U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

October 20, 2020

Austin Evers
American Oversight
1030 15th Street NW, Suite B255
Washington, DC 20005
foia@americanoversight.org

Re: FOIA-2020-00385
20-cv-01211 (D.D.C.)
VRB:JMB:BPF

Dear Austin Evers:

This is an interim response to your FOIA requests dated February 28 and March 6, 2020, seeking various records pertaining to Michael Flynn and the review of his criminal investigation and prosecution, dating from June 1, 2019 or January 1, 2020.[1]

Please be advised that searches have been conducted within the Offices of the Attorney General and Deputy Attorney General, as well as the Departmental Executive Secretariat, and 476 pages containing records responsive to your request were located. At this time, I have determined that 263 of these pages are appropriate for release without withholdings, and copies are enclosed. Additionally, 213 pages containing records responsive to your request are being withheld in full pursuant to Exemptions 3, 5, 6, 7(A), 7(C), and 7(F) of the FOIA, 5 U.S.C. §§ 552(b)(3), (b)(5), (b)(6), (b)(7)(A), (b)(7)(C), and (b)(7)(F).

Exemption 3 pertains to information exempted from release by statute (in this instance, Rule 6(e) of the Federal Rules of Criminal Procedure, which pertains to the secrecy of grand jury proceedings). Exemption 5 pertains to certain inter- and intra-agency communications protected by the attorney work-product and deliberative process privileges. Exemption 6 pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy. Exemption 7(A) pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement proceedings. Exemption 7(C) pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy. Finally, Exemption 7(F) pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to endanger the life or physical safety of an individual.

[1] You sent a request to the Executive Office for United States Attorneys (EOUSA), which forwarded a portion of that request to this Office for handling. The EOUSA tracking number associated with this request is EOUSA-2020-001827. This Office received your request from EOUSA on March 6, 2020.

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For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2018). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions regarding this response, please contact Christopher Bates of the Department's Civil Division at 202-514-3307.

Sincerely,

Jonathan Breyan

Jonathan Breyan
Senior Supervisory Attorney
for
Vanessa R. Brinkmann
Senior Counsel

Enclosures

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U.S. Department of Justice

The Special Counsel's Office

Washington, D.C. 20530

November 30, 2017

Robert K. Kelner
Stephen P. Anthony
Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956

FILED
DEC 01 2017
Clerk, U.S. District and Bankruptcy Courts

Re: United States v. Michael T. Flynn

Dear Counsel:

This letter sets forth the full and complete plea offer to your client, Lieutenant General Michael T. Flynn (Ret.) (hereinafter referred to as "your client" or "defendant"), from the Special Counsel's Office (hereinafter also referred to as "the Government" or "this Office"). If your client accepts the terms and conditions of this offer, please have your client execute this document in the space provided below. Upon receipt of the executed document, this letter will become the Plea Agreement (hereinafter referred to as "this Agreement"). The terms of the offer are as follows:

1. Charges and Statutory Penalties

Your client agrees to plead guilty to the Criminal Information, a copy of which is attached, charging your client with making false statements to the Federal Bureau of Investigation in violation of 18 U.S.C. § 1001.

Your client understands that a violation of 18 U.S.C. § 1001 carries a maximum sentence of 5 years' imprisonment; a fine of $250,000, pursuant to 18 U.S.C. § 3571(b)(3); a term of supervised release of not more than 3 years, pursuant to 18 U.S.C. § 3583(b)(2); and an obligation to pay any applicable interest or penalties on fines and restitution not timely made.

In addition, your client agrees to pay a special assessment of $100 per felony conviction to the Clerk of the United States District Court for the District of Columbia. Your client also understands that, pursuant to 18 U.S.C. § 3572 and § 5E1.2 of the United States Sentencing Guidelines, *Guidelines Manual* (2016) (hereinafter "Sentencing Guidelines," "Guidelines," or "U.S.S.G."), the Court may also impose a fine that is sufficient to pay the federal government the costs of any imprisonment, term of supervised release, and period of probation.

2. Factual Stipulations

Your client agrees that the attached "Statement of the Offense" fairly and accurately describes your client's actions and involvement in the offense to which your client is pleading

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DOJ-OIP-20-0368, 20-0369, 20-0370, DOJ-EOUSA-20-0371-A-000001

guilty. Please have your client sign and return the Statement of the Offense as a written proffer of evidence, along with this Agreement.

3. Additional Charges

In consideration of your client's guilty plea to the above offense, your client will not be further prosecuted criminally by this Office for the conduct set forth in the attached Statement of the Offense.

4. Sentencing Guidelines Analysis

Your client understands that the sentence in this case will be determined by the Court, pursuant to the factors set forth in 18 U.S.C. § 3553(a), including a consideration of the applicable guidelines and policies set forth in the Sentencing Guidelines. Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B), and to assist the Court in determining the appropriate sentence, the parties agree to the following:

A. Estimated Offense Level Under the Guidelines

The parties agree that the following Sentencing Guidelines sections apply:

U.S.S.G. §2B1.1(a)(2)	Base Offense Level:	6
	Total:	6

B. Acceptance of Responsibility

The Government agrees that a 2-level reduction will be appropriate, pursuant to U.S.S.G. § 3E1.1, provided that your client clearly demonstrates acceptance of responsibility, to the satisfaction of the Government, through your client's allocution, adherence to every provision of this Agreement, and conduct between entry of the plea and imposition of sentence.

Nothing in this Agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1, and/or imposition of an adjustment for obstruction of justice, pursuant to U.S.S.G. § 3C1.1, regardless of any agreement set forth above, should your client move to withdraw your client's guilty plea after it is entered, or should it be determined by the Government that your client has either (a) engaged in conduct, unknown to the Government at the time of the signing of this Agreement, that constitutes obstruction of justice, or (b) engaged in additional criminal conduct after signing this Agreement.

In accordance with the above, the applicable Guidelines Offense Level will be at least **4**.

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C. Estimated Criminal History Category

Based upon the information now available to this Office, your client has no criminal convictions.

Accordingly, your client is estimated to have zero criminal history points and your client's Criminal History Category is estimated to be I. Your client acknowledges that if additional convictions are discovered during the pre-sentence investigation by the United States Probation Office, your client's criminal history points may increase.

D. Estimated Applicable Guidelines Range

Based upon the agreed total offense level and the estimated criminal history category set forth above, your client's estimated Sentencing Guidelines range is zero months to six months' imprisonment (the "Estimated Guidelines Range"). In addition, the parties agree that, pursuant to U.S.S.G. § 5E1.2, should the Court impose a fine, at Guidelines level 4, the estimated applicable fine range is $500 to $9,500. Your client reserves the right to ask the Court not to impose any applicable fine.

The parties agree that, solely for the purposes of calculating the applicable range under the Sentencing Guidelines, neither a downward nor upward departure from the Estimated Guidelines Range set forth above is warranted, subject to the paragraphs regarding cooperation below. Accordingly, neither party will seek any departure or adjustment to the Estimated Guidelines Range, nor will either party suggest that the Court consider such a departure or adjustment, except as provided in the preceding sentence. Moreover, your client understands and acknowledges that the Estimated Guidelines Range agreed to by the parties is not binding on the Probation Office or the Court. Should the Court determine that a different guidelines range is applicable, your client will not be permitted to withdraw his guilty plea on that basis, and the Government and your client will still be bound by this Agreement.

Your client understands and acknowledges that the terms of this section apply only to conduct that occurred before the execution of this Agreement. Should your client commit any conduct after the execution of this Agreement that would form the basis for an increase in your client's base offense level or justify an upward departure (examples of which include, but are not limited to, obstruction of justice, failure to appear for a court proceeding, criminal conduct while pending sentencing, and false statements to law enforcement agents, the probation officer, or the Court), the Government is free under this Agreement to seek an increase in the base offense level based on that post-agreement conduct.

5. Agreement as to Sentencing Allocution

Based upon the information known to the Government at the time of the signing of this Agreement, the parties further agree that a sentence within the Estimated Guidelines Range

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would constitute a reasonable sentence in light of all of the factors set forth in 18 U.S.C. § 3553(a), should such a sentence be subject to appellate review notwithstanding the appeal waiver provided below.

6. **Reservation of Allocution**

The Government and your client reserve the right to describe fully, both orally and in writing, to the sentencing judge, the nature and seriousness of your client's misconduct, including any misconduct not described in the charges to which your client is pleading guilty.

The parties also reserve the right to inform the presentence report writer and the Court of any relevant facts, to dispute any factual inaccuracies in the presentence report, and to contest any matters not provided for in this Agreement. In the event that the Court considers any Sentencing Guidelines adjustments, departures, or calculations different from any agreements contained in this Agreement, or contemplates a sentence outside the Guidelines range based upon the general sentencing factors listed in 18 U.S.C. § 3553(a), the parties reserve the right to answer any related inquiries from the Court. In addition, if in this Agreement the parties have agreed to recommend or refrain from recommending to the Court a particular resolution of any sentencing issue, the parties reserve the right to full allocution in any post-sentence litigation. The parties retain the full right of allocution in connection with any post-sentence motion which may be filed in this matter and/or any proceeding(s) before the Bureau of Prisons. In addition, your client acknowledges that the Government is not obligated and currently does not intend to file any post-sentence downward departure motion in this case pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure.

7. **Court Not Bound by this Agreement or the Sentencing Guidelines**

Your client understands that the sentence in this case will be imposed in accordance with 18 U.S.C. § 3553(a), upon consideration of the Sentencing Guidelines. Your client further understands that the sentence to be imposed is a matter solely within the discretion of the Court. Your client acknowledges that the Court is not obligated to follow any recommendation of the Government at the time of sentencing or to grant a downward departure based on your client's substantial assistance to the Government, even if the Government files a motion pursuant to Section 5K1.1 of the Sentencing Guidelines. Your client understands that neither the Government's recommendation nor the Sentencing Guidelines are binding on the Court.

Your client acknowledges that your client's entry of a guilty plea to the charged offense authorizes the Court to impose any sentence, up to and including the statutory maximum sentence, which may be greater than the applicable Guidelines range. The Government cannot, and does not, make any promise or representation as to what sentence your client will receive. Moreover, it is understood that your client will have no right to withdraw your client's plea of guilty should the Court impose a sentence that is outside the Guidelines range or if the Court does not follow the Government's sentencing recommendation. The Government and your client will be bound by this Agreement, regardless of the sentence imposed by the Court. Any effort by your client to withdraw the guilty plea because of the length of the sentence shall constitute a breach of this Agreement.

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8. Cooperation

Your client agrees to cooperate with this Office on the following terms and conditions:

(a) Your client shall cooperate fully, truthfully, completely, and forthrightly with this Office and other Federal, state, and local law enforcement authorities identified by this Office in any and all matters as to which this Office deems the cooperation relevant. Your client acknowledges that your client's cooperation may include, but will not necessarily be limited to: answering questions; providing sworn written statements; taking government-administered polygraph examination(s); and participating in covert law enforcement activities. Any refusal by your client to cooperate fully, truthfully, completely, and forthrightly as directed by this Office and other Federal, state, and local law enforcement authorities identified by this Office in any and all matters in which this Office deems your client's assistance relevant will constitute a breach of this Agreement by your client, and will relieve this Office of its obligations under this Agreement, including, but not limited to, its obligation to inform this Court of any assistance your client has provided. Your client agrees, however, that such breach by your client will not constitute a basis for withdrawal of your client's plea of guilty or otherwise relieve your client of your client's obligations under this Agreement.

(b) Your client shall promptly turn over to this Office, or other law enforcement authorities, or direct such law enforcement authorities to, any and all evidence of crimes about which your client is aware; all contraband and proceeds of such crimes; and all assets traceable to the proceeds of such crimes. Your client agrees to the forfeiture of all assets which are proceeds of crimes or traceable to such proceeds of crimes.

(c) Your client shall submit a full and complete accounting of all your client's financial assets, whether such assets are in your client's name or in the name of a third party.

(d) Your client acknowledges and understands that, during the course of the cooperation outlined in this Agreement, your client will be interviewed by law enforcement agents and/or Government attorneys. Your client waives any right to have counsel present during these interviews and agrees to meet with law enforcement agents and Government attorneys outside of the presence of counsel. If, at some future point, you or your client desire to have counsel present during interviews by law enforcement agents and/or Government attorneys, and you communicate this decision in writing to this Office, this Office will honor this request, and this change will have no effect on any other terms and conditions of this Agreement.

(e) Your client shall testify fully, completely and truthfully before any and all Grand Juries in the District of Columbia and elsewhere, and at any and all trials of cases or other court proceedings in the District of Columbia and elsewhere, at which your client's testimony may be deemed relevant by the Government.

(f) Your client understands and acknowledges that nothing in this Agreement allows your client to commit any criminal violation of local, state or federal law during the period of your client's cooperation with law enforcement authorities or at any time prior to the sentencing

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DOJ-OIP-20-0368, 20-0369, 20-0370, DOJ-EOUSA-20-0371-A-000005

in this case. The commission of a criminal offense during the period of your client's cooperation or at any time prior to sentencing will constitute a breach of this Agreement and will relieve the Government of all of its obligations under this Agreement, including, but not limited to, its obligation to inform this Court of any assistance your client has provided. However, your client acknowledges and agrees that such a breach of this Agreement will not entitle your client to withdraw your client's plea of guilty or relieve your client of the obligations under this Agreement.

