



Did Michael Flynn commit treason?

Treason is defined in 18 US Code 2381 as "Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere is guilty of treason and shall suffer death, or shall be imprisoned not less than 5 years and fined under this title but not less than \$10,000.00; and shall be incapable of holding any office under the United States". (emphasis added)

In law school exams, students are given strange, complicated fact scenarios, often including some arcane statute. They are then asked to identify the legal issues presented and discuss them. Giving the correct answer is important, but using the correct analysis is paramount.

Here is the question: if a soon to be national security advisor has an 'off the record' conversation with a Russian ambassador, about recently imposed sanctions and in effect told him 'don't worry about it, we've got you covered', is that treason pursuant to 18 USC 2381?

Although virtually no one is ever prosecuted under the treason statute, this is still an active law of the land. The initial inquiries must focus on whether Russia would be considered an 'enemy' under the statute and whether Flynn gave them 'aid and comfort' by advising them that sanctions imposed by the Obama Administration would be relaxed, changed, canceled, or in some form or fashion reconfigured in a way that would aid or comfort them.

While many people would identify Russia as an enemy of ours, that analysis is far from obvious. Many people consider Russia as an ongoing adversary, particularly with the recent uptick in perceived animosities, from the alleged involvement in hacking to the recent deployable of a seemingly banned cruise missile. But, there is, of course, no declaration of war; we have trade agreements (the WTO as of 2012; they gained Permanent Normal Trade Relations on December 20, 2012); and we have treaties with them, including New Start treaty. It is, therefore, doubtful if Flynn or anyone else could be held accountable under this statute due to Russia's non-classification as an enemy.

Whether Flynn gave 'aid and comfort' to Russia will be borne out by the yet to be released transcripts of the calls, but if Flynn advised of an anticipated reversal or relaxation of the sanctions, that would, arguably, meet the definition. Flynn's denial that he discussed sanctions is significant because it is relevant to his potential guilt. Just as flight from the scene of a crime may be used as evidence of guilt, so too can a denial or falsity regarding the event.

Second part of the law school question: identify and discuss responsibilities of the administration if they were advised of this breach by intelligence agencies weeks before demanding Flynn's resignation. Include in that analysis that Flynn, after the disclosure to the administration, maintained his position in and therefore access to classified information and briefings.

As to this analysis regarding the responsibilities of the Administration, they are much more difficult to identify and therefore analyze. The executive branch has wide powers, and broad discretion in how to attend to and administer issues of foreign policy and national security. We get some insight from 18 U.S. Code §798, dealing with disclosure of classified information, which states in part that whoever knowingly and willfully communicates to an unauthorized person any classified information (which would include information discussed at the relevant intelligence briefings) then that person shall be fined or imprisoned for not more than 10 years or both. The question is whether Administration officials could be held to answer for 'knowingly and willfully communicated classified information to an unauthorized person' (Flynn), since the Administration had notice that he might have violated the law, and was put on notice that he may have been susceptible to blackmail. This inquiry demands a full investigation of what the administration knew about Flynn's failings, and when. Using the information given to them by the intelligence officials, including the acting Attorney General, did they separate Flynn from the briefings? If so, why and if not, why not?

With the law school examination and analysis behind us, one question is why Flynn would be so flagrantly reckless in his behavior? Flynn is simply too intelligent and experienced not to know that his communications may have been monitored by his very own Intelligence community. Did he believe that he was so far up the food chain that he could have squelched the inquiry had it occurred, or that those in the Intelligence community would cover the conversations that he had with the Russian ambassador? Why he would affirmatively have such a conversation and then lie directly to the Vice President? Why when challenged, did he come up with a series of expanding acknowledgements of his behavior from a firm "no" to an "I don't remember" to a "maybe"?

Unfortunately for the Trump administration, all of these questions must be answered, investigated and analyzed, as the very heart of our national security, entrusted to someone who violated protocol, possibly statutes, and certainly the trust of a nation, must be vindicated.