

GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

United States Sanctions Russian Individuals and Entities After Accusing Russian Government of Interfering with U.S. Election Process; Congressional Committees and Intelligence and Law Enforcement Agencies Continue to Investigate President Trump's Connections to Russian Officials

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On October 7, 2016, following months of tense interactions between the United States and Russia regarding hacks of high-profile U.S. political organizations, the Department of Homeland Security and Office of the Director of National Intelligence (DNI) issued a joint statement formally accusing Russia of using cyberattacks to influence the U.S. election process.¹ Reports suggest that Russia intended to use the hacks and subsequent information dump to help then-candidate Donald Trump win the presidential election.² In response to the cyberattacks, the United States took steps against several Russian individuals and entities.³ The Obama administration also initiated an extensive review of Russian involvement in the election, which eventually reaffirmed key intelligence conclusions regarding the scope of Russian interference.⁴ Several congressional committees have also initiated investigations, all of which are still ongoing as of the date of publication.⁵

Several incidents appeared to trigger the U.S. accusation. The first, reported in June 2016, occurred when hackers breached the Democratic National Committee (DNC) computer network and gained access to its entire database of research on Donald Trump, who was by that time the presumptive Republican presidential nominee.⁶ A private cybersecurity incident response group, CrowdStrike, investigated the breach at the DNC's request. CrowdStrike concluded that the hacks were perpetrated by two entities—known as “Cozy Bear” and “Fancy Bear”⁷—each working independently on behalf of a different Russian intelligence service.⁸

¹ The statement is described in more detail below. See *infra* text at notes 33–34.

² See *infra* notes 52–56 and corresponding text.

³ See *infra* notes 89–97 and corresponding text.

⁴ See *infra* notes 66–71, 117–27 and corresponding text.

⁵ See *infra* notes 72–78 and corresponding text.

⁶ Ellen Nakashima, *Russian Government Hackers Penetrated DNC, Stole Opposition Research on Trump*, WASH. POST (June 14, 2016), at https://www.washingtonpost.com/world/national-security/russian-government-hackers-penetrated-dnc-stole-opposition-research-on-trump/2016/06/14/cf006cb4-316e-11e6-8ff7-7b6c1998b7a0_story.html. The DNC had apparently become aware of the hack in late April 2016. See *id.*

⁷ See Dmitri Alperovitch, *Bears in the Midst: Intrusion into the Democratic National Committee*, CROWDSTRIKE (June 15, 2016), at <https://www.crowdstrike.com/blog/bears-midst-intrusion-democratic-national-committee>. According to CrowdStrike, Fancy Bear had infiltrated the network in April 2016, and the DNC discovered this breach. See Nakashima, *supra* note 6. Cozy Bear, on the other hand, gained access to the network in summer 2015, and had been monitoring the Democratic National Committee's (DNC) email and chat communications since that time. See *id.*

⁸ Alperovitch, *supra* note 7. According to CrowdStrike, Russia's three main intelligence services have a “highly adversarial relationship” with one another. They

have overlapping areas of responsibility, but also rarely share intelligence and even occasionally steal sources from each other and compromise operations. Thus, it is not surprising to see them engage in intrusions against the same victim, even when it may be a waste of resources and lead to the discovery and potential compromise of mutual operations.

Id.

Later that day, an entity named “Guccifer 2.0”—later identified by U.S. intelligence officials as an agent of Russia’s Main Intelligence Directorate (GRU)⁹—declared itself to be the “lone hacker” of the DNC’s network, posting several of the purportedly stolen documents.¹⁰ In response, CrowdStrike asserted that “these claims do nothing to lessen our findings relating to the Russian government’s involvement.”¹¹

The White House and State Department both declined to provide details about any investigation.¹² In contrast, the Kremlin’s spokesman, Dmitry Peskov, said: “I completely rule out a possibility that the [Russian] government or the government bodies have been involved in this.”¹³ An adviser to Russian President Vladimir Putin on Internet issues added:

Usually these kinds of leaks take place not because hackers broke in, but . . . because someone simply forgot the password or set the simple password 123456. . . . [I]t’s always simpler to explain this away as the intrigues of enemies, rather than one’s own incompetence.¹⁴

The next incident occurred in July 2016, when WikiLeaks released nearly twenty thousand emails from the DNC, many of them including embarrassing information about the inner workings of the DNC.¹⁵ It was unclear how WikiLeaks had obtained the emails, but some of them had earlier been published by Guccifer 2.0.¹⁶ According to press reports, U.S.

⁹ Charlie Savage & Nicole Perlroth, *Is D.N.C. E-mail Hacker a Person or a Russian Front? Experts Aren’t Sure*, N.Y. TIMES (July 27, 2016), at <http://www.nytimes.com/2016/07/28/us/politics/is-dnc-email-hacker-a-person-or-a-russian-front-experts-arent-sure.html> (discussing Guccifer 2.0’s connection with Russia’s Main Intelligence Directorate (GRU)). A subsequent media report indicated that Guccifer 2.0 was one of two “outlets” created by Fancy Bear, a “G.R.U.-controlled unit,” in order to make the hacked documents public. See David E. Sanger & Scott Shane, *Russian Hackers Acted to Aid Trump in Election, U.S. Says*, N.Y. TIMES (Dec. 9, 2016), at <https://www.nytimes.com/2016/12/09/us/obama-russia-election-hack.html>.

¹⁰ Guccifer2, *Guccifer 2.0 DNC’s Servers Hacked by a Lone Hacker*, GUCCIFER 2.0 (June 15, 2016), at <https://guccifer2.wordpress.com/2016/06/15/dnc/>.

¹¹ Alperovitch, *supra* note 7.

¹² U.S. Dep’t of State, Daily Press Briefing (June 14, 2016), at <https://2009-2017.state.gov/r/pa/prs/dpb/2016/06/258467.htm> (“I[’ve] just seen these recent press reports. I don’t have anything to corroborate them. I’d refer you to the Democratic National Committee and to law enforcement authorities to speak to . . . these reports.”); White House Press Release, Press Briefing by Press Secretary Josh Earnest (June 15, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/06/15/press-briefing-press-secretary-josh-earnest-61516> (“[F]or any sort of discussion about a federal government response, I’d refer you to the FBI. . . . And I’m just not able to comment on this in much detail because I don’t weigh into even potential law enforcement or international security investigations.”).

¹³ Nakashima, *Russian Government*, *supra* note 6.

¹⁴ Andrew Roth, *Russia Denies DNC Hack and Says Maybe Someone “Forgot the Password,”* WASH. POST (June 15, 2016), at <https://www.washingtonpost.com/news/worldviews/wp/2016/06/15/russias-unusual-response-to-charges-it-hacked-research-on-trump>.

¹⁵ See Tom Hamburger & Karen Tumulty, *WikiLeaks Releases Thousands of Documents About Clinton and Internal Deliberations*, WASH. POST (July 22, 2016), at <https://www.washingtonpost.com/news/post-politics/wp/2016/07/22/on-eve-of-democratic-convention-wikileaks-releases-thousands-of-documents-about-clinton-the-campaign-and-internal-deliberations>.

¹⁶ David E. Sanger & Eric Schmitt, *Spy Agency Consensus Grows That Russia Hacked D.N.C.*, N.Y. TIMES (July 26, 2016), at <http://www.nytimes.com/2016/07/27/us/politics/spy-agency-consensus-grows-that-russia-hacked-dnc.html>. The founder of WikiLeaks, Julian Assange, has claimed that the “Russian government is not the source.” Adam Entous, Ellen Nakashima & Greg Miller, *Secret CIA Assessment Says Russia Was Trying to Help Trump Win White House*, WASH. POST (Dec. 9, 2016), at https://www.washingtonpost.com/world/national-security/obama-orders-review-of-russian-hacking-during-presidential-campaign/2016/12/09/31d6b300-be2a-11e6-94ac-3d324840106c_story.html; see also *infra* note 109 and corresponding text. Yet, according to media reports, intelligence agencies identified individuals connected to the Russian government who provided WikiLeaks with the hacked documents. See Entous, Nakashima & Miller, *supra*.

intelligence agencies had “high confidence” that the Russian government was responsible for the DNC breach,¹⁷ although they were less certain whether the exploit was designed to influence the election or was more routine cyberespionage.¹⁸

When asked whether Russia wanted to interfere with the election, President Obama acknowledged in July that “experts have attributed [the DNC hack] to the Russians,” but then noted that “[a]nything’s possible.”¹⁹ Secretary Kerry stated that he had “raise[d] the issue of the DNC” when meeting with Russian Foreign Minister Sergey Lavrov, but said that “before we draw any conclusions in terms of what happened or who is behind it it’s very important that whatever public information is put out is based on fact. . . . [A]nd we will continue to work to see precisely what those facts are.”²⁰ White House Press Secretary Josh Earnest reiterated that the White House had not yet adopted an official position:

There’s plenty of speculation out there. I recognize there’s been an analysis done that has indicated that the Russians are likely to blame, but that is not a conclusion that the FBI has chosen to publicize at this point. They’re conducting an ongoing investigation, and so I’ll let them speak to whether or not they’ve made such a determination, and I’ll let them speak to whether they believe it’s appropriate to go public with such a determination.²¹

Press Secretary Earnest later emphasized, in September 2016, that the FBI was

cognizant of the fact that as soon as they make a declaration like that most people are going to understandably be interested in seeing that evidence. And some of that evidence may not be something that we want to show. We don’t necessarily want to reveal sources and methods that the FBI uses to conduct these kinds of investigations. . . .

The other thing . . . that’s relevant here is the United States also may be in a position where we want to respond but not announce it in advance, or maybe not announce it ever.²²

Russian officials continued to deny any role in releasing the DNC’s emails. Asked what he had told Secretary Kerry, Foreign Minister Lavrov replied: “Well, I don’t want to use four-letter words.”²³ Likewise, Deputy Foreign Minister Sergey Ryabkov asserted: “Only spin doctors who see conspiracy theories everywhere could imagine that Russia is trying to push this election to any specific candidate by hacking into some servers. In reality, this is simply impossible.”²⁴ Putin made a similar statement regarding the DNC incident:

¹⁷ Sanger & Schmitt, *supra* note 16.

¹⁸ *Id.*

¹⁹ *President Obama on Russian DNC Hack Involvement: “Anything’s Possible,”* NBC NEWS (July 26, 2016), at <http://www.nbcnews.com/nightly-news/video/president-obama-on-russian-dnc-hack-involvement-anything-s-possible-732675139636>.

²⁰ U.S. Dep’t of State Press Release, John Kerry, Press Availability in Vientiane, Laos (July 26, 2016), available at <https://2009-2017.state.gov/secretary/remarks/2016/07/260475.htm>.

