

TRUMP ADMINISTRATION ACCOUNTABILITY PROJECT



Report on Possible Misconduct by Department of Justice in Dropping the Prosecution of Gen. Michael Flynn

Background: The Flynn Case

Michael Flynn was the first senior Trump Administration official who pleaded guilty and pledged to cooperate with the Special Counsel investigation into Russian election interference. As the former National Security Advisor to President Trump, his cooperation was viewed as a critical point of vulnerability to President Trump and other Trump campaign officials targeted by the Special Counsel investigation. However, Flynn's degree of cooperation varied over time.

After a federal judge expressed skepticism over Flynn's conduct and the fulsomeness of his cooperation, Flynn changed course and decided to challenge his prosecution. The judge rejected his claims of prosecutorial misconduct. He then attempted to withdraw his guilty plea. When the judge expressed reluctance to accept his withdrawal, too, the Department of Justice—in an unprecedented move—filed a motion to withdraw Flynn's prosecution by Special Counsel Mueller. Did officials at the Department of Justice violate the law when they moved to undo the guilty plea entered by Flynn? What possible charges could be investigated?

What did Flynn do?

Before his tenure in the Trump Administration, Lt. General Michael Flynn held a senior position at the Office of the Director of National Intelligence (ODNI) during the Obama Administration.¹ Obama nominated Flynn to become the 18th Director of the Defense Intelligence Agency (DIA) in April 2012.² During his service, Flynn became the first U.S. officer to be allowed inside the Russia military intelligence (GRU) unit headquarters.³ He later expressed a desire to invite high-ranking GRU officials to the U.S. or visit the GRU again.⁴ His requests were rejected by Director of National Intelligence James Clapper and raised some alarm among U.S. officials.⁵

In 2014, a longtime informant for the American intelligence community, Stefan Halper, encountered Flynn at a conference in Europe. Halper expressed concern to U.S. government officials over Flynn's close relationship with a Russian woman and suggested that Flynn may have been compromised by Russian intelligence.⁶ Flynn was viewed by some staffers as a habitual liar—staffers referred to his dubious assertions as “Flynn facts.”⁷ His two-year term as the DIA Director was not extended in 2014. Flynn retired from the military the same year.⁸

Flynn went on to create a private consulting group, Flynn Intel Group Inc., which provided intelligence services to foreign governments.⁹ Through that venture, he was paid \$65,000 by companies connected to Russia.¹⁰ In December 2015, Flynn attended a gala in honor of the Russian propaganda network RT and was seated next to Russian President Vladimir Putin. Flynn was paid \$45,000 for appearing at the event. Because the event took place after Russia's invasion of Ukraine at a moment of hostility between the U.S. and Russia, the appearance startled U.S. officials.¹¹ Flynn also served on the board of OSY Technologies, a consortium of Israeli cyber-intelligence firms with connections to Russian oligarch, while working on the Trump Campaign.¹² This information, in tandem with the report from Stefan Halper, bolstered questions at the FBI about Flynn being a possible target for Russian access to the Trump Campaign when Flynn joined as a surrogate in 2015.

Flynn was also paid \$530,000 in 2016 to serve as a foreign agent for Turkey.¹³ He did not register as a foreign agent with the Department of Justice as required by the Foreign Agents Registration Act (FARA).¹⁴ Flynn was campaigning actively for Donald Trump while serving as a foreign agent for Turkey, conduct outlined as an uncharged offense in his plea agreement.¹⁵ Flynn authored several articles while under the lobbying contract with Turkey that criticized a Turkish cleric who had fled Turkey and received asylum in the U.S.¹⁶ The cleric currently resides in Pennsylvania. In the articles, Flynn characterized the cleric as the leader of a terrorist network who should be extradited back to Turkey:

“the primary bone of contention between the U.S. and Turkey is [the cleric], a shady Islamic mullah residing in Pennsylvania. [The cleric] portrays himself as a moderate, but he is in fact a radical Islamist. If he were in reality a moderate, he would not be in exile, nor would he excite the animus of Recep Tayyip Erdogan and his government.”¹⁷

Flynn wrote that “U.S. media is doing a bang-up job of reporting the Erdogan government's crackdown on dissidents, but it's not putting it into perspective.”¹⁸ He never disclosed that he was acting as a foreign agent for Turkey paid \$530,000 by the Erdogan government for his work; however, he did not hesitate to include his status as a Lieutenant General in the piece, which was published on Election Day.

