Penn State Journal of Law & International Affairs

Volume 9 | Issue 1

February 2021

# Refusing To Concede The Election: Defending Democracy By Expanding The G7 Rapid Response Mechanism

Taylor Hayes



ISSN: 2168-7951

Penn State
Journal of Law & International Affairs

2020 VOLUME 9 NO. 1

# REFUSING TO CONCEDE THE ELECTION: DEFENDING DEMOCRACY BY EXPANDING THE G7 RAPID RESPONSE MECHANISM

*Taylor Hayes*[*]

*The past decade is rife with examples of actions by nefarious groups to improperly interfere in democratic elections around the world, and it is time that democratic nations band together to effectively combat these interference efforts. More than two dozen nations around the world have fallen victim to some form of election interference. The United States and its allies have traced many of these interference campaigns to state actors, particularly the Russian government.*

*In 2018, the Group of Seven (G7) announced the creation of a Rapid Response Mechanism (G7 RRM). The aim of the G7 RRM is to limit the impact of election interference through collecting and sharing information about interference campaigns. Most G7 nations have generally complied with the requirements for the G7 RRM, but, by limiting the institution to only G7 nations, the G7 RRM will not have a broad enough membership base to have the necessary impact to protect elections.*

*The United States should take a prominent role in the development and expansion of election security expertise by leading the creation of an Election Security Centre of Excellence (ESCOE) accredited by the North Atlantic Treaty Organization (NATO). The knowledge gained from the ESCOE should then be operationalized and incorporated into U.S. election laws. NATO is well positioned to host an "expanded-G7 RRM," or ESCOE. NATO has more than four-times as many member nations as the G7, has a history of countering Russian influence, has developed expertise relevant to election security, and its "center for excellence" (COE) organization model would be effective to create an ESCOE. With the knowledge gained from an ESCOE, democracies around the world can better defend their elections.*



[*] Taylor Hayes, J.D., University of Nebraska College of Law, 2020. *Thanks to Mom, Dad, Kody, Shelby, Dr. Wendy Hind, Dr. Patrick Monaghan, Bill "Cheetah" Gavers, and all others who made this article possible.*

## I. INTRODUCTION

A vital part of a healthy democracy is a healthy election system. Democracies rely on elections to provide fair and accurate results that reflect the choices made by citizens. Since elections are an essential part of a functioning democracy, they are also an attractive target for those wishing to disrupt or undermine either a single democracy or the concept of democracy as a whole.

The twenty-first century is rife with examples of nefarious groups attempting to meddle in democratic elections. If the last decade has taught democracies around the world anything, it should be that no nation should be caught off guard when its next election is the target of an interference campaign. The prominence of election interference around the world has prompted the creation of a variety of institutions with similar, overlapping aims to combat

disinformation generally,[1] but this global problem needs a unified institution that will gather together democracies around the globe to develop the knowledge and techniques to effectively protect an election from improper foreign interference. To this end, the United States should take a prominent role in the development of election security expertise by leading the creation of an Election Security Centre of Excellence (ESCOE) accredited by the North Atlantic Treaty Organization (NATO), and the knowledge gained from the ESCOE should be incorporated into U.S. election laws.

The discussion that follows begins with Part II, which provides a description of the concept of election interference and examples of such interference. Part III explains the efforts of the Group of Seven (G7) to combat election interference with the creation of the G7 Rapid Response Mechanism (G7 RRM). The G7 RRM was an important step toward securing elections in the United States and abroad, but it was only a small step. As a result, Part IV discusses NATO's ability to adopt the blueprints of the G7 RRM and create an ESCOE. Next, Part V describes the power of the U.S. federal government to take a leadership role in the creation of an ESCOE and subsequently implement lessons learned into U.S. federal election laws. Finally, Part VI argues that the United States should do just that, take a leadership role in the creation of an ESCOE and have its expertise inform federal election laws.

## II. ELECTION INTERFERENCE

The ever-growing list of democracies impacted by election interference demonstrates the need for additional knowledge and systems to protect democracies. Notably, the list includes the United States and its infamous 2016 Presidential Election. Also included is the United Kingdom, Germany, France, Netherlands, Montenegro,

[1] *See generally* SOPHIA IGNATIDOU, EU-US COOPERATION ON TACKLING DISINFORMATION 18, 31–32 (2019), https://www.chathamhouse.org/sites/default/files/2019-10-03-EU-US-TacklingDisinformation.pdf (listing the Transatlantic Commission on Election Integrity, the European Centre of Excellence for Countering Hybrid Threats, and the European Rapid Alert System as a few of the existing institutions combatting disinformation).

and many more.[2] At least one report suggests that Russia alone has interfered in twenty-seven nations' elections since 2004.[3] The global scope of election interference has created a problem that should involve a global solution.[4]

Election interference can take many forms, and it is a term that encompasses more than merely helping one candidate win an election over another candidate. The interference could aim to damage "trust in the election," to create internal disruption, to damage a nation's external appearance, or simply to damage the image of all democracies as a whole.[5] To create interference that accomplishes one of these goals, the interferers could (1) attack the election administration, (2) attack "the will and ability of voters to

---

[2] *Russian Intervention in European Elections: Hearing before the Select Comm. on Intelligence of the United States Senate*, 115th Cong. 2–14 (2017) [hereinafter *Russian Intervention in European Elections*]; *see also* Emma Woollacott, *Russian Hackers Target European Elections*, FORBES (Mar. 21, 2019, 9:41 AM), https://www.forbes.com/sites/emmawoollacott/2019/03/21/russian-hackers-target-european-elections/#61ff6fe33c7c; Dan Sabbagh & Luke Harding, *PM Accused of Cover-Up Over Report on Russian Meddling in UK Politics*, GUARDIAN (Nov. 4, 2019, 4:38 PM), https://www.theguardian.com/politics/2019/nov/04/no-10-blocks-russia-eu-referendum-report-until-after-election.

[3] Oren Dorell, *Allege Russian political meddling documented in 27 countries since 2004*, USA TODAY (Sept. 7, 2017, 6:20 PM), https://www.usatoday.com/story/news/world/2017/09/07/alleged-russian-political-meddling-documented-27-countries-since-2004/619056001/; *see also* James Pamment, *The EU's Role in Fighting Disinformation: Taking Back the Initiative*, CARNEGIE ENDOWMENT FOR INT'L PEACE (July 15, 2020), https://carnegieendowment.org/2020/07/15/eu-s-role-in-fighting-disinformation-taking-back-initiative-pub-82286 (describing Russia as "the dominant hostile actor currently spreading disinformation," while also noting that China may be "Russia's superior in terms of its potential capabilities").

[4] *Russian Intervention in European Elections*, *supra* note 2, at 1 (statement of Sen. Burr, Chairman, S. Select Comm. On Intelligence) ("Facing down Russia's malicious activity is no longer just a bipartisan issue. To successfully protect our institutions and the integrity of our electoral systems, we must work as a global community to share our experience.").

