

THE FLYNN SENTENCING: WHAT COMES NEXT?

As Zoe Tillman describes, the Mike Flynn sentencing hearing today was even more unpredictable than I imagined (and I anticipated it would bring some surprises). Judge Emmet Sullivan (after apparently putting Flynn under oath so these questions, too, could be charged for perjury) asked him several times whether – given the sentencing memorandum he submitted suggesting extenuating circumstances for his lies to the FBI (but not to DOJ’s FARA team) – he believed he had lied, whether he knew that was a crime, whether he wanted to plead guilty.

Throughout the proceedings, US District Judge Emmet Sullivan repeatedly asked Flynn if he wanted to go ahead with sentencing, given his lawyers’ comments questioning the conduct of the FBI officials and agents who handled his questioning in January 2017, and the fact that Flynn might not be finished cooperating.

Having established that – and offered Flynn several opportunities to delay sentencing, he laid into him, even going so far as to ask prosecutor Brandon Van Grack if Mueller had considered charging Flynn with treason.

“Arguably, that undermines everything this flag over here stands for,” Sullivan said, gesturing to an American flag displayed behind his chair. “Arguably you sold your country out.”

Sullivan continued: “I’m not hiding my disgust, my disdain for this criminal offense.”

Flynn at that point took up the judge’s offer of additional time to consult with

his lawyers. Before the judge took a break, however, he asked special counsel prosecutor Brandon Van Grack if Flynn could have been charged with treason for his conversations with now-former Russian ambassador Sergey Kislyak in December 2016, after then-president Barack Obama had entered sanctions against Russia for interfering in the election.

That's when Flynn asked Sullivan for a break. When he and his lawyers returned, they took Sullivan up on his offer for a delay, and suggested a status hearing in March.

But it's not entirely clear how that will help – aside from giving Sullivan time to set aside the visceral disgust he showed for Flynn today.

Here's are some possible scenarios:

Flynn Finds Something Else to Cooperate On

This is the ostensible reason to delay the sentencing, so that Flynn can cooperate some more, in an attempt to convince Sullivan he should avoid prison time.

When Sullivan asked Van Grack whether Flynn was done cooperating, and the prosecutor replied that it remained a possibility. That stops short of even promising that Flynn will be called to testify in the trial against his former partner, Bijan Kian. As I noted yesterday, the indictment seemed to be built to avoid that, and as an unindicted co-conspirator there may be problems if Flynn does testify, to say nothing of his limited credibility as a sworn liar. Moreover, Flynn's substantial cooperation in getting prosecutors to this point was already baked into today's sentencing. It's hard to imagine what Flynn could do to improve on that.

Which leaves the possibility that Flynn knows of

something – some other crime, whether by Trump and his circle, or some of his other pals – that he can offer to federal prosecutors. It is possible that, seeing an angry judge talking about treason and imagining prison, Flynn unforgot somethings he knows, so took his lawyer aside and said there was another area he might be willing to share with prosecutors.

Trump Risks Clemency

A more likely motivation, for Flynn, is the hope that Trump will decide to give Flynn the pardon he floated over a year ago. If Flynn delays long enough, Trump might get into a place where it'll be politically feasible for him to commute any sentence Flynn makes.

Maybe he, like the nutters who occupy the same bubble he does, that after a series of false hoaxes over the last year, someone will finally discover something that will provide the excuse Trump needs.

Or maybe he's just delaying in hopes that one of the long shot challenges to Mueller's authority – or perhaps his firing – will get him off his charges.

All of these, of course, would amount to a play for time, in the hopes that his fortune will improve.

Kelner Falls on His Sword

After they came back from the break, Robert Kelner said something suggesting that Sullivan shouldn't penalize Flynn in his sentencing for something his attorney (that is, he, Kelner) had written in a sentencing memo.

It's unclear to me whether Kelner was referencing the stunt suggesting there were extenuating circumstances explaining why Flynn lied or a reference he made to David Petraeus

(Sullivan explicitly suggested he thought Petraeus got an easy deal). It's equally unclear to me how much of Sullivan's tirade today stemmed from Flynn's actual conduct (and the sweet deal he himself got) or the stunt.

Particularly if it's the former, then it's possible to win some favor from Sullivan by having Kelner even more publicly fall on his sword, claiming (the claim would almost certainly be utter bullshit) that it was his idea to try that stunt. That might provide Flynn an opportunity to present a new, chastened sentencing memo in March, such that Sullivan would be more amicable to giving him probation.

There's a tension underlying this: One reason Flynn wanted to get sentenced early was so he could return to sleazy influence peddling so he could pay his legal bills. Now he's looking at still more legal bills for a stunt that he probably demanded.

The Unfolding Turkish and Russian Stories Change the Context

Judge Sullivan (or his clerks) have read, at a minimum, the following:

- An unredacted copy of Flynn's 302
- An unredacted copy of the McCabe memo
- A partly unredacted copy of the Strzok 302 (some parts of it are not relevant to this case, so may not have been shared)
- An unredacted copy of Flynn's cooperation addendum
- An ex parte version of the

Flynn cooperation addendum
including details Flynn
doesn't know

- Information, in some form,
on the Kian indictment

And there are still some sealed items in Flynn's docket.

So Sullivan *should* have a pretty complete idea of what cooperation Flynn has given.

That said, it's not impossible that as both the Kian prosecution (I suspect he'll plead) and the Russian investigation proceeds, additional information will become known – or at least public – to change the context of Flynn's actions. Maybe, if the crimes of his business partner end up far worse than we know, Flynn's treatment for the foreign agent charge won't appear as easy. Maybe, if people next to Trump get charged with serious crimes, the value of Flynn's cooperation will make him look less like a sell-out.

But the opposite could happen, as well. As his co-conspirators attempt to save themselves, they may be able to present credible evidence about stuff Flynn has thus far suppressed (if not from Mueller, from the public).

And what if Trump ultimately quits in disgrace? Sure, he could pardon his co-conspirators on the way out (though I doubt he'd do that if there weren't a benefit to him). But if Trump leaves in disgrace, Flynn's continued good relations with Trump may only make him look like more of a sell-out.

The point is, short of finding other criminals to flip on or finding a way to remove Mueller's authority, it's not clear how Flynn's fortune can improve over the next three months, and there are definitely ways his fortune could go south.

As I disclosed in 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.