# CONCORD CONSULTING AIMS TO MAKE RUSSIAN BOTS LEGAL

Remember when they used to say, “they hate us for our freedoms” in the wake of 9/11? The company of Putin’s buddy Yevgeniy Prigozhin is doing the opposite — having a field day with the due process rights his company, Concord Consulting, gets under US law after being charged in the Internet Research Agency indictment.

As I noted, Concord unexpectedly decided to contest its indictment for using Prigozhin’s troll factory to interfere in the 2016 election. Last week it pled not guilty.

In that post, I suggested that the risk posed by the Concord not guilty plea could be deferred, for now, by arguing over a protection order and ensuring that sensitive data be shared under CIA.

> [N]either will happen immediately — Mueller’s team will push for a protection order and CIPA process before turning over the requested discovery and defendants almost never get a Bill of Particulars — effectively, Concord signaled its intention to impose real costs on the US government’s use of our criminal justice system to embarrass Russia. They made it clear that one of Putin’s closes allies will be demanding the intelligence behind an indictment naming him and two of his companies. Which is going to pose real discomfort for Mueller’s team (which might explain a bit of their delay here).
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> Let me clear: Concord is entirely within its right to begin demanding such evidence. That’s the risk of using our criminal justice system, affording due process, in charging a Russian corporate

> person who can challenge any charges without risking their freedom. I imagine Mueller's team didn't sufficiently account for this possibility when charging it this way. And if there are any other known Russian corporations involved in this operation (or fronts, such as the one Joseph Mifsud worked behind), I would imagine Mueller's team is rethinking their approach to including those fronts. This could be problematic to the extent that proving any "collusion" between Trump's people and Russians would most easily be demonstrated via conspiracy charges involving Russian entities.

If and when Mueller dismisses the indictment against Concord (but not its 13 paid trolls), it would be an embarrassing PR moment. But the contest thus far only posed a legal risk to any further indictments that relied on corporate entities, which the rest of the Internet Research Agency one does not.

Concord's latest challenge may pose a greater threat. It requests the judge in the case (which here would be Magistrate Michael Harvey, though Trump appointee Dabney Friedrich is the District judge on the case) to review the grand jury instructions to make sure the prosecutors explained the *mens rea* required behind the conspiracy to defraud the US charge in the case. It is, as the motion argues, a fairly modest request (the government will argue, rightly, that it asks for grand jury information it is not entitled to, but Concord is asking just for the judge to review it). It's basically asking the judge to make sure prosecutors explained to the grand jury that they had to find that IRA knew that it was violating US law.

As I noted here, ConFraudUs provides Mueller's team with a way to argue the abuse of weak parts in our electoral system violates the law, and charging a conspiracy sets up a way to drop in American defendants at a later date. And, as

Lawfare laid out in this good legal review of ConFraudUs, ConFraudUs has been used in the electoral context in the past.

> Notably for present purposes, §371 has been deployed in the context of election law specifically. The Justice Department's manual on federal prosecution of election offenses explicitly contemplates bringing charges of conspiracy to defraud based on campaign finance offenses. It explains the theory as follows:
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> > To perform [its] duties, the FEC must receive accurate information from the candidates and political committees that are required to file reports under the Act. A scheme to infuse patently illegal funds into a federal campaign, such as by using conduits or other means calculated to conceal the illegal source of the contribution, thus disrupts and impedes the FEC in the performance of its statutory duties.
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> Several federal circuit courts have heard cases brought under §371 based on this theory and have not found fault with its application to behavior that may also violate the Federal Election Campaign Act (FECA).

But Concord is arguing the use of ConFraudUs in this case departs from the approach DOJ has previously used to keep foreign influence out of elections (citing cases of Chinese influence peddling under Clinton).