(g) Your client agrees that the sentencing in this case may be delayed until your client's efforts to cooperate have been completed, as determined by the Government, so that the Court will have the benefit of all relevant information before a sentence is imposed.

9. Waivers

A. Venue

Your client waives any challenge to venue in the District of Columbia.

B. Statute of Limitations

Your client agrees that, should the conviction following your client's plea of guilty pursuant to this Agreement be vacated for any reason, any prosecution, based on the conduct set forth in the attached Statement of the Offense, that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement (including any counts that the Government has agreed not to prosecute or to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against your client, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution of conduct set forth in the attached Statement of the Offense that is not time-barred on the date that this Agreement is signed.

C. Trial Rights

Your client understands that by pleading guilty in this case your client agrees to waive certain rights afforded by the Constitution of the United States and/or by statute or rule. Your client agrees to forgo the right to any further discovery or disclosures of information not already provided at the time of the entry of your client's guilty plea. Your client also agrees to waive, among other rights, the right to be indicted by a Grand Jury, the right to plead not guilty, and the right to a jury trial. If there were a jury trial, your client would have the right to be represented by counsel, to confront and cross-examine witnesses against your client, to challenge the admissibility of evidence offered against your client, to compel witnesses to appear for the purpose of testifying and presenting other evidence on your client's behalf, and to choose whether to testify. If there were a jury trial and your client chose not to testify at that trial, your client would have the right to have the jury instructed that your client's failure to testify could not be held against your client. Your client would further have the right to have the jury instructed that your client is presumed innocent until proven guilty, and that the burden would be

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on the United States to prove your client's guilt beyond a reasonable doubt. If your client were found guilty after a trial, your client would have the right to appeal your client's conviction. Your client understands that the Fifth Amendment to the Constitution of the United States protects your client from the use of compelled self-incriminating statements in a criminal prosecution. By entering a plea of guilty, your client knowingly and voluntarily waives or gives up your client's right against compelled self-incrimination.

Your client acknowledges discussing with you Rule 11(f) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence, which ordinarily limit the admissibility of statements made by a defendant in the course of plea discussions or plea proceedings if a guilty plea is later withdrawn. Your client knowingly and voluntarily waives the rights that arise under these rules in the event your client withdraws your client's guilty plea or withdraws from this Agreement after signing it.

Your client also agrees to waive all constitutional and statutory rights to a speedy sentence and agrees that the plea of guilty pursuant to this Agreement will be entered at a time decided upon by the parties with the concurrence of the Court. Your client understands that the date for sentencing will be set by the Court.

D. Appeal Rights

Your client understands that federal law, specifically 18 U.S.C. § 3742, affords defendants the right to appeal their sentences in certain circumstances. Your client agrees to waive the right to appeal the sentence in this case, including but not limited to any term of imprisonment, fine, forfeiture, award of restitution, term or condition of supervised release, authority of the Court to set conditions of release, and the manner in which the sentence was determined, except to the extent the Court sentences your client above the statutory maximum or guidelines range determined by the Court or your client claims that your client received ineffective assistance of counsel, in which case your client would have the right to appeal the illegal sentence or above-guidelines sentence or raise on appeal a claim of ineffective assistance of counsel, but not to raise on appeal other issues regarding the sentencing. In agreeing to this waiver, your client is aware that your client's sentence has yet to be determined by the Court. Realizing the uncertainty in estimating what sentence the Court ultimately will impose, your client knowingly and willingly waives your client's right to appeal the sentence, to the extent noted above, in exchange for the concessions made by the Government in this Agreement.

E. Collateral Attack

Your client also waives any right to challenge the conviction entered or sentence imposed under this Agreement or otherwise attempt to modify or change the sentence or the manner in which it was determined in any collateral attack, including, but not limited to, a motion brought under 28 U.S.C. § 2255 or Federal Rule of Civil Procedure 60(b), except to the extent such a motion is based on newly discovered evidence or on a claim that your client received ineffective assistance of counsel. Your client reserves the right to file a motion brought under 18 U.S.C. § 3582(c)(2), but agrees to waive the right to appeal the denial of such a motion.

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F. Privacy Act and FOIA Rights

Your client also agrees to waive all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including and without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a, for the duration of the Special Counsel's investigation.

10. Restitution

Your client understands that the Court has an obligation to determine whether, and in what amount, mandatory restitution applies in this case under 18 U.S.C. § 3663A. The Government and your client agree that mandatory restitution does not apply in this case.

11. Breach of Agreement

Your client understands and agrees that, if after entering this Agreement, your client fails specifically to perform or to fulfill completely each and every one of your client's obligations under this Agreement, or engages in any criminal activity prior to sentencing, your client will have breached this Agreement. In the event of such a breach: (a) the Government will be free from its obligations under this Agreement; (b) your client will not have the right to withdraw the guilty plea; (c) your client will be fully subject to criminal prosecution for any other crimes, including perjury and obstruction of justice; and (d) the Government will be free to use against your client, directly and indirectly, in any criminal or civil proceeding, all statements made by your client and any of the information or materials provided by your client, including such statements, information, and materials provided pursuant to this Agreement or during the course of any debriefings conducted in anticipation of, or after entry of, this Agreement, whether or not the debriefings were previously characterized as "off-the-record" debriefings, and including your client's statements made during proceedings before the Court pursuant to Rule 11 of the Federal Rules of Criminal Procedure.

Your client understands and agrees that the Government shall be required to prove a breach of this Agreement only by a preponderance of the evidence, except where such breach is based on a violation of federal, state, or local criminal law, which the Government need prove only by probable cause in order to establish a breach of this Agreement.

Nothing in this Agreement shall be construed to permit your client to commit perjury, to make false statements or declarations, to obstruct justice, or to protect your client from prosecution for any crimes not included within this Agreement or committed by your client after the execution of this Agreement. Your client understands and agrees that the Government reserves the right to prosecute your client for any such offenses. Your client further understands that any perjury, false statements or declarations, or obstruction of justice relating to your client's obligations under this Agreement shall constitute a breach of this Agreement. In the event of such a breach, your client will not be allowed to withdraw your client's guilty plea.

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12. **Government's Obligations**

The Government will bring to the Court's attention at the time of sentencing the nature and extent of your client's cooperation or lack of cooperation. The Government will evaluate the full nature and extent of your client's cooperation to determine whether your client has provided substantial assistance in the investigation or prosecution of another person who has committed an offense. If the Government determines that your client has provided such substantial assistance, this Office shall file a departure motion pursuant to Section 5K1.1 of the Sentencing Guidelines, which would afford your client an opportunity to persuade the Court that your client should be sentenced to a lesser period of incarceration and/or fine than indicated by the Sentencing Guidelines. The determination of whether your client has provided substantial assistance warranting the filing of a motion pursuant to Section 5K1.1 of the Sentencing Guidelines is within the sole discretion of the Government and is not reviewable by the Court. In the event your client should fail to perform specifically and fulfill completely each and every one of your client's obligations under this Agreement, the Government will be free from its obligations under this Agreement, and will have no obligation to present your client's case to the Departure Guideline Committee or file a departure motion pursuant to Section 5K1.1 of the Sentencing Guidelines.

13. **Complete Agreement**

No agreements, promises, understandings, or representations have been made by the parties or their counsel other than those contained in writing herein, nor will any such agreements, promises, understandings, or representations be made unless committed to writing and signed by your client, defense counsel, and the Special Counsel's Office.

Your client further understands that this Agreement is binding only upon the Special Counsel's Office. This Agreement does not bind any other United States Attorney's Office, nor does it bind any other state, local, or federal prosecutor. It also does not bar or compromise any civil, tax, or administrative claim pending or that may be made against your client.

If the foregoing terms and conditions are satisfactory, your client may so indicate by signing this Agreement and the Statement of the Offense, and returning both to me no later than November 30, 2017.

Sincerely yours,

ROBERT S. MUELLER, III
Special Counsel

By: _____
Brandon L. Van Grack
Zainab N. Ahmad
Senior Assistant Special Counsels
The Special Counsel's Office

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DEFENDANT'S ACCEPTANCE

I have read every page of this Agreement and have discussed it with my attorneys, Robert K. Kelner and Stephen P. Anthony. I fully understand this Agreement and agree to it without reservation. I do this voluntarily and of my own free will, intending to be legally bound. No threats have been made to me nor am I under the influence of anything that could impede my ability to understand this Agreement fully. I am pleading guilty because I am in fact guilty of the offense identified in this Agreement.

I reaffirm that absolutely no promises, agreements, understandings, or conditions have been made or entered into in connection with my decision to plead guilty except those set forth in this Agreement. I am satisfied with the legal services provided by my attorneys in connection with this Agreement and matters related to it.

Date: 11/30/17

Lieutenant General Michael T. Flynn (Ret.)
Defendant

ATTORNEYS' ACKNOWLEDGMENT

I have read every page of this Agreement, reviewed this Agreement with my client, Lieutenant General Michael T. Flynn (Ret.), and fully discussed the provisions of this Agreement with my client. These pages accurately and completely set forth the entire Agreement. I concur in my client's desire to plead guilty as set forth in this Agreement.

Date: 11/30/17

Robert K. Kelner
Attorney for Defendant

Stephen P. Anthony
Attorney for Defendant

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FILED
DEC 01 2017
Clerk, U.S. District and Bankruptcy Courts

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. MICHAEL T. FLYNN, Defendant.	Criminal No.: Violation: 18 U.S.C. § 1001 (False Statements)

STATEMENT OF THE OFFENSE

Pursuant to Federal Rule of Criminal Procedure 11, the United States of America and the defendant, MICHAEL T. FLYNN, stipulate and agree that the following facts are true and accurate. These facts do not constitute all of the facts known to the parties concerning the charged offense; they are being submitted to demonstrate that sufficient facts exist that the defendant committed the offense to which he is pleading guilty.

1. The defendant, MICHAEL T. FLYNN, who served as a surrogate and national security advisor for the presidential campaign of Donald J. Trump ("Campaign"), as a senior member of President-Elect Trump's Transition Team ("Presidential Transition Team"), and as the National Security Advisor to President Trump, made materially false statements and omissions during an interview with the Federal Bureau of Investigation ("FBI") on January 24, 2017, in Washington, D.C. At the time of the interview, the FBI had an open investigation into the Government of Russia's ("Russia") efforts to interfere in the 2016 presidential election, including the nature of any links between individuals associated with the Campaign and Russia, and whether there was any coordination between the Campaign and Russia's efforts.

2. FLYNN's false statements and omissions impeded and otherwise had a material impact on the FBI's ongoing investigation into the existence of any links or coordination

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between individuals associated with the Campaign and Russia's efforts to interfere with the 2016 presidential election.

False Statements Regarding FLYNN's Request to the Russian Ambassador that Russia Refrain from Escalating the Situation in Response to U.S. Sanctions against Russia

3. On or about January 24, 2017, FLYNN agreed to be interviewed by agents from the FBI ("January 24 voluntary interview"). During the interview, FLYNN falsely stated that he did not ask Russia's Ambassador to the United States ("Russian Ambassador") to refrain from escalating the situation in response to sanctions that the United States had imposed against Russia. FLYNN also 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 as a result of FLYNN's request. In truth and in fact, however, FLYNN then and there knew that the following had occurred:

a. On or about December 28, 2016, then-President Barack Obama signed Executive Order 13757, which was to take effect the following day. The executive order announced sanctions against Russia in response to that government's actions intended to interfere with the 2016 presidential election ("U.S. Sanctions").

b. On or about December 28, 2016, the Russian Ambassador contacted FLYNN.

c. On or about December 29, 2016, FLYNN called a senior official of the Presidential Transition Team ("PTT official"), who was with other senior members of the Presidential Transition Team at the Mar-a-Lago resort in Palm Beach, Florida, to discuss what, if anything, to communicate to the Russian Ambassador about the U.S. Sanctions. On that call, FLYNN and

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DOJ-OIP-20-0368, 20-0369, 20-0370, DOJ-EOUSA-20-0371-A-000012

the PTT official discussed the U.S. Sanctions, including the potential impact of those sanctions on the incoming administration's foreign policy goals. The PTT official and FLYNN also discussed that the members of the Presidential Transition Team at Mar-a-Lago did not want Russia to escalate the situation.

d. Immediately after his phone call with the PTT official, FLYNN called the Russian Ambassador and requested that Russia not escalate the situation and only respond to the U.S. Sanctions in a reciprocal manner.

e. Shortly after his phone call with the Russian Ambassador, FLYNN spoke with the PTT official to report on the substance of his call with the Russian Ambassador, including their discussion of the U.S. Sanctions.

f. On or about December 30, 2016, Russian President Vladimir Putin released a statement indicating that Russia would not take retaliatory measures in response to the U.S. Sanctions at that time.

g. On or about December 31, 2016, the Russian Ambassador called FLYNN and informed him that Russia had chosen not to retaliate in response to FLYNN's request.

h. After his phone call with the Russian Ambassador, FLYNN spoke with senior members of the Presidential Transition Team about FLYNN's conversations with the Russian Ambassador regarding the U.S. Sanctions and Russia's decision not to escalate the situation.