²¹ White House Press Release, Press Briefing by Press Secretary Josh Earnest (July 28, 2016), at <https://obama-whitehouse.archives.gov/the-press-office/2016/07/28/press-briefing-press-secretary-josh-earnest-72816>.

²² White House Press Release, Press Briefing by Press Secretary Josh Earnest (Sept. 15, 2016), at <https://obama-whitehouse.archives.gov/the-press-office/2016/09/15/press-briefing-press-secretary-josh-earnest-91516>.

²³ Ministry of Foreign Aff. of the Russ. Fed’n Press Release, Foreign Minister Sergey Lavrov’s Answer to a Media Question Before the Meeting with the US Secretary of State John Kerry, Vientiane (July 26, 2016), at http://www.mid.ru/en/web/guest/meropriyatiya_s_uchastiem_ministra/-/asset_publisher/xK1BhB2bUjd3/content/id/2370461.

²⁴ Ministry of Foreign Aff. of the Russ. Fed’n Press Release, Deputy Foreign Minister Sergey Ryabkov Interviewed by Mezhdunarodnaya Zhizn Magazine (Aug. 10, 2016, 7:44 PM), at http://www.mid.ru/en/web/guest/nota-bene/-/asset_publisher/dx7DsH1WAM6w/content/id/2386924.

I know absolutely nothing about it, and Russia has never done anything like this at the State level. Frankly speaking, I could never even imagine that such information would be of interest to the American public or that the campaign headquarters of one of the candidates—in this case, Mrs. Clinton—apparently worked for her, rather than for all the Democratic Party candidates in an equal manner. I could never assume that anybody would find it interesting. Thus, in view of what I have said, we could not officially hack it.²⁵

Shortly thereafter, media reports indicated that the FBI was also investigating a cyberattack against the Democratic Congressional Campaign Committee (DCCC).²⁶ The intrusion was reportedly initiated by Fancy Bear, which was apparently working for the GRU.²⁷ Given that entity's alleged role in the prior DNC breach,²⁸ one administration official stated that the FBI was treating the DNC and DCCC breaches as a single investigation.²⁹ As with the DNC breach, however, Kremlin spokesman Peskov denied that the Russian government was involved, stating that “[w]e don’t see the point any more in repeating yet again that this is silliness.”³⁰

A third incident heightened U.S. fears that Russia was attempting to influence the presidential election directly. On August 29, a media report stated that hackers had targeted voter registration systems in Illinois and Arizona.³¹ In addition, the FBI alerted Arizona state officials in June that Russian individuals were responsible for the hack in that state.³² However, a spokesperson for Arizona's secretary of state noted that the FBI had not said whether the perpetrators were working for the Russian government.³³

The various incidents and investigations finally led to an unusual joint statement on October 7 by the Department of Homeland Security and the Office of the DNI, in which they formally accused Russia of using cyberattacks to interfere with the U.S. election process. They said:

The U.S. Intelligence Community (USIC) is confident that the Russian Government directed the recent compromises of e-mails from US persons and institutions, including from US political organizations. The recent disclosures of alleged hacked e-mails on sites like DCLeaks.com and WikiLeaks and by the Guccifer 2.0 online persona are consistent with the methods and

²⁵ President of Russ. Press Release, Interview to *Bloomberg* (Sept. 5, 2016), at <http://en.kremlin.ru/events/president/news/52830>.

²⁶ See Joseph Menn, Dustin Volz & Mark Hosenball, *Exclusive: FBI Probes Hacking of Democratic Congressional Group – Sources*, REUTERS (July 29, 2016), at <http://www.reuters.com/article/us-usa-cyber-democrats-exclusive-idUSKCN1082Y7>; Ellen Nakashima, *FBI Probes Suspected Breach of Another Democratic Organization by Russian Hackers*, WASH. POST (July 29, 2016), at https://www.washingtonpost.com/world/national-security/fbi-probes-suspected-breach-of-dccc-computers-by-russian-hackers/2016/07/28/71210464-5536-11e6-b7defe509430c39_story.html. One report claimed that the breach might have begun in June 2016. Menn, Volz & Hosenball, *supra*.

²⁷ Nakashima, *FBI Probes Suspected Breach*, *supra* note 26.

²⁸ See *supra* note 7 and corresponding text.

²⁹ Nakashima, *FBI Probes Suspected Breach*, *supra* note 26; see also Dustin Volz (@dnvolz), TWITTER (July 29, 2017, 7:09 AM), at <https://twitter.com/dnvolz/status/759028001883451392> (publishing statement by Democratic Congressional Campaign Committee (DCCC) National Press Secretary Meredith Kelly that “[b]ased on the information [the DCCC] ha[s] to date, we’ve been advised by investigators that this is similar to other recent incidents, including the DNC breach”).

³⁰ Menn, Volz & Hosenball, *supra* note 26.

³¹ Ellen Nakashima, *Russian Hackers Targeted Arizona Election System*, WASH. POST (Aug. 29, 2016), at https://www.washingtonpost.com/world/national-security/fbi-is-investigating-foreign-hacks-of-state-election-systems/2016/08/29/6e758ff4-6e00-11e6-8365-b19e428a975e_story.html.

³² *Id.*

³³ *Id.*

motivations of Russian-directed efforts. These thefts and disclosures are intended to interfere with the US election process. Such activity is not new to Moscow—the Russians have used similar tactics and techniques across Europe and Eurasia, for example, to influence public opinion there. We believe, based on the scope and sensitivity of these efforts, that only Russia's senior-most officials could have authorized these activities.³⁴

The statement noted that the United States was not yet prepared to accuse Russia of hacking state voter registration systems:

Some states have also recently seen scanning and probing of their election-related systems, which in most cases originated from servers operated by a Russian company. However, we are not now in a position to attribute this activity to the Russian Government. The USIC and the Department of Homeland Security . . . assess that it would be extremely difficult for someone, including a nation-state actor, to alter actual ballot counts or election results by cyber attack or intrusion. This assessment is based on the decentralized nature of our election system in this country and the number of protections state and local election officials have in place. States ensure that voting machines are not connected to the Internet, and there are numerous checks and balances as well as extensive oversight at multiple levels built into our election process.³⁵

The timing of the announcement was understood to be politically delicate. A senior administration official stated that President Obama was “under pressure to act” soon because a statement closer to Election Day might appear too political.³⁶ A media report claimed, however, that FBI Director James B. Comey advised the administration against publishing the October 7 statement, since he was concerned about the propriety of what some might view as a politically motivated intervention into the late stages of the

³⁴ See Dep't of Homeland Sec. & Office of the Dir. of Nat'l Intelligence Press Release, Joint Statement from the Department of Homeland Security and Office of the Director of National Intelligence on Election Security (Oct. 7, 2016), at <https://www.dhs.gov/news/2016/10/07/joint-statement-department-homeland-security-and-office-director-national>.

³⁵ *Id.* In addition, after the statement was released, WikiLeaks published hacked emails from John D. Podesta, the campaign chairman for Hillary Clinton. David E. Sanger & Charlie Savage, *U.S. Says Russia Directed Hacks to Influence Elections*, N.Y. TIMES (Oct. 7, 2016), at <http://www.nytimes.com/2016/10/08/us/politics/us-formally-accuses-russia-of-stealing-dnc-emails.html>. Podesta said that he was “not happy about being hacked by the Russians in their quest to throw the election to Donald Trump.” John Podesta (@johnpodesta), TWITTER (Oct. 7, 2016, 4:42 PM), at <https://twitter.com/johnpodesta/status/784539455453560833>. It was not initially clear whether the administration had also attributed this hack to the Russian government. See, e.g., White House Press Release, Press Briefing by Press Secretary Josh Earnest (Oct. 21, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/10/21/press-briefing-press-secretary-josh-earnest-10212016> (“I believe what the intelligence community and the Department of Homeland Security have said is that the kinds of tactics that we saw with regard to the malicious activity on Mr. Podesta's email account are similar to the kinds of tactics that we've seen used in other places. . . . But I'm not aware of any sort of formal determination that ascribes responsibility to one country or one actor with regard to the malicious activity in Mr. Podesta's email account.”). However, a private security firm later concluded that the same hackers were responsible for both the DNC and Podesta hacks. Nicole Perloth & Michael D. Shear, *Private Security Group Says Russia Was Behind John Podesta's Email Hack*, N.Y. TIMES (Oct. 20, 2016), at <https://www.nytimes.com/2016/10/21/us/private-security-group-says-russia-was-behind-john-podestas-email-hack.html>. In addition, Director of National Intelligence James Clapper stated on January 5, 2017, that the October 7 statement could be extended to Mr. Podesta's emails, even if it did not include them at the time, based on evidence gathered by the intelligence community after that statement. See *Hearing to Receive Testimony on Foreign Cyber Threats to the United States Before the S. Comm. on Armed Servs.*, 115th Cong. 62 (2017), available at http://www.armed-services.senate.gov/imo/media/doc/17-01_01-05-17.pdf [hereinafter *Foreign Cyber Threats Hearing*] (statement of James R. Clapper, Jr., Director of Nat'l Intelligence) (“I would have to research the exact chronology of when John Podesta's emails were compromised. But I think, though, that bears on my statement that our assessment now is that is even more resolute than it was with that statement on the 7th of October.”).

³⁶ Sanger & Savage, *supra* note 35.

presidential campaign.³⁷ Consequently, the statement was released without the FBI's name on it, despite the fact that the FBI had taken the lead in investigating the DNC and DCCC hacks.³⁸

Russian officials dismissed the claims in the statement. A Foreign Ministry spokesperson said that “[t]he US side has failed to provide any facts or arguments to corroborate its allegations.”³⁹ Similarly, Putin criticized

the hysteria the USA has whipped up over supposed Russian meddling in the American presidential election. The United States has plenty of genuinely urgent problems, it would seem, from the colossal public debt to the increase in firearms violence and cases of arbitrary action by the police.

You would think that the election debates would concentrate on these and other unresolved problems, but the elite has nothing with which to reassure society, it seems, and therefore attempt to distract public attention by pointing instead to supposed Russian hackers, spies, agents of influence and so forth.

