

# JUDGE REGGIE WALTON HAS QUESTIONS ABOUT THE NON-STONE REDACTIONS IN THE MUELLER REPORT

Judge Reggie Walton appears to have questions about the non-Roger Stone redactions in the Mueller Report – but we won't learn what they are for another six weeks or more.


I say that because of two orders he has recently issued in the BuzzFeed/EPIC FOIA lawsuit to liberate the document. Back in May, the plaintiffs pointed to a number of developments in the Roger Stone case, arguing that DOJ can no longer rely on any of the FOIA exemptions previously used to hide such information.

First, the Department of Justice ("DOJ") may no longer assert that it is prohibited by Judge Jackson's order from disclosing additional material from the Mueller Report pursuant to the Freedom of Information Act ("FOIA"), as that order has now been lifted. 11.

Second, because the DOJ has disclosed extensive new material concerning its investigation of Mr. Stone—in addition to the new material already disclosed by the DOJ during Mr. Stone's trial—the DOJ may no longer withhold that same information contained in the Mueller Report. See *Mobley v. CIA*, 806 F.3d 568, 583 (D.C. Cir. 2015) (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)) ("[W]hen information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim."). Plaintiffs are thus entitled to any such material under the FOIA.

Third, the DOJ's Exemption 7(A) claims predicated on the Stone trial are moot. Exemption 7(A) applies only to records compiled for law enforcement purposes, the disclosure of which "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. § 552(b)(7). "[A] law enforcement agency invoking the exception [must] show that the material withheld 'relates to a concrete prospective law enforcement proceeding.'" *Juarez v. DOJ*, 518 F.3d 54, 58 (D.C. Cir. 2008) (quoting *Bevis v. Dep't of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986)) (emphasis added). Notably, disclosure "cannot interfere with parts of the enforcement proceeding already concluded." *CREW v. DOJ*, 746 F.3d 1082, 1097 (D.C. Cir. 2014) (quoting *North v. Walsh*, 881 F.2d 1088, 1100 (D.C. Cir. 1989)).

In response, last week, Walton ordered DOJ to file a response by this Friday.

Upon consideration of the plaintiffs' 119  Notice of Factual Developments Relevant to Pending Motions, it is hereby ORDERED that, on or before June 12, 2020, the United States Department of Justice shall file its response to the plaintiffs' notice.

DOJ's response will be interesting, given that, in May, DOJ withheld information from Stone's warrants partly for privacy reasons (protecting Ted Malloch's privacy, among others), and partly because of pending investigations. The latter material actually appears to pertain to things that don't appear in the Mueller Report, however, so any 7A exemptions that DOJ invokes will be of some interest.

But, particularly given the fact that DOJ has not yet responded to that order yet, it suggests that an order Walton issued yesterday, delaying

the public hearing on the lawsuit and instead scheduling an ex parte hearing with the government on July 20 – possibly extending to July 21 and 22 (!!!) – pertains to other matters.

Having reviewed the unredacted version of the Mueller Report, the Court cannot assess the merits of certain redactions without further representations from the Department. However, because the Court must discuss the substance of the redactions with the Department, and because such a discussion cannot occur remotely due to the lack of a secure connection between the Court and the Department necessary to avoid disclosure of the redacted information, and in light of Chief Judge Howell's May 26, 2020 Order, In re: Further Extension of Postponed Court Proceedings in Standing Order 20-9 and Limiting Court Operations in Exigent Circumstances Created by the COVID-19 Pandemic, Standing Order No. 20-29 (BAH), it is hereby

ORDERED that the status conference currently scheduled for June 18, 2020, is VACATED.

It is further ORDERED that, on July 20, 2020, at 9:30 a.m.,<sup>1</sup> the Department shall appear before the Court for an ex parte hearing to address the Court's questions regarding certain redactions of the Mueller Report.<sup>2</sup>

<sup>1</sup> The Department shall be prepared to appear before the Court for a continuation of the July 20, 2020 ex parte hearing on July 21, 2020, and July 22, 2020, if necessary.