It was also reported that before the election in September 2016, Flynn met with Turkish officials and discussed kidnapping the cleric from Pennsylvania, smuggling him out of the country, and sending him back to Turkey—which would all be in violation of U.S. law.¹⁹ Flynn reportedly engaged with Jared Kushner, President Trump's son-in-law and senior White House Advisor, about promoting a plan to transfer nuclear technology from the U.S. to Saudi Arabia for use in a proposed joint US-Russia project, also a possible violation of U.S. law.²⁰ Saudi Arabian officials were later convicted of assassinating a U.S.-based journalist, Jamal Khashoggi, in an embassy located in Turkey, for which Flynn had worked.²¹ The Saudi government reportedly used technology from the Israeli company Flynn had worked with to hack Khashoggi's phone prior to his murder.²² Flynn's connections to Saudi Arabia, Turkey, and Israeli companies raise serious questions about the role he played in the Trump Administration's policies toward those nations or leniency shown to their leaders despite their violent criminal conduct.

Before Trump's election, Flynn submitted documents asserting that he had "insubstantial contact" with foreigners and reported he had never been paid by foreign companies—both demonstrably false.²³ Department of Defense Inspector General Glenn Fine later confirmed an investigation into Flynn's possible falsehoods on these documents.²⁴ Fine himself was later fired by President Trump. During the period before Trump formally assumed the Presidency, Flynn was again implicated in multiple crimes due to his own conduct. Flynn asked President Obama's National Security Advisor Susan Rice to delay a U.S. military action in Syria pursuant to Turkey's goals, again without disclosing his role as a paid foreign agent of Turkey.²⁵ And, as we now know, Flynn's conversations with the Russian Ambassador Sergei Kislyak ultimately led to an indictment by the Special Counsel's Office.

On November 30, 2016, Flynn, Kushner and Kislyak met at Trump Tower to discuss Syria.²⁶ Kislyak wanted them to find a means of discussing Syria on a secure channel.²⁷ Flynn told Kislyak the Trump team did not possess secure channels that were unmonitored by U.S. intelligence agencies. Kushner then suggested using secure channels at the Russian embassy. Kislyak rejected that idea.²⁸ Several phone conversations between Kislyak and Flynn followed.²⁹ On December 22 or 23, Flynn, acting at the request of the Israeli government, called Kislyak and asked if he could oppose or delay a U.N. Security Council resolution condemning Israeli settlements in Palestine—despite the fact the United States supported the resolution.³⁰ Kislyak returned Flynn's call and told him that, "for historical reasons, as I explained to you . . . we cannot . . . other than to support it. That is something . . . that is . . . part of the position that we have developed within the countries in the region for a long period of time. But, responding to your telephone call, and our conversations we will try to help postpone the vote and to allow for consultations."³¹ Flynn thanked him for that effort.³² The request was a formal contradiction of official U.S. policy at the time. Kislyak transmitted Flynn's request to the Kremlin, and Russia ultimately chose to stay neutral on the U.N. resolution instead of voting against Israel.³³

On December 29, President Obama announced sanctions and the expulsion of thirty-five suspected Russian intelligence agents from the Russian embassy in response to election interference operations.³⁴ The Obama Administration expected retaliatory measures.

Later that day, another Russian official called Flynn's phone and got his voicemail. Before the voice message turned on, intelligence agencies recorded the official talking. He said "Which agency are we talking about? Which Agency hackers did the hacking? Believe me, Americans did hack [sic] this all."³⁵ The official went on to ask Flynn on the voicemail to call Kislyak as soon as possible. Flynn contacted Kislyak later that day and urged him not to escalate in response.³⁶ He specifically stated: "Do not allow this administration to box us in right now! Depending on what actions they take over this current issue of cyber stuff, wheter they are looking like they are going to dismiss some number of Russians out of the country. I understand all that and I understand the information that they have and all that. But I ask Russia to do is to not, if anything . . . don't go further than you have to because I don't want us to get into something that have to escalate to tit-for-that. Do you follow me?"³⁷ Kislyak said he understood, but that Moscow was unhappy. Flynn told Kislyak he appreciated that fact and reminded him that he is not a politician: "You are talking to a soldier. I am a very practical guy."³⁸

The conversation was perhaps a violation of the Logan Act, a rarely applied law criminalizing diplomatic negotiations by citizens that run counter to Executive Branch policy. In any event, it was a staggering non-response—especially for a former soldier—to a hostile cyberattack on U.S. election infrastructure.

