FEDERAL JUDGE DESTROYS THE HOPES OF RICO SALVATION IN DNC LAWSUIT

Yesterday, Clinton-appointed Judge John Koeltl dismissed with prejudice the DNC's lawsuit against Russia, Trump's flunkies, and WikiLeaks alleging they conspired against the party in 2016. He also ruled against a Republican demand to sanction the DNC for sustaining their claim in the wake of Robert Mueller finding that he "did not establish" a conspiracy between Trump and Russia. Koeltl's decision is unsurprising. But his decision is interesting nevertheless for what it reveals about his legal assessment of the events of 2016, not least because of the ways it does and does not parallel Mueller's own decisions.

The scope of the two analyses is different: The Democrats alleged RICO and some wiretapping charges, as well as the theft of trade secrets; Mueller considered campaign finance crimes and a quid pro quo. A short version of the difference and similarity in outcome is that:

1. Mueller charged the GRU officers who hacked the DNC for the hack (which DOJ has been doing for five years, but which has never been contested by a state-hacker defendant); by contrast, Judge Koeltl ruled that Russia's hackers could not be sued under the Foreign Sovereign Immunities Act (which is what the Mystery Appellant tried to use to

avoid responding to a subpoena); notably, Elliot Broidy's attempt to blame Qatar for his hack serves as precedent here. For the DNC, this meant the key players in any claimed conspiracy could not be sued.

2. While Democrats made a bid towards arguing that such a conspiracy went beyond getting Trump elected to getting Trump to enact policies that would benefit Russia, Koeltl treated any Trump role as just that, attempting to get Trump elected. This meant that (for example) Stone's alleged criminal obstruction after Trump got elected was not deemed part of any conspiracy.
3. As Mueller did with both the hack-and-leak itself but also with any campaign finance violation associated with getting hacked documents as assistance to a campaign, Koeltl ruled that the Supreme Court's decision in Bartnicki meant the First Amendment protected everyone besides the Russians from liability for dissemination of the stolen documents.
4. DNC's RICO fails because,

> while the Trump campaign itself was an association, the DNC claim that there was an Association in Fact under RICO fails because the ties between individuals were too scattered and their goals were not the same. Moreover, the goal of the Trump associates — to get Trump elected — is in no way illegal.

The most important part of the decision — both for how it protects journalism, what it says about the EDVA charges against Julian Assange, and what it means for similar hack-and-leak dumps going forward — is Koeltl's First Amendment analysis, in which he argued that even WikiLeaks could not be held liable for publishing documents, even if they knew they were stolen.

> Like the defendant in Bartinicki, WikiLeaks did not play any role in the theft of the documents and it is undisputed that the stolen materials involve matters of public concern. However, the DNC argues that this case is distinguishable from Bartnicki because WikiLeaks solicited the documents from the GRU knowing that they were stolen and coordinated with the GRU and the Campaign to disseminate the documents at times favorable to the Trump Campaign. The DNC argues that WikiLeaks should be considered an after-the-fact coconspirator for the theft based on its coordination to obtain and distribute the stolen materials.
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> As an initial matter, it is constitutionally insignificant that WikiLeaks knew the Russian Federation

> had stolen the documents when it published them. Indeed, in Bartnicki the Supreme Court noted that the radio host either did know, or at least had reason to know, that the communication at issue was unlawfully intercepted.
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> [snip]
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> And, contrary to the DNC's argument, it is also irrelevant that WikiLeaks solicited the stolen documents from Russian agents. A person is entitled [sic] publish stolen documents that the publisher request from a source so long as the publisher did not participate in the theft. … Indeed, the DNC acknowledges that this is a common journalistic practice.
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> [snip]
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> WikiLeaks and its amici argue that holding WikiLeaks liable in this situation would also threaten freedom of the press. The DNC responds that this case does not threaten freedom of the press because WikiLeaks did not engage in normal journalistic practices by, for example, "asking foreign intelligence services to steal 'new material' from American targets." … The DNC's argument misconstrues its own allegations in the Second Amended Complaint. In the Second Amended Complaint, the DNC states that "WikiLeaks sent GRU operatives using the screenname Guccifer 2.0 a private message asking the operatives to '[s]end any new material (stolen from the DNC] her for us to review.'" … This was not a solicitation to steal documents but a request for material that had been stolen. [citations removed]

