, this casts at least some doubt on whether the identity theft and bank account fraud were a significant part of the conspiracy to defraud the United States. Many social media posts can be done virtually anonymously, or under an alias without any identity theft or bank information from a real person at all, which is how most of the Defendants operated.³²²

Second, the allegations suggest that the reason the conduct proves criminal has little to do with bank fraud and identity theft activities—which are already charged elsewhere in the Indictment—but has everything to do with the fact that these activities took place in order to oppose Hillary Clinton. After all, the opposition to the Democratic frontrunner is the only additional element that federal prosecutors can use to differentiate Count I from the remainder of the counts, which must be done to avoid double jeopardy.³²³ To put it in

.uslegal.com/freedom-of-speech-and-expression/protection-of-core-political-speech/ (last visited Jan. 6, 2019) [hereinafter *Protection of Core Political Speech*].

320. *Id.*

321. Indictment, *supra* note 4, at 25–34.

322. The Russians used fake identities to acquire access to American servers within the United States, but each post did not require such an acquisition.

323. *See generally* Blockburger v. United States, 284 U.S. 299 (1932).

mathematical terms, the Government's argument is: bank fraud plus identity theft plus free speech equals conspiracy to defraud the United States. This is an equation the First Amendment cannot permit.

If the Russians had the right to carry out their speech, then the speech cannot be criminalized via addition to other criminal activities, even if those criminal activities led to the speech. The fact that criminal conduct makes speech possible hardly strips the speech of its protection.³²⁴ A man who leads a rally with a stolen megaphone might be jailed for theft, but he should not face additional charges simply because the speech he made with the aid of the megaphone displeased the government. Likewise, the Russians stole a metaphorical megaphone, the bank accounts and personal identities of several Americans, to mask their social media content as American in origin (which likely helped shield it from censorship).³²⁵ Thus, the bank fraud and identity theft can be criminalized, but the speech activities, under the guise of an additional charge, should not. Even under a potentially vague³²⁶ and overbroad³²⁷ application of the conspiracy to defraud statute, the speech of the Russian Defendants does not interfere with the government function of the United States. This means that if support for Donald Trump

324. For example, when the Ku Klux Klan trespasses on property to burn a cross in the front yard of an African American, the commission of the trespass does not permit the prosecution of the Klan for the content of its speech unless proof exists that the speech was accompanied by intent to intimidate. See *Virginia v. Black*, 538 U.S. 343 (2003).

325. Indictment, *supra* note 4, at 31–34.

326. *Modern Tests and Standards: Vagueness, Overbreadth, Strict Scrutiny, Intermediate Scrutiny, and Effectiveness of Speech Restrictions.*, CORNELL LAW SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-1/modern-tests-and-standards-vagueness-overbreadth-strict-scrutiny-intermediate-scrutiny-and-effectiveness-of-speech-restrictions> (last visited Jan. 6, 2019). The importance of courts as well as prosecutors upholding the statutory clarity requirement cannot be overstated. Clear laws eliminate surprise and confusion, which is an important principle in the drafting, enactment, and enforcement of rules and statutes. Artem M. Joukov, *Isn't That Hearsay Anyway? How the Federal Hearsay Rule Can Serve as a Map to the Confrontation Clause*, 63 WAYNE L. REV. 337, 380 (2018). The violation of this principle in the instant case might leave both Americans and foreign social media users wondering: *Did my speech cross the line, and could I be next?*

327. *Id.*

and opposition to Hillary Clinton is the only evidence against these Defendants in addition to the bank fraud and identity theft, the charges cannot be sustained under the First Amendment or even under a narrow reading of the conspiracy to defraud statute itself.³²⁸

D. American Politics on the World Stage

In the historical context, the government and citizens of the United States should not be particularly surprised when foreign nations develop an interest in the outcome of American elections. American involvement in world affairs has grown significantly since the late nineteenth century³²⁹ with the United States emerging as perhaps the most powerful player on the world stage.³³⁰ How the United States exercises its power has a broad impact across the globe, not just on its own citizens, and that exercise of power has historically depended at least in part on who occupies the White House and the party affiliation of that individual.³³¹ Like any other interest group, it should come as no surprise that citizens of foreign nations, perhaps even guided by their respective governments, attempt to persuade Americans to select one leader over another. After all, the United States itself has engaged in similar tactics in many countries across the globe, sometimes using far more than just speech to achieve its ends.³³² Depending on the method of

