CARLTON FIELDS

Flynn's False Statement Charge Reveals Failed Investigation

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A federal investigation, backed by the awesome power of the federal government, might appear impressive and awe-inspiring, similar to how the wizard first appeared to Dorothy in Oz.

But pull back the curtain on a standalone Section 1001 charge and, like Dorothy, be prepared for disappointment. What you will likely find is a failed federal investigation. The government's case against Michael Flynn offers a prime example.

The FBI's Investigation of Michael Flynn

In August 2016, the Federal Bureau of Investigation opened a counterintelligence investigation of retired U.S. Army Lt. Gen. Michael Flynn as part of its larger investigation into Russia's efforts to meddle in the 2016 U.S. presidential election.

After several months, the investigation came up short. The FBI had no evidence to support any federal charge against Flynn. The FBI's investigation of Flynn was on the verge of being shut down. Flynn's telephone calls with Russian Ambassador Sergey Kislyak in December 2016, however, gave the FBI an excuse to make one more play before walking off the field.

On January 24, 2017, two FBI agents interviewed Flynn at the White House.[1] At that time, Flynn was serving as President Trump's national security adviser. When the FBI asked Flynn about his conversations with Kislyak, Flynn's answers didn't match the transcripts of the calls.[2]

Ultimately, the special counsel charged Flynn with one count of making false statements to the FBI in violation of Title 18 of U.S. Code Section 1001(a)(2).[3] In December 2017, Flynn pleaded guilty pursuant to a plea agreement.[4] More than two years later, in May, U.S. Attorney Timothy Shea moved to dismiss the Section 1001 charge against Flynn.[5]

When the district court decided not to immediately grant the government's motion to dismiss, Flynn filed a petition with the U.S. Court of Appeals for the D.C. Circuit requesting a mandate that the district court dismiss his case. The much-anticipated oral argument on Flynn's petition took place on June 12 before a three-judge panel of the D.C. Circuit. Its decision on Flynn's petition for writ of mandamus remains pending.

The Fallout

The government's decision to seek the dismissal of Flynn's Section 1001 prosecution has triggered a tremendous amount of publicity. Those following the case generally fall into one of two camps.

On one hand, those who favor the administration support the claim that the Flynn case is further confirmation that overzealous federal agents are more interested in adding notches to their belts than serving justice; even worse, some politically motivated agents are abusing their awesome powers to exact revenge on perceived political enemies.

On the other side, critics of the administration claim this motion represents another gross and unjustifiable interference with the only department in the executive branch that is supposed to remain above political influence.

Politics aside, whether you view Flynn as a martyr or an undeserving sycophant of the president, this case is shining a light on one of the most misused charges in the federal prosecutor's toolbox. And, like it or not, the motion to dismiss Flynn's Section 1001 charge will generate some healthy skepticism of Section 1001 cases by the U.S. Department of Justice and the judiciary.

The Consolation Prize

A charge of lying to federal agents, in violation of Section 1001, is the consolation prize for an investigation that is going nowhere. That is how many *failed* white-collar investigations come to an end or how investigating agencies suggest they should end.

Why is the Section 1001 charge the offspring of the failed federal investigation? It's simple. During an investigation, it's not very difficult to find a lie. People do it all the time, even to federal agents. And detecting lies is a skillset agents develop through training and everyday human interaction.

Often, proving a statement is false tends not to be a heavy lift.[6] Take the target's statement and compare it with irrefutable evidence (like a recording of someone's telephone conversation); if the two don't match, then the statement is false. It's also not a tough sell to a prosecutor — lying is wrong; therefore, it should be punished.

Once a lie is found, drafting a charging document to support a Section 1001 charge is relatively easy. In Flynn's case, the charging document isn't even a full page of text.[7] And, for a variety of reasons, targets often accept an offer to resolve their case with a plea to a Section 1001 charge.

But most federal investigations are not Section 1001 investigations. The lie is the byproduct of the actual investigation; it's what agents encounter while conducting a federal investigation into something else. Shifting a case from its intended aim to this alternative objective should compel a moment of pause. But that rarely happens.

The Forces Driving Section 1001 Prosecutions

A Section 1001 charge allows agents to go back to their bosses, who might be annoyed that they have nothing to show for months or years of hard work, and say they can close out the case with a prosecution. Thus, investigations that would otherwise be shut down end in a charge for purposes of generating a stat for the agent and prosecutor or engineering a cooperator.

