

**EXPOSING RUSSIAN INFLUENCE  
OPERATIONS AND FIRST  
AMENDMENT CONCERNS**

**Discussion Paper**

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## EXPOSING RUSSIAN INFLUENCE OPERATIONS AND FIRST AMENDMENT CONCERNS

### Key Observations

- While much attention has focused on Russia's meddling in U.S. elections, Russia's hostile information operations are continuous and extend to a broad range of domestic issues.
- Russia aims to create confusion, foment distrust of all institutions, and deepen discord on just about every contentious topic, including national debates on race, immigration, policing gun control, and other issues.
- The lack of an effective American response will encourage Russia as well as other adversaries of the United States to escalate their campaigns—campaigns that pose a serious threat to the country.
- The public has a right to know. Americans would be better served by fuller accounts of what the Russians are doing, how they are doing it, and the scale of their activities.
- Officials in Washington agree that publicly exposing Russian efforts is desirable, but they have run into the argument that since Russian influence operations often repeat content created by U.S. sources, government exposure of the Russian effort could raise First Amendment concerns.
- Exposure does not inherently regulate what one says or writes. Exposure of Russian activities is a matter of policy and politics, not the Constitution or the law.
- Ample precedents exist for mandating transparency and limiting foreign interference.
- Exposure can be achieved by legally requiring self-disclosure, government exposure of foreign information operations, or a combination of the two—mandatory self-disclosure and exposure of those who do not comply.
- The government already regulates free speech with campaign-financing laws, bans on tobacco advertising, defamation laws, search warrants, and subpoenas for records or testimony. While all of these regulations conceivably may chill freedom of speech, the public interest is a greater consideration.
- The government also requires the registration of agents of foreign powers. This has been extended to certain foreign information sources.

- The Constitutional guarantee of free speech is generally considered to include the right of Americans to receive speech from foreign speakers, including hostile governments. Imposing a disclosure requirement does not prevent this; it enables the public to better evaluate the material and does not violate the First Amendment.
- The United States is not opposed to openly expressed foreign viewpoints. The United States does not shut down foreign news broadcasting in this country, even though the viewpoints expressed may include criticism of U.S. policies.
- If First Amendment concerns were to preclude efforts to expose Russian information campaigns because they included American content, foreign information operations would, in effect, be protected by the First Amendment, which, on the face of it, seems absurd.
- While all of the respondents at the 2019 workshop in Washington, DC, were comfortable with exposure of foreign information campaigns itself, they did not want to see exposure become a means of belittling or vilifying Americans whose content might be repeated in part or in whole, correctly or out of context, by Russian operators.
- Government commentary on content is more controversial. Exposure is separate from countering propaganda.
- Close oversight will be required to ensure that selective exposure is not being abused to support political agendas. All of the respondents are mindful of the current partisan environment.
- Predictions about the effects of exposure on public behavior or the outcome of elections should be avoided. We simply don't know.
- Current efforts contribute to awareness of Russian information operations but do not ensure public disclosure.
- First Amendment concerns must be addressed, but they cannot be the basis for protecting hostile information campaigns by foreign actors, nor can they be an excuse for inaction by the United States.

## EXPOSING RUSSIAN INFLUENCE OPERATIONS AND FIRST AMENDMENT CONCERNS

While much attention has focused on Russia's meddling in U.S. elections, Russian information operations are continuous and extend to a broad range of domestic issues. They aim at creating confusion, fomenting distrust of all institutions, and deepening discord on just about every contentious topic, including national debates on race, immigration, policing, gun control, LGBT rights, vaccination, and other issues. Russian propagandists have been particularly active in spreading disinformation during the Covid-19 crisis. Russian efforts seek to amplify extreme positions, often magnifying dissonance and aggravating divisions by promoting the polar expressions of both sides of the issue.

The 2020 Report of the Cyberspace Solarium Commission noted that “the Kremlin has combined cyber intrusions and propaganda to distort democratic processes, weaken trust in institutions, and sow chaos in liberal democratic societies.”<sup>1</sup> Cyberspace is not the only theater in which the Russians operate, nor are the Russians the only adversaries.

The use of disinformation and propaganda remains robust in the 21<sup>st</sup> century as it has demonstrated its effectiveness and will continue to do so. The lack of an effective U.S. response will encourage Russia as well as other adversaries of the United States to escalate their campaigns. Those campaigns pose a serious threat to the country.

But the United States has faced this threat before and is not defenseless. Most of the attention has been paid to ensuring the integrity of the election process. Americans may disagree on which candidate should win, but voting is an exclusive right of U.S. citizens—foreign powers don't get a vote. Progress has been made in ensuring the integrity of the vote count, but more remains to be done.