When questions were raised about the conversations, Flynn later instructed his deputy to lie to the press and say he had not discussed the topic of Obama Administration sanctions in any way with the Russian ambassador.³⁹ Flynn then lied to incoming Press Secretary Sean Spicer and Vice-President-elect Mike Pence about the conversations, again claiming nothing about the Obama sanctions was discussed.⁴⁰ Flynn was unaware that U.S. intelligence agencies had intercepted the communication and thus knew he was lying.⁴¹

In January, fearing that Russia had leverage over Flynn because Kislyak knew he had lied to senior Trump Administration officials, Deputy FBI Director Andrew McCabe called Flynn and set up a meeting with agents.⁴² Given the existing knowledge about Flynn's connections to Russia and other countries, McCabe and other law enforcement officials had fears about Flynn's appointment as National Security Advisor. Before the December calls, President Obama had told President-elect Trump that appointing Flynn was a bad decision, and that he should reverse it.⁴³ FBI Director James Comey knew Flynn was lying to the Vice-President and other Administration officials, and he and FBI counterintelligence director Bill Priestap sought to expose the lie so that Flynn was either forced to resign, fired, or potentially charged for lying to law enforcement.⁴⁴

Instead of admitting the truth of his conversation with Kislyak, Flynn lied to the agents and told them he had not asked Russia to avoid escalation in response to the sanctions and said he had never tried to influence Russia's vote in the Israeli settlement resolution.⁴⁵ Over the course of the following weeks, public reports emerged that Flynn's call had been intercepted. Still, even during his tenure he engaged in suspicious conduct: he was a key link between Putin and Trump in the development of a "Ukraine Peace Plan" brokered by a pro-Russia Ukrainian, Andrew Artemenko, and Trump associates Michael Flynn and felon Felix Sater.⁴⁶ Finally, the Washington Post reported that he had discussed sanctions on the calls, and that they were intercepted.⁴⁷ Flynn resigned on February 13.⁴⁸ He is the shortest-tenured National Security Advisor in history at just twenty-four days of service.

The day after Flynn's resignation, Trump met with FBI Director Comey and pressured him to drop the investigation into the Flynn matter.⁴⁹ After Comey declined to do so and following several more meetings where similar requests were made, Trump fired Comey.⁵⁰ Robert Mueller was appointed Special Counsel just days later.⁵¹

Soon after Mueller's appointment, public reporting suggested Mueller had enough evidence to charge Flynn and his son with crimes relating to their consulting work⁵² and their conspiracy to kidnap the Turkish cleric.⁵³ In November 2017, less than a year after the phone calls with Kislyak, several of Flynn's foreign business partners were arrested by the FBI.⁵⁴ On December 1, 2017, Flynn and Mueller announced a plea agreement: Flynn would plead guilty to one count of lying to

law enforcement, and Mueller would not bring charges relating to Flynn's association and work with Turkey.⁵⁵ Flynn became a purported cooperating witness.

Flynn's sentencing has been long-delayed. Originally, on December 18, 2018, Mueller's office recommended no jail time for Flynn's cooperation. Flynn—through a sentencing memo—insisted he was tricked into lying at the White House interview.⁵⁶ Mueller's office followed up with a supplemental filing the next day, rejecting those assertions and that Flynn's behavior showed his commitment to lying.⁵⁷ Judge Emmet Sullivan, who had a history of skepticism about government conduct, rebuked Flynn for his assertions, saying “arguably you sold your country out.”⁵⁸ He asked Flynn if he wanted to withdraw his guilty plea, still accepted responsibility for his conduct, and whether he was satisfied with his legal representation. Flynn replied—under oath—that he did not want to withdraw, still accepted responsibility and was satisfied.⁵⁹ He urged Flynn to continue cooperating, warning him that he would sentence him to jail if the sentencing proceeded that day. Flynn accepted the delay and promised to continue cooperating.⁶⁰