[5] SEBASTIAN BAY & GUNA ŠNORE, PROTECTING ELECTIONS: A STRATEGIC COMMUNICATIONS APPROACH, NATO STRATEGIC COMMUNICATION CENTRE OF EXCELLENCE 10 (2019), https://www.stratcomcoe.org/download/file/fid/80396.

participate," or (3) attack the political debate.[6] Evidence of efforts to accomplish each of these three goals can be seen in the Russian interference in the 2016 U.S. Presidential Election.

A. Election Administration

There is evidence of an attack by Russia on U.S. election administration systems and infrastructure. A report of the U.S. Senate's Select Committee on Intelligence found that the "Russian government directed extensive activity, beginning in at least 2014 and carrying into at least 2017, against U.S. election infrastructure."[7] The report further elaborated that it's reference to election infrastructure included attacks against voter registration databases, election-related websites, election software, and election service companies.[8] These efforts targeted systems in all fifty states.[9] Furthermore, the efforts included extensive, targeted attacks on specific components in the overall election system, such as a manufacturer of "devices that maintain and verify the voter rolls."[10]

B. Will and Ability

An attack on the will and ability of voters focuses on impacting voters' mental states. One way to do this is to attempt to create fear. An April 2018 paper by a group of scholars explained one method used by Russia to instill fear in American voters in 2016.[11]

---

[6] *Id.* at 10–11, fig 1.

[7] S. SELECT COMM. INTELLIGENCE, 116TH CONG., REPORT ON RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION 3 (Comm. Print 2019).

[8] *Id.* at 6, 8.

[9] David E. Sanger & Catie Edmondson, *Russia Targeted Election Systems in All 50 States, Report Finds*, N.Y. TIMES (July 25, 2019), https://www.nytimes.com/2019/07/25/us/politics/russian-hacking-elections.html.

[10] Matthew Cole et al., *Top-Secret NSA Report Details Russian Hacking Effort Days Before 2016 Election*, THE INTERCEPT (June 5, 2017), https://theintercept.com/2017/06/05/top-secret-nsa-report-details-russian-hacking-effort-days-before-2016-election/.

[11] Dr. Emily Darraj et al., *Information Operations: The Use of Information Weapons in the 2016 US Presidential Election* (Apr. 2018) (conference paper from the European Conference on Cyber Warfare and Security at the University of Dublin),

The scholars stated that in September and October of 2016 several major news organizations featured articles stating that if Hilary Clinton won the presidency, then Russia would go to war with the United States.[12] These articles were connected by the authors to a Russian goal to "paralyze" voters with misinformation, checking the box of an attack on "the will and ability of voters to participate."[13]

Another way to attack the will and ability of voters is to use one election as an example to destroy confidence in future elections. As the United States headed into its 2020 election cycle, a January 2020 poll found that 41% of Americans think that the United States is not prepared to ensure that November 2020 elections will be safe and secure.[14] Though one can't claim that all of the American skepticism captured in that poll was caused by prior attempts to interfere in American elections, it seems equally dubious to assert that prior interference hasn't impacted the numbers reported.

C. Political Debate

An attack to influence the political debate is one that aims to shape the political discussions in the nation. One example of how the Russian campaign sought to influence the political debate was by releasing previously private emails to influence political headlines. The report of Special Counsel Robert Mueller on Russian Interference in the 2016 Presidential Election explains how Russia

---

https://www.researchgate.net/publication/324703806_Information_Operations_The_Use_of_Information_Weapons_in_the_2016_US_Presidential_Election.

[12] *Id.* The story that Russia would go to war if Hillary Clinton won the election was carried by several major news organizations including New York Daily News and Reuters. *Id.*

[13] *Id.* (noting Russian efforts to spread information "designed to paralyze" voters).

[14] Brett Neely, *NPR Poll: Majority of Americans Believe Trump Encourages Election Interference*, NAT'L PUB. RADIO (Jan. 21, 2020, 5:01 AM), https://www.npr.org/2020/01/21/797101409/npr-poll-majority-of-americans-believe-trump-encourages-election-interference. This same poll also found that 35% of Americans viewed misinformation has the biggest threat to our elections, beating out the next two most popular responses which were voter fraud and voter suppression. *Id.*

sought to attack the political debate during the 2016 election cycle.[15] It states how, in March 2016, Russia began gaining access to the computers and email accounts of individuals associated with Hilary Clinton's presidential campaign and the Democratic National Committee.[16] The hacking continued throughout 2016, resulting in the release of thousands of documents stolen from the various compromised computers and accounts.[17] The documents released undoubtedly impacted the political discussion in the United States as the leaked documents made national and international headlines.[18]

An interferer can also influence the political debate by encouraging the polarization of the electorate. In the wake of the 2016 Presidential election, two political science professors conducted a study to analyze how foreign election interference impacted American voters.[19] After giving study participants a hypothetical about a future presidential election, the professors found that foreign involvement in the election had a polarizing effect on American voters. The study suggested that "[b]oth Democrats and Republicans were far more likely to condemn foreign involvement, lose faith in democracy, and call for retaliation when a foreign power sided with the opposition than when a foreign power aided their own party."[20] Notably, the study found that "even modest forms of electoral intervention divided and demoralized the country."[21]

---

[15] ROBERT S. MUELLER, III, U.S. DEP"T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 36 (2019), https://www.justice.gov/storage/report.pdf.

[16] *Id.*

[17] *Id.* at 40–43.

[18] *See generally* Amy Chozick et al*., Highlights from the Clinton Campaign Emails: How to Deal with Sanders and Biden*, N.Y. TIMES (Oct. 10, 2016), https://www.nytimes.com/2016/10/10/us/politics/hillary-clinton-emails-wikileaks.html; David Smith, *WikiLeaks Emails: What they revealed About the Clinton Campaign's Mechanics*, GUARDIAN (Nov. 6, 2016, 6:30 AM), https://www.theguardian.com/us-news/2016/nov/06/wikileaks-emails-hillary-clinton-campaign-john-podesta.

[19] Michael Tomz & Jessica L. P. *Weeks, Public Opinion and Foreign Electoral Intervention*, 114(3) AM. POL. SCI. R. 856 (2019), https://tomz.people.stanford.edu/sites/g/files/sbiybj4711/f/tomzweeks-apsr-2020.pdf.

[20] *Id.* at 857.

[21] *Id.*

With firsthand knowledge of the disruptive intentions and capabilities of the foreign meddlers, namely Russia, the United States needs to take an active role in creating a global solution to prevent or reduce the impact of future interference efforts.

## III. G7 RRM

At least a portion of the global solution necessary to combat the rise in election interference has begun to take shape with the recent creation of the G7 RRM. The G7 RRM is a coordination tool created to increase the flow of election-related information to better protect elections in the G7 nations.[22] The G7 RRM is an important first step in the journey to enhanced election security.

