

Checking Robert Mueller - WSJ

The sentencing judge brings to light dodgy FBI conduct in the Mike Flynn case.

By Kimberley A. Strassel Dec. 13, 2018 7:03 p.m. ET

Robert Mueller has operated for 19 months as a law unto himself, reminding us of the awesome and destructive powers of special counsels. About the only possible check on Mr. Mueller is a judge who is wise to the tricks of prosecutors and investigators. Good news: That's what we got this week.

Former national security adviser Mike Flynn a year ago pleaded guilty to one count of lying to the Federal Bureau of Investigation about his conversations with Russia's ambassador to the U.S. Mr. Flynn's defense team this week filed a sentencing memo to Judge Emmet Sullivan that contained explosive new information about the Flynn-FBI meeting in January 2017.

Judge Emmet Sullivan in Washington, May 1, 2008. PHOTO: CHARLES DHARAPAK/ASSOCIATED PRESS

It was arranged by then-Deputy FBI Director Andrew McCabe, who personally called Mr. Flynn on other business, then suggested he sit down with two agents to clear up the Russia question. Mr. McCabe urged Mr. Flynn to conduct the interview with no lawyer present—to make things easier.

The agents (including the infamous Peter Strzok) showed up within two hours. They had already decided not to inform Mr. Flynn that they had transcripts of his conversations or give him the standard warning against lying to the FBI. They wanted him “relaxed” and “unguarded.” Former Director James Comey this weekend bragged on MSNBC that he would never have “gotten away” with such a move in a more “organized” administration.

The whole thing stinks of entrapment, though the curious question was how the Flynn defense team got the details. The court filing refers to a McCabe memo written the day of the 2017 meeting, as well as an FBI summary—known as a 302—of the Flynn interview. These are among documents congressional Republicans have been fighting to obtain for more than a year, only to be stonewalled by the Justice Department. Now we know why the department didn't want them public.

They have come to light thanks to a man who knows well how men like Messrs. Mueller and Comey operate: Judge Sullivan. He sits on the U.S. District Court in the District of Columbia, and as he [wrote](#) for the Journal last year, he got a “wake-up call” in 2008 while overseeing the trial of then-Sen. Ted Stevens of Alaska. Judge Sullivan ultimately assigned a lawyer to investigate Justice Department misconduct.

The investigator's report found prosecutors had engaged in deliberate and repeated ethical violations, withholding key evidence from the defense. It also excoriated the FBI for failing to write up 302s and for omitting key facts from those it did write. The head of the FBI was Mr. Mueller.

Judge Sullivan has since made it his practice to begin every case with a Brady order, which reminds prosecutors of their constitutional obligation to provide the defense with any exculpatory evidence. On Dec. 12, 2017, days after being assigned the Flynn case, Judge Sullivan issued such an order, instructing Mr. Mueller's team to turn over "any evidence in its possession that is favorable to defendant and material either to defendant's guilt or punishment." Had any other judge drawn the case, we likely would never have seen these details of the FBI's behavior.

It's clear that something has concerned the judge—who likely sees obvious parallels to the Stevens case. The media was predicting a quick ruling in the Flynn case. Instead, Judge Sullivan issued new orders Wednesday, demanding to see for himself the McCabe memo and the Flynn 302. He also ordered the special counsel to hand over by Friday any other documents relevant to the Flynn-FBI meeting.

Given his history with the FBI, the judge may also have some questions about the curious date on the Flynn 302—Aug. 22, 2017, seven months after the interview. Texts from Mr. Strzok and testimony from Mr. Comey both suggest the 302 was written long before then. Was the 302 edited in the interim? If so, by whom, and at whose direction? FBI officials initially testified to Congress that the agents did not think Mr. Flynn had lied.

Judges have the ability to reject plea deals and require a prosecutor to make a case at trial. The criminal-justice system isn't only about holding defendants accountable; trials also provide oversight of investigators and their tactics. And judges are not obliged to follow prosecutors' sentencing recommendations.

No one knows how Judge Sullivan will rule. His reputation is for being no-nonsense, a straight shooter, an advocate of government transparency. Whatever the outcome, he has done the nation a favor by using his Brady order to hold prosecutors to some account and allow the country a glimpse at how federal law enforcement operates. Which is the very least the country can expect.

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