



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

MAY 29 2018

Dear Mr. Chairman:

This responds to your letter to the Deputy Attorney General and FBI Director dated May 11, 2018. According to your letter, former FBI Director James B. Comey briefed the Committee on March 15, 2017, one month after Lt. Gen. Michael Flynn left the position of National Security Adviser. Your letter states that two congressional staffers made notes about Mr. Comey's comments concerning FBI agents who interviewed Mr. Flynn on January 24, 2017. One staffer reportedly wrote that Mr. Comey said agents did not observe any "change in ... demeanor or tone" that might indicate deception, and another staffer wrote that Mr. Comey said the agents "saw nothing" to suggest that Mr. Flynn was lying. Your letter explains that in recent media interviews, Mr. Comey denied any memory of those comments.

Whatever Mr. Comey may have said and whatever Mr. Flynn's demeanor, the evidence in the public record proves beyond any reasonable doubt that Mr. Flynn knowingly made false statements about contacts with the Russian ambassador.

As you know, Mr. Flynn pleaded guilty last December and admitted under oath to making a materially false statement. Mr. Flynn also signed a written plea agreement in which he certified that he "read every page ... and discussed it with my attorneys." Mr. Flynn stated that he chose to enter the agreement "voluntarily and of my own free will," and that he was "pleading guilty because I am in fact guilty of the offense identified in th[e] Agreement." Mr. Flynn confirmed in writing that he was satisfied with the legal services provided by his attorneys.

Mr. Flynn was represented by two experienced attorneys, both of whom also signed the plea agreement. They affirmed in writing that they "read every page" of the agreement and "fully discussed the provisions" with Mr. Flynn. They also certified that they concurred in Mr. Flynn's decision to enter a guilty plea.

In the plea agreement, Mr. Flynn and his attorneys verified that the written "Statement of the Offense" fairly and accurately describes [his] actions and involvement in the offense." Mr. Flynn also signed the Statement of the Offense. He affirmed that "after consulting with my

attorneys, I agree and stipulate to this Statement of the Offense, and *declare under penalty of perjury that it is true and correct.*” Both defense attorneys also signed the Statement of the Offense, and affirmed, “I have read this Statement of the Offense, and have reviewed it with my client fully. I concur in my client’s desire to adopt and stipulate to this Statement of the Offense as true and accurate.”

In the Statement of the Offense, Mr. Flynn admitted making several material false statements, including that during his FBI interview on January 24, 2017, Mr. Flynn “falsely stated that he did not ask Russia’s Ambassador to the United States ... to refrain from escalating the situation in response to sanctions that the United States had imposed against Russia” and “falsely stated that he did not remember a follow-up conversation in which the Russian Ambassador stated that Russia had chosen to moderate its response to those sanctions in response to my request.” Mr. Flynn admitted that he indeed did make the request on December 29, 2016, just four weeks before the FBI interview, that the Russian Ambassador called him on December 31, 2016, to inform him that Russia had chosen not to retaliate, and that Mr. Flynn discussed both calls with members of the Presidential Transition Team.

Federal district judges follow Federal Rule of Criminal Procedure 11 when considering whether to accept a guilty plea. On December 1, 2017, Mr. Flynn appeared in federal district court. Mr. Flynn swore an oath to tell the truth. He then affirmed that the factual statement was accurate, that he was guilty, that he had decided voluntarily to enter into the plea agreement, and that he entered his plea of guilty because he was guilty and for no other reason. The court accepted his guilty plea after determining that the undisputed evidence established Mr. Flynn’s guilt beyond any reasonable doubt, and verifying that the attorneys were satisfied with the plea agreement, and that Mr. Flynn was satisfied with the services of his attorneys.

After the hearing, Mr. Flynn chose to issue a public statement through the news media in which he wrote, “I recognize that the actions I acknowledged in court today were wrong.” An attorney from the White House Counsel’s Office issued a statement asserting, “The false statements involved mirror the false statements to White House officials which resulted in his resignation.”

There is no foolproof method to determine whether a witness is lying merely by judging physical signs of his apparent sincerity. In a criminal case, prosecutors require admissible evidence that proves beyond any reasonable doubt that the defendant made a material false statement. Moreover, a false statement spoken with apparent sincerity may be more obstructive than a false statement that the defendant obviously does not believe to be true. *See e.g. Brogan v. United States*, 522 U.S. 398, 402 (1998) (“It could be argued, perhaps, that a *disbelieved* falsehood does not pervert an investigation. But making the existence of this crime turn upon the credulousness of the federal investigator (or the persuasiveness of the liar) would be exceedingly strange” (emphasis in original)).

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It is not clear why Mr. Comey would have briefed congressional staffers about the criminal investigation of Mr. Flynn. In any event, the briefing occurred more than eight months prior to Mr. Flynn's guilty plea. Moreover, the responsibility to determine whether to prosecute rests with federal prosecutors, not the FBI Director, and the case was based in part on subsequent events and additional investigation and evidence. Prosecutors make a final decision whether to bring charges at the end of an investigation, not in medias res.

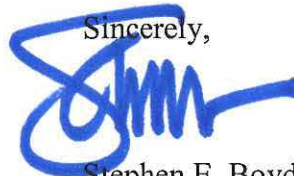
We know that leaders of the Senate Committee on the Judiciary pride themselves on their commitment to protect the independence of the Department of Justice (Department) and avoid the reality or appearance of political interference. If the Department were to produce evidence and the testimony of federal agents involved in a pending criminal prosecution, it unavoidably would create the appearance of political influence. For this reason, the Department is obligated at this time to respectfully decline to provide documents or arrange for staffers to interview the agent named in your letter.

Unnecessarily publicizing names of agents in criminal cases can generate unwelcome publicity and unwarranted criticism of law enforcement officers and their families. We are not aware of any allegation against or previous publicity about the agent, and it is not clear why someone gave his name to Committee staffers, or why they chose to release his name to the news media.

Please be assured that Mr. Flynn is represented by skilled and experienced attorneys who, pursuant to court order, will have access to favorable evidence in the government's possession.

We hope you find this information helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'S.E. Boyd', with a stylized flourish at the end.

Stephen E. Boyd
Assistant Attorney General