### A. Creation of the G7 RRM

The G7 RRM was announced following the completion of the G7 summit in Challevoix, Quebec, Canada, through the Charlevoix G7 Summit Communique on June 9, 2018 (the Communique).[23] Paragraph 15 of the Communique stated that the G7 was committed to taking "concerted action in responding to foreign actors who seek to undermine our democratic societies and institutions, our electoral processes, our sovereignty and our security as outlined in the Charlevoix Commitment on Defending Democracy from Foreign Threats."[24]

The document referenced in Paragraph 15, the Commitment on Defending Democracy from Foreign Threats (Commitment on Defending Democracy), laid out seven additional commitments which underpinned the G7 RRM. These included commitments to:

> 3. Establish a G7 Rapid Response Mechanism to strengthen our coordination to identify and respond

---

[22] Jan Strupczewski, *G7 to Pledge Joint Defense of Democracies from Foreign Threats: EU Official*, REUTERS (June 5, 2018, 3:09 PM), https://www.reuters.com/article/us-g7-summit-foreign-threats-idUSKCN1J12NN.

[23] G7, Charlevoix G7 Summit Communique, (June 9, 2018), http://www.g7.utoronto.ca/summit/2018charlevoix/communique.html.

[24] *Id.* ¶ 15.

> to diverse and evolving threats to our democracies, including through sharing information and analysis, and identifying opportunities for coordinated response.
>
> 4. Share lessons learned and best practices in collaboration with governments, civil society and the private sector that are developing related initiatives including those that promote free, independent and pluralistic media; fact-based information; and freedom of expression.
>
> 5. Engage directly with internet service providers and social media platforms regarding malicious misuse of information technology by foreign actors, with a particular focus on improving transparency regarding the use and seeking to prevent the illegal use of personal data and breaches of privacy.
>
> 6. Support public learning and civic awareness aimed at promoting critical thinking skills and media literacy on intentionally misleading information, and improving online security and safety.[25]

The G7 RRM announcement in Paragraph 15, along with the related Commitment on Defending Democracy, is a step toward more secure elections. However, the necessary buy-in from the United States and other G7 nations has not always been guaranteed.

B. Complying with the Commitment

Though the United States is a member of the G7 and has previously participated in the G7 tradition of signing on to the communiques at the end of each summit, 2018 was a different

[25] G7, Charlevoix Commitment on Defending Democracy From Foreign Threats (June 9, 2018), http://www.g7.utoronto.ca/summit/2018charlevoix/democracy-commitment.html.

story.[26] U.S. President Donald Trump was present at the G7 meeting in La Malbaie, Quebec, Canada, along with leaders from Canada, the United Kingdom, France, Italy, Japan, and Germany. However, President Trump broke from tradition when he stated following the summit that the United States would not endorse the joint communique.[27] Though one could be forgiven for being confused about the United States' role in the G7 RRM after President Trump's refusal to endorse the Communique, his refusal did not result in the United States refusing to comply with the political commitments in the Commitment on Defending Democracy.[28]

By mid-2019, the United States was one of at least three G7 governments to have a group of civil servants sharing information in the name of the G7 RRM.[29] The two other nations were Canada and the United Kingdom.[30] Canada has created a G7 RRM Coordination Unit (RRM Canada) that "serves as a permanent secretariat to the [G7] RRM."[31] RRM Canada is to report on "threat patterns and

---

[26] *See G8 Background*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/archives/ag/g8-background (last updated Mar. 8, 2017). Though this source references the "G8," the G8 became the G7 when Russia was removed from the Group after its invasion of Ukraine in 2014. *See* Andrew Restuccia & Brent D. Griffiths, *Trump Stuns Allies, Won't Sign G-7 Joint Agreement*, POLITICO (June 9, 2018, 2:37 PM), https://www.politico.com/story/2018/06/09/trump-g7-allies-clashes-trade-tariffs-russia-635006.

[27] *G7 Summit Ends in Disarray as Trump Abandons Joint Statement*, BBC NEWS (June 10, 2018), https://www.bbc.com/news/world-us-canada-44427660 (explaining that "'Trump said he had instructed US officials 'not to endorse the communique'").

[28] It should be noted at this point that the Communique and the Commitment on Defending Democracy are non-binding political commitments, as are most G7 commitments. *See* CAMILLA BAUSCH & MICHAEL MEHLING, *Alternative Venues of Climate Cooperation: An Institutional Perspective*, *in* CLIMATE CHANGE AND THE LAW 111, 122 (2012) ("The G8 summits aim primarily to send political signals and set trends, and do not produce binding results.").

[29] Josh Rudolph, *The G7 Should Redouble Efforts to Stop Covert Foreign Money*, CIPHER BRIEF (Aug. 23, 2019), https://www.thecipherbrief.com/column_article/the-g7-should-redouble-efforts-to-stop-covert-foreign-money ("Since then, three G7 governments have launched teams of civil servants sharing threat intelligence with each other, but thus far they've only focused on information operations.").

[30] *Id.*

[31] *Rapid Response Mechanism Canada*, GOV'T OF CANADA (Sept. 6, 2019), https://www.international.gc.ca/world-monde/issues_development-

trends" and share the information that it learns with other G7 partners.[32] The United Kingdom's Rapid Response Unit (UK RRU) has been set up within their Government Communications Service to focus on "news and information being shared and engaged with online to identify emerging issues."[33] Though it's not exactly clear how all other G7 nations are fulfilling their political commitment, it does appear most nations are taking steps to comply.

On February 25, 2019, the G7 Research Group at the University of Toronto issued the 2018 Charlevoix G7 Interim Compliance Report.[34] This report explained that, for G7 nations to be in "full compliance" with the Commitment on Defending Democracy, the nations must take actions directed towards fulfilling five of the seven above referenced commitments.[35] The actions taken could be through verbal responses, diplomatic actions, or physical actions.[36] The compliance report evaluated all seven nations' progress and found Canada, France, Germany, the United Kingdom, and the United States to be in full compliance with the Commitment on

---

enjeux_developpement/human_rights-droits_homme/rrm-mrr.aspx?lang=eng; *G7 Rapid Response Mechanism*, GOV'T OF CANADA (Jan. 30, 2019), https://www.canada.ca/en/democratic-institutions/news/2019/01/g7-rapid-response-mechanism.html. One can even find what appears to be a job posting for the RRM Canada. See Senior Policy Analyst, G7 Rapid Response Mechanism Coordination Unit, Global Aff. Canada, http://www.ieim.uqam.ca/IMG/pdf/ib_lbp-_11485298-v1-job_poster_-_senior_policy_analyst_-_g7_rapid_response_mechanism.pdf (last visited Apr. 27, 2020).

[32] *G7 Rapid Response Mechanism*, *supra* note 31; *Rapid Response Mechanism Canada*, *supra* note 31.

