FEDERAL ELECTION COMMISSION
1050 FIRST STREET, N.E.
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MURs7207, 7268, 7274, 7623
Russian Federation, *et al.*	)	
	)	

SUPPLEMENTAL STATEMENT OF REASONS OF VICE CHAIR ALLEN DICKERSON

Few events in recent memory have received the level of sustained attention accorded to the Russian Federation's involvement in the 2016 presidential election. This has included a full investigation by a special counsel of the Department of Justice[1] and a five-volume bipartisan review by the Senate Intelligence Committee.[2] The results of these inquiries have included extensive reports, federal indictments, exhaustive press coverage, and even, indirectly, the impeachment of a president.[3]

Against this backdrop, the Federal Election Commission has been asked to play its modest role in supervising the raising and spending of "contributions" and "expenditures" under the Federal Election Campaign Act ("FECA" or "the Act").[4]

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[1] Special Counsel Robert S. Mueller, III, "Report On The Investigation Into Russian Interference In The 2016 Presidential Election," U.S. Department of Justice, March 2019.

[2] Select Committee on Intelligence, "Russian Active Measures Campaigns And Interference In The 2016 U.S. Election…Vols. I-V," United States Senate, Nov. 2020 ("Senate Intelligence Comm. Rep.").

[3] H.R. 755 at 1-2, "Articles of Impeachment Against Donald John Trump," 116th Cong., 1st Sess., Dec. 18, 2019 ("Article I: Abuse of Power…These actions were consistent with President Trump's previous invitations of foreign interference in United States elections").

[4] Supp. Statement of Reasons of Vice Chair Dickerson and Comm'r Trainor at 1-2, MURs 7821/7827/7868 ("Twitter, Inc."), Sept. 13, 2021 ("Accordingly, our authority is limited both the by Act itself, which denies us a roving commission to police elections and limits our jurisdiction to 'contributions' and 'expenditures,' and by nearly a half century of accumulated judicial decisions narrowing that legislative grant").

As a preliminary matter, we can add little to the public record concerning these events. The Commission lacks the resources, access, and expertise to meaningfully supplement the work already taken at the highest levels of government. This should be immediately apparent to anyone with even a passing knowledge of this agency. But the proof is in our Office of General Counsel's ("OGC") report itself.[5] We have undertaken no original research – the entirety of our efforts have been derivative of the Special Counsel's investigation and the Senate's public conclusions.[6]

Nevertheless, as has been noted before, "there is a tendency to recast political disputes as campaign finance violations and enlist the Commission as a party to larger conflicts."[7] Citizens who are quite properly outraged by the efforts of a foreign state to divide and weaken our polity will look for options. One is to file a complaint with this agency.[8]

And we received several complaints alleging that the Russian Federation, through hacking operations, social media activity, the purchasing of online advertisements, and direct or indirect coordination between Russian agents and the Donald Trump for President campaign committee and a then-unknown Congressional candidate, violated FECA's prohibitions on foreign contributions and expenditures.

As one might expect, the merits of these allegations varied.[9] But, as explained below, I am persuaded that there is reason to believe the Russian Federation violated the Act. I also voted to find reason to believe that a then-unknown Congressional candidate solicited opposition research from a known foreign national, Guccifer 2.0, a Russian intelligence agent that publicly claimed to be a Romanian citizen.[10]

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[5] *See* First Gen'l Counsel's Report, MUR 7207/7268/7274/7623 (Russian Fed'n, *et al.*) ("FGCR"), Feb. 23, 2021.

[6] *Id*. This is hardly OGC's fault. It reflects our institutional capabilities, not our attorneys' diligence.

[7] Supp. Statement of Reasons of Vice Chair Dickerson and Comm'r Trainor at 2, MURs 7821/7827/7868 ("Twitter, Inc."), Sept. 13, 2021.

[8] 52 U.S.C. § 30109(a)(1) ("*Any* person who believes a violation of this Act…has occurred may file a complaint with the Commission") (emphasis supplied).

[9] This Statement addresses only the subset of these allegations concerning action by foreign entities.

[10] Certification at 3-4, MURs 7207/7268/7274/7623, Apr. 22, 2021.

The difficulty is finding the appropriate remedy. OGC advised that we have the authority to pursue the Russian Federation in court, but then advised against doing so, opting instead for the empty gesture of finding reason to believe a significant international power violated federal law and then doing…nothing.[11]

I could not agree to mere signaling in a matter of this importance. Congress entrusted the Commission with independent discretion regarding FECA, and there is a colorable argument that we have authority to bring an enforcement action against the Russian Federation and its agents. In recommending that we declare a legal violation and take no action, OGC forgot that taking no action is itself a choice. "To be weak is miserable, doing or suffering,"[12] and this impotent act would have sent a message just as surely as choosing to enforce would have.

