

1 my sense of this is that there is no predicate for this
2 investigation, none. And that the kind of thing that we're
3 talking about here is the kind of thing that would surface if
4 you looked at any government official's e-mail. I mean this
5 is not a matter of mathematics. It's just a person
6 attempting to engage in government service.

7 By saying this, I don't mean to concede any even
8 technical wrongdoing because I don't believe any occurred.
9 But to the extent an argument could be made that any sort of
10 de minimis forwarding of internal government material might
11 have occurred, it is de minimis and not something that should
12 be the subject of an investigation. You know investigative
13 activity even by an IG or the Department of Justice or
14 anybody else has a chilling effect on a person's activities
15 and creates a lot of anxiety. And my suggestion is that
16 there is, like I said, no predicate for this one. And that
17 it should be closed down.

18 MR. BERRY: Okay. Well, I respectfully disagree with
19 you. And we will be issuing a report.

20 MR. FINE: Can I ask this question, though? What's the
21 predicate for looking at all of his e-mails was as opposed to
22 looking at somebody else's e-mails? Because I agree with
23 Barry that if you look at e-mails, it's likely to turn up
24 examples of this in many, many officials' e-mails. And has
25 this been a fair and universal look at e-mails in the NLRB or

1 is it just focusing on one or two individuals?

2 MR. BERRY: This came up as the result of another
3 investigation. So this is not that we just went and pulled
4 his e-mail account and decided to look at him. It came up in
5 the course of a different investigation. And, actually, it
6 came up because of his -- got initiated because of his
7 communications with Peter Kirsanow.

8 MR. FINE: But have you done this with others as well or
9 is this just simply focused on him? Because I think --

10 MR. BERRY: Well, I'm not --

11 MR. FINE: -- as Barry mentioned, the kinds of things
12 that we're seeing here are the kinds of things that I would
13 venture to say happens quite frequently. And that if you're
14 looking at one, are you going to also look at others as well.

15 MR. BERRY: If I have evidence other people are engaging
16 in this type of conduct, we would look at other individuals.
17 But I'm not going to go look at everyone's e-mail account
18 without some basis for doing so. We looked at Mr. Flynn's e-
19 mail account because we had a basis for doing so. We don't
20 routinely just go look at e-mail accounts.

21 MR. FINE: Well, but if you see that it is happening on
22 one or what you believe is happening in one instance,
23 wouldn't you want to go look and see whether it is happening
24 in others as well?

25 MR. BERRY: Well, I think you would have to have some

1 basis to believe that it is happening with other individuals.
2 We haven't.

3 MR. FINE: Well, I guess --

4 MR. BERRY: Well, I can tell you this, though, we have
5 had to talk to some other individuals about some of this
6 information, whether or not it was public information or
7 whether or not it was, you know, what the Agency considers
8 deliberative or something like that. We certainly don't make
9 that call ourselves. And other individuals who have looked
10 at it have identified it as deliberative. This is not just
11 me saying this is a problem or this is deliberative. We've
12 also had discussions with the Office of Government Ethics,
13 and they concur with our analysis of various ethics
14 provision.

15 MR. COBURN: It'll be an issue of fact, you know. I
16 mean if push comes to shove, it will be. I mean from my
17 point of view, I didn't see anything that could be
18 legitimately characterized as deliberative. And to the
19 extent there is anything that could conceivably be
20 characterized as internal even, it's just absolutely de
21 minimis in my view.

22 MR. BERRY: You're doing a fine job of advocating for
23 your client. But --

24 MR. COBURN: Oh, I don't mean, I don't really -- I don't
25 actually sort of mean to. I mean I haven't even started

1 that, you know; I'm just, you know, this is just kind of in
2 the privacy of this room, in the context of his providing his
3 voluntary statement. I mean I think it's just something that
4 I hope you are going to consider. Like I said, my remark
5 about not living in a bubble. I mean what we want, it seems
6 to me, is for government officials to be available and
7 accessible and to interact with other people who are
8 interested in what the agencies are doing. That's the whole
9 motion of transparency and fosters good agency decision
10 making and that kind of thing. That's all he was doing.

11 MR. FINE: And I would venture to say if there is a
12 problem, and you see there is a problem here in this one
13 instance, probably would have a broader problem in other
14 instances, and I think it's not fair just to simply look at
15 one rather than look at the Agency as a whole as to what the
16 practices are, what they are doing, what they are not doing,
17 whether it is a common practice or not. And to pull out
18 somebody's e-mails and look at one, in the absence of looking
19 at a broader perspective, I think is not fair.

20 MR. COBURN: We appreciate the opportunity to talk with
21 you about this and to be present during the interview. And
22 we're not really trying to throw down any gauntlets here.
23 We're just trying to promote some good decision making, we
24 hope, at the earliest possible moment.

25 MR. FINE: And we also appreciate your willingness to

1 consider having us look at the report because I think it is
2 more than just facts at this point. They are facts, but they
3 lead to analysis, as you were just even talking about just
4 then. So to the extent that there is those kind of factual
5 issues and analysis, I think it's very important for us to
6 have an opportunity to comment on it so there is not just one
7 perspective, but it's Mr. Flynn's perspective as well.

8 MR. BERRY: Well, if you find the e-mail you sent to
9 Member Schaumber saying that you sent that analysis to him in
10 error, we'd be more than happy to include that in our
11 consideration.

12 MS. JANDRAIN: Can we, before we finalize the record,
13 can we have just a moment to speak outside?

14 MR. BERRY: Sure.

15 **(Off the record until 4:40 p.m.)**

16 MR. BERRY: So this concludes the interview, if no one
17 has anything further to say.

18 MR. COBURN: Thank you.

19 **(Whereupon, at 4:40 p.m., the interview in the above-entitled**
20 **matter was concluded.)**

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CERTIFICATION

I, CATHY BELKA, a court reporter and Notary Public in and for the State of Maryland,

DO HEREBY CERTIFY that I was authorized to and did report the foregoing Interview of TERENCE FLYNN; that the foregoing pages constitute a true and accurate record thereof.

I FURTHER CERTIFY that I am neither an attorney or counsel for, nor related to or employed by any of the parties to the action in which this deposition is taken; and furthermore, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

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My Notary Expires: MD 12/20/14

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CATHY BELKA

Court Reporter