

The Mueller Report: Is Information a Contribution?

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Summaries and commentaries about the Mueller Report are ubiquitous. The first, written by the Attorney General of the United States, proved highly controversial, reflective of the polarized environment. If a summary is not to one's liking, however, the Report itself is widely available and the redactions are actually modest. Most redactions appear in Volume I of the Report, which covers Russian election meddling and concludes there was no conspiracy with the Trump campaign. Most of the redactions cover ongoing proceedings that have been referred by the Special Counsel to U.S. Attorneys for further investigation or prosecution (e.g., Roger Stone). There are few redactions in Volume II of the Report, which covers the politically and legally sensitive subject of obstruction of justice.

Russian 'Active Measures'

Volume I recounts the "active measures" by Russian operatives to meddle in American politics. The measures fall into three basic categories:

- Russian military intelligence agents (the GRU) hacked American computers, stole emails and other sensitive information, and disseminated the stolen emails on the Internet (including via WikiLeaks);
- Russian operatives at the Internet Research Agency purchased false American identities, opened bank accounts in false names, purchased socially divisive ads on media platforms, and assumed false identities on several social media platforms to disseminate propaganda and organize politically themed rallies;

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- Russians attempted to contact and recruit unwitting American citizens, including individuals in the Trump campaign, often through social media contacts.

Many of these facts were previously set forth in Mr. Mueller's criminal indictments of Russian computer hackers and military generals. And Russian "active measures" to spread disinformation and influence American elections have been part of Russian and Soviet espionage for many decades.

No Trump Coordination or Conspiracy

According to the Mueller Report, "the investigation examined whether these contacts involved or resulted in coordination or a conspiracy with the Trump Campaign and Russia, including with respect to Russia providing assistance to the Campaign in exchange for any sort of favorable treatment in the future." The Report concludes that "the investigation did not establish such coordination."

The Report states that the Special Counsel considered several potential violations of law. For example, the Report analyzes whether any Trump campaign consultant served as an unregistered foreign agent under the Foreign Agents Registration Act (FARA) (18 U.S.C. §§ 611-621) or 18 U.S.C. § 951. On this score, the Report concludes that the "investigation did not ... yield evidence sufficient to sustain any charge that any individual affiliated with the Trump Campaign acted as an agent of a foreign principal within the meaning of FARA or, in terms of Section 951, subject to the direction or control of the government of Russia, or any official thereof."

Campaign Finance Law Analyzed

The Report also concludes that no Trump campaign official violated the foreign national prohibition of the Federal Election Campaign Act (FECA). Specifically, the Report grapples with a difficult legal issue: whether intangible *information* constitutes a contribution, a "thing of value," and therefore whether solicitation or receipt of *information* from a foreign national violates the prohibition against foreign national contributions.

The Report recounts the 20-minute meeting between Donald Trump Jr., Jared Kushner, Paul Manafort, and a Russian citizen named Natalia Veselnitskaya in Trump Tower on June 9, 2016. The Report analyzes that meeting through the paradigm of a potential in-kind contribution of negative information about Hillary Clinton. That is, the Report states that the Special Counsel tried to determine if Donald Trump Jr. unlawfully solicited a cognizable "thing of value" from a foreign national by agreeing to meet with the Russian with the expectation of learning negative information about Hillary Clinton or whether he accepted a "thing of value" in the form of the information imparted during the meeting. As it turns out, however, the meeting was decidedly non-informative. The Russian imparted no information about Hillary Clinton.

The Report, in tepid reasoning, observes that "[t]here are reasonable arguments that the offered information would constitute a 'thing of value' within the meaning" of the FECA definition of "contribution" and analogizes negative information to paid professional opposition research. But the Special Counsel declined to make a case because there was no way to place a *value* on the information that never materialized at the Trump Tower meeting and, moreover, he did not believe he could establish a "willful" violation in any event.

Significantly, in the next passage, the Report acknowledges that “no judicial decision has treated the voluntary provision of uncompensated opposition research or similar information as a thing of value that could amount to a contribution under campaign-finance law.”