Federal prosecutors and agents don't have billable hours. Instead, they record stats — that is each charging document, trial, etc. — and they're rated based on the number and types of cases they charge. A common complaint of many federal prosecutors is that the DOJ values stats, or quantity, over the quality of their cases. That's not completely fair, but there is certainly some truth to this; just ask any current or former federal prosecutor.

The DOJ also rates U.S. attorney's offices, in part, on how many stats they generate in a year. Higher stats, in turn, help boost the office's justification for demanding a larger budget and the hiring of more prosecutors. In short, closing out cases with a prosecution keeps offices on track to get something tangible for their investigative efforts.

There is another force driving Section 1001 prosecutions—cooperation. A Section 1001 charge can easily be used to leverage cooperation from a target, as the government successfully did in the Flynn case. A plea agreement with a cooperation provision incentivizes defendants, like Flynn, to cooperate in hopes of earning cooperation credit and a reduced sentence.[8]

In Flynn's case, the government got a high-profile stat with his guilty plea plus 19 cooperation sessions, which, at the very least, led to the indictment of two people in the U.S. District Court for the Eastern District of Virginia.[9] Ultimately, Flynn's cooperation rose to the level of substantial assistance, so the government honored its agreement and moved to reduce Flynn's sentence.[10]

Although it might appear as though the government got something it wanted (cooperation) and so did Flynn (the government's support for a reduced sentence), the way this case came about shows

the government is prone to pursuing unwarranted Section 1001 charges in hopes of salvaging an otherwise failed investigation.

During Flynn's original sentencing hearing, the government admitted it could not charge him with treason,[11] and the potential Logan Act violation was a dud.[12] Thus, the Section 1001 charge came to the rescue to seize victory out of the clutches of defeat.

Section 1001 - Charging Made Easy

There is a lot of noise surrounding Flynn's in-court admissions to making false statements to the FBI. U.S. District Judge Emmett Sullivan is entertaining the possibility of holding Flynn in contempt for committing perjury, now that Flynn has retracted those admissions. This would be a mistake.

To support a Section 1001 charge, a defendant must know his statements are false at the time he makes them.[13] Flynn's admissions of falsity, however, seem questionable. No one remembers the precise wording of how he or she answered a couple of questions 11 months earlier. That is why people use records to refresh their recollection.

In this case, Flynn reviewed an interview report days before his change-of-plea hearing, and months after the events occurred, describing the FBI's recollection of the interview. Likely, Flynn's memory of how he answered the FBI's questions was influenced by his review of this report, otherwise known as memory distortion.

This is not defense attorney voodoo; it's real. If there is a problem with the accuracy of the documentation Flynn was shown to refresh his recollection about an event, then Flynn's admissions to the court may likewise be unreliable through no fault of his own.

"Materiality" – Not So Easy

The focus in Section 1001 cases tends to be on the lie and not assessing the materiality of the lie. Materiality is not a heavy bar to hurdle,[14] but the government must still jump over it.[15] In Flynn's case, the plea agreement provides a basic factual basis for materiality, assuming all those facts to be true.[16]

At the plea hearing, however, the government provided zero explanation of how Flynn's statements were material to the FBI's investigation, aside from merely repeating the word "material." Providing a factual basis for the government's materiality assessment would have given the parties and the court one last chance to reflect on its adequacy. That didn't happen.

At Flynn's original sentencing hearing in December 2018, the court hinted at the government's failure to explain the materiality of Flynn's statements to the FBI.[17] If the government had done its job and sufficiently explained materiality in its charging document, the plea agreement, or the statement of the offense, it would have been unnecessary for the court to ask questions about materiality.

There has also been a suggestion that Flynn admitted his statements were material, so he is stuck with that admission. But what is Flynn's admission really worth? No criminal defendant truly understands the meaning of the term "material." A defendant's admission that his statement is material reflects a client's trust in his attorney's advice, nothing more.

Holding proceedings to determine whether a defendant committed perjury by recanting his admission to making material false statements will only serve to turn client against counsel.

Especially in the circumstance of pre-indictment plea negotiations, a defense attorney's assessment of materiality may be imperfect through no fault of his own, based on the evidence the government has provided to him. Many Section 1001 cases, and almost everyone who is charged by an information, as in the Flynn case, arise out of pre-indictment negotiations.