[33] *Alex Aiken Introduces the Rapid Response Unit*, GOV'T COMMC'N SERV. (July 19, 2018), https://gcs.civilservice.gov.uk/news/alex-aiken-introduces-the-rapid-response-unit/. Though the UK RRM appears to be a UK component of the G7 RRM, it should be noted that the UK RRM was created before the G7 RRM commitment was announced.

[34] ANGELA MIN YI HOU ET AL., 2018 CHARLEVOIX G7 INTERIM COMPLIANCE REPORT: 10 JUNE 2018–10 DECEMBER 2018, U. OF TORONTO (Feb. 25, 2019), http://www.g7.utoronto.ca/evaluations/2018compliance-interim/01-2018-G7-interim-compliance-terrorism.pdf.

[35] *Id.* at 17 ("Thus, for full compliance, the members must have taken actions in 5 or more of those listed in the *Charlevoix Commitment on Defending Democracy from Foreign Threats*."). *See also supra* section III.A.

[36] *Id.* at 18.

Defending Democracy. This left Japan as the only nation found in partial compliance, and Italy as the only nation found to be non-compliant.[37]

Though the University of Toronto report suggests that most G7 nations are acting to comply with the Commitment to Defend Democracy, very little is known about how the G7 RRM functions and what its lasting impact will be.

C. RRM Actions

As of the spring of 2020, little information is available that sheds light on the actual workings of the G7 RRM or its impact, but the absence of a clear track-record for success does not undercut the need for an organization that will facilitate international cooperation to protect democracies from outside interference. The most concrete information about the G7 RRM comes from the work done by RRM Canada and the UK RRU.

RRM Canada has released three reports discussing election interference.[38] Two of these reports – one on the 2019 European Union Parliamentary Elections and one on the 2019 provincial elections in Alberta, Canada – found no notable evidence of foreign interference.[39] However, the third report, discussing the 2019 Ukrainian Presidential Election, found that the Ukrainian election "was likely the target of a Russian [foreign interference] campaign

---

[37] *Id.* at 18–38.

[38] *Rapid Response Mechanism Canada*, *supra* note 31.

[39] *Rapid Response Mechanism Canada, Open Data Analysis- European Parliamentary Elections: Comprehensive Report*, GOV'T OF CANADA (July 18, 2019), https://www.international.gc.ca/gac-amc/publications/rrm-mrr/european-elections-europeennes.aspx?lang=eng; *Rapid Response Mechanism Canada, Open Data Analysis- Alberta Election Analysis*, GOV'T OF CANADA (May 1, 2019), https://www.international.gc.ca/gac-amc/publications/rrm-mrr/alberta_elections.aspx?lang=eng. *See also* Marianne Lavelle, *'Trollbots' Swarm Twitter with Attacks on Climate Science Ahead of UN Summit*, INSIDE CLIMATE NEWS (Sept. 16, 2019), https://insideclimatenews.org/news/16092019/trollbot-twitter-climate-change-attacks-disinformation-campaign-mann-mckenna-greta-targeted (discussing RRM Canada's detection of "questionable social media activity" around Alberta elections.)

aimed at undermining local and international confidence in the Ukrainian democracy."[40] The report states that RRM Canada detected some common interference techniques, such as automated social media accounts or "bots," and some unusual interference techniques, such as Russian intelligence agents renting established social media accounts and the use of "meta-trolling."[41]

The only other information regarding the actions of the G7 RRM comes from the UK RRU. In January 2019, the UK RRU published a discussion of their actions for the year of 2018.[42] The discussion highlighted the UK RRU's focus on news stories and misinformation found online.[43] Though these actions weren't tied to a specific election, the UK RRU did appear to focus heavily on polarizing issues that will have an impact on future elections, such as Brexit.[44]

There is a clear need for the G7 RRM or a similar international mechanism to counter the impact of election interference, but there is little information available about the G7 RRM outside of the information discussed above regarding RRM Canada and the UK RRU. Most other mentions of the G7 RRM note its existence but offer little information other than describing the G7 RRM as having the potential to fill the growing need for an organization to combat election interference.[45] While the G7 RRM

---

[40] *Rapid Response Mechanism Canada, 2019 Ukrainian Elections Final Report*, GOV'T OF CANADA (Sept. 3, 2019), https://www.international.gc.ca/gac-amc/publications/rrm-mrr/ukrainian-elections-ukrainiennes.aspx?lang=eng.

[41] *Id.* Meta-trolling was described in the report as "content designed to be detected and called out as Russian propaganda in order to discredit the information" contained in the post. *Id.*

[42] Oliver Marsh, *Rapid Response Unit: A Year in Digital Trends*, GOV'T COMMC'N SERV. (Jan. 22, 2019), https://gcs.civilservice.gov.uk/rapid-response-unit-a-year-in-digital-trends/ [https://web.archive.org/web/20190221234436/https://gcs.civilservice.gov.uk/rapid-response-unit-a-year-in-digital-trends/].

[43] *Id.*

[44] *Id.*

[45] *See generally* Christopher Walker, *Safeguarding Democracies Against Authoritarian Sharp Power*, POLICY OPTIONS (Jan. 14, 2019), https://policyoptions.irpp.org/magazines/january-2019/safeguarding-democracies-against-authoritarian-sharp-power/ (stating that "the nascent Rapid Response Mechanism

begins to fill that need, to better protect democracies around the world, a mechanism similar to the G7 RRM needs to be expanded.[46]

## IV. NATO POTENTIAL

One international organization well positioned to launch an "expanded RRM" is NATO, and it could be launched as an ESCOE. NATO is an organization with broader membership than the G7[47] and is well positioned to lead this expansion because of (1) its history as a coalition to counter Russian influence; (2) its work to develop expertise relevant to protecting elections from interference, including centers focused on cooperative cyber defense and strategic communications; and (3) the suitability of NATO's mission specific "centres for excellence" (COEs) as a model for the new election security organization. By capitalizing on NATO's position, the United States could greatly increase its ability to protect its own elections while simultaneously increasing the election defense capabilities of other NATO democracies.

---

(RRM) initiated in 2018 under Canada's G7 presidency to defend against foreign threats holds promise and could offer a valuable model of cooperation for future efforts to defend democracy and the ideas that underlie it"); Press Release, Prime Minister's Office, Hostile States to Face Rapid and Unified International Response (June 9, 2018), https://www.gov.uk/government/news/hostile-states-to-face-rapid-and-unified-international-response; *Undermining Democracy: Kremlin Tools of Malign Political Influence: Hearing before the Subcomm. on Europe, Eurasia, Energy, and the Environment of the H. Comm. on Foreign Affairs*, 116th Cong. 28 (2019) [hereinafter *Undermining Democracy*] (statement of Laura Rosenberger, Director of the Alliance for Securing Democracy and Senior Fellow with the German Marshall Fund) (arguing that the response to Russian interference should include information and coordination organizations like the G7 RRM).

