

Comeygate: Susan Rice's Memo as Exhibit A in the Case Against Comey



by John D. O'Connor

The following is an article originally published on *BizPac Review*. Read it [HERE](#).

Understandably there has been much discussion about the odd, flank-covering, self-addressed [January 20, 2017 memo of Susan Rice](#), sent literally the minute President Obama's term had ended. Many have suggested that the memo might be the basis for the investigation of the five-member team involved.

A close examination of it suggests that it is indeed, as Rice intended it, exculpatory as to her, and by inference, most other team members, including [President Obama](#). But by the same reasoning that exculpates four individuals, it clearly inculpatates one: FBI Director James Comey, for concealing national security information that he was duty-bound to give to his incoming Commander-in-Chief, President Trump.

Let us begin our analysis of Susan Rice's memo by clearly demarcating what it does not concern: law enforcement matters, commonly known as criminal cases or investigations. Rice notes the unanimous agreement of the group that all "law enforcement" information will be shared in a "by-the-book" manner.

After that was agreed, President Obama addressed the elephant in the room, the reason the meeting was called. The participants were aware (although Trump was not) of a "Russian collusion" investigation and also a transcript showing incoming National Security Advisor General Michael Flynn discussing Obama's Russian sanctions with Russian Ambassador, [Sergey Kislyak](#). Such discussions between the incoming national security team and foreign representatives are common, and, indeed, the norm.

The team knew two things that the Trump team did not: a) the Trump campaign had been targeted by a FISA warrant and accompanying investigation suggesting, falsely, that at least some campaign members were possibly treasonous colluders with Russia; and b) the Obama was considering springing the never-enforced, unconstitutionally vague Logan Act as a basis for criminally charging General Flynn.

With that background, Obama asked an extremely astute question, which recognized the wide and distinct gulf between a criminal case and a counterintelligence, or national security, matter:

"From a national security perspective, however, President Obama said he wants to be sure that, as we engage with the incoming team, we are mindful to ascertain if there is any reason that we cannot share information fully as it relates to Russia."

This is crucial: all agreed that the Russia investigation was not a *criminal* matter within the Attorney General's responsibilities, but a *national security* matter which it needed to share. The incoming team was headed, of course, by NSA General Flynn, for Trump. But, stunningly, when asked if such information should not be passed to Flynn, Comey answered, "potentially."

Special Counsel later termed the Russian investigation a "proceeding," thereby confirming that Comey was "potentially" planning to obstruct this proceeding by concealing material information from Trump and Flynn, who had constitutional authority over that proceeding.

Intentional obstruction is not immunized by laudable motives. What were Comey's? According to the memo, he expressed concern that, even though Flynn had not passed on classified information to Kislyak, "the level of communication is unusual." Of course, Comey had no idea what "usual" transition communications are; he had no prior experience. And, given serious [anti-Russian sanctions of December 29, 2016](#), there was every reason for a high level of communication. But assuming for purposes of argument that Flynn was doing something suspicious, wouldn't Comey have an even more heightened and urgent duty to share this with Trump? Of course he would.

For the next five months, Comey, it appears, concealed from Trump and, for weeks, from the Comey-targeted Flynn, information that was clearly within their national security responsibility.

So the first question posed by the Rice memo: is Comey guilty for intentional concealment of national security information from Trump and his incoming national security team?

The second corollary question: should Attorney General Jeff Sessions have recused himself under the statute cited to him by Department of Justice conflicts lawyers, [28 C.F.R. § 45.2](#)? Clearly not, since this section deals with conflicts arising from *criminal* investigations or cases.

Should we blame DOJ conflicts counsel for bad advice? Likely not, because that department would rely, in determining a conflict, on the investigating agency, Comey's FBI. If Comey lied to or concealed from Department lawyers that the case was not a criminal one, isn't he as guilty as was President Nixon of obstruction of justice?

Another dishonesty comes, again, from Comey when he urged a Special Counsel on his firing. The statute for a Special Counsel appointment again relies on the presence of a criminal case or investigation, which this was not:

“The ... Acting Attorney General, will appoint a Special Counsel when he or she determines that *criminal investigation* ... would *present a conflict of interest* for the Department ...”

([28 C.F.R. § 600.1](#), emphasis added)

So Comey, again, was being less than honest in so urging, since there was no *criminal* investigation warranting a Special Counsel, and Acting Attorney General Rod Rosenstein, in his Appointment Memo, only referenced “coordination or links between the Trump campaign and Russia.” This describes, accurately, a *counterintelligence* matter, inappropriate for a Special Counsel.

Should Franklin Roosevelt have recused himself from World War II intelligence matters because they concerned his Administration? Of course not. The question reveals the absurdity of Comey's position, apparently swallowed whole by the newly-appointed Rosenstein.

Of course, to be fair, Comey considered his firing to be obstruction of justice, a criminal matter. Shouldn't this warrant a Special Counsel? If such were the predicate for Special Counsel, which it wasn't, such would have limited the Special Counsel's role to that act, and not to a wide-ranging investigation. Comey's firing, in any case, was not criminal because the President was free to fire an FBI Director for any reason, or no reason, as part of his Constitutional authority.

But assuming *arguendo* that this potential crime of obstruction was the predicate for Special Counsel, who should have decided whether Special Counsel was appropriately appointed? We know who could not decide it: all the conflicted material witnesses, including Rosenstein,

Comey's Deputy Andrew McCabe, and the entirety of Comey's shady FBI team. They clearly were covered by the conflicts statute that they urged, wrongly so, on Jeff Sessions.

So the Rice memo, clarifying the Russian investigation as a national security matter, and Comey's intent to conceal key aspects, may be properly viewed as a roadmap both to a well-deserved conviction and an undeserved Special Counsel investigation.

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