I have to ask myself and ask you too: Does anyone seriously imagine that Russia can somehow influence the American people's choice?⁴⁰

Press Secretary Earnest, in response, said that Putin's statement was “not surprising,” and did not “undermine our confidence in the analysis that's been put forward by the intelligence community and the Department of Homeland Security.”⁴¹

In the wake of the October accusation, it was not immediately clear what measures the United States might take in response. Earlier in the year, responding to inquiries about how the United States would respond if the FBI concluded that the Russian government was involved in the hacks, a White House deputy press secretary had said:

[G]enerally speaking, if you look at how the United States has responded to intrusions by state actors into cyber infrastructure within the United States, there's a whole host of options available to us. That includes economic sanctions that would be housed at the Department of Treasury, and

³⁷ Ellen Nakashima, *Comey Was Concerned Publicly Blaming Russia for Hacks of Democrats Could Appear Too Political in Run-up to Elections*, WASH. POST (Nov. 1, 2016), at https://www.washingtonpost.com/world/national-security/fbi-director-james-b-comey-was-concerned-that-publicly-blaming-russia-for-hacks-of-democrats-could-appear-too-political-in-runup-to-nov-8/2016/10/31/b01a8be4-9fab-11e6-8832-23a007c77bb4_story.html.

³⁸ *Id.*

³⁹ Ministry of Foreign Aff. of the Russ. Fed'n Press Release, Briefing by Foreign Ministry Spokesperson Maria Zakharova, Moscow (Oct. 13, 2016), at http://www.mid.ru/en/web/guest/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2498635#11; see also Ministry of Foreign Aff. of the Russ. Fed'n Press Release, Foreign Minister Sergey Lavrov's Interview with Amanpour Program on CNN International, Moscow (Oct. 12, 2016), at http://www.mid.ru/en/web/guest/meropriyatiya_s_uchastiem_ministra/-/asset_publisher/xK1BhB2bUjd3/content/id/2497676 (“Now everybody in the United States is saying that it is Russia which is running the United States presidential debate. It's flattering, . . . but it has nothing to be explained by the facts. We have not seen a single fact, a single proof. . .”).

⁴⁰ Vladimir Putin, President of Russ., Remarks at the 13th Annual Meeting of the Valdai International Discussion Club (Oct. 27, 2016), at <http://en.special.kremlin.ru/events/president/transcripts/53151>.

⁴¹ White House Press Release, Press Briefing by Press Secretary Josh Earnest (Oct. 27, 2016), at <https://obama-whitehouse.archives.gov/the-press-office/2016/10/27/press-briefing-press-secretary-josh-earnest-10272016>. Indeed, even after the election took place, the Director of the National Security Agency, Adm. Michael S. Rogers, reiterated that Russia's hacking was “a conscious effort by a nation-state to attempt to achieve a specific effect.” Wall Street Journal (@WSJ), TWITTER (Nov. 15, 2016, 2:02 PM), at <https://twitter.com/WSJ/status/798647324687929344>.

that does include law enforcement measures that could be taken out of the Department of Justice.⁴²

Elaborating after the October 7 statement was issued, Earnest asserted that the United States would

ensure that [its] response is proportional. It is unlikely that our response would be announced in advance. It's certainly possible that the President could choose response options that we never announce. The President has talked before about the significant capabilities that the U.S. government has to both defend our systems in the United States, but also carry out offensive operations in other countries. So there are a range of responses that are available to the President, and he will consider a response that's proportional.⁴³

Vice President Biden followed up on October 15, saying:

We're sending a message. We have the capacity to do it. . . . [President Putin wi]ll know it. And it will be at the time of our choosing. And under the circumstances that have the greatest impact. . . . And . . . to the extent that they [fundamentally alter the election], we will be proportional in what we do.⁴⁴

Vice President Biden further stated that he “hope[d]” the public would not know it when the “message [wa]s . . . sent.”⁴⁵ In response, Putin said that “[t]here [wa]s nothing surprising about that [statement]. . . . You can expect anything from our US friends. But was there anything new in what he said? As if we didn't know that US government bodies snoop on and wiretap everyone?”⁴⁶

According to media reports, Obama contacted Putin privately in October to warn him about using cyberattacks to disrupt the election.⁴⁷ The White House also sent a message directly to the

⁴² White House Press Release, Press Gaggle by Principal Deputy Press Secretary Eric Schultz En Route Atlanta, Georgia (Aug. 1, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/08/01/press-gaggle-principal-deputy-press-secretary-eric-schultz-en-route>. See also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law*, 109 AJIL 419, 419–22 (2015) (describing U.S. response to North Korea hack of Sony Pictures Entertainment); 109 AJIL 880, 880–82 (2015) (describing U.S. response to cyberattacks from China, some of which were characterized as economic espionage).

⁴³ White House Press Release, Press Gaggle by Press Secretary Josh Earnest En Route Greensboro, NC (Oct. 11, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/10/11/press-gaggle-press-secretary-josh-earnest-en-route-greensboro-nc>. This statement is consistent with language used by President Obama before the statement was released. See White House Press Release, Remarks by President Obama and Prime Minister Lee of Singapore in Joint Press Conference (Aug. 2, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/08/02/remarks-president-obama-and-prime-minister-lee-singapore-joint-press> (“[W]e have provisions in place where if we see evidence of a malicious attack by a state actor, we can impose potentially certain proportional penalties.”).

⁴⁴ *Meet the Press - October 16, 2016*, NBC NEWS (Oct. 16, 2016), at <http://www.nbcnews.com/meet-the-press/meet-press-october-16-2016-n667251>.

⁴⁵ *Id.*

⁴⁶ President of Russ. Press Release, Vladimir Putin Answered Questions from Russian Journalists (Oct. 16, 2016), at <http://en.kremlin.ru/events/president/news/53103>.

⁴⁷ David Ignatius, *In Our New Cold War, Deterrence Should Come Before Détente*, WASH. POST (Nov. 15, 2016), at https://www.washingtonpost.com/opinions/global-opinions/in-our-new-cold-war-deterrence-should-come-before-detente/2016/11/15/051f4a84-ab79-11e6-8b45-f8e493f06fcd_story.html; see also David E. Sanger, *Under the Din of the Presidential Race Lies a Once and Future Threat: Cyberwarfare*, N.Y. TIMES (Nov. 6, 2016), at <http://www.nytimes.com/2016/11/07/us/politics/under-the-din-of-the-presidential-race-lies-a-once-and-future-threat-cyberwarfare.html>. President Obama later stated that he had also raised the issue with President Putin even earlier, in September 2016. See White House Press Release, Press Conference by the President (Dec. 16, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/16/press-conference-president> [hereinafter Dec. 16 Press Conference] (“[I]n early September, when I saw President Putin in

Russian government on October 31 regarding “malicious cyberactivity” that was “targeting U.S. state election-related systems.”⁴⁸ It did so using a special channel created as part of the Nuclear Risk Reduction Center, using a template intended for crisis communication; use of this particular channel “was part of the messaging,” according to a senior administration official.⁴⁹

Following the election, legislators called for further investigation into Russia’s influence on the election. Senator Lindsey Graham demanded Senate hearings to determine if the Russian government interfered with the election, asserting that “Putin should be punished” if that was the case.⁵⁰ Similarly, Representative Elijah Cummings, a member of the House Oversight Committee, wrote to the committee’s chairman to ask for a “bipartisan” look at Russia’s involvement in the election.⁵¹ However, neither the Senate nor the House of Representatives appeared to take any immediate steps in response to these requests.

On November 26, in response to questions regarding an investigation into the integrity of the presidential election, a senior administration official stated:

The Kremlin probably expected that publicity surrounding the disclosures that followed the Russian Government-directed compromises of e-mails from U.S. persons and institutions, including from U.S. political organizations, would raise questions about the integrity of the election process that could have undermined the legitimacy of the President-elect. Nevertheless, we stand behind our election results, which accurately reflect the will of the American people.

The Federal government did not observe any increased level of malicious cyber activity aimed at disrupting our electoral process on election day. . . . [W]e remained confident in the overall integrity of electoral infrastructure, a confidence that was borne out on election day. As a result, we believe our elections were free and fair from a cybersecurity perspective.

That said, since we do not know if the Russians had planned any malicious cyber activity for election day, we don’t know if they were deterred from further activity by the various warnings the U.S. government conveyed.⁵²

Nonetheless, on December 9, it was reported that the CIA and other intelligence agencies had determined with “high confidence” that the Russian government conducted the cyberattacks in order to benefit Donald Trump in the election and to harm Hillary Clinton’s candidacy.⁵³

China, I . . . talk[ed] to him directly and t[old] him to cut it out, and there were going to be some serious consequences if he didn’t.”

⁴⁸ David E. Sanger, *White House Confirms Pre-election Warning to Russia over Hacking*, N.Y. TIMES (Nov. 16, 2016), at <http://www.nytimes.com/2016/11/17/us/politics/white-house-confirms-pre-election-warning-to-russia-over-hacking.html>.

⁴⁹ Ignatius, *supra* note 47.

⁵⁰ Marina Fang, *Lindsey Graham Calls for Senate Investigation into Whether Russia Hacked DNC*, HUFFINGTON POST (Nov. 15, 2016), at http://www.huffingtonpost.com/entry/russia-dnc-hack-lindsey-graham_us_582bb306e4b0e39c1fa703d5.

⁵¹ Tal Kopan, *Top Democrat Calls for Investigation into Russia’s Role in US Election*, CNN (Nov. 17, 2016), at <http://www.cnn.com/2016/11/17/politics/house-oversight-democrat-investigate-russia>.

⁵² *U.S. Statement on Reliability of Election Results*, N.Y. TIMES (Nov. 26, 2016), at <http://www.nytimes.com/2016/11/26/us/politics/us-statement-on-reliability-of-election-results.html>.

⁵³ See Entous, Nakashima & Miller, *supra* note 16; Sanger & Shane, *supra* note 9. The FBI apparently did not initially join in this conclusion. See Mark Mazzetti & Eric Lichtblau, *C.I.A. Judgment on Russia Built on Swell of Evidence*, N.Y. TIMES (Dec. 11, 2016), at <https://www.nytimes.com/2016/12/11/us/politics/cia-judgment-intelligence-russia-hacking-evidence.html>. However, an email sent by CIA Director John Brennan on December 16 said that Brennan had “met separately with FBI [Director] . . . Comey and DNI . . . Clapper, and there [wa]s strong consensus among [them] on the scope, nature, and intent of Russian interference in our presidential election.” Adam Entous & Ellen Nakashima, *FBI in Agreement with CIA that Russia Aimed to Help Trump Win White House*, WASH. POST (Dec. 16, 2016), at <https://www.washingtonpost.com/politics/clinton-blames-putins->

Those agencies had previously indicated that they believed Russia had sought to undermine confidence in the U.S. electoral system.⁵⁴ However, the agencies reached a different conclusion—that Russia also acted with the goal of electing Mr. Trump—based on significant circumstantial evidence supporting that inference.⁵⁵ That evidence included another intelligence finding, reached with high confidence, that the Russian government had also hacked the computer systems of the Republican National Committee (RNC) but, according to a senior administration official, “conspicuously released no documents.”⁵⁶ One report indicated that intelligence officials believed that President Putin was personally involved in the Russian interference with the election, in part because of a “vendetta” against Mrs. Clinton.⁵⁷ Putin had previously accused Mrs. Clinton, as secretary of state, of personally inciting protests against him following Russia’s parliamentary elections.⁵⁸

President-elect Trump immediately denounced the agencies’ conclusion and the quality of the underlying evidence. The same day the reports emerged, Trump’s transition office released a statement criticizing the agencies:

These are the same people that said Saddam Hussein had weapons of mass destruction. The election ended a long time ago in one of the biggest Electoral College victories in history. It’s now time to move on and ‘Make America Great Again.’⁵⁹

[personal-grudge-against-her-for-election-interference/2016/12/16/12f36250-c3be-11e6-8422-eac61c0ef74d_story.html](https://www.nytimes.com/2016/12/16/12f36250-c3be-11e6-8422-eac61c0ef74d_story.html) (first alteration in original).