[46] *See Undermining Democracy*, *supra* note 45 (highlighting that "[t]ransatlantic cooperation, including unified responses across the EU and within NATO, is essential" to combat Russian interference).

[47] *Member Countries*, NORTH ATLANTIC TREATY ORGANIZATION, https://www.nato.int/cps/en/natohq/topics_52044.htm? (last visited May 3, 2020) (noting that NATO currently has 30 member nations).

A. Counter Russian Influence

As noted above, one of the primary election interferers has been Russia;[48] and, coincidentally, NATO was born of the need to counter Russian actions. After the end of World War II, nations on both sides of the Atlantic sought collective security against the growing threat from the Soviet Union. In 1949, NATO was created as an extension of the 1948 Brussels Treaty among Western European nations, and it allowed nations to band together against the Soviet Union.[49] Though the European nations initially sought to limit membership in the newly created NATO to the signatories of the Brussels Treaty and the United States, eventually the view won out that the alliance would benefit from enlarging the group to "bridge" the North Atlantic Ocean.[50] This bridging coalition countered the ever-present threat of the Soviet Union throughout the close of the twentieth century, and it persists as a powerful force into the twenty-first century.

B. Relevant Expertise

As NATO has worked to adjust to a post-cold war international environment, it has begun to develop various COEs, and an ESCOE could build upon the expertise in existing COEs. COEs are mission-specific institutions created to develop knowledge and capabilities by furthering developments in their specific area.[51] NATO has already developed twenty-five COEs for issues ranging from specialized military operations, such as "Operations in

---

[48] *See supra* Part II.

[49] *Milestones: 1945-1952: North Atlantic Treaty Organization (NATO), 1949*, DEP' OF STATE: OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1945-1952/nato (last visited Apr. 27, 2020). The members of the Brussels treaty were Great Britain, France, Belgium, the Netherlands, and Luxembourg. *Id.*

[50] *Id.*

[51] *See Centres of Excellence*, NATO ALLIED COMMAND TRANSFORMATION (2019), https://www.act.nato.int/centres-of-excellence (last visited Apr. 26, 2020).

Confined and Shallow Waters," to more generalized issues, such as "Crisis Management and Disaster Relief."[52]

Two existing COEs, the "Cooperative Cyber Defence" COE (CCDCOE) and the "Strategic Communications" COE (SCCOE) appear to have already laid the foundation for a potential ESCOE.[53] The CCDCOE began operations in 2008 and exists to create cooperation and information sharing channels for "exercises, law and policy workshops, technical courses and conferences to prepare NATO and Sponsoring Nations to detect and fight cyber-attacks."[54] Since January 2018, the CCDCOE has been tasked with educating and training all NATO components on cyber defense.[55]

The SCCOE leverages NATO's communications apparatus to support NATO policies, operations, and activities. This includes using "traditional media, internet-based media and public engagement, to build awareness, understanding, and support for its decisions and operations."[56] To fulfill this aim, the SCCOE develops communications education courses and conducts research on

---

[52] *Centres of Excellence*, NORTH ATLANTIC TREATY ORGANIZATION, https://www.nato.int/cps/en/natohq/topics_68372.htm (last updated Jan. 24, 2019). COEs are not officially part of the NATO Command Structure and are nationally or multi-nationally funded. *Id.* However, even though they exist outside the formal structure of NATO, they offer an interesting example of how NATO nations can pool their resources and expertise.

[53] Though not a NATO accredited COE, another source of relevant expertise is the European Centre of Excellence for Countering Hybrid Threats, an institution which currently shares information with both the European Union and NATO. *See* IGNATIDOU, *supra* note 1, at 31.

[54] *Id.*

[55] *About Us: History*, NATO COOPERATIVE CYBER DEFENCE CENTRE OF EXCELLENCE, https://ccdcoe.org/about-us/ (last visited Apr. 27, 2020).

[56] *About Strategic Communication*, NATO STRATEGIC COMMUNICATIONS CENTRE OF EXCELLENCE, https://www.stratcomcoe.org/about-strategic-communications (last visited Apr. 27, 2020).

communications related issues, such as "Robotrolling"[57] and disinformation campaigns.[58]

By drawing from the cyber defense expertise of the CCDCOE as well as the strategic communications knowledge of the SCCOE, NATO has the knowledge base to form an ESCOE that can competently compile and distribute information to help protect elections in member nations. An ESCOE could undoubtedly draw on the CCDCOE's cyber expertise to better understand how to protect election systems and monitor infiltration attempts. Further, by combining this cyber knowledge with the strategic communications and messaging knowledge of the SCCOE, an ESCOE could better understand the messaging strategies used by interfering nations on social media platforms. Using the seven commitments laid out in the Commitment on Defending Democracy as the guiding outline,[59] a hybrid combination of the CCDOE and the SCCOE should be more than adequate to work toward election security.

C. Suitability of the COE Model

In addition to NATO as a whole being well positioned, the NATO COE model appears to be well suited for the creation of an ESCOE because COEs are designed to tackle specific subsets of issues and can be driven by a small group of NATO nations. Furthermore, the formal establishment and accreditation process for a new COE does not appear to impose any insurmountable obstacles for an ESCOE.

A new COE must go through a formal NATO establishment process that requires at least one nation to assume a leadership role. The first step of the establishment process is a request for a new

---

[57] Dr. Rolf Fredheim et al., *Robotrolling*, NATO STRATEGIC COMMUNICATIONS CENTRE OF EXCELLENCE (2020), https://www.stratcomcoe.org/robotrolling-20201.

[58] Rachael Lim, *Disinformation as a Global Problem- Regional Perspectives*, NATO STRATEGIC COMMUNICATIONS CENTRE OF EXCELLENCE (2020), https://www.stratcomcoe.org/disinformation-global-problem-regional-perspectives.

[59] *See supra* Section III.A.

COE from either NATO itself or a NATO member nation.[60] Once a request for a new COE is formulated, a particular member nation, known as a "framework nation," is responsible for moving it through the establishment process.[61] As the COE moves through the early stages of the establishment process, it is important for the COE to pick up sponsoring nations that will support the creation and development of the COE. The establishment process is completed when two memorandums of understanding (MOUs) are signed by the nations that have agreed to create the COE.[62]

In addition to the above described steps in the COE establishment process, the proposed COE must be accredited by satisfying the NATO "mandatory criteria" and the less stringent "highly desirable criteria." The mandatory requirements are that the new COE:

> 1. Further "new policies, concepts, strategies and doctrines that transform and/or improve NATO operational capabilities and interoperability."
>
> 2. "Provide capabilities, not provided by other NATO entities. . . .[and] promote the knowledge and application of advanced concepts and doctrines. . . ."
>
> 3. "[M]aintain qualified knowledgeable and credible Subject Matter Experts (SME) for their niche area of expertise."