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False Statements Regarding FLYNN's Request that Foreign Officials Vote Against or Delay a United Nations Security Council Resolution

4. During the January 24 voluntary interview, FLYNN made additional false statements about calls he made to Russia and several other countries regarding a resolution submitted by Egypt to the United Nations Security Council on December 21, 2016. Specifically FLYNN falsely stated that he only asked the countries' positions on the vote, and that he did not request that any of the countries take any particular action on the resolution. FLYNN also falsely stated that the Russian Ambassador never described to him Russia's response to FLYNN's request regarding the resolution. In truth and in fact, however, FLYNN then and there knew that the following had occurred:

a. On or about December 21, 2016, Egypt submitted a resolution to the United Nations Security Council on the issue of Israeli settlements ("resolution"). The United Nations Security Council was scheduled to vote on the resolution the following day.

b. On or about December 22, 2016, a very senior member of the Presidential Transition Team directed FLYNN to contact officials from foreign governments, including Russia, to learn where each government stood on the resolution and to influence those governments to delay the vote or defeat the resolution.

c. On or about December 22, 2016, FLYNN contacted the Russian Ambassador about the pending vote. FLYNN informed the Russian Ambassador about the incoming administration's opposition to the resolution, and requested that Russia vote against or delay the resolution.

AMERICAN OVERSIGHT

DOJ-OIP-20-0368, 20-0369, 20-0370, DOJ-EOUSA-20-0371-A-000014

d. On or about December 23, 2016, FLYNN again spoke with the Russian Ambassador, who informed FLYNN that if it came to a vote Russia would not vote against the resolution.

Other False Statements Regarding FLYNN's Contacts with Foreign Governments

5. On March 7, 2017, FLYNN filed multiple documents with the Department of Justice pursuant to the Foreign Agents Registration Act ("FARA") pertaining to a project performed by him and his company, the Flynn Intel Group, Inc. ("FIG"), for the principal benefit of the Republic of Turkey ("Turkey project"). In the FARA filings, FLYNN made materially false statements and omissions, including by falsely stating that (a) FIG did not know whether or the extent to which the Republic of Turkey was involved in the Turkey project, (b) the Turkey project was focused on improving U.S. business organizations' confidence regarding doing business in Turkey, and (c) an op-ed by FLYNN published in *The Hill* on November 8, 2016, was written at his own initiative; and by omitting that officials from the Republic of Turkey provided supervision and direction over the Turkey project.

ROBERT S. MUELLER, III
Special Counsel

By: _____
Brandon L. Van Grack
Zainab N. Ahmad
Senior Assistant Special Counsels
The Special Counsel's Office

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DOJ-OIP-20-0368, 20-0369, 20-0370, DOJ-EOUSA-20-0371-A-000015

DEFENDANT'S ACCEPTANCE

The preceding statement is a summary, made for the purpose of providing the Court with a factual basis for my guilty plea to the charge against me. It does not include all of the facts known to me regarding this offense. I make this statement knowingly and voluntarily and because I am, in fact, guilty of the crime charged. No threats have been made to me nor am I under the influence of anything that could impede my ability to understand this Statement of the Offense fully.

I have read every word of this Statement of the Offense, or have had it read to me. Pursuant to Federal Rule of Criminal Procedure 11, 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.

Date: 11/30/17

Michael T. Flynn
Defendant

ATTORNEYS' ACKNOWLEDGMENT

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.

Date: 11/30/17

Robert K. Kelner
Attorney for Defendant

Stephen P. Anthony
Attorney for Defendant

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DOJ-OIP-20-0368, 20-0369, 20-0370, DOJ-EOUSA-20-0371-A-000016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Criminal No. 17-232
	)	
MICHAEL T. FLYNN,	)	
	)	Washington, D.C.
Defendant.	)	Friday, December 1, 2017

TRANSCRIPT OF PLEA HEARING
BEFORE THE HONORABLE RUDOLPH CONTRERAS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: Brandon Lang Van Grack, Esq.
Zainab N. Ahmad, Esq.
U.S. DEPARTMENT OF JUSTICE
Special Counsel's Office
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For the Defendant: Robert K. Kelner, Esq.
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
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-and-
Stephen Pierce Anthony
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Washington, DC 20001

Also Present: Special Agent William Barnett

Court Reporter: PATRICIA KANESHIRO-MILLER, RMR, CRR
United States Courthouse
333 Constitution Avenue, NW
Washington, D.C. 20001

Proceedings reported by stenotype shorthand.
Transcript produced by computer-aided transcription.

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P R O C E E D I N G S

(10:34 a.m.)

THE DEPUTY CLERK: This is Criminal Case 17-232, United States v. Michael T. Flynn.

Counsel, please step forward to the podium and state your appearances for the record.

MR. VAN GRACK: Good morning, Your Honor. Brandon Van Grack and Zainab Ahmad on behalf of the United States.

THE COURT: Good morning.

MR. VAN GRACK: And with us at counsel table is Special Agent William Barnett.

THE COURT: Good morning.

MR. KELNER: Good morning, Your Honor. Robert Kelner with Covington & Burling for the defendant, Michael T. Flynn. I'm joined by Stephen Anthony from Covington & Burling.

THE COURT: Good morning.

Give me a moment to look at the paperwork.

(Pause)

THE COURT: Are we ready to get started?

MR. KELNER: Yes, Your Honor.

MR. VAN GRACK: Yes, Your Honor.

THE COURT: Why don't you guys come to the podium.

I gather that Mr. Flynn wishes to enter a plea of guilty; is that correct?

MR. KELNER: Yes, Your Honor.

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THE COURT: Okay. Mr. Flynn, I assume you have never been through this process before.

THE DEFENDANT: Never, Your Honor.

THE COURT: Let me give you the most important particulars of how we are going to proceed.

There are going to be a number of questions. As part of this process, you're going to be giving up a number of your rights, both statutory and constitutional, so it is critical that you understand everything that goes on here because I have to determine at the end whether you have given up those rights knowingly, voluntarily, and with the advice of your counsel.

If there is anything I ask you that you don't understand, feel free to ask me to clarify it or, better yet, take a moment to discuss the issue with your counsel in private, if necessary.

You got that?

THE DEFENDANT: Thank you.

THE COURT: Okay. We're going to swear you in.

(Defendant sworn)

THE DEPUTY CLERK: Can you please state your name for the record.

THE DEFENDANT: Michael Thomas Flynn.

THE COURT: Mr. Flynn, do you understand that you're now under oath?

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THE DEFENDANT: Yes, Your Honor.

THE COURT: And that any answers that you give can be later used against you in this or another proceeding? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And that if you do not answer my questions truthfully, you could be prosecuted for perjury or making a false statement? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: As I said, I'm going to ask you a number of questions. If you choose to enter a plea of guilty today, I need to know that you're entering that plea of guilty knowingly, voluntarily, and intelligently, with the advice of your attorney.

As I said, if you don't understand my question or anything else about these proceedings, please tell me, and I will try to explain. But most importantly, you may consult with your attorney privately, if necessary, at any point in time.

I'm going to start with the routine questions. How old are you, sir?

THE DEFENDANT: 58.

THE COURT: I assume you can read and write English.

THE DEFENDANT: Yes.

THE COURT: How far did you go in school?

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THE DEFENDANT: Master's level.

THE COURT: Okay. And I assume you were born in this country.

THE DEFENDANT: Yes.

THE COURT: All right. Have you ever been treated for any type of mental illness or psychological or emotional problem?

THE DEFENDANT: No.

THE COURT: All right. Have you ever been treated for addiction to narcotic drugs or alcohol?

THE DEFENDANT: No.

THE COURT: Are you, in fact, addicted to narcotic drugs or alcohol?

THE DEFENDANT: No.

THE COURT: Are you under the influence today of any medicine or other narcotic that might impact your ability to understand what's going on here today?

THE DEFENDANT: No, Your Honor.

THE COURT: Are you ill in any way that might impact your ability to understand what's going on here today?

THE DEFENDANT: I'm not.

THE COURT: Does defense counsel have any question whatsoever as to the defendant's competency to pled at this time?

MR. KELNER: No, Your Honor.

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MR. ANTHONY: No, Your Honor.

THE COURT: Mr. Flynn, have you had sufficient time to consult with your attorneys about this case?

THE DEFENDANT: I have.

THE COURT: Are you satisfied with the services that they have provided you?

THE DEFENDANT: Yes.

THE COURT: Have you had the opportunity to discuss with them the charge against you and whether or not you should enter a plea of guilty?

THE DEFENDANT: I have.

THE COURT: Counsel, have you had sufficient time to review and investigate the law and the facts of this case?

MR. KELNER: Yes, Your Honor.

THE COURT: In your opinion, does the defendant understand the nature of the charge pending against him?

MR. KELNER: Yes, Your Honor.

THE COURT: Do you believe that he is mentally competent to enter this plea?

MR. KELNER: Yes, Your Honor.

THE COURT: Mr. Flynn, as I mentioned earlier, before I accept your plea, I need to explain to you certain rights. You have to make sure that you understand them because you're going to be waiving a significant number of them.

THE DEFENDANT: Uh-huh.

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THE COURT: Please listen closely. Be patient because it is going to take a little bit of time. And again, let me know if you do not understand anything. And finally, again, at any point in time, if you need to consult with your attorneys, please take the time to do that.

Do you understand that the charge against you is a felony charge?

THE DEFENDANT: I do.

THE COURT: Because it is a felony charge, you have a constitutional right to have the members of a grand jury indict and charge you with that felony. A federal grand jury is composed of at least 16 and not more than 23 citizens of the District of Columbia. In order to charge you, at least 12 of them must find that there is probable cause to believe that a crime has been committed and that you were the person that committed that crime. And if they charged you, they would list the charges in a written indictment. If you do not give up your right to be charged by grand jury indictment, the government cannot file felony charges against you on its own.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: In this case, the felony charges against you have been brought by the Special Counsel's Office by the filing of an Information.

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If you do not give up your right to be charged by grand jury indictment, the government may present the case to the grand jury and ask them to indict you, and a grand jury might indict you, but then there is always the possibility that they won't.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: Okay. If you do give up your right to be charged by a grand jury in an indictment, the case will proceed against you on the Special Counsel's Office Information, just as though you had been indicted. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Mr. Flynn, do you understand your right to indictment by a grand jury?

THE DEFENDANT: Yes.

THE COURT: Have you discussed giving up your right to indictment by the grand jury with your attorneys?

THE DEFENDANT: I have.

THE COURT: Have any threats or promises other than the promises made in the plea agreement been made to you to induce you to give up your right to the indictment?

THE DEFENDANT: No.

THE COURT: I gather there's a written waiver. Let me get that in front of me.

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Could you just confirm that that is your signature on that document?

Is that a "yes"?

THE DEFENDANT: Yes.

THE COURT: Okay. The signature on that document waiving your right to a grand jury, it's yours; correct?

THE DEFENDANT: Yes.

THE COURT: Counsel, is there any reason the defendant should not waive his right to a grand jury?

MR. KELNER: No.

THE COURT: I find that the waiver of indictment by grand jury is knowingly and voluntarily made, and it is accepted, and the signed waiver will be filed.

Mr. Flynn, you have the right to plead not guilty to any offense charged against you. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You would have the right to challenge the government's case against you by seeking to have the charges dismissed or having the evidence against you suppressed or thrown out. Do you understand you would have that right if you did not waive them?

THE DEFENDANT: Yes.

THE COURT: All right. Under the Constitution and the laws of the United States, you have the right to a jury trial in this case. That means that 12 citizens of the

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District of Columbia would sit as the jury and determine whether you are guilty or not guilty based upon evidence presented in this courtroom.

Do you understand your right to a jury trial?

THE DEFENDANT: I do, Your Honor.

THE COURT: If you choose to go to trial, you would have a right to be represented by your attorneys at that trial. Do you understand that?

THE DEFENDANT: I do.

THE COURT: At a trial, you would have the right through your lawyers to confront and cross-examine any witnesses against you. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You would also have the right to present your own witnesses, and you would have the right to subpoena them to require them to testify in your defense at trial. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: At a trial you would have the right to testify yourself and to present evidence on your behalf if you wanted to, but you would not have to testify or present any evidence if you did not want to because you cannot be forced to incriminate yourself, that is, to present evidence of your own guilt. Do you understand that?

THE DEFENDANT: Yes.

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THE COURT: If you chose not to testify or to put on any evidence at a trial, those choices could not be used against you to infer or suggest your guilt. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Unless and until I accept your guilty plea, if you choose to enter one today, you are presumed by the law to be innocent because it is the government's burden through competent evidence to prove your guilt beyond a reasonable doubt, and until it does, you cannot be convicted at trial. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you went to trial and you were convicted, you would have the right to appeal your conviction to the Court of Appeals and to have a lawyer help you prepare that appeal. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand that by pleading guilty, you will be generally giving up your rights to appeal? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, to summarize, do you understand that if you plead guilty in this case and I accept your guilty plea, you will give up all the rights I just explained to you because there will not be any trial and there will probably

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be no appeal and you will waive your right not to incriminate yourself, because in order for me to accept your plea, you have to admit your guilt. Do you understand that?

THE DEFENDANT: I do.

THE COURT: Mr. Flynn, do you wish to give up your rights to a trial, your right to an appeal in most circumstances, and all of the rights I have explained that you have if your case went to trial? Do you wish to do that?

THE DEFENDANT: Yes.

THE COURT: All right. And there is a signed waiver of trial by jury. If you could confirm that that is your signature on that page.

It is?

THE DEFENDANT: Yes.

