HOW THE MUELLER TEAM THINKS OF CONFRAUDUS

I've written before how I think Conspiracy to Defraud the United States (ConFraudUs) provides Mueller a way to charge a variety of conduct with conspiracy charges that additional defendants can be dropped into, all of which might form an interlocking series of ConFraudUs indictments that map out the entire election crime. In this post, I observed how the charge worked in the Manafort and Internet Research Agency indictments. In this one, I described how it might work to charge Jared (and everyone else) for pretending to be serving US foreign policy interests while actually making bank.

In response to a challenge from Concord Consulting in the IRA indictment, the Mueller team has laid out how they think of ConFraudUs. The filing hints at how and why they may be using this as a backbone for their pursuit of the 2016 election tampering culprits.

In a blustery motion claiming that Mueller only charged Concord with ConFraudUs because he needed to charge some Russians, any Russians, to justify his appointment, Concord demanded access to the grand jury instructions on the ConFraudUs charge, claiming that the charge requires willfulness. (Click through to read the footnotes here, which include a gratuitous Casablanca reference and complaints about US tampering in elections.)

> Now, some twenty years later, the Deputy Attorney General acting for the recused Attorney General has rejected the history and integrity of the DOJ, and instead licensed a Special Counsel who for all practical political purposes cannot be fired, to indict a case that has absolutely nothing to do with any links or coordination between any

> candidate and the Russian Government.2 The reason is obvious, and is political: to justify his own existence the Special Counsel has to indict a Russian – any Russian. 3 Different from any election case previously brought by the DOJ, the Special Counsel used the catch-all provision of the federal criminal code, the defraud prong of conspiracy, 18 U.S.C. § 371, to allege that a foreign corporate defendant with no presence in the United States and having never entered the United States, engaged in the make-believe crime of conspiring to "interfere" in a United States election. Indictment, Dkt. 1, ¶ 2. Presumably to bolster these allegations (which have a strong odor of hypocrisy) 4 , the Special Counsel has pleaded around the knowledge requirements of all related substantive statutes and regulations by asserting that Concord conspired to obstruct the functions of the United States Departments of Justice ("DOJ") and State ("DOS"), and the Federal Election Commission ("FEC").5 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).6

Violations of the federal campaign laws and foreign agent registration … require the defendant to have acted "willfully," say the Russians who trolled our election.

That's true, Mueller concedes.

Then points out they haven't charged those underlying crimes. They've just charged ConFraudUs. And the standard for ConFraudUs is "intent to defraud the US;" there's no

"willfullness" standard required.

> As an initial matter, the government agrees that the plain language of the statutory provisions Concord Management has identified in the Federal Election Campaign Act, 52 U.S.C. § 30109(d), and the Foreign Agent Registration Act 22 U.S.C. § 618(a), set forth a "willfulness" standard with respect to knowledge. The government, however, did not charge Concord Management with substantive violations of FECA, FARA, or for that matter, visa fraud — an offense that requires only a "knowing" standard. See 18 U.S.C. § 1546. Concord Management is alleged to have conspired to defraud the United States, in violation of 18 U.S.C. § 371. As described in more detail below, the mens rea for that offense is intent to defraud the United States, not to willfully commit substantive offenses that are not charged in the Indictment

Which brings them to where they lay out precisely what ConFraudUs requires:

> The essential elements of a conspiracy to defraud the United States consist of the following: (1) two or more persons formed an agreement to defraud the United States; (2) the defendant knowingly participated in the conspiracy with the intent to defraud the United States; and (3) at least one overt act was committed in furtherance of the common scheme. See United States v. Treadwell, 760 F.2d 327, 333 (D.C. Cir. 1985); United States v. Coplan, 703 F.3d 46, 61 (2d Cir. 2012), cert. denied, 571 U.S. 819 (2013). The agreement to defraud must be one to obstruct a lawful function of the Government or its agencies by deceitful or dishonest means. Coplan, 703 F.3d at 60–61; see United States v. Davis, 863 F.3d 894,

> 901 (D.C. Cir. 2017) (explaining that a charge under the defraud clause requires proof that a defendant "knowingly agreed with [the codefendant] (or another person) to defraud the federal government of money or to deceptively interfere with the lawful functions of" a particular government agency). The mens rea is a specific intent to defraud the United States, not willfulness. See United States v. Khalife, 106 F.3d 1300, 1303 (6th Cir. 1997), cert. denied, 522 U.S. 1045 (1998); United States v. Jackson, 33 F.3d 866, 871–72 (7th Cir. 1994), cert. denied, 514 U.S. 1005 (1995). The mens rea requirements of particular substantive crimes, in short, do not carry over to defraud-clause prosecutions. See, e.g., Jackson, 33 F.3d at 870–72 (government need not establish the level of willfulness required to prove a "structuring" offense when it charges the same behavior as a conspiracy to defraud); Khalife, 106 F.3d at 1303 (same).4

So,

> (1) two or more persons formed an agreement to defraud the United States;
>
> (2) [each] defendant knowingly participated in the conspiracy with the intent to defraud the United States; and
>
> (3) at least one overt act was committed in furtherance of the common scheme.

Basically, the Mueller team argues, Concord and all its trolls only have to agree to pull a fast one on the American electoral regulatory apparatus, with at least one overt act like … a trollish tweet. They don't have to individually *willfully* violate the underlying law.

We'll see what Judge Dabney Friedrich has to say

about this argument (though as far as I understand it, the Mueller argument is not at all controversial). As a reminder, Rick Gates has already pled guilty to this charge.

However Friedrich rules, however, you can how this would apply to a number of other known actions. Did Don Jr conspire with Aras Agalarov and his surrogates to defraud the fair management of elections when he stated, in the context of receiving dirt on Hillary Clinton, that he would revisit the Magnitsky Act sanctions when his father won the election (several witnesses gave sworn testimony that this happened)? Did Roger Stone conspire with Guccifer 2.0 when they (as reported but not yet substantiated with evidence) discussed how to find Russian hackers who had stolen Hillary's emails? Did Brad Parscale conspire with Cambridge Analytica, not just to permit foreigners to illegally provide assistance to the Trump campaign, but also to use stolen models to heighten discontent among Democratic voters?

Importantly, Mueller would not have to prove that all participants in all these conspiracies had the *mens rea* required by the underlying charges. It's enough that they're trying to deceitfully thwart the lawful functioning of a government process.

Obviously, Mueller hasn't yet charged any of these ConFraudUs conspiracies, if indeed they happened. But you can see why he might use ConFraudUs to do so.