

JUDGE AMY BERMAN JACKSON LAYS THE PRECEDENT FOR FARA

I said while following yesterday's live tweets of the Paul Manafort sentencing that, because so few FARA cases have been criminally prosecuted, Manafort's will set some precedent going forward, as DOJ moves to put some prosecutorial teeth behind the law. So I wanted to look at the various things she said yesterday about it.

First, there's the way she characterizes Manafort's own actions. After calling out the way Manafort claims his entire life's work has been about spreading democracy without actually presenting evidence to support the case (and leaving unstated the obvious fact that in fact he was more often serving dictators), she then notes that ultimately it was easier for him to get a win for his clients if he hid who he was working for.

The sentencing memorandum also states: Mr. Manafort has spent his life advancing American ideals and principles. It starts with his work on numerous political campaigns and positions within some of the administrations, and it goes on to say during his years outside of government service, Mr. Manafort also worked with world leaders. He has spent a lifetime promoting American democratic values and assisting emerging democracies to adopt reforms necessary to become a part of Western society.

At times he interacted with politicians and business people in emerging countries to assist in the development of American beliefs of equal justice, human rights, and free markets. There aren't really any exhibits or letters that go along with that, so I don't have

the facts or the record before me that would permit me to either accept or question what is a very general description. It will fall to others in other settings to assess whether the way the defendant chose to market the access he gained during political campaigns and the work he did for the clients he represented has been characterized accurately. So it doesn't factor into my consideration of the history and characteristics of the defendant.

[snip]

It may have been that in addition to thinking of his own finances, he had his clients' ability to win in mind. He knew that revealing the true source behind the lobbying activities would have made those activities ineffective and unsuccessful, as the prosecutor said. Secrecy was integral. But that willingness to win at all costs was contrary to laws designed to ensure transparency in the political process and the legislative process. So it cannot possibly justify the behavior, particularly when there's no question that this defendant knew better and he knew exactly what he was doing.

This is important background for how she distinguishes lobbying, even for sleazy clients, and lobbying without disclosing it.

It is important to note, in case there's any confusion, notwithstanding the use of the word "agent," an unregistered foreign agent is not a spy. He is a lobbyist. Lobbying is not illegal. Being paid to do it, even on behalf of clients who others might view as unseemly or odious or even tyrannical is not illegal, if you follow the laws that govern foreign financial transactions and pay your taxes. But this defendant

kept his money offshore and under wraps so he wouldn't have to pay.

[snip]

So what remains to be considered here? According to the defendant, it's just an administrative matter, a regulatory crime, a violation of the Foreign Agent Registration Act. And that's not a fair description. He was hiding the truth of who he represented from policymakers and the public, and that's antithetical to the very American values that he told me he championed. And this was after he knew and already had been warned not to do it.

What becomes clear from this record is that defendant's approach in his career, and what he didn't abandon even after he was indicted, was that it's all about strategy, positioning, public relations, spin. And you could say, well, there's nothing wrong with that, at least if you're not a journalist. But there is something wrong with it if you're not simply advancing a position as part of a PR campaign.

It's okay to say: Members of Congress, the government of the Ukraine, President Victor Yanukovich, would like you to consider the following when you consider how to respond to his actions, when you determine what the foreign policy of the United States should be. But what you were doing was lying to members of Congress and the American public, saying, look at this nice American PR firm, look at this nice U.S.-based law firm, look at this nice group of prominent former European officials, isn't it great how they've all voluntarily stepped forward to stand up for Yanukovich and the new administration, when all along you were hiding that you and the Ukrainians

actually had them on the payroll. This deliberate effort to obscure the facts, this disregard for truth undermines our political discourse and it infects our policymaking. If the people don't have the facts, democracy can't work.

That's key background for how she treats Manafort's specific violations of FARA. She dismisses Manafort's claims that this is a mere registration violation in several ways that may lay important precedent: she invokes the money laundering (which prosecutors said was an important part of hiding the lobbying he was doing), the serial lies to DOJ – including lies told to his lawyer preparing his registration, and his efforts to get others (Tony Podesta, Vin Weber, and Greg Craig) to lie as well.

The other thing the sentencing statute tells me I'm supposed to do is I'm supposed to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. With respect to sentencing disparities, the defense points primarily to other regulatory cases. But those involve, ordinarily, just a plain failure to register, or a plain failure to reveal a foreign bank account. They're not analogous. **They don't involve, as here, a failure to register – to hide the existence of – multiple foreign bank accounts for the purpose of laundering millions of dollars, shielding millions of dollars from the IRS.**

[snip]

I've got the regulatory FARA piece of Count 1 and the money laundering. And I don't believe that's covered by the Eastern District sentence and I think it has to be addressed. As I noted earlier, it's not a mere oversight, it's not a missing piece of paper. To the extent it

could or should have been treated as a mere administrative matter, I think the defendant forfeited being able to rely on that sort of discretion on the part of law enforcement **by having his lawyer lie to the Department of Justice twice on his behalf.**

I do note that the Eastern District of Virginia found 30 months to be an appropriate sentence for the other single regulatory disclosure violation. And here, it wasn't just a single failure to register; **the defendant prevailed upon others in the scheme not to register either**, and he admitted under oath at the plea that he caused them not to register.

Those three factors (the second of which was present in Mike Flynn's FARA violation as well), are all likely to be aggravating factors that may get into criminal prosecution of FARA in the future.

Finally, there's the timing. To rebut claims that these prosecutions were simply about long passed lobbying efforts, ABJ clearly describes the crime as persisting through the time Manafort twice lied to DOJ about his lobbying.

Furthermore, this conduct is not, as the defendant would have me conclude, old news. It's not just some ancient failure to comply with a couple of regulations, something that took place so long before the campaign it's just unfair and inappropriate to charge him for it in 2017. He pled guilty to laundering of funds through 2016. He pled guilty to a lobbying campaign in the United States for the government of Ukraine, Victor Yanukovich, and when he was out of office, his Party of Regions and the Opposition Bloc from 2005 to 2015. And the defense says, well, yes, but the government investigated and wrapped it

all up and there wouldn't have been a prosecution but for the appointment of the special counsel.

I'm not exactly sure what that prediction – which they've made to me repeatedly – is actually based on. I don't believe there is evidence that a formal final determination was made. Prior to the time when anybody was even thinking about a special counsel, the Department of Justice was already looking into this matter. And when the Department of Justice – not the Office of Special Counsel – was looking into the matter, it asked Mr. Manafort questions. He lied to his own lawyers and he lied to the Department of Justice. He had them submit not one, but two letters, falsely stating that he had not performed lobbying activities in the United States on the part of the Ukraine.

That first lie was in November of 2016, after he resigned as campaign chair but well before the appointment of the special counsel. The second, in February, was after the special counsel investigation was underway. So it's not entirely clear that a civil resolution would still have been possible at that point.

This, too, would have big implications for Flynn's actions, since he lied to DOJ *while he was at the White House*.

Particularly given Manafort's example, people are unlikely to wrack up these many aggravating factors in the future. But they do lay out a clear map for what a criminal FARA violation would look like in the future.

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.