THE COURT: Counsel, is there any reason the defendant should not waive a jury trial and his right against self-incrimination as to the charge to which a plea of guilty will be made?

MR. KELNER: No, Your Honor.

MR. VAN GRACK: No, Your Honor.

THE COURT: I find that the waiver is knowingly and voluntarily made, and it is accepted, and the signed waiver will be filed, as well.

Mr. Flynn, have you and your attorney received a copy of the Information in this case, which contains the written

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charges against you?

THE DEFENDANT: Yes.

THE COURT: Have you read that document and has your lawyer explained it to you, the charges contained therein?

THE DEFENDANT: Yes.

THE COURT: Have you had the opportunity to discuss the charges and the case in general fully with your attorneys?

THE DEFENDANT: I have.

THE COURT: You understand that the Information charges you with the offense of making false statements in a matter within the jurisdiction of the Executive Branch of the Government of the United States, in violation of 18 U.S.C. § 1001? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Before I accept your guilty plea, I must make a determination that there's a factual basis for that plea.

I'm going to have the government come up and make a presentation as to what it believes it can prove beyond a reasonable doubt at trial. I know that there is a written signed statement of offense, as well. So if you can just confirm that that is your signature on page 6 of that document.

It is?

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THE DEFENDANT: It is.

THE COURT: The government's presentation is going to largely duplicate that, but I still need you to listen closely, and at the end of it, if you disagree with anything they have said -- I will give you another opportunity to disagree with anything in the written document -- you need to tell me. So please listen carefully, okay?

THE DEFENDANT: Yes.

THE COURT: Go ahead and have a seat.

Let me hear from the government. Why don't you start with the elements of the charges.

MR. VAN GRACK: Your Honor, the elements for violating 18 U.S.C. § 1001 are that the defendant made a false statement that was material, the defendant acted knowingly and willfully, and the statement pertained to a matter within the jurisdiction of the Executive Branch of the United States Government.

THE COURT: Why don't you go through the facts that you think you can prove at trial.

MR. VAN GRACK: That the defendant made material false statements and omissions during an interview with the Federal Bureau of Investigation on January 24, 2017, in Washington, D.C.

At the time of the interview, the FBI had an open investigation into Russia's efforts to interfere in the 2016

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presidential election, including the nature of any links or coordination between individuals associated with Russia and the campaign of President Donald Trump.

Specifically, during that January 24th interview, the defendant 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. The defendant also 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 as a result of the defendant's request. In truth and in fact, the defendant then and there knew that:

On or about December 29, 2016, the day sanctions against Russia were announced, the defendant called a senior official of the Presidential Transition Team, who was with other senior members of the Presidential Transition Team at the Mar-a-Lago resort, to discuss what to communicate to the Russian Ambassador about sanctions. On that call, the defendant and the official discussed sanctions, including that members of the transition team at Mar-a-Lago did not want Russia to escalate the situation.

Immediately after that phone call, the defendant called the Russian Ambassador and requested that Russia not escalate the situation and only respond to the U.S. sanctions

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in a reciprocal manner.

Shortly after his phone call with the Russian Ambassador, the defendant spoke again with the senior official to report on the substance of his call with the Russian Ambassador, including their discussion of sanctions. Two days later, the Russian Ambassador called the defendant and informed him that Russia had chosen not to retaliate in response to the defendant's request. After that phone call, the defendant spoke with senior members of the transition team about his conversations with the Russian Ambassador regarding sanctions and Russia's decision not to escalate the situation.

During that same January 24th interview with the FBI, the defendant made additional false statements about his calls to Russia and other countries regarding a resolution submitted to the United Nations Security Council on December 24, 2016. The defendant falsely stated that he only asked the countries' positions on the resolution and that he did not request that any of the countries take any particular action on the resolution. The defendant also falsely stated that the Russian Ambassador never described to him Russia's response to his request. In truth and in fact, the defendant then and there knew that:

On or about December 22, 2016, a very senior member of the transition team directed the defendant to contact

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officials from foreign governments, including Russia, to learn where each government stood on the resolution and to influence those governments to delay the vote or defeat the resolution.

On or about December 26, 2016, the defendant contacted the Russian Ambassador about the pending vote. The defendant requested that Russia vote against or delay the resolution.

The next day the defendant again spoke with the Russian Ambassador, who informed him that if it came to a vote, Russia would not vote against the resolution.

In addition, on March 7, 2017, the defendant filed multiple documents with the Department of Justice pursuant to the Foreign Agents Registration Act pertaining to a project performed by him and his company for the principal benefit of the Republic of Turkey. In those filings, the defendant made materially false statements and omissions, including by falsely stating that his company did not know whether or the extent to which the Republic of Turkey was involved in the project; that the project was focused on improving U.S. business organizations' confidence regarding doing business in Turkey; and an op-ed by the defendant published on November 8, 2016 was written at his own initiative. In addition, the defendant omitted in those filings that officials from the Republic of Turkey provided supervision

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and direction over the project.

THE COURT: Thank you.

MR. VAN GRACK: Your Honor, I want to correct two dates that I read: That the resolution before the United States Security Council was submitted on December 24, 2016; and that the second call that the defendant made with the Russian Ambassador about that UN vote was on December 23rd.

THE COURT: All right. Thank you.

Mr. Flynn, if you could come back to the podium, please.

Are those dates correct in the written statement?

MR. VAN GRACK: Yes, they are, Your Honor.

THE COURT: So they don't need to be corrected there, as well.

MR. VAN GRACK: No, Your Honor.

THE COURT: Okay.

Mr. Flynn, now that you've read the written statement of facts, you've heard the government's oral presentation, are there any corrections or errors that you need to point out?

THE DEFENDANT: Nothing that I heard, Your Honor, no.

THE COURT: Or that you read?

THE DEFENDANT: Or that I read.

THE COURT: Is that factual summary true and correct?

THE DEFENDANT: It is.

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THE COURT: Did you, in fact, do what the government has stated that it can prove at trial?

THE DEFENDANT: Yes.

THE COURT: Mr. Flynn, there is a written letter outlining the plea agreement in this case. Do you have a copy of that agreement?

THE DEFENDANT: Yes.

THE COURT: Have you read it carefully?

THE DEFENDANT: Yes.

THE COURT: Have you had the chance to discuss it fully with your attorneys?

THE DEFENDANT: I have.

THE COURT: Do you understand it?

THE DEFENDANT: I do.

THE COURT: If you can confirm that that is your signature on page 10 of that document.

It is?

THE DEFENDANT: Yes.

THE COURT: Okay. By signing that agreement, are you accepting and agreeing to the terms of the agreement?

THE DEFENDANT: I am.

THE COURT: Okay. Is your willingness to plead guilty here today the result of the discussions you had with the government through your attorneys?

THE DEFENDANT: Yes.

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THE COURT: Okay. Does that written agreement represent the entire understanding you have with the government?

THE DEFENDANT: Yes, I believe it does.

THE COURT: Okay. There are no side oral agreements?

THE DEFENDANT: None.

THE COURT: Does the government counsel agree that that is correct?

MR. VAN GRACK: Yes, Your Honor.

THE COURT: Okay. Does government counsel wish to summarize it or file the written agreement and rely upon it?

MR. VAN GRACK: File the written agreement and rely on it.

THE COURT: Okay. We will go ahead and do that and get that filed.

Mr. Flynn, as I understand it, you're proposing to plead guilty to the offense of making false statements in a matter within the jurisdiction of the Executive Branch of the Government of the United States, in violation of 18 U.S.C. § 1001.

Do you understand that if I accept your guilty plea in this case, you could receive a maximum sentence of 5 years' imprisonment. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you also understand that I can impose

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a fine of up to $250,000?

THE DEFENDANT: I do.

THE COURT: Do you also understand that I could impose a fine sufficient to pay the government the cost of any imprisonment, term of supervised release, or period of probation?

THE DEFENDANT: Yes.

THE COURT: Do you also understand that although no restitution issues have been brought to my attention that I have an independent duty to determine whether any restitution needs to be made if anyone has sustained a loss as a result of your actions, and I would be required by law to impose that amount of restitution?

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand, also, that you would be obligated to pay any applicable interest or penalties on fines or restitution that are not timely made? Do you understand that?

THE DEFENDANT: I do.

THE COURT: Do you also understand that you would be subject to a term of supervised release not to exceed 3 years? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And what that means is that if you're

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sent to prison that upon your release you will be on supervision under certain circumstances and rules with which you must comply. And if you violate those conditions and rules, you could be sent back to prison for an additional period of time. Do you understand --

THE DEFENDANT: Yes.

THE COURT: -- how supervised release works?

THE DEFENDANT: Yes.

THE COURT: Do you also understand, although no prior criminal history has been brought to my attention, that if the probation office determines you have two or more convictions for a crime of violence or felony drug offenses, you may be subject to higher penalties provided in the career offender statutes in the sentencing guidelines? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you also understand that you would be subject to a special assessment of $100 for a felony offense, as required by statute? Do you understand that?

THE DEFENDANT: I do, Your Honor.

THE COURT: And again, although no forfeiture issues have been brought to my attention, do you understand that if they are applicable, the Court can require you to forfeit certain property to the government? Do you understand that?

THE DEFENDANT: I do.

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THE COURT: Mr. Flynn, do you understand all of these possible consequences of your plea agreement?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I'm going to review something with you that I'm sure your counsel has discussed with you, and that is the sentencing guidelines.

This case falls within the Sentencing Reform Act of 1984, by which Congress created the United States Sentencing Commission. The Sentencing Commission has issued detailed guidelines for judges such as myself to consider in determining the sentence in a criminal case like this. The Commission has set sentencing ranges for specific offenses, and those ranges are contained in the guidelines manual. However, in light of Supreme Court decisions, the sentencing guidelines are not mandatory, they are advisory, but they must be consulted by the Court in the first instance in determining the appropriate sentence. Hence, I will assess and determine the proper sentence in this case by reference to and in consideration of the guidelines. And while the Court, prosecutor, your counsel, and even you have some idea of what that guidelines range will be based on the charge and based upon your prior criminal history, nothing will be certain until the probation office conducts its investigation and advises me what they believe the sentencing guideline range is.

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Do you understand that process?

THE DEFENDANT: I do.

THE COURT: The probation office will create a presentence report that contains their conclusions as to what the range is. That report will come to me, and it would also go to both sets of attorneys, and all of you will have a chance to make objections to portions of it or request changes. Your attorney will go over it with you, and then at the time of the sentencing I will hear from both sets of attorneys, and it is only then that I will make a determination what your advisory sentence and guidelines range is.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Once I do that in accordance with the sentencing guidelines, I'm still permitted, however, to impose a sentence outside of that range, either above or below that range.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: However, I cannot sentence you to more than the statutory period which I explained a little earlier.

Have you and your attorney talked about the sentencing guidelines and how they might apply to your case?

THE DEFENDANT: Yes, Your Honor.

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THE COURT: Do you understand that I cannot determine what the sentence would be under the guidelines until I have received a presentence report from the probation office and the government and your attorneys have had the opportunity to challenge the facts reported by the probation officer?

Do you understand that?

THE DEFENDANT: Yes, I understand that.

THE COURT: Do you understand that after I have decided what guidelines range applies in your case, I still have the authority in my discretion to impose a sentence that is more severe or less severe than the sentence called for by the guidelines? Do you understand that?

THE DEFENDANT: I do, Your Honor.

THE COURT: Do you also understand that parole has been abolished for federal charges and that if you are sentenced to prison that you will serve the sentence I impose, with a possible modest reduction for good time credit, but that you will not be released early on parole as used to be the case? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you also understand that the offense to which you are proposing to plead guilty is a felony offense; and that if your plea is accepted and you're found guilty of that offense, then, depending upon the specific circumstances and the jurisdiction in which you reside, such

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a finding may deprive you of valuable civil rights, such as the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess any kind of firearm?

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you also understand that under some circumstances, not only you, but also the government may have the right to appeal any sentence that I impose if the government believes that the sentence is improper or unlawful? Do you understand that?

THE DEFENDANT: I do.

THE COURT: Do you understand that under this plea agreement you are generally giving up your right to appeal any conviction or sentence I impose? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: There's very limited exceptions to what you can appeal in this matter. Do you understand that?

THE WITNESS: Yes.

THE COURT: And you've specifically discussed with your attorneys the waiver of the right-to-appeal rights?

THE DEFENDANT: Yes.

THE COURT: All right. Do you understand that if the proper guideline range that I determine is higher than you expected, as I warn you it could be, or the sentence I impose

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is more severe than you expected -- again, I warn you it could be -- you will still be bound by your guilty plea and will have no right to withdraw it? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand that if I do not accept any sentencing recommendations made in the plea agreement or made by the lawyers at the time of sentencing, you will still be bound by your guilty plea and will have no right to withdraw it? Do you understand that?

THE DEFENDANT: I do.

THE COURT: The plea agreement includes an agreement by you to cooperate with the United States and an agreement by the U.S. to make a motion pursuant to Sentencing Guideline 5K1.1 if, but only if, the United States determines that you have provided substantial assistance in the investigation or prosecution of another person.

Do you understand that the decision whether that motion under 5K is filed is within the sole discretion of the United States, and neither you nor the Court can require the government to file that motion? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: So if the government decides that your cooperation is not enough to justify them filing that motion, that is their call, it is not mine and it is not yours. Do you understand that?

