



May 13, 2020

BY ELECTRONIC MAIL

Jeffrey R. Ragsdale
Acting Director and Chief Counsel
Office of Professional Responsibility
Department of Justice
950 Pennsylvania Ave., NW
Room 3266
Washington, DC 200530
opr.complaints@usdoj.gov

Re: *Request for Investigation of Interim U.S. Attorney Timothy Shea*

Dear Mr. Ragsdale:

American Oversight respectfully requests that the Office of Professional Responsibility immediately open an investigation into the unprecedented decision by Interim U.S. Attorney for the District of Columbia Timothy Shea to drop the charges against former National Security Advisor Michael Flynn, after Mr. Flynn had pleaded guilty to the charge of making false statements. The course of events surrounding this reversal raise significant questions about whether Mr. Shea complied with his professional responsibility to zealously and impartially represent the interests of his client, the United States, as well as principles contained in the Justice Manual intended to safeguard the independent and impartial administration of justice and to protect the Department of Justice's (DOJ) role in upholding the rule of law without fear or favor.

As you are likely aware, Michael Flynn voluntarily pleaded guilty on two occasions, both times testifying under oath that he had made material false statements to the Federal Bureau of Investigation, and agreeing that the government could use these admissions against him in future prosecutions if he attempted to renege on his plea. Mr. Flynn reached this agreement with career prosecutors in part to avoid other potentially more serious criminal charges and his plea deal was widely viewed both as very generous and as suggestive that the government expected to receive significant cooperation from Mr. Flynn in other matters.

Nevertheless, following a highly public pressure campaign by President Donald J. Trump and his allies, Attorney General William Barr ordered an unusual review of the case by attorneys outside the D.C. U.S. Attorney's Office. Following that inquiry, the U.S. Attorney's Office for the District of Columbia filed a motion seeking to withdraw the charge



with prejudice.¹ Notably, the only person who signed that motion was Mr. Shea; none of the career prosecutors who had participated in the investigation and resulting prosecution and plea agreement signed the motion and one formally withdrew from the case. As the sole signatory to the motion, it was Mr. Shea’s professional responsibility to ensure that the motion met both his legal ethics obligations and the principles contained in the Justice Manual.

Mr. Shea’s motion advances a narrow, defense-friendly argument that Mr. Flynn’s lies were not “material”—a position DOJ would almost certainly have firmly rejected if argued by a defendant in an ordinary criminal case. The argument that the charges should be dismissed because the false statements were not “material” because there was purportedly no “legitimate investigative basis” for the interview is problematic in several respects that raise questions about the true motivation for filing the motion. To begin with, Mr. Shea’s motion misstates the legal standard for “materiality” under 18 U.S.C. § 1001, suggesting that the false statement must be “material” to a pending and properly predicated investigation.² The statute, however, only requires that it be related to “any matter within the jurisdiction” of the federal investigators, and the test for materiality under the statute in case law is “whether concealments or misrepresentations . . . had a natural tendency to affect the (agency’s) decisions.”³ There is no requirement in case law that a misstatement relate to a specific, open matter under investigation, and there is no evidence DOJ has employed such a narrow standard in its prosecution of other cases.⁴

The motion also rests on the faulty proposition that there was no legitimate reason to conduct the interview where Mr. Flynn made his false statements. As commentators have remarked, it is an extraordinary proposition that the Federal Bureau of Investigation (FBI) had “no reasonable basis” even to interview a senior government official who engaged with a foreign adversary government that interfered in a U.S. election and who “subsequently lied to the vice president of the United States about the substance of his conversation with an agent of that government.”⁵ In the context of the existing investigation about Russian

¹ Gov’t Mot. to Dismiss the Crim. Information Against Michael T. Flynn, *U.S. v. Flynn*, Crim. No. 17-232 (D.D.C. filed May 7, 2020), ECF No. 198 (also available at <https://lawprofessors.typepad.com/files/u.s.-v.-flynn--government-motion-to-dismiss-1-1.pdf>) (hereafter cited as the “Flynn Motion”).

² See *id.*, at 12–14.

³ See, e.g., *Kungys v. United States*, 485 U.S. 759, 772 (1988).

⁴ The motion’s emphasis on the interview’s relationship to a pending investigation also appears to ignore the various levels of inquiry set forth in the Federal Bureau of Investigation’s Domestic Investigations and Operations Guide, which distinguishes among fully predicated investigations, preliminary investigations, and assessments. As commentators have noted, the standard for conducting an assessment is quite low. See, e.g., Robert Litt, *The Justice Department’s Faulty Arguments in the Flynn Case*, LAWFARE, May 8, 2020, <https://www.lawfareblog.com/justice-departments-faulty-arguments-flynn-case>.