Koeltl analyzes whether the Democratic claim that GRU also stole trade secrets — such as their donors and voter engagement strategies —

changes the calculus, but judges that because those things were newsworthy, “that would impermissibly elevate a purely private privacy interest to override the First Amendment interest in the publication of matters of the highest public concern.”

Koeltl goes on to note that the analysis would be the same for Trump’s associates, even though they make no claim (as WikiLeaks does) to being part of the media.

> [E]ven if the documents had been provided directly to the Campaign, the Campaign defendants, the Agalarovs, Stone, and Mifsud, they could have published the documents themselves without liability because they did not participate in the theft and the documents are of public concern. … Therefore, the DNC cannot hold these defendants liable for aiding and abetting publication when they would have been entitled to publish the stolen documents themselves without liability. [citations removed]

That analysis is absolutely right, and even while Democrats might hate this outcome and be dismayed by what this might portend about a repeat going forward, it is also how this country treats the First Amendment, both for those claiming to be journalists and those making no such claim.

All that said, there are several aspects of this analysis worth noting.

This is a DNC suit, not a suit by all harmed Democrats

First, this is a suit by the DNC. Neither Hillary nor John Podesta are parties. “Podesta’s emails had been stolen in a different

cyberattack," Koeltl said, "there is not allegation they were taken from the DNC's servers." Had they been, they would have had to have been prepared to submit to discovery by Trump and his associates.

Including Podesta might have changed the calculus somewhat, though Koeltl does not deal with them (though he does suggest they would not have changed his calculus).

[16] Stone argues that the DNC does not have standing to assert the claims against him because it alleges no cognizable injury that can be fairly traced to Stone's alleged actions. Stone states that the allegations against him in the Second Amended Complaint concern an alleged conspiracy relating to Podesta's emails, not the DNC's. He argues, therefore, that he was not part of the RICO enterprise or conspiracy to injure the DNC, steal its "trade secrets," or trespass on the DNC's computers. The DNC responds that the allegations raised against Stone show that he was a coconspirator in the overall scheme to steal and disseminate the DNC's information. The DNC plainly does not have standing to assert claims on behalf of Podesta. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). However, as discussed below, the DNC has failed to allege plausibly claims against Stone. To the extent that the DNC's allegations attempt to impute liability to Stone for his alleged actions injuring parties other than the DNC, the Court does not consider those allegations and they would not support the DNC's claims in any event.

They *might* change the calculus, however, because (as Emma Best has noted) WikiLeaks did solicit something — the transcripts of Hillary's speeches — that was subsequently obtained in the Podesta hack. The DNC did not include that in their complaint and that might have changed Koeltl's analysis or, at a minimum, tested one of the theories the government is currently using in the Assange prosecution.

Similarly, while there is now evidence in the record that suggests Stone may have had advanced knowledge even of the July 2016 DNC dump, the allegations that would show him having had an impact on the release of documents pertains to the release of the Podesta emails. Jerome Corsi (who was added in the DNC's second complaint but not as a conspirator) claimed that he had helped Stone optimize the Podesta release in an attempt to drown out the Access Hollywood video, but Mueller was not able to corroborate that.

More tantalizingly, a filing in Stone's case shows that in at least one warrant application, the government cited some conversation in which he and others — possibly Corsi and Ted Malloch — were discussing "phishing with John Podesta." That's not something that will be public for some time. But even if it suggested that Stone

may have had more knowledge of the Podesta hack then let on, it would be meaningless in a suit brought by the DNC.

No one knows why Manafort shared polling data and his plans to win the Rust Belt (indirectly) with Oleg Deripaska

The second DNC complaint mentions, but does not explain, that Paul Manafort had Rick Gates send polling data to Konstantin Kilimnik intended to be share with oligarchs including Oleg Deripaska.