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THE DEFENDANT: Yes.

THE COURT: Do you also understand that the Court is not required to reduce your sentence even if the government files that motion? That is my decision to make, not theirs. Do you understand that?

THE DEFENDANT: I do.

THE COURT: Finally, to repeat again, do you understand that under the law, I must consider and take into account the sentencing guidelines, along with all the other relevant factors, but that the guidelines are advisory, they're not binding on me, and ultimately the appropriate sentence will be determined in my discretion, considering the sentencing guidelines and all of the other relevant factors under the statute?

Do you understand that?

THE DEFENDANT: I do, Your Honor.

THE COURT: Mr. Flynn, has anyone, including your attorney, the federal agents, the prosecutor, or any other person in which you have come in contact promised or suggested to you that merely because you are pleading guilty I will give you a lighter sentence?

THE DEFENDANT: No.

THE COURT: Has anyone made any promises to you as to what sentence I will impose in this case if I accept your guilty plea?

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THE DEFENDANT: They have not.

THE COURT: Do you understand that at this time I do not know what sentence I will impose in your case since I have not yet heard from the lawyers or from the probation office?

THE DEFENDANT: Yes.

THE COURT: Has anyone made any promises to you in connection with your guilty plea other than those that are contained in the written plea agreement?

THE DEFENDANT: They have not.

THE COURT: Has anyone forced, threatened, or coerced you in any way into entering this plea of guilty?

THE DEFENDANT: No.

THE COURT: Mr. Flynn, has there been anything about your plea agreement or these proceedings that you do not understand or that you wish to consult with your attorneys about?

THE DEFENDANT: There isn't.

THE COURT: Is there anything that you want to ask me before you make a decision whether or not you want to plead guilty or go to trial?

THE DEFENDANT: No, Your Honor.

THE COURT: Counsel for both sides, is there anything else we need to cover before taking the plea?

MR. KELNER: No, Your Honor.

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MR. ANTHONY: No, Your Honor.

MR. VAN GRACK: No, Your Honor.

THE COURT: Mr. Flynn, are you now ready to make a decision about whether you wish to enter a plea of guilty or whether you, instead, wish to go to trial?

THE DEFENDANT: I am.

THE COURT: Mr. Flynn, how do you plead to the charge in Count One of the Information, making false statements, in violation of 18 U.S.C. § 1001; do you plead guilty or not guilty?

THE DEFENDANT: Guilty, Your Honor.

THE COURT: Are you entering this plea of guilty voluntarily and of your own free will?

THE DEFENDANT: I am.

THE COURT: Are you entering this plea of guilty because you are guilty and for no other reason?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Defense counsel, do you know of any reason why the defendant should not plead guilty to the charge?

MR. KELNER: No, Your Honor.

MR. VAN GRACK: No, Your Honor.

THE COURT: It is the finding of this Court in the case of *United States v. Michael T. Flynn*, Criminal Number 17-232, that the defendant, Michael Flynn, is fully competent

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and capable of making a decision today and entering an informed plea; that he understands the nature of the charges against him and the consequences of what he is doing; that he is acting voluntarily and of his own free will; and that there is an adequate factual basis for his plea. Therefore, the plea of guilty is accepted, and I find you guilty as charged in Count One of the Information.

Mr. Flynn, as I explained to you a little bit earlier, there is going to be a presentence investigation conducted and a report prepared by the probation office to assist me in the sentencing. You are going to be interviewed by a probation officer, and you are required to give truthful information for that report. Your attorney may be present if you wish -- and that is generally a good idea -- and then you and your attorney will be permitted to read the presentence report, a draft of it, before the sentencing hearing, and make any objections to any errors that you believe are in that report. And then at the sentencing hearing, both you and your attorney will be given an opportunity to speak on your behalf.

Do you understand that process?

THE DEFENDANT: I do.

THE COURT: I assume that we're deferring sentencing for the time being?

MR. VAN GRACK: Yes, Your Honor.

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THE COURT: Okay. How do you want to proceed as far as setting a status report --

MR. VAN GRACK: Yes, Your Honor, we've spoken with defense counsel, and we would like to schedule a status date in three months.

THE COURT: Okay. And defer the presentence investigation?

MR. VAN GRACK: Yes, Your Honor.

THE COURT: Okay.

THE DEPUTY CLERK: Status date is February 1, 2018.

THE COURT: 10 a.m.

A status report or status hearing?

Mr. VAN GRACK: A status report.

THE COURT: Okay. Status report, February 1, 2018.

I assume the government is not requesting that we hold him prior to that?

MR. VAN GRACK: No, Your Honor.

THE COURT: Okay. I will agree with that.

I'm going to have you report weekly by phone, and to live at the address that is in the pretrial materials. Is that correct?

MR. ANTHONY: Yes, that's the address, Your Honor.

THE COURT: I have signed the booking documents.

The one last thing I need to advise you, Mr. Flynn, is when we do finally set a sentencing date, you are required

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to appear for that sentencing, and the failure to appear as required is a separate criminal offense for which you could be sentenced to imprisonment. All the conditions that you will be released upon now apply, and the penalties for violating those conditions can be severe, and that committing a crime while on release can subject you to more severe punishment than would otherwise be the case if you were not under the release conditions.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Counsel, is there anything else we need to cover?

MR. KELNER: No, Your Honor.

Government?

MR. VAN GRACK: No, Your Honor.

THE COURT: Thank you. You're excused.

(Proceedings adjourned at 11:16 a.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Patricia A. Kaneshiro-Miller, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Patricia A. Kaneshiro-Miller — December 1, 2017

PATRICIA A. KANESHIRO-MILLER — DATE

AMERICAN OVERSIGHT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
Plaintiff,	:	Criminal Action
	:	No. 17-232
v.	:	
	:	
MICHAEL FLYNN,	:	December 18, 2018
	:	11:00 a.m.
	:	
	:	
Defendant.	:	Washington, D.C.
	:	
.....	:	

TRANSCRIPT OF SENTENCING PROCEEDINGS
BEFORE THE HONORABLE EMMET G. SULLIVAN,
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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MORNING SESSION, DECEMBER 18, 2018

(11:16 a.m.)

THE COURT: Good morning.

THE COURTROOM CLERK: Good morning, Your Honor.

THE COURT: Good morning.

THE COURTROOM CLERK: Your Honor, this is criminal case 17-232, *United States of America versus Michael Flynn*.

Will all parties please come forward to this lectern and identify yourselves for the record.

MR. VAN GRACK: Good morning, Your Honor. Brandon Van Grack on behalf of the United States, and with me at counsel's table is Zainab Ahmed and William McCausland from the FBI.

THE COURT: Good morning, Counsel.

MS. AHMAD: Good morning, Your Honor.

MR. KELNER: Good morning, Your Honor. Robert Kelner with Covington & Burling for the defendant, Michael Flynn, and with me at counsel table is Stephen Anthony.

THE COURT: All right. Good morning, Counsel. Mr. Flynn, good morning. How are you?

THE DEFENDANT: Good.

THE COURT: From the Probation Department?

MS. KRAEMER-SOARES: Good morning, Your Honor. Kelly Kraemer-Soares and Renee Moses-Gregory on behalf of U.S. Probation.

THE COURT: All right. Good morning to you both. The

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case is in a very unique posture. As everyone knows, I was not the judge who took the plea of guilty from Mr. Flynn, so before I focus on sentencing issues, I need to focus on some other issues. I want to say a couple of things before I get to those issues. I read every filing very carefully in this case. There's a great deal of nonpublic information in this case, and I'll just leave it at that.

If any of my questions require a party to disclose nonpublic information, or if I begin to discuss something nonpublic, don't be shy in telling me. My clerks over the years have learned to do this (indicating) if I get off of script or if I get into areas where -- I won't get offended if you do it. I may not see you, so stand up and raise your hands or say something, please. I don't want to unintentionally say something that should not be revealed on the public docket.

There's a new document that was filed at 10:19 this morning. The government filed a sealed motion alerting the Court that it inadvertently omitted one document from the government's in-camera production.

The Court understands that the defendant received this document from the government on November the 8th of this year. The Court received and read the document before I came on the bench. Does the defendant have any concerns about this inadvertent omission before this hearing proceeds or otherwise any objections?

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MR. KELNER: No, Your Honor.

THE COURT: All right. I want to focus on the plea first because I think I need to. And there are some questions that I'm going to ask Mr. Flynn, and because this is an extension, in my opinion, of the plea colloquy, I'm going to ask the courtroom deputy at that time to administer the oath, because normally when we have plea colloquies, we always require a defendant to be under oath, and that's what I'm going to do this morning, unless there are objections.

MR. KELNER: No objection, Your Honor.

THE COURT: All right. And in Mr. Flynn's Memorandum in Aid of Sentencing he states he, quote, does not take issue with the description of the nature and circumstances of the offense contained in the government's sentencing memorandum and the presentence investigation report, end quote. He also states that he has, quote, frankly acknowledged, end quote, that, quote, his actions were wrong and he accepted full responsibility for them, end quote.

At the same time, however, Mr. Flynn focuses much of his memorandum on certain, quote, additional facts, end quote, regarding the circumstances surrounding the January 24, 2017 FBI interview at which Mr. Flynn admittedly lied about several topics to the FBI agents.

Mr. Flynn contends that such additional facts, quote, warrant the Court's consideration as it evaluates the seriousness

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of the offense relative to the circumstances of witness interviews and typical cases charged under 18 U.S. Code Section 1001, end quote.

Mr. Flynn highlights the fact that former Deputy FBI Director Andrew McCabe explained that the, quote, quickest, end quote, way, to conduct the interview would be without involving the White House counsel's office.

Mr. Flynn then agreed to meet the agents without any additional participants.

Mr. Flynn also highlights that the FBI agents intentionally decided not to warn him that lying to the FBI was a crime to ensure that Mr. Flynn would be relaxed.

At the interview, Mr. Flynn was relaxed and unguarded. He implies that he was unguarded because he did not receive a warning and was not represented by counsel.

In his sentencing memorandum, Mr. Flynn cited a January 24, 2017 FBI memorandum and an August commonly referred to as a 302, and an August 22nd -- strike that. I misspoke. It's the memorandum -- and an August 22nd, 2017 FD-302 without providing copies to the Court.

Mr. Flynn did not cite or quote the FD-302 prepared immediately after his interview. These documents were not otherwise in the record. The Court then ordered the defendant to produce the cited material and ordered the government to produce any other memoranda or FD-302 relevant to Mr. Flynn's FBI

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interview.

After reviewing the produced material, the Court concluded that the FD-302 prepared immediately after Mr. Flynn's interview was relevant to sentencing and thus ordered the government to file a redacted version on the public docket.

The Court takes its responsibility here today, as always, very seriously.

Mr. Flynn's briefing concerned the Court, as he raised issues that may affect or call into question his guilty plea, and, at the very least, maybe his acceptance of responsibility.

As such, the Court concludes that it must now first ask Mr. Flynn certain questions to ensure that he entered his guilty plea knowingly, voluntarily, intelligently, and with fulsome and satisfactory advice of counsel.

I cannot recall any incident in which the Court has ever accepted a plea of guilty from someone who maintained that he was not guilty, and I don't intend to start today. So I'm going to invite Mr. Flynn and his attorney or attorneys to come to the podium, and I'm going to ask the courtroom deputy to administer the oath to Mr. Flynn.

(MICHAEL FLYNN, DEFENDANT IN THE CASE, SWORN)

THE COURT: All right. And I will inform you, sir, that any false answers will get you in more trouble. Do you understand that?

THE DEFENDANT: Yes.

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THE COURT: You have to keep your voice up. If you don't understand my question, please tell me and I'll rephrase it.

Most importantly, you may consult with your attorney privately before answering my questions or at any point in time. Should you want the opportunity to attempt to withdraw your plea, I will afford you that opportunity. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you wish to challenge the circumstances on which you were interviewed by the FBI?

THE DEFENDANT: No, Your Honor.

THE COURT: Do you understand that by maintaining your guilty plea and continuing with sentencing, you will give up your right forever to challenge the circumstances under which you were interviewed?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any concerns that you entered your guilty plea before you or your attorneys were able to review information that could have been helpful to your defense?

THE DEFENDANT: No, Your Honor.

THE COURT: At the time of your January 24th, 2017 interview with the FBI, were you not aware that lying to FBI investigators was a federal crime?

THE DEFENDANT: I was not -- I was aware.

THE COURT: You were aware?

THE DEFENDANT: Yeah.

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THE COURT: Your sentencing memorandum also states that you pled guilty before certain, quote, revelations that certain FBI officials involved in the January the 24th interview were themselves being investigated for misconduct, end quote. Do you seek an opportunity to withdraw your plea in light of those revelations?

THE DEFENDANT: I do not, Your Honor.

THE COURT: All right. Now, again, at any time -- I should have said this before I started asking questions, but knowing what I was going to do, to have this colloquy with you, I've made arrangements for a private room for you and your attorneys to talk about any of these questions and your answers. So, even though I've taken a number of answers from you, if you want -- if you want that opportunity to speak privately with your attorneys, then I'll certainly afford you that opportunity as well. Would you like to do that?

THE DEFENDANT: No, Your Honor.

THE COURT: All right. Are you satisfied with the services provided by your attorneys?

THE DEFENDANT: I am.

