

MIKE FLYNN SEIZES THE ROPE TO HANG HIMSELF WITH: PROBATION FOR PETRAEUS

The government and Mike Flynn submitted several motions today:

- Government reply to sentencing memo
- Motion to withdraw guilty plea
- A(nother) motion to dismiss for misconduct

Eventually, I'll hit them all in this post. But for now, I'm going to address just the government reply to Flynn's sentencing memo, because I read it very very differently than virtually everyone who has read it.

A number of people are shocked by what seems to be the government's deference to Mike Flynn in the memo, particularly their recommendation for a guidelines sentence – which might include probation. It's true, the memo mentions probation over and over.

As set forth below, the government maintains that a sentence within the Guidelines range – to include a sentence of probation – would be appropriate and warranted in this case.

[snip]

Here, the applicable Guidelines range already encompasses a potential penalty of probation and there is no lower possible penalty for the offense of conviction.

[snip]

Based on all of the relevant facts and

for the foregoing reasons, the government submits that a sentence within the Guidelines range of 0 to 6 months of incarceration is appropriate and warranted in this case, agrees with the defendant that a sentence of probation is a reasonable sentence and does not oppose the imposition of a sentence of probation.

The memo then goes on to nod to the issues Flynn raised. It acknowledges, then rebuts, Flynn's complaints about what he claims is the government asking him to lie about FARA. But, the government notes, regardless of who is right, it wouldn't change the guidelines sentence.

Importantly, regardless of whether or not the Court considers the defendant's FARA false statements in fashioning its sentence, the applicable Guidelines range is still 0 to 6 months of incarceration.

It notes Flynn's apparent backtracking on acknowledgement of responsibility. But, the government notes, regardless of who is right, it wouldn't change the guidelines sentence.

But again, this makes no difference to the applicable Guidelines range – a two-level reduction in his base offense level would still result in a range of 0 to 6 months of incarceration.

Thus far, the government is doing precisely what it did in its own sentencing memo, emphasize that the government position has not changed. It asked for a guidelines sentence in December 2018, it asked for a guidelines sentence earlier this month, and it is recommending a guidelines sentence here. Anything outside those guidelines is Judge Emmet Sullivan's decision.

Where the memo is absolutely fucking genius,

though, is where it addresses Flynn's emphasis that because he was a General forever, he should get probation. Every memo Flynn has submitted of late has basically argued that because he gave his life to the country, he should get special treatment.

As the government notes, in the very last words of their memo, that *has* happened in the past.

In terms of comparative sentences in cases involving arguably similarly-situated defendants, we note that there are several cases involving high-ranking government officials where probationary sentences were imposed. Former National Security Advisor Sandy Berger stole classified information from the National Archives, destroyed that information, and then lied to the government about his conduct. At the government's recommendation, based in part on Berger's cooperation with the government, he received a probationary sentence. See Gov't Sent'g Mem. at 9, *United States v. Berger*, No. 05-mj-00175 (D.D.C. Sept 6, 2005) (Doc. 13); see also *Factual Basis for Plea* (D.D.C. Apr. 1, 2005) (Doc. 6). Likewise, after General David Petraeus pleaded guilty to the unauthorized retention and removal of classified documents, in violation of 18 U.S.C. § 1924, he received a probationary sentence. *United States v. Petraeus*, No. 15-cr-47 (W.D.N.C.). Here, the Court should consider these and other arguably analogous cases, along with all of the other relevant facts in this case, in fashioning a sentence that is "sufficient but not greater than necessary" to satisfy the statutory sentencing requirements under Title 18, United States Code, Section 3553(a).

Boy oh boy do these prosecutors look reasonable, huh, noting that powerful people sometimes get probation for things the little people go to

prison for.

Except we know how Emmet Sullivan feels about Generals who think they should get special treatment because they're high-ranking Generals, because he said so explicitly when Rob Kelner raised David Petraeus back in December 2018.

MR. KELNER: In addition, I would note there have been other high profile cases, one involving a four-star general, General Petraeus.

THE COURT: I don't agree with that plea agreement, but don't –

[snip]

THE COURT: All right. Let me just say this. I probably shouldn't. Having said that, I probably shouldn't. I don't agree with the Petraeus sentence. I'm sorry. I don't see how a four-star general gives classified information to someone not authorized to receive it and then is allowed to plead to a misdemeanor, but I don't know anything about it. Maybe there were extenuating circumstances. I don't know. It's none of my business, but it's just my opinion.

And that has no impact – I would not take that into consideration in whatever sentence I impose here. Just based upon what I know about that case, I just disagreed with it. That's all.

Yes, the prosecutors look totally docile in this memo. They're disputing Flynn's point, but ultimately they're recommending the same thing they've always recommended, a guidelines sentence. They're doing that because it inoculates them against *any* claim that their decision not to have Flynn testify affected his sentence, and they're doing so to make clear that what Flynn is doing, in requesting to blow everything up, he's doing even though the same

guidelines sentence remains on the table. What comes next will be entirely his own fault.

And, yes, they mention probation, just like Flynn did. But in doing so, they almost certainly did so in a way that only exacerbates Sullivan's innate disgust with powerful people who ask for special treatment.