Accordingly, I believed the better path was to pursue such alleged violations as were supported by the record and let the courts judge Russia's claims of immunity. [redacted] But we do not act alone, and I did not consider it appropriate to take action against the Russian Federation and the Internet Research Agency ("IRA") without first apprising the Department of State [redacted][14]

[11] FGCR at 95 (recommending the Commission "[t]ake no further action as to the Russian Federation and the Internet Research Agency").

[12] John Milton, *Paradise Lost*: Book 1 (capitalization altered); *available at*: https://www.poetryfoundation.org/poems/45718/paradise-lost-book-1-1674-version.

[redacted]

[14] *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("As [future Chief Justice John] Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation is its external relations, and its sole representative with foreign nations'").

Denied that opportunity by my colleagues,[15] I reluctantly agreed that a dismissal pursuant to our prosecutorial discretion was the best remaining course.[16]

I. FACTUAL BACKGROUND

After evaluating the complaints and conducting a thorough review of the public record[17] in these matters, OGC provided a First General Counsel's Report to the Commission analyzing the Russian government's alleged social media activity conducted through the IRA,[18] the "hack-and-release" operations undertaken by the Main Directorate of the General Staff of the Armed Forces of the Russian Federation ("GRU"),[19] an allegation that an unknown Congressional candidate solicited and received an illegal contribution from the GRU, and three principal interactions between the Trump committee and the Russian Federation.[20]

Because it is my belief that the Commission should only enforce against the Russian Federation and the IRA for a subset of these allegations – namely the making of certain prohibited foreign national independent expenditures, and for failing to report those independent expenditures – this analysis will focus solely on those claims.

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[15] Certification at 1, MURs 7207/7268/7274/7623, Apr. 22, 2021 ("Failed by a vote of 2-4 to: Instruct the Office of General Counsel to deliver the letter to the Secretary of State as last circulated by Vice Chair Dickerson's Office…").

[redacted] I did not believe that the substantially weakened draft suggested by Commissioner Weintraub adequately informed the Department of our intentions, and voted accordingly. *Id.* at 1-2.

[16] *Heckler v. Chaney*, 470 U.S. 821 (1985).

[17] As already noted, the facts known to the Commission are those developed and placed into the public record by other organs of the government. While the allegations below were developed by OGC in its Report, we stand here upon the shoulders of others.

[18] FGCR at 9-17.

[19] *Id.* at 17-23.

[20] *Id.* at 23-39.

The IRA was a Russian corporation that was formed sometime around the year 2013.[21] It operated as a quasi-governmental entity "at the direction of the Kremlin" and conducted what it self-described as "information warfare against the United States of America."[22] The IRA reportedly "received its funding from Yevgeny Prigozhin, a Russian oligarch and 'close Putin ally with ties to Russian intelligence;' Prigozhin also controlled other companies that had Russian government contracts."[23] It is unclear how much the IRA spent on operations to influence the 2016 U.S. election; however, there is information suggesting that, by July 2016, "'more than eighty' IRA employees were specifically tasked with U.S.-related operations."[24]

"During the 2016 election, IRA employees operated accounts on U.S. social media platforms, including Facebook, Twitter, YouTube, and Instagram, masquerading as U.S. citizens or grassroots organizations."[25] "According to information released by these platforms, the IRA operated approximately 3,800 accounts on Twitter, 470 on Facebook, and 170 on Instagram."[26]

As a small part of these activities, the IRA used some of its fake accounts to distribute paid advertisements over the internet.[27] Often these advertisements provided a simple description of a phony organization, "apparently for the purpose of attracting additional followers."[28] A small number of the IRA's paid advertisements referenced the 2016 election or candidates.[29] In total, the IRA purchased around 1,000 ads, spending approximately $70,000 on paid social media advertisements during the 2016 election cycle.[30]

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[21] *Id*. at 9.

[22] *Id* (citing Senate Intelligence Comm. Rep. Vol. II at 32).

[23] *Id*. (citing Superseding Indictment ¶ 10(d), *United States v. Internet Research Agency, et al.*, 1:18-cr-00032 (D.D.C. Nov. 8, 2019) ("IRA Indictment")).

[24] *Id*. at 10 (citing IRA Indictment ¶ 10(c)).

[25] *Id*. at 10 (citations omitted).

[26] *Id*. at 12.

[27] *Id*. at 13.

[28] *Id*.

[29] *Id*. at 14.

[30] *Id*. at 13.

