

JUDGE SULLIVAN ALREADY RULED THAT MIKE FLYNN'S DAVID IGNATIUS STORY DOESN'T HELP HIM

When I noted that the John Durham investigation has been investigating the first 10 months of the Russian investigation for 11 months now (and seemed on track to continue for another four months at least), I didn't include a number of details laid out in this government filing and this NYT story.

The government filing makes it clear that St. Louis US Attorney continues his second-guess review of the investigation into Mike Flynn, three months after he began.

The NYT story describes that, in addition to the DC AUSA on Durham's team and two prosecutors from Connecticut, he's also got an SDNY prosecutor.

Mr. Durham is relying on a team of prosecutors, including Nora R. Dannehy and Neeraj Patel, from Connecticut, as well as former and current F.B.I. agents to complete his investigation. Anthony Scarpelli, a top prosecutor from the U.S. attorney's office in Washington, was detailed to the team along with a federal prosecutor from Manhattan, Andrew DeFilippis.

Two former F.B.I. agents, Timothy Fuhrman and Jack Eckenrode, are also assisting. An F.B.I. agent who oversaw public corruption in Chicago and served in Ukraine as an assistant legal attaché, Peter Angelini, has also joined Mr. Durham's team.

Arguably, Durham has more staffers than the investigation he is investigating had.

The NYT story also provides further evidence that Trump's flunkies have been able to get Durham to chase down each of their grievances on command. Durham has been investigating something lifted out of a Sidney Powell filing – one already rejected by Emmet Sullivan – regarding the source of the leak to David Ignatius which led Mike Flynn to start lying, at first to the press.

Last year, Mr. Durham also started examining the 2017 column by The Post's David Ignatius, said a person familiar with that line questioning. Mr. Ignatius revealed that Mr. Flynn had spoken in late 2016 with Sergey I. Kislyak, the Russian ambassador to the United States at the time, as the Obama administration was about to place sanctions on Russia for its election sabotage.

Mr. Ignatius noted Mr. Flynn's close contacts with the Russians and suggested that because Mr. Flynn was apparently conducting foreign policy while another administration was in power, he might have violated the Logan Act. The law is an obscure statute that bars private citizens from interfering with diplomatic relations between the United States and foreign governments and is widely considered to be essentially defunct.

The next month, Mr. Flynn resigned after lying to the vice president and other White House officials about the call with Mr. Kislyak. He eventually pleaded guilty to lying to the F.B.I. about the nature of his discussions with Mr. Kislyak but later backtracked, asking a federal judge to allow him to withdraw his guilty plea.

Powell asked for this last September as part of an elaborate claim that James Clapper – who, of course, fired Mike Flynn for cause – had it in for Flynn and therefore set him up to be ambushed by the FBI once he became National Security Advisor. In addition to asking for records of calls between Clapper and Ignatius, she asked for all records pertaining to Ignatius.

All FBI 302s or any notes of interviews of David Ignatius or any other reporter regarding the publication of information concerning Mr. Flynn and/or the reporters' contacts with James Clapper, Andrew McCabe, John Brennan, Michael Kortan, or anyone in the FBI, DNI, DOD, DOJ, or CIA regarding Mr. Flynn.

[snip]

All FBI 302s, notes, memoranda of James Clapper regarding Mr. Flynn, and the cell phone and home phone records of Mr. Clapper and David Ignatius between December 5, 2016, and February 24, 2017.

The NYT reported that KT McFarland *also* was attributing the dramatically varied stories she told to the FBI to the Ignatius story.

Mr. Ignatius's column "set off a chain of events that helped lead to the Russia probe," K.T. McFarland, the former deputy national security adviser to Mr. Trump, wrote in her recent book, "Revolution: Trump, Washington and 'We the People.'"

Mr. Durham has reviewed Ms. McFarland's interviews with F.B.I. investigators in other inquiries, examining what she has said about Mr. Ignatius's reporting and asked other witnesses about it, according to person familiar with elements of the investigation. She revised her answers to questions from investigators for the special

counsel, Robert S. Mueller III, on elements of Mr. Flynn's talks with Mr. Kislyak but has accused the investigators of trying to ensnare her in "perjury trap."

Mr. Durham has not questioned Ms. McFarland.

Let's run with this for a moment, shall we? In addition to criticizing the Obama Administration for not responding more aggressively to the Russian operation and asserting that we needed to find out whether the Russians had fed Christopher Steele disinformation (both assertions Republicans have made), Ignatius revealed that a Senior Government Official told him that Flynn had had multiple conversations with Sergei Kislyak in advance of Russia declining to respond to Obama's sanctions.

Question 3: What discussions has the Trump team had with Russian officials about future relations? Trump said Wednesday that his relationship with President Vladimir Putin is "an asset, not a liability." Fair enough, but until he's president, Trump needs to let Obama manage U.S.-Russia policy.