<sup>2</sup> The Court will advise the Department as to the topics that the Department should be prepared to discuss at the July 20, 2020 ex parte hearing at a later date.

Curiously, Walton isn't even asking the government to brief these redactions; he's asking for someone to come into his courtroom and discuss it, possibly for an extended discussion.

The least interesting topic in question might pertain to the significant redactions of the Internet Research Agency materials, which were redacted in significant part for national security reasons rather than to protect the integrity of an upcoming trial, as they were for Stone. I doubt Walton will have much interest in unsealing that stuff anyway, because he is generally quite sober about protecting national security information.

But there are other things of interest that Walton would want to preserve secrecy on until he tests DOJ's claims about them. The most obvious are the two discussions apiece about how Trump père and fils avoided testifying; those discussions are currently hidden under a grand jury redaction, one that is arguably inconsistent with other discussions of grand jury actions (including, most recently, a bunch of 302s describing the FBI serving witnesses with subpoenas). We, as voters, should know the details of how Trump dodged a Mueller interview before November 3, and these redactions have always been one of the obviously abusive redactions.

Similarly, DOJ redacted at least two names from the Report's description of an October 20 scope memo (which the frothy right has gotten disinterested in obtaining), one of which is Don Jr.

On October 20, 2017, the Acting Attorney General confirmed in a memorandum the Special Counsel's investigative authority as to several individuals and entities. First, "as part of a full and thorough investigation of the Russian government's efforts to interfere in the 2016 presidential election," the Special Counsel was authorized to investigate "the pertinent activities of Michael Cohen, Richard Gates, (b)(5), (b)(6), (b)(7)(C) Roger Stone, and (b)(5), (b)(6), (b)(7)(C) (b)(5)-2 (b)(6) / (b)(7)(C)-2

Confirmation of the authorization to investigate such individuals," the memorandum stressed, "does not suggest that the Special Counsel has made a determination that any of them has committed a crime." Second, with respect to Michael Cohen, the memorandum recognized the Special Counsel's authority to investigate "leads relate[d] to Cohen's establishment and use of Essential Consultants LLC to, *inter alia*, receive funds from Russian-backed entities." Third, the memorandum memorialized the Special Counsel's authority to investigate individuals and entities who were possibly engaged in "jointly undertaken activity" with existing subjects of the investigation, including Paul Manafort. Finally, the memorandum described an FBI investigation opened before the Special Counsel's appointment into "allegations that [then-Attorney General Jeff Sessions] made false statements to the United States Senate[.]" and confirmed the Special Counsel's authority to investigate that matter.

DOJ has claimed these privacy redactions are of tertiary third parties, which – given that the second redaction is almost certainly the failson – is clearly false in this instance.

Similarly, given KT McFarland's public claims that she was caught in a perjury trap, any passage that explains why she wasn't charged with false statements (which might be the redaction on page 194 of the first part of the report) might be justifiably released.

But there are two redactions that – given recent events – are far more interesting.

There's a sentence describing Mueller's decision not to charge Carter Page as an agent of Russia. While, in Page's case, I might otherwise support leaving this redacted, DOJ has declassified far more sensitive information than what must appear here in response to GOP demands.

The investigation did not, however, yield evidence sufficient to sustain any charge that any individual affiliated with the Trump Campaign acted as an agent of a foreign principal within the meaning of FARA or, in terms of Section 951, subject to the direction or control of the government of Russia, or any official thereof. In particular, the Office did not find evidence likely to prove beyond a reasonable doubt that Campaign officials such as Paul Manafort, George Papadopoulos, and Carter Page acted as agents of the Russian government—or at its direction, control, or request—during the relevant time period.<sup>1282</sup> (b) (5), (b) (6), (b) (7)(C)

(b)(5)-2  
(b)(6) /  
(b)(7)(C)-2

As a result, the Office did not charge (b) (5), (b) (6), (b) (7)(C) any other Trump Campaign official with violating FARA or Section 951, or attempting or conspiring to do so, based on contacts with the Russian government or a Russian principal.