Based on OGC's "review of the ad[vertisement]s made available by the House Intelligence Committee, we identified at least 58 IRA-purchased advertisements totaling approximately $3,000…which appear to support or oppose a candidate."[31]

II. LEGAL ANALYSIS

The Act prohibits foreign nationals from "directly or indirectly" providing "a contribution or donation or other of value," including an independent expenditure placed on an online platform for a fee, in connection with an American election.[32] Soliciting foreign nationals is also a violation of the Act.[33] Thus, the Commission can—and has—enforced against U.S.-based political actors that solicit help from foreign nationals, and may also take action against foreign nationals when they make regulated contributions or expenditures.

Although the Russian Federation has claimed immunity pursuant to [redacted] FECA explicitly applies, by reference, to foreign governments.[35] There is some question as to whether that statutory grant of authority conflicts with the Foreign Sovereign Immunities Act of 1976 ("FSIA"), and whether foreign sovereign immunity applies to administrative action like ours as well as to legal process in the courts. We do not have special expertise in this area, but OGC, for its part, believes that there was no legal bar to enforcement in these matters.[36] I take no position on the question, which may one day require a decision of the courts, but there is certainly an argument that OGC's analysis is correct.[37]

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[31] *Id.* at 14.

[32] 52 U.S.C. § 30121(a)(1); *see also* 11 C.F.R. § 110.20.

[33] 52 U.S.C. § 30121(a)(2).

[redacted]

[35] The Russian Federation and the IRA are foreign nationals under the meaning of "foreign principal" incorporated in the Act's definition. 52 U.S.C. 30121(b)(1) (defining "foreign principal" as it is used at 22 U.S.C. § 611(b)). That definition includes any "government of a foreign country," 22 U.S.C. § 611(b)(1), as well as any "partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country." 22 U.S.C. § 611(b)(3).

[36] FGCR at 44-49.

[37] The FSIA includes a limited exception for certain "commercial activity," 28 U.S.C. § 1605(a)(2), and, as Alexander Hamilton cogently observed in his 1791 *Opinion as to the Constitutionality of the Bank*

Assuming, then, that FECA vests us with jurisdiction over foreign governments, the Act prohibits the Russian Federation and the IRA[38] from "directly or indirectly" making "an expenditure, independent expenditure, or disbursement for an electioneering communication,"[39] "in connection with any Federal, state, or local election."[40]

An "independent expenditure" is "an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or cooperation with, or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents."[41] Every person that is not a political committee that makes independent expenditures aggregating in excess of $250 with respect to a given election in a calendar year must report such independent expenditures to the Commission.[42]

A communication expressly advocates when, it:

(a) Uses phrases such as . . . "support the Democratic nominee," . . . "Bill McKay in '94," . . . "vote against Old Hickory," "defeat" accompanied by a picture of one

of the United States, "[m]oney is the very hinge on which commerce turns." As we regulate "contributions" and "expenditures" – that is, the raising and spending of money – it is possible this exception would apply, assuming the FSIA's application in the first place. *Buckley v. Valeo*, 424 U.S. 1, 63 (1976) (*per curiam*) ("Both definitions [of 'contribution' and 'expenditure'] focus on the use of money or other objects of value").

[redacted]

They undoubtedly have their own, possibly better considered, views.

[38] Because the Russian Federation is a foreign government and the IRA is a Russian company headquartered in Saint Petersburg, Russia, both respondents are considered foreign nationals under the Act. *See* n.33, *supra*.

[39] 52 U.S.C. § 30121(a)(1)(C).

[40] 11 C.F.R. § 110.20(f).

[41] 11 C.F.R. § 100.16(a) (cleaned up); *see also* 52 U.S.C. § 30101(17).

[42] 52 U.S.C. § 30104(c); 11 C.F.R. § 109.10(b). Perhaps unsurprisingly, the Russian state did not file contemporaneous paperwork with the Commission reporting any illicit independent expenditures.

> or more candidate(s), "reject the incumbent," or . . . campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, . . . advertisements, etc. which say "Nixon's the One,". . . or "Mondale!"; or
>
> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.[43]

Here, the IRA purchased over 1,000 advertisements totaling approximately $70,000, but the publicly-available evidence suggests that only approximately $3,000 worth of those advertisements contained express advocacy.[44] Those advertisements use language such as "vote Republican" and "vote Trump" – unambiguously advocating the election or defeat of clearly identified candidates – and therefore, violate 52 U.S.C. § 30121(a)(1)(c).[45]

The remaining $67,000 worth of advertisements do not contain any express advocacy. However, OGC argues that the lack of express advocacy in these communications did not bar enforcement because "the Russian Federation did not act to advance an issue relevant to U.S. voters but instead to surreptitiously influence the election to advance its own interests and generally erode faith in the U.S. democratic process."[46] But this reading goes against the Supreme Court's explicit decision to limit our jurisdiction over independent expenditures to those which *expressly* advocate an electoral outcome.[47]

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[43] FGCR at 51-52 (quoting 11 C.F.R. § 100.22).