*“Russian efforts seek to amplify extreme positions, often magnifying dissonance and aggravating divisions by promoting the polar expressions of both sides of the issue.”*

At a 2019 workshop in Washington, DC, organized by Robert McCreight and Brian Jenkins, participants reviewed the threat and examined the possible countermeasures that could be employed to deter or blunt the Russian campaign. This was not new territory for the participants. Most were veterans of the Cold War with long firsthand experience in this area. They had served in the White House, the State Department, United States Information Agency (USIA), the Pentagon, the Intelligence Community,

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<sup>1</sup> U.S. Cyberspace Solarium Commission, *Report of the Cyberspace Solarium Commission*, March 2020, p.11, available [https://drive.google.com/file/d/1ryMCIL\\_dZ30QyjFqFkkf10MxIXJGT4yv/view](https://drive.google.com/file/d/1ryMCIL_dZ30QyjFqFkkf10MxIXJGT4yv/view).

the FBI, research centers, and broadcasting entities under both Republican and Democratic administrations. They added a useful historical perspective and were able to point out that the United States has a long history of countering Soviet and Russian disinformation, propaganda, and other influence operations targeting the West.<sup>2</sup>

They noted that among the options discussed, one of the most useful countermeasures to Russian influence operations is the public exposure of specific Russian disinformation operations. Exposure also was considered the least controversial of the potential measures.

*“...one of the most useful countermeasures to Russian influence operations is the public exposure of specific Russian disinformation operations.”*

In subsequent discussions, officials in Washington agreed that exposure was desirable, but they indicated that they were running into the argument that since Russian influence operations often repeat content created by U.S. sources, government exposure of the Russian effort could raise First Amendment concerns. Specifically, exposing Russian efforts that included the repetition of American content might imply (or allow the inference) that the authors of that content are part of a Russian disinformation campaign and thereby could have a chilling effect on the right of free speech.

It is an intriguing argument, and I invited members of the original group of participants plus others to offer their opinions on the topic.<sup>3</sup> It was not a poll, but rather an effort to elicit a broad variety of views. The question put forward for discussion was:

**Should government exposure of Russia’s current influence operations, including its manipulation of the Internet to promote selected American content, be precluded because of First Amendment concerns?**

The worry is that by mandating or authorizing exposure of foreign information operations that include American content, Congress would tread upon the free speech guarantee of the First Amendment, which states: “Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof; or abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances” (italics added).

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<sup>2</sup> The results of the workshop were subsequently published in Brian Michael Jenkins (ed.), “America’s Great Challenge: Russia’s Weapons of Mass Deception,” September 2019, available at <https://weaponsofmassdeception.net/>.

<sup>3</sup> No participant at the 2019 workshop was known to be a lawyer. Three additional respondents offered comments on this discussion paper. Two of them were lawyers—a former federal prosecutor and a former Department of Justice attaché in Moscow—and the other was a former senior official in the Department of Homeland Security.

This discussion paper is not intended to be legal brief. There is a long history of cases relating to the First Amendment.<sup>4</sup>

*“Beginning in 1986, the State Department issued both annual and special reports on Soviet propaganda and disinformation activities ...”*

The current concern about Russian influence operations is not new. Countering Soviet propaganda had been a component of U.S. strategy through most of the Cold War but had diminished in the 1970s with the policy of détente. However, in response to increasingly hostile Soviet behavior in Europe, Afghanistan, Africa and Central America in the late 1970s, the United States pushed back more conertedly in the late Carter Administration. The Reagan Administration, in accord with its more ambitious—and confrontational—approach, stepped up and implemented a more focused and substantial campaign.

In 1981, President Regan created an interagency team called the Active Measures Working Group (AMWG) to monitor, analyze, and counter Soviet disinformation and “active measures”—the term employed by the Soviet Union for its influence operations. The effort was led initially by the Department of State and later by USIA. Its members included the CIA, Department of Defense, Arms Control and Disarmament Agency, Defense Intelligence Agency, Department of Justice, National Security Council, and the FBI.<sup>5</sup> Periodic and special reports prepared by the AMWG analyzed the scale, direction, themes, and targets of Soviet propaganda and programs, identified forgeries, and exposed disinformation campaigns.

Congress sought public disclosure of Soviet efforts and in 1985 passed legislation—introduced by Newt Gingrich—ordering the Secretary of State, in consultation with the heads of relevant federal departments and agencies, to prepare and deliver “to the Speaker of the House of Representatives and to the Chairman of the Committee on Foreign Relations of the Senate, an unclassified report on Soviet and Communist disinformation and press manipulation with respect to the United States.”<sup>6</sup> Beginning in 1986, the State Department issued both annual and special reports on Soviet

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<sup>4</sup> A list of these cases can be found in Legal Information Institute, “First Amendment,” Cornell Law School, available at [https://www.law.cornell.edu/constitution/first\\_amendment](https://www.law.cornell.edu/constitution/first_amendment); The Free Speech Center, *The First Amendment Encyclopedia*, available at <https://www.mtsu.edu/first-amendment/encyclopedia>; and Floyd Abrams, *The Soul of the First Amendment*, New Haven, CT: Yale University Press, 2018. Others are included in the bibliography.

<sup>5</sup> Herbert Romerstein, “The Interagency Active Measures Working Group: An Eyewitness Account of U.S. Counterpropaganda Strategy,” in J. M. Waller (ed.), *The Public Diplomacy Reader*, Washington, DC: Institute of World Politics Press, 2007, available at [https://www.academia.edu/11035481/The\\_Public\\_Diplomacy\\_Reader\\_2007\\_](https://www.academia.edu/11035481/The_Public_Diplomacy_Reader_2007_).

