

MIKE FLYNN DOESN'T WANT DRUG-TESTING TO INTERRUPT HIS RETURN TO INFLUENCE-PEDDLING

Last night, while I was blowing a wad of cash at Zingermans in Ann Arbor, MI, Mike Flynn submitted his sentencing memo. As a number of people have noted – especially the frothy right wing – Flynn makes a back-handed attack on the FBI's treatment of his original questioning.

General Flynn does not take issue with the description of the nature and circumstances of the offense contained in the Government's sentencing memorandum and the Presentence Investigation Report. See Government's Memorandum in Aid of Sentencing ("Gov. Sent. Mem.") at 2-5, *United States v. Flynn*, 17 CR 232 (D.D.C. Dec. 4, 2018) (Doc. 46); PSR ¶¶ 15- 22. As General Flynn has frankly acknowledged in his own words, he recognizes that his actions were wrong and he accepts full responsibility for them.¹⁹ There are, at the same time, some additional facts regarding the circumstances of the FBI interview of General Flynn on January 24, 2017, that are relevant to the Court's consideration of a just punishment.

At 12:35 p.m. on January 24, 2017, the first Tuesday after the presidential inauguration, General Flynn received a phone call from then-Deputy Director of the FBI, Andrew McCabe, on a secure phone in his office in the West Wing.²⁰ General Flynn had for many years been accustomed to working in cooperation with the FBI on matters of national

security. He and Mr. McCabe briefly discussed a security training session the FBI had recently conducted at the White House before Mr. McCabe, by his own account, stated that he "felt that we needed to have two of our agents sit down" with General Flynn to talk about his communications with Russian representatives.²¹

Mr. McCabe's account states: "I explained that I thought the quickest way to get this done was to have a conversation between [General Flynn] and the agents only. I further stated that if LTG Flynn wished to include anyone else in the meeting, like the White House Counsel for instance, that I would need to involve the Department of Justice. [General Flynn] stated that this would not be necessary and agreed to meet with the agents without any additional participants."²²

Less than two hours later, at 2:15 p.m., FBI Deputy Assistant Director Peter Strzok and a second FBI agent arrived at the White House to interview General Flynn.²³ By the agents' account, General Flynn was "relaxed and jocular" and offered to give the agents "a little tour" of the area around his West Wing office. ²⁴ The agents did not provide General Flynn with a warning of the penalties for making a false statement under 18 U.S.C. § 1001 before, during, or after the interview. Prior to the FBI's interview of General Flynn, Mr. McCabe and other FBI officials "decided the agents would not warn Flynn that it was a crime to lie during an FBI interview because they wanted Flynn to be relaxed, and they were concerned that giving the warnings might adversely affect the rapport," one of the agents reported.²⁵ Before the interview, FBI officials had also decided that, if

"Flynn said he did not remember something they knew he said, they would use the exact words Flynn used, . . . to try to refresh his recollection. If Flynn still would not confirm what he said, . . . they would not confront him or talk him through it."²⁶ One of the agents reported that General Flynn was "unguarded" during the interview and "clearly saw the FBI agents as allies."²⁷

²⁰ Certain information summarized or quoted in this Memorandum derives from documents furnished to Defendant's counsel pursuant to the Protective Order, *United States v. Flynn*, 17 CR 232 (D.D.C. Feb. 21, 2018) (Doc. 22). Undersigned counsel conferred with the Government, which represented that disclosing the selected information does not constitute a violation of the Protective Order.

²¹ Memorandum dated Jan. 24, 2017.

²² Id.

²³ FD-302 dated Aug. 22, 2017, at 3. ²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ Id.

Flynn is right that it was a dickish move for the FBI not to warn him against lying. You won't find me denying that the FBI can be dickish. But just as many of these details seem to suggest that the FBI guys were his allies going in and that Flynn honestly believed there was no way someone like him could be held accountable for lying as anything else. Maybe he lied because he has gotten away with lying and other misconduct in the past, and assumed he would continue to do so in the future?

Still, I am wondering why the FBI didn't write up his 302 until August. This is a point the frothy right used to harp on. I wonder if they've discovered that the FBI wasn't going to write it up until it became clear how material his lies were?

The focus on the circumstances of his FBI interview, however, should shift attention on what he doesn't mention: His lies to DOJ about influence-peddling for Turkey. Having admitted his guilt, there's no reason to address either of his lies. But since he did present a quasi excuse for his lies about Russia, his silence about Turkey is notable.

As always, I think the details of his cooperation are just as interesting. He doesn't describe the topics of his cooperation – we're stuck with that heavily redacted memo. But in addition to describing his 62 hours and 45 minutes of meetings with the government (but who's counting?), he describes that he had five pre-plea proffer sessions, all apparently with Mueller's office.

He participated in five pre-plea proffer sessions with the Special Counsel's Office and fourteen additional meetings with the Government pursuant to the Plea Agreement entered on December 1, 2017. In total, he participated in nineteen meetings with the Special Counsel's Office and other components of the Government, totaling approximately sixty-two hours and forty-five minutes.