---

[60] COE CATALOGUE, ALLIED COMMAND TRANSFORMATION 5 (Dec. 2018), https://www.act.nato.int/images/stories/structure/coe_catalogue_20190118.pdf.

[61] *Centres of Excellence*, *supra* note 51. In addition to the framework nation, there can be sponsoring nations, which contribute funds and personnel to the centre, and contributing nations, which generally contribute funds or something else of value. Id.

[62] COE CATALOGUE, *supra* note 60; Guy B. Roberts, *NATO's Centers of Excellence: A Key Enabler in Transforming NATO to Address 21st Century Security Challenges* (Oct. 8, 2014) (working paper) ("Allied nations, which agree to establish and operate a particular COE, must sign two Memoranda of Understanding (MOU); an 'Operation MOU' and a 'Functional Relationship MOU,' in order to become Sponsoring Nations.").

> 4. Educate and train in a manner "consistent with the quality, content and standardization of established NATO educational policy and services."
>
> 5. Provide safety and security "in accordance with NATO standards and regulations."
>
> 6. Provide accessibility to NATO nations and agencies.
>
> 7. Maintain "open lines of communication with [the Supreme Allied Commander Transformation], Strategic Commands, their subordinate entities and agencies and other nations."[63]

The highly desirable criteria that the COE must strive for are not a basis for decertification,[64] and generally include promoting the goals of the NATO Allied Command Transformation, encouraging support and participation from NATO nations, promoting transparency and efficient coordination of the COE, and maintaining modern communication and information systems.[65]

The proposed ESCOE should not have any significant problems meeting the demands of the NATO establishment and accreditation requirements. First, the United States and other G7 nations are all capable of making the initial request to NATO for the creation of a new ESCOE. The framework nation should have the support of the other NATO members that have signed on to the G7 RRM, thus there should be little worry that the new COE would pick-up a sufficient number of sponsoring or contributing nations.

Second, using the current blueprint of the G7 RRM as a stand-in for the shape an ESCOE would take, the NATO accreditation process should not be a significant hurdle. There does not appear to be any other NATO component or COE dedicated to protecting elections and thus an ESCOE would further new policies

---

63 Roberts, *supra* note 62.

64 *Id.*

65 *Id.*

while not duplicating existing capabilities. Though there would likely be overlap between an ESCOE, on one hand, and CCDOE and the SCCOE, on the other hand, an ESCOE would require capabilities that the CCDOE and the SCCOE appear to lack. These necessary capabilities would include in-depth knowledge of the election laws and election technology networks in all participating nations. The individuals who provide these necessary capabilities would certainly also qualify as SMEs "for their niche area of expertise."

The remaining required criteria can also be satisfied by an ESCOE. There is nothing that would impede the COE from educating in a manner consistent with NATO standards. Further, there does not appear to be an impediment to an ESCOE providing safety and security of elections in compliance with NATO standards. Accessibility to NATO nations similarly should not be a problem because the COE would appear to benefit from gathering information from many different elections and sharing its knowledge to all member nations to decrease the impact of potential election interference campaigns. Lastly, there should not be any reason that an ESCOE would have an issue maintaining open communication with the various components of the NATO command structure.

## V. MAKING IT HAPPEN: CONSTITUTIONAL POWERS

With the need for the United States to take action quite apparent, the individuals with the power to act need to take action. First, the President needs to move forward with the creation of an ESCOE. It is not entirely clear whether the MOUs to establish an ESCOE would be binding or non-binding international agreements.[66] However, regardless of the binding or non-binding nature of the agreements, the President appears to have the authority to approve the MOUs.[67] The second step is for the lessons learned from the ESCOE to be woven into U.S. election law. The states and the federal government share the power to regulate and control elections in the United States.[68] However, the federal government has broad

[66] *See infra* section V.A.
[67] *See infra* section V.B.
[68] *See infra* section V.C.

powers emanating from Article I, sections 2 and 4, of the Constitution, and those powers appear sufficient to enact the changes needed to further secure American elections.[69]

A. Binding vs. Non-Binding

Until the MOUs for an ESCOE are actually drafted, one would not know if they are intended to be binding or non-binding international agreements. There is clear evidence that the MOUs to establish various NATO COEs are intended to be non-binding agreements as several MOUs expressly state that the agreement is not "intend[ed] to create any rights or obligations under international law."[70] However, the one NATO COE on U.S. soil, the Combined Joint Operations from the Sea Centre of Excellence, may have been established with at least one binding MOU as there is no clear statement in the MOU to avoid the creation of international obligations[71] and the MOU appears in the Department of State's List

---

[69] *Id.* Though it doesn't expressly deal with elections, the necessary and proper clause further supports these two election specific sections of the Constitution. *United States v. Classic*, 313 U.S. 299, 315 (1941); Graham August Toney Floyd, *Federalism, Elections, Preemption, and Supremacy: The Aftermath of Inter Tribal Council*, 33 MISS. C. L. REV. 235, 256 (2014) (citing *Classic*, 313 U.S. at 315); *see also United States v. Bowman*, 636 F.2d 1003 (5th Cir. 1981).

[70] Memorandum of Understanding Concerning the Establishment, Administration and operation of the NATO Mountain Warfare Centre of Excellence sec. 14.4, Mar. 25, 2016, https://www.mwcoe.org/wp-content/uploads/2018/05/1457353348.pdf. Similar statements are found in the following. *See also* Memorandum of Understanding Concerning the Functional Relationship Regarding the NATO Mountain Warfare Centre of Excellence sec 8.2, Mar. 25, 2015, https://www.mwcoe.org/wp-content/uploads/2018/05/1457448557.pdf; Note of Joining by the Minister of Defence of the Kingdom of Belgium and Amendment of the Memorandum of Understanding on the Establishment, Administration and Operation of the Centre of Excellence for Military Medicine sec. 14.7, July 28–Dec., 2014, https://www.coemed.org/files/static_texts/MILMED%20COE%20OPS%20MOU_BEL%20joining_4Dec2014.pdf; Memorandum of Understanding Concerning the Establishment, Administration and Operation of the NATO Strategic Communications Centre of Excellence sec. 14.5, July 1, 2014, https://m.likumi.lv/doc.php?id=267690.

[71] Memorandum of Understanding Concerning the Establishment, Administration, and Operation of the Combined Joint Operations from the Sea Centre of Excellence sec. 4, May 31, 2006, T.I.A.S. No. 06-531.1.

of Treaties in Force.[72] Adding to the confusion is guidance from NATO suggesting that MOUs are generally non-binding,[73] while a working paper from a former Department of Defense official suggests COE MOUs have a binding character.[74] Despite this confusion, the President appears to have the legal authority to approve either a binding or non-binding MOU to establish an ESCOE.