⁵⁴ Entous, Nakashima & Miller, *supra* note 16; *see also* Sanger & Shane, *supra* note 9.

⁵⁵ Mazzetti & Lichtblau, *supra* note 53. The CIA had shared this assessment with key senators in a closed-door briefing the week before these reports were made public. Entous, Nakashima & Miller, *supra* note 16. On November 29, a group of seven Democrats from the Senate Intelligence Committee sent a letter to President Obama, which said: “We believe there is additional information concerning the Russian Government and the U.S. election that should be declassified and released to the public.” Letter from Ron Wyden et al. to the President (Nov. 29, 2016), *available at* <https://www.wyden.senate.gov/download/?id=D12DD589-5800-4BEF-9F93-A0A122F38D29>. According to administration officials, the senators specifically requested that the White House release parts of the CIA’s closed-door presentation. Entous, Nakashima & Miller, *supra* note 16. However, the White House did not take any apparent steps in response.

⁵⁶ Sanger & Shane, *supra* note 9. then-RNC Spokesperson Sean Spicer disputed this claim, stating that “The RNC was not ‘hacked’. The @nytimes was told and chose to ignore.” Sean Spicer (@seanspicer), TWITTER (Dec. 9, 2016, 8:29 PM), *at* <https://twitter.com/seanspicer/status/807442009778688000>; *see also* Sanger & Shane, *supra* note 9 (describing denials by RNC officials). FBI Director Comey later testified that

[t]here was evidence that there was hacking directed at . . . the RNC, but old domains of the RNC, that is, e-mail domains that they were no longer using, and that information was harvested from there, but that it was old stuff. None of that was released. We did not develop any evidence that the Trump campaign or the current RNC was successfully hacked.

Russian Intelligence Activities: Hearing Before the S. Select Comm. on Intelligence, 115th Cong. (2017), *available at* <https://www.intelligence.senate.gov/hearings/open-hearing-russian-intelligence-activities> [hereinafter Russian Intelligence Activities Hearing] (statement of James Comey, Director, Fed. Bureau of Investigation).

⁵⁷ William M. Arkin, Ken Dilanian & Cynthia McFadden, *U.S. Officials: Putin Personally Involved in U.S. Election Hack*, NBC NEWS (Dec. 15, 2016), *at* <http://www.nbcnews.com/news/us-news/u-s-officials-putin-personally-involved-u-s-election-hack-n696146>. When asked if he believed that President Putin had “authorized the hack,” President Obama said: “Not much happens in Russia without Vladimir Putin. This is a pretty hierarchical operation. Last I checked, there’s not a lot of debate and democratic deliberation, particularly when it comes to policies directed at the United States.” Dec. 16 Press Conference, *supra* note 47.

⁵⁸ Mazzetti & Lichtblau, *supra* note 53; *see also* David M. Herszenhorn & Ellen Barry, *Putin Contends Clinton Incited Unrest over Vote*, N.Y. TIMES (Dec. 8, 2011), *at* <http://www.nytimes.com/2011/12/09/world/europe/putin-accuses-clinton-of-instigating-russian-protests.html>.

⁵⁹ Sanger & Shane, *supra* note 9.

Addressing the reports a few days later, Trump reiterated his concerns:

I think it's ridiculous. I think it's just another excuse. . . .

[I]f you look at the story and you take a look at what they said, there's great confusion. Nobody really knows.

And hacking is very interesting. Once they hack, if you don't catch them in the act, you're not going to catch them. They have no idea if it's Russia or China or somebody. It could be somebody sitting in a bed some place. I mean, they have no idea. . . .

I think the Democrats are putting [these reports] out because they suffered one of the greatest defeats in the history of politics in this country. . . . It's ridiculous.⁶⁰

Putin's response was similar. Questioning the strength of the agencies' evidence, he said:

The defeated party always tries to blame somebody on the outside. They should be looking for these problems closer to home.

Everybody keeps forgetting the most important point. For example, some hackers breached email accounts of the US Democratic Party leadership. Some hackers did that. But, as the President-elect rightly noted, does anyone know who those hackers were? Maybe they came from another country, not Russia. Maybe somebody just did it from their couch or bed. These days, it is very easy to designate a random country as the source of attack while being in a completely different location.⁶¹

Despite the reports, the Obama administration declined to blame the results of the election on the Russian government's interference. Obama acknowledged that

[t]here's no doubt that [the Russian hack of the DNC] contributed to an atmosphere in which the only focus for . . . months at a time . . . were Hillary's e-mails . . . [and] political gossip surrounding the DNC. And that whole swirl that ended up dominating the news meant that . . . issues weren't talked about a lot in the coverage. Huge policy differences were not debated and vetted. . . . And I think in that scrum, in that swirl, . . . Donald Trump and his celebrity and his ability to garner attention and obviously tap into a lot of the anxieties and fears that some voters . . . definitely made a difference.⁶²

However, he pointed out that "elections can always turn out differently. You never know which factors are [going to] make a difference."⁶³ Likewise, the White House press secretary did not elaborate on the administration's position regarding the agencies' determination.⁶⁴ Nonetheless, he added that

you didn't need a security clearance to figure out who benefitted from malicious Russian cyber activity. The President-elect didn't call it into question. He called on Russia to hack his opponent. He called on Russia to hack Secretary Clinton.⁶⁵ So he certainly had a pretty good sense of whose side this activity was coming down on. The last several weeks of the election were focused on a

⁶⁰ *Exclusive: Donald Trump on Cabinet Picks, Transition Process*, FOX NEWS (Dec. 11, 2016), at <http://www.foxnews.com/transcript/2016/12/11/exclusive-donald-trump-on-cabinet-picks-transition-process>.

⁶¹ President of Russ. Press Release, Vladimir Putin, Annual News Conference (Dec. 23, 2016, 3:55 PM), at <http://en.kremlin.ru/events/president/news/53573>.

⁶² *Transcript and Video: NPR's Exit Interview with President Obama*, NPR (Dec. 19, 2016, 5:00 AM), at <http://www.npr.org/2016/12/19/504998487/transcript-and-video-nprs-exit-interview-with-president-obama>.

⁶³ *Id.*

⁶⁴ See White House Press Release, Press Briefing by Press Secretary Josh Earnest (Dec. 12, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/12/press-briefing-press-secretary-josh-earnest-121216> [hereinafter Dec. 12 Press Briefing] ("If that's something that can be shared publicly, that's going to come from the intelligence community. It's not going to come from here.")

⁶⁵ [Editors' note: In July 2016, Donald Trump said: "Russia, if you're listening, I hope you're able to find the 30,000 emails that are missing"—an apparent reference to Hillary Clinton's deleted emails. He added: "I think you will probably be rewarded mightily by our press." Ashley Parker & David E. Sanger, *Donald Trump Calls on*

discussion of emails that had been hacked and leaked by the Russians. These were emails from the DNC and John Podesta—not from the RNC and Steve Bannon.⁶⁶

At the same time as the reports were published, a White House deputy press secretary announced that Obama had “instructed the intelligence community to conduct a full review of the pattern of malicious cyber activity related to our presidential election cycle,” and to ensure that the subsequent “report be completed and submitted to him before the end of his term.”⁶⁷ The review was ordered with a comprehensive scope: “to look at malicious activity timed to our presidential election cycle. And so it will be broader than just looking at this past election.”⁶⁸ In fact, the review would “put [malicious cyber activity] in a greater context. . . . dating all the way back to 2008.”⁶⁹ As a result, the press secretary confirmed, the review would not “be looking [just] at Russia,” but would instead “follow the facts wherever they may lead[,] if that includes other either state actors or non-state actors.”⁷⁰ Given that the 2008 election cycle, for example, involved cyber intrusions by Chinese actors, the review would “be looking at all foreign actors and any attempt to interfere with the elections.”⁷¹ After the report was completed, the administration would

make public as much as we can. Obviously, . . . a report like this is going to contain highly sensitive and even classified information, perhaps, so when that report is submitted we’re going to take a look. We want to make sure we brief Congress and relevant stakeholders, like possibly state administrators who actually operationalize the elections.⁷²

In addition, several congressional committees announced that they would conduct their own investigations into Russia’s interference with the 2016 election. Senator Mitch McConnell stated on December 12 that a panel of senators from the Senate Intelligence Committee, led by Senator Richard Burr, would pursue a bipartisan investigation of Russia’s interference in the election.⁷³ That inquiry would examine, among other things,

- [T]he intelligence that informed the Intelligence Community Assessment [ordered by the White House];

Russia to Find Hillary Clinton’s Missing Emails, N.Y. TIMES (July 27, 2016), at <https://www.nytimes.com/2016/07/28/us/politics/donald-trump-russia-clinton-emails.html>.]

⁶⁶ Dec. 12 Press Briefing, *supra* note 64.

⁶⁷ White House Press Release, Press Briefing by Principal Deputy Press Secretary Eric Schultz (Dec. 9, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/09/press-briefing-principal-deputy-press-secretary-eric-schultz-12916> [hereinafter Dec. 9 Press Briefing]. Media reports indicated that DNI Clapper would lead the review. Entous, Nakashima & Miller, *supra* note 16.

⁶⁸ Dec. 9 Press Briefing, *supra* note 67.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*; see also Ellen Nakashima, *National Intelligence Director: Hackers Have Targeted 2016 Presidential Campaigns*, WASH. POST (May 18, 2016), at https://www.washingtonpost.com/world/national-security/national-intelligence-director-hackers-have-trying-to-spy-on-2016-presidential-campaigns/2016/05/18/2b1745c0-1d0d-11e6-b6e0-c53b7ef63b45_story.html (summarizing previous election-related hacking incidents).

⁷² Dec. 9 Press Briefing, *supra* note 67.