[44] *Id*. at 54-55.

[45] *See* 11 C.F.R. § 100.22(a).

[46] FGCR at 60-61.

[47] *Buckley*, 424 U.S. at 44, *id*. at n.52. While the 2002 amendments to FECA gave us jurisdiction to regulate "electioneering communications," 52 U.S.C. § 30104(f)(3), which need not constitute express advocacy, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 191-192 (2003), the definition of "electioneering communication" extends only to large broadcast communications over radio or

I understand the temptation to stretch our authority to reach troubling, or even outrageous, conduct that has some connection to federal elections. That temptation is inherent in our name; "Federal Election Commission" implies powers far in excess of those actually granted to us by Congress. But there is simply no legal basis for applying a different meaning of "independent expenditure" for purposes of the foreign national prohibition. And to take OGC's invitation and expand the meaning of "independent expenditure" to reach any communication with the subjective intention of "surreptitiously influencing" elections or "undermining confidence" in our electoral processes would pose insurmountable constitutional difficulties—especially for American speakers, who would bear the brunt of our overreach. We have been explicitly cautioned not to adopt such "intents and effects tests" in doing our work.[48]

In short, Russia's non-express-advocacy communications were the heart of its illicit activities and have been the focus of other government entities enforcing different statutes against a different constitutional backdrop. But they do not fall within our limited jurisdiction under the FECA.

While the Russian Federation itself did not make any payments for the express advocacy advertisements at issue in this matter, it is nonetheless responsible for the payments made by the IRA.[49] According to the publicly-available evidence derived from other investigations, although the IRA is a non-governmental entity, Russian President Vladimir Putin directed the Russian influence campaign and the Russian Federation reportedly acted through the IRA to execute a portion of it.[50] "The U.S. Intelligence Community labeled the IRA a 'quasi-government' actor and described Yevgeniy Prigozhin, the financier of the IRA, as 'a close Putin ally with ties to Russian intelligence.'"[51] The Senate Intelligence Committee reiterated that Prigozhin's "close ties to high-level Russian government officials including President Vladimir Putin, point to significant Kremlin support, authorization, and direction of the IRA's operations and goals."[52] Furthermore, "[t]he State Department has identified both

television. As far as the Commission is aware, the Russian state did not, directly or through the IRA, fund electioneering communications during the 2016 election.

[48] *Fed. Election Comm'n v. Wisc. Right to Life, Inc.,* 551 U.S. 449, 469 (2007) (controlling opinion of Roberts, C.J.).

[49] *See* 52 U.S.C. § 30121(a)(1).

[50] FGCR at 50.

[51] *Id*. (citation omitted).

[52] *Id*. (quoting Senate Intelligence Comm. Rep. Vol. II at 5).

the IRA and Prigozhin as 'persons that are part of, or operate for or on behalf of, the defense and intelligence sectors of the Government of the Russian Federation.'"[53] Accordingly, the record suggests that the Russian Federation is responsible for the IRA's FECA violations.

While these alleged independent expenditures constitute only a fraction of the total cost of the Russian Federation's influence campaign, they are the ones within our jurisdiction. Accordingly, the Commission could have, and in my opinion should have, found reason to believe concerning the Russian Federation and the IRA for these violations and proceeded to the next stage in our statutory enforcement process.

III. CONCLUSION

The Commission should recognize that while we are experts at administering and enforcing federal campaign finance laws, we lack expertise with respect to the international ramifications of our decisions. I could not vote to take an administrative action against the Russian Federation and the IRA – an action that the Russian state has made clear it would consider an official act of the United States – without first informing the State Department and others responsible for the concrete consequences of our actions.

Faced with a choice between empty signaling and reckless adventurism, I joined my colleagues in dismissing these matters pursuant to our prosecutorial discretion.

Allen Dickerson
Vice Chair

September 16, 2021
Date

[53] *Id.* (quoting Notice of Department of State Sanctions Actions Pursuant To Section 231(a) of the Countering America's Adversaries Through Sanctions Act of 2017 ("CAATSA") and Executive Order 13849 of September 20, 2018, and Notice of Additions To the CAATSA Section 231(d) Guidance, 83 Fed. Reg. 50,433, 50,434 (Oct. 5, 2018); CAATSA, Pub. Law 115-44, 131 Stat. 898 (2017)).

[redacted]