328. See U.S. CONST. amend. I; 18 U.S.C. § 371 (2018).

329. *An American Time Capsule: Three Centuries of Broadsides and Other Printed Ephemera: American Involvement in World Affairs*, LIBRARY CONG., <https://www.loc.gov/teachers/classroommaterials/connections/time-capsule/history6.html> (last visited Jan. 6, 2019).

330. See VLADIMIR KRYUCHKOV, LICHNOYE DELO [A PERSONAL ACCOUNT] 7 (2003) (noting the danger to Russia from the apparent intent of both political parties in the United States to expand American global dominance).

331. Carroll Doherty, *Key Takeaways on Americans' Growing Partisan Divide Over Political Values*, PEW RES. CTR. (Oct. 5, 2017), <http://www.pewresearch.org/fact-tank/2017/10/05/takeaways-on-americans-growing-partisan-divide-over-political-values/>.

332. Lindsey A. O'Rourke, *The U.S. Tried to Change Other Countries' Governments 72 Times During the Cold War*, WASH. POST (Dec. 23, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/23/the-cia-says-russia-hacked-the-u-s-election-here-are-6-things-to-learn-from-cold-war-attempts-to-change-regimes/?noredirect=on&utm_term=.074cabb555b2.

persuasion that foreign nationals apply to American politics, the persuasion itself can be completely consistent with democratic principles as well as the principles governing the freedom of speech.³³³

The United States Constitution and the Bill of Rights have not outlived their usefulness when dealing with what many deem as outside threats. When foreign nationals break constitutional federal and state statutes, there are few impediments to their prosecution. However, that rightfully is not the case when foreigners engage in conduct Americans may simply deem unpleasant because that is precisely the type of situation where public outrage may dispense with considerations for human rights. That is partly why a constitutional amendment requires significantly more effort to pass: to prevent the outrage felt in the moment from leading to a frenzy and resulting in the swift passage of a statute or prosecution of a protected individual before cooler heads can prevail.³³⁴ Applying this logic in the instant case, it is clear that Special Counsel Mueller's Indictment has the political backing of many outraged constituents, particularly on the Democratic side of the isle.³³⁵ Yet, this hardly strips the Defendants in this case from the protections the First Amendment offers them, preventing additional charges simply because their alleged criminal activities came coupled with political speech.³³⁶

In some respects, the Russians' actions are not so revolutionary. There is no doubt that foreign nations try to influence American politics.³³⁷ That is the price of being a powerful nation: other nations attempt to influence the way the

333. U.S. CONST. amend. I.

334. *The Amendment Process: Adding a New Amendment to the United States Constitution: Not an Easy Task!*, HARRY S. TRUMAN PRESIDENTIAL LIBRARY & MUSEUM, https://www.trumanlibrary.org/whistlestop/teacher_lessons/3branches/15b.htm (last visited Jan 6, 2019).

335. *See Russia Scandal: Mueller's Latest Indictments Point to Democratic Collusion*, INVESTOR'S BUS. DAILY (Feb. 20, 2018), <https://www.investors.com/politics/editorials/mueller-investigation-13-indictments-trump-russia-collusion/>.

336. *Protection of Core Political Speech*, *supra* note 319.