⁷³ Ed O’Keefe & Paul Kane, *McConnell Announces Senate Probe of Suspected Russian Election Interference: “The Russians Are Not Our Friends,”* WASH. POST (Dec. 12, 2016), at <https://www.washingtonpost.com/news/powerpost/wp/2016/12/12/schumer-on-congressional-probe-of-russia-i-dont-want-this-to-turn-into-a-benghazi-investigation>; Jennifer Steinhauer, *Senate and House Leaders Call for Inquiry of Russian Hacking in Election*, N.Y. TIMES (Dec. 12, 2016), at <https://www.nytimes.com/2016/12/12/us/politics/mcconnell-supports-inquiry-of-russian-hacking-during-election.html>.

- Counterintelligence concerns related to Russia and the 2016 U.S. election, including any intelligence regarding links between Russia and individuals associated with political campaigns;
- Russian cyber activity and other “active measures” directed against the U.S., both as it regards the 2016 election and more broadly.⁷⁴

House Speaker Paul D. Ryan also said that he supported an ongoing investigation by Rep. Devin Nunes, the chairman of the House Intelligence Committee.⁷⁵ That investigation would address:

- Russian cyber activity and other “active measures” directed against the U.S. and its allies;
- Counterintelligence concerns related to Russia and the 2016 U.S. election, including any intelligence regarding links between Russia and individuals associated with political campaigns;
- The United States Government response to these Russian active measures and any impact they may have on intelligence relationships and traditional alliances; and
- Possible leaks of classified information related to the Intelligence Community’s assessments of these matters.⁷⁶

Finally, members of the Senate Armed Services Committee indicated that the committee would conduct a bipartisan inquiry regarding Russia’s cyberthreats to the military, which could shed light on its interference with the election.⁷⁷ Discussing these investigations, Press Secretary Earnest noted that the White House had “long supported the principle of congressional review of” Russian interference in the election.⁷⁸ He further stated that the Obama administration would “[a]bsolutely” cooperate in sharing information with the investigations, since “the [A]dministration and national security professionals, both high-ranking officials and those farther down the chain, have been in regular touch with members of Congress on this matter.”⁷⁹

⁷⁴ Richard Burr, U.S. Senator for N.C. Press Release, Joint Statement on Committee Inquiry into Russian Intelligence Activities (Jan. 13, 2017), at <https://www.burr.senate.gov/press/releases/joint-statement-on-committee-inquiry-into-russian-intelligence-activities>.

⁷⁵ Steinhauer, *supra* note 73.

⁷⁶ U.S. House of Representatives, Permanent Select Comm. on Intelligence Press Release, Joint Statement on Progress of Bipartisan HPSCI Inquiry into Russian Active Measures (Jan. 25, 2017), at <http://democrats-intelligence.house.gov/news/documentsingle.aspx?DocumentID=211>.

⁷⁷ See *Face the Nation Transcript December 11, 2016: McCain, Conway, Sanders*, FACE THE NATION (Dec. 11, 2016), at <http://www.cbsnews.com/news/face-the-nation-transcript-december-11-2016-mccain-conway-sanders> (noting statement by Senator John McCain that “rogue states . . . view cyber as a form of warfare”); Jack Reed, U.S. Senator for R.I. Press Release, Reed Backs Bipartisan Probe into Russian Cyberthreats (Dec. 9, 2016), at <https://www.reed.senate.gov/news/releases/reed-backs-bipartisan-probe-into-russian-cyberthreats>.

Some senators also called for an independent commission to review Russian interference with the election. See Ben Cardin, U.S. Senator for MD Press Release, Senators Cardin, Feinstein, Leahy Call for Independent Nonpartisan Commission to Investigate Russian Interference in Election (Dec. 12, 2016), at <https://www.cardin.senate.gov/newsroom/press/release/senators-cardin-feinstein-leahy-call-for-independent-nonpartisan-commission-to-investigate-russian-interference-in-election>; see also Charles Schumer, U.S. Senator for N.Y. Press Release, Schumer Remarks Calling for Senate Select Committee to Investigate Russian Interference in 2016 Elections (Dec. 18, 2016), at <https://www.schumer.senate.gov/newsroom/press-releases/schumer-remarks-calling-for-senate-select-committee-to-investigate-russian-interference-in-2016-elections> (outlining benefits of independent committee). However, Senator McConnell and House Speaker Ryan asserted that the intelligence committees were capable of conducting an inquiry on their own, and they did not take any steps to form an independent commission. O’Keefe & Kane, *supra* note 73.

⁷⁸ Dec. 12 Press Briefing, *supra* note 64.

⁷⁹ *Id.*

In addition, in an unusual step, a bipartisan group of electors from the Electoral College wrote an open letter to DNI Clapper on December 12.⁸⁰ The letter stated:

The Electors require to know from the intelligence community whether there are ongoing investigations into ties between Donald Trump, his campaign or associates, and Russian government interference in the election, the scope of those investigations, how far those investigations may have reached, and who was involved in those investigations. We further require a briefing on all investigative findings, as these matters directly impact the core factors in our deliberations of whether Mr. Trump is fit to serve as President of the United States.

Additionally, the Electors will separately require from Donald Trump conclusive evidence that he and his staff and advisors did not accept Russian interference, or otherwise collaborate during the campaign, and conclusive disavowal and repudiation of such collaboration and interference going forward.⁸¹

Nonetheless, it does not appear that the Obama administration, the intelligence community, or Trump himself disclosed any information in response to this request.

On December 29, the administration took several public actions to respond to Russian interference with the election.⁸² First, Obama issued Executive Order 13,757, which amended Executive Order 13,694 in order to allow sanctions against foreign actors engaging in “cyber-enabled malicious activities that . . . [t]amper with, alter, or cause a misappropriation of information with the purpose or effect of interfering with or undermining election processes or institutions.”⁸³ Second, pursuant to the new executive order, Obama “sanctioned nine entities and individuals: two Russian intelligence services (the GRU and the FSB); four individual officers of the GRU; and three companies that provided material

⁸⁰ Letter from Christine Pelosi, Cal. Presidential Elector et al. to James Clapper, Director of Nat’l Intelligence (Dec. 12, 2016), available at <https://extranewsfeed.com/bipartisan-electors-ask-james-clapper-release-facts-on-outside-interference-in-u-s-election-c1a3d11d5b7b#.f5yd5dpsq>.

⁸¹ *Id.*

⁸² See *supra* notes 42–45 and corresponding text.

⁸³ White House Press Release, Fact Sheet: Actions in Response to Russian Malicious Cyber Activity and Harassment (Dec. 29, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/29/fact-sheet-actions-response-russian-malicious-cyber-activity-and> [hereinafter Fact Sheet]; see also Exec. Order No. 13,757 §1, 82 Fed. Reg. 1, 1 (Jan. 3, 2017). Executive Order 13,694 had stated, in relevant part:

- (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:
 - (i) any person determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be responsible for or complicit in, or to have engaged in, directly or indirectly, cyber-enabled activities originating from, or directed by persons located, in whole or in substantial part, outside the United States that are reasonably likely to result in, or have materially contributed to, a significant threat to the national security, foreign policy, or economic health or financial stability of the United States and that have the purpose or effect of:
 - (A) harming, or otherwise significantly compromising the provision of services by, a computer or network of computers that support one or more entities in a critical infrastructure sector;
 - (B) significantly compromising the provision of services by one or more entities in a critical infrastructure sector;
 - (C) causing a significant disruption to the availability of a computer or network of computers; or
 - (D) causing a significant misappropriation of funds or economic resources, trade secrets, personal identifiers, or financial information for commercial or competitive advantage or private financial gain

Exec. Order No. 13,694 §1(a)(i)(A)–(D), 3 C.F.R. §297, 297 (2015); see also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law*, 109 AJIL 643, 658 (2015) (describing order in detail).

support to the GRU's cyber operations."⁸⁴ Third, the Office of Foreign Assets Control imposed sanctions on two individuals pursuant to Executive Order 13,694 for "engag[ing] in significant malicious cyber-enabled misappropriation of financial information" or "personal identifiers" for private financial gain.⁸⁵

Fourth, the State Department "declared persona non grata 35 Russian officials operating in the United States who were acting in a manner inconsistent with their diplomatic or consular status."⁸⁶ The State Department "also informed the Russian Government that it would deny Russian personnel access to two recreational compounds in the United States owned by the Russian Government."⁸⁷ A deputy spokesperson specified that the Department

took these actions as part of a comprehensive response to Russia's interference in the U.S. election and to a pattern of harassment of our diplomats overseas that has increased over the last four years, including a significant increase in the last 12 months. This harassment has involved arbitrary police stops, physical assault, and the broadcast on State TV of personal details about our personnel that put them at risk. In addition, the Russian Government has impeded our diplomatic operations by, among other actions: forcing the closure of 28 American corners which hosted cultural programs and English-language teaching; blocking our efforts to begin the construction of a new, safer facility for our Consulate General in St. Petersburg; and rejecting requests to improve perimeter security at the current, outdated facility in St. Petersburg.⁸⁸

Finally, the Department of Homeland Security and FBI released a Joint Analysis Report (the JAR) that expanded on the Obama administration's October 7 statement accusing the Russian government of interfering in the election.⁸⁹ The JAR

⁸⁴ Fact Sheet, *supra* note 83; *see also* Exec. Order No. 13,757, *supra* note 83, at §1 & Annex, 82 Fed. Reg. at 1, 3 (adding entities and individuals to list of persons who could be sanctioned under Executive Order 13,694). The five entities sanctioned were the "Main Intelligence Directorate (a.k.a. Glavnoe Razvedyvatel'noe Upravlenie) (a.k.a. GRU)"; the "Federal Security Service (a.k.a. Federalnaya Sluzhba Bezopasnosti) (a.k.a. FSB)"; "Special Technology Center (a.k.a. STLC, Ltd. Special Technology Center St. Petersburg)"; "Zorsecurity (a.k.a. Esage Lab)"; and "Autonomous Noncommercial Organization 'Professional Association of Designers of Data Processing Systems' (a.k.a. ANO PO KSI)." *Id.*, at Annex, 82 Fed. Reg. at 3. "STLC . . . assisted the GRU in conducting signals intelligence operations; Zorsecurity . . . provided the GRU with technical research and development; and . . . ANO PO KSI . . . provided specialized training to the GRU." Fact Sheet, *supra* note 83. The four individuals sanctioned were Igor Valentinovich Korobov, Sergey Aleksandrovich Gizunov, Igor Olegovich Kostyukov, and Vladimir Stepanovich Alexseyev. Exec. Order No. 13,757, *supra* note 83, at Annex, 82 Fed. Reg. at 3. Korobov is the current chief of the GRU, and the other three individuals are deputy chiefs. Fact Sheet, *supra* note 83.