B. The President

The constitutional powers of the President most relevant to the ability to serve as a framework nation for the creation of an ESCOE are the powers to negotiate, approve, and ratify the required MOUs. Once an ESCOE is created, the President must then be able to implement or carry out the obligations of the MOUs. Every action of the President must be an outgrowth of power granted to the presidency by the Constitution or an act of Congress.[75] Here, the President's inherent powers to conduct foreign affairs and delegations by Congress appear to place the President on solid legal grounds. If the ESCOE MOUs turn out to be non-binding, the President's power to negotiate is all that is needed. However, if the ESCOE MOUs turn out to be binding, then the President will also need to have the power to approve the agreement.

---

[72] U.S. DEP'T OF STATE, MULTILATERAL TREATIES IN FORCE ON JANUARY 1,2020 506 (2020), https://www.state.gov/wp-content/uploads/2019/07/2019-TIF-Multilaterals-7-31-2019-1.pdf.

[73] Andres B. Munoz Mosquera, *Memorandum of Understanding (MOU): A Philosophical and Empirical Approach (Part I)*, 34 NATO LEGAL GAZETTE55, 57 (2014), https://www.act.nato.int/images/stories/media/doclibrary/legal_gazette_34a.pdf; N. ATL. TREATY ORG., NATO LEGAL DESKBOOK, 127–29 (2d ed. 2010), https://publicintelligence.net/nato-legal-deskbook/ (noting that MOUs are generally non-binding, though the United States doesn't always consider MOUs to be non-binding).

[74] Roberts, *supra* note 62 (referring to the MOUs as "legally binding documents").

[75] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

1. Power to Negotiate

The power of the President, or the executive branch in general, to negotiate an international agreement is well settled. As a result, this power should not be an issue for a President seeking to serve as a framework nation for a new ESCOE. A non-binding international agreement can be made on the President's power to negotiate alone, so there is no question that the President can authorize a non-binding MOU.[76] With regard to binding international agreements, the President's power to negotiate has been affirmed in conclusory fashion in cases such as *United States v. Curtiss-Wright Export Corporation*[77] and the more recent *Zivotofsky ex rel. Zivotofsky v. Kerry*.[78]

The conclusion of the Supreme Court in these two high-profile decisions was that the "President has the sole power to negotiate treaties," and that power appears applicable here.[79] For an ESCOE to be supported by the United States and ultimately accredited by NATO, there must be two MOUs, and these MOUs must first be negotiated before any party can sign on. These negotiations would likely be conducted by officials from the Department of Defense and the State Department. There appears to be little problem with the President, acting through other executive branch officials, negotiating these MOUs with other supporting nations to begin the establishment process of an ESCOE.

---

[76] *See* Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1218 (2018) ("In practice Presidents have asserted the authority to make a political commitment on practically any topic without authorization from Congress or the Senate and without any obligation to even inform Congress about the commitment, as long as the commitment does not violate extant federal law.").

[77] *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates.")

[78] *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1 (2015) (citing *Curtiss-Wright*, 299 U.S. at 319)
("The President has the sole power to negotiate treaties.").

[79] *Id.*

2. Power to Approve

The slightly more controversial step that the President would need to take to initially establish an ESCOE is to conclude a binding MOU. The framework to analyze the President's power to conclude a legally binding international agreement is an outgrowth of Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.[80] In *Youngstown*, Justice Jackson described three distinct categories of presidential actions: actions taken "pursuant to an express or implied authorization of Congress," actions taken in the "absence of either a congressional grant or denial of authority," and actions taken contrary to the "expressed or implied will of Congress."[81] When acting with the authorization of Congress, the Presidency has its greatest power, and the Presidency has its least power when acting in the face of Congressional disapproval.[82] This rigid tripart framework was transformed by Justice Rehnquist into a "spectrum" of Presidential powers in *Dames & Moore v. Regan*.[83] This spectrum blended each of the three categories into a graduated scale of Presidential power with each extreme on the scale still marked by actions with the support of Congress and actions in the face of Congress.[84]

Applying Justice Rehnquist's spectrum of Presidential power to the ability of the President to create an ESCOE, it appears the President would be acting with the express approval of Congress and thus likely has the power to conclude the necessary MOUs. The most relevant act of Congress that research has identified is 10 U.S.C. § 344.[85] In § 344, Congress authorized the Secretary of Defense, "with

---

[80] 343 U.S. 579 (1952).

[81] *Youngstown Sheet & Tube Co.*, 343 U.S. at 635–38 (1952) (Jackson, J., concurring).

[82] *Id.* Actions in the middle category of congressional silence place the President in a zone of power between the two extremes.

[83] *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) (discussing *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring)).

[84] *Id.* at 668–69.

[85] 10 U.S.C.A. § 344 (Westlaw through Pub. L. No. 116-140). Another tangentially relevant statute that supports the President's power related to an ESCOE is 10 U.S.C. § 311. In § 311, Congress authorized the Secretary of Defense to enter "international defense personnel exchange agreements" with other nations.

the concurrence of the secretary of State," to have American personnel participate in a "multinational military center of excellence."[86] A multinational military center of excellence is defined in § 344 as "an entity sponsored by one or more nations that is accredited and approved by the Military Committee of [NATO]." Further, § 344 requires that the American participation in the center of excellence be pursuant to "the terms of one or more memoranda of understanding *entered into* by the Secretary of Defense, with the concurrence of the Secretary of State."[87] This section appears to be an express authorization from Congress for the President to enter into the MOUs necessary to create an ESCOE and places the President near the top of the Rehnquist spectrum.[88] An action with the express authorization of Congress "would be supported by the strongest of presumptions" that the President has the requisite power.[89]

3. Power to Ratify

The final step for a binding agreement is for the President to formally ratify the agreement. The final act of ratification through which a nation "expresses its 'intent to be bound,'" is an event

---

Such agreements would involve American personnel being sent to another nation or a security organization and the U.S. government paying the costs of sending its personnel abroad. Further context for the powers afforded the Secretary of Defense through § 311 is that it is found in the "Military-to-Military Engagements" subchapter of title 10.

[86] The power to authorize the participation of American personnel through § 344 is subject to the requirements that the participation enhance the military forces of the participating nation and that the personnel "improv[e the] interoperability" of the forces. 10 U.S.C.A. § 344. Neither of these restrictions seems to impose a problem for the action contemplated in this Note.

[87] 10 U.S.C.A. § 344 (emphasis added).

[88] *See* Bradley & Goldsmith, *supra* note 6, at 1213 (stating that Congress can give the President "general advance authorization to make an agreement (or many agreements) that the President in his or her broad discretion can negotiate, conclude, and ratify without ever returning to Congress for its review, much less approval").