337. *See generally* Corey R. Sparks, Note, *Foreigners United: Foreign Influence in American Elections After Citizens United v. Federal Election Commission*, 62 CLEV. ST. L. REV. 245 (2014).

power is applied. The difference is that foreign influence usually enters United States politics through foreign ambassadors, businesspersons, and lobbyists.³³⁸ These foreign actors apply various types of pressure on politicians, sometimes enticing them with business deals for the states they represent, sometimes offering campaign funds, and perhaps on some occasions offering to *help* the politician directly.³³⁹ All of these approaches should lead to some concern, and all of them seek to influence various congressional votes and actual elections through campaign funding;³⁴⁰ yet, they all seem to avoid federal indictments, perhaps because most of these indirect approaches are protected.³⁴¹

It may be argued that what the Russians did is different: rather than influencing a politician by contributing to his or her campaign, for example, they went directly to the people, seeking to influence the voters themselves.³⁴² However, in some respects, this is a more honest approach because it bypasses the middle man or woman and allows the voters to decide to be influenced by various arguments.³⁴³ Of course, the Russians' influence was less honest because the decisions are being driven by advertisements, comments, and social media posts that were often intentionally false or misleading, but political advertisements, too, sometimes suffer from this defect.³⁴⁴ Whatever the case may be, the Defendants' efforts hardly deprived the United States of a fair election and merely provided an additional perspective to the debate between two somewhat

338. *Foreign Lobbying in Congress: A Discussion of Influence and Transparency*, AM. U. (Feb. 8, 2018), <https://www.american.edu/spa/news/foreign-lobbying.cfm>.

339. Andrew Perez, David Sirota & Jay Cassano, *Foreign Lobbyists Contributed More Than \$4.5 Million to Candidates in 2016 Elections*, MAPLIGHT (Dec. 4, 2017), <https://maplight.org/story/foreign-lobbyists-contributed-more-than-4-5-million-to-candidates-in-2016-elections/>.

340. *Id.*

341. *Id.*

342. Indictment, *supra* note 4, at 3.

343. There has been no convincing proof yet that the Russians made definitive contact with the current President of the United States in an effort to influence him directly in return for a political stance favorable to the Russian Federation.

344. Indictment, *supra* note 4, at 13–15, 19–20; *see* sources cited *supra* note 49.

controversial politicians. This is precisely the kind of political speech that should be welcomed, regardless of its source, because in the end it elevates the debate by providing an alternative perspective and giving voters additional information and incentive to confirm its veracity.

E. No Aliens, No Sedition

History offers us yet another perspective from which to evaluate the Russian involvement in the 2016 Presidential Election. In the infancy of the United States of America, the country faced other external threats that sought to influence not just its power structure, but to subjugate it altogether.³⁴⁵ The American government suspected that the British Empire, having lost one of its more valuable colonies, would have a significant motive to try to influence American politics and perhaps even launch another military effort to take control of the colonies.³⁴⁶ To counter this potential interference, the United States Congress passed the Alien and Sedition Acts.³⁴⁷

The Alien and Sedition Acts of 1798³⁴⁸ were four rather controversial internal security laws that placed restrictions on aliens and the press. Specifically, the Alien Act increased the waiting period for naturalization from five to fourteen years, permitted the United States to detain subjects of an enemy nation, and authorized the country's chief executive to expel any alien he considered dangerous.³⁴⁹ The Sedition Act banned a person or entity from publishing false or misleading statements against the government and prohibited a person from inciting opposition to any presidential or congressional act.³⁵⁰ Although Thomas Jefferson denounced the Sedition Act as a violation of

345. Alien and Sedition Acts, 1 Stat. 570, 577, 596 (1798); *see also Alien and Sedition Acts*, MERRIAM WEBSTER'S DICTIONARY OF LAW (1996).

346. A suspicion that proved true in 1812. David S. Heidler & Jeanne T. Heidler, *War of 1812*, ENCYC. BRITANNICA, <https://www.britannica.com/event/War-of-1812> (last visited Feb. 7, 2019).

347. *See* sources cited *supra* note 345.

