BILLY BARR PUT A FIREARMS PROSECUTOR IN CHARGE OF REVIEWING A COUNTERINTELLIGENCE INVESTIGATION

The NYT published a story yesterday that will be very handy for the amicus that Emmet Sullivan appointed in the Mike Flynn case, John Gleeson. It describes two pieces of evidence that St. Louis US Attorney Jeffrey Jensen (whom Barr ordered to conduct a review of Flynn's prosecution) and Timothy Shea (whose name was on the motion to dismiss asking Sullivan to dismiss the case) failed to account for in their motion.

Most notably, prosecutors interviewed Bill Priestap two days before the motion to dismiss, on May 5. Priestap's notes have been portrayed by Flynn's team as proof that the FBI tried to entrap Flynn. In the interview, Priestap disputed the interpretation of the notes that had already been released a week earlier.

> That interpretation was wrong, Mr. Priestap told the prosecutors reviewing the case. He said that F.B.I. officials were trying to do the right thing in questioning Mr. Flynn and that he knew of no effort to set him up. Media reports about his notes misconstrued them, he said, according to the people familiar with the investigation.
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> [snip]
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> Mr. Jensen and Ms. Ballantine, herself a veteran prosecutor, interviewed Mr. Priestap along with another prosecutor, Sayler Fleming, and an F.B.I. agent from St. Louis who was there to memorialize the encounter.

> [snip]
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> Those notes reflected Mr. Priestap's own thoughts before meeting with F.B.I. leadership to discuss how to question Mr. Flynn, the people said. A footnote in Mr. Shea's motion included a reference to Mr. Priestap's ruminations. The motion described them as "talking points."
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> The notes also showed that the F.B.I. softened its interview strategy with Mr. Flynn. Officials decided that agents would be allowed to read back portions of the highly classified phone call transcripts to refresh Mr. Flynn's memory. F.B.I. investigators felt at the time it was important to figure out whether Mr. Flynn would tell the truth in an interview.

The article also reveals the existence of an FBI email, dated April 23, that reflects the Bureau's view that Prietap's notes were not Brady material, but gave them to Flynn's team only because they were not sensitive.

> Eventually the F.B.I. agreed to release the documents because they contained no classified or sensitive material, even though they believed they were not required to share them with the defense, according to an email from lawyers in Mr. Boente's office on April 23.

Finally, the article describes that Jensen started drafting the motion to dismiss "by the beginning of May," which would be before interviewing Priestap (the FBI's drafting of the Hillary declination before her interview is regarded as a key sin among the frothy right).

> By the beginning of May, Mr. Jensen recommended to Mr. Barr that the charge be dropped, and the team began to draft the motion to dismiss it.

> [snip]
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> As the lawyers digested the interview with Mr. Priestap, some prosecutors expressed concern that they were moving too fast. But other officials pointed out that in less than a week the department was due to respond to Mr. Flynn's motion to dismiss the case, and argued against proceeding in that matter if they were about to drop the entire case.

So Jensen's crack review of the propriety of the Flynn prosecution *first* turned over the document to Flynn, *then* started drafting the motion to dismiss, and only then decided to ask Priestap about what the notes mean. It will be interesting to discover whether whoever drafted the motion to dismiss had decided the notes were "talking points" before the Priestap interview and just ignored the interview entrely.

The NYT story reveals another detail, however: who, from Jensen's team, is conducting this review, a St. Louis prosecutor named Sayler Fleming. Fleming's day job seems to be entirely focused on prosecuting felon possession of firearms cases, along with typical related crimes, car-jacking and drug trafficking. Because of recent Supreme Court decision, that means he or she has fielded a bunch of appeals in recent months.

But nothing in PACER suggests he or she has any experience with counterintelligence at all, or even national security cases.

And that may explain one of the more egregious errors in the motion to dismiss. The motion admits that the case against Flynn, which was never closed, was predicated on both 18 USC 951 and FARA, two different kinds of Foreign Agent laws. But its analysis of the investigative purpose of the January 24, 2017 interview, claims that the FBI was only investigating the Logan Act.

> Believing that the counterintelligence investigation of Mr. Flynn was to be closed, FBI leadership ("the 7th Floor") determined to continue its investigation of Mr. Flynn on the basis of these calls, and considered opening a new criminal investigation based solely on a potential violation of the Logan Act, 18 U.S.C. § 953. See Ex. 3 at 2-3; Ex. 7 at 1-2; Ex. 8 at 1-5, FBI Emails RE: Logan Act Jan. 4, 2017. Yet discussions with the Department of Justice resulted in the general view that the Logan Act would be difficult to prosecute. Ex. 3 at 2-3; Ex. 4 at 1-2, FBI FD-302, Interview of Sally Yates, Aug. 15, 2017 (Sept. 7, 2017); Ex. 5 at 9. The FBI never opened an independent FBI criminal investigation.

The motion adopts expressive language to suggest the investigative team vacillated between whether there was a criminal investigation or not — in the process, falsely suggesting an interview would only be appropriate if there were a criminal investigation.

> Deputy Attorney General Yates and another senior DOJ official became "frustrated" when Director Comey's justifications for withholding the information from the Trump administration repeatedly "morphed," vacillating from the potential compromise of a "counterintelligence" investigation to the protection of a purported "criminal" investigation. Ex. 3 at 5; compare Ex. 5 at 5 ("[W]e had an open counterintelligence investigation on Mr. Flynn"), with Ex. 4 at 4 ("Comey had said something to the effect of there being an 'ongoing criminal investigation'").