> The Court is well aware that heretofore investigations of alleged improper foreign involvement in American

> elections have been handled by the United States Department of Justice ("DOJ"); specifically the Campaign Finance Task Force created by former Attorney General Reno in 1997, and where the Court worked as a prosecutor from September 1997 to August 1998. Former Attorney General Reno refused to bow to massive political pressure to appoint a special counsel, and instead the Task Force methodically investigated and prosecuted cases through 2000.1 Throughout all of that activity, the DOJ never brought any case like the instant Indictment, that is, an alleged conspiracy by a foreign corporation to "interfere" in a Presidential election by allegedly funding free speech. The obvious reason for this is that no such crime exists in the federal criminal code.

It doesn't actually prove that use of ConFraudUs in this case would be improper (indeed, after complaining that Janet Reno didn't appoint a special counsel to investigate funding of Clinton, the motion spends a page complaining about a special counsel in this case). Rather, it argues that the indictment couldn't charge ConFraudUs because none of the Russians involved knew they had to register with the government before engaging in online trolling (they note they're going to make similar challenges with respect to other charges in the future).

> But violations of the relevant federal campaign laws and foreign agent registration requirements administered by the DOJ and the FEC require the defendant to have acted "willfully," a word that does not appear anywhere in Count One of the Indictment. See 52 U.S.C. § 30109(d) and 22 U.S.C. § 618(a).
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> [snip]

> Count One of the Indictment appears to be facially invalid because it fails to charge an essential element of the offense of conspiracy to defraud the United States by impairing, obstructing and defeating the functions of the FEC and the DOJ, that is, that the Defendant acted willfully, in this case meaning that Defendant was aware of the FEC and FARA requirements, agreed to violate those requirements, and ultimately acted with intent to violate those requirements.

There's a two-fold risk here, if Concord is successful (and they could be).

First, there's a risk that such a ruling would in effect provide foreign corporations more ability to engage in improper election speech than domestic ones. Particularly as social media companies move to require more transparency in online advertising, a foreign company could continue to violate those requirements simply by pleading dumb. Certainly Congress could mandate some kind of transparency on foreign companies and with that require private companies to administer such things. but it wouldn't be a quick fix.

There's a more immediate risk, however. The filing claims that this indictment is, "a case that has absolutely nothing to do with any links or coordination between any candidate and the Russian Government." While it is true that Rod Rosenstein emphasized there was no allegation in the current indictment that any American knowingly conspired with these Russians, there are actually three Trump campaign staffers described in a way in the indictment that may reflect they're still under investigation. And in its last filing, Concord demanded the communications behind one event — an American holding a sign in front of the White House — that leads me to believe Concord knows that the involvement of this US person is more complex than alleged in the indictment.

> With respect to ¶ 12b, identify the "real U.S. person," identify the specific Defendant or conspirator who communicated with the "real U.S. person," provide the dates and times of any such communications, identify the Defendant or conspirator who stated "is a leader here and our boss . . . our funder," and clarify whether it is alleged that any such communications were made on behalf of Defendant Concord.

That is, while Rosenstein said that thus far there are no Americans in this indictment, that doesn't mean Mueller didn't have plans to add some at a later date.

But if Concord can get this conspiracy charge thrown out before then, it's going to undercut any effort to claim the conspiracy that will be critical to substantiating the collusion charge *even if Mueller presents clear evidence of an agreement to carry out this trolling*.

That doesn't mean he won't be able to prove a conspiracy involving a more obvious agreement — such as the Agalarovs offering dirt in exchange for sanction relief (though that would invoke the bribery rules that SCOTUS has significantly reined in).

But for now, the IRA indictment is a test case in a legal theory that will make it fairly easy to show that Republicans engaged in a conspiracy to tamper with the election. Because Mueller named a corporate person, he provided a way for the Russians to otherwise undercut a theory that seems central to the effort to hold Trump and the Russians accountable.

Again, Mueller can likely prove ConFraudUs with other players in the larger conspiracy. But this filing poses an immediate threat of undermining the logic of such an approach before he can charge it.