

TRUMP APPOINTEE DABNEY FRIEDRICH CONTINUES TO TROUNCE THE TROLLS' HOPES OF DISCREDITING MUELLER

Dabney Friedrich, the Trump appointee presiding over the Concord Management challenge to its indictment, just released her opinion rejecting their attempt to argue they can't be indicted for conspiring to illegally tamper in our elections. The indictment effectively argued that Yevgeniy Prigozhin's trolls deceptive tactics – including not just failing to register as foreigners trying to influence US politics, but also social media users hiding they were foreign – prevented the US government from ensuring foreigners don't participate in our elections.

The key passage in the opinion is this one, which upholds the government's contention that it doesn't have to prove that Concord broke the underlying laws protecting elections. It only has to prove that Concord conspired to undermine lawful government functions.

Concord is correct that the indictment must identify the lawful government functions at issue with some specificity. And it does. See Indictment ¶¶ 9, 25–27. A defraud-clause conspiracy need not, however, allege an agreement to violate some statutory or regulatory provision independent of § 371.

With this passage, a Trump judge affirms the underlying theory behind all of Mueller's interlocking conspiracies.

But I think what Friedrich did with Concord's

claim that, because trolling on social media involves First Amendment concerns, the bar for willingness is raised higher is as important. She dismissed this claim by treating Concord's trolling as fraud, not just lying.

Concord's remaining argument—that the indictment implicates protected speech—fares no better. There is no doubt that speech is of “primary importance . . . to the integrity of the election process,” *Citizens United*, 558 U.S. 310, 334 (2010), or that political speech “occupies the highest rung of the hierarchy of First Amendment values,” *Janus v. Am. Fed’n of State, Cnty. and Mun. Emps.*, Counsel 31, 138 S. Ct. 2448, 2476 (2018) (internal quotation marks omitted). However, the indictment does not focus on the defendants’ speech, or its content, but on a course of deceptive conduct. See, e.g., Indictment ¶¶ 4–7, 30, 32, 36, 39, 41, 43, 48, 51. Although the Supreme Court made clear in *United States v. Alvarez* that “false statements” are not automatically unprotected, 567 U.S. 709, 717–22 (2012) (plurality opinion), it distinguished such statements from “fraud,” which involves “legally cognizable harm,” *id.* at 719, and remains one of the few historical categories of unprotected speech, *id.* at 717. Indeed, the Court approved of statutes prohibiting false statements to government officials, perjury, impersonating an officer, and pretending to speak on behalf of the government because such statutes “implicate fraud or speech integral to criminal conduct.” *Id.* at 721. Consistent with these principles, the Fifth Circuit in *United States v. Daly* rejected a claim that a conspiracy to defraud the United States by impeding and impairing the lawful functions of the IRS implicated the First Amendment. 756 F.2d 1076, 1082 (5th Cir. 1985).

The same is true here. The conspiracy to defraud does not implicate the First Amendment merely because it involved deceptive statements like claiming to represent U.S. entities, claiming to be U.S. persons, and providing false statements on visa applications. 9

9 Even if the indictment did implicate protected speech, the United States' "compelling interest . . . in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process," Bluman, 800 F. Supp. 2d at 288, might well sustain the charge against Concord.

Friedrich puts the government on notice that it will have to prove Concord knew it was interfering with government functions (which will be much easier with evidence laid out in the Elena Alekseevna Khusyaynova complaint, at least going forward).

Although the § 371 conspiracy alleged does not require willfulness, the parties' disagreement may be narrower than it first appears. The government concedes that § 371 requires the specific intent to carry out the unlawful object of the agreement—in this case, the obstruction of lawful government functions. Gov't's Opp'n at 16 ("Because Concord is charged with conspiring to defraud the United States, . . . the requisite mental state is the intent of impairing, obstructing, or defeating the lawful function of any department of government through deception." (internal quotation marks omitted)). Further, the government agrees that to form the intent to impair or obstruct a government function, one must first be aware of that function. See Hr'g Tr. at 40 ("[Y]ou can't act

with an intent to impair a lawful government function if you don't know about the lawful government function."). Thus, Concord is correct—and the government does not dispute—that the government “must, at a minimum, show that Concord knew what ‘lawful governmental functions’ it was allegedly impeding or obstructing.” Def.’s Mot. to Dismiss at 22; Def.’s Reply at 5. Here, as alleged in the indictment, the government must show that Concord knew that it was impairing the “lawful functions” of FEC, DOJ, or DOS “in administering federal requirements for disclosure of foreign involvement in certain domestic activities.” Indictment ¶ 9. But Concord goes too far in asserting that the Special Counsel must also show that Concord knew with specificity “how the relevant laws described those functions.” Def.’s Mot. to Dismiss at 22; Def.’s Reply at 5. A general knowledge that U.S. agencies are tasked with collecting the kinds of information the defendants agreed to withhold and conceal would suffice. Concord will have further opportunities—with jury instructions and in trial and post-trial motions, if any—to ensure that the government proves enough knowledge to support a specific intent to thwart at least one of the three government functions alleged in the indictment.

But it's not clear Concord will sustain this legal challenge that long.

While regulation of elections for Americans is less onerous than it is for foreigners, the notion that trolling is fraud may be useful for other kinds of people tampering in elections.