That means there is no formal discovery process, making the defense attorney entirely reliant on the government to share relevant evidence to assess the case. And, in the pre-indictment negotiation scenario, defense attorneys rarely, if ever, get all the evidence they would receive in formal post-indictment discovery. Challenging Flynn's admissions at his plea hearing, the court may find, is also a condemnation of the pre-indictment process of negotiating plea agreements.

An Offer You Can't Refuse

Before we criticize Flynn's initial impulse to plead guilty to a Section 1001 charge (or his original counsel's advice for him to do so), consider the many reasons to embrace this kind of offer. First, the most effective defense attorneys develop a comprehensive understanding of their client's case and learn where the bodies are buried, so to speak.

Concerned that the government will discover this evidence, and waiting for the government to lower the boom on his client, a defense attorney may welcome a Section 1001 charge with a sigh of relief.

There are also several attractive sentencing features of a Section 1001 charge. Foremost, this charge caps out the defendant at a potential five-year sentence instead of the mandatory minimum or 20-plus-year sentence originally threatened by the prosecutor.

And with an offense level as low as four under the U.S. Sentencing Guidelines,[18] and a cooperation provision in the plea agreement, probation is the likely outcome. There is no forfeiture for a Section 1001 false statement charge, and typically no restitution. In Flynn's case, the government agreed he was not subject to mandatory restitution.[19]

Finally, a Section 1001 charge offers an offense many defendants can live with; they don't have to admit they committed a more serious offense, like fraud, and they can chalk up the charge to getting tripped up during an interview. In short, a defendant can confess to wrongdoing and move on with his life with minimal consequences.

What most people fail to recognize is that the government's offer of a Section 1001 plea is often a confession that it failed to prove its theory of the defendant's conduct. Defense counsel may recognize that the client indeed lied during his interview, and counsel may be concerned that turning down this seemingly generous offer will result in the real investigation continuing, which could lead to even more serious charges.

This may be reason enough for some defendants to take a questionable Section 1001 plea offer to get out from under the exposure to more serious charges. What they don't realize is that the more serious charges are probably never coming.

Making Bad Cases Go Away

Some critics of the DOJ's motion to dismiss Flynn's case have claimed there is no precedent for dismissing a case after a guilty plea. That's simply untrue. Dismissing cases after guilty pleas is not typically how the DOJ makes bad cases disappear. It's done quietly and without any fanfare, often through a sweetheart deal with a defendant.

Sometimes the DOJ will dismiss an entire case, a particular charge, or a particular defendant before trial. The government may offer to resolve a case with reduced charges. Sentencing concessions sometimes get made as well.

For example, the DOJ may agree to recommend a Federal Rule of Criminal Procedure 11(c)(1)(C) plea — a unicorn in most districts. For the nonfederal criminal practitioner, Rule 11(c)(1)(C) binds federal judges to a particular sentencing recommendation—that is, if the judge agrees to be bound.

It should come as no surprise that under the rock of most Rule 11(c)(1)(C) pleas is the rotting corpse of a case the DOJ just needs to go away. Why have you never heard about cases resolved in this fashion? Because the defendant is not friends with the president. But it happens more often than you know.

Conclusion

The Flynn case is not unique. It is the byproduct of a failed federal investigation. This is why the Flynn case presents such a wonderful model of what not to do (the government), what not to accept (the defendant), and what to watch out for (the court).

Again, set aside politics and your personal feelings about the administration when examining the Flynn case. Read the pleadings. Pore over the transcripts. Examine the facts. This investigation was going nowhere until a couple of agents showed up at Flynn's office for a chat.

Ultimately, this high-profile case is shining a light on an often overused, or misused, federal charge that otherwise would not receive any attention. And that's no lie, or, at least, not a *material* one.[20]