> At some point during the runup to the 2016 election, Manafort "shar[ed] polling data . . . related to the 2016 presidential campaign" with an individual connected to Russian military intelligence. This data could have helped Russia assess the most effective ways to interfere in the election, including how best to use stolen Democratic party materials to influence voters.
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> [snip]
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> In March 2016, the Trump Campaign also hired Manafort. As noted above, Manafort was millions of dollars in debt to Deripaska at the time. He was also broke.55 Yet he agreed to work for the Trump Campaign for free. A few days after he joined the Trump Campaign, Manafort emailed Kilimnik to discuss how they could use Manafort's "media coverage" to settle his debt with Deripaska.56 Manafort had multiple discussions with Kilimnik in the runup to the 2016 election, including one in

> which Manafort "shar[ed] polling data . . . related to the 2016 presidential campaign."57 This data could have helped Russia assess the most effective ways to interfere in the election, for instance, by helping it determine how best to utilize information stolen from the DNC .
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> [snip]
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> Manafort lied about sharing polling data with Kilimnik related to Trump's 2016 campaign.226

The Mueller Report's further details on the sharing, including Manafort's review of his strategy to win the Rust Belt, came too late for the complaint. And as such, Koeltl doesn't really deal with that allegation (which would likely require naming others as conspirators in any case), and instead treats any conspiracy as limited to the hack-and-leak.

Thus, he does not treat the hints of further coordination, nor is there currently enough public evidence for the DNC to get very far with that allegation. This is a ruling about an alleged hack-and-leak conspiracy, not a ruling about any wider cooperation to help Trump win the election.

No one knows what happened to the stolen DNC analytics

Finally, while the DNC complaint extensively described the September hack of its analytics hosted on AWS servers — a hack that took place after Stone scoffed at the analytics released to date by Guccifer 2.0 — Koeltl doesn't treat that part of the hack in detail because it was never publicly shared with anyone.

> The Second Amended Complaint does not allege that any materials from the

> September 2016 hack were disseminated to the public and counsel for the DNC acknowledged at the argument of the current motions that there is no such allegation.

The DNC included the analytics in their trade secret discussion, but given that Russia had FSIA immunity, and given that the GOP is not known to have received any of this, Koeltl did not consider the later theft (which is not known to have had the same public interest value as the claimed trade secrets that got leaked).

> The SAC asserts: "The GRU could have derived significant economic value from the theft of the DNC's data by, among other possibilities, selling the data to the highest bidder." There is no allegation that the Russian Federation did in fact sell the DNC's data, and any claims against the Russian Federation under the federal and state statutes prohibiting trade secret theft are barred by the FSIA.

Finally, given that it was not released publicly Koeltl does not consider how the GRU hack of analytics after Stone's discussion of analytics with Guccifer 2.0 might change the analysis on whether Stone was involved prior to any hacks.

> Similarly, Stone is alleged to have contacted WikiLeaks through Corsi for the first time on July 25, 2016 and spoke to GRU officers in August 2016 — months after the April 2016 hack. Stone is not alleged to have discussed stealing the DNC's documents in any of these communications, or to have been aware of the hacks until after they took place.
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> [snip]
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> DNC does not raise a factual allegation that suggests that any of the defendants

> were even aware that the Russian Federation was planning to hack the DNC's computers until after it had already done so.

Again, there's too little know about the purpose of this part of the hack (which virtually no one is aware of, but which would have been particularly damaging for the Democrats), and as such the DNC would not be in a position to allege it in any case. But it is a key part of the hack that shifts the timeline Koeltl addressed.

Which ultimately leaves Koeltl's final judgment about the DNC attempt to obtain some kind of remedy for having Trump welcome and capitalize on a foreign state's actions to tamper in the election. "Relief from the alleged activities of the Russian Federation," Koeltl said, "should be sought from the political branches of the Government and not from the courts."

One of the few ways to do that is to impeach.

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.