

STEALING ELECTIONS: THE UNDERLYING ASSUMPTION BEHIND BILLY BARR'S FLIP-FLOP ON THE MATERIALITY OF FLYNN'S LIES

Marty Lederman has a very long piece assessing DOJ's motion to dismiss the Mike Flynn case, one that pulls together a lot of the public record (including details, like about DOJ's January 24, 2017 sentencing memorandum, that haven't gotten attention other than at this site). As a very sober assessment that criticizes the FBI but lays out the national security implications, it's well worth reading.

Even after he wades through all those details, though, Lederman argues that the important takeaway isn't whether Flynn will do prison time or not (he notes, as I have, that Flynn will be pardoned in any case), but instead what this incident says about Bill Barr.

Unfortunately, just as with the public's anticipation of and reaction to the Mueller investigation, the inordinate focus on whether a particular individual committed one or another offense under the U.S. criminal code is diverting attention from where it ought to be, on much more significant matters of constitutional governance.

Most importantly, as I'll explain, what's most alarming and troubling about the DOJ brief itself is not that it asks the court for leave to dismiss the charge against Flynn, but that it depends upon the rather shocking view of the Attorney General and the Acting U.S. Attorney for the District of Columbia that Flynn's underlying conduct in 2016

and 2017 was unobjectionable and that therefore there wasn't a "legitimate" basis for the FBI to be investigating Flynn's secret communications with the Russian Ambassador at all, even though Russia had just completed an elaborate effort to manipulate the American electoral process in order to help elect Donald Trump.

[snip]

There is, however, at least one other possibility—one that's much more troubling but that doesn't involve prosecutorial "bad faith," as such: It could be, as **Charlie Savage** recently put it, that Attorney General Barr sincerely "considers to be illegitimate the government's counterintelligence effort to understand the scope of Russian election interference in 2016 and any links to the Trump campaign." That would explain the astounding assertions in the DOJ motion that Flynn's calls with Kislyak "were entirely appropriate on their face" and that there wasn't any "legitimate" basis for a counterintelligence investigation, even after Flynn lied to the Vice-President-Elect about the content of the calls. Indeed, in a recent **interview**, Attorney General Barr asserted that the FBI investigation was "based on a perfectly legitimate and appropriate call [Flynn] made as a member of the transition." According to Barr, there "was nothing wrong with it whatever. In fact, *it was laudable.*"

If *that's* the reason Barr insisted on moving to dismiss the Flynn charge, it raises a far, far greater problem than whether Michael Flynn is or isn't convicted of a criminal offense. Such a view reflects an alarming disregard for the constitutional difference between an

incumbent President and the incoming administration. It ignores the harms of engaging in such private diplomacy in secret, without the knowledge of the State Department. It treats as "laudable" an effort to undermine the incumbent President's conduct of foreign affairs in real time—and to do so in order to accommodate a hostile nation that had just engaged in a concerted effort to distort the U.S. presidential campaign in order to secure the election of the very President whose agent is engaged in the stealth diplomacy, and where that very President (and/or his agent engaged in the shadow communications) might possibly be in debt to that nation, and/or compromised by it. It also assumes that the FBI should have turned a blind eye to all this even after several top officials of the new administration made repeated false representations to the public about the new National Security Advisor's communications with that foreign power, either knowing that the statements were false or, more troubling still, having been assured by Flynn that the communications were very different from what the Bureau knew them to be.

If the Attorney General of the United States believes all of that conduct was "legitimate," "appropriate" and "laudable," and that there wasn't any "legitimate" basis for investigating it, then how can anyone be confident that the Department of Justice under his stewardship will faithfully fulfill its constitutional responsibilities?

I think Lederman is right: Even more than the question of whether Flynn does time is the question of what it means that Barr intervened and – based off no new evidence – weighed in to say that it was laudable that Flynn called up Russia and undermined the punishment Obama

imposed after Russia tampered in the election and illegitimate for FBI to investigate why he did so (predictably, the motion to dismiss doesn't deal with Flynn's work for Turkey).

But I would go further.

Lederman is rightly offended that Bill Barr has just given sanction to undermining the constitutional transition between one administration and another.

But that's not all that the FBI was investigating, nor is it what the record suggests Barr is sanctioning.

In his post, Lederman suggests the FBI didn't take any of the logical steps to chase down Flynn as a counterintelligence concern.

As I hoped I've shown above, that was precisely correct—the principal objective of any interview with Flynn should have been to get to the bottom of the potential counterintelligence threat. FBI Director Comey himself later testified that he sent his agents to interview Flynn on January 24, 2017 at least in part because there was a “disconnect” between what the Vice President was saying in public and what Flynn had in fact said to Kislyak, and Comey wanted his agents “to sit before [Flynn] and say ‘what is the deal?’” And FBI Counterintelligence Chief Bill Priestap apparently agreed. His notes from that morning state his view that “if [Flynn] initially lies, then we present him [redacted] and he admits it, document for DOJ, and let them decide how to address it.”