THE COURT: In certain special circumstances, I have over the years appointed an independent attorney to speak with a defendant, review the defendant's file, and conduct necessary research to render a second opinion for a defendant. Do you want the Court to consider appointing an independent attorney for you

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in this case to give you a second opinion?

THE DEFENDANT: I do not, Your Honor.

THE COURT: Do you feel that you were competent and capable of entering into a guilty plea when you pled guilty on December 1st, 2017?

THE DEFENDANT: I do, Your Honor.

THE COURT: Do you understand the nature of the charges against you and the consequences of pleading guilty?

THE DEFENDANT: I do understand, Your Honor.

THE COURT: And that was covered extensively by Judge Contreras. I've read the transcript.

Are you continuing to accept responsibility for your false statements?

THE DEFENDANT: I am, Your Honor.

THE COURT: Do you still want to plead guilty, or do you want me to postpone this matter, give you a chance to speak with your attorneys further, either in the courtroom or privately at their office or elsewhere, and pick another day for a status conference? And I'm happy to do that.

THE DEFENDANT: I appreciate that, but no, Your Honor.

THE COURT: All right. For your attorneys: Do you have any concerns that potential *Brady* material or other relevant material was not provided to you?

MR. KELNER: No, Your Honor.

THE COURT: All right. Do you contend that Mr. Flynn is

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entitled to any additional information that has not been provided to you?

MR. KELNER: No, Your Honor.

THE COURT: Do you wish to seek any additional information before moving forward to sentencing?

MR. KELNER: No, Your Honor.

THE COURT: Do you believe the FBI had a legal obligation to warn Mr. Flynn that lying to the FBI was a federal crime?

MR. KELNER: No, Your Honor.

THE COURT: Is it your contention that Mr. Flynn was entrapped by the FBI?

MR. KELNER: No, Your Honor.

THE COURT: Do you believe Mr. Flynn's rights were violated by the fact that he did not have a lawyer present for the interview?

THE DEFENDANT: No, Your Honor.

THE COURT: Do you believe his rights were violated by the fact that he may have been dissuaded from having a lawyer present for the interview?

MR. KELNER: No, Your Honor.

THE COURT: The sentencing memorandum also states that Mr. Flynn pled guilty before certain, quote, revelations that certain FBI officials involved in the January 24th interview were, themselves, being investigated for misconduct," end quote. Is it your contention that any misconduct by a member of the FBI

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raises any degree of doubt that Mr. Flynn intentionally lied to the FBI?

MR. KELNER: No, Your Honor.

THE COURT: The references that I've mentioned that appear in your sentencing memorandum raise some concerns on the part of the Court. And my question is, how is raising those contentions about the circumstances under which Mr. Flynn lied consistent with acceptance of responsibility?

MR. KELNER: Your Honor, the principle reason we raised those points in the brief was to attempt to distinguish the two cases in which the Special Counsel's investigation has resulted in incarceration, the Papadopoulos and Van der Zwaan cases in which the Special Counsel had pointed out as aggravating factors the fact that those defendants had been warned and the fact that those defendants did have counsel and lied anyway, and we felt it was important to identify for the Court that those aggravating circumstances do not exist in this case relevant to sentencing.

But General Flynn has been, I think, clear from the beginning and will be clear again to you today that he fully accepts responsibility, stands by his guilty plea, which was made based on knowing and willful conduct.

We did think there was information produced in the *Brady* process that Your Honor might want to see, and that was relevant strictly to the question of the history and circumstances of the case for sentencing purposes.

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Those are the reasons that was included.

THE COURT: All right. But you can understand why the Court has some concern after --

MR. KELNER: -- I can --

THE COURT: -- reading those passages in the sentencing memo.

MR. KELNER: We absolutely understand your concerns, Your Honor, yes.

THE COURT: And you're not asking for a postponement to give more time to whether you wish to file a motion to attempt to withdraw Mr. Flynn's plea of guilty?

MR. KELNER: We have no intention and the defendant has no intention to withdraw the guilty plea, and we're certainly not asking Your Honor to consider that. We're ready to proceed to sentencing.

THE COURT: All right. And you don't need any further time to think about it?

MR. KELNER: We do not, Your Honor.

THE COURT: And nothing that's been filed within the last week on the docket raises any concerns on your part about any aspect of Mr. Flynn's guilty plea?

MR. KELNER: That's correct, Your Honor.

THE COURT: The other puzzling question I have is this: Can you explain for the record why Mr. Flynn was interviewed by the FBI on January the 24th but the 302 cited in his sentencing

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memorandum is dated August the 22nd, 2017? There's no reference, and the January 24th is not highlighted at all.

MR. KELNER: Yes, Your Honor. Thank you for the opportunity to address that. I think there's been some public confusion about that. The original draft of our brief cited specifically to the FD-302 for the interview of Special Agent Strozk and cited it specifically to the McCabe memorandum, and actually originally we intended to include those documents with the filing.

Prior to the filing, we shared a draft copy of our brief with the Special Counsel's Office really for two purposes: One was to make sure that we weren't including anything covered by the protective order, which they objected to our including, which would, perhaps, have to be redacted or filed under seal; and the other reason, frankly, was generally to understand what their reaction might be to particular points in the filing.

After that, the Special Counsel's Office discussed it with us and asked that we consider removing the Strozk 302, and the McCabe memorandum from the brief and to simply cite to them. Given our position as cooperating in the investigation, we acceded to that.

We then sent them a draft of the footnotes that we would use to cite to the relevant documents, and originally those footnotes, as drafted by us, named the McCabe memorandum specifically and named the Strozk 302 specifically so that it

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would be clear to the reader which documents we were talking about.

The Special Counsel's Office requested that we change those citations to simply reference the memorandum and date and the FD-302 and date without the names. We acceded to that request, and I would add would not have acceded to it if in any way we felt it was misleading, but we respected the preferences of the Special Counsel's Office.

THE COURT: All right. Any objection to what counsel said? Anything that you wish to add to that?

MR. VAN GRACK: Judge, just one point of clarification.

THE COURT: Sure.

MR. VAN GRACK: Which is what we've represented to defense counsel in terms of what to and not to include, what we indicated was anything in the Strozk 302 and the McCabe memorandum that they thought was relevant can and should be included in their submissions. What we asked was that they not attach the documents because, as the Court is aware, there are other considerations in the material there that we wanted to be sensitive to.

THE COURT: All right. Thank you, Counsel. Thank you both.

Mr. Flynn, anything else you want to discuss with me about your plea of guilty? This is not a trick. I'm not trying to trick you. If you want some time to withdraw your plea or try to

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withdraw your plea, I'll give you that time. If you want to proceed because you are guilty of this offense, I will finally accept your plea.

THE DEFENDANT: I would like to proceed, Your Honor.

THE COURT: All right. Because you are guilty of this offense?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. I am satisfied that Mr. Flynn entered his guilty plea while competent and capable. He understood at that time the nature of the charges against him and the consequences of pleading guilty. Having carefully read all the materials provided to the Court in this case, including those materials reviewed under seal and in-camera, I conclude that there was and remains to be a factual basis for Mr. Flynn's plea of guilty. As such, there's no reason to reject his guilty plea and I'll, therefore, move on to the sentencing phase.

What I would normally do at this point, Mr. Flynn, is to ask you a few questions about the pretrial -- strike that -- the presentence report. Have you had an opportunity to read the presentence report?

THE DEFENDANT: I have.

THE COURT: Did you read it?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any questions that you want to ask me about it?

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THE DEFENDANT: I don't believe so.

THE COURT: All right. At some point, if you would like to say something, I'll give you an opportunity. I would not hold it against you if you decided you didn't want to say anything.

To your attorneys, I'm going to inquire whether or not there are any objections to the mathematical calculations. This is a total offense level of 4, criminal history category of 1. Mr. Flynn has no prior criminal history, and the advisory, and I emphasize that word, the advisory guideline range is zero months to six months. This is a five-year statutory felony. Are there any objections to the mathematical calculations, Counsel?

MR. KELNER: No, Your Honor.

THE COURT: All right. And the advisory range for supervised release is one year to three years.

I'm going to request that you gentlemen have a seat because I want to, for the record -- and again, because I wasn't the original judge who accepted the plea in the first instance, I want to talk about the plea agreement and the facts that are relevant for the Court's consideration, and you gentlemen don't have to stand there in front of me while I do that, all right. You can have a seat.

MR. KELNER: Thank you, Your Honor.

THE COURT: Sure. Mr. Flynn agreed to plead guilty to Count 1 of the information, making false statements, in violation of 18 U.S. Code Section 1001. He stated that he understood the

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maximum sentence is five years imprisonment, three years supervised release, and a $250,000 fine.

The parties also agreed that his Guideline calculation range was zero to six months.

His base offense level is 4 after a two-point reduction for acceptance of responsibility, and he's in a criminal history category of 1, and I believe he has no prior criminal history.

His Guideline fine range is 500 to $9,000. Mr. Flynn also attested that he understood and agreed that the Guidelines were not binding on the Court and that the Court was not obligated to grant a downward departure, quote, even if the government files a motion pursuant to Section 5K1.1 of the Sentencing Guidelines, end quote. And even if the parties agree that there should not be -- there should be a certain sentence, the Court's not obligated to accept that recommendation.

Mr. Flynn also agreed to cooperate with the Special Counsel's Office and agreed that any refusal to cooperate will constitute a breach of the plea agreement. He further agreed that a breach of the plea agreement does not constitute a basis for him to withdraw his plea.

Special Counsel's Office agreed to file a departure motion pursuant to Section 5K1.1 of the U.S. Sentencing Guidelines if it determined that Mr. Flynn, quote, provided substantial assistance in the investigation, end quote.

Relevant here, Mr. Flynn also agreed that, quote,

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sentencing in this case may be delayed until his efforts to cooperate have been completed as determined by the government so that the Court will have the benefit of all relevant information before a sentence is imposed, end quote.

With respect to the Statement of Facts, when he pleaded guilty Mr. Flynn agreed to the follow facts: He served as an advisor and surrogate for the Trump Campaign and the transition team. He later served as the National Security Advisor for President Trump starting on January 20th, 2017. Mr. Flynn made materially false statements and omissions during a January 24th, 2017 interview with the FBI.

At that time, the FBI had an open investigation into Russia's efforts to interfere with the 2016 presidential election. As part of that investigation, the FBI investigated, quote, the nature of any links, end quote, between the Trump campaign and Russia, and, quote, whether there was any coordination, end quote, between the two.

Mr. Flynn admitted that his false statements or omissions impeded and had a material impact on the investigation, and when I ask questions of the government, I need to know answers about how he impeded the investigation and what the material impact on the investigation was.

The Statement of Facts further describes Mr. Flynn's false statements. One, Mr. Flynn falsely stated that he did not ask the Russian Ambassador Sergey Kislyak to refrain from, quote,

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escalating the situation, end quote, in response to sanctions the Obama Administration had imposed upon Russia.

On December the 28th, 2016, then-President Obama signed Executive Order 13757 which was to take effect on December the 29th, 2016. The executive order announced sanctions against Russia as a response to Russia's interference in the 2016 presidential election.

On December the 28th, 2016, the ambassador contacted Mr. Flynn. The next day Mr. Flynn called a senior transition official who was with other senior officials at the Mar-a-Lago Resort. They discussed the sanctions and their shared desire that Russia not escalate the situation.

Immediately after this phone call, Mr. Flynn called the ambassador, quote, and requested that Russia not escalate the situation and only respond in a reciprocal manner, end quote.

Shortly after this conversation, Mr. Flynn spoke again with the senior official to report on the call.

Mr. Flynn also falsely stated that he did not remember a, quote, follow-up conversation, end quote, in which the ambassador stated that Russia had, quote, moderated its response to those sanctions as a result of Mr. Flynn's request, end quote.

On December 30th, 2016, President Putin announced that he would not take retaliatory measures in response to the sanctions imposed by then-President Obama.

On December 31, 2016, the ambassador called Mr. Flynn to

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inform him that Russia had chosen not to retaliate. After this call, Mr. Flynn spoke with senior members of the transition team about the conversation and Russia's decision not to escalate the situation.

Three: Mr. Flynn also made statements, quote, about calls he made to Russia and several other countries regarding a resolution submitted by Egypt to the United Nations Security Council on September 21, 2016, end quote.

Mr. Flynn told the FBI that he had only, quote, asked the country's positions on the vote and that he did not request that any of the countries take any particular action on the resolution, end quote.

On December 21, 2016, Egypt submitted a resolution to the United Nations Security Council on the issue of Israeli settlements. The resolution was aimed at preventing Israeli settlements and Palestinian territories. The U.N. Security Council was scheduled to vote on the resolution the next day.

On December the 22nd, 2016, a, quote, very senior, end quote, member of the transition team directed Mr. Flynn to contact officials from foreign governments, including Russia to, quote, learn where each government stood on the resolution, end quote, and to, quote, influence those governments to delay the vote or defeat the resolution, end quote.

That same day, Mr. Flynn contacted the ambassador about the vote and informed him that the incoming administration was

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opposed to the resolution. He requested that Russia vote against or delay the resolution.

On December 23rd, 2016, Mr. Flynn again spoke to the ambassador who informed him that Russia would not vote against the resolution if it came to a vote.

Four: Finally, Mr. Flynn made false statements or omissions regarding his contacts with foreign governments, specifically, the Republic of Turkey, when filing documents with the Department of Justice pursuant to the Foreign Agents Registration Act, commonly referred to as FARA.