That may pose some risks for Jared Kushner, given that Mueller first met with Jared in the weeks before Flynn flipped, and Jared seems to have stopped short of exonerating Flynn.

Mueller's team specifically asked Kushner about former national security advisor Michael Flynn, who is under investigation by the special counsel, two sources said. Flynn was the dominant

topic of the conversation, one of the sources said.

[snip]

The conversation lasted less than 90 minutes, one person familiar with the meeting said, adding that Mueller's team asked Kushner to clear up some questions he was asked by lawmakers and details that emerged through media reports. One source said the nature of this conversation was principally to make sure Kushner doesn't have information that exonerates Flynn.

In addition to that detail, the memo also describes meeting with other government components, plural, suggesting his cooperation went beyond just a Turkish investigation in one US Attorney's office.

Flynn's lawyer, Rob Kelner, is equally specific when he asks that Flynn be excused from several normal conditions of probation.

We ask the Court to exercise its discretion by deleting conditions 2, 3, 6, and 7 of the standard conditions recommended under U.S.S.G. § 5B1.3(c). We also request that the Court conclude based on the Presentence Investigation Report that drug testing is not necessary, in accordance with U.S.S.G. § 5B1.3(a)(5) and 18 U.S.C. § 3563(a)(5). As noted above, we submit that a condition requiring community service would be appropriate under U.S.S.G. § 5B1.3(a)(2) and 18 U.S.C. §§ 3563(a)(2) and (b)(12).

Effectively, this request asks twice that Flynn be excused from drug testing, as the clauses he's asking to be exempted from include those:

(2) For a felony, the defendant shall
(A) make restitution, (B) work in

community service, or (C) both, unless the court has imposed a fine, or unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the discretionary conditions set forth under 18 U.S.C. § 3563(b) (see 18 U.S.C. § 3563(a)(2)).

(3) For any offense, the defendant shall not unlawfully possess a controlled substance (see 18 U.S.C. § 3563(a)).

[snip]

(6) The defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (see 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule.

(7) The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments (see 18 U.S.C. § 3563(a)).

Frankly, I don't blame the General for wanting to avoid drug testing, and there are several legitimate explanations for wanting to avoid it (such as taking prescription pain killers, or living in state where marijuana has been decriminalized). Moreover, our criminal justice system imposes conditions like that largely to humiliate people (though if that's the reason, it's not clear why Flynn should be able to dodge the humiliation other felons undergo).

It's the request that Flynn not be asked to make restitution and *especially* his request not to

have to notify the court of any change in his economic circumstances that I find particularly notable.

Back in July, you'll recall, influence peddling firm Stonington Strategies announced that Flynn would be its new Director of Global Strategy. But then his lawyers intervened, presumably hoping to avoid the appearance that their client was returning to influence peddling even before being sentenced for breaking the law while influence peddling.

Hours after a new lobbying firm aimed at domestic and global clients announced it was partnering with former national security adviser Mike Flynn, attorneys for the embattled Mr. Flynn said the deal was off and the notice had been released as a result of a "misunderstanding" among the participants in Stonington Global LLC.

"General Flynn has not joined Stonington and did not personally issue any public statement," Mr. Flynn's attorneys Robert Kelner and Stephen Anthony said in a statement Tuesday. "He was aware that a statement was being drafted, but he did not intend that it be issued at this time."

Mr. Flynn is awaiting sentencing for lying to federal investigators. His December guilty plea grew out of special counsel Robert Mueller's probe into Russian interference in the 2016 U.S. presidential election. He agreed to cooperate with prosecutors and faces up to six months in jail.

Nick Muzin and Joey Allaham told The Wall Street Journal on Tuesday that they had started their firm with Mr. Flynn. They also launched a Stonington website and promotional video Tuesday.

"We cannot comment on General Flynn's considerations about the timing of the

announcement, but we have faith in his patriotism and long history of service to our country," Messrs. Muzin and Allaham said after Mr. Flynn's lawyers issued their statement. "We look forward to working together."

[snip]

Muzin and Allaham previously worked together helping a failed political candidate in Albania and on an influence campaign for the embattled Persian Gulf nation Qatar, according to foreign lobbying records. The pair ended their work with Qatar last month, after helping its royal family connect with U.S. Jewish leaders and associates of President Donald Trump to repair the country's image, according to interviews with Messrs. Muzin and Allaham and foreign lobbying reports filed with the Justice Department.

Mind you, the corrections to the announcement generally said that the announcement was premature, not that it was inaccurate. So it seems that Flynn, like David Petraeus before him, will go from lying to the Feds to making lots of money selling access to them.

Can you blame him? The guy has to pay the bills for his very competent defense attorneys, after all.

Most of all, though, that very specific request – asking to have those clauses excised rather than asking for a community service only probation – seems to be as much about hiding his impending influence peddling riches as anything else.