In The
SUPREME COURT OF THE UNITED STATES
Case No. 16-907

DIANNE BLUMSTEIN,
NANCY GOODMAN,
and
DONNA SOODALTER-TOMAN
Petitioners Pro Se

vs.

JOSEPH A. BIDEN,
President of the United States Senate
MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
114TH CONGRESS
MEMBERS OF THE UNITED STATES SENATE,
114th CONGRESS
DONALD TRUMP,
President of the United States
MIKE PENCE
Vice President of the United States
DIRECTOR OF UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

MOTION OF PETITIONERS FOR APPOINTMENT OF SPECIAL MASTER

RELIEF SOUGHT:

Now come the Petitioners in the above-entitled matter and respectfully move this Honorable Court to appoint a Special Master with the immunities, security classifications, subpoena powers, staffing and funding reasonably necessary to perform the following tasks:

1.) This Court has jurisdiction to appoint a Special Master:

a) "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C.A. § 1651(a);

b) The writ of mandamus is an extraordinary writ. *Miller v. French*, 530 U.S. 327, 339, 120 S.Ct. 2246, 2254, 147 L.Ed.2d (2000), thus the "form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed, Supreme Court Rule 17.1 and 17.2; and therefore F.R.Civ.P. 53.1 allows this Court to appoint a Special Master; and,

c) "In designating a Master, the Court customarily confers 'authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent

proceedings,' as well as 'authority to summon witnesses, issue subpoenas, and take such evidence as may be necessary and such as he may deem it necessary to call for." Stern Robert L., *Supreme Court Practice*, 8th ed., 2002, p. 576; citing to *Nebraska v. Iowa*, 379 U.S. 996 (1965) and *Illinois v. Missouri*, 384 U.S. 924 (1966).

2.) Its is necessary to:

a.) Identify those officials, agencies, departments and offices of the United States Government engaged in the collection, analysis, and reporting of data pertaining to cyber intrusions, and mitigation of effects of intrusions conducted and/or facilitated within the United States by the Government of Russia and or its agents in the year 2016.

b.) Obtain from those officials, agencies, departments and/or offices, and, subject to the discretion of the Special Master, obtain from third parties, whose identities are disclosed to the Special Master, any and all summaries, analyses or reports, classified or unclassified, related to cyber intrusions, more probably than not conducted directly or indirectly by the Government of Russia, and that were determined by those officials, agencies, departments and/or offices to have been related to the November 2016 congressional and presidential elections.

c.) If the Special Master determines the Government of Russia more probably than not committed one or more cyber intrusions involving the Presidential and Congressional elections in one or more precincts/districts in one or more states in the year 2016, enquire of polling organizations and the election officials in each of the affected precincts/districts/states to determine the possible impact of those intrusions.

d.) Prepare for the *in camera* review by the Supreme Court of a report of the findings of the Special Master conforming, to a reasonable extent, to the standards of Federal Rules of Evidence 702 and 703 as to whether there were cyber intrusions more probably than not committed by the Government of Russia which may have impacted one or more of the November 2016 congressional and presidential elections.

e.) If such intrusions probably occurred and possibly caused such impacts, the report would identify any individuals, whether agents of the Government of Russia or others who probably aided or abetted the intrusions, detail the probable type and extent of each intrusion, describe the possible impact of each intrusion or pattern of intrusions, and identify the particular relevant election races.

3.) Upon receipt of the Report of the Special Master, the Supreme Court would review *in camera* the Report and decide what, if any remedy to provide. Following redactions of classified information, the Report could be published by the Court for review by the parties and the public and the matter referred by the Court to a Special Prosecutor if criminal prosecution appeared warranted.

GROUNDS FOR RELIEF:

A. <u>THE "CHECKS" ON FOREIGN INTRIGUE ANTICIPATED BY THE FRAMERS</u>

EITHER ARE HISTORICALLY INEFFECTIVE OR HAVE BEEN PRE-EMPTED.

4. The Framers anticipated foreign powers might attempt to corrupt this country's political leaders.

5. Alexander Hamilton wrote, in regard to the means of election of the President:

> "Nothing was to be more desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly in the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this than by raising a creature of their own to the chief magistracy of the Union?"