<sup>6</sup> The legislation was eventually signed into law on August 16, 1985, as section 147 (SOVIET AND COMMUNIST DISINFORMATION AND PRESS MANIPULATION) of Public Law 99-93, available at <https://www.govinfo.gov/content/pkg/STATUTE-99/pdf/STATUTE-99-Pg405.pdf#page=16>.

propaganda and disinformation activities, as did other government agencies and USIA. The effort continued until the end of the Cold War.

Those who prepared these reports were mindful of possible First Amendment sensitivities, and they chose a cautious path to avoid controversy. They focused their attention on Soviet propaganda efforts outside of the United States. They knew, of course, that these efforts, even before the advent of the Internet, did not stop at the U.S. border, but they wanted the foreign “cover” to justify exposure. They also knew that their reports would raise questions about Soviet campaigns reaching into the United States and prepared appropriate answers. Putting the First Amendment question to the participants in the 2019 workshop, some of whom were veterans of the earlier effort, prompted divergent responses that are not easily summarized. Nonetheless, twelve takeaways emerged.

*“People would be better served by fuller accounts of what the Russians are doing, how they are doing it, and the scale of their activities.”*

## **TWELVE TAKEAWAYS**

**Greater transparency is needed. No one argued that transparency was not desirable.**

The public has a right to know. Recent news media accounts of Russian influence operations, based on government sources, were viewed by the respondents as incomplete and therefore potentially misleading. People would be better served by fuller accounts of what the Russians are doing, how they are doing it, and the scale of their activities. Exposure is necessary even if the Russians are quoting Americans.

**Exposure would have little to no effect on the exercise of First Amendment rights.**

Respondents generally agreed that exposure does not impede free speech or rise to the level of censorship or regulation of the press. Exposure does not regulate what one says or writes. There is no First Amendment issue with imposing disclosure requirements on foreign powers or agents of foreign powers. Exposure of Russian activities is a matter of policy and politics, not the Constitution or the law.

The Constitutional guarantee of free speech is generally considered to include the right of Americans to receive speech from foreign speakers, including hostile governments. However, imposing a disclosure requirement—and by extension, government exposure and even criminal prosecution for failure to comply—does not violate the First Amendment. U.s. governMandatory disclosure enables the public to better evaluate the material under consideration.<sup>7</sup>

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<sup>7</sup> Joseph Thai, “The Right to Receive Foreign Speech,” *Oklahoma Law Review*, Vol. 71, No. 1, 2018, available at <https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=1348&context=olr>.

## **But there are some differences.**

Respondents differed in how they saw the issue. Some argued that exposure simply that there was no effect on the First Amendment. Speakers and authors enter the public square. Exposure does not prevent them from speaking or writing and does not seek to censor what they say or write. As a hypothetical situation, if an American politician says that economic inequality in America is at a historical high, the fact that Russia might repeat it is unlikely to deter the person from advancing the argument.

Other respondents, however, took the position that while exposure could theoretically have some chilling effect, public interest favors disclosure. For example, campaign-funding disclosure laws may have a chilling effect on some donors who would prefer not to be identified, but the public interest in disclosure outweighs these concerns. Defamation laws, search warrants, and subpoenas for records or testimony conceivably may have a chilling effect, but the public interest is a greater consideration. Some pointed out that exposure is less likely to have a chilling effect if it remains devoid of comment on content.

As one respondent pointed out, “A proposal to require self-disclosure, government exposure, or a combination of both does not involve any direct action touching on the press and freedom of speech. And the national and public interests furthered by such proposals are clear and overwhelmingly outweigh the wholly hypothetical chilling effect.”

No respondents dismissed the concern. “Resolving the thorny First Amendment dilemma of preserving and protecting free speech while diverting and deterring disinformation and propaganda,” noted one respondent, “is no easy task.”

Another respondent commented that “concern about how such an effort by the U.S. government would inhibit free speech and thus represent an offense against the First Amendment is legitimate. But on balance, the right and need to know of American sources, audiences, and everybody else how their material is being exploited by Russian influence operations takes precedence.”

Several felt that First Amendment concerns, while legitimate, cannot be the basis for Russian immunity. They pointed out that if First Amendment concerns were to preclude efforts to expose Russian influence operations because they included American

*“...if First Amendment concerns were to preclude efforts to expose Russian influence operations because they included American content, foreign information operations would, in effect, be protected by the First Amendment, which, on the face of it, seems absurd.”*

content, foreign information operations would, in effect, be protected by the First Amendment, which, on the face of it, seems absurd. Americans may be a quarrelsome bunch, but our quarrels are family matters.

Russia and other foreign actors could muddy the waters further by creating fake American entities that they could then quote, thereby impeding exposure efforts.

Finally, some argued that exposure was appropriate but that the process had to be carefully controlled to ensure that it did not open the door to political weaponization through verbal assaults, threats to authors, government commentary on content, or allegations of fake news. Because something is repeated by the Russians does not mean that it is automatically fake. The ideological component of the earlier Soviet propaganda no longer exists. Current Russian efforts are meant to weaken American democracy, not advance a Marxist revolution. Terms like “fellow travelers” or “useful idiots” were once applied to those who supported communism or the Soviet Union. They have little meaning today, where Russian influence operations may support any group, cause, or argument solely in order to deepen domestic discord.