⁵ Susan Hennessey, Quinta Jurecic, & Benjamin Wittes, *An Ugly Day for the Justice Department*, LAWFARE, May 7, 2020, <https://www.lawfareblog.com/ugly-day-justice-department>.

interference in the 2016 election and given the concerns that Mr. Flynn’s false statements exposed him to potential compromise by adversaries, such as Russia, that knew the true contents of the communication, it is a stunning proposition that DOJ’s official position is now that there was no basis to undertake the interview. General application of this standard to the investigative activities of the FBI and other federal law enforcement agencies would upend their regular conduct of routine assessments and preliminary investigations undertaken to identify potential violations of federal law.

Mr. Shea also paints a vivid and suggestive picture of disagreements between DOJ and the FBI that appears designed to raise questions about the legitimacy of the FBI’s conduct of the interview with Mr. Flynn. In doing so, Mr. Shea places significant weight on a summary of an interview with a former DOJ official, Mary McCord. The motion’s reliance on those statements are misleading and materially misrepresent Ms. McCord’s explanation in her interview, according to Ms. McCord herself.⁶ According to Ms. McCord, DOJ and the FBI had disagreements about how to proceed once it became apparent that Mr. Flynn had lied to other federal officials about the content of his communications with the Russian ambassador, including when to notify the White House and when to conduct an interview of Mr. Flynn, but there was no disagreement about the importance of investigating the matter or the need to conduct such an interview. The motion’s misrepresentations regarding these disagreements further call into question the true motivation for the decision to withdraw the charges.

In its effort to justify the decision to withdraw the charges, the motion also seeks to characterize law enforcement tactics the FBI and prosecutors routinely employ in other matters, such as questioning a witness about a conversation without first disclosing that the government knows the contents of the conversation, as somehow sinister and inappropriate.⁷ But there are numerous legitimate reasons investigators may employ such a tactic that go unacknowledged in Mr. Shea’s motion, including to learn about the nature of the relationship between the participants in the conversation, the larger context for the communications contained in the transcript, the motivations of the participants, whether the witness was acting on behalf of another person, and why the witness took steps to conceal the contents of the communication from others. Investigators will often withhold the fact that they already know the contents of the communication from a witness in order to assess the witness’s candor, which informs the credibility of other information the witness provides. If DOJ now truly believes these tactics are inappropriate, it will need to reassess the cases against innumerable federal defendants and convicted federal inmates. Failing such action, Mr. Shea’s reliance on these issues raises questions about whether the arguments made in the motion were made in good faith.

⁶ Mary McCord, *Bill Barr Twisted My Words in Dropping the Flynn Case. Here’s the Truth*, N.Y. TIMES, May 10, 2020, <https://www.nytimes.com/2020/05/10/opinion/bill-barr-michael-flynn.html?smid=tw-share>.

⁷ See, e.g., Litt, *supra* n. 4; Hennessey et al., *supra* n. 5.

Mr. Shea's motion even suggests DOJ had doubts it could prove Mr. Flynn made false statements to the FBI at all. But the idea that DOJ did not believe it could prove Mr. Flynn made any false statements to the FBI given all of the existing evidence, including Mr. Flynn's own testimony under oath that the statements were false (any objections to the use of which he had waived), strains credulity and suggests Mr. Shea was relying on motivated reasoning to reach a pre-determined result.

These features of the motion raise significant questions about whether Mr. Shea has complied with his professional obligations and the principles of impartial administration of justice laid out in the Justice Manual. As you know, the Office of Professional Responsibility was created in 1975, following revelations of ethical abuses and serious misconduct by senior DOJ officials during the Watergate scandal.⁸ OPR's role is to "receive and review any information concerning conduct by a Department employee that may be in violation of law, regulations or orders, or applicable standards of conduct."⁹

In arguing to dismiss the Flynn case, Mr. Shea purported to rely upon DOJ's Justice Manual, which guides investigative, charging and sentencing decisions of DOJ employees across the country. In support of his claim that "continued prosecution of the charged crime does not serve a substantial federal interest," Mr. Shea quoted the following passage from the Justice Manual § 9-27.001: "A determination to prosecute represents a policy judgment that the fundamental interests of society require the application of federal criminal law to a particular set of circumstances. . . ."¹⁰

Yet in fact, the prosecution of Mr. Flynn -- according to the numerous career Assistant United States Attorneys who handled this case as well as the former U.S. Attorney who supervised the prosecution -- did serve a substantial federal interest. The only person (other than Mr. Flynn) whose interest the prosecution did not serve was that of President Trump, who made no secret of his displeasure with the case, publicly stating he believed Mr. Flynn should be cleared in court and suggesting a pardon might be in the offing.¹¹

D.C. Rule of Professional Conduct 1.3 provides that a lawyer "shall represent a client zealously and diligently within the bounds of the law."¹² DOJ lawyers are bound by the rules of professional conduct.¹³ As a lawyer representing the United States, Mr. Shea is required

⁸ U.S. Dep't of Justice, *About OPR*, last updated Oct. 15, 2019, <https://www.justice.gov/opr/about-opr>.