The Federalist No. 68 (Alexander Hamilton).

6. Hamilton foresaw the electoral college as one check because the constitutional convention had "not made the appointment of the President to depend on any pre-existing bodies of men who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment." Id.

7. When Hamilton noted the "business of corruption, when it is to embrace so considerable a number of men, requires time as well as means," Id., Hamilton could not have anticipated the speed of computer information, such as it is in the 21 century, or the vast wealth under the control of a single foreign despot.

8. "The executive Power shall be vested in a President of the United States of America. ..." U.S. Const. Art. II, § 1.

9. The electoral college is not independently selected as The Framers had anticipated.

10. In fact, the electors are chosen, part and parcel, in the same process as that by which votes are cast for the candidates for President and Vice President.

11. An "invasion" is the "incursion of an army for conquest or plunder." Black's Law Dictionary, 10th ed., 2014, p. 952.

12. "In *The Federalist* No. 43, James Madison referred to the Invasion Clause as affording protection in situations wherein a state is exposed to armed hostility from another political entity. Madison stated that Article IV, § 4 serves to protect a state from 'foreign hostility' and 'ambitious or vindictive enterprises' on the part of other states or foreign nations." State of California v. United States, 104 F.3d 1086, 1091 (9th Cir. 1997).

13. Cyber attacks were amongst developments unforeseen by the Framers.

14. The persons who otherwise are under a duty conferred by the Constitution to enforce the laws under which

B. UNCLASSIFIED EVIDENCE OF CYBER INTRUSIONS BY THE GOVERNMENT OF RUSSIA:

14. The Addendum includes the Petition for Rulemaking to Require an Enhanced Reliability Standard to Detect, Report, Mitigate, and Remove Malware from the Bulk Power System; the Petition was filed by the Foundation for Resilient Societies, an organization comprised of experts in the fields of national defense, foreign relations, and cyber security.

15. The Addendum also includes correspondence from the Hon. Seth Moulton, a

Member of Congress, who documents that Congress and the Executive Branch are aware of the cyber intrusions involving the 2016 elections and neither Congress nor the Executive Branch has taken remedial steps to address either the consequences of the past electoral intrusions or prevent future intrusions.

C. BURDEN OF PERSUASION:

16. "[B]efore a federal court can responsibly order a new election, the claimants seeking this extraordinary relief must come forward with the most clear and convincing evidence that ... persons... intentionally...altered the outcome of the election. A party contesting a Presidential election carries a heavy burden. Not to put too fine a point on it, this standard implies conduct of a most egregious nature, approximating criminal activity." Donahue v. Board of Elections, 435 F.Supp. 957, 968 (E.D.N.Y. 1976).

17. Given that the "evidence" of cyber intrusions in the electoral process is for the most part the subject of security classification, only the judiciary can through the exercise of its equity power assemble the evidence necessary to support the necessary adjudication.

D. RIGHTS ABRIDGED:

18. Voting enjoys constitutional protection. Norman v. Reed, 502 U.S. 279, 112 S.Ct. 698 (1992); Burdick v. Takushi, 504 U.S. 428, 433, 112 S.Ct. 2059, 2063 (1992).

19. Voters have a fundamental right to associate politically and to vote for candidates of their choice. Schulz v. Williams, 44 F.3d 48, 54-55 (2nd Cir. 1994).

20. The United States Constitution is the written manifestation of the social compact among the citizens of the United States and their government. As part of the social compact, Article IV §4 guarantees the States and their citizens "... a Republican Form of Government, and ...(that the United States will) ... protect each of ... (the States) ....against invasions...."

21. The Constitution guarantees elections as part of the compact free of foreign intervention. (See Federalist Paper No. 68, supra., Alexander Hamilton.)

22. Post election, Article I, §9 of the Constitution forbade the President from receiving any financial benefit from a foreign power. The right to cast a vote and the right to have one's vote counted are both constitutionally protected. United States v. Classic, 313 U.S. 299, 315, 61 S.Ct. 1031 (1941).

