JUDGE SULLIVAN CALLS BULLSHIT ON DOJ'S PRETEXTUAL REASONS FOR BLOWING UP THE MIKE FLYNN PROSECUTION

As described in this post, Judge Emmet Sullivan dismissed Mike Flynn's prosecution as moot. In his opinion dismissing the case, he asserted his authority to weigh whether DOJ's motion to dismiss Flynn's prosecution was in the public interest, while stopping short of doing so since the decision is moot. That part of the opinion affirmed District court authority to weigh whether DOJ has done something corrupt in blowing up Mike Flynn's plea.

Along the way, Sullivan made it quite clear he believed that DOJ was lying about their two main excuses *for* blowing up Flynn's prosecution — that his lies weren't material nor were they clearly lies.

> Given this context, the new legal positions the government took in its Rule 48(a) motion and at the motion hearing raise questions regarding its motives in moving to dismiss. The government advances two primary reasons8 justifying dismissing the case based on its assessment of the strength of the case: (1) it would be difficult to prove the materiality of Mr. Flynn's false statements beyond a reasonable doubt; and (2) it would be difficult to prove the falsity of those statements beyond a reasonable doubt. See Gov't's Reply, ECF No. 227 at 31. As explained below, the Court finds both stated rationales dubious to say the least, arguably overcoming the strong presumption of

> regularity that usually attaches to prosecutorial decisions.

Sullivan argues Flynn's lies were material under the DC circuit's standard

As Sullivan laid out, in their efforts to justify blowing up the Mike Flynn prosecution, the government adopted a totally new standard for materiality.

> In making its arguments, however, the government relies on a newly-minted definition of "materiality" that is more circumscribed than the standard in this Circuit. The government describes the materiality threshold as requiring more than "mere 'relevance'"; rather, the false statement must have "probative weight" and be "reasonably likely to influence the tribunal in making a determination required to be made." Gov't's Mot. Dismiss, ECF No. 198 at 12-13 (quoting Weinstock v. United States, 231 F.2d 699, 701 (D.C. Cir. 1956)). Therefore, "[t]he materiality threshold thus ensures that misstatements to investigators are criminalized only when linked to the particular 'subject of [their] investigation.'" Id. at 13 (quoting United States v. Kim, 808 F. Supp. 2d 44, 59 (D.D.C. 2011)).

After laying out what the standard really is — whether a lie is capable of affecting the general function of the FBI — Sullivan then notes that the government had previously argued that Flynn's lies *were* material.

> Given the materiality threshold's expansive scope, the government's new

> use of the narrowed definition of "materiality" is perplexing, particularly given that the government has previously argued in this case that the materiality standard required only that a statement have a "natural tendency to influence, or [be] capable of influencing." See Gov't's Surreply Def.'s Reply Support Mot. Compel, ECF No. 132 at 10-11. The government, for its part, offers no response as to why it relies on this new, more stringent definition. Nor does the government direct the Court's attention to any other case in which it has advanced this highly-constrained interpretation of materiality as applied to a false statements case.

He then lays out how — going even further — DOJ claimed it didn't need to adhere to any standard of law, much less the precedent for this circuit. Sullivan uses that to argue that the government has lost the presumption of regularity.

> Notably, during the September 29, 2020 motion hearing, the government seemed to suggest that, when moving for dismissal of an action pursuant to Rule 48(a), the government need not refer to the correct materiality standard at all when determining whether a false statement is "material." See Hr'g Tr., ECF No. 266 at 78:21-79:3 ("[W]hen we move to dismiss, the question in our mind is not what is the legal standard of materiality for whether the evidence here will be sufficient to sustain a conviction on appeal. The question is whether we, the Department of Justice, think this evidence is material . . . ."). In view of the government's previous argument in this case that Mr. Flynn's false statements were "absolutely material" because his false statements "went to

> the heart" of the FBI's investigation, the government's about-face, without explanation, raises concerns about the regularity of its decision-making process.

Importantly (as I'll return to), the opinion engages in a page-long discussion about the bullshit excuses DOJ has floated to argue these lies weren't material.

> Several of the government's arguments regarding materiality also appear to be irrelevant or to directly contradict previous statements the government has made in this case. For example, as Mr. Gleeson points out, many of the "bureaucratic formalities" the government asserts reveal the "confusion and disagreement about the purpose and legitimacy of the interview and its investigative basis"—such as the drafting of the FBI's Closing Communication or internal conversations between FBI and Department of Justice officials regarding whether to notify the Trump administration of Mr. Flynn's false statements—are not relevant to proving materiality. See Amicus Reply Br., ECF No. 243 at 19. Nor is it relevant whether Mr. Flynn was an "agent of Russia" or guilty of some other crime at the time he made the false statements. Furthermore, while the government argues that, "since the time of [Mr. Flynn's guilty] plea, extensive impeaching materials had emerged about key witnesses the government would need to prove its case," Gov't's Reply, ECF No. 227 at 35; the government had been aware of much of this evidence since early on in the case, see, e.g., Gov't's Response Def.'s Mot. Compel, ECF No. 122 at 8-9.