Instead, Flynn began formally challenging his plea agreement. Mueller concluded his investigation in March 2019; by August, Flynn made claimed there was prosecutorial misconduct and violations of his due process rights.⁶¹ The Judge ruled against him on both arguments.⁶² Flynn suddenly filed a motion to withdraw from his guilty plea.⁶³ Judge Sullivan did not appear inclined to grant the motion, because Flynn had twice in open court and under oath declared that he was guilty of the offense.

Before Judge Sullivan could grant or deny Flynn's request, the Department of Justice filed an astonishing motion to drop Flynn's charges.⁶⁴ All the prosecutors on the Flynn case immediately withdrew, and one resigned from the Department of Justice.⁶⁵ Judge Sullivan asked which attorney was making the motion to drop the charges. The Acting U.S. Attorney for the District of Columbia Timothy Shea eventually signed the motion.⁶⁶ It is unclear whether Attorney General Barr ordered him to file it or whether the two agreed to make the motion to drop Flynn's case together.

Flynn's conduct during 2014–2016 is relevant to the analysis of conduct of Department of Justice officials for three reasons. First, it demonstrates that much of Flynn's potential misconduct was left uncharged by the Special Counsel, undermining the notion he was “railroaded” into pleading guilty. Second, the scope of the misconduct contradicts multiple representations made by Department of Justice leadership to Judge Sullivan in its motion to drop Flynn's case—chiefly that Flynn's lies were not “material” to any investigation or proceeding—because many of Flynn's former business partners were subsequently arrested, charged, tried and convicted. Finally, the Department's knowledge of this array of misconduct strongly suggests its effort to dismiss Flynn's case *with prejudice*—meaning it can never be brought again—is corruptly motivated.

Possible Misconduct

There are at least two areas of possible criminal misconduct by officials at the Department of Justice with respect to their respective roles in dropping the Flynn prosecution: obstruction of justice and conspiracy to defraud the United States. Depending on additional fact-finding and

investigation, criminal charges may be warranted for the Attorney General, Acting U.S. Attorney Timothy Shea and other officials who participated in the effort to drop Flynn's prosecution in an attempt to obstruct proceedings before Judge Sullivan or in a conspiracy to impede the lawful function of the Department of Justice.

A. Obstruction of Justice

Three basic elements are common to most of the relevant obstruction statutes: an obstructive act; a link between the obstructive act and an official proceeding; and a corrupt intent. Obstructive acts cover all corrupt conduct capable of producing any effect that prevents justice from being administered.⁶⁷ This is a broad category and likely applies to conduct designed to undo a guilty plea prior to a sentencing date before a federal judge. The link to a pending proceeding is similarly clear: Judge Sullivan was evaluating defendant Flynn's sentence for federal crimes, as well as a motion to withdraw his guilty plea, after considering multiple attempts by Flynn to assail his prosecution when the Department disrupted that process by suddenly trying to revoke the entire plea deal. Corrupt intent is the element which would likely require further investigation in pursuit of any obstruction of justice charges.

President Trump's Conduct

President Trump tweeted on December 2, 2017 that he fired Flynn because he knew Flynn had lied to the FBI.⁶⁸ In doing so, Trump admitted that he knew Flynn committed a crime. Lying to a law enforcement officer is a criminal act under 18 U.S.C. § 1001 if it relates to an ongoing investigation or official proceeding. The day after Flynn resigned, Trump asked the FBI to *stop* its investigation into the Flynn matter, demonstrating that he was aware of an ongoing investigation as required under the relevant obstruction statutes.

It does not matter whether or not President Trump knew the language of the relevant statute, whether he knew that lying to law enforcement was a crime, or whether he thought it should be a crime. In criminal law At the time of Flynn's conduct, 18 U.S.C. § 1001 was an active criminal statute. The President has no discretion in deciding what should or should not exist as a statute once it has been passed by both houses of Congress and signed into law. President Trump's knowledge that Flynn lied to the FBI and that the FBI was investigating Flynn is probably enough to show he was aware a crime had been committed by Flynn, and that there was a pending proceeding.