⁸⁵ Fact Sheet, *supra* note 83; *see also* *Issuance of Amended Executive Order 13694; Cyber-Related Sanctions Designations*, U.S. DEP'T OF THE TREASURY (Dec. 29, 2016), at <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20161229.aspx>. The two individuals, Evgeniy Mikhailovich Bogachev and Aleksey Alekseyevich Belan, were sanctioned under Section 1(a)(i)(D) of Executive Order 13694. *See* Fact Sheet, *supra* note 83; Exec. Order No. 13,694, *supra* note 83, at §1(a)(i)(D), 3 C.F.R. §297, 297. "Bogachev and his cybercriminal associates [we]re responsible for the theft of over \$100 million from U.S. financial institutions, Fortune 500 firms, universities, and government agencies." Fact Sheet, *supra* note 83. "Belan compromised the computer networks of at least three major United States-based e-commerce companies." *Id.*

⁸⁶ U.S. Dep't of State Press Release, Department of State Actions in Response to Russian Harassment (Dec. 29, 2016), at <https://2009-2017.state.gov/r/pa/prs/ps/2016/12/266145.htm> [hereinafter Department of State Actions].

⁸⁷ *Id.* State Department officials indicated that these compounds—in Upper Brookville, New York, and Maryland's Eastern Shore—were used for Russian intelligence activities, but it is unclear whether they were used in connection with the election-related intrusions. David E. Sanger, *Obama Strikes Back at Russia for Election Hacking*, N.Y. TIMES (Dec. 29, 2016), at <https://www.nytimes.com/2016/12/29/us/politics/russia-election-hacking-sanctions.html>.

⁸⁸ Department of State Actions, *supra* note 86.

⁸⁹ U.S. Dep't of Homeland Sec. Press Release, Joint DHS, ODNI, FBI Statement on Russian Malicious Cyber Activity (Dec. 29, 2016), at <https://www.dhs.gov/news/2016/12/29/joint-dhs-odni-fbi-statement-russian-malicious-cyber-activity>.

provide[d] technical details regarding the tools and infrastructure used by the Russian civilian and military intelligence Services (RIS) to compromise and exploit networks and endpoints associated with the U.S. election, as well as a range of U.S. Government, political, and private sector entities.⁹⁰

As a summary in the JAR explained further, “[t]his activity by RIS is part of an ongoing campaign of cyber-enabled operations directed at the U.S. government and its citizens.” Consequently, “[t]his JAR provide[d] technical indicators related to many of these operations, recommended mitigations, suggested actions to take in response to the indicators provided, and information on how to report such incidents to the U.S. Government.”⁹¹

Moreover, Obama asserted that “[t]hese actions are not the sum total of our response to Russia’s aggressive activities. We will continue to take a variety of actions at a time and place of our choosing, some of which will not be publicized.”⁹² As a result, as a senior administration official said,

there may be things that commence while we’re in office in addition to what we’re saying today. When the [Trump] [A]dministration takes office, it’s entirely their judgment as to whether or not they continue down the course that we have set in a number of different areas.⁹³

Russia’s planned response was not immediately clear. The Russian foreign minister initially said that Russia would

definitely respond to these actions. Reciprocity is a basic tenet of international diplomacy and international relations. Therefore, the Russian Foreign Ministry and colleagues from other agencies have submitted a proposal to the President of Russia to declare “*persona non grata*” 31 diplomats from the US Embassy in Moscow and four diplomats from the US Consulate General in St Petersburg. Furthermore, we have proposed shutting down the US dacha (recreation facility) in Serebryanny Bor and the US Embassy warehouse on Dorozhnaya Street. We hope these proposals will be considered as a priority.⁹⁴

Less than two hours later, however, Putin issued a statement that seemed to take a softer line:

We regard the recent unfriendly steps taken by the outgoing US administration as provocative and aimed at further weakening the Russia-US relationship. This runs contrary to the fundamental interests of both the Russian and American people. Considering the global security responsibilities of Russia and the United States, this is also damaging to international relations as a whole.

⁹⁰ NAT’L CYBERSEC. & COMM’NS INTEGRATION CTR. & FED. BUREAU OF INVESTIGATION, GRIZZLY STEPPE – RUSSIAN MALICIOUS CYBER ACTIVITY 1 (2016), at https://www.us-cert.gov/sites/default/files/publications/JAR_16-20296A_GRIZZLY%20STEPPE-2016-1229.pdf. A summary in the Joint Analysis Report (JAR) noted that “[p]revious JARs have not attributed malicious cyber activity to specific countries or threat actors. However, public attribution of these activities to RIS is supported by technical indicators from the U.S. Intelligence Community, DHS, FBI, the private sector, and other entities.” *Id.*

⁹¹ *Id.*

⁹² White House Press Release, Statement by the President on Actions in Response to Russian Malicious Cyber Activity and Harassment (Dec. 29, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/29/statement-president-actions-response-russian-malicious-cyber-activity>.

⁹³ White House Press Release, Press Call on the Administration Response to Russian Malicious Cyber Activity and Harassment (Dec. 29, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/29/press-call-administration-response-russian-malicious-cyber-activity-and>.

⁹⁴ Ministry of Foreign Aff. of the Russ. Fed’n Press Release, Comment by Foreign Minister Sergey Lavrov on Recent US Sanctions and the Expulsion of Russian Diplomats, Moscow (Dec. 30, 2016), at http://www.mid.ru/en/press_service/minister_speeches/-/asset_publisher/7OvQR5KJWVmr/content/id/2583996.

As it proceeds from international practice, Russia has reasons to respond in kind. Although we have the right to retaliate, we will not resort to irresponsible ‘kitchen’ diplomacy but will plan our further steps to restore Russian-US relations based on the policies of the Trump Administration.⁹⁵

Some legislators sought to impose greater sanctions on Russia. Senators McCain and Graham stated that these “retaliatory measures . . . [we]re a small price for Russia to pay.”⁹⁶ Consistent with this statement, on January 11, 2017, they cosponsored a bill with several other senators that would, among other things, impose certain sanctions on “persons engaging in significant activities undermining cybersecurity and democratic institutions,” as well as “persons engaging in transactions with the intelligence or defense sectors of the Government of the Russian Federation,” and would codify Executive Order 13694.⁹⁷ In addition, on February 8, Senator Graham introduced the Russia Sanctions Review Act of 2017.⁹⁸ That bill would require the Trump administration to submit two items to Congress before relaxing sanctions: (1) a description of any proposed sanctions relief; and (2) a certification that Moscow had stopped supporting actions to undermine the government of Ukraine and ceased cyberattacks against the United States.⁹⁹ Congress would then have 120 days either to pass a joint resolution of disapproval or to decline to act on the sanctions relief.¹⁰⁰

During this period, President-elect Trump’s position on Russian interference in the election remained unclear. Responding to the Obama administration’s sanctions, President-elect Trump simply stated that the “country [should] . . . move on to bigger and better things.”¹⁰¹ He then agreed to meet with intelligence officials so he could “be updated on the facts” of the hacking.¹⁰² Before then, however, Julian Assange repeated his claim “that [WikiLeaks] source [wa]s not the Russian government and it [wa]s not a state party.”¹⁰³ In response, Trump noted that “Julian Assange . . . said Russians did not give him the info!”¹⁰⁴ He later clarified: “The dishonest media likes saying that I am in Agreement with Julian Assange - wrong. I simply state what he states, it is for the people . . .¹⁰⁵ to make up their

⁹⁵ President of Russ. Press Release, Statement by the President of Russia (Dec. 30, 2016, 3:15 PM), at <http://en.kremlin.ru/events/president/news/53678>. Later that day, President-elect Trump noted his approval of this statement on Twitter. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 30, 2016, 11:41 AM), at <https://twitter.com/realDonaldTrump/status/814919370711461890> (“Great move on delay (by V. Putin) - I always knew he was very smart!”).

⁹⁶ John McCain, U.S. Senator AZ Press Release, McCain & Graham on New Sanctions Against Russia (Dec. 29, 2016), at <http://www.mccain.senate.gov/public/index.cfm/press-releases?ID=DFAE6FFD-976A-468C-B53B-15D548E46BD7>.

⁹⁷ Counteracting Russian Hostilities Act of 2017, S. 94, 115th Cong. §§103–05 (2017).

⁹⁸ See Russia Sanctions Review Act of 2017, S. 341, 115th Cong. (2017).

⁹⁹ *Id.* §4(a).

¹⁰⁰ See *id.* §§4(b)–(c).

¹⁰¹ Michael D. Shear, *Donald Trump, After Dismissing Hacking, Agrees to an Intelligence Briefing*, N.Y. TIMES (Dec. 29, 2016), at <https://www.nytimes.com/2016/12/29/us/politics/donald-trump-russia-hack.html>.

¹⁰² *Id.*

¹⁰³ *Julian Assange: Our Source Is Not the Russian Government*, FOX NEWS (Jan. 3, 2017), at <http://www.foxnews.com/transcript/2017/01/03/julian-assange-our-source-is-not-russian-government>; see also *infra* note 15 (noting similar previous assertion by Mr. Assange).

¹⁰⁴ Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 4, 2017, 4:22 AM), at <https://twitter.com/realDonaldTrump/status/816620855958601730>.

¹⁰⁵ Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 5, 2017, 5:25 AM), at <https://twitter.com/realDonaldTrump/status/816999062562107392>.

own minds as to the truth.”¹⁰⁶ That same day, however, Trump again questioned the attribution of the election hacking to Russia: “The D[NC] would not allow the FBI to study or see its computer info after it was supposedly hacked by Russia”¹⁰⁷ So how and why are they so sure about hacking if they never even requested an examination of the computer servers? What is going on?”¹⁰⁸ Vice President-elect Mike Pence claimed that Trump had “expressed his very sincere and healthy American skepticism about intelligence conclusions.”¹⁰⁹ However, DNI Clapper subsequently asserted that “there is an important distinction here between healthy skepticism, which policymakers . . . should always have for intelligence, . . . and disparagement.”¹¹⁰

At the January 6 briefing, intelligence officials presented Trump with the original, classified version of the report that the CIA, FBI, and NSA had prepared based on the comprehensive review ordered by President Obama.¹¹¹ The declassified version of the report, released later that day, stated:

We assess with high confidence that Russian President Vladimir Putin ordered an influence campaign in 2016 aimed at the US presidential election, the consistent goals of which were to undermine public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency.

- We also assess Putin and the Russian Government aspired to help President-elect Trump’s election chances when possible by discrediting Secretary Clinton and publicly contrasting her unfavorably to him. . . .¹¹²
- In trying to influence the US election, we assess the Kremlin sought to advance its longstanding desire to undermine the US-led liberal democratic order, the promotion of which Putin and other senior Russian leaders view as a threat to Russia and Putin’s regime.
- Putin publicly pointed to the Panama Papers disclosure and the Olympic doping scandal as US-directed efforts to defame Russia, suggesting he sought to use disclosures to discredit the image of the United States and cast it as hypocritical.