Sullivan closes that section by reasserting the

standard that the government can't just invent bullshit to justify its decisions.

> Under Ammidown, the Court must be satisfied that the government undertook a "considered judgment," 497 F.2d at 620; and asserting a factual basis that is largely irrelevant to meeting any legal threshold likely does not meet this standard.

Sullivan debunks DOJ's claims that Flynn may not have lied

Then Sullivan debunks DOJ's claims that there was any doubt that Flynn lied, focusing primarily on the import of the fact that Peter Strzok and Joe Pientka didn't believe he exhibited signs of lying when walking out of the interview. Primarily, this discussion focuses on how the claim is legally irrelevant and conflicts with what DOJ has said in the past.

> The government's second rationale is that it "does not believe it could prove that Mr. Flynn knowingly and willfully made a false statement beyond a reasonable doubt." Gov't's Mot. Dismiss, ECF No. 198 at 18; see also Gov't's Reply, ECF No. 227 at 38-39. To support this rationale, the government initially pointed to the fact, which was known at the time Mr. Flynn pled guilty, that the FBI agents who interviewed him did not think he was lying, and it also noted the "equivocal" or "indirect" nature of Mr. Flynn's responses. Gov't's Mot. Dismiss, ECF No. 198 at 18. The government further contends that evidentiary problems have "emerged" including: (1) "inconsistent FBI records as to the actual questions and statements made," id. at 19; (2) "Director [James] Comey's own sentiment

> that the case was a 'close one,'" id. (quoting Ex. 5 to Gov't's Mot. Dismiss, ECF No. 198); and (3) "substantial impeaching materials on the key witnesses,"9 Gov't's Reply, ECF No. 227 at 39.
>
> [snip]
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> As an initial matter, whether or not the FBI agents thought Mr. Flynn was lying is irrelevant in a false statements case. See Brogan v. United States, 522 U.S. 398, 402 (1998). And the government has not explained how evidence that the government previously stated was "consistent and clear," Gov't's Surreply, ECF No. 132 at 4-5; suddenly became "equivocal" or "indirect." With regard to the "inconsistent records" rationale, the government has not pointed to evidence in the record in this case that contradicts the FD-302 that memorialized the FBI agents' interview with Mr. Flynn.

Sullivan then goes on to debunk a lot of the other bullshit DOJ threw into his docket. I'll return to this. But the important point is that Sullivan relied on DOJ's past assertions to debunk the claims that DOJ later threw up.

Having reviewed DOJ's two substantive excuses for blowing up Flynn's prosecution, Sullivan suggests they've forfeited the presumption of regularity they'd need to convince him to dismiss Mike Flynn's prosecution, but ultimately avoids saying whether he would have rejected their request or not because the question is moot.

> Again, under Ammidown, the Court must be satisfied that the government undertook a "considered judgment." 497 F.2d at 620. Asserting factual bases that are irrelevant to the legal standard, failing to explain the government's

> disavowal of evidence in the record in this case, citing evidence that lacks probative value, failing to take into account the nature of Mr. Flynn’s position and his responsibilities, and failing to address powerful evidence available to the government likely do not meet this standard.
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> Thus, the application of Rule 48(a) to the facts of this case presents a close question. However, in view of the President’s decision to pardon Mr. Flynn, Mr. Flynn’s acceptance of the pardon, and for the reasons stated in the following section, the appropriate resolution is to deny as moot the government’s motion to dismiss pursuant to Rule 48(a).

So first Sullivan laid out *that* he had the authority to decide, but stopped short of deciding because the question is moot. Then he laid out abundant reason why DOJ had forfeited the presumption of regularity such that their rationale for asking that the case be dismissed would otherwise have to be accepted, but once again stops short of ruling, because the question is moot.

He has the authority to decide but won’t because the question is moot.

He shows all the evidence that the government is full of shit, but does not rule as such, because the question is moot.

Because the government has very little way to appeal either of these rulings, the rest of the opinion (and the steps Sullivan took to get there) will likely never be appealed. Sullivan has laid a record out that almost certainly cannot be challenged. He has used the mootness of the question as a shield to lay out two key judgments: that he could decide, and that he could have decided against the government.