

## DOJ's Arguments In Flynn Case Could Aid Future Defendants

By **Ronald White** (May 19, 2020, 3:10 PM EDT)

Lost in all the commentary regarding the U.S. Department of Justice's recent motion to dismiss the charges in U.S. v. Michael Flynn[1] is the fact that it holds the potential in the long run to assist other federal criminal defendants and make future prosecutions of false statement cases more difficult for the government.

By citing various factors as justifying the dismissal of charges against Gen. Flynn, including the success (or lack thereof) of the government's prior investigative steps, whether agents already knew the answers to the questions they asked the defendant, and the government's subjective assessment of the strength of the evidence, the DOJ has implicitly conceded that these factors are relevant to the elements of materiality and falsity under Title 18 of U.S. Code Section 1001.



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As a result, its motion in the Flynn case may serve as a useful precedent for defendants in false statement cases to seek discovery of, and offer evidence at trial, regarding such issues.

As is well-known, Flynn, who was then President Donald Trump's national security adviser, was charged with making false statements in violation of Section 1001 in a Jan. 24, 2017, interview with Federal Bureau of Investigation agents regarding the contents of his December 2016 telephone conversations with the Russian ambassador to the U.S., Sergey Kislyak.[2] Flynn pleaded guilty to the charge, acknowledging both that he knowingly made false statements and that they were material.[3]

On May 7, the government filed a motion to dismiss the case against Flynn on the grounds that newly discovered information had led it to conclude that it could not prove either the materiality or falsity of the alleged statements beyond a reasonable doubt.[4]

In its motion, the government noted that it no longer wished to pursue prosecution of Flynn "for a crime that it is not satisfied occurred and that it does not believe it can prove beyond a reasonable doubt." [5] With respect to materiality, the government cited a series of facts that it said resulted in its inability to establish this required element of the offense.

First, the motion noted that the FBI's previously opened investigation of whether Flynn was Russian agent (code-named Crossfire Razor) had, by the date of the interview, found no derogatory information on Flynn and had been proposed internally for closure.[6]

Even though this investigation formally remained open (since necessary supervisory approval for the closure had not yet been obtained) and the closing recommendation specifically noted that the investigation would be reopened if new information on Flynn arose, the DOJ advised the court that it did not believe Flynn's statements were material to this investigation (or any other) since it had not yielded any evidence to justify further investigative efforts.[7]

Second, the government argued that Flynn's statements, on their face, were not improper and did not constitute a basis on which to resurrect the Crossfire Razor investigation or initiate a new one, since it would not be unusual for the incoming national security adviser to have such contacts with foreign officials.[8]

Third, the government motion noted that since the FBI had transcripts of the Flynn conversations with the Russian ambassador from U.S. intelligence sources, there was no question regarding the content of the calls and no "justification or need" to interview Flynn about his recollection of the conversations.[9]

Finally, the government argued that the Jan. 15, 2017, statement by Vice President Mike Pence (in which he stated publicly that Flynn had told him that the calls did not relate to sanctions, a claim that was contradicted by the transcripts in the FBI's possession) also did not provide a justification for the interview. The motion asserted that the fact that Flynn may have misled the vice president about the subject matter of the calls "did not create a predicate for believing he had committed a crime or was beholden to a foreign power." [10]

The facts cited in the DOJ motion, such as whether an investigation was internally slated for closure and whether the agents already knew the answers to the questions asked of a witness, are largely ones that, if raised by a defendant in a routine false statement case, would likely be dismissed by the government as irrelevant to the elements of materiality and falsity.

However, with the DOJ now publicly asserting that details of the inner workings of the government's investigation, including what it knew and when, are relevant to its ability to prove the essential elements of the offense, defendants would seem to have a powerful precedent supporting their right to seek discovery regarding, or introduce evidence at trial, on these issues.

For example, the government argued that, because the prior investigation of Flynn had come up empty and was about to be closed, there was no basis for the FBI to continue that investigation and their interview of him was therefore not material.

But it is not at all unprecedented that an ongoing law enforcement investigation initially fails to turn up incriminating information (and is even slated for closure or actually closed) before investigators get some fortuitous break in the case. If the internal status of the investigation and the precise extent of the

evidence developed by agents prior to an interview is relevant to the element of materiality, a defendant would seem to have a valid claim to obtain discovery on this issue and potentially offer evidence on this point at trial in his defense.