348. *Id.*

349. *Id.*

350. *Id.*

the United States Constitution,³⁵¹ state legislatures from every state except Kentucky and Virginia supported the Acts.³⁵²

The Alien and Sedition Acts were never appealed to the Supreme Court because the government did not recognize the Supreme Court's right of judicial review until *Marbury v. Madison* in 1803,³⁵³ so there was "effectively no check on federal lawmakers."³⁵⁴ However, statements in Supreme Court opinions beginning in the mid-twentieth century indicate that the Supreme Court would find the Alien and Sedition Acts unconstitutional today.³⁵⁵ For example, in *New York Times v. Sullivan*, the Court stated: "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."³⁵⁶ Justice William O. Douglas noted in a separate concurring opinion that the "Alien and Sedition Laws constituted one of our sorriest chapters; and I had thought we had done with them forever. . . . Suppression of speech as an effective police measure is an old, old device, outlawed by our Constitution."³⁵⁷

Perhaps to the dismay of Justice Douglas and the *Sullivan* majority, the United States Government has attempted to criminalize speech through the conspiracy to defraud statute that even the Alien and Sedition Acts did not seek to punish. As oppressive as the Alien and Sedition Acts may have been, they only sought to combat false and otherwise libelous or slanderous statements against the incumbent president of the United States, not the non-incumbent candidates running for the office.³⁵⁸ The speech of the Russian Defendants in this case would thus escape prosecution under the Alien and Sedition Acts even if the accused found themselves on United States soil.

The Acts prohibited speech against the government, not

351. *Alien and Sedition Acts*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Alien_and_Sedition_Acts (last visited Jan. 6, 2019).

352. *Id.*

353. *See generally* *Marbury v. Madison*, 5 U.S. 137 (1803).

354. *Alien and Sedition Acts*, *supra* note 351.

355. *See* *N.Y. Times v. Sullivan*, 376 U.S. 254, 276 (1964); *see also* *Watts v. United States*, 394 U.S. 705, 712 (1969) (Douglas, J., concurring).

356. *Sullivan*, 376 U.S. at 276 (1964) (footnote omitted).

357. *Watts*, 394 U.S. at 710, 712 (footnote omitted).

358. *See* sources cited *supra* note 345.

speech regarding who should head that government.³⁵⁹ Even if the Russians in this case were determined to be dangerous, thereby justifying expulsion under the Acts, their online activities were already occurring abroad, requiring no expulsion whatsoever.³⁶⁰ If the Russian speech could not be censored under the Alien and Sedition Acts, which “constituted one of our sorriest chapters,”³⁶¹ then, *a fortiori*, the current attempt to charge the Defendants under a rather expansive reading of the conspiracy to defraud statute must surely fail constitutional scrutiny. Finally, the Russians did not conduct the vast majority of the activities federal prosecutors seek to punish on United States soil, so they would not qualify as aliens under the Acts. This is perhaps all the more ironic because their First Amendment liberties would be more assured had they engaged in their expressive activities on American soil rather than from abroad.³⁶²

Part V: All Eyes on US

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference

359. *Id.*

360. *See generally* Indictment, *supra* note 4.

361. *Watts*, 394 U.S. at 712.

362. *See supra* Part III; *see also* *Small v. United States*, 544 U.S. 385, 388 (2005); *Foley Bros. v. Filardo*, 336 U.S. 281, 287 (1949); *see generally* *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205 (2013); *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108 (2013) (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010)); *Boumediene v. Bush*, 553 U.S. 723 (2008); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Ross v. McIntyre*, 140 U.S. 453 (1891); *DKT Mem’l Fund Ltd. v. Agency for Int’l Dev.*, 887 F.2d 275 (D.C. Cir. 1989); *BOLLINGER*, *supra* note 152; *NEUMAN*, *supra* note 152; *RAUSTIALA*, *supra* note 152; *SMOLLA*, *supra* note 152; *ZICK*, *THE COSMOPOLITAN FIRST AMENDMENT*, *supra* note 151; *Balkin*, *supra* note 152; *Burnett*, *supra* note 152; *Cleveland*, *supra* note 152; *“Foreign” Campaign Contributions and the First Amendment*, *supra* note 147; *Henkin*, *supra* note 152; *Krotoszynski*, *supra* note 152; *Lebowitz*, *supra* note 152; *Lobel*, *supra* note 152; *Su*, *supra* note 151; *Zick*, *Falsely Shouting Fire*, *supra* note 151; *Zick*, *First Amendment Cosmopolitanism*, *supra* note 151; *Zick*, *Territoriality*, *supra* note 151; *Zick*, *Trans-Border Perspective*, *supra* note 151; *Bowie & Litman*, *supra* note 151; *Do Noncitizens Have Constitutional Rights?*, *supra* note 147; *Somin*, *supra* note 147; *Zick*, *The First Amendment and the World*, *supra* note 151.

