

ON THE FIZZLE AND BOOM IN FRIDAY'S MIKE FLYNN FRIDAY NIGHT NEWS DUMP

Some events set in motion by a request WaPo made in April to unseal the sentencing files of Mike Flynn that have resulted in some fizzle, some pop, and a lot of premature speculation.

In their response to the request, the government said that the release of the Mueller Report meant they could release three of the four documents WaPo initially asked for in less redacted form: Flynn's cooperation addendum (parts of which were and are still sealed to protect ongoing investigations), an Andrew McCabe memo on his interview, and a Peter Strzok 302 (both of which had personal privacy and deliberative privilege redactions). The government moved to unseal them. In approving that unsealing, Judge Emmet Sullivan picked up on the reference to the Flynn transcript and issued an order to the government to unseal both that transcript, any sealed parts of the Mueller Report that "relate to Flynn," and transcripts of all recordings involving Flynn, "including, but not limited to, audio recordings of Mr. Flynn's conversations with Russian officials."

<small>MINUTE ORDER as to MICHAEL T. FLYNN. The government is hereby ORDERED to file on the public docket in this case the transcript of the "voicemail recording" referenced in the 25 18 Addendum to Government's Memorandum in Aid of Sentencing and the transcripts of any other audio recordings of Mr. Flynn, including, but not limited to, audio recordings of Mr. Flynn's conversations with Russian officials, by no later than May 31, 2019. It is FURTHER ORDERED that the government shall submit to Chambers audio versions of the recordings on a DVD by no later than May 31, 2019. Signed by Judge Emmet G. Sullivan on 5/16/2019. (lcegs3) (Entered: 05/16/2019)</small>
<small>MINUTE ORDER as to MICHAEL T. FLYNN. The government is hereby ORDERED to file the publicly-available version of Special Counsel Robert S. Mueller, III's Report on The Investigation Into Russian Interference in The 2016 Presidential Election on the public docket in this case by no later than May 17, 2019. The government is FURTHER ORDERED to file on the public docket in this case by no later than May 31, 2019 an unredacted version of those portions of the report that relate to Mr. Flynn. Signed by Judge Emmet G. Sullivan on 5/16/2019. (lcegs3) (Entered: 05/16/2019)</small>

Meanwhile, WaPo expanded their request to include Flynn's original 302. Unlike the other documents they had earlier requested, his 302 quoted from the transcripts of his conversations with Kislyak. Surprisingly, Sullivan did not respond (I had wondered whether he might order the government to release it along with the other items). The government said it will review what can be released in that, as they had with

other filings, though Flynn objects to this release. And WaPo responded in their original request, reaffirming their interest in Sullivan being involved.

Last night, the government filed the transcript of the call from John Dowd to Flynn's lawyer Rob Kelner, as well as a filing blowing off at least one, and probably two, of Sullivan's requests. The one that has gotten all the attention is that the government blew off Sullivan's order to include all transcripts of audio recordings of Flynn's conversations with Russian officials by claiming no other records are part of the guilt and sentencing record.

The government further represents that it is not relying on any other recordings, of any person, for purposes of establishing the defendant's guilt or determining his sentence, nor are there any other recordings that are part of the sentencing record.

I also believe the government is being rather cute with this explanation about the Mueller Report.

With respect to the Report, the government represents that all of the information in the Report that the defendant provided to the Special Counsel's Office has been unredacted, as has all of the information in the Report that others provided about the defendant. In those sections where the defendant's conduct is discussed, limited remaining redactions pertain to the sourcing of information, such as references to grand jury subpoenas. See, e.g., Report, Volume I, pp. 169- 72.

Sullivan ordered the government to turn over all portions of the Report that *relate* to Flynn, not just those that describe information he provided to Special Counsel or that others provided about

him. Plus, the government should have warned Sullivan they were going to withhold references to grand jury materials (their representation that these were just references stating that the call records the government used to clarify whom Flynn spoke to before and after his calls to Kislyak is pretty clearly correct), rather than just informing him of that in this filing.

But I also don't understand how it is possible that this footnote does not relate to 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").¹²⁸¹

¹²⁸¹ Harm to Ongoing Matter

The Mueller Report admits elsewhere that Flynn was under counterintelligence investigation for his ties to Russia, on top of the investigation into his sleazy influence peddling for Turkey. It should be explained in this section, but is not – unless it is in this redacted footnote.

Of course, that's precisely the kind of thing Sullivan would probably like to have made public, given his opinion that Flynn "arguably ... sold [his] country out." Which may be why the government excused not turning it over with the same indirect explanation – that even if this footnote "relates" to Flynn (and so would fall into his order) it isn't pertinent for sentencing. The same indirect excuse they offered for withholding what are surely FISA transcripts.

All that said, I'm not sure the government's intransigence is as big a deal as people are making out, nor am I convinced this is Bill Barr's doing, to protect Trump.

To be sure, I think if the government were forced to turn over all transcripts where Flynn got recorded – even if it were just with Russian officials, and not anyone else a National Security Advisor designee would speak to – it

would be fairly damning, and not just because the three Kislyak calls are really damning. There are more Kislyak-Flynn calls than the government wants to talk about right now: at a minimum, the calls surrounding a meeting Flynn and his spawn had in advance his RT-paid trip to Moscow in December 2015, as well as a call in early 2016. But there are likely even more from during the campaign period, calls that discuss policy issues that would be unseemly for a candidate to be discussing with the adversary who also happens to be trying to help Flynn's boss get elected.

But even given Sullivan's tendency to respond especially poorly to government defiance, I'm not sure this is going to escalate (in part, because it hasn't yet). Had Sullivan really wanted to push this issue, he would have already ordered Flynn's 302 be released, and he hasn't. Plus, I think WaPo's supplemental request for Flynn's 302 will shift this debate to a more appropriate area of discussion.

Having been told by the government they would discretionarily release these files, the WaPo reply reiterated their original argument about First Amendment right of access to court filings. And Flynn's original 302 is – because Sullivan ordered it to be, in response to a cute ploy by Flynn – a document already posted to the docket. So the WaPo's argument that the full 302 should be disclosed should be fairly persuasive for Sullivan.

But the 302 *also* quotes directly from at least Flynn's December 29, 2016 call with Kislyak, because the FBI Agents decided (as recorded in the McCabe memo) that they would quote directly from the transcript if Flynn pretended not to remember this. For example, the FBI Agents tried to remind Flynn he had used the term "tit-for-tat" that he also used with KT McFarland's assistant earlier in the day; they appear to quote the phrase, "don't do something" to him twice.

Sullivan already has scheduled a hearing to

discuss all this, on June 24. So between the supplemental WaPo request and that hearing, there's plenty of opportunity to litigate all this without Sullivan blowing up.

In spite of a lot of suspicions, I suspect the non-responsive response came from DOJ's National Security Division, not from Bill Barr. That's true, in part, because DOJ as an institution is less patient with Sullivan's quirky demands than they should be. That's also true because there are almost certainly three levels of intercepts that might be responsive to Sullivan's request that, at each level, would raise more and more heartburn for NSD, first for things they'd disclose about Flynn (and Trump), and then generally for the precedent it would set generally.

As I disclosed last July, I provided information to the FBI on issues related to the Mueller investigation, so I'm going to include disclosure statements on Mueller investigation posts from here on out. I will include the disclosure whether or not the stuff I shared with the FBI pertains to the subject of the post.