It then goes on to suggest that because records searches had yielded nothing in the 18 USC 951

investigation, a call showing Flynn intervened to undermine official US policy with no hint that he did so on Trump's orders would not by itself be relevant to a Foreign Agent investigation.

> In the case of Mr. Flynn, the evidence shows his statements were not "material" to any viable counterintelligence investigation—or any investigation for that matter—initiated by the FBI. Indeed, the FBI itself had recognized that it lacked sufficient basis to sustain its initial counterintelligence investigation by seeking to close that very investigation without even an interview of Mr. Flynn. See Ex. 1 at 4. Having repeatedly found "no derogatory information" on Mr. Flynn, id. at 2, the FBI's draft "Closing Communication" made clear that the FBI had found no basis to "predicate further investigative efforts" into whether Mr. Flynn was being directed and controlled by a foreign power (Russia) in a manner that threatened U.S. national security or violated FARA or its related statutes, id. at 3.
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> With its counterintelligence investigation no longer justifiably predicated, the communications between Mr. Flynn and Mr. Kislyak—the FBI's sole basis for resurrecting the investigation on January 4, 2017—did not warrant either continuing that existing counterintelligence investigation or opening a new criminal investigation. The calls were entirely appropriate on their face.

When the motion gets around to arguing — relying on the transcripts but not providing them — that Flynn's call was totally cool, it assessed that question in terms of FARA (undisclosed lobbying) not 18 USC 951.

> Nor was anything said on the calls themselves to indicate an inappropriate relationship between Mr. Flynn and a foreign power. Indeed, Mr. Flynn's request that Russia avoid "escalating" tensions in response to U.S. sanctions in an effort to mollify geopolitical tensions was consistent with him advocating for, not against, the interests of the United States. At bottom, the arms-length communications gave no indication that Mr. Flynn was being "directed and controlled by … the Russian federation," much less in a manner that "threat[ened] … national security." Ex. 1 at 2, Ex. 2 at 2. They provided no factual basis for positing that Mr. Flynn had violated FARA.

The motion then imagines that counterintelligence investigators would only interview someone about a transcribed call to learn his recollection of what had been said, again suggesting the Logan Act would be the only reason to interview Flynn.

> With no dispute as to what was in fact said, there was no factual basis for the predication of a new counterintelligence investigation. Nor was there a justification or need to interview Mr. Flynn as to his own personal recollections of what had been said. Whatever gaps in his memory Mr. Flynn might or might not reveal upon an interview regurgitating the content of those calls would not have implicated legitimate counterintelligence interests or somehow exposed Mr. Flynn as beholden to Russia.
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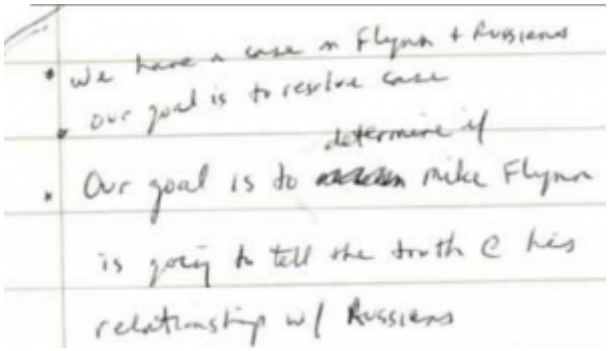
> Notably, at this time FBI did not open a criminal investigation based on Mr. Flynn's calls with Mr. Kislyak predicated on the Logan Act. See Ex. 7 at 1-2.4 See Ex. 3 at 2-3; Ex. 4 at 1-2; Ex. 5 at 9. The FBI never attempted to

> open a new investigation of Mr. Flynn on these grounds. Mr. Flynn's communications with the Russian ambassador implicated no crime.

These moves in the motion to dismiss were always obviously problematic. The exhibits submitted with the motion, including Priestap's own notes, make it crystal clear that the purpose of the interview was not primarily to investigate the Logan Act, but to determine whether Flynn was hiding a clandestine relationship with Russia, a question primarily implicating 18 USC 951, and in no way limited to or even primarily about FARA, as one claim in this motion suggests.



As such, the claims made about the counterintelligence investigation affirmatively misrepresent even the exhibits submitted in support of the filing. Plus, as noted, the motion makes claims about the transcripts, doesn't provide them, but the exhibits provide abundant evidence to suggest those claims are wrong (the op-ed Gleeson wrote last week laying out the addition steps Sullivan might take in response to the motion to dismiss specifically suggests Sullivan order the release of the transcripts). Nor does the motion account for the fact that *to this day* the public evidence claims (improbably) that Flynn was acting on his own when he made that call, which by itself would support a counterintelligence investigation.

In other words, the motion to dismiss makes obvious errors of fact and claims backed by no evidence (and refuted by the evidence present)

pertaining to what FBI’s counterintelligence interests would be when the incoming National Security Advisor, seemingly freelancing, called up the country that just attacked us and undermined the official US policy.

One possible explanation for those errors and omissions is that the one career prosecutor Billy Barr put in place to conduct this review is perfectly suited to chasing down felons brandishing guns, but totally inappropriate to assess a counterintelligence investigation.