

IN OPPOSING MANDAMUS, JUDGE SULLIVAN NOTES SCHRODINGER'S MATERIALITY

Beth Wilkinson, the attorney representing (with the approval of the Office of US Courts) Judge Emmet Sullivan in Mike Flynn's mandamus petition has submitted her brief making a very strong case opposing the petition. The brief argues what I have: that DOJ argued repeatedly and forcefully that Mike Flynn's lies were material – and Judge Sullivan twice agreed – before DOJ flip-flopped and claimed the lies were not material.

Wilkinson lays out three instances where the government has argued Flynn's lies were material and the District has agreed.

December 1, 2017

The statement of offense recounted three sets of materially false statements. Two involved lies Mr. Flynn told to the FBI, in a January 24, 2017 interview, regarding his contacts with Russia and other countries regarding U.S. foreign policy. Id. at 2–5. The remaining statements involved lies to the DOJ, in documents Mr. Flynn filed on March 7, 2017, about work that he and his consulting firm did for Turkey. Id. at 5.

[snip]

At this hearing, the government represented the basis for its charge. Among other things, the government claimed that “the defendant made material false statements and omissions during an interview with the [FBI] on

January 24, 2017” regarding his interactions with Russia, *id.* at 14; that “[a]t the time of the interview, the FBI had an open investigation into Russia’s efforts to interfere in the 2016 presidential election,” *id.* at 14–15; and that “on March 7, 2017, the defendant filed multiple documents with [DOJ] ... pertaining to a project performed by him and his company for the principal benefit of the Republic of Turkey” where “the defendant made materially false statements and omissions,” *id.* at 17. The government also provided a detailed description of why each statement was materially false. See *id.* at 15–18.

December 18, 2018

A full year after Mr. Flynn originally pleaded guilty, the parties filed sentencing memoranda. The government’s memorandum reiterated that Mr. Flynn’s false statements in both the January 2017 FBI interview and the March 2017 DOJ filings were “material” under § 1001. Dkt. 46 at 2–4. Mr. Flynn “d[id] not take issue” with the government’s description of his offense. Dkt. 50 at 7.

[snip]

Only after these repeated offers and colloquies did Judge Sullivan accept Mr. Flynn’s guilty plea to making materially false statements to the government. *Id.* at 16.

January 7, 2020

In January 2020, the government filed a supplemental sentencing memorandum, reiterating its representations about Mr. Flynn’s guilt. See Dkt. 150 at 5–14. The government again asserted that “this

case is about multiple false statements that the defendant made to various DOJ entities.” Id. at 5; see also id. at 9, 12–13, 17 (explaining bases for materiality). The government recommended that Mr. Flynn be sentenced to 0 to 6 months in prison, noting that he had committed a “serious” offense, in a position of “public trust,” that undermined “[t]he integrity of our criminal justice [system, which] depends on witnesses telling the truth. That is precisely why providing false statements to the government is a crime.” Id. at 2, 26, 31.

After claiming Flynn’s lies were material three different times, the brief notes, DOJ and Flynn claimed they weren’t.

May 7, 2020

After spending more than two years claiming that Mr. Flynn’s “false statements to the FBI on January 24, 2017, were absolutely material,” Dkt. 132 at 10, the government now claimed that any lies by Mr. Flynn in the same interview were “not ... material,” Dkt. 198 at 2.

This flip-flop is one of four things Wilkinson points to that questions any presumption of regularity here. First, she notes that the government has not withdrawn its past filings, including those asserting Flynn’s lies were material.

Fourth, the government has not moved to withdraw any of its prior pleadings in the case, including its sentencing memoranda, or any of the representations it previously made in open court regarding the purported materiality of Mr. Flynn’s false statements.

Then she notes that the government is now claiming that all those past statements, made under the Rules of Professional Conduct requiring accurate representations to the court, were not true.

The relevant facts are set forth in detail above. For several years, the government represented to the district court, across multiple court filings and appearances, that Mr. Flynn was guilty of making materially false statements. As recently as January of this year, the government maintained those representations. And Mr. Flynn repeatedly affirmed his guilt, under oath and penalty of perjury, despite being given multiple opportunities to disclaim it. It was not until this year that Mr. Flynn, and then the government, told the district court that its finding of guilt should be reversed and that the government's prior solemn representations were legally and factually untrue.

I've argued that DOJ has put itself in a position where their current stance may be estopped by all their prior stances. Wilkinson has certainly laid out the record to make that case.

Update: Corrected that Wilkinson only included the times DOJ and Flynn agreed the lies were material, a total of three times. Judge Sullivan has found them to be one more time.