¹⁰⁶ Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 5, 2017, 5:45 AM), at <https://twitter.com/realDonaldTrump/status/817004210529116160>.

¹⁰⁷ Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 5, 2017, 4:30 PM), at <https://twitter.com/realDonaldTrump/status/817166353266262016>.

¹⁰⁸ Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 5, 2017, 4:40 PM), at <https://twitter.com/realDonaldTrump/status/817168818539757568>. Adding to these statements, the day before the intelligence briefing, President-elect Trump stated that the focus on Russian interference with the election was a “political witch hunt” to distract from the Democratic Party’s loss in the presidential election. See Michael D. Shear & David E. Sanger, *Putin Led a Complex Cyberattack Scheme to Aid Trump, Report Finds*, N.Y. TIMES (Jan. 6, 2017), at <https://www.nytimes.com/2017/01/06/us/politics/donald-trump-wall-hack-russia.html>.

¹⁰⁹ Antonio José Vielma, *Vice President-Elect Pence: Trump Expressed “Healthy American Skepticism” About US Intelligence Conclusions*, CNBC (Jan. 4, 2017), at <http://www.cnbc.com/2017/01/04/vice-president-elect-pence-trump-expressed-healthy-american-skepticism-about-us-intelligence-conclusions.html>.

¹¹⁰ Foreign Cyber Threats Hearing, *supra* note 35, at 51 (statement of James R. Clapper, Jr., Director of Nat’l Intelligence). Indeed, as DNI Clapper indicated, intelligence agencies in early January “st[ood] actually more resolutely on the strength of th[e] statement that we made on the 7th of October [attributing the hacks to the Russian government].” *Id.* at 31.

¹¹¹ See Shear & Sanger, *supra* note 108; see also *supra* notes 67–72 and corresponding text.

¹¹² The NSA only had “moderate confidence” in this assessment, while the CIA and FBI both had “high confidence.” OFFICE OF THE DIRECTOR OF NAT’L INTELLIGENCE, ICA 2017-01D, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS 1 (2017), available at <https://assets.documentcloud.org/documents/3254237/Russia-Hack-Report.pdf>.

- Putin most likely wanted to discredit Secretary Clinton because he has publicly blamed her since 2011 for inciting mass protests against his regime in late 2011 and early 2012, and because he holds a grudge for comments he almost certainly saw as disparaging him.

We assess Putin, his advisers, and the Russian Government developed a clear preference for President-elect Trump over Secretary Clinton.

- Beginning in June, Putin's public comments about the US presidential race avoided directly praising President-elect Trump, probably because Kremlin officials thought that any praise from Putin personally would backfire in the United States. Nonetheless, Putin publicly indicated a preference for President-elect Trump's stated policy to work with Russia, and pro-Kremlin figures spoke highly about what they saw as his Russia-friendly positions on Syria and Ukraine. Putin publicly contrasted the President-elect's approach to Russia with Secretary Clinton's "aggressive rhetoric."
- Moscow also saw the election of President-elect Trump as a way to achieve an international counterterrorism coalition against the Islamic State in Iraq and the Levant
- Putin, Russian officials, and other pro-Kremlin pundits stopped publicly criticizing the US election process as unfair almost immediately after the election because Moscow probably assessed it would be counterproductive to building positive relations.

We assess the influence campaign aspired to help President-elect Trump's chances of victory when possible by discrediting Secretary Clinton and publicly contrasting her unfavorably to the President-elect. When it appeared to Moscow that Secretary Clinton was likely to win the presidency the Russian influence campaign focused more on undercutting Secretary Clinton's legitimacy and crippling her presidency from its start, including by impugning the fairness of the election.

- Before the election, Russian diplomats had publicly denounced the US electoral process and were prepared to publicly call into question the validity of the results. Pro-Kremlin bloggers had prepared a Twitter campaign, #DemocracyRIP, on election night in anticipation of Secretary Clinton's victory, judging from their social media activity.¹¹³

The report also addressed the scope of the Russian government's intrusion into election-related activities:

We assess Russian intelligence services collected against the US primary campaigns, think tanks, and lobbying groups they viewed as likely to shape future US policies. In July 2015, Russian intelligence gained access to Democratic National Committee (DNC) networks and maintained that access until at least June 2016.

- The General Staff Main Intelligence Directorate (GRU) probably began cyber operations aimed at the US election by March 2016. We assess that the GRU operations resulted in the compromise of the personal e-mail accounts of Democratic Party officials and political figures. By May, the GRU had exfiltrated large volumes of data from the DNC.¹¹⁴

Finally, it detailed the methods that the Russian government used to interfere:

¹¹³ *Id.* at 1–2.

¹¹⁴ *Id.* at 2.

We assess with high confidence that the GRU used the Guccifer 2.0 persona, DCLeaks.com, and WikiLeaks to release US victim data obtained in cyber operations publicly and in exclusives to media outlets.

- Guccifer 2.0, who claimed to be an independent Romanian hacker, made multiple contradictory statements and false claims about his likely Russian identity throughout the election. Press reporting suggests more than one person claiming to be Guccifer 2.0 interacted with journalists.
- Content that we assess was taken from e-mail accounts targeted by the GRU in March 2016 appeared on DCLeaks.com starting in June.

We assess with high confidence that the GRU relayed material it acquired from the DNC and senior Democratic officials to WikiLeaks. Moscow most likely chose WikiLeaks because of its self-proclaimed reputation for authenticity. Disclosures through WikiLeaks did not contain any evident forgeries.

- In early September, Putin said publicly it was important the DNC data was exposed to WikiLeaks, calling the search for the source of the leaks a distraction and denying Russian “state-level” involvement.¹¹⁵
- The Kremlin’s principal international propaganda outlet RT (formerly Russia Today) has actively collaborated with WikiLeaks. RT’s editor-in-chief visited WikiLeaks founder Julian Assange at the Ecuadorian Embassy in London in August 2013, where they discussed renewing his broadcast contract with RT, according to Russian and Western media. Russian media subsequently announced that RT had become “the only Russian media company” to partner with WikiLeaks and had received access to “new leaks of secret information.” RT routinely gives Assange sympathetic coverage and provides him a platform to denounce the United States.¹¹⁶

The report also indicated that, although “Russian intelligence accessed elements of multiple state or local electoral boards,” the Department of Homeland Security “assesses that the types of systems we observed Russian actors targeting or compromising are not involved in vote tallying.”¹¹⁷ Beyond that finding, however, the agencies

did not make an assessment of the impact that Russian activities had on the outcome of the 2016 election. The US Intelligence Community is charged with monitoring and assessing the intentions, capabilities, and actions of foreign actors; it does not analyze US political processes or US public opinion.¹¹⁸

A significant amount of classified evidence was omitted from the public version of the report.¹¹⁹ The agencies noted that the declassified report’s “conclusions [we]re identical to

¹¹⁵ [Editors’ note: The report appears to refer to an interview that Putin gave to *Bloomberg* news. See Interview to *Bloomberg*, *supra* note 25 (“[D]oes it really matter who hacked Mrs. Clinton’s election campaign team database? Does it? What really matters is the content shown to the community. This is what the discussion should be held about.”) (quoting President Putin).]

¹¹⁶ OFFICE OF THE DIRECTOR OF NAT’L INTELLIGENCE, *supra* note 112, at 2–3. The report also detailed how Russia’s “state-run propaganda machine—comprised of its domestic media apparatus, outlets targeting global audiences such as RT and Sputnik, and a network of quasi-government trolls—contributed to the influence campaign by serving as a platform for Kremlin messaging to Russian and international audiences.” See *id.* at 3.

¹¹⁷ *Id.* at 3.

¹¹⁸ *Id.* at i.

¹¹⁹ A media report indicated that the classified report was over fifty pages long. Adam Entous & Greg Miller, *U.S. Intercepts Capture Senior Russian Officials Celebrating Trump Win*, WASH. POST (Jan. 5, 2017), at

the highly classified assessment, but this document d[id] not include the full supporting information, including specific intelligence on key elements of the influence campaign.”¹²⁰ The intelligence community “rarely can publicly reveal the full extent of its knowledge or the precise bases for its assessments, as the release of such information would reveal sensitive sources or methods and imperil the ability to collect critical foreign intelligence in the future.”¹²¹

Russian officials denounced the declassified report. A Kremlin spokesman said that “[t]hese are baseless allegations substantiated with nothing, done on a rather amateurish, emotional level.”¹²² The Foreign Ministry’s spokeswoman added: “If ‘Russian hackers’ managed to hack anything in America, it’s two things: Obama’s brain and, of course, the report itself.”¹²³

After the briefing, President-elect Trump released a brief statement that did not address the report in any detail. It said, in relevant part:

While Russia, China, other countries, outside groups and people are consistently trying to break through the cyber infrastructure of our governmental institutions, businesses and organizations including the D[NC], there was absolutely no effect on the outcome of the election[,] including the fact that there was no tampering whatsoever with voting machines. There were attempts to hack the R[NC], but the RNC had strong hacking defenses and the hackers were unsuccessful.¹²⁴

Nonetheless, a few days later, Trump acknowledged that Russia might have been responsible: “As far as hacking, I think it was Russia, but I think we also get hacked by other countries and other people.”¹²⁵

In the wake of new material reported by media outlets after the January 6 briefing, members of Congress called for investigation of links between Trump’s campaign and the Russian government.¹²⁶ The leaders of the Senate Intelligence Committee’s investigation into

https://www.washingtonpost.com/world/national-security/us-intercepts-capture-senior-russian-officials-celebrating-trump-win/2017/01/05/d7099406-d355-11e6-9cb0-54ab630851e8_story.html.

¹²⁰ OFFICE OF THE DIRECTOR OF NAT’L INTELLIGENCE, *supra* note 112, at i. Such intelligence might have included, among other evidence, communications intercepted by U.S. intelligence agencies in which Russian officials—including those with knowledge of Russia’s election interference campaign—celebrated Mr. Trump’s election. See Entous & Miller, *supra* note 119.

¹²¹ OFFICE OF THE DIRECTOR OF NAT’L INTELLIGENCE, *supra* note 112, at 1.

¹²² Shaun Walker, *Russia Slates “Baseless, Amateurish” US Election Hacking Report*, GUARDIAN (Jan. 9, 2017), at <https://www.theguardian.com/world/2017/jan/09/vladimir-putin-slates-baseless-amateurish-us-election-hacking-report>.

¹²³ *Id.*

¹²⁴ *Donald Trump’s Statement After Intelligence Briefing on Hacking*, N.Y. TIMES (Jan. 6, 2017), at <https://www.nytimes.com/2017/01/06/us/politics/donald-trump-statement-hack-intelligence-briefing.html>.

