

**Hearing on Lessons from the Mueller Report:
Counterintelligence Implications of Volume I
House Permanent Select Committee on Intelligence**

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Statement of Andrew C. McCarthy

Chairman Schiff, Ranking Member Nunes, members of the Committee, thank you for inviting me to this morning's hearing.

I served as a federal prosecutor for nearly 20 years, almost all at the Office of the United States Attorney for the Southern District of New York, from which I retired in 2003 as the chief assistant U.S. attorney in charge of the Southern District's satellite office in White Plains. I've also done a short stint working on an independent counsel probe; and for several months in 2004, I was a consultant to the Deputy Secretary of Defense while the Pentagon was grappling with various legal issues after the onset of post-9/11 military operations. During my years as a prosecutor, I was honored to receive the Attorney General's Distinguished Service Award in 1988 and the Attorney General's Exceptional Service Award in 1996 for my work on international organized crime and international terrorism cases.

Since leaving government service, I have been a writer and commentator. I am appearing this morning in my personal capacity as a former government official who cares deeply about our national security and the rule of law.

For most of my first several years as a prosecutor, my work focused on international organized crime. After the World Trade Center was bombed on February 26, 1993, I spent much of the last decade of my tenure working on national security investigations. I am proud to have led the successful prosecution of Sheikh Omar Abdel Rahman and eleven other jihadists for conspiring to wage a war of urban terrorism against the United States, which included the Trade

Center attack, a plot to bomb New York City landmarks, and other plots to carry out political assassinations and terrorist strikes against civilian populations. In that effort, I was privileged to work alongside a superb team of federal prosecutors, support staff, and investigators assigned to the FBI's Joint Terrorism Task Force.

It was in connection with that investigation that I became intimately familiar with the FBI's counterintelligence mission, and the powerful tools that the Constitution and federal law make available for the execution of that mission. While it escapes the attention of many Americans, who know the bureau as the nation's premier law enforcement agency, the FBI is also our domestic security service.

That is a purposeful arrangement on our government's part, and I believe a prudent one. Most of our intelligence services focus on the activities of foreigners outside the United States that could threaten American interests. Their work is essential, but it is frequently dangerous and often occurs outside the writ of our laws and courts. We want our domestic security to be safeguarded by an agency that is both highly professional and at all times beholden to our Constitution and laws. The FBI fits that bill.

In some nations, the law enforcement and domestic security functions are handled by separate agencies. Our government's theory, to the contrary, has been that housing them under the same bureaucratic roof allows these missions to be carried out more efficiently in that they support one another more easily. This is a sound theory, and I have seen how effective it can be when the FBI's counterintelligence mission is leveraged not only by the bureau's criminal division and federal prosecutors, but also by the force multiplier that is the combination of state law enforcement agencies and the public at large. In the aftermath of the 9/11 attacks and the spate 1990s atrocities that preceded them, cooperation and information-sharing between the

federal government and state agencies, and the cooperation among federal agencies themselves (particularly intelligence agencies), have become far superior to what they were when I started working on these matters a generation ago.

There is an implicit understanding in our law: The awesome powers vested in our security agencies must not be used pretextually to carry out law enforcement functions. This was the major controversy we dealt with in the 1990s. The infamous “Wall” imposed by internal Justice Department guidelines, which had the effect of impeding cooperation between intelligence and law enforcement investigators, was unwise policy driven by good intentions. The idea was to ensure that agents, who lacked an adequate factual predicate to use criminal law investigative techniques, would not do an end-around the Constitution by conjuring a national security angle that would justify resort to foreign counterintelligence authorities – such as warrants issued under the 1978 Foreign Intelligence Surveillance Act (FISA).

Law enforcement involves serious intrusions on our most fundamental freedoms – liberty, privacy, in some instances even life. Consequently, our law builds in due process presumptions and protections to safeguard Americans. Search, arrest, and eavesdropping warrants, for example, may only issue based on probable cause that a crime has been (or is being) committed.