On March 7th, 2017, Mr. Flynn filed multiple documents pursuant to the Foreign Agents Registration Act. In the filings, he made false statements or omissions by stating that his company, the Flynn Intel Group, Incorporated did not know whether or the extent to which Turkey was involved in a project he and his company performed, quote, for the principle benefit of Turkey, end quote, when, in fact, Turkish officials had supervised, approved, and directed the work his company performed.

Mr. Flynn also made false statements by stating that his company's Turkey project was, quote, focused on improving U.S. business organizations' confidence regarding doing business with Turkey, end quote, when that was not the primary purpose.

Finally, Mr. Flynn made a false statement that an op-ed he published in the Hill on November 8th, 2016 was written at his

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own initiative, when it was actually written for Turkey's benefit at its direction and under its supervision.

At the time the Turkish officials were directing and supervising this work, Mr. Flynn was also serving as a senior national security official on the Trump Campaign.

With respect to the sentencing questions that the Court needs to focus on and resolve today, the Court, pursuant to Title 18, U.S. Code section 3553(a), the Court must impose a sentence that it fines sufficient but not greater than necessary to reflect the seriousness of the crime, afford adequate deterrence, and protect the public, among other things.

In determining the particular sentence to be imposed, the Court must consider several factors as set forth in Title 18 U.S. Code 3553(a). Those factors include, one, the nature and circumstances of the offense and the history and characteristics of the defendant; two, the need for the sentence to reflect the seriousness of the offense, to promote respect for the law and provide just punishment; three, the need for the sentence to afford adequate deterrence; four, the need, if any, for the sentence to protect the public from further crimes of the defendant; five, the need, if any, to provide the defendant with correctional treatment; six, the sentences available, the sentencing range, and any applicable policy statements set forth in United States Sentencing Guidelines; seven, the need to avoid unwarranted sentence disparities among similarly situated

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defendants; and eight, the need, if any, to provide restitution to victims.

The process is highly individualized. As such, some of these factors are not relevant in Mr. Flynn's case and some factors, including the seriousness of the crime, which the Court emphasizes, and the history and characteristics of the defendant, weigh very heavily.

This is a very serious offense. A high-ranking senior official of the government making false statements to the Federal Bureau of Investigation while on the physical premises of the White House.

The Court will also consider the defendant's acceptance of responsibility and his substantial assistance in several investigations. In Mr. Flynn's case, the government has filed a motion for a downward departure pursuant to Section 5K1.1 of the Sentencing Guidelines. The memorandum states that Mr. Flynn provided substantial assistance to certain investigations.

When the government files such a memorandum, the Court may depart -- the Court's not obligated to do so -- and sentence the defendant to a lower sentence than contemplated by the Guidelines. In determining whether a reduction is warranted, the Court may consider the significance and usefulness of the defendant's assistance, the truthfulness, completeness, and reliability of the defendant's assistance, the nature and extent of the defendant's assistance, any gains or injury the defendant

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may have endured as a result of his assistance; and the timeliness of the defendant's assistance, among other considerations.

Mr. Flynn's total offense level is 4. And having no other criminal history, his criminal history category is 1. Therefore, the applicable Guideline range is zero to six months of incarceration with one to three years of supervised release.

All that being said, the Guidelines, again, are advisory, as I've said four, five, six times. The Court could sentence the defendant to a sentence above or below the Guidelines, notwithstanding any Section 5K1.1 motion.

Now, I'd like to hear from the government first, all right. Would you come forward, Counsel, to the microphone. And your colleagues can join you if they wish to, whatever.

And again, I'm not intentionally trying to intrude on matters that should not be on the public record, so I will respect your resistance to answer a question, all right.

Is Mr. Flynn still cooperating with and providing assistance to the government?

MR. VAN GRACK: Your Honor, it remains a possibility that General Flynn is continuing to cooperate with the government at this time.

THE COURT: All right. It's a possibility?

MR. VAN GRACK: Yes, Your Honor.

THE COURT: All right. And the reason I ask that is

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because, as you know and most people don't know, most of these cooperation agreements are conducted in sealed courtrooms, and the public doesn't really know a lot about cooperation efforts by individuals. And it's for that reason -- not for that reason, but the courts are reluctant to proceed to sentencing unless and until cooperation has been completed, more often than not, for cogent reasons. Because the Court wants to be in a position to fully evaluate someone's efforts to assist the government.

Had I taken the plea, I would have had a discussion with Mr. Flynn probably along these lines: I probably would have said something like, as I say in every case in which someone is cooperating, "the more you assist the government, the more you, arguably, help yourself at the time of sentencing."

Now, I make no promises about that. I mean, conceivably the Court could thank someone at the end of their cooperation after months or years and say "thank you" and sentence someone to the maximum. I don't recall ever doing that, but that's a possibility, and I tell people that. But I want people to have the best opportunity to help themselves at the time of sentencing. That's why, more often than not, the Court will wait until the government says, "this person is finished; this person has testified in the Grand Jury" or "there have been pleas of guilty entered, there's nothing else he can do to help us."

But there's still a likelihood that he could help, though, correct?

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MR. VAN GRACK: And, Your Honor, let me clarify that point.

THE COURT: Sure.

MR. VAN GRACK: Which is the determination on the path of the government to proceed is for a number of reasons, which is, one, based on the totality of the assistance that the defendant had provided at that point. We believe that it did merit substantial assistance in the filing of a motion for a downward departure, and we made a submission summarizing that.

Related to that is, based on the government's view of not only the assistance he provided, but the nature of the investigations that he provided, that the defendant had provided the vast majority of cooperation that could be considered. And so in order to fully inform the Court, the Court was in a position to consider the vast majority of not just the cooperation, but the potential benefit of that cooperation. And we'd like to bring to the Court's attention that we just had an indictment unsealed in the Eastern District of Virginia charging Bijan Rafiekian and Ekim Alptekin with various violations, and the defendant provided substantial assistance to the attorneys in the Eastern District of Virginia in obtaining that charging document.

THE COURT: All right. Could the defendant have been indicted in that indictment? Could he have been charged in that indictment?

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MR. VAN GRACK: And, Your Honor, the answer is yes, and the reason for that is that in the Statement of Offense in this case, the defendant refers to false statements in that FARA filing that are part of the indictment filed in the Eastern District of Virginia.

THE COURT: All right. And I can assume that the person identified as "A" is the defendant, correct, or would you rather not mention that?

MR. VAN GRACK: Your Honor, having not conferred with attorneys from the Eastern District of Virginia -- I just want to be sensitive about --

THE COURT: I think that's fair. I think that's fair. Your answer is he could have been charged in that indictment.

MR. VAN GRACK: Yes, Your Honor.

THE COURT: And that would have been -- what's the exposure in that indictment if someone is found guilty?

MR. VAN GRACK: Your Honor, I believe, if you'll give me a moment, I believe it was a conspiracy, 18 U.S.C. 371, which I believe is a five-year offense. It was a violation of 18 U.S.C. 951, which is either a five- or ten-year offense, and false statements -- under those false statements, now that I think about it, Your Honor, pertain to Ekim Alptekin, and I don't believe the defendant had exposure to the false statements of that individual.

THE COURT: Could the sentences have been run consecutive

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to one another?

MR. VAN GRACK: I believe so.

THE COURT: So the exposure would have been grave, then, would have been -- it would have been -- exposure to Mr. Flynn would have been significant had he been indicted?

MR. VAN GRACK: Yes. And, Your Honor, if I may just clarify. That's similar to the exposure for pleading guilty to 18 U.S.C. 1001.

THE COURT: Right. Exactly. I'm not minimizing that at all. It's a five-year felony.

MR. VAN GRACK: Yes, Your Honor.

THE COURT: Excuse me one second.

(Brief pause in proceedings.)

THE COURT: Yes, Counsel.

MR. VAN GRACK: Your Honor, I'd clarify that the maximum penalty for 18 U.S.C. 951 is a ten-year felony and five years --

THE COURT: Ten-years. All right. Thank you.

I want to thank you at this point. I'm going to invite Mr. Flynn back at this point and his attorneys. Thank you, Counsel.

So, at this point you've paid attention to what the attorney said, Mr. Flynn, correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I want to ensure that you want to move forward today with sentencing. The government's publicly filed Addendum

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in Aid of Sentencing, quote, seeks to provide a comprehensive description of the benefit the government has thus far obtained from your substantial assistance, end quote, but cautions that some of that benefit may not be fully realized at this time, end quote, and that's not different from what counsel just said. There could be a need for further cooperation from you. Did you understand that?

THE DEFENDANT: I believe I understand that, yes, Your Honor.

THE COURT: All right. And I don't know what that could be, but I accept the government's representations, and it could involve that case in Virginia, it could involve other matters for which you've spoken with the government, because you've had 19 interviews with the government, correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right.

You've asked to proceed to sentencing at this time and for the Court to assess your cooperation and substantial assistance and what impact that will have on the Court's sentencing, and that's your desire, to proceed with sentencing today, correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. You've heard me say that sentencing a cooperating defendant before cooperation has ended is relevant, is rare. Normally, these discussions we're having now are held in sealed courtrooms with people, and more often

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than not, I may weigh in and say, "let's wait because more is expected of this defendant," and, arguably, "he or she should have a chance to argue for the full benefit of that assistance."

And it's only fair because the Court's not bound by the recommendations. The Court has to be in a position to say, "I can consider everything now, the full extent of a defendant's cooperation."

I can't do that in your case because, arguably, you could be required to provide more cooperation to the government. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: So, if you proceed to sentencing today, which is your prerogative and only yours, the Court will have to impose a sentence without fully understanding the true extent and nature of your assistance. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: If you want to postpone this and come back at some later point -- and I don't know what that later point will be -- that's fine with me. Because at that time I can say the book is closed, the government is satisfied, there's nothing else that Mr. Flynn can do, and I can evaluate everything that you've done or not done.

I have to caution you, Mr. Flynn, that the sentence the Court imposes today, if sentencing proceeds, may not be the sentence that you would receive after your cooperation ends. I

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don't know that to be a fact. I don't know. I mean, who knows? I don't have the proverbial crystal ball, but I always approach sentencing with an open mind, and I'm fully prepared to listen to the attorneys and the defendant and consider the full extent of someone's cooperation.

In other words, the Court likes to be in a position to say there's nothing else this defendant can do to help the United States of America. He's done everything that he can do. And then the Court focuses on what impact that has under the advisory Guidelines.

I'm going to be frank with you. This crime is very serious. As I stated, it involves false statements to the Federal Bureau of Investigation agents on the premises of the White House, in the White House in the West Wing by a high ranking security officer with, up to that point, had an unblemished career of service to his country. That's a very serious offense.

You know, I'm going to take into consideration the 33 years of military service and sacrifice, and I'm going to take into consideration the substantial assistance of several ongoing -- several ongoing investigations, but I'm going to also take into consideration the aggravating circumstances, and the aggravating circumstances are serious. Not only did you lie to the FBI, but you lied to senior officials in the Trump Transition Team and Administration. Those lies caused the then-Vice

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President-Elect, incoming Chief of Staff, and then-Press Secretary to lie to the American people. Moreover, you lied to the FBI about three different topics, and you made those false statements while you were serving as the National Security Advisor, the President of the United States' most senior national security aid. I can't minimize that.

Two months later you again made false statements in multiple documents filed pursuant to the Foreign Agents Registration Act. So, all along you were an unregistered agent of a foreign country, while serving as the National Security Advisor to the President of the United States.

I mean, arguably, that undermines everything this flag over here stands for (indicating). Arguably, you sold your country out. The Court's going to consider all of that. I cannot assure you that if you proceed today you will not receive a sentence of incarceration. But I have to also tell you that at some point, if and when the government says you've concluded with your cooperation, you could be incarcerated.

It could be that any sentence of incarceration imposed after your further cooperation is completed would be for less time than a sentence may be today. I can't make any guarantees, but I'm not hiding my disgust, my disdain for this criminal offense.

THE DEFENDANT: Yes, Your Honor.

THE COURT: But it's your call, Mr. Flynn. I'm just being

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up front with you, as I would with anyone else, and everyone who knows me knows that. If you want to proceed to sentencing today, I can't promise anything other than I'll give full consideration to anything you wish to say, if you want to say anything at all. You may say, "Judge, my lawyers have said everything possible. I don't want to say anything." I would not hold that against you, sir. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: But if you want some more time and to come back later after it's clear that you've done everything you possibly can for the United States of America, I'm going to grant that request.

Now, if you would like to take a recess now and talk to your attorneys, I'm happy to accommodate you in that regard as well. Would you like to do that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Fair enough. Why don't you have a seat. Let me ask the government a few more questions that I want you to consider as well.

Counsel. And these are questions -- answers to which the Court's going to consider in attempting to determine an appropriate sentence. The conversation with the Russian ambassador in December, is that a violation of law?

MR. VAN GRACK: Your Honor --

THE COURT: I hate to be so blunt. Could he have been

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charged with a criminal offense?

MR. VAN GRACK: Let me answer two ways.

THE COURT: Okay.

MR. VAN GRACK: Which is the facts could potentially, potentially support a violation of the Logan Act, which I think is, perhaps, what the Court is referring to.

THE COURT: Is that the Act that no one has ever been prosecuted under?