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[1] *See United States v. Michael Flynn*, Case No. 1:17-cr-232-EGS (D.D.C. Nov. 30, 2017) (Sullivan, J.) (Doc. 62-1, at 1).
[2] *See id.* (Doc. 198, at 4).
[3] *Id.* (Doc. 1).
[4] *Id.* (Docs. 3, 4).
[5] *Id.* (Doc. 198).
[6] The elements are relatively straightforward: (1) the defendant made a statement; (2) the statement was false; (3) it concerned a material matter; (4) the defendant made this statement willfully, knowing it was false; and (5) he made this statement in a matter within the jurisdiction of an agency of the United States. *United States v. Williams*, 934 F.3d 1122, 1128 (10th Cir. 2019); *United States v. Clay*, 832 F.3d 1259, 1305 (11th Cir. 2016); *United States v. Geisen*, 612 F.3d 471, 489 (6th Cir. 2010); *United States v. Love*, 516 F.3d 683, 688 (8th Cir. 2008).
[7] *See United States v. Flynn*, Case No. 1:17-cr-232-EGS (Doc. 198).
[8] *Id.* (Doc. 3, at 5-6, 9; Doc. 103, at 24-27).
[9] *Id.* (Doc. 103, at 27, 30). Flynn's cooperation led to the indictment of Bijan Rafiekian and Kamil Ekim Alptekin. *See United States v. Bijan Rafiekian and Kamil Ekim Alptekin,* Case No. 1:18-cr-457-AJT (E.D. Va. Dec. 12, 2018).
[10] *See United States v. Flynn*, No. 1:17-cr-232-EGS (Doc. 47; Doc. 103, at 27).
[11] *Id.* (Doc. 103, at 36, 40, 41).
[12] *Id.* (Doc. 103, at 35).
[13] *See United States v. Hsia*, 176 F.3d 517, 522 (D.C. Cir. 1999); *United States v. Lupton*, 620 F.3d 790, 806 (7th Cir. 2010).

[14] Actual influence is not required. *United States v. Turner*, 551 F.3d 657, 663 (7th Cir. 2008). The false statement just needs to have the capacity to impair or pervert the functioning of a government agency. *United States v. Gafyczk*, 847 F.2d 685, 691 (11th Cir. 1988). A false statement is "material" even if ignored or never read, *United States v. Boffil-Rivera*, 607 F.3d 736, 742 (11th Cir. 2010); it was known to be false, *United States v. Moore*, 708 F.3d 639, 649 (5th Cir. 2013); the interviewing agent should have known it was false, *Clay*, 832 F.3d at 1309; the statement was corrected after being confronted by the interviewing agent, *United States v. Salas-Camacho*, 859 F.2d 788, 791-92 (9th Cir. 1988); or the defendant tried to correct it. *United States v. McKanry*, 628 F.3d 1010, 1018 (8th Cir. 2011). A statement's materiality is assessed at the time the statement is uttered. *See United States v. Beaver*, 515 F.3d 730, 742 (7th Cir. 2008). But, significantly, the statement must relate to an existing investigation. *See United States v. Pickett*, 353 F.3d 62, 68-69 (D.C. Cir. 2004).
[15] *United States v. White*, 270 F.3d 356, 365 (6th Cir. 2001).
[16] *See United States v. Flynn*, No. 1:17-cr-232-EGS (Doc. 4, at ¶ 2).
[17] For example, the court stated:

- "I need to know answers about how [Flynn] impeded the investigation and what the material impact on the investigation was." *Id.* (Doc. 103, 19).
- "At some point — it probably won't surprise you that I had many, many, many more questions…." "These are questions ... such as, you know, how the government's investigation was impeded? What was the material impact of the criminality?" *Id.* (Doc. 103, 50).
- "You probably know the questions I'm going to ask anyway, impeding the investigation, materiality impact." *Id.* (Doc. 103, 51).

[18] *See United States v. Flynn*, No. 1:17-cr-232-EGS (D.D.C. Dec. 18, 2018) (Doc. 103, at 17–18, 25). At Flynn's original sentencing hearing on December 18, 2018, Judge Sullivan explained Flynn's advisory guidelines range. With a total offense level of 4, and a criminal history category of I, Flynn's advisory guidelines sentencing range was 0 to 6 months in prison. The sentencing range doesn't get any lower.
[19] *Id.* (Doc. 3, at 8).
[20] *Post Script – I would like to offer a brief postscript if you will indulge me and care to read further. It has probably become cliché to lament that politics has infected all aspects of life. What I never thought I would say is that politics has divided criminal defense attorneys. Universally, criminal defense attorneys celebrate a defendant's win over the federal government — the most powerful law enforcement entity in the entire world. It doesn't matter the type of case or the background of the defendant or the lawyer leading the charge; we as criminal defense attorneys rejoice in a good win over Goliath. That ended with Flynn. Most lawyers who have commented on the Flynn case have injected their personal feelings and political views into their legal analysis. This sets a very dangerous precedent. Politics can be, and often is, a dirty business. Our legal system, which is adversarial by nature, should avoid infusing politics — a divisive and emotionally charged battle of competing ideas*

— into that fragile system. We can't afford to devalue our legal system, especially the criminal justice system where life and liberty are at stake, with senseless political rancor. Leave politics to politicians. And leave law to lawyers.

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