*“Indeed, exposure would show how widespread and largely non-ideological Russian information operations are thereby reducing the potentially chilling stigma ...”*

Indeed, exposure would show how widespread and largely non-ideological Russian information operations are thereby reducing the potentially chilling stigma that might otherwise be attached to being exploited by Russia. In other words, it could help to show that not everyone who is being retweeted or otherwise amplified by inauthentic Russian accounts is parroting Russian talking points. This is particularly true where Russia weighs in on both sides of a divide.

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### **Ample precedents exist for mandating transparency and limiting foreign interference.**

Some Internet news sites place paid advertisements on one side of the screen, where it is clear that they are commercial promotions, or they label items in the list of articles that are paid for by third parties as “ad” or “sponsored.” This has not shut down criticisms that Internet news sites conflate advertising with the content of their news streams, but it indicates a public concern and a degree of self-regulation to clearly label content according to source.

Newspapers and magazines currently label periodic supplements that are paid for by foreign governments—China, Saudi Arabia, etc.—as advertising. One suspects that even if patently false or objectionable material was paid for, newspapers would refuse to publish it.

Country-of-origin labeling is required for all imported products. While we generally think of this only in terms of physical products, in the information age, the label could be required for information “products” as well.

There is a requirement for foreign agents (including lobbyists employed by foreign governments) to register. The 1938 Foreign Agents Registration Act (FARA) was passed to prevent enemy propaganda, while protecting the First Amendment prohibition of government censorship.<sup>8</sup> Instead of censoring content, the government mandated the exposure of its source.

As already indicated, legislation passed in 1985 required the State Department to issue public reports on Soviet disinformation campaigns.

*“The 1938 Foreign Agents Registration Act (FARA) was passed to prevent enemy propaganda, while protecting the First Amendment prohibition of government censorship.”*

In 1974, Congress passed legislation mandating the disclosure of campaign contributions.<sup>9</sup> The U.S. Supreme Court upheld the law in 1976 on the grounds that disclosure impedes corruption and provides valuable information to the public, although it exempted small donations. In fact, one study found that public disclosure of campaign issues did make contributors think twice about their contributions,<sup>10</sup> but the greater good is served by transparency. (Campaign-finance laws currently do not hold digital platforms to the same standards as television and radio regarding the required disclosure of sources of payments for political advertisements.<sup>11</sup>)

The U.S. Criminal Code (52 U.S.C. 30121) prohibits foreign contributions to campaigns and donations by foreign nationals.<sup>12</sup>

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<sup>8</sup> Cynthia Brown, “The Foreign Agents Registration Act (FARA): A Legal Overview,” Congressional Research Service, December 4, 2017, available at <https://fas.org/sgp/crs/misc/R45037.pdf>.

<sup>9</sup> L. Paige Whitaker, “Campaign Finance Law: An Analysis of Key Issues, Recent Developments, and Constitutional Considerations for Legislation,” Congressional Research Service, updated September 24, 2018, available at <https://fas.org/sgp/crs/misc/R45320.pdf>.

<sup>10</sup> R. J. La Raja, “Political Participation and Civic Courage: The Negative Effect of Transparency on Making Small Campaign Contributions,” *Political Behavior*, December 2014, Vol. 36, pp. 753–776.

<sup>11</sup> Tony Romm, “Political Ads Are Flooding Hulu, Roku and Other Streaming Services, Revealing Loopholes in Federal Election Laws,” *The Washington Post*, February 20, 2020, available at <https://www.washingtonpost.com/technology/2020/02/20/hulu-roku-political-ads-streaming/>; Ann Ravel, “How the FEC Turned a Blind Eye to Foreign Meddling,” *Politico Magazine*, September 18, 2017, available at <https://www.politico.com/magazine/story/2017/09/18/fec-foreign-meddling-russia-facebook-215619>.

<sup>12</sup> Available at <https://www.law.cornell.edu/uscode/text/52/30121>.

The Bipartisan Campaign Reform Act of 2002, better known as the McCain–Feingold Act, contains an amendment that requires political candidates to stand by their ads.<sup>13</sup> The intent was to discourage anonymous attack ads.

Disinformation can be dangerous during health crises. The coronavirus pandemic has called attention to a number of instances of public intervention by U.S. government officials to rebut stories circulating on the Internet (mainly promoted by China) that the U.S. military brought the virus to China.<sup>14</sup> In similar circumstances more than three decades earlier, the Soviets blamed the Americans for creating the virus that caused AIDS.<sup>15</sup> According to the Soviets then, and the Chinese now, both viruses were created at Fort Detrick in Maryland. The Food and Drug Administration and the Federal Trade Commission have warned several companies to cease promoting and selling fraudulent products that claim to treat or prevent the coronavirus.<sup>16</sup> And the Surgeon General of the United States publicly criticized a national news show for hyping a treatment that had not been tested and proven effective.<sup>17</sup> There is no First Amendment concern or defense here.

