

TOM BARRACK SUGGESTS HE CAN'T BE PROSECUTED BECAUSE IT DIDN'T HAPPEN EARLY ENOUGH TO BE OBSTRUCTED

Tom Barrack has filed a previously scheduled motion to dismiss his prosecution.

It consists of challenges to the Foreign Agent – 18 USC 951 – charge against him that rely heavily on the Bijan Kian case, which is in a different circuit and very much in flux. Though as always disputes about this Foreign Agent application are of interest.

It includes a typical challenge based on FBI's practice of writing up reports of interviews rather than recording them. This challenge might or might not include more valid complaints about the 302 than similar challenges that have failed in the past (we'll find out at the end of February when the government files its response).

Moreover, the sole record the government chose to create are the handwritten notes of a single case agent that reflect little more than the agent's subjective commingling of the questions and answers into shorthand assertions, wholly devoid of the actual questions asked and answers given.

[snip]

Similarly, Count 6 alleges that Mr. Barrack "falsely stated [that he) had no role in facilitating communications between the President-Elect and officials from the United Arab Emirates[.]" Indictment ,r 105. The

indictment alleges that this statement was false because Mr. Barrack supposedly “arrang[ed] one or more telephone calls between the President-Elect and Emirati Official 1 and Emirati Official 2” and because he “provid[ed] contact information” for Emirati officials to the President-Elect’s assistant. As with Count 4, however, the record does not reflect whether the ambiguous term “facilitating communications” was used by the government in its question or instead whether those were words used by Mr. Barrack in his response.

But the bulk of this motion to dismiss consists of an insinuation that this prosecution should have been successfully obstructed by Donald Trump.

Barrack doesn’t say that outright. Instead, he raises the fact that he was charged two years after his interview. He says that over and over. He even asks for discovery as to why it happened that way.

After that June 2019 interview, Mr. Barrack heard nothing more from the prosecutors. They did not contact him or his counsel to express any concerns about the information he provided or to discuss potential charges or a pre-indictment presentation. Meanwhile, Mr. Barrack continued working as Executive Chairman of his company and in that role made dozens of trips overseas, including to the Middle East. He also continued to act as an informal advisor to the Administration on foreign and economic policy with no indication by the government that he was supposedly an undisclosed foreign agent or national security threat.

On July 20, 2021, after two years of silence, more than a dozen armed FBI agents burst into a Los Angeles office

where Mr. Barrack was attending a business meeting and took him into custody. He was incarcerated in a California general population prison for four days until he was released under extremely harsh and virtually unprecedented bail conditions.

Third, the government waited two years long after memories of the precise language used during the interview would have faded to charge Mr. Barrack with multiple felony counts premised on allegedly false statements

[snip]

The government appears to have taken few investigative steps following Mr. Barrack's June 2019 interview, waiting for two years before bringing charges. This delay is even more inexplicable given that the government's actions since Mr. Barrack's interview do not reflect any apparent concern that he was a foreign agent or national security threat, even though he traveled overseas more than a dozen times and continued to have access to senior White House personnel and the President. The Due Process Clause protects defendants against such prejudicial, unjustified pre-indictment delay. See *United States v. Lovasco*, 431 U.S. 783, 789 (1977); *United States v. Marion*, 404 U.S. 307, 324 (1971); see also Fed. R. Crim. Proc. 48(b) (allowing dismissal of indictment for pre-indictment delay). To establish such a due process violation, a defendant must show both that he was prejudiced by the delay and that the government acted with an impermissible mens rea in delaying the indictment. Because both are present here, the indictment must be dismissed in full. Or, at the very least, the Court should allow discovery into the reasons for the

government's extended delay.

[snip]

Finally, the government's unjustified two-year delay in charging Mr. Barrack also warrants dismissal of the indictment. The government had all the evidence on which the indictment was based in 2019. The indictment pleads the conspiracy terminated in April 2018, and the alleged false statements occurred in June 2019. Why the government waited more than two years, and until after a change in administration, is a question only it can answer, but it should answer it especially given the paramount First Amendment interests at stake. Had the government brought this case when its investigation was complete in 2019, recollections regarding Mr. Barrack's June 2019 interview would have been fresh and the harm from the government's failure to make a contemporaneous record might have been mitigated. The lengthy delay has also prejudiced Mr. Barrack's ability to identify, preserve, and secure documentary evidence and obtain evidence from witnesses whose memories have faded. The government has provided no explanation for its delay, and the specter that the government intentionally delayed bringing this case for political reasons or tactical advantage hangs heavily over this case. Because Mr. Barrack has been deprived of a fair opportunity to defend himself, the indictment should be dismissed. [my emphasis]

Barrack's suggestion – probably correct – that any charges under Donald Trump wouldn't have survived Billy Barr's meddling and Donald Trump's pardons are all the more curious given his suggestion that the White House and intelligence agencies deleted records involving his actions.

To that point, the government has not produced, or perhaps not even searched for, internal memoranda or communications in government offices such as the White House or the intelligence agencies that were in the possession of key individuals in the campaign and Administration with whom Mr. Barrack was in communication about the matters alleged in the indictment. Moreover, it is doubtful that texts and emails once in the possession of such witnesses can now be reasonably obtained, especially with the change of administration.

While an intriguing insinuation, this seems to say more about the way that Jared Kushner and Trump were protected by this investigation than anything else; Barrack does not, here, make a claim that this should have been turned over in discovery. (I suspect the charges were scoped the way they were to implicate Trump and Kushner as little as possible, which I noted here.)

Unless the 302 problems are unique – and nothing here suggests they are – the way in which DOJ backstopped this with the false statements charges will make this indictment less susceptible to challenge on the face of the law.

But before it gets there, this challenge will be a test of DOJ's ability to wait out an obstructionist President and Attorney General to prosecute an alleged criminal.