⁹ *Id.*

¹⁰ Flynn Motion at 2 (quoting U.S. Dep't of Justice, *Justice Manual*, <https://www.justice.gov/jm/justice-manual> (hereafter cited as JM)).

¹¹ Associated Press, *Trump Praise of 'Tormented' Flynn Raises Pardon Speculation*, N.Y. TIMES, April 30, 2020, <https://www.nytimes.com/aponline/2020/04/30/us/politics/ap-us-trump-russia-probe.html>.

¹² Rule of Professional Conduct 1.3 – Diligence and Zeal, Am. Rules of Prof. Conduct, D.C. Bar, <https://www.dcbbar.org/bar-resources/legal-ethics/amended-rules/rule1-03.cfm>.

¹³ JM § 1-4.010.

to zealously represent the interests of all Americans, not the interests of President Trump. Here, it is unknown whether Mr. Shea or his superiors at DOJ discussed the Flynn case with the president, but regardless, President Trump made it abundantly clear he wanted to see Mr. Flynn cleared.

Furthermore, by acting at the president's behest, beyond failing in his duty of zealously representing the United States, Mr. Shea also may have violated a number of guidelines set forth in the Justice Manual. In determining "whether to commence or recommend prosecution or take other action against a person, the attorney for the government should not be influenced by:

1. The person's race, religion, gender, ethnicity, national origin, sexual orientation, or political association, activities, or beliefs;
2. The attorney's own personal feelings concerning the person, the person's associates, or the victim; or
3. The possible effect of the decision on the attorney's own professional or personal circumstances.¹⁴

Here, it appears Mr. Shea may have abused his position by taking an action based on any or all of: (1) Mr. Flynn's political association with President Trump; (2) Mr. Shea's own personal feelings concerning Mr. Flynn, or at least his associate -- President Trump; and (3) the possible effect of failing to withdraw the case against Mr. Flynn on Mr. Shea's professional career. In addition to violating the department's guidelines, such conduct likely constitutes an impermissible exercise of prosecutorial "discretion to . . . improperly favor or invidiously discriminate against any person" under the D.C. Rule of Professional Conduct 3.8.¹⁵

The Justice Manual also emphasizes the need for prosecutorial decisions to be impartial and free from political influence and that the department's "investigatory and prosecutorial powers be exercised free from partisan consideration."¹⁶ In fact, "[i]t is a fundamental duty of every employee of the Department to ensure that these principles are upheld in all of the Department's legal endeavors."¹⁷

¹⁴ JM § 9-27.260.

¹⁵ Rule of Professional Conduct 3.8 – Special Responsibilities of a Prosecutor, Am. Rules of Prof. Conduct, D.C. Bar, <https://www.dcbbar.org/bar-resources/legal-ethics/amended-rules/rule3-08.cfm>. Depending on the facts developed in the course of its investigation, OPR should also consider whether it should evaluate whether the conduct surrounding the decision to file the motion to withdraw charges amounts to "serious interference" with the administration of justice in violation of D.C. Rule of Professional Conduct 8.4 – Misconduct, Am. Rules of Prof. Conduct, D.C. Bar, <https://www.dcbbar.org/bar-resources/legal-ethics/amended-rules/rule8-04.cfm>.

¹⁶ JM § 1-8.100.

¹⁷ *Id.*

Therefore, by taking the unprecedented action of dropping the charges against Mr. Flynn—whether directly at the president’s behest or merely to curry favor with him—Mr. Shea appears to have violated these directives.

The overarching principles of federal prosecution are, as set forth in the Justice Manual:

ensuring the fair and effective exercise of prosecutorial discretion . . . and promoting confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case.¹⁸

Finally, Mr. Shea’s decision to move to dismiss the charges against Mr. Flynn effectively seeks to reverse the decision by the Office of Special Counsel Robert Mueller to bring those charges. This reversal is in significant tension with the spirit, if not the letter, of DOJ’s special counsel regulations, which permit reversal of decisions by a special counsel only where the proposed action by a special counsel “was so inappropriate or unwarranted under established Departmental practices that it should not be pursued.”¹⁹ As noted above, Mr. Shea’s unprecedented motion hardly meets this bar given the motion’s departure from departmental practices. Consequently, Mr. Shea’s actions undermine the important interests in impartial administration of justice that those regulations are designed to promote.

By dropping the very serious charges against Mr. Flynn after he pleaded guilty to them in front of two federal judges—in apparent contravention of the elements of the false statements statute, the Rules of Professional Responsibility governing the conduct of attorneys, DOJ’s own principles and guidelines, and against the advice of career prosecutors—Mr. Shea has brought discredit to the department and undermined the rule of law. The Office of Professional Responsibility should investigate Mr. Shea’s conduct and hold him accountable for any violations of department policy and forward its findings to the D.C. Bar if appropriate.

Thank you for your consideration of this important matter.

Sincerely,



Melanie Sloan
Senior Advisor

¹⁸ JM § 9-27.001.

¹⁹ 28 C.F.R. 600.9(a)(3).