Retired Lt. Gen. Michael T. Flynn, Trump's choice for national security adviser, cultivates close Russian contacts. He has appeared on Russia Today and received a speaking fee from the cable network, which was described in last week's unclassified intelligence briefing on Russian hacking as "the Kremlin's principal international propaganda outlet."

According to a senior U.S. government official, Flynn phoned Russian Ambassador Sergey Kislyak several times on Dec. 29, the day the Obama administration announced the expulsion of 35 Russian officials as

well as other measures in retaliation for the hacking. What did Flynn say, and did it undercut the U.S. sanctions? The Logan Act (though never enforced) bars U.S. citizens from correspondence intending to influence a foreign government about “disputes” with the United States. Was its spirit violated? The Trump campaign didn’t immediately respond to a request for comment.

If the Trump team’s contacts helped discourage the Russians from a counter-retaliation, maybe that’s a good thing. But we ought to know the facts.

Note, contrary to a lot of claims about this story, there’s no indication that the *content* of the conversation between Flynn and Kislyak got shared (and even just toll records showing the conversations did happen would be enough for a spooked up reporter like Ignatius to ask the question). In addition, the term, “government official,” is often used to hide the identity of members of Congress. It in no way is limited to someone like Clapper.

Nevertheless, let’s assume for the moment Flynn’s allegations are correct and Clapper was the guy who tipped off Ignatius to Flynn’s calls with Kislyak.

Clapper – and virtually all the other people who were part of discussions about this call early on – were Original Classification Authorities. He had just as much authority to declassify the existence of the Flynn calls as Ric Grenell had to declassify the Carter Page applications (arguably more so, since Clapper had obtained and sustained a security clearance on his own right for four decades, with none of the questionable conflicts Grenell has that remain unexamined). Even accepting Flynn’s claim that Clapper did leak the existence of the call, it would not be illegal. There’s an argument that says the intelligence community, with Clapper’s experience that Flynn was unsuited to run DIA

and burgeoning questions about what Flynn had done for a frenemy government while serving as Trump's foreign policy advisor, had to do something about the fact that the NSA designee had secretly worked for another government during the election, was still refusing to come clean about that, and had been caught on a wiretap undermining the official policy of the United States *and* arguing that Russia should face almost no punishment for interfering in the US election.

Trump would say Obama should simply have warned him. Except Obama did warn him, even before all the details of his work for Turkey had come out. And Trump ignored that warning.

Accepting Flynn's allegation that Clapper did that (solely for the sake of argument), that would be a fairly quick way to figure out whether Flynn did what he did in contravention of Trump's desires, something that Trump presumably would have wanted to know.

In response to the story, Flynn ordered his subordinates, including McFarland, to tell a series of lies, lies that conflicted with both what the intelligence community and the Russians knew.

UPDATE: The Trump transition team did not respond Thursday night to a request for comment. But two team members called with information Friday morning. A first Trump official confirmed that Flynn had spoken with Kislyak by phone, but said the calls were before sanctions were announced and didn't cover that topic. This official later added that Flynn's initial call was to express condolences to Kislyak after the terrorist killing of the Russian ambassador to Ankara Dec. 19, and that Flynn made a second call Dec. 28 to express condolences for the shoot-down of a Russian plane carrying a choir to Syria. In that second call, Flynn also discussed plans for a Trump-Putin conversation sometime after the

inauguration. In addition, a second Trump official said the Dec. 28 call included an invitation from Kislyak for a Trump administration official to visit Kazakhstan for a conference in late January.

That's not a crime, but insanely stupid from a counterintelligence perspective. Then, when the FBI asked him about it (in a situation that would not become public, in which he could simply have said that the Trump Administration wanted to pursue a different strategy, which would make him stupid but probably not criminal), Flynn continued to lie about it. When McFarland was asked details about the events surrounding the call, she claimed to have no memory of details that she would later forget; that's what her perjury trap amounts to: she continued to tell a story she knew Flynn had been fired for.

Which is to say, even if Flynn's suspicions are true, if Clapper told Ignatius about the existence of calls, it would be (for Clapper) a legal way to try to sort out whether someone hiding damning secrets about *two foreign governments* was about to be put in charge of US national security.

Nothing about doing so would have changed the fact that Flynn was unsurprised by the FBI to be asked about this, was friendly and relaxed when he met with the FBI, knew it was illegal to lie to the FBI, and nevertheless proceeded to tell an easily identifiable lie.

When rejecting Powell's request for Clapper and Ignatius' call record in December, Judge Emmet Sullivan pointed out that even if everything she alleged about Clapper was true, that wouldn't change that her client lied to the FBI.