¹²⁵ Natalia Wojcik, Mack Hogan & Mike Juang, *Transcript of President-Elect Trump’s News Conference*, CNBC (Jan. 11, 2017, 1:37 PM), at <http://www.cnbc.com/2017/01/11/transcript-of-president-elect-donald-j-trumps-news-conference.html>.

¹²⁶ Karoun Demirjian, *Democrats Press FBI to Investigate Trump-Russia Ties*, WASH. POST (Jan. 13, 2017), at <https://www.washingtonpost.com/news/powerpost/wp/2017/01/13/democrats-press-fbi-to-investigate-trump-russia-ties>. At the briefing, intelligence officials reportedly also presented President-elect Trump with a brief synopsis of two allegations: (1) that Russian operatives are in possession of compromising personal and financial information on him, and (2) that Mr. Trump’s surrogates exchanged information with individuals associated with the Russian government during the campaign. Evan Perez, Jim Sciutto, Jake Tapper & Carl Bernstein, *Intel Chiefs Presented Trump with Claims of Russian Efforts to Compromise Him*, CNN (Jan. 12, 2017), at <http://www.cnn.com/2017/01/10/politics/donald-trump-intelligence-report-russia/index.html>. The synopsis was drawn from a thirty-five-page dossier of memos written by a former British intelligence operative. See *id.* President-elect Trump has firmly denied the allegations. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 10, 2017, 5:19 PM), at <https://twitter.com/realDonaldTrump/status/818990655418617856> (calling reports “FAKE NEWS - A TOTAL POLITICAL WITCH HUNT!”).

Russian hacking indicated that they would also investigate those connections.¹²⁷ In addition, media reports stated that both law enforcement and intelligence agencies were examining intercepted communications and financial transactions as part of a broad investigation into ties between Russian officials and Trump's campaign associates, including Paul Manafort, Carter Page, and Roger Stone.¹²⁸ However, during a closed-door meeting with House leaders, FBI Director Comey reportedly refused to confirm whether the FBI was investigating the alleged links.¹²⁹ Similarly, when asked by the Senate Intelligence Committee about an FBI investigation of possible connections, Mr. Comey said that he "would never comment on investigations, whether we have one or not, in an open forum like this."¹³⁰

The new administration's National Security Advisor, Lieutenant General Michael Flynn, resigned on February 13 following allegations that he improperly discussed certain issues with the Russian Ambassador to the United States, Sergey Kislyak, before President Trump took office.¹³¹ The press had previously reported that Gen. Flynn and Mr. Kislyak spoke on the phone several times on December 29, when President Obama announced sanctions against Russia for its election interference.¹³² Then, in early February, U.S. officials reportedly said that Gen. Flynn's statements might have suggested that the Russian government could expect relief from those sanctions, even if his statements did not convey an explicit promise.¹³³

After these reports emerged, according to President Trump, he "asked for [Gen. Flynn's] resignation" because Gen. Flynn "didn't tell . . . Vice President [Pence] . . . the facts [about his

¹²⁷ See *supra* note 74 and corresponding text (noting that investigation would examine "any intelligence regarding links between Russia and individuals associated with political campaigns"). The House Intelligence Committee also stated that it would investigate those links. See *supra* note 76 and corresponding text (describing same update as Senate Intelligence Committee). Those committees lack the power to compel information disclosure. See Karoun Demirjian, *Senate Intel Chiefs Promise Investigation of Trump-Russia Ties as House Democrats Accuse FBI Director of Stonewalling*, WASH. POST (Jan. 13, 2017), at <https://www.washingtonpost.com/news/powerpost/wp/2017/01/13/democrats-accuse-fbi-director-of-stonewalling-on-trump-russia-ties-as-more-call-for-him-to-step-down> (noting limitations of Senate Intelligence Committee). However, they can investigate the links by examining information already collected by intelligence agencies. *Id.*

¹²⁸ See Michael S. Schmidt, Matthew Rosenberg, Adam Goldman & Matt Apuzzo, *Intercepted Russian Communications Part of Inquiry into Trump Associates*, N.Y. TIMES (Jan. 19, 2017), at <https://www.nytimes.com/2017/01/19/us/politics/trump-russia-associates-investigation.html>; U.S. Inquiries into Russian Election Hacking Include Three FBI Probes, REUTERS (Feb. 18, 2017), at <http://www.reuters.com/article/us-usa-trump-russia-cyber-idUSKBN15X0OE> (reporting that the FBI is pursuing at least three separate investigations, including one into financial transactions by Russian persons believed to have links to Trump's associates).

¹²⁹ Demirjian, *supra* note 127. Following that meeting, some House Democrats even called for Comey's resignation because they did not believe that he could capably lead any Russian hacking investigation. See *id.*

¹³⁰ Russian Intelligence Activities Hearing, *supra* note 56. Mr. Comey reiterated later in the hearing that "especially in a public forum, [the FBI] never confirm[s] or den[ies] a pending investigation." *Id.*

¹³¹ See Maggie Haberman, Matthew Rosenberg, Matt Apuzzo & Glenn Thrush, *Michael Flynn Resigns as National Security Advisor*, N.Y. TIMES (Feb. 13, 2017), at <https://www.nytimes.com/2017/02/13/us/politics/donald-trump-national-security-adviser-michael-flynn.html>; see also Greg Miller, Adam Entous & Ellen Nakashima, *National Security Adviser Flynn Discussed Sanctions with Russian Ambassador, Despite Denials, Officials Say*, WASH. POST (Feb. 9, 2017), at https://www.washingtonpost.com/world/national-security/national-security-adviser-flynn-discussed-sanctions-with-russian-ambassador-despite-denials-officials-say/2017/02/09/f85b29d6-ee11-e6-b4ff-ac2cf509efe5_story.html (describing events preceding Mr. Flynn's resignation).

¹³² David Ignatius, *Why Did Obama Dawdle on Russia's Hacking?*, WASH. POST (Jan. 12, 2017), at https://www.washingtonpost.com/opinions/why-did-obama-dawdle-on-russias-hacking/2017/01/12/75f878a0-d90c-11e6-9a36-1d296534b31e_story.html.

¹³³ Miller, Entous & Nakashima, *supra* note 131. Those officials had "access to reports from U.S. intelligence and law enforcement agencies that routinely monitor the communications of Russian diplomats." *Id.*

discussions with Mr. Kislyak], and then he didn't remember," which "just wasn't acceptable to me."¹³⁴ But he said that Gen. Flynn "didn't have to [resign], because what he [discussed] wasn't wrong."¹³⁵ Nonetheless, both congressional intelligence committees indicated that they would likely examine the nature of Gen. Flynn's discussions with Mr. Kislyak in the course of their broader investigations into Russian election interference.¹³⁶

STATE JURISDICTION AND IMMUNITY

Second Circuit Overturns \$655 Million Jury Verdict Against Palestine Liberation Organization and Palestinian Authority
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In its August 2016 decision in *Waldman v. Palestine Liberation Organization*, the U.S. Court of Appeals for the Second Circuit reversed a \$655 million jury verdict against the Palestine Liberation Organization (PLO) and the Palestinian Authority (PA) for lack of personal jurisdiction.¹ The plaintiffs were individuals whose family members had been killed in terrorist attacks that took place in Jerusalem; defendants were alleged to have coordinated and carried out these attacks.² While the United States government took no position on the merits

¹³⁴ White House Press Release, Remarks by President Trump in Press Conference (Feb. 16, 2017), at <https://www.whitehouse.gov/the-press-office/2017/02/16/remarks-president-trump-press-conference> [hereinafter Feb. 16 Press Conference]. Vice President Pence had previously stated, based on his conversations with Gen. Flynn, that Gen. Flynn and Mr. Kislyak had not discussed the sanctions against Russia at all. See *Face the Nation Transcript January 15, 2017: Pence, Manchin, Gingrich*, FACE THE NATION (Jan. 15, 2017, 2:06 PM), at <http://www.cbsnews.com/news/face-the-nation-transcript-january-15-2017-pence-manchin-gingrich>; Miller, Entous & Nakashima, *supra* note 131. Gen. Flynn later denied ever discussing sanctions with Mr. Kislyak, both to the FBI and to media outlets, but then stated that he "had no recollection of discussing sanctions, [but] couldn't be certain that the topic never came up." Sari Horwitz & Adam Entous, *Flynn in FBI Interview Denied Discussing Sanctions with Russian Ambassador*, WASH. POST (Feb. 16, 2017), at https://www.washingtonpost.com/world/national-security/flynn-in-fbi-interview-denied-discussing-sanctions-with-russian-ambassador/2017/02/16/e3e1e16a-f3d5-11e6-8d72-263470bf0401_story.html.

¹³⁵ Feb. 16 Press Conference, *supra* note 134; see also White House Press Release, Press Briefing by Press Secretary Sean Spicer, #12 (Feb. 14, 2017), at <https://www.whitehouse.gov/the-press-office/2017/02/14/press-briefing-press-secretary-sean-spicer-2142017-12> ("The evolving and eroding level of trust as a result of this situation and a series of other questionable instances is what led the President to ask for General Flynn's resignation. Immediately after the Department of Justice notified the White House Counsel of the situation, the White House Counsel briefed the President and a small group of senior advisors. The White House Counsel reviewed and determined that there [wa]s not a legal issue, but rather a trust issue.").

¹³⁶ See Karoun Demirjian, *House Intelligence Committee Open to Probing Michael Flynn*, WASH. POST (Feb. 16, 2017), at https://www.washingtonpost.com/powerpost/house-intelligence-committee-open-to-probing-michael-flynn/2017/02/16/b3d9ea0a-f496-11e6-a9b0-ecce7ce475fc_story.html; *Senate Republicans: Intelligence Committee Will Investigate Flynn Contact with Russia*, WASH. POST (Feb. 14, 2017), at https://www.washingtonpost.com/video/national/senate-republicans-intelligence-committee-will-investigate-flynn-contact-with-russia/2017/02/14/b6f5dad2-f2ed-11e6-9fb1-2d8f3fc9c0ed_video.html. Leaders of the Senate Judiciary Committee "issued a letter requesting a Justice Department briefing and access to relevant documents concerning Mr. Flynn's resignation." Matt Flegenheimer, *Despite Democrats' Demands, Broad Inquiry on Russia Ties Isn't Assured*, N.Y. TIMES (Feb. 15, 2017), at <https://www.nytimes.com/2017/02/15/us/politics/trump-russia-inquiry.html>.

¹ *Waldman v. Palestine Liberation Organization*, 835 F.3d 317 (2d Cir. 2016).

² *Id.* at 324–25.