and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

–The United Nations, Universal Declaration of Human Rights³⁶³

When considering how to proceed in this case, the United States Government should be aware that the world is watching quite closely.³⁶⁴ The United States, both through the United Nations and otherwise, has long championed the cause of constitutional democratic republics as this system of government has spread throughout the world.³⁶⁵ Being one of the most powerful and essentially the oldest democratic nation,³⁶⁶ the United States has an important responsibility to uphold the brand,³⁶⁷ and bearing the mantle of democracy does not come without its responsibilities.³⁶⁸ If the United States preaches freedom and constitutionalism abroad, then it has the responsibility of upholding its own Constitution at home and perhaps even upholding some of the human rights promulgated by the United Nations.³⁶⁹ This is the only way its message to tyrants in the Middle East, Asia, and, yes, Russia can have any legitimate meaning.

Complete consistency for any government is always difficult: there is no question that the United States has a history of violating the very Constitution that its citizens hold so dear.³⁷⁰ However, what sets the nation apart is the ability to

363. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 19 (Dec. 10, 1948).

364. Lindsay Huth, *The World Is Watching the U.S.*, U.S. NEWS & WORLD REPORT (Mar. 1, 2018), <https://www.usnews.com/news/data-mine/articles/2018-03-01/around-the-world-half-of-people-follow-us-news-closely-study-finds>.

365. Sean M. Lynn-Jones, *Why the United States Should Spread Democracy*, BELFER CTR. SCI. & INT'L AFFAIRS (Mar. 1998), <https://www.belfercenter.org/publication/why-united-states-should-spread-democracy>.

366. Not counting Ancient Greece, for example.

367. Lynn-Jones, *supra* note 365.

368. David Vines, *Upholding the Constitution*, HUFFPOST (May 25, 2011), https://www.huffingtonpost.com/david-vines/upholding-the-constitution_b_401907.html.

369. *Id.*

370. *Abuses and Usurpations*, CONSTITUTION SOC'Y, http://www.constitution.org/cs_abuse.htm (last visited Jan. 6, 2019).

recognize its mistakes, reform its approach, and ultimately *avoid* countless constitutional violations that would occur in a country less committed to justice.³⁷¹ Avoiding violations of this sort is a case-by-case process that requires each criminal case, no matter how large or small, to receive the individual attention necessary to preserve the rights of the parties. This rule is particularly true when the United States evaluates how it will treat foreign nationals, especially when it deals with a nation that America has long tried to guide onto the path of democracy.³⁷² If the United States demonstrates that its own Constitution means nothing so long as the federal government has a quarrel with a prospective defendant, then the message of constitutional justice and a powerful independent judiciary fails.³⁷³ It will only appear as a charade behind which hide some incredibly powerful federal agencies whose leaders are willing and ready to prosecute those who are innocent as a matter of law for making a political statement.³⁷⁴ In some sense, it would make the United States not so different from what Americans sometimes think of Russia.³⁷⁵ The irony of a nation becoming the very thing that it abhors would be unfortunate.³⁷⁶

What makes Russian President Vladimir Putin's opposition to the United States resonate with his supporters is that he is occasionally right. When a debate rages regarding Russian aid to the forces fighting for a Russian Ukraine, he can merely point to American involvement in Iraq and Libya and ask why Russian actions deserve any more scrutiny.³⁷⁷ When critics raise objections to Russian support for a Syrian dictator with a terrible human rights record, President Putin can point to the

371. Jason Ross, *Is the Constitution Important?*, BILL RIGHTS INST. (Oct. 21, 2011), <https://www.billofrightsinstitute.org/is-the-constitution-important/>.

