

THE BIGGER THREAT FOR FLYNN THAN SIX MONTHS IN PRISON: THE COUNTERINTELLIGENCE LANGUAGE

As I laid out in this post on the government sentencing memo for Mike Flynn, they basically gave Judge Emmet Sullivan all the justification he'd need to throw the book at Mike Flynn, certainly a few months in prison and maybe more.

But that may not be the most worrisome stuff in this memo, particularly given Robert Mueller's statement, in July, that the FBI continued to investigate aspects of Flynn's false statements about Russia.

KRISHNAMOORTHY: Since it was outside the purview of your investigation your report did not address how Flynn's false statements could pose a national security risk because the Russians knew the falsity of those statements, right?

MUELLER: I cannot get in to that, mainly because there are many elements of the FBI that are looking at different aspects of that issue.

KRISHNAMOORTHY: Currently?

MUELLER: Currently.

The Flynn sentencing memo, for lying about whether he had discussed sanctions with Russia, speaks over and over again about the questions I laid out here: why Flynn lied and whether he did it on Trump's orders, questions rather conspicuously not answered in the Mueller Report.

On top of repeatedly referring to the "FBI counterintelligence" investigation, for example,

for the first time I remember, the government discusses the scope of the inquiry to include whether any Trump associates took actions that would benefit Russia (the Mueller Report did say that it did not establish “coordination” trading Russian assistance during the election for favorable treatment in the future, though there were temporal limits on the scope of that part of the investigation, not including the transition).

The inquiry included examining relationships between individuals associated with the campaign and the Russian government, as well as identifying actions of such individuals that would have benefited the Russian government.

Much later, the memo describes undermining sanctions – what Flynn did, then lied about – as possible evidence of that kind of benefit to Russia.

The topic of sanctions went to the heart of the FBI’s counterintelligence investigation. Any effort to undermine those sanctions could have been evidence of links or coordination between the Trump Campaign and Russia.

The sentencing memo even raises the import of *who directed* that Flynn ask Russian to hold off on retaliating on sanctions – again, something very pointedly not answered in the Mueller Report, but the answer to which might either be “because Trump ordered him to” or “because then counterintelligence suspect Mike Flynn was acting as an Agent of Russia.”

Any effort to undermine the recently imposed sanctions, which were enacted to punish the Russian government for interfering in the 2016 election, could have been evidence of links or coordination between the Trump Campaign

and Russia. Accordingly, determining the extent of the defendant's actions, why the defendant took such actions, and at whose direction he took those actions, were critical to the FBI's counterintelligence investigation.

After raising the import of benefits to Russia like undermining sanctions, the sentencing memo also focuses on why Flynn lied, something else that has not been fully explained.

It was material to the FBI's counterintelligence investigation to know the full extent of the defendant's communications with the Russian Ambassador, and why he lied to the FBI about those communications.

The sentencing memo describes how the Intelligence Community Assessment raised the stakes on Russia's actions in the immediate wake of his sanctions call with Sergey Kislyak and how Flynn started lying shortly thereafter and just kept on lying. But that doesn't explain why he lied in the first place – or why he and KT McFarland created a false paper trail immediately after Kislyak informed Flynn they would not respond.

In one of the memo's most scathing passages, however, it ties Flynn's lies – about both Turkey and Russia – to monetizing his influence and power.

The defendant's conduct was more than just a series of lies; it was an abuse of trust. During the defendant's pattern of criminal conduct, he was the National Security Advisor to the President of the United States, the former Director of the Defense Intelligence Agency, and a retired U.S. Army Lieutenant General. He held a security clearance with access to the government's most sensitive information. The only reason the Russian

Ambassador contacted the defendant about the sanctions is because the defendant was the incoming National Security Advisor, and thus would soon wield influence and control over the United States' foreign policy. That is the same reason the defendant's fledgling company was paid over \$500,000 to work on issues for Turkey. *The defendant monetized his power and influence over our government, and lied to mask it. When the FBI and DOJ needed information that only the defendant could provide, because of that power and influence, he denied them that information. And so an official tasked with protecting our national security, instead compromised it.* [my emphasis]

This may just be shorthand or an attempt to spin both Flynn's charged lies in most damning light (though this filing has been reviewed with such attention that the government had to get two extensions for the necessary review). But the passage suggests he was engaged in sleazy influence peddling *both* when he secretly acted as an agent of Turkey while serving as Trump's top national security campaign advisor, *and* when he took a call during the Transition and worked to undermine President Obama's sanctions on Russia. The first is obviously influence peddling, and its import for national security is also fairly clear.

It's also obvious how the second – Flynn's attempts to undermine sanctions – compromised national security. The effort basically attempted to eliminate any punishment for Russia's attempt to pick our President.

What's not clear, however, is whether (and if so, why) the government includes his calls to Sergey Kislyak in a passage describing him "monetizing his power and influence."

And Flynn should have known better, the memo implies. Among the reasons why Flynn's extensive government service is so important, the

government explains, is that he should have known the counterintelligence danger from Russia.

The defendant's extensive military record, as described in his prior sentencing submission, presents a clear factor in mitigation. See Def. Sent'g Mem. at 7-12. However, that extensive record and government service, at the highest levels of the national security apparatus, and his "many years" of working with the FBI, should have made him particularly aware of the harm caused by providing false statements to the government. See *id.* at 13. That work also exposed him to the threat posed by foreign governments, in particular Russia, seeking to covertly influence our government and democracy.

The sentencing memo gives Emmet Sullivan lots of reason to want to punish Flynn more aggressively than any of the other liars busted by Mueller. It does so, in part, by laying out the stakes of his sleazy influence peddling, describing how it made the country less safe.

And then, the memo notes the Russian government continues its attempts to interfere in "our democratic process," something that is broader than elections.

The sentence should also to deter others from lying to the government. The FBI protects our homeland from terrorism, espionage, cyber-based attacks, and all other manner of threats. Lying to the FBI, in any context, cannot be tolerated. That is particularly true in a counterintelligence investigation targeting efforts by a foreign government to interfere in our democratic process—a threat that continues to this day.

The sentencing memo argues that Flynn's lies made it harder for the FBI to protect the country from Russia's efforts to undermine our democracy and speaks obliquely in terms of benefit and monetization. These oblique references to the counterintelligence investigation ought to be of far more concern to Flynn than the prospect of six months in prison.