FISA bypasses important Fourth Amendment safeguards. Our law permits this for two reasons. First, the objective of a counterintelligence investigation is not to build criminal prosecutions but to collect information. Second, the “target” of a counterintelligence investigation is a foreign power that threatens U.S. interests. Consequently, the typical counterintelligence scenario is not an effort to gather evidence against an American in order to arrest, indict, convict and imprison that American.

Nevertheless, FISA does endeavor to give an American suspected of being a foreign agent some protections. A warrant may not issue unless the FBI and Justice Department demonstrate probable cause to believe the American is knowingly engaged in clandestine activity. The relevant FISA statute (50 U.S. Code, Section 1804(b)(2)) does not quite require probable cause of a crime; but it calls for something very close – a showing that the suspected activities may involve a violation of criminal statutes. To underscore that the required showing calls for a demonstration of grave and willful conduct, the statute speaks of taking direction from foreign powers to commit criminal offenses, engaging in such activities as sabotage or terrorism, or intentionally using false identities specifically on behalf of a foreign power – which, of course, makes more serious clandestine activity possible.

There has been some expert commentary and testimony over the last few years about the threats posed by Russian espionage, addressing the fact that Russian intelligence services attempt to coopt or dupe Americans into providing assistance. This is, indeed, a serious threat. It is noteworthy, though, that it would not be an adequate basis for a surveillance warrant against the unwitting American. Our law requires a showing of purposeful action on the foreign power's behalf against our country.

It is also worth noting that our law calls for electronic surveillance to be something like a last resort because it is such an intrusive investigative technique – the monitoring of all a person's communications, by telephone, email, text, and the like. Whether we are talking about criminal or counterintelligence investigations, the law requires the FBI and the Justice Department to satisfy the court that alternative investigative techniques have been tried and have failed, or would surely fail if tried. For example, a warrant would not be justifiable if investigators had the ability to conduct productive interviews with the subject, or if the

investigators had other ways of drawing information from the subject, such as the infiltration of an informant.

I mention these aspects of surveillance to highlight that, even in normal circumstance where no extraordinary public interests are at stake, our law permits counterintelligence monitoring of Americans only reluctantly, and only on a strong showing that they truly are involved in nefarious activities on behalf of a foreign power.

Obviously, 2016 was not a normal circumstance in that regard. It involved the extraordinary public interest of a campaign for the presidency. We have an important norm in the United States against the use of the government's investigative authorities, very much including its foreign counterintelligence powers, to monitor the political opposition of the incumbent government. This norm is salutary fallout from the political spying misadventures of the 1960s and 1970s.

There are some commentators who recoil at the terms "spying" and "political spying." There are others who suggest that, because of the negative implications investigations could have for our capacity for self-governance, a political campaign should be immune from surveillance. I have never fallen into either of these camps.

Spying is simply the covert collection of information. If the government is doing the spying, the issue is not what term we use to describe it but, rather, whether the government had a lawful basis and an appropriate factual predicate for it.

Our nation has a relatively recent history of *political spying* episodes from which there is much to learn. When I was prosecuting terrorism cases, that history was instructive: It is an unavoidable fact that unlawful forcible action against our country is inextricably bound up with lawful political dissent; nevertheless, the Constitution creates a safe harbor for political dissent,

even noxious political dissent, and therefore we must avoid criminalizing policy disputes even if doing so makes it harder to protect the nation from foreign threats.

My own view of Russia's government, for what it's worth, is that it is a menace – an anti-American regime that engages in territorial aggression, crushes dissent internally (and, occasionally, outside its borders), and abets bad actors globally – including Iran, the world's leading state sponsor of anti-American terrorism. If the 1980s wanted to call to ask for their foreign policy back, I would be glad to dial the number for them. I've never thought Vladimir Putin thought the Cold War was over, and I said as much in dissenting from the Bush administration's depiction of Russia as a potential strategic partner, and the Obama administration's foolish "Russia Reset" policies. Naturally, I also disagreed with the Trump campaign's blandishments toward the Kremlin and what I regard as the quixotic quest for better relations with Putin's regime. That was a big reason why I supported a different candidate in the Republican primaries, and why I have been pleased that the Trump administration has taken tougher action against Russia than the rhetoric presaged.