In other words, there are a number of measures aimed at ensuring transparency and limiting foreign interference in domestic politics. These laws currently apply to U.S. persons, but it is unimaginable that they would not apply to foreign governments or entities as well. It would seem to be possible to use these precedents for legislation aimed at ensuring and enforcing transparency of foreign

information campaigns. There are also ample precedents for pointing out content that is false or misleading and even for prohibiting the promotion of products or behavior deemed dangerous (tobacco products immediately come to mind).

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<sup>13</sup> Seth Gitell, “Making Sense of McCain-Feingold and Campaign-Finance Reform,” *The Atlantic*, July/August 2003, available at <https://www.theatlantic.com/magazine/archive/2003/07/making-sense-of-mccain-feingold-and-campaign-finance-reform/302758/>.

<sup>14</sup> Jonathan Swan, “State Department Commends China's Ambassador for Disowning Virus Conspiracy,” *Axios*, March 24, 2020, available at <https://www.axios.com/state-department-china-coronavirus-conspiracy-0b961ef8-fd5c-4b1e-a8d1-7f8a6ce3cf93.html>.

<sup>15</sup> Linda Qiu, “Fingerprints of Russian Disinformation: From AIDS to Fake News,” *The New York Times*, December 12, 2017, available at <https://www.nytimes.com/2017/12/12/us/politics/russian-disinformation-aids-fake-news.html>.

<sup>16</sup> Christine Hauser and Johnny Diaz, “F.D.A. Warns 7 Companies to Stop Claiming Silver and Other Products Treat Coronavirus,” *The New York Times*, March 9, 2020, available at <https://www.nytimes.com/2020/03/09/health/fda-letter-coronavirus-cures.html>.

<sup>17</sup> Benjamin Fearnow, “Surgeon General Immediately Warns Viewers Against Trying Malaria Drug Treatment for Coronavirus After Dr. Oz Tells Fox Viewers He's Testing It,” *Newsweek*, March 23, 2020, available at <https://www.newsweek.com/surgeon-general-immediately-warns-viewers-against-trying-malaria-drug-treatment-coronavirus-after-1493751>.

## **The United States is not opposed to openly expressed foreign viewpoints.**

The United States does not shut down foreign news broadcasting in this country, even though the broadcasts may offer alternate viewpoints or criticism of U.S. policies. RT and Sputnik (funded by the Russian government), CGTN (funded by the government of China), Al Jazeera (funded by the government of Qatar), TRT (funded by Turkey), BBC (funded by the United Kingdom), NHK (funded by Japan), France 24 (funded by France), DW (funded by Germany), and others all broadcast regular news programs in the United States.

However, the U.S. government has required RT, Sputnik, and CGTN to register as foreign agents, not because of foreign-government funding, but because of a judgment that, unlike BBC and the others, these three are responsive to current foreign-government policy goals. They are not independent.

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The U.S. government has not interfered with contracts between Radio Sputnik and Alpine Broadcasting Corporation of Liberty, Missouri—the owner of the three Kansas City–area radio stations that broadcast Radio Sputnik several hours a day. Responding to criticism that the content comes from an organization that was compelled by the U.S. government to register as an agent of a foreign country, the Kansas broadcaster cited “free speech” as a defense.<sup>18</sup>

But, as one respondent asked, “RT and Sputnik are, by law, registered foreign agents. How often does that label appear in their content and does it affect distribution and perceptions of their messaging?”

## **There are different ways to achieve exposure.**

The first way to achieve exposure is mandatory self-reporting. FARA and Stand by Your Ad laws (a provision of the McCain–Feingold Act) provide the precedent for this approach. The newspaper practice of labeling sponsored content as advertising would be another example of voluntary self-regulation. FARA could be expanded to cover influence operations in the United States by foreign agents abroad. The use of the term “sponsored” on Internet news sites offers another precedent but raises the question of whether a requirement for disclosure runs into the Internet’s desire to protect anonymity. Obligatory self-reporting raises fewer First Amendment issues.

<sup>18</sup> Neil MacFarquhar, “Playing on Kansas City Radio: Russian Propaganda,” *The New York Times*, February 13, 2020, available at <https://www.nytimes.com/2020/02/13/us/russian-propaganda-radio.html>.

As one respondent put it, “There’s no First Amendment problem with requiring Russia to include a disclosure at the bottom of any ad it runs in *The New York Times*.” And why would the analysis change if Russia’s ad repurposes speech by Americans? It would be a different story if the disclosure requirement were imposed on Americans whose speech is repurposed by foreign powers, but that doesn’t seem like a likely scenario in this conversation.

Another approach is exposure by government, following the practice of the 1985 legislation detailed earlier and the current efforts of Voice of America (VOA) and Radio Free Europe/Radio Liberty (RFR/RL), which are described below. The two approaches might be combined in a law mandating self-disclosure which can be enforced through government exposure of those failing to comply with the law.

If there is legislation to require self-disclosure by foreign information sources or to mandate government reporting of foreign information operations, it should be crafted narrowly to address the issue of foreign activity and avoid imposing unnecessary burdens on American activity. At the same time, legislators must preclude the invention of fake American entities or the use of American fronts to avoid identification as a foreign source.