Similarly, the government motion asserts that the new information that came to the FBI after the proposed closure of the Crossfire Razor investigation but before the interview of Flynn (the transcripts of his conversations with the Russian ambassador) showed that the conversations were appropriate and thus not a basis to continue the investigation.

But again, this argument would seem to be a precedent for a future defendant to obtain discovery regarding exactly what information was in the government's possession at the time of an interview and potentially challenge whether it was sufficient justification for agents to undertake his interview.

In its motion, the government also contended that the agents had no need to interview Flynn because they already knew the contents of the conversations he had with the Russian ambassador because it had transcripts from intelligence intercepts. While conceding that this fact does not render a statement immaterial,[11] the government noted that a false statement must still be capable of influencing an agency function or decision.

But federal agents frequently already know the answers to the questions they ask witnesses in interviews. It is commonplace for agents, having reviewed emails or telephone records or bank records or other materials, to interview witnesses both to test their veracity and seek additional information.

If, as the DOJ motion in the Flynn case contends, the agents' prior knowledge regarding the subjects they ask about is relevant to whether the answers are capable of influencing the agency and thus are material, a future defendant would presumably be justified in arguing that they should be able to obtain discovery on this point and introduce any favorable evidence on this point before the jury at trial.

Finally, the DOJ motion asserted that the fact that Flynn may have misled the vice president about the contents of his conversations also did not establish a crime or justify conducting the interview. But law enforcement frequently operates on the (entirely reasonable) inference that if someone is demonstrated to have lied about a subject, that is a potential indication that they have something to hide.

At a minimum, it is usually regarded as warranting an interview of the individual in order to determine the reason for the apparent discrepancy. Future defendants will be able to take advantage of the fact that the DOJ has arguably staked out the position that evidence of false statements (even to a high-ranking government official) raise no inference of wrongdoing and do not even justify further investigation.

The DOJ motion in Flynn takes a similar approach to its claimed inability to prove the falsity of Flynn's statements to the FBI. Despite the fact that Flynn admitted under oath at his plea allocution that he intentionally lied to the agents, the DOJ cited several reasons why it did not believe it could satisfy its

burden of proof on this element, including that the interviewing agents were not sure whether Flynn was lying and that the FBI Director considered the question of whether Flynn had intentionally lied a close one.[12]

Notably, the government did not cite these facts as ones suggesting it should exercise its prosecutorial discretion not to proceed with Flynn's case; instead, it concluded that they created reasonable doubt about whether Flynn intentionally lied.[13]

Again, the DOJ's position appears to open it up to future defense arguments that evidence regarding the government's internal decision-making and subjective assessments of a defendant's statements are relevant and admissible on the element of the falsity of a defendant's statements. If, as the government admits, such evidence can create reasonable doubt, it will be hard-pressed to resist future defense efforts to offer such evidence at trial or to obtain discovery bearing on the issue.

These concessions by the DOJ should carry weight in future cases for a number of reasons. To begin with, the government's arguments cannot be dismissed as simply the position of a single assistant U.S. attorney or a single U.S. attorney's office. Instead, as he acknowledged in interviews, they were formulated and endorsed by the attorney general himself.

In addition, the Flynn prosecution cannot be distinguished in future cases as representing some sort of unique case; absent the fact that Flynn was a White House adviser, the facts of his case amount to a run-of-the-mill false statement prosecution not unlike ones seen every day in federal courtrooms.

As a result, a DOJ committed to equal justice under the law for all persons may have a difficult time maintaining that the factors warranting dismissal of the case against Flynn do not similarly apply to defendants who are not as high profile and well-connected.

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[1] 17 CR 232 (D.D.C.).

[2] *Id.*, Information, ECF No. 1 (Nov. 30, 2017).

[3] *Id.*, Statement of the Offense, ECF No. 4 (Dec. 1, 2017).

[4] *Id.*, Government's Motion to Dismiss the Criminal Information Against the Defendant Michael T. Flynn, ECF No. 198 (May 7, 2020) (hereinafter "Motion to Dismiss").

[5] Id. at 12.

[6] Id. at 3, 13.

[7] Id. at 3-4, 13.

[8] Id. at 13-14.

[9] Id. at 15-16.

[10] Id. at 6, 16.

[11] *United States v. Safavian*, 649 F.3d 688, 691-92 (D.C. Cir. 2011).

[12] Motion to Dismiss at 18-19.

[13] Id. at 19.