TO JUSTIFY DISMISSING MIKE FLYNN'S PROSECUTION, TIMOTHY SHEA CLAIMS INFORMATION DOJ HAS ALWAYS HAD IS "NEW"

As noted earlier, the government has officially asked Judge Emmet Sullivan to drop the prosecution against Mike Flynn. Sullivan is not required to do so, particularly not after Flynn pled guilty twice and given that Sullivan has fully briefed sentencing memoranda before him.

This post will try to lay out the shoddiness of the argument they make to support that move. In a follow-up, I will show how Judge Sullivan *already dismissed much of this argument*. Finally, I will show that some of what DOJ relies on to claim they've discovered "new" information is actually utterly damning to the Trump White House, making it fairly clear Trump endorsed what Flynn had done.

As I always say, it is a fool's errand to predict what Sullivan might do. But this argument is not one that I imagine will impress Sullivan, particularly given the past events in this prosecution.

Note that just Acting US Attorney Timothy Shea signed this filing, which may create a similar kind of dynamic at the DC US Attorney's Office regarding this action as Barr's interference in the Roger Stone sentencing did. Barr transparently removed the Senate approved US Attorney for DC, installed his flunky, and then had his flunky renege on statements that DOJ (even DOJ under Barr) had made in the past. It is a breathtaking abuse of power, and it's likely that Sullivan will regard it as such.

Shea makes three arguments:

- DOJ discovered new material that changed their understanding of the investigation
- That material has led them to believe (they claim) that Flynn's lies weren't material to any investigation
- Therefore they can't prove to a non-existent jury that the lies were material, which they don't have to do because Flynn has twice pled guilty, which Shea glosses over ineffectively

Shea claims there's new material but points to none

As noted, Shea repeatedly justifies this move by claiming there is "newly discovered" material.

> After a considered review of all the facts and circumstances of this case, including newly discovered and disclosed information appended to the defendant's supplemental pleadings, ECF Nos. 181, 188-190,1 the Government has concluded that the interview of Mr. Flynn was untethered to, and unjustified by, the FBI's counterintelligence investigation into Mr. Flynn—a no longer justifiably predicated investigation that the FBI had, in the Bureau's own words, prepared to close because it had yielded an "absence of any derogatory information." Ex. 1 at 4, FBI FD-1057 "Closing Communication" Jan. 4, 2017 (emphases added)

> 1 This review not only included newly discovered and disclosed information, but also recently declassified information as well.
>
> [snip]
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> Based on an extensive review of this investigation, including newly discovered and disclosed information attached to the defendant's supplemental pleadings, see ECF Nos. 181, 188-190, the Government has concluded that continued prosecution of Mr. Flynn would not serve the interests of justice.

Except Shea never actually describes what is "new."

He cites a bunch of exhibits, many of which have already been entered into this case. Zero of the documents he cites were *new to DOJ*, at all. Indeed, prosecutors dealt with almost all of the documents in their response to Sidney Powell's Brady demand, at a time when Bill Barr was already Attorney General, so even Judge Sullivan already knew of them, and Bill Barr's DOJ already accounted for most of them *in this prosecution*.

Moreover, Shea simply cites to them as exhibits. He doesn't describe how DOJ purportedly discovered them. He doesn't claim that Rod Rosenstein, who authorized this prosecution, didn't know of the documents when he authorized this prosecution. He doesn't explain why previously classified documents — which were always accessible to prosecutors and Rosenstein — count as new.

While he cites to prosecutors' past mention of US Attorney Jeffrey Jensen's review of the case, which is where these documents that were always known came to take on new relevance, he doesn't mention it specifically, and he sure as hell doesn't explain how it came to be that Jensen was appointed to review the case.

All of which is to say that the entire premise of this filing — that there is information that is new to DOJ (as opposed to newly in Flynn's possession) — has no basis in fact and is demonstrably false with respect to a number of things Shea points to.

Shea misrepresents the status of the investigation to claim Flynn's lies were not material to it

Shea then claims these new documents which are not new newly convinced DOJ that Flynn's lies were not material to any investigation.

> The Government is not persuaded that the January 24, 2017 interview was conducted with a legitimate investigative basis and therefore does not believe Mr. Flynn's statements were material even if untrue. Moreover, we not believe that the Government can prove either the relevant false statements or their materiality beyond a reasonable doubt.
>
> [snip]
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> Accordingly, a review of the facts and circumstances of this case, including newly discovered and disclosed information, indicates that Mr. Flynn's statements were never "material" to any FBI investigation.6
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> 6 The statements by Mr. Flynn also were not material to the umbrella investigation of Crossfire Hurricane, which focused on the Trump campaign and its possible coordination with Russian officials to interfere with the 2016 presidential election back prior to November 2016. See Ex. 1 at 3; Ex. 2 at 1-2. Mr. Flynn had never been identified

> by that investigation and had been deemed “no longer” a viable candidate for it. Most importantly, his interview had nothing to do with this subject matter and nothing in FBI materials suggest any relationship between the interview and the umbrella investigation. Rather, throughout the period before the interview, the FBI consistently justified the interview of Flynn based on its no longer justifiably predicated counterintelligence investigation of him alone.

