

DONALD TRUMP HAS A ROGER STONE PROBLEM

By all appearances, the investigation into whether Roger Stone bears some liability for the 2016 Russian hacks is ongoing, with new evidence available from the search of his homes, a February search following that, Andrew Miller's testimony, and anything Ecuador turns over to the US government.

But even without any further charges against Stone, Donald Trump has a Roger Stone problem, one he may not be able to dispense with by pardoning his rat-fucker before Stone's November trial.

That's because he could be a lynch pin in the DNC lawsuit against Trump's campaign and associates, and no one is actually contesting that.

The lawsuit has been inching along with updates after each new batch of evidence. Earlier this week, everyone but WikiLeaks submitted their reply in support of a motion to dismiss (WikiLeaks' response, which has always been premised on claiming that Julian Assange and WikiLeaks are not the same thing, has gotten more difficult in the wake of Assange's arrest).

Along with all the replies, the Trump campaign (represented by Jones Day, which has an incentive to bill liberally while the White House tries to prevent partner Don McGahn from testifying to Congress) submitted a motion for sanctions on the DNC for continuing to claim a conspiracy after the Mueller Report made clear there was evidence of a – or several – conspiracies, but nothing for which he had proof beyond a reasonable doubt.

Of course, the standard for a civil case is lower than it is for a criminal one, and to survive the motion to dismiss the DNC doesn't even have to get that far, which is one of the things the DNC argued when the Trump campaign

first threatened sanctions.

In arguing to the contrary, the Trump Campaign commits a logical error that the Report warned readers not to make. Specifically, the Campaign assumes that there were only two possible outcomes from the Special Counsel's investigation: (1) it would conclusively establish the Trump Campaign's guilt; or (2) it would conclusively establish the Trump Campaign's innocence. And because the investigation did not conclusively prove that the Trump Campaign conspired with Russia, the Campaign insists that investigation proved their innocence. By creating a false choice between these two extremes, the Trump Campaign leaves no room for the Report's actual findings: there was evidence of the Trump Campaign's guilt, but not enough to establish that guilt beyond a reasonable doubt. On page 2 of the Report, the Special Counsel warned readers not to make that mistake, explaining: "A statement that the investigation did not establish particular facts does not mean there was no evidence of those facts." Report at 2 (emphasis added). Nevertheless, the Trump Campaign's letter repeatedly and falsely suggests that, if the Special Counsel's investigation "did not establish" a particular fact, then the investigation refuted that fact. 3. The Campaign's Letter Overlooks the Differences Between Civil and Criminal Actions

The Campaign's May 13 letter also overlooks the crucial differences between civil and criminal cases. It is axiomatic that an "acquittal in [a] criminal action does not bar civil suit based on the same facts." 2A Charles Wright et al, Federal Practice & Procedure § 468 (4th ed. 2013); see also

Purdy v. Zeldes, 337 F.3d 253, 259 (2d Cir. 2003). Similarly, the government's decision not to press criminal charges against a defendant has no effect on civil proceedings. Indeed, civil plaintiffs routinely prevail in cases where the government has declined to prosecute the defendants. See, e.g., In re: Urethanes Antitrust Litigation, No. 04-1616 (D. Kan.) (after the government determined there was not enough evidence to prosecute the defendants, civil plaintiffs took the case to trial and secured a judgment of approximately \$1.06 billion). This is not surprising in light of the different standards of proof in civil and criminal cases and the additional sources of evidence available to civil plaintiffs.

First, a civil plaintiff's burden of proof is much lighter than the government's burden of proof in a criminal case. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985) (noting that a civil plaintiff only needs to show that it is more likely than not that the defendants violated the law, while criminal prosecutors must prove their case "beyond a reasonable doubt"). Thus, while the information available in the Special Counsel's Report may be insufficient to sustain a criminal conviction, a civil jury could find the same information more than sufficient to hold Defendants civilly liable.