Robert Mueller's report and countless white-collar crime prosecutors stress that the most difficult element to prove on obstruction charges is corrupt intent. Evidence regarding Trump's communications with others about Flynn are essential to understanding exactly what happened in this case and whether Trump obstructed justice. It is possible Trump, through lawyers, communicated to Flynn various areas where he could cooperate and areas he did not want him to cooperate on. It is possible Trump communicated to Flynn after his lackluster cooperation that he would help alleviate his criminal punishment. It is possible Trump discussed these matters with Attorney General Barr or others at the Department of Justice or communicated that the DOJ needed to help Flynn in return for Flynn's less than full cooperation with the Special Counsel. It is possible

Trump discussed these matters with his son, Donald Trump Jr., who refused to speak to the Special Counsel's team; or Paul Manafort, who was prosecuted for lying to the Special Counsel's team after he, too, signed a cooperation agreement; or Roger Stone, who was convicted of similar lying charges. Any of these avenues could render evidence of corrupt intent and are essential for future law enforcement investigations to pursue.

Department of Justice Conduct

With respect to officials at the Department of Justice, further evidence of the corrupt intent of Attorney General Barr or other senior leaders will also be essential to prove obstruction of justice charges relating to the motion to dismiss Flynn's guilty plea. If the Attorney General, the President or others communicated to Flynn that they would assist in his efforts to undo his plea agreement or help him avoid sentencing by Judge Sullivan in exchange for his silence or other benefits to the President, such efforts might violate obstruction statutes depending on what officials at the Department knew and when they knew it.

Specifically, one provision of 18 U.S.C. § 1512(c), an obstruction statute which makes it a crime to "knowingly . . . corruptly persuade another person" or "engage in misleading conduct towards another person" with the intent to "influence, delay or prevent the testimony of any person in an official proceeding" or to "hinder, delay, or prevent the communication to a law enforcement officer . . . of information relating to the commission or possible commission of a Federal offense," is one possible criminal charge.

Multiple theories exist under which an officer of the Department of Justice may have violated § 1512(c) if the relevant evidence is uncovered. For example: a DOJ officer like Barr or someone else could have persuaded Flynn—directly, through attorneys, or through another intermediary—not to cooperate with the Special Counsel based on promises they would undo his plea deal. A DOJ officer could have engaged in misleading conduct toward Judge Sullivan in filing misrepresentations with the court in the motion to drop Flynn's case. A DOJ officer could have hindered communication of crimes to the Special Counsel by curtailing Flynn's full cooperation on matters relating to the Mueller Report through offers of benefits or pardons.

Recall that Flynn received cooperation benefit mainly for information provided about President Trump's potential obstruction of justice while in office. He did not receive significant cooperation credit for providing anything of substance with respect to Mueller's investigation into election interference activity, other than testimony about how the campaign responded to Wikileaks disclosures. Congressional investigators have found that Flynn knew far more about foreign interference efforts than simply Wikileaks: for example, Flynn was aware Israeli cyber firms made overtures to the Trump campaign offering expensive social media strategies to spread disinformation to aid Trump's election. None of that information appears in Mueller's filings relating to Flynn's cooperation credit.

Also recall that early on in Mueller's investigation, future-Attorney General Barr wrote a memorandum espousing the theory that obstruction of justice by a President was legally impossible. He was later appointed to run the Department of Justice and concluded President

Trump had not obstructed justice. If further fact-finding showed that the Department or the President communicated to Flynn that his cooperation on the “obstruction” part of the Mueller Investigation but not the “Russian interference” part of the investigation was not worrisome because the President did not fear exposure to obstruction charges due to Attorney General Barr’s beliefs, then those communications may create liability under the relevant obstruction statute. Anyone aware of those communications who then participated in the filing of the Department’s motion to drop the charges against Flynn could be ascribed the same corrupt intent as the President, the Attorney General, or whomever originally communicated such information to Flynn.