Even ignoring how Shea pretends the 2020 Trump DOJ needs to be “persuaded” by the 2017 Trump DOJ, the argument here involves misrepresenting the record.

On August 16, 2016, the FBI opened an investigation into Flynn. The goal of that investigation was to figure out whether Flynn was being controlled by Russia; 18 USC 951 was one of the crimes for which Flynn was being investigated.

> The goal of the investigation is to determine whether the captioned subject, associated with the Trump Team, is being directed and controlled by and/or coordinating activities with the Russian Federation in a manner which may be a threat to the national securit y and/or possibly a violation of the Foreign Agents Registration Act, 18 U.S.C section 951 et seq, or other related statutes.

Nothing about the predication of the investigation into Flynn was limited to election tampering. It was an investigation into whether Flynn was acting on Russia’s behalf, period. On January 4, 2017, FBI drafted a memo closing the Crossfire Hurricane investigation into Flynn. That they did so is proof they didn’t have it in for Flynn. They had investigated the reasons

they had suspected him, not corroborated it, and decided to close the investigation.

But on those same days, in response to a request from Obama for insight into why the Russians hadn't responded more aggressively to the sanctions, FBI discovered the Flynn call with Sergey Kislyak. When they discovered that new information, Peter Strzok asked the case agent to keep the case open, for now, until they could figure out what to do.

There was a lot of debate between FBI and DOJ over the following weeks about what to do, whether to inform Trump or not. Once Mike Pence made representations about what Flynn had done, however, it raised the stakes, because it meant that Flynn had lied internally, which also meant that Flynn was more of a counterintelligence concern. Ultimately, Comey said that because the FBI already had an investigation open, DOJ could not intervene.

> And then the DNI and the Director of Central Intelligence Agency, so Mr. Clapper and Mr. Brennan, both approached me on the 19th, the last evening of the Obama administration, and asked me whether I was going to tell them about what I knew about Mr. Flynn before they took office, and I said that I was not, given our investigative equities, and the conversation ended there.

I'm perfectly sympathetic to a debate about Jim Comey being an asshole, but it is in fact the case that there was an ongoing investigation, and it is also in fact the case that even when Sally Yates informed Don McGahn about it, she herself refused to tell him about the status of the ongoing investigation.

In a description of the debrief after the interview, Bill Priestap made clear that they did this interview to find out whether Flynn was acting as an agent for Russia.

> The FBI's provided rationale for doing the interview was that the existence of the investigation had already leaked, so Flynn was already aware that the information was being discussed publicly and there was no element of surprise. Priestap told the group the goal of the interview was whether to determine whether or not Flynn was in a clandestine relationship with the Russians.

That's what Comey said, too.

> MR. COMEY: To find out whether there was something we were missing about his relationship with the Russians and whether he would — because we had this disconnect publicly between what the Vice President was saying and what we knew. And so before we closed an investigation of Flynn, I wanted them to sit before him and say what is the deal?

So to review: the investigation was started to determine whether Flynn was in a clandestine relationship with Russia, and they conducted the interview to find out whether he was in a clandestine relationship with Russia. The interview was solidly within the scope of the predicated investigation.

And once that interview had happened, you had someone who was being investigated to learn whether he had clandestine ties with Russia who had lied about having called up Russia several times to undermine US policy. Which is pretty solid evidence in an 18 USC 951 investigation.

Now, Shea concedes that that investigation was still open. He concedes that the closing documents never got filed. Which is, really, all that should matter.

But he says that because the FBI already knew what Flynn had said, they didn't have a purpose to interview him.

He does that, first of all, by arguing that when the FBI discovers you've called up the foreign country that just attacked us and told them not to worry about it, and then the Vice President makes it clear you've lied about that, did not justify extending an investigation into whether Flynn was secretly working for Russia.

> Notably, at this time FBI did not open a criminal investigation based on Mr. Flynn's calls with Mr. Kislyak predicated on the Logan Act. See Ex. 7 at 1-2.4 See Ex. 3 at 2-3; Ex. 4 at 1-2; Ex. 5 at 9. The FBI never attempted to open a new investigation of Mr. Flynn on these grounds. Mr. Flynn's communications with the Russian ambassador implicated no crime. This is apparent from the FBI's rush to revive its old investigation rather than open and justify a new one, see Ex. 7 at 1-2, as well as its ongoing inability to espouse a consistent justification for its probe in conversations with DOJ leadership, See Ex. 3 at 5. In fact, Deputy Attorney General Yates thought that the FBI leadership "morphed" between describing the investigation into Mr. Flynn as a "counterintelligence" or a "criminal" investigation. Id.
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> In short, Mr. Flynn's calls with the Russian ambassador—the only new information to arise since the FBI's decision to close out his investigation—did not constitute an articulable factual basis to open any counterintelligence investigation or criminal investigation. Mr. Strzok and Ms. Page apparently celebrated the "serendipitous[]" and "amazing" fact of the FBI's delay in formally closing out the original counterintelligence investigation. Ex. 7 at 1. Having the ability to bootstrap the calls with Mr. Kislyak onto the existing authorization

> obviated the need for the "7th Floor" of the FBI to predicate further investigative efforts. In doing so, the FBI sidestepped a modest but critical protection that constrains the investigative reach of law enforcement: the predication threshold for investigating American citizens.