*“The two approaches might be combined in a law mandating self-disclosure which can be enforced through government exposure of those failing to comply with the law.”*

That leaves the question, How can such exposures be shared with the broad public? Official reports, articulation by members of Congress, media coverage, investigative reporting, TV anchors, documentaries, social media, and public education are all avenues for dissemination.

### **There is some wariness about where exposure might lead.**

While all of the respondents were comfortable about exposure itself, some raised issues about where it might lead. They did not want to see exposure become a means of belittling or vilifying Americans whose content might be repeated in part or in whole, correctly or out of context, by Russian operators. Broad exposure of Russian information operations could mitigate the taint.

The shelf life of secrets is vanishingly short. Everyone should assume that information will become public anyway, including the fact that your tweet was amplified by Russia. A concerted exposure campaign will underscore this expectation. Instead of hoping their arguments won’t become public, authors could address any concern about taint by putting them into context, explaining—and standing by—what they wrote or said, and noting the cases where Russia amplified the other side of the argument as well. In other words, authors concerned that Russian promotion might undermine their

arguments or reputation can do things that negate Russian influence, which is the purpose of exposure.

### **Commentary on content is more controversial.**

Whether government disclosure would lead to a requirement that social media organizations be obliged to remove content or would provide them with incentive or cover for doing so puts such efforts in more-controversial territory.

Generally, the respondents were comfortable with exposure, but some were less comfortable with editorial comment that could raise First Amendment concerns. However, some felt that clear untruths in Russian influence operations should be exposed, pointing out that First Amendment protection does not and ought not extend to foreign operators.

Some respondents suggested that mandatory removal of content should not be part of any law mandating exposure. That might be viewed as censorship and could raise First Amendment concerns. However, violating a law requiring exposure would provide grounds for content removal, in which case, it is not censorship of content but a “time, place, and manner” restriction. Mandatory removal would be appropriate for activity that violates a platform’s Terms of Service, such as lying about being an American. Even if an inauthentic account is amplifying American-authored content, removing the account does not violate the First Amendment. The First Amendment applies only to activity of the government, not of the platforms.

*“Internet companies prefer to describe themselves as ‘platforms,’ thereby shying away from responsibility for content.”*

Exposure may not require shutting down sites or removal of material, but it will require cooperation with media and Internet companies.

Internet companies prefer to describe themselves as “platforms,” thereby shying away from responsibility for content.<sup>19</sup> They also tend to protect anonymity. They therefore will have different ideas about cooperation than publishers who accept editorial responsibility, and they may not share a commitment to anonymous

authors, although they will fiercely protect their sources. As one respondent pointed out, the claim of the “right” of anonymity would not extend to the actions of foreign governments.

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<sup>19</sup> Alexis C. Madrigal, “The ‘Platform’ Excuse Is Dying,” *The Atlantic*, June 11, 2019, available at <https://www.theatlantic.com/technology/archive/2019/06/facebook-and-youtubes-platform-excuse-dying/591466/>.

Rules for the Internet are still a work in progress. Whether the Internet will gradually work out its own set of rules or will increasingly be subjected to government controls is still a matter of debate. Facebook has moved toward exerting some controls, while Twitter has resisted removals on the grounds of free speech. However, Twitter recently removed 8,558 accounts attributed to Serbian President Vucic's political party for violating its own rules on unacknowledged coordination of activities—in other words, conspiracy.<sup>20</sup> As platforms exert controls, Russian influence operators move to other platforms that provide more favorable terrain.

### **We cannot predict the effects of exposure.**

It is difficult to predict the effects on citizens of exposing Russian information operations, just as it is difficult to predict how much Russian information operations actually influence American behavior. While democracy is founded upon the presumption that a well-informed public will make appropriate choices about candidates and policies, predictions about the effects of exposure on public behavior or the outcome of elections should be avoided. We simply don't know.

*“Rules for the Internet are still a work in progress. Whether the Internet will gradually work out its own set of rules or will increasingly be subjected to government controls is still a matter of debate.”*

Without getting into the question of how exposure of Russian information operations has affected or may affect voting patterns, several respondents emphasized the need for Americans in today's age of the Internet and social media to become better-informed consumers of what is presented to them as news. They need to be savvy about sources, agendas, and biases in order to critically evaluate the credibility and veracity of information. Disinformation tracking can help, but teaching media literacy should be a part of the nation's education curriculum.

### **Exposure will require expertise and oversight.**

Several respondents pointed out that exposure will require a coordinated government effort by a dedicated and skilled unit. Some doubted that the skills were currently available and suggested that training would have to be improved.

Several also underscored the need for close oversight to ensure that selective exposure was not being abused to support political agendas. All are mindful of the current partisan environment. While respondents pointed out that fewer Americans today trust government institutions, they themselves were wary of possible future abuses. How

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<sup>20</sup> “Twitter Removes Thousands of Accounts 'Promoting' Serbian Ruling Party,” Radio Free Europe/Radio Liberty, available at <https://www.rferl.org/a/serbia-twitter-vucic-sns-serbian-progressive-party/30526199.html>.

might creative political operatives with no scruples or those who self-righteousness placed them above scruples try to influence or exploit legislation to achieve goals beyond exposing the information campaigns of foreign adversaries?