B. Conspiracy to Defraud the United States

The conspiracy statute, 18 U.S.C. § 371, prohibits conspiracies to *defraud* the United States. This clause creates a new crime for conspiracies (where an illegal agreement, criminal intent and an overt act exist) that involve defrauding an agency of the United States. Such language is extremely broad, limited only by case law limiting the meaning of the word “defraud.” The Supreme Court has said that the “statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government.”⁶⁹ If defendants engage in dishonest practices in connection with action by an agency of Government, it constitutes a fraud on the United States under § 371.⁷⁰

Recall that the Department of Justice has made a number of submissions to the federal courts in conjunction with its effort to drop Flynn’s case. It has stated that Flynn’s lies were not material to any investigation; that the FBI engaged in misconduct, despite internal findings that concluded the opposite; that uncharged conduct by the Special Counsel’s office was irrelevant to the plea agreement. Any one of those statements could be characterized as dishonest in light of further information or evidence that explains the true motivation of the Department in dropping the Flynn matter. If, for example, communications between the Attorney General and President Trump exist where they discussed dropping the Flynn case for other reasons—and not the reasons cited by the Department which appear at points to be demonstrably false—then the demonstrable falsehood of the Department’s submissions might escalate from bad faith representation to misleading the court as to its reason for dropping Flynn’s case.

Furthermore, Special Counsel Mueller worked closely with the Department of Justice in the proceeding of his investigation into Russian interference in the 2016 election. If the Department made certain representations to Mueller in order to assure him his work would not be undone in an effort to convince him to end his investigation in a timely manner while Department officials were aware of agreements to undo Flynn’s prosecution, such acts may qualify as overt acts in furtherance of an illegal agreement to corruptly impede the function of the Special Counsel investigation. These charges can only be brought upon further investigation of the communications of Department of Justice leadership, including Attorney General Barr, Acting U.S. Attorney Shea, and President Trump or other Executive Branch officials.

Conclusion

Further investigation into communications regarding this matter between President Trump, Attorney General Barr, Michael Flynn or his counsel, Timothy Shea and other Executive Branch officials is warranted on the grounds that there may have been a violation of 18 U.S.C. § 1512 or 18 U.S.C. § 371.

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² *Id.*

³ Peter Zwack, Death of the GRU Commander, *Defense One* (Feb. 1, 2016) available at <https://www.defenseone.com/ideas/2016/02/death-gru-commander/125567/>.

⁴ Harding, Luke et al., *Michael Flynn: new evidence spy chiefs had concerns about Russian ties: US and UK officials were troubled by Moscow contacts and encounter with woman linked to Russian spy agency records*, *THE GUARDIAN* (Mar. 31, 2017) available at <https://www.theguardian.com/us-news/2017/mar/31/michael-flynn-new-evidence-spy-chiefs-had-concerns-about-russian-ties>.

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¹² Michael Flynn, New Entrant Report, OGE 5 C.F.R. part 2634.

¹³ Borzou Daragahi, The Man at the Center of the Trump Scandal Wants to Clear His Name, *Buzzfeed News* (Jun. 20, 2017) available at <https://www.buzzfeednews.com/article/borzoudaragahi/the-man-at-the-center-of-this-trump-scandal-wants-to-clear>.

¹⁴ *United States v. Flynn*, Statement of the Offense, ¶ 5.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Lt. Gen. Michael T. Flynn, *Our ally Turkey is in crisis and needs our support*, *The Hill* (Nov. 8, 2016) available at <https://thehill.com/blogs/pundits-blog/foreign-policy/305021-our-ally-turkey-is-in-crisis-and-needs-our-support>.

¹⁸ *Id.*

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²⁸ Mueller Report Vol. I.

²⁹ *Id.*

³⁰ *Id.*

³¹ Office of Dir. of Nat. Intelligence, *Flynn Transcript*, (Dec. 23, 2016).

³² *Id.*

³³ Mueller Report Vol. I.

³⁴ *Id.*

³⁵ Office of Dir. of Nat. Intelligence, *Flynn Transcript*, (Dec. 29, 2016).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Mueller Report Vol. I.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Josh Gerstein et al, *Documents show FBI debated how to handle investigation of Michael Flynn*, Politico (Apr. 29, 2020) available at <https://www.politico.com/news/2020/04/29/fbi-michael-flynn-224311>.

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⁴⁵ United States v. Flynn, *Statement of the Offense*, ¶ 1–4.

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