

# THE LOGAN ACT IS JUST THE CHERRY ON MIKE FLYNN'S FOREIGN AGENT SUNDAE

There's an ironic line in Billy Barr's CBS interview this week, where he acknowledges that prosecutors can become too wedded to a particular outcome.

These are very smart people who were working in the special counsel's office, and in senior levels of the FBI. So what drove them here?

Well, I think one of the things you have to guard against, both as a prosecutor and I think as an investigator, is that if you get too wedded to a particular outcome and you're pursuing a particular agenda, you close your eyes to anything that sort of doesn't fit with your preconception. And I think that's probably the phenomenon we're looking at here.

That's because Barr and Sidney Powell have the frothy right chasing the Logan Act like six year olds after a soccer ball as if that was the only basis to interview Mike Flynn on January 24, 2017. It's unclear whether frothy commenters have been duped by Barr's guile, or they just haven't read the record.

The record is crystal clear, however: When the investigation into Mike Flynn was opened on August 16, 2016, he was being investigated as a witting or unwitting Agent of a Foreign Power (Barr's DOJ – and DOJ IG – have both made the same error in suggesting this was just about FARA, but the investigation was also predicated under 18 USC 951). Timothy Shea conceded in his motion to dismiss the prosecution that that investigation was never closed. And evidence

from three different contemporaneous witnesses – Jim Comey, Mary McCord, and Bill Priestap – say that's why the FBI interviewed Flynn on January 24, 2017.

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?

The Priestap notes that the frothy right is pointing to as proof of abuse makes quite clear that the point of the interview was not to create a perjury trap, but to see whether Flynn would be honest about his relationship with the Russians.

- \* we have a case in Flynn + Russians
- \* our goal is to resolve case
- \* determine if
- \* Our goal is to ~~assess~~ make Flynn
- \* is going to tell the truth & his
- \* relationship w/ Russians

Bob Litt, who (per these same records) was the first person to raise the Logan Act, analyzed the ways that Timothy Shea's motion conflicts with the FBI's DIOG. He described the interview to be, first and foremost, about counterintelligence.

The attorney general and his minions are making the astounding argument that when the FBI—aware of extensive Russian interference in U.S. politics in order to benefit the Trump campaign—learned that the incoming national security advisor requested that Russia not respond to the sanctions that were imposed in response to that interference and then lied to other government officials about that, it could not even “collect information or facts to determine” whether this created a counterintelligence threat. This cannot be right. Even if the prior investigation into Flynn had been closed, which it had not, these circumstances at a minimum justified an assessment under standard FBI policy.

In fact, the department's motion virtually concedes the point. It dismisses Flynn's lies to Pence and Spicer by saying that “[h]ad the FBI been deeply concerned about the disparities between what they knew had been said on the calls and the representations of Vice President Pence or Mr. Spicer, it would have sought to speak with them directly, but did not.” But that would be a kind of

investigative activity, and under the DIOG, either the FBI has a basis to investigate or it doesn't. If the facts justified talking to Pence about Flynn, they justified talking to Flynn.

Once you have a predicated investigation into 18 USC 951, adding another potential crime (the Logan Act) does not change that the investigation into 18 USC 951 remained, per Shea, ongoing.

In his interview, Barr misrepresents the record to claim what Flynn did – undermining the punishment imposed on a hostile foreign country after they attacked us – was “laudable.”

They did not have a basis for a counterintelligence investigation against Flynn at that stage, based on a perfectly legitimate and appropriate call he made as a member of the transition. So.

[snip]

Let me say that, at that point, he was the designated national security adviser for President-Elect Trump, and was part of the transition, which is recognized by the government and funded by the government as an important function to bring in a new administration. And it is very typical, very common for the national security team of the incoming president to communicate with foreign leaders.

And that call, there was nothing wrong with it whatever. In fact, it was laudable. He – and it was nothing inconsistent with the Obama administration's policies. And it was in U.S. interests. He was saying to the Russians, you know, “Don't escalate.” And they asked him if he remembered saying that, and he said he didn't remember that.

There are several problems with this claim.

For starters, at first, Mary McCord agreed with this take. She dismissed the call for the same reasons Barr still does – that this was just the typical communication between an incoming national security team and foreign leaders.

Two things changed her mind.

The first was the evidence that Flynn was lying about what he did to others in the incoming Administration.

It seemed logical to her that there may be some communications between an incoming administration and their foreign partners, so the Logan Act seemed like a stretch to her. She described the matter as “concerning” but with no particular urgency. In early January, McCord did not think people were considering briefing the incoming administration. However, that changed when Vice President Michael Pence went on Face the Nation and said things McCord knew to be untrue. Also, as time went on, and then-White House spokesperson Sean Spicer made comments about Flynn’s actions she knew to be false, the urgency grew.

It is normal for officials in incoming Administrations to reach out to foreign leaders. But it is not the norm for incoming officials to freelance, to set policy that no one else in the Administration knows about. And the public evidence at the time the FBI interviewed Flynn was that he had done this on his own and was actively hiding it from his colleagues (as indeed the current record says he was).

The record that Barr distorted in this interview shows that FBI was in a holding pattern until there was public evidence that Flynn had lied to others in the Administration, which not only changed the calculus about warning the Administration, but created urgency to take an

investigative step FBI might not otherwise have done.

The other thing that changed McCord's mind about whether this was the normal pre-inauguration outreach was reading the transcript.

After reading them, she felt they were "worse" than she initially thought; she noted that her recollection of them is that Flynn proactively raised the issue of sanctions, and she feels it is hard to believe he would forget talking about something he raised himself.

Sally Yates described Flynn make a series of asks, some of which remain classified.

And McCord wasn't the only one who responded that way. Once Mike Pence and Reince Priebus read the transcripts, Flynn was out the door the next day.

Notably, even though Ric Grenell is in the middle of a declassification spree, neither he nor Barr have chosen to declassify the actual transcripts here, even though Flynn has requested them repeatedly. Barr's DOJ is also withholding other details that would describe the reaction of Administration officials to reading the transcript in the Buzzfeed FOIA. So it's easy for Barr to claim this was normal, but a career prosecutor who read the transcripts said they weren't, and Barr is deliberately withholding information that would let us test that claim.

This is why DOJ's materiality argument fails, too. Had Flynn told the truth, the FBI might have had reason to treat this as the normal pre-inauguration contact. But once he lied, the FBI had more reason to continue investigating, to try to figure out why he lied. All the more so given that Flynn was hiding his other Foreign Agent relationship with Turkey at the time.

If Flynn's behavior were, as Barr claims, "laudable," then he would have simply admitted

it. Once he lied about it, the FBI had more reason to suspect he had been freelancing, deliberately undermining American policy without the sanction and knowledge of others in the Trump Administration.

Only one thing explains Barr's view, and it is damning. The FBI had reason to investigate anyway, and as Litt correctly lays out, these actions were solidly within the guidelines laid out in the FBI's Domestic Investigations and Operations Guide. But the only way to conclude, as Barr has, that Flynn's actions – calling up the Russian Ambassador and telling him not to worry about the sanctions imposed for helping Trump get elected – are not clear cut evidence that he was clandestinely operating as an Agent of Russia is if Trump told him to do it.

That doesn't make it laudable. But it is as close as we've ever come to an admission that Flynn did this not just with the knowledge of, but on orders from, Trump. That's probably why Trump is boasting about learning from Nixon right now: Because unlike Nixon, he got away with cheating to win an election.