As far as the available public record shows, however, the agents who interviewed Flynn didn't take that route. Instead, it appears that Bureau leadership apparently decided before the interview that if Flynn didn't confirm to the agents what they knew he had said

to Kislyak, “they would not confront him or talk him through it.” (The quote is from a later 302 report of an interview with one of the agents, Peter Strzok. Unfortunately, the reasons for that decision appear to be redacted from Strzok’s 302 Report. Nor is it clear who made this tactical decision.) In the interview itself, Flynn said he couldn’t recall any discussion with Kislyak of the sanctions and expulsions, even after the agents used his own words from those conversations in order to jog his memory (and/or to subtly signal to him that they had a recording). And then the agents left it at that. They didn’t confront Flynn with evidence of what he had said to Kislyak; didn’t ask him *why* he said such things; about who else, if anyone, he discussed the call with, before or after; why he had disregarded the Obama administration’s pointed request that he not have such conversations; why he had lied to Pence, et al.; etc. In other words, they didn’t do any of the things one might expect investigators to do if their goal was to get to the bottom of the case, and assess the scope and degree of any possible counterintelligence threat, during that interview. Instead, all they appeared to accomplish was to confirm that Flynn was committed to lying about his calls with Kislyak.

This is the one part of Lederman’s post that I believe is wrong.

On January 24, 2017, the FBI would have learned that Flynn was going to continue to lie about his discussion of sanctions. But the evidence would still have supported an interpretation that Flynn had gone rogue, that he – someone who had been paid directly by Russia in the previous year and met directly with Putin – had decided to undermine all of US policy in response to the

Russian operation all by himself.

That interpretation would change.

Moreover, the record shows the FBI did take next steps, but next steps that served to get at the key purpose for Flynn's lies, to hide that he had consulted with Mar-a-Lago before calling Kislyak. As I have laid out here, the FBI did some call records analysis (on Flynn's private phone, because he hadn't used his government issue BlackBerry). That would have disclosed a bunch of calls to Mar-a-Lago beforehand, calls that were clearly inconsistent with Flynn's claims to the FBI. Ultimately, FBI obtained the devices that first Flynn, and then other members of the Transition had used. Those would show emails explicitly discussing strategy on sanctions. Between getting those communications and getting Flynn to flip, FBI would eventually have gotten KT McFarland to tell her version of the story.

After a year of work, the FBI would have substantiated that Flynn's lies served to hide his consultation with Mar-a-Lago. Mueller never got him or McFarland or Steve Bannon to admit that Trump weighed in ahead of time (and Mueller was deliberately coy about whether he has phone records suggesting he did).

Ultimately, though, Mueller was never able to answer a key question: whether Trump had ordered Flynn to do what he did.

Although transition officials at Mar-a-Lago had some concern about possible Russian reactions to the sanctions, the investigation did not identify evidence that the President-Elect asked Flynn to make any request to Kislyak.

As Lederman himself notes, Trump blew off questions about his role in all of this when asked.

Although it's therefore almost certain Trump knew at least roughly what Flynn

planned to say to Kislyak, the Mueller investigation did not find any evidence that Trump directed Flynn to say anything about sanctions. (Mueller asked Trump specifically about these incidents (see Questions V(b)-(e)), but in his written responses the President ... simply ignored those questions, as though they hadn't even been asked.) Several weeks later, then-President Trump said in a press conference that although he didn't direct Flynn to discuss sanctions with Kislyak, "it certainly would have been okay with me if he did. I would have directed him to do it if I thought he wasn't doing it. I didn't direct him, but I would have directed him because that's his job."

And Lederman notes the part of the January sentencing memo that describes how central a question sanctions were to Mueller's investigation.

In a sentencing memorandum it filed in January 2020, the Department of Justice explained that after Flynn's calls with Kislyak and the false stories that Pence and others were purveying, the FBI "did not know the totality of what had occurred between the defendant and the Russians," and that "determining the extent of [Flynn's] actions, why [he] took such actions, and at whose direction he took those actions, were critical to the FBI's counterintelligence investigation." This was particularly true because "[a]ny 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."

What he doesn't consider, however (though he comes awfully close), is the aspect of Mueller's investigation that considered whether there was a quid pro quo.

In particular, the investigation examined whether these contacts involved or resulted in coordination or a conspiracy with the Trump Campaign and Russia, including with respect to Russia providing assistance to the Campaign in exchange for any sort of favorable treatment in the future. Based on the available information, the investigation did not establish such coordination.

That is, Mueller wasn't just investigating whether Trump was friendly to Russia because he was friendly to Russia or whether he was friendly to Russia out of tacit acknowledgement that Russia had helped him.

Mueller was also investigating (and parts of DOJ may still be investigating) whether Trump entered into one or more quid pro quos in which he accepted help getting elected in exchange for implicit or explicit pay-offs later.

Whether or not Mueller proved a quid pro quo (and there are aspects of this that remain ongoing, or recently were ongoing before Barr's latest efforts to undermine them), that was an obvious, legitimate topic for investigation after a campaign advisor got approached about Russia's help in April and after Trump asked Russia for help in the same press appearance where he offered to recognize Russia's annexation of Crimea.

That's what FBI's investigation ultimately became. That's the question the answer to which Flynn's lies about consulting with Mar-a-Lago have obscured. That is the part of the investigation that Flynn's lies had a material impact on.

Bill Barr is saying it was illegitimate for the FBI to investigate whether the incoming

President engaged in a quid pro quo to get elected and therefore Flynn's lies that hid key details needed to answer that question are not material to any investigation that FBI should be engaging in.

And he's saying it just before campaign season begins again in earnest.