As one respondent pointed out, “The danger that the capability required to operate effectively on this front could easily be exploited for illegitimate political purposes demands that such capability be exercised under the most scrupulous legal and political oversight and control. How to assure that in our current political environment will be challenging.”

Conscience cannot be legislated. The Bill of Rights itself is testament to the misgivings of those who wrote and ratified the Constitution. The transparency sought by exposing Russian information operations should also be the guiding principle for how the exposure is conducted and controlled.

Oversight could be provided by an Inspector General assigned to the government entity given the task of exposing foreign information operations, by Congress, or by a non-partisan public commission whose function would be to establish and ensure adherence to basic principles, assist in addressing controversial issues, and prevent the enterprise from being employed as a weapon in domestic politics.

Another difference between the 1980s and today is that government is not as trusted today as it was decades ago. There are two possible ways to address the lack of trust. One way is to ensure that the oversight itself remains transparent. The other way is to augment government oversight with oversight by an external non-government entity, although that by itself is no guarantee that the external entity will be immune to accusations of partisanship or will necessarily be more trusted.

*“Conscience cannot be legislated. The Bill of Rights itself is testament to the misgivings of those who wrote and ratified the Constitution.”*

### **It is not just the Russians who raise concerns.**

Finally, all of the respondents are aware that it is not just the Russians who are a concern, but a number of foreign adversaries who are engaged in influence operations. China, Iran, and others are also engaging in hostile information operations. The absence of an effective response to these operations will encourage others to adopt Russian methods.

**Current efforts contribute to awareness of Russian information operations but do not ensure public disclosure.**

There are a number of current efforts that offer organizational models for implementing an exposure strategy, but they are disconnected and often underfunded, and they fall short of a coordinated national effort to ensure that the American public knows what the Russians and other adversaries are doing.

Self-disclosure can be legislatively mandated by extending FARA. This is consistent with other legislation mandating transparency.

The 1980s legislation mandating public reports of Russian influence operations offers another approach. This could be carried out by an interagency entity along the lines of the AMWG, or by a specially created entity, which could be either a government agency or a government-supported but independent agency.

*“While the government still has formidable capabilities in this area, much of the necessary expertise also resides in the Internet platform companies and among independent researchers.”*

In the 1980s, the U.S. government was better positioned to detect Soviet information operations. While the government still has formidable capabilities in this area, much of the necessary expertise also resides in the Internet platform companies and among independent researchers. The linkage between public and private sectors will be critical. The Department of Homeland Security is already tracking Russian influence operations and sharing the material with federal, state, local, and selected private sector officials, but For Official Use Only designations prevent sharing it with the general public.<sup>21</sup>

As part of the 2017 National Defense Authorization Act, Congress expanded the mission of the State Department’s Global Engagement Center (GEC) to counter disinformation spread by foreign countries.<sup>22</sup> The GEC had originally been established in 2016 to counter terrorist propaganda. In response to the new congressional mandate, the GEC set up three new teams, one focused on Russian disinformation, one on Chinese disinformation, and one on Iranian disinformation.

According to the head of the GEC, one of its primary tasks is to publicly expose false narratives “to help audiences understand the need to be vigilant about the threat of

<sup>21</sup> Elizabeth Bodine-Baron, Todd C. Helmus, Andrew Radin, and Elina Treyger, *Countering Russian Social Media Influence*, Santa Monica, CA: RAND Corporation, RR-2740-RC, 2018, available at [https://www.rand.org/pubs/research\\_reports/RR2740.html](https://www.rand.org/pubs/research_reports/RR2740.html).

<sup>22</sup> Matthew C. Weed, “Global Engagement Center: Background and Issues,” *CRS Insight*, Congressional Research Service, August 4, 2017, available at <https://fas.org/sgp/crs/row/IN10744.pdf>.

disinformation.”<sup>23</sup> There is nothing in the legislative authorization that would appear to prevent its exposure of hostile information operations to a U.S. audience, although that is not the same as an affirmative responsibility to inform the public of information campaigns by foreign states and their proxies, which is the issue addressed here.

In fact, with the exception of one report shared with a news media outlet, the GEC has not released any of its reports to the public, according to its director, on the grounds that doing so might “reveal operational secrets.”<sup>24</sup> That seems inconsistent with the statement that one of GEC’s primary tasks is to *publicly expose* false narratives, and it suggests that public exposure of Russian information operations may be impeded as much by a culture of secrecy as by First Amendment concerns. Congressionally mandated exposure would oblige the GEC or another government entity charged with the task of exposure to figure out how to make such information public without exposing tradecraft. It can be done.

One respondent referred specifically to the work currently being done by VOA and RFE/RL as a possible model for organization.

VOA and RFE/RL are multimedia, non-partisan, international broadcasters providing accurate news and information, particularly for audiences with limited press freedoms. VOA and RFE/RL journalists research and analyze quotes, stories, and reports distributed by government officials, government-sponsored media, and other high-profile sources. The reporters separate fact from fiction, add context, and debunk lies.