All that said, these are policy disputes. Personally, I do not favor bending over backwards to have better relations with Moscow. That does not mean people who do favor it are unpatriotic or are engaged in espionage – they could just be wrong, or I could be wrong. Our First Amendment guarantees should enable us to engage in robust political debates without criminalizing our disagreements.

On the other hand, when the framers were writing and debating the Constitution, few specters caused them more anxiety than the possibility that the immense powers of the presidency they were creating could fall under the sway of foreign powers. Consequently, if there actually were strong evidence that a president or presidential candidate was a clandestine

agent of a foreign power, the incumbent government would have not only the authority but the duty to take investigative and enforcement action. If the evidence were compelling, it would not matter whether the candidate in question was from the opposition party – the administration’s duty would be to protect the United States.

But the evidence would have to be compelling.

That is the way it is with norms. We should not discount the possibility that our norm against the training government surveillance powers on political campaigns could ever be overcome; but the proof required to overcome the presumption against such surveillance must be very convincing.

Based on what is publicly known, including through the now-concluded Mueller investigation, there was never compelling evidence for the proposition that the Trump campaign was engaged in an espionage conspiracy with the Kremlin.

The only publicly known allegations that the Trump campaign was complicit in Russia’s hacking and influence operations, and in the dissemination of stolen emails, are contained in the Steele dossier. To date, there is no known corroboration for those claims. Obviously, had they been verified, the Mueller investigation would have had a very different conclusion.

While looking forward to engaging with the Committee, I would conclude with the following points:

1. Volume I of the Mueller Report draws three principal conclusions: (a) the Putin regime perceived advantage in a Trump victory and conducted its operations accordingly; (b) there is evidence the Trump campaign hoped to benefit from the publication of negative information about the opponent; and (c) there is no evidence of a conspiracy between the Trump campaign and the Russian regime. Of these, the first is plainly the weakest. The evidence in the report

indicates that Russia. The first two of these are more in the nature of political assertions than prosecutorial findings. If there is insufficient evidence that a conspiratorial enterprise existed, a prosecutor has no business speculating on motives in a politically provocative manner.

Moreover, I do not believe the assertion is borne out by the evidence. The reports shows that agents of Putin's regime expressed support for Trump's candidacy. That is entirely consistent with a motivation to incite divisions and dissent in the body politic of free Western nations, which is Russia's modus operandi. Russia goal is to destabilize Western governments, which advantages the Kremlin by making it more difficult for those governments to pursue their interests in the world. Putin tends to back the candidates he believes will lose, on the theory that an alienated losing faction will make it harder for the winning faction to govern. Putin is all about Russia's interests, which is in destabilization; it is a mistake to portray to allow him to divide us by portraying him as on one side or the other; he is against all of us.

2. There is no reason to doubt that the Trump campaign hoped to benefit from the publication of negative information about Secretary Clinton. That is what campaigns do. It is not an admirable aspect of our electoral politics that campaigns seek negative information – euphemistically called “opposition research” – wherever they can find it. Candidate Trump's opposition hoped to benefit from the theft of tax information. The Clinton campaign took help from elements of the Ukrainian government; and, through its agents, it hired a British former spy to tap Kremlin-connected operatives for damaging information about Trump. The First Amendment makes it difficult to regulate this sort of thing; our guiding principle is that good information will win out over bogus information. We can debate how well that works, but we shouldn't pretend that the Trump campaign is the first or only one ever to play this game.