23. A person's interest in participating in the political process through voting and having his vote counted is a right both 'individual and personal in nature.' Reynolds v. Sims, 377 U.S. 533, 561, 84 S.Ct. 1362 (1963)" as cited in Griffin v. Burns, 570 F.2d 1065, 1072 (1st Cir. 1978).

24. "And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the fee exercise of the franchise." Reynolds v. Sims, 377 U.S. at 554.

25. "[W]e do not see how an election conducted under these circumstances can be said to be fair." Griffin v. Burns, 570 F.2d at 1076.

D. *STANDING TO REQUEST RELIEF*:

26. The petitioners have a direct "stake" as citizens of the United States and the Commonwealth of Massachusetts who voted for Hillary Clinton and whose candidate lost due to electoral votes cast by electors of other states in response, in part, to the popular vote.

27. The petitioners also have a direct "stake" in the Congressional races of other states because when the Republican candidates were declared to have "won" those races, the Republicans took substantial majorities in the House and Senate. Affidavits of Dianne Blumstein, Nancy Goodman, and Donna Soodalter-Toman filed herewith.

28. The interests of voters are "independent" of the interests of their candidates, and the failure of a candidate to pursue relief is not material to determining whether the voters for that candidate have "standing" to contest how an election was conducted. *See* Tarpley v. Salerno, 803 F.2d 57, 59-60 (2nd Cir. 1986).

29. The petitioners have standing to challenge the lawfulness of the election. Diamond v. Charles, 476 U.S. 54, 66-67, 106 S.Ct. 1697 (1986); Schulz v.Williams, 44 F.3d, *supra* 52-53.

30. The petitioners have a right to relief even if they did not vote for the losing candidate: "The right to participate in the choice of representatives ... includes ... the right to cast a ballot and to have it counted at the general election, whether for the successful candidate or not." United States v. Classic, 313 U.S. 299, 318, 61 S.Ct. 1031 (1940).

31. "The Constitution of the United States protects the right of all qualified citizens to vote, in state and well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally recognized protected right to vote. Reynolds v. Sims, 377 U.S.533, 554, 84 S.Ct. 1362, 1377 (1964)..." as cited in Donahue v. Board of Elections, 435 F.Supp., *supra* at 966.

32. Further, the "loss of (Democratic candidates') opportunity to compete equally from votes in an election" vested Democratic voters with standing. *See generally* Fulani v. League of Women Voters Educ. Fund, 883 F.2d 621, 626 (2nd Cir. 1989).

E. *ABILITY OF COURT TO GRANT RELIEF*:

33. "The granting of equitable relief premised directly upon the Constitution has long been a practice accepted without discussion. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 404, 91 S.Ct. 1999 (Harlan concurring, 1971)" as cited in Donahue v. Board of Elections, 435 F.Supp., *supra* at 963.

34. "The point, however, is not that ordering a new Presidential election in New York State is beyond the equity jurisdiction of the federal courts. Protecting the integrity of elections - particularly Presidential contests - is essential to a free and democratic society. *See* United States v. Classic, *supra*.

35. "It is difficult to imagine a more damaging blow to public confidence in the electoral process than the election of a President whose margin of victory was provided by ... illegal means. Indeed, entirely foreclosing injunctive relief in the federal courts would invite attempts to influence national elections by illegal means.... " Donahue v. Board of Elections, 435 F.Supp. , *supra* at 967.

36. Relief for a violation of the Guarantee Clause may be provided by the Supreme Court:

> The view that the Guarantee Clause implicates only non-judiciable political questions has its origin in Luther v. Borden .... this view has not always been accepted. In a group of cases decided before the holding of Luther was elevated into a general rule of non-justiciability, the Court addressed the merits of the

> claims founded on the Guarantee Clause without any suggestion that the claims were non-justiciable.... More recently, the Court has suggested that perhaps not all claims under the Guarantee clause present non-judiciable political questions .... Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances.

New York v. United States, 505 U.S. 144, 156, 112 S.Ct. 2433 (1992) (Justice O'Connor); *see also* Erwin Chemerinksy, "Cases Under the Guarantee Clause Should be Justiciable", University of Colorado Law Review, Vol. 65, p. 849.