Request 35 seeks "[a]ll FBI 302s, notes, memoranda of James Clapper regarding Mr. Flynn, and the cell phone and home phone records of Mr. Clapper and David

Ignatius between December 5, 2016, and February 24, 2017.” Id. at 7. The government responds—and the Court agrees—that each request is not relevant to Mr. Flynn’s false statements during his January 24, 2017 FBI interview or to his sentencing. Gov’t’s App. A, ECF No. 122-1 at 2-5. Mr. Flynn fails to make out a Brady claim for the requested information regarding any earlier investigations, the circumstances that led to the January 24, 2017 FBI interview, or the events surrounding his prosecution because Mr. Flynn fails to establish the favorability element. Even assuming, *arguendo*, that the information regarding the circumstances that led to Mr. Flynn’s January 24, 2017 FBI interview, the events surrounding his prosecution, and any earlier investigations were both exculpatory and suppressed, Mr. Flynn bears the burden of showing a reasonable probability of a different outcome. *Strickler*, 527 U.S. at 291. “[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Bagley*, 473 U.S. at 682 (“A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”). Mr. Flynn cannot overcome this hurdle.

Mr. Flynn appears to seek this information to: (1) support his claims of government misconduct; and (2) cast doubt on the legal basis for the FBI’s investigation. See Def.’s Reply, ECF No. 133 at 19, 19 n.13, 34-35. Mr. Flynn also asserts, without support, that the Special Counsel’s Office was “manipulating or controlling the press to their advantage to extort the plea.” Def.’s Br., ECF No. 109 at 4. Regardless of Mr. Flynn’s new theories, he pled guilty twice to the crime, and he fails

to demonstrate that the disclosure of the requested information would have impacted his decision to plead guilty.

To be sure, Mr. Flynn was aware of the circumstances of the January 24, 2017 interview, and the allegations of misconduct against the FBI officials before he entered his guilty pleas. Sentencing Hr'g Tr., ECF No. 103 at 8-9. Mr. Flynn did not challenge those circumstances, and he stated, under oath, that he was aware that lying to the FBI was a crime. *Id.* In response to this Court's questions, Mr. Flynn maintained his guilty plea. *Id.* at 9-10. None of Mr. Flynn's arguments demonstrate that prejudice ensued. See *Strickler*, 527 U.S. at 291. The Court therefore finds that there was no reasonable probability that Mr. Flynn would not have pled guilty had he received the requested information in Requests 1, 3, 4, 11, 17, 21, 25, 28, and 35.

Earlier this month, Covington & Burling provided Flynn's team with some materials they had overlooked when they transferred his case to Sidney Powell last summer. On Thursday, Covington & Burling gave the government over a hundred pages of declarations from four attorneys defending the competence of the legal advice they gave Flynn. Yesterday, the government provided Flynn reports that Jeffrey Jensen has done on the investigation into Flynn.

Beginning in January 2020, at the direction of Attorney General William P. Barr, the United States Attorney for the Eastern District of Missouri ("USA EDMO") has been conducting a review of the Michael T. Flynn investigation. The review by USA EDMO has involved the analysis of reports related to the investigation along with communications and notes by Federal Bureau of

Investigation ("FBI") personnel associated with the investigation.

The enclosed documents were obtained and analyzed by USA EDMO in March and April 2020 and are provided to you as a result of this ongoing review; additional documents may be forthcoming.

Hours later, Powell filed a supplement to her motion to dismiss Flynn's case for government misconduct (again, Sullivan has ruled on virtually all of these issues), claiming to show proof that Brandon Van Grack had promised not to prosecute Flynn's son, but instead providing an email stating, "The government took pains not to give a promise to MTF regarding Michael Jr., so as to limit how much of a 'benefit' it would have to disclose as part of its Giglio disclosures to any defendant against whom MTF may one day testify" – that is, to show that Flynn did not have a guarantee. Even if the email said what she claimed, it would be yet more proof that Flynn lied under oath to Sullivan in December 2018 when he said no such promise had been made.

She also claimed the reports from Jensen included,

stunning Brady evidence that proves Mr. Flynn's allegations of having been deliberately set up and framed by corrupt agents at the top of the FBI. It also defeats any argument that the interview of Mr. Flynn on January 24, 2017 was material to any "investigation."

Maybe she does have proof the FBI agents fucked up. The NYT reports that someone briefed on them claimed, "the documents indicated that F.B.I. agents did not follow standard procedures as they investigated Mr. Flynn," which is different than framing Flynn.

But Powell has made such claims over and over,

and each time thus far, the claims have proven to be not only way overblown, but full of embarrassing factual errors.

And unless she can show Sullivan something new, something that changes the fact that Flynn told obvious lies in his original interview with the FBI, he risks not just the original charge, but additional perjury referrals from Sullivan.

Meanwhile, Flynn has rejoined Twitter (he even blocked me finally, after following me for four years!), posting a declaration from January as if it was news. The declaration, along with these new emails, strongly suggests his son was in legal trouble as well.

It would be unwise to underestimate Bill Barr's ability to interfere with DOJ's normal processes (precisely the allegation being waged against the FBI). Still, Judge Sullivan still gets a vote, and on some of this stuff, he already voted against it.