372. Lynn-Jones, *supra* note 365.

373. Ross, *supra* note 371.

374. *Id.*

375. Megan Brenan, *Americans, Particularly Democrats, Dislike Russia*, GALLUP (Mar. 5, 2018), <http://news.gallup.com/poll/228479/americans-particularly-democrats-dislike-russia.aspx>.

376. *Id.*

377. Tom O'Connor, *Russia Says U.S. Wars for Democracy in Middle East and Europe Could Soon Come to Moscow*, NEWSWEEK (Mar. 5, 2018, 6:01 PM), <http://www.newsweek.com/russia-says-us-wars-democracy-middle-east-europe-could-soon-come-moscow-831569>.

severe destabilization and violence in nations that have garnered American military attention and ask why Assad would be worse for Russia than complete anarchy.³⁷⁸ Finally, when questioned about his efforts to scale the Russian military, President Putin needs only to point across the ocean and demonstrate that the United States spends far more on its own forces, which requires Russia to expand its arsenal to match.³⁷⁹ This list of examples is hardly exhausting, but it should serve to demonstrate that when America attempts to lead the world forward, its actions will receive extra scrutiny and must be narrowly tailored to advance the moral and political arguments the country wants to advance.

Leaders like President Putin may always draw equivalencies, whether false or true, between their own actions and those of America no matter how clean the United States attempts to keep its record. This approach gives President Putin a political retreat and justification for quite a few unsavory decisions. This consequence should not paralyze the United States, and it should not prevent it from punishing those who break its laws or who encroach on its political system. Conversely, it should give the American government pause before contradicting its own principles.

It is one thing to contradict the diplomatic desires of the Russian Federation. It is quite another for the United States to contradict its own Constitution in a situation that is quite avoidable: that is, in a situation where America seeks to prosecute individuals that it will likely never apprehend and whose prosecution appears to be under the complete control of a federal prosecutor.³⁸⁰ The federal government should either avoid levying charges at all, or if charges must be levied, only bring charges that can be supported by the law and the Constitution, not ones that might seem politically popular. By doing this, the government can both protect the citizens of the United States and increase the legitimacy of its actions.

378. *Id.*

379. Tom O'Connor, *How Does U.S. Military Compare to Russia, China and North Korea? Rivals Attack Trump National Security Strategy*, NEWSWEEK (Dec. 19, 2017, 6:10 PM), <http://www.newsweek.com/how-us-military-compare-russia-china-north-korea-blast-trump-national-security-752778>.

380. Goldman, *supra* note 5.

Conclusion

The United States Government should *nolle prosequi* Count I of its Indictment of the Russian Defendants because the First Amendment so requires. Russian involvement in persuading American voters to elect Donald Trump is non-traditional, but it is unlikely to be an isolated incident, and the response by federal prosecutors will likely set precedent for decades to come. Prosecutors like Special Counsel Mueller should be cautious to ensure that the precedent they set is a valuable one rather than something resembling the Alien and Sedition Acts or even exceeding the Acts in severity. In this instance, setting a favorable precedent is somewhat simple: the federal government should simply charge the Russians as the law and the Constitution permit without adding an additional charge that merely encompasses the frustration of the masses. The United States already punches above its weight when it comes to the number of individuals convicted of criminal acts without adding foreign nationals to the count without a constitutional reason to do so.³⁸¹ Rather than stretching its laws to reach politically unpopular foreigners, America has an opportunity to avoid a mistake at the outset and send a clear message to foreign powers: they can advocate for one political candidate over another if they please, but if their actions cross the line into identity theft, bank fraud, or other illegal activities, they will be punished for those crimes to the fullest extent of the law—but not beyond.

381. William N. Clark & Artem M. Joukov, *The Criminalization of America*, 76 AL. LAW. 225 (2015); see also Artem M. Joukov & Samantha M. Caspar, *Wherefore Is Fortunato? How the Corpus Delicti Rule Excludes Reliable Confessions, Helps the Guilty Avoid Responsibility, and Proves Inconsistent with Basic Evidence Principles*, 41 AM. J. TRIAL ADVOC. 459, 522 (2018).