

ROGER STONE'S LATEST: WHEN LEGAL CATEGORIES OF INNOCENT OR GUILTY BECOME DISINFORMATION AND PARDON [UPDATED]

Update, June 27: This post describes why Stone's defense strategy – not to mount a legal defense, but to engage in disinformation – may pose a problem for Amy Berman Jackson's enforcement of her gag against Roger Stone. That's because his magnification of other outlets' coverage of his lawyers' own bullshit filings questioning whether Russia hacked the DNC do amount to a magnification of his own defense strategy. ABJ ordered Stone to explain why his release conditions shouldn't be changed. Stone's response is here. As expected, his response largely claims he was within the terms of her order when commenting on his lawyers' own filings.

The government's disproportionate reaction is an effort to deprive Stone of the narrow latitude the Court left him; a latitude that was not violated by the posts, and a latitude which, if curtailed, based on the posts, would violate Stone's First Amendment rights. The notion that "an appeal to major media outlets to publish information that is not relevant to, but may prejudice, this case" (Dkt. 136, p. 4, n.1), is oxymoronic, outré, and out of First Amendment bounds

Stone's response is weakest in the explanation for calling for John Brennan to be hanged.

June 2, 2019 (Gov't Ex. 8): "This psycho must be charged, tried, convicted [John Brennan] and hung for treason." Dkt. 136-9. Stone: No comment was made by Stone about the "case" or about the "investigation." Analysis: As background, Mr. Brennan, in a July 16, 2018 Tweet (about which 133,000 people were "talking") wrote: "Donald Trump's press conference performance in Helsinki rises to and exceeds the threshold of 'high crimes and misdemeanors. It was nothing short of treasonous'." The First Amendment protected Brennan's remarks. Likewise, Stone's remarks are also protected. This posting has nothing whatsoever to do with Stone's case and therefore posed no fair trial threat, nor did it violate the Order.

This is clearly an attempt to explain away what Stone's deletion of the post seems to recognize did violate the gag.

Anyway, I may be alone in thinking this, but I suspect ABJ won't do anything more than restrict Stone's use of the Internet, if even she does that.

I will add, however, that the government would do well to formally notice what I pointed out here: that in the DNC lawsuit, his attorneys are arguing the opposite of what they're arguing here, that Russia definitely did the DNC hack.

Yesterday, the government asked Judge Amy Berman Jackson to hold a hearing to determine whether Roger Stone didn't violate his gag order earlier this week by trying to get mainstream press outlets to pick up marginal outlets' reports of his attorneys' effort to undermine the attribution of the DNC hack to Russia. They point to several Instagram posts Stone made that referred to conspiratorial interpretations of his lawyers' own frivolous arguments and ask why

other outlets aren't picking up the story. [I've added links to the posts.]

On June 18, 2019, Stone posted a screenshot of an article about one of his recent filings in this case. The screenshot read: "US Govt's Entire Russia-DNC Hacking Narrative Based on Redacted Draft of CrowdStrike Report." Ex. 1. He tagged the post, "But where is the @NYTimes? @washingtonpost? @WSJ? @CNN?" Id. Later that day, Stone posted a screenshot of another piece about his filing with the title, "FBI Never Saw CrowdStrike Unredacted Final Report on Alleged Russian Hacking Because None was Produced." Ex. 2. Next, Stone posted an article titled, "Stone defense team exposes the 'intelligence community's' [sic] betrayal of their responsibilities." Ex. 3. The text further stated, "As the Russia Hoax is being unwound, we are learning some deeply disturbing lessons about the level of corruption at the top levels of the agencies charged with protecting us from external threats. One Jaw-dropping example has just been exposed by the legal team defending Roger Stone." Id. Stone tagged the article, "Funny , No @nytimes or @washingtonpost coverage of this development."

On June 19, 2019, Stone posted a screenshot of an article with the title, "FBI Never Saw CrowdStrike Unredacted or Final Report on Alleged Russian Hacking Because None Was Produced." Ex. 4. He tagged the post, "The truth is slowly emerging. #NoCollusion." Id.2

They argue this violates ABJ's ban on,

making statements to the media or in public settings about the Special Counsel's investigation or this case or any of the participants in the

investigation or the case. The prohibition includes, but is not limited to, statements made about the case through the following means: radio broadcasts; interviews on television, on the radio, with print reporters, or on internet based media; press releases or press conferences; blogs or letters to the editor; and posts on Facebook, Twitter, Instagram, or any other form of social media.

Thus far, ABJ has not responded to this request, though in that same time she assented to another of the government's requests, to submit a sur-reply to Stone's claim that the FBI never had any direct evidence Russia hacked the DNC.

I want Roger Stone to go to jail as much as the next opponent of rat-fucking. But I think the government's claim, on this point, is problematic. Back when ABJ set Stone's gag, she said,

You may send out as many emails, Tweets, posts as you choose that say, Please donate to the Roger Stone defense fund to help me defend myself against these charges. And you may add that you deny or are innocent of the charges, but that's the extent of it. You apparently need clear boundaries, so there they are.

But in the same hearing, prosecutor Jonathan Kravis – the guy who signed yesterday's filing – laid out that defensible public statements would include articulating a defense.