37. Other cases that have addressed the Guarantee clause can be distinguished by a critical element—they do not concern an allegation that the President, who is charged with enforcement of the body of laws in question, obtained his office through the invasion at issue. *See* People of Colorado ex rel. Suthers v. Gonzales, 558 F.Supp.2d 1158, 1161 (D.Colo. 2007) (claim that United States failed to protect plaintiffs from invasion "implicates foreign policy and national defense issues, which are the province of the political branches of government and which courts are reluctant to address"); also State of California v. United States, 104 F.3d at 1091 (California's allegation it had been "invaded" by immigrants and suffered fiscal losses where "the political branches have made no such determination would disregard the constitutional duties that are the specific responsibility of other branches of government, and would result in the Court making an effective non-judicial policy decision.").

38.

The absence of necessary parties does not preclude relief where "... equity demands that the court proceed in their absence." Donahue v. Board of Elections, 435 F.Supp., *supra* 965 citing Toney v. White, 476 F.2d 203, 207 (5th Cir.).

Willful misconduct renders misconduct justiciable. Hennings v. Grafton, 523 F.2d 861, 864 (7th Cir. 1975). "The Supreme Court has ... read the criminal counterpart to the civil rights statutes as conferring federal jurisdiction over corrupt practices in state-run elections for federal office. United States v. Saylor, 322 U.S. 385, 64 S.Ct. 1101 (1944)" as cited in Griffin v. Burns, 570 F.2d, *supra* at 1076. "[P]atent and fundamental unfairness" may be a violation of the due process clause. Gold v. Feinberg, 101 F.3d 796, 801 (2nd Cir. 1996) citing Griffin v. Burns, 570 F.2d, *supra* at 1077. The cyber attacks were not a "political act" of one party or a branch of the United States government but rather the intrusion of a foreign state in our democracy, and claims for violation of Article IV §4 are subject to adjudication. *Compare* Baker v. Carr, 369 U.S. 186 (1962) The cyber intrusions were acts of espionage and aggression by a foreign power directed against the United States and candidates seeking public office within the Legislative and Executive Branches of the United States government.

CONCLUSION:

Americans have fought and died to maintain the integrity of America's version of democracy. It is reasonable to infer that if the State of Russia committed these acts, it did so to have one or more "creatures of its own" elected to high office - i.e. "Manchurian Candidates."

In so doing, these “creatures” may over the term of their office have more long term impact than the Japanese bombing of Pearl Harbor, the German invasions of European countries in both World Wars, and the “cold war” with the Soviet Union.

The relief sought is non-partisan due to the knowing failure prior to the November 2016 election of both the Executive Branch headed by a Democratic President and the houses of Congress dominated by Republicans to implement the guarantees of Article IV in the Constitution. Post election, it appears that the intrusions may have benefitted candidates of one party over the other, and with both the Executive Branch and the Legislative Branch in control of a single party, it is unrealistic to expect a meaningful inquiry and remedy afforded by either branch of government. Given the failure of politicians of both persuasions to live up to the mandate of the Constitution, only the Judiciary can afford the relief to which the voters of the United States are entitled. To do so, it is most prudent for the Supreme Court to pull back the curtain of National Security, determine the nature of the intrusions, identify the perpetrators, and fashion permanent relief thereafter.

The result would assure the citizens of the United States that the American version of democracy survived and that the members of Congress, the President and Vice President were legitimate expressions of that democracy. If material impacts were found by the Special Master to have occurred in specific races due to intrusions and the Court concludes that the integrity of specific races fell below constitutional minimums, the Court could fashion relief suitable for each race. If a new election were mandated for one or more races, the Court could frame rules regarding the retroactive effect, if any, of the invalidated elections.

If the 2016 election for President and Vice President did not meet constitutional minimums, the position of President could be filled consistent with the official order of succession pending a “revote” for the President and Vice President in the 2018 election cycle. If the election of certain Representatives and Senators did not meet constitutional minimums, the effected states could appoint replacements pursuant to state law and subject to the results of new elections conducted consistent with state law.