They have recently initiated a fact-checking website, called Polygraph.info, to expose Russian disinformation.<sup>25</sup> The website serves as a resource for verifying the increasing volume of disinformation and misinformation being distributed and shared globally. A similar website in the Russian language can be found at factograph.info.<sup>26</sup>

*“In fact, with the exception of one report shared with a news media outlet, the GEC has not released any of its reports to the public, according to its director, on the grounds that doing so might ‘reveal operational secrets.’”*

<sup>23</sup> U.S. Department of State, “Briefing on Disinformation and Propaganda Related to COVID-19—Special Briefing: Lea Gabrielle, Special Envoy and Coordinator, Office of Global Engagement Center via Teleconference,” March 27, 2020, available at <https://www.state.gov/briefing-with-special-envoy-lea-gabrielle-global-engagement-center-on-disinformation-and-propaganda-related-to-covid-19/>.

<sup>24</sup> Bill Gertz, “Global Engagement Secrecy,” *The Washington Times*, March 11, 2020, available at <https://www.washingtontimes.com/news/2020/mar/11/inside-the-ring-global-engagement-secrecy/>.

<sup>25</sup> Available at <https://www.polygraph.info/>.

<sup>26</sup> Available at <https://www.factograph.info/>.

In addition, there are a number of private fact-checking organizations in the United States and abroad. Snopes.com, PolitiFact.com, and FactCheck.org are examples.<sup>27</sup> Other examples include the Hamilton 68 Project, funded by the Marshall Fund's Alliance for Securing Democracy, which tracks Russian disinformation efforts on some social media platforms,<sup>28</sup> and Hoaxy, an Indiana University project, which offers a platform for tracking and visualizing the spread of disinformation.<sup>29</sup>

*“...many of these efforts lack adequate resources to cover the breadth of Russian-disseminated disinformation and influence operations.”*

In 2015, the European Union's East Stratcom Task Force launched a site called EU vs Disinfo to forecast, expose, and respond to Russian disinformation aimed at EU countries.<sup>30</sup>

However, many of these efforts lack adequate resources to cover the breadth of Russian-disseminated disinformation and influence operations.

It is beyond the scope of this paper to propose specific legislation, design the appropriate organization, formulate the specific protocols and principles that would guide its efforts, or determine the structure of oversight. That merits further examination.

## **OUR ANSWER TO THE QUESTION**

To answer the question set forth at the beginning of this discussion paper, it is fair to say that the respondents would argue that First Amendment concerns must be taken into account in whatever measures are proposed to expose Russian (or other foreign) influence operations, but that the First Amendment ought not to be the basis for protecting hostile information campaigns by foreign actors, nor can it be an excuse for inaction by the United States.

## **NEXT STEPS**

This memorandum is intended to initiate a broader discussion. It certainly will not be the last word on this subject. As indicated previously, it is not a legal brief. There is a rich case law relating to the First Amendment and a cadre of lawyers who have dedicated their professional careers to the issue. It would be useful to elicit their views on this particular question.

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<sup>27</sup> Available at <https://www.snopes.com/>, <https://www.politifact.com/>, and <https://www.factcheck.org/>.

<sup>28</sup> Available at <https://securingdemocracy.gmfus.org/hamilton-dashboard/>.

<sup>29</sup> Available at <https://hoaxy.iuni.iu.edu/>.

<sup>30</sup> Available at <https://euvsdisinfo.eu/>.

One should have no illusions about the likelihood of agreement. The framers of the Constitution argued fervently among themselves. The document they created did not end the Constitutional debates, but reflected compromises sometimes reluctantly agreed to without abandoning deeply held views. Arguments continued—confirmation of our living democracy.

The memorandum underscores the importance of collaboration with the private companies that provide the online news services and social media platforms exploited by foreign operatives. Industry attitudes appear to be on the move. The discussion would benefit from a better understanding of how these companies view mandatory self-disclosure and government exposure. They have their own core values, business models, responsibility to shareholders, and international concerns. How do these interact with U.S. national security interests?

Russia has been the longest and most aggressive practitioner of hostile influence operations, but as mentioned several times in the memorandum, it is not the only adversary targeting the United States. China, Iran and others are also sources of disinformation campaigns and hostile influence operations. However, the participants who contributed to this memorandum were mainly knowledgeable about Russia, far less so about the different strategies and tactics of other adversaries. Further discussion with appropriately informed audiences would be useful in countering these activities although it may not fundamentally alter responses to the First Amendment question.

**Summary prepared by Brian Michael Jenkins**

**April 2020**

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This Discussion Paper was prepared in part with comments from participants of the original May 2019 workshop. In addition, two new participants were invited to offer additional commentary: Richard C. Daddario and Suzanne Spaulding. They are listed in the participant biographies on the following two pages. In addition, thanks are owed to Karen J. Greenberg, Director of the Center on National Security at Fordham University School of Law, who provided a robust critique and helpful comments. Mr. Jenkins drafted the summary. Thanks also to Janet DeLand for her excellent editorial assistance.

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\*More-detailed biographies of most of the participants can be found in the workshop report, *America's Great Challenge: Russia's Weapons of Mass Deception*, available at <https://weaponsofmassdeception.net/>.

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