On this point, absent from the Report is any citation of FEC analyses of the issue. The FEC is the agency tasked by Congress with interpreting and implementing the FECA. It has treated similar issues over the years. Under FEC precedents, the sharing of non-public information is not generally considered a cognizable contribution. For example, in Matter Under Review (MUR) 6938, the Commission found there was no contribution where author Peter Schweizer, the author of *Clinton Cash*, provided to Senator Rand Paul non-public, politically significant, negative information about Hillary Clinton which Senator Paul in turn used in connection with his presidential campaign. In another matter, MUR 6958, a controlling group of Commissioners concluded that Senator Claire McCaskill did not make a contribution to the campaign of her eventual general election opponent, Todd Akin, by authorizing her pollster to discuss polling data during a telephone conversation with a representative of the Akin campaign. As a general rule, mere *information* imparted in verbal conversation has been considered too nebulous to constitute a “*thing of value*.” Were the rule otherwise, every conversation on the street could be deemed a valuable in-kind contribution to campaigns if it imparts non-public but politically useful information.

In any event, the Report describes a meeting that produced no definitive information, no opposition report, no dossier, no emails – nothing useful or even informative that could have been used by the Trump campaign. Accordingly, the Special Counsel concluded that no violation of the ban against foreign national contributions could be inferred from the meeting with a Russian citizen in Trump Tower.

Omitted or Redacted Matters

As noted above, the Report redacts information about 14 ongoing investigations or prosecutions referred to other offices. However, some issues appear to have been omitted from the Report. The Mueller Report devotes many pages to describing details about each conversation and contact, however remote from the campaign, between Russian nationals and Trump campaign advisors. It likewise documents in detail the Trump campaign’s abiding interest in the WikiLeaks revelations about Clinton. It analyzes at great length the legal significance of Donald Trump Jr.’s meeting with a Russian citizen in Trump Tower. And it devotes many pages to Paul Manafort’s connections with Ukrainians before, during, and after his service on the Trump campaign. That is in addition to the Special Counsel’s prosecution of Manafort and Rick Gates for serving as unregistered agents for the Party of Regions under the FARA. The Report even states that the Special Counsel devoted resources to determining whether George Papadopoulos was an agent of the Israeli government. These detailed accounts reflect hundreds or perhaps thousands of hours of investigative time by the Office of Special Counsel.

Given that searching approach to contacts with Russians, Ukrainians, and Israelis by the Trump campaign, the absence of any detailed discussion of the Clinton campaign’s employment of Christopher Steele to reach out to Russians for “dirt” on Trump, the extent of those contacts, the use of that information, and the legal significance of that situation is a curious omission. It is possible that matter was referred to a U.S. Attorney’s

office and therefore is among the redacted list of 14 ongoing matters.

Likewise, there is no mention in the Report of the Democratic National Committee's apparent efforts to obtain and deploy negative information about Paul Manafort from the Government of Ukraine and its U.S. embassy. The Report does acknowledge that Manafort was forced to resign from the Trump campaign "amidst negative media reporting about [Manafort's] political consulting work for the pro-Russian Party of Regions in Ukraine," but beyond that factual statement indicates no attention to the Ukrainian government's role in instigating that negative media or any American's participation. It is at least possible that matter also is one of the 14 redacted ongoing matters.

Obstruction of Justice

Finally, the Report recounts many details about the President's frustration with then-Attorney General Jeff Sessions, Deputy Attorney General Rod Rosenstein, and Special Counsel Robert Mueller and his many and varied efforts to fend off what he viewed as an unfair investigation. The Report concludes that the President's exercise of official Article II powers of the presidency, such as firing the FBI director, are not prosecutable by the Department of Justice but rather a subject for constitutional checks and balances under Congress' impeachment powers. As for non-Article II actions by the President, the Report defers to the Attorney General. As we all know, Attorney General William Barr and Deputy Attorney General Rod Rosenstein determined that none of the conduct detailed in the Report constituted obstruction of justice.