

# JUDGE EMMET SULLIVAN JUST CREATED FOUR BIG PROBLEMS FOR DOJ IN THE MIKE FLYNN CASE

Judge Emmet Sullivan just issued an order that may well destroy DOJ's presumption of regularity (the legal principle that unless the government really fucks up, you have to assume they didn't fuck up) in the Mike Flynn case.

He noted that on September 29, he had ordered DOJ to certify all documents submitted as exhibits in the motion to dismiss proceeding, but that DOJ had not done so. Instead, it admitted that it had "inadvertently" altered two Peter Strzok and one Andrew McCabe documents, and asked for a mulligan.

So now he's ordering DOJ to do what he first ordered: to certify all the exhibits submitted to this docket (both those submitted directly by DOJ and those submitted by Flynn's team) and provide a transcription and the author and date of any handwritten notes.

MINUTE ORDER as to MICHAEL T. FLYNN.  
During the September 29, 2020 motion hearing, the Court informed the government that it would need government counsel to authenticate documents filed with the Court. See Hr'g Tr., ECF No. 266 at 91:19-92-21; see also Min. Order (Sept. 29, 2020) (ordering the parties to file any supplemental materials by no later than October 7, 2020). On October 7, 2020, the government filed [259] Notice of Compliance in which it stated that: (1) Federal Bureau of Investigation ("FBI") agents assigned to review Mr. Strzok's notes had placed sticky notes on the document with estimated dates, and the sticky notes had not been removed prior to scanning

the documents for production purposes (see ECF Nos. 248-2, 248-3); and (2) a sticky note with an estimated date had been placed on the notes of Andrew McCabe, and the sticky note had not been removed prior to scanning the document for production purposes (see ECF No. 248-4). The government stated that the notes of Mr. Strzok and Mr. McCabe were otherwise unaltered, and it provided the unaltered versions of Mr. Strzok's and Mr. McCabe's notes. See Exs. to Notice of Compliance, ECF Nos. 259-1, 259-2, 259-3. However, **the government did not address the Court's authentication request despite the government's acknowledgement that altered FBI records have been produced to Mr. Flynn and filed on the record in this case.** See Notice of Compliance, ECF No. 259. The government has filed a motion to dismiss pursuant to Federal Rule of Criminal Procedure 48(a), has attached 13 Exhibits to that motion, and has cited the Exhibits throughout its motion to support its description of the factual background and its argument in support of dismissal. See generally Mot. Dismiss, ECF No. 198. The government has also filed a supplement to its motion and attached an Exhibit to that supplement. Suppl., ECF No. 249. Although the government relies heavily on these 14 Exhibits, the government has not provided a declaration attesting that the Exhibits are true and correct copies. "The presumption [of regularity] applies to government-produced documents" and "to the extent it is not rebutted—requires a court to treat the government's record as accurate." *Latif v. Obama*, 666 F.3d 746, 748, 750 (D.C. Cir. 2011). Here, however, the government has acknowledged that altered FBI records have been produced by the government and filed on the record in

this case. See Notice of Compliance, ECF No. 259. Accordingly, the government is HEREBY ORDERED to file, by no later than October 26, 2020, a declaration pursuant to penalty of perjury under 28 U.S.C. sec. 1746 in support of its motion to dismiss that the Exhibits attached to its motion and supplement are true and correct copies. It is FURTHER ORDERED that the government's declaration shall identify each exhibit by name, date, and author. It is FURTHER ORDERED that the government shall provide transcriptions of all handwritten notes contained in the Exhibits. The government has also filed on the record in this case numerous notices of filing discovery correspondence and Mr. Flynn has generally filed the discovery produced on the record in this case as Exhibits to his supplementary filings. See ECF Nos. [228], [231], [237], [248], [251], [257], [264]. The government has acknowledged that the discovery provided to Mr. Flynn and thereafter filed on the record contained altered FBI records. See Notice of Compliance, ECF No. 259. Accordingly, the government is HEREBY ORDERED to file, by no later than October 26, 2020, a declaration pursuant to penalty of perjury under 28 U.S.C. sec. 1746 that the discovery documents provided to Mr. Flynn and filed on the record in this case are true and correct copies. It is FURTHER ORDERED that the government's declaration shall identify each discovery document by name, date, and author. It is FURTHER ORDERED that the government shall provide transcriptions of all handwritten notes contained in the Exhibits.

This is going to create four problems for DOJ.

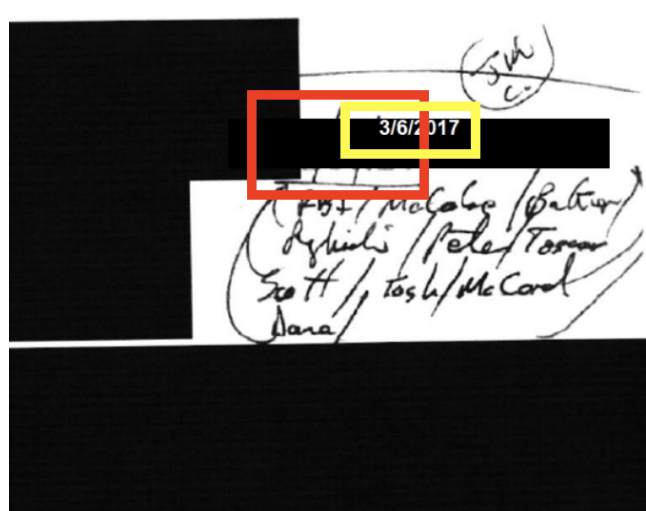
First, there's no way they can finish this by Monday. Even if the lawyers on this case were as

familiar with these documents as they claimed to be, it would take more than this weekend to transcribe and double check everything. They will likely ask for an extension, one that would extend the order past the election.

Plus, once they do transcribe these documents, it will become crystal clear that parts of the notes – most notably, the Bill Priestap notes they've claimed are a smoking gun – in fact confirm that every single witness agreed on the purpose of the January 24, 2017 Mike Flynn interview: to see whether Flynn would lie. By submitting a transcript, then, they will have to admit they've misrepresented the substance of the documents.

Then, this order will catch them in their past false claims about the date of (at least) the January 5, 2017 Peter Strzok notes. As I've noted, DOJ has submitted several documents in this docket making it clear that Strzok's notes must have been written on January 5, 2017. Except they falsely claimed not to know. There's probably no easy way out of this problem.

Finally, there is this exhibit, which *also* had a date added, but a date added via means that cannot have been accidental.



It's possible that that redaction doesn't cover over an existing date (but my annotation, in red, may show the hash marks of a date). But I don't see how DOJ can authenticate this, and

they're going to have to tell Sullivan who wrote it, making it really easy for journalists to call up the author and get him to confirm or deny the date.

Notably, after Strzok and McCabe's lawyers gave notice that DOJ had altered their notes, Sidney Powell submitted a demand that Judge Sullivan prevent anyone else from telling him their notes had been altered. So maybe she has exhibits about which she has specific concerns.

The false Strzok claims, by themselves, are going to make a truthful declaration here difficult, if not impossible. But that's not even the only problem this order will create for DOJ.

Update: There are two sets of documents Sullivan is now asking DOJ to ID the author, provide date, and transcribe: those linked in this post and those in this document cloud project.