Even though Shea has not contested the basis for the investigation in the first place, which was explicitly an 18 USC 951 investigation, he basically argues it is improper for the FBI to investigate whether people might be secretly working with Russia. At one point, notably, he pretends that an investigation that explicitly considered a 951 prosecution from the start is just about FARA.

> Having repeatedly found "no derogatory information" on Mr. Flynn, id. at 2, the FBI's draft "Closing Communication" made clear that the FBI had found no basis to "predicate further investigative efforts" into whether Mr. Flynn was being directed and controlled by a foreign power (Russia) in a manner that threatened U.S. national security or violated FARA or its related statutes, id. at 3.

Having done that, he then argues that meant there was no basis for the interview.

> In light of the fact that the FBI already had these transcripts in its possessions, Mr. Flynn's answers would have shed no light on whether and what he communicated with Mr. Kislyak.—and those issues were immaterial to the no longer justifiably predicated counterintelligence investigation. Similarly, whether Mr. Flynn did or "did not recall" (ECF No. 1) communications already known by the FBI was assuredly not material.

> Under these circumstances, the Government cannot explain, much less prove to a jury beyond a reasonable doubt, how false statements are "material" to an investigation that—as explained above—seems to have been undertaken only to elicit those very false statements and thereby criminalize Mr. Flynn.

Consider: Flynn could have dealt with this interview in many different ways. He could have admitted his statements, which would have made it clear he wasn't hiding the calls (though he had taken other steps to hide them). He could have refused the interview. Or, he could have lied, to cover up what he had one.

Just one of those actions would make it more likely he was secretly working for Russia. And that's what he did. It's hard to understand how anything could be more material to an ongoing counterintelligence investigation (and, indeed, FBI took the same approach with both Carter Page and George Papadopoulos when their investigations became public).

Shea pretends Flynn's guilty pleas don't count

Note how Shea argues that DOJ has decided to drop this prosecution *as if they'd need to convince a jury*. Bizarrely, when Shea admits that Flynn has already pled guilty, he neglects to mention the second time he did so.

> On November 30, 2017, the Special Counsel's Office filed a criminal information against Mr. Flynn charging him with a single count of making false statements in violation of 18 U.S.C. § 1001(a)(2). ECF No. 1. Mr. Flynn pleaded guilty to that offense, see ECF Nos. 3-4, but moved to withdraw that guilty

> plea on January 14, 2020, ECF Nos. 151, 154, 160. On January 29, 2020, Mr. Flynn also filed a "Motion to Dismiss Case for Egregious Government Misconduct and in the Interest of Justice," ECF No. 162, and supplemented that motion on April 24 and 30, 2020 based on additional disclosures, see ECF Nos. 181, 188-190. Both Mr. Flynn's motion to withdraw his guilty plea and motion to dismiss the case remain pending before the Court.3

He simply ignores that Flynn pled guilty, again, before Emmet Sullivan, on December 18, 2018.

Shea excuses those pleas — the provenance of the Judge in this case, not DOJ — by saying poor Mike Flynn didn't know about all this newly discovered information.

> Mr. Flynn previously pleaded guilty to making false statements. See Def's Plea Agreement, ECF Nos. 3-4. In the Government's assessment, however, he did so without full awareness of the circumstances of the newly discovered, disclosed, or declassified information as to the FBI's investigation of him. Mr. Flynn stipulated to the essential element of materiality without cause to dispute it insofar as it concerned not his course of conduct but rather that of the agency investigating him, and insofar as it has been further illuminated by new information in discovery.

Here's why Shea's silence about Flynn's December 18, 2018 plea is so important, though. First of all, Flynn actually knew virtually everything listed in this filing by his second guilty plea, which both the prosecution and Sullivan himself have pointed out. More importantly, when Flynn asked for copies of all the materials listed here as Brady materials (which is itself proof he knew they existed), Sullivan said he wasn't

entitled to them.

Nowhere does Shea deal with the reality of this case, that Flynn has already pled guilty twice, once knowing most of what is laid out in this filing.

So to sum up:

- Shea says there's new information, except all of this information was known to DOJ when they prosecuted Flynn. He's the same DOJ, under the same Administration, and everyone involved with the case had access to this information.
- Shea says whether someone covers up what he did is immaterial to an investigation of whether they're working clandestinely for another country.
- Then Shea claims Mike Flynn didn't account for all this when he pled guilty the last two times, when in fact the record shows he did know most of it before he pled the second time, and even so, Judge Sullivan judged that he wasn't entitled to it.

Ultimately, by making a claim there's new information when DOJ had the information all the time but Mike Flynn did not, Shea admits — seemingly without awareness of doing so — that DOJ has become the defense attorney for a sworn

felon.

As I keep saying, I would hesitate to predict how Sullivan will respond to this. But I would be surprised if he didn’t recognize all the giant holes in Shea’s argument.