And because the conduct we're talking about now, because the message we're talking about now are not just messages about proclaiming innocence or articulating a defense, but are messages that could be construed as threatening, the government believes that the

restriction on extrajudicial statements would be appropriate under the Bail Reform Act.

And the posts *from this week* that prosecutors lay out do nothing more than point to poor analysis of Stone's own lawyers' filings, and as such probably count as an effort to articulate a defense.

The problem is precisely what prosecutors explicitly explain is their real concern, that these posts are designed to generate more attention for conspiracy theories that totally undermine the public record of the Mueller investigation.

Stone's posts appear calculated to generate media coverage of information that is not relevant to this case but that could prejudice potential jurors. They relate to Stone's claims—made in both filings before the Court and in public settings—that Russia did not hack the DNC servers, that the FBI and intelligence community were negligent in investigating Russian interference in the 2016 presidential election, that the government improperly “targeted” Stone and others, and that the entire investigation was somehow invalid and any crimes flowing from it (including Stone's witness tampering and lies to Congress) were justified.³ If those theories were relevant to this case (which they are not), public statements aimed at the media and meant to bolster the claims would risk prejudicing the jury pool. But these posts are arguably even worse, because they risk tainting the jury pool with information that is not relevant but that may appear, to some, to be relevant. At best, Stone's efforts could create the misimpression that this case is about issues that are not charged in the Indictment, and risk the trial “devolv[ing] into a circus”

(Tr. 49:19-20). But worse, it could confuse prospective jurors or color how they later view the actually-relevant evidence and understand the Court's instructions about that evidence.

Prosecutors are absolutely right: the reporting on Stone's lawyers filings misrepresent what his case is about. But that's because Stone's own lawyers are engaging in a legal strategy of disinformation, not legal defense.

I've repeatedly said that I think Stone will be pardoned before his November trial. Currently, there are no charges against him which could be refiled in NY or FL (the latter of which wouldn't do it anyway). DOJ has already ruled that Stone's known underlying activity – optimizing the release of documents stolen by Russians – does not reach the level of illegal conspiracy. So if Trump pardoned Stone before November, the fact that Stone would lose his Fifth Amendment rights over his charges would pose no legal risk to Trump (unlike, say, Manafort). Yet November's trial, if it goes forward, will be unbelievably damning for the President.

And that means that Stone's lawyers have an even bigger incentive than Manafort's lawyers did to mount a defense that undermines the credibility of the Russian investigation, even if it does nothing to increase Stone's chances for acquittal (which, if this goes to trial, are slim).

Which leaves ABJ and the prosecutors attempting to litigate a trial that will find innocence or guilt, while Stone's lawyers are litigating to push disinformation in support of a pardon.

All that said, Stone may still be in trouble. Prosecutors note that this is not the first time Stone has violated the letter (if not spirit) of ABJ's gag. They include several more examples.

1 These posts are not the first statements that appear to have run afoul

of the Court's order. See, e.g., Ex. 5 (Instagram Posting of April 4, 2019, stating "FBI Refuses Records Request for Emails to CNN on Day of Roger Stone Raid," with the tag, "How curious? What could they possibly be hiding?"); Ex. 6 (Instagram Posting of May 8, 2019, with the headline "Judge demands unredacted Mueller report in Roger Stone case," with the comment, "The Judge has ruled but @Politico gets most of the story wrong because they are biased elitist snot-nosed fake news [expletive] who's [sic] specialty is distortion by omitting key facts to create a false narrative."); Ex. 7 (Instagram Posting of May 16, 2019, with headline, "Roger Stone Swings For the Fences; Court Filing Challenges Russiagate's Original Premise," with the comment, "My attorneys challenged the entire "Russia hacked the DNC/CrowdStrike" claim by the Special Counsel in public court filings[.]"); Ex. 8 (Instagram Posting of June 2, 2019, picturing a former CIA Director and writing, "This psycho must be charged, tried, convicted and hung for treason.") (ellipses in original) (subsequently deleted). The government is bringing this matter to the Court's attention now because Stone's most recent posts represent a direct attempt to appeal to major media outlets to publish information that is not relevant to, but may prejudice, this case.

Three of these, like the other four, might be viewed as articulating a defense, with the defense being, engaging in disinformation.

The fourth, however, solidly violates the spirit and letter of ABJ's gag, because it would be likely to incite violence directed at John Brennan, because it calls for his hanging (Click through to see the post; I don't want to magnify

Stone's violent language).

I'm not sure what the remedy is for lawyers whose defense strategy is to sow disinformation inside and outside the court room (in both filings this week, the government has said they're going to move to prevent any such discussion from the trial). But I think these Instagram posts were probably designed, with advice of counsel, to be defensible as part of a defense strategy.

It's Stone's defense strategy that's the problem.

Update: ABJ has given Stone until Thursday to convince her he didn't violate her gag.

MINUTE ORDER as to ROGER J. STONE, JR. It is ORDERED that defendant may file by June 27, 2019 any response to the government's motion [136] and must show cause in writing by that date why the Court should not find that the defendant has violated the Court's order dated February 21, 2019 and his conditions of release. Signed by Judge Amy Berman Jackson on 6/21/19. (DMK)

As I disclosed last July, I provided information to the FBI on issues related to the Mueller investigation, so I'm going to include disclosure statements on Mueller investigation posts from here on out. I will include the disclosure whether or not the stuff I shared with the FBI pertains to the subject of the post.