<sup>1282</sup> On four occasions, the Foreign Intelligence Surveillance Court (FISC) issued warrants based on a finding of probable cause to believe that Page was an agent of a foreign power. 50 U.S.C. §§ 1801(b), 1805(a)(2)(A). The FISC's probable-cause finding was based on a different (and lower) standard than the one governing the Office's decision whether to bring charges against Page, which is whether admissible evidence would likely be sufficient to prove beyond a reasonable doubt that Page acted as an agent of the Russian Federation during the period at issue. *Cf. United States v. Cardoza*, 713 F.3d 656, 660 (D.C. Cir. 2013) (explaining that probable cause requires only "a fair probability," and not "certainty, or proof beyond a reasonable doubt, or proof by a preponderance of the evidence").

The redacted sentence likely summarizes what the fully declassified FISA applications reveal: which is that there was a great deal of evidence that Page was willing to work with known Russian intelligence officers, including sharing non-public information on US businesses, as well as evidence he either lied or had gotten so unbalanced by 2017 that he didn't tell the truth about those contacts as they they continued to be investigated. Because the FISA application was a case of selective declassification, this passage might be justifiably unsealed to prevent that kind of selective release.

Finally, in the that same section of the report

discussing why Mueller didn't charge people with violations of FARA or 18 USC 951, there's a footnote about an ongoing investigation that must pertain to Mike Flynn.

In addition, the investigation produced evidence of FARA violations involving Michael Flynn. Those potential violations, however, concerned a country other than Russia (*i.e.*, Turkey) and were resolved when Flynn admitted to the underlying facts in the Statement of Offense that accompanied his guilty plea to a false-statements charge. Statement of Offense, *United States v. Michael T. Flynn*, No. 1:17-cr-232 (D.D.C. Dec. 1, 2017), Doc. 4 ("*Flynn* Statement of Offense").<sup>1281</sup>

1281 (b) (7)(A)

My *guess* is this pertains to a counterintelligence investigation into the ways Russia was cultivating Flynn, something the transcripts of his calls with Sergey Kislyak make clear was happening (which is to say, it doesn't necessarily say Flynn was at risk of prosecution but that FBI had a duty to investigate). Mueller said FBI was still investigating counterintelligence issues pertaining to Flynn during his July 2019 congressional testimony, which would be consistent with the b7A redaction here.

In any case, given DOJ's decision to flip-flop on Flynn's prosecution, any indication there was an ongoing investigation pertaining to Flynn 15 months after he pled guilty for lying would sharply undercut DOJ efforts to exonerate Flynn. And given DOJ's declassification of so much else pertaining to Flynn – up to and including some, but not all, of the FISA intercepts collecting his calls with Russia – it would be hard for them to argue that this passage could not be declassified.

Unless, of course, the investigation remains ongoing.

Which makes Walton's apparent delay regarding what topics he expects DOJ to cover next month rather interesting. By July 20, when this *ex parte* hearing will take place, the DC Circuit may well have decided the Mandamus petition targeting Judge Emmet Sullivan (though, particularly given Noel Francisco's inclusion on

DOJ's brief on the topic, I expect it to be appealed no matter the decision). And even though he has read the entire report, Walton's order deferred instructing DOJ about what they would have to discuss until "a later date," meaning it's unlikely he issued a sealed order doing so yesterday. At the very least, Walton may delay until he gets DOJ's response on the Stone materials on Friday.

If there really is an ongoing counterintelligence investigation into Flynn, I would expect (and always have expected) Walton to leave this redaction untouched. But if Billy Barr's DOJ squelched that investigation, too, I imagine Walton would make the footnote and any discussions about it public.

Once upon a time, DOJ might have gotten by with just the Stone redactions and the abusive redactions protecting Trump and his son. But in recent months, DOJ has done plenty to justify more broadly releasing some of this information.

Sadly, that won't happen for over a month yet.