[89] *Dames and Moore*, 453 U.S. at 668 (citing *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

separate from the signing of the agreement.[90] Not until an agreement is ratified does it become fully binding on the ratifying nation.[91] Generally, the act of ratification is to deposit an "instrument of ratification" with a designated nation or international organization.[92] The act of ratification can only be accomplished by the President and, in the case of an agreement that has been authorized by an already existing statute, the President does not need to consult with Congress before undertaking an act of ratification.[93] As a result, there should be no issues with the President's ratifying any binding MOUs for the establishment of an ESCOE.

*iv. Presidential Power to Implement*

Once the MOUs for an ESCOE are completed, all that is left for the President to do is implement the MOUs and carry out the obligations. Though it may sometimes be a battle for the President to get Congress to agree to fund a specific project, that should not be the case for an ESCOE. There should be little problem with the President's implementation here because of the authority conferred by Congress in § 344 as the statute expressly permits the use of funds appropriated to the Department of Defense for satisfying the United States' NATO COE obligations.[94] Furthermore, § 344 authorizes the use of Department of Defense "[f]acilities and equipment" to support NATO COEs.[95] Through the broad authority conferred by § 344, the President should be confident in his ability to satisfy the funding obligations of an ESCOE. Once the President has completed the above described steps, attention then turns to Congress' ability to incorporate the lessons learned from an ESCOE into U.S. election law.

---

90 Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 313 (2007).

91 *Id.*

92 *Id.* at 307.

93 *See* Bradley & Goldsmith, *supra* note 6, at 1213.

94 10 U.S.C.A. § 344.

95 *Id.*

C. Congressional Authority to Implement

Article I, section 2 of the United States Constitution provides that "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."[96] This section has been interpreted as allowing the states to "define who [is] to vote for the popular branch of their own legislature, and the constitution of the United States says the same persons shall vote for members of congress in that state."[97] Article I, section 4 supplements the statement in section 2 and explains that it is the power of each state to set the "times, places and manner" for electing members of the House of Representatives and Senators, "but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."[98] The United States Supreme Court has explained the impact of section 4 as granting authority for Congress "to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."[99]

The effect of these two sections is that Congress has the power to preempt state regulations regarding an election that involves votes for federal offices. This includes a "mixed election," an election where both state and federal positions are up for a vote, even when the Congressional regulation is violated without a clear intent to interfere with a vote for a federal office.[100]

---

[96] U.S. Const. art. I, § 2.

[97] *The Ku Klux Cases*, 110 U.S. 651, 663 (1884) (explaining Article I, section 2 of the Constitution).

[98] U.S. Const. art. I, § 4.

[99] *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

[100] *See Ex parte Coy*, 127 U.S. 731, 754–55 (1888) (discussing that an individual can violate a law designed to protect a federal elections by merely interfering with the election process or procedure set out by law, even if the individual lacks an intent to influence the election with regard to a federal office); *see also United States v. Bowman*, 636 F.2d 1003, 1009-12 (5th Cir. 1981) ("[W]hen federal and state candidates are together on the same ballot, Congress may regulate any activity which exposes the federal aspects of the election to the possibility of

## VI. MAKING IT HAPPEN: BUILDING FROM EXISTING LAWS

The most effective way to operationalize the knowledge gained from the international community would be for Congress to act. Congress should exercise its authority to regulate federal elections and set election interference prevention requirements for all states. The broad authority granted to Congress under Article I, section 4 gives Congress the power to impose requirements on state election officials to provide information to the federal government about potential incidents of election interference and to mandate that states have voting systems in place that satisfy minimum, baseline requirements created by an ESCOE. Though the exact shape that this new legislation should take is beyond the scope of this Note, one could imagine new federal legislation growing from the foundation laid by 50 U.S.C. § 3371b and 52 U.S.C. § 21081.

A requirement for states to provide information to the federal government about potential incidents of election interference could build on 50 U.S.C. § 3371b.[101] Through § 3371b, the Department of Homeland Security is authorized to share "classified information related to threats to election systems and to the election process" with designated state government officials.[102] To facilitate a flow of information from state governments to the federal government and an ESCOE, Congress should draft new legislation that compliments § 3371b and flips the flow of information so that states are required to report any information related to threats to election systems and the election process to the Department of Homeland security. Many states likely already have processes in place to facilitate this flow of information but imposing such a requirement may prompt states to share the information quicker and allow more time for a meaningful response from the federal government.

Congress could also enact legislation that provides an election systems baseline informed by ESCOE expertise. This baseline could

---

corruption, whether or not the actual corruption takes place and whether or not the persons participating in such activity had a specific intent to expose the federal election to such corruption or possibility of corruption.").

101 50 U.S.C.A. § 3371b (Westlaw through Pub. L. No. 116-140).

102 *Id.*

be modeled on 52 U.S.C. § 21081,[103] a statute enacted in 2002 seemingly to avoid a repeat of the 2000 Presidential Election's "hanging chad issue."[104] This section imposes a series of minimum requirements for election systems. Congress should either update § 21081 to reflect the requirements for modern election systems or leave the section as it is and mirror its format in new legislation. This new election baseline statute would be the ideal way to put the knowledge of an ESCOE to use.

Without Congress taking this final step to implement the lessons learned from an ESCOE, the United States might not reap the maximum possible benefits from its efforts to create an ESCOE. As the 2016 Presidential Election made clear, the United States has room to improve its election security, and without federal action there may be no action taken to correct this problem. The reality of having an election system that relies on federalism means that unless Congress steps and exercises its powers to preempt state policies, election security and infrastructure often relies heavily on small local governments.[105] Without a guiding federal hand, it simply seems unrealistic to rely on a local county government to implement the international wisdom gained from an ESCOE.

## VII. CONCLUSION

The United States and its NATO allies have felt the disruption that can be caused by election interference, and it is time to take additional steps to prevent future interference by developing an ESCOE. The groundwork for this next step has been laid by the G7 RRM. The United States should take a prominent role in building on the G7 RRM's groundwork by leading the creation of an Election Security Centre of Excellence (ESCOE) accredited by the North Atlantic Treaty Organization (NATO), and the President and

---

103 52 U.S.C.A. § 21081 (Westlaw through Pub. L. No. 116-140).

104 *See* Brian Kim, *Help America Vote Act*, 40 HARV. J. ON LEGIS. 579, 591 (2003) (discussing the Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, 1666-1730, which included the provision now codified at 52 U.S.C. § 21081).

105 *Election Security*, DEPT. OF HOMELAND SECURITY, https://www.dhs.gov/topic/election-security (last visited Apr. 26, 2020).

Congress should take the actions within their authority to weave the knowledge gained from an ESCOE into U.S. election laws.

Once the President and Congress have completed their roles, it is important that the strategies and methods of protecting elections be distributed beyond the G7 nations for the democracies around the globe to be secure in their election results. Allowing this knowledge to be more widely shared will continue to raise the costs and efforts needed to interfere in elections, a necessary deterrent. With this deterrent in place, the United States and democracies around the world will be able to better ensure that they have a healthy election system and that the system has the confidence of the people necessary for sustaining democracy.