3. As for the conclusion that there was no Trump-Russia conspiracy to commit espionage or violate any other federal criminal law, I believe this had to have been obvious since no later than the end of 2017. In September 2017, the Carter Page FISA warrant lapsed, and it would have been time for the Mueller investigation to seek its reauthorization – which would, in turn, have called for reaffirming Steele’s information. That did not happen. In 2018, Special Counsel Mueller began filing indictments against Russian actors which did not allege any participation by Americans; in fact, they indicated that Russia preferred to act in stealth and with deniability, which makes perfect sense. I believe the Special Counsel should have been directed by the Deputy Attorney General to issue an interim report advising the country that the neither the president nor his campaign was under criminal investigation for conspiring with the Kremlin. That would not have prejudiced the investigation’s continuing work on Russia’s interference in the campaign, or on whether the investigation had been obstructed.

4. Criminal investigations have a way of keeping investigators honest in a way that counterintelligence investigations do not. In a criminal probe, while it is true that prosecutors and agents petition the court for warrants in sealed proceedings, everyone acts on the assumption that there will be an eventual prosecution in which their work will be carefully scrutinized by counsel for the accused and reviewing courts. If liberties are taken with facts, if information that should be disclosed is withheld, if rules or guidelines are flouted, that will become publicly known and could have serious ramifications for the case. In counterintelligence, by contrast, everything is done in secret and the only due process an American suspected of being a foreign agent ever gets is if the Justice Department and the FBI scrupulously honor their obligations of disclosure and compliance, and if the Foreign Intelligence Surveillance Court holds them to those obligations.

5. Congress has been wrestling with national security powers for nearly a half-century because we understand that, on the one hand, they are essential for the protection of the nation, but on the other hand, they can easily be abused. It is essential that when serious questions arise about how they have been used, the FBI, the Justice Department, and the Congress conduct serious, searching inquiries to get to the bottom of what happened, and to take remedial action. What I have feared from the beginning of the controversies over investigations touching on the 2016 election is that the public would become convinced that our government is not serious about policing itself. If that happens, there will be even more public demand than there has been in recent years for the restriction or even the repeal of foreign intelligence surveillance authorities. I believe, based on first-hand experience, that these authorities are critical to protecting the United States from the threats posed by foreign powers – both anti-American regimes and such sub-sovereign entities as foreign terrorist organizations.

6. Good faith investigations require that we gather facts but do not rush to judgment. I spent many months advising people that it was highly unlikely – I occasionally said it was inconceivable – that the FBI and the Justice Department would rely in the FISC on sensational, suspect allegations such as those contained in the Steele report. I said the bureau would surely have taken the handful of facts needed to show probable cause and do what the bureau does better than any other investigative agency: investigate them until they were so solidly corroborated that it would be unnecessary even to refer to Christopher Steele in the warrant application. I turn out to have been spectacularly wrong on that score. But I'm not sorry about the sentiment behind the error. There is reason to suspect that investigative judgments were made in some instances and by some actors for improper political motivations; there may also be innocent explanations, or explanations that involve a zeal to protect the country from a perceived

threat that was well-intentioned but excessive under the circumstances. We do not know the answers to these questions but they should be answered. And to ask them is not to attack our institutions but to preserve them by showing the public that we know how to police ourselves.

7. I do not believe evidence of connections and associations with Russian operatives is irrelevant for counterintelligence purposes. It is, however, important to distinguish between two things: Incriminating evidence and indications of disturbing ties. The purpose of a criminal investigation or a counterintelligence probe that rises to the level of monitoring Americans on suspicion that they are foreign agents would be to investigate evidence of serious criminal activity, in particular, espionage. That is especially the case if we are talking about overcoming the norm against the intrusion of surveillance powers into political campaigns.

8. If, on the contrary, we are talking about disturbing connections with a hostile regime, those connections may be worth exploring. But then, we should look at *everybody's* connections to Russian officials, Russian oligarchs, and Russian commerce – not just the Trump campaign's connections. And we should do so mindful of the fact that it has been bipartisan doctrine in Washington since the fall of the Soviet Union that Russia is not an enemy regime but a potential strategic partner with which the U.S. can and should do business. We should not pretend as if that were not the case just because we are in an overheated partisan environment. As someone who has long been skeptical of our government's approach to Russia, I am quite confident that the perils we've been obsessing over for the past two years did not start with the Trump campaign.