[snip]

Moreover, a civil plaintiff can pursue evidentiary avenues unavailable to prosecutors. For example, unlike in a criminal proceeding, where a defendant has no obligation to speak to government investigators regarding her own illegal conduct, a civil plaintiff can compel a

defendant to attend a deposition, and if the defendant refuses, she can be held in contempt of court or otherwise sanctioned. See Fed. R. Civ. P. 37(b). Similarly, if a defendant invokes her Fifth Amendment right not to answer specific questions during a deposition or at trial, a civil jury—unlike a criminal jury—can infer that the defendant invoked her rights because she violated the law. See, e.g., See *Mitchell v. United States*, 526 U.S. 314, 328 (1999); *Woods v. START Treatment & Recovery Centers, Inc.*, 864 F.3d 158, 170 (2d Cir. 2017). Thus, in this case, Trump, Jr., Assange, and the Agalarovs—whom the Special Counsel did not interview—can be compelled to attend depositions, where they will have an incentive to answer the DNC’s questions truthfully (rather than invoking their Fifth Amendment rights).

More interestingly, the motion for sanctions remains utterly silent about one of DNC’s key allegations: Roger Stone’s seemingly successful effort to optimize the WikiLeaks releases.

Admittedly, so is the DNC in its response to the Trump campaign letter, when it points to all the new details in the Mueller Report that supports their suit. But there’s good reason for it: Most of the Roger Stone stuff is redacted.

But the Trump campaign’s silence on Roger Stone is particularly damning because Stone has never address a key observation the DNC has made: that after Stone dismissed the value of leaked DCCC oppo research in a DM with Guccifer 2.0, the GRU went on to hack Democratic data that was quite valuable: their AWS-hosted analytics.

On September 9, 2016, GRU operatives contacted Stone, writing him “please tell me if I can help u anyhow[,]” and adding “it would be a great pleasure to me.” ¶ 179. The operatives then asked

Stone for his reaction to a stolen “turnout model for the Democrats’ entire presidential campaign.” Id. Stone replied, “[p]retty standard.” See id.

Throughout September 2016, Russian intelligence agents illegally gained access to DNC computers hosted on a third-party cloud computing service, stole large amounts of the DNC’s private data and proprietary computer code, and exfiltrated the stolen materials to their own cloud-based accounts registered with same service. ¶ 180.

[snip]

Moreover, GRU officers using the screenname Guccifer 2.0 stayed in close contact with Stone, asking for feedback on how they could be most helpful, after Russia had been publicly linked to the theft of Democratic documents. See ¶¶ 167, 177-79. In September 2016, the GRU operatives asked Stone for his reaction to a “turnout model” that the GRU had stolen from another Democratic Party target. ¶ 179. After Stone suggested that he was not impressed, see id., Russia took snapshots of the virtual servers that housed key pieces of the DNC’s analytics infrastructure— its “most, important, valuable, and highly confidential tools,” which could have “provided the GRU with the ability to see how the DNC was evaluating and processing data critical to its principal goal of winning elections,” ¶ 180.

Not only does this put Stone’s interaction with GRU prior to some of the hacking it did, but it undercuts Stone’s entire defense (which is mostly to claim his involvement extends only to John Podesta emails, which he distinguishes from DNC).

The DNC's second amended complaint does not overcome the lack of standing argument and that it does not allege Roger Stone conspired to damage the DNC; rather, the allegations are only inferences of another conspiracy against John Podesta whose emails were on a Google server – i.e. "gmail.com." Furthermore, it has no standing against Roger Stone because Plaintiff did not sufficiently allege that he participated in the conspiracy against it.

The DNC keeps raising the September hack – which was clearly a DNC target – and Stone keeps just blowing that allegation off.

As noted above: the Stone material in the Mueller Report is currently redacted. But it's there, showing that Stone provided Trump non-public details ahead of time (which Michael Cohen has described under oath and Rick Gates apparently has also described) and also showing that Trump wanted the emails and his top aides – including Paul Manafort, Rick Gates, Mike Flynn, and Steve Bannon – made sure he got them.

It is still a very high bar for the DNC to win this suit.

But Roger Stone is a very weak point in the Republican attempt to defeat it. And neither he nor the Trump campaign seem to want to address that fact head on.