MR. VAN GRACK: That's right, which is why I want to be clear in terms of the government's consideration of potential charges against General Flynn. That is not one of the charges that the government was considering in its interfacing with --

THE COURT: Fair enough. Good. That's the answer I wanted. Were there other charges that could have been brought against Mr. Flynn, Other than FARA violations, false statements? I'm not minimizing either one of those.

MR. VAN GRACK: The government's Statement of Offense represents a representation of the unlawful activity that the government was -- believes that the defendant committed in terms of beyond a reasonable doubt. And in terms of other offenses, they were not sort of in consideration in our interfacing with the defendant.

THE COURT: All right. I really don't know the answer to this question, but given the fact that the then-President of the United States imposed sanctions against Russia for interfering

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with federal elections in this country, is there an opinion about the conduct of the defendant the following days that rises to the level of treasonous activity on his part?

MR. VAN GRACK: The government did not consider -- I shouldn't say -- I shouldn't say did not consider, but in terms of the evidence that the government had at the time, that was not something that we were considering in terms of charging the defendant.

THE COURT: All right. Hypothetically, could he have been charged with treason?

MR. VAN GRACK: Your Honor, I want to be careful what I represent.

THE COURT: Sure.

MR. VAN GRACK: And not having that information in front of me and because it's such a serious question, I'm hesitant to answer it, especially because I think it's different than asking if he could be charged under FARA or if there were other 1001 violations, for example.

THE COURT: The government filed a sentencing memorandum in which it recommended sentencing at the low end of the Guidelines, including probation. Subsequent thereto, the government filed its reply, which did not include the language "including probation." Now, I'm going to assume that was intentional.

MR. VAN GRACK: Your Honor, thank you for the opportunity

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to clarify. The government's recommendation is that a sentence at the low end of the Guideline range is appropriate and warranted period. And, in fact, the conclusion of the government's sentencing memo states that very point. The clarification in that opening paragraph of "including a term of no incarceration" was to represent that when we say "low end of the Guideline range," that, in fact, could include a term of no incarceration. And in particular, it was to distinguish some other representations that the Special Counsel's Office had made in other cases in which there was a specific recommendation for a term of incarceration. So it was meant to clarify the position from the beginning, including in its reply, was intended to be consistent.

THE COURT: All right. So, there was an intention to be consistent, then?

MR. VAN GRACK: Yes, yes. The government's representation that a sentence at the low end of the Guideline range is warranted.

THE COURT: All right. The points raised by Mr. Flynn in his sentencing memorandum concerned the Court. Do you have an opinion as to whether he's forfeited the adjustment points for acceptance of responsibility by raising questions about the circumstances surrounding his interview with the FBI agents on January the 24th?

MR. VAN GRACK: Your Honor, we believe that he has

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accepted responsibility, not just from his statements to the Court today, but throughout the proceedings, including the statements he made under oath in front of Judge Contreras that he has accepted responsibility and acknowledges that his false statements were knowing and willful.

THE COURT: All right. Because in your memo you say "assuming he continues to accept responsibility." So, was there some doubt in your mind that he was wavering on acceptance?

MR. VAN GRACK: Your Honor, though the government interpreted the defendant's submission in the way that it was presented to the Court, which is to identify distinguishing characteristics to two other matters that the Special Counsel's Office had prosecuted, it was also aware of the potential implications that the memorandum had made and wanted to clarify under no uncertain terms its position that those were not mitigating circumstances in any way, and is satisfied both in terms of the representations the defense counsel has made and his statements today that we do not doubt that he has accepted responsibility.

THE COURT: All right. Excuse me one second, Counsel.

(Brief pause in proceedings.)

THE COURT: Yes, Counsel.

MR. VAN GRACK: No, Your Honor.

THE COURT: Nothing further? All right. I'm going to -- at Mr. Flynn's request, I'm going to give them a -- we're going

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to take a recess. I can never see that clock because there's a glare on that clock there. It's 12:04. Until 12:30. Will that be enough time?

MR. KELNER: Yes, Your Honor.

THE COURT: Do you have any other questions that you want to ask me before we take a recess?

MR. KELNER: Not at this time, Your Honor.

THE COURT: All right. Any questions, Counsel?

MR. VAN GRACK: No, Your Honor.

THE COURT: All right. The Court will stand in recess until 12:30. There's no need to stand.

THE COURT: Marshal Ruffin. There's a room available for you to speak privately with your client, Counsel, and Marshal Ruffin will accommodate you. Thank you.

(Thereupon, a recess in the proceedings occurred from 12:09 p.m. until 12:45 p.m.)

THE COURT: All right. Thank you.

THE COURTROOM CLERK: Your Honor, resuming Criminal Case 17-232, *United States of America versus Michael Flynn*.

THE COURT: All right. I just want to ask a couple of questions. This is directed to either government counsel or defense counsel. I made a statement about Mr. Flynn acting as a foreign agent while serving in the White House. I may have misspoken. Does that need to be corrected?

MR. VAN GRACK: Yes, Your Honor, that would be correct,

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which is that the conduct ended, I believe, in mid-November 2016.

THE COURT: All right. That's what I thought, and I felt terrible about that. I just want the record clear on that. You agree with that, Counsel?

MR. KELNER: Yes, Your Honor.

THE COURT: All right. I also asked about -- and this is very important -- I also asked about the Special Counsel's Office. I also asked questions about the Special Counsel and the -- and other potential offenses for the purpose of understanding the benefit, if any, that Mr. Flynn has received in the plea deal. I wasn't suggesting he's committed treason. I wasn't suggesting he committed violations. I was just curious as to whether or not he could have been charged, and I gave a few examples. And, you know, there are a lot of conspiracy theorists out there. I'm not taking the elements of any of the uncharged offenses into consideration at the time of sentencing. I was just trying to determine the benefit of and the generosity of the government in bestowing a benefit on Mr. Flynn. That was the reason why.

MR. VAN GRACK: Yes, Your Honor.

THE COURT: And I said early on, Don't read too much into the questions I ask. But I'm not suggesting he committed treason. I just asked a legitimate question.

MR. VAN GRACK: Yes, Your Honor. And that affords us an opportunity to clarify something on our end which is, with

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respect to treason, I said I wanted to make sure I had the statute in front of me. The government has no reason to believe that the defendant committed treason; not just at the time, but having proffered with the defendant and spoken with him through 19 interviews, no concerns with respect to the issue of treason.

THE COURT: Right, right, and I've never presided over a treasonous offense and couldn't tell you what the elements are anyway. I just asked the question. All right. Thank you very much. How would you like to proceed, Counsel.

MR. KELNER: Your Honor, with your indulgence, if I could make a few points.

THE COURT: Sure.

MR. KELNER: First of all, let me make very clear, Your Honor, that the decisions regarding how to frame General Flynn's sentencing memorandum made by counsel, made by me, made by Mr. Anthony, are entirely ours and really should not and do not diminish in any way General Flynn's acceptance of responsibility in this case. And I want to make that --

THE COURT: That point is well taken, but you understand why I had to make the inquiry?

MR. KELNER: I do.

THE COURT: Because I'm thinking, this sounds like a backpedaling on the acceptance of responsibility. It was a legitimate area to inquire about. And I don't want to be too harsh when I say this, but I know you'll understand. I would

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never penalize any client for what his or her attorney has said. I'm not saying that you misspoke at all, but you understand absolutely why I had to make the inquiry.

MR. KELNER: I absolutely understand. We understand the Court's --

THE COURT: And I wouldn't take it out on him or anyone else, for that matter, what the attorneys say, no.

MR. KELNER: Right. We understand the Court's reason for concern. I just wanted to make very clear the very specific reasons that those sections in the brief were included, to distinguish the Papadopoulos and Van der Zwaan cases, which did result in incarceration, we think are meaningfully distinguishable in many respects.

THE COURT: Let me stop you on that point, because I'm glad you raised that, and I was going to raise this point at some point. We might as well raise it now since you brought up Papadopoulos and Van der Zwaan. The Court's of the opinion that those two cases aren't really analogous to this case. I mean, neither one of those individuals was a high-ranking government official who committed a crime while on the premises of and in the West Wing of the White House. And I note that there are other cases that have been cited in the memorandum with respect to other individuals sentenced in 2017, I believe, for 1001 offenses, and the point being made -- and I think it's an absolutely good point -- the point being made that no one

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received a jail sentence.

My guess is that not one of those defendants was a high-ranking government official who, while employed by the President of the United States, made false statements to the FBI officers while on the premises of and in the West Wing of the White House. That's my guess. Now, if I'm wrong, then you can point me to any one or more of those cases.

This case is in a category by itself right now, but I understand why you cited them. I appreciate that.

MR. KELNER: Your Honor, we don't disagree. We recognize that General Flynn served in a high-ranking position, and that is unique and relevant. But I --

THE COURT: Absolutely.

MR. KELNER: But I would submit to you a couple of points in response for the Court's consideration.

Number one, because of his high rank and because of his former high office, when it came time to deal with this investigation and to deal with the Special Counsel's Office, that, too, set a higher standard for him, and he did understand that as a three-star general and a former National Security Advisor, what he did was going to be very consequential for the Special Counsel's investigation, and very consequential for the nation, so he made decisions early on to remain low profile, not to make regular public statements, as some other people did. That was acknowledged by the Special Counsel's Office when we did

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first hear from them, the value of that silence.

And then he made the decision publicly and clearly and completely and utterly to cooperate with this investigation, knowing that, because of his high rank, that was going to send a signal to every other potential cooperator and witness in this investigation, and that was consequential, and we appreciate the fact that the Special Counsel memorialized that in his brief. That did make a decision, and that was another kind of high standard that was set for him and that he rose to and met decisively. In addition, there have been other cases --

THE COURT: Can I just stop you right now? Is -- How do you wish to proceed? Do you wish to proceed with sentencing today or do you want to defer it?

MR. KELNER: Thank you, Your Honor.

THE COURT: Or are you leading up to that point?

MR. KELNER: I'm leading up to that.

THE COURT: No, that's fine.

MR. KELNER: Just a bit of indulgence, if I may.

THE COURT: No, no. Go ahead. That's fine.

MR. KELNER: And let me just finish that last point.

THE COURT: No, no, no. I'm not trying to curtail you. I just wanted to make sure I didn't miss anything.

MR. KELNER: I'm building up to it. I'm building up to it, Your Honor.

THE COURT: All right.

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MR. KELNER: In addition, I would note there have been other high profile cases, one involving a four-star general, General Petraeus.

THE COURT: I don't agree with that plea agreement, but don't --

MR. KELNER: It's a classic --

THE COURT: He pled to a misdemeanor?

MR. KELNER: He was allowed after lying to the FBI --

THE COURT: -- right --

MR. KELNER: -- to plead to a misdemeanor and was sentenced to probation.

THE COURT: All right. Well, I'm not going to criticize -- I don't know any of the facts about that case, other than what I've read in -- what I've read, so....

MR. KELNER: I'll just briefly highlight those examples. The Sandy Berger case, also involving a former National Security Advisor, also included lies to government officials. He was also allowed to plead to a misdemeanor and also sentenced to probation. So there is precedence. But I want to be clear. We absolutely take your point. General Flynn recognizes the obligations that came with high office and that this is a serious offense. We don't in any way dispute that.

But at the same time, knowing that high standard, he made use of it in sending a signal as part of the larger Special Counsel's investigation.

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Your Honor, I would like to also emphasize that our understanding, and I think it's been reiterated today, is that it remains the position of the Special Counsel's Office that a sentence at the low end of the Guidelines range, quote, including a sentence that does not impose a term of incarceration, is appropriate and warranted in the government's view, and we've just reconfirmed that with them.

I'd like to highlight that General Flynn has held nothing back, nothing in his extensive cooperation with the Special Counsel's Office. He's answered every question that's been asked. I believe they feel that he's answered them truthfully, and he has. He's complied with every request that's been made, as has his counsel.

Nothing has been held back. That said, it is true that this EDVA case that was indicted yesterday is still pending, and it's likely, I would think, that General Flynn may be asked to testify in that case. We haven't been told that, but I think it's likely, and he's prepared to testify. And while we believe that the Special Counsel's Office views his cooperation as having been very largely complete, completed at this point, it is true that there's this additional modicum of cooperation that he expects to provide in the EDVA case, and for that reason, we are prepared to take Your Honor up on the suggestion of delaying sentencing so that he can eke out the last modicum of cooperation in the EDVA case to be in the best position to argue to the

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Court the great value of his cooperation.

THE COURT: Let me tell you something. It didn't occur to me to do that. I just raised the thought. I'm prepared to go forward today, but I think it's only fair to say exactly what I did say.

MR. KELNER: Yes.

THE COURT: So, you know, call it a suggestion or a thought. It was a thought. I didn't, you know, say, you know, wink-wink, nod-nod, you need to do this. So if you want to proceed today, I'm prepared to do so.

MR. KELNER: We do not take it as a wink-wink, nod-nod.

THE COURT: And I'm not promising anything either.

MR. KELNER: And we understand that.

THE COURT: All right.

MR. KELNER: But from the beginning of this process, literally from the beginning, General Flynn has cooperated with Director Mueller and the Special Counsel's investigation in every way imaginable, and he's prepared to continue that cooperation with respect to the EDVA case, which I think is the only area which there is anything left to give, probably just consisting of his testimony at trial in that case.

But we would like to request a continuance of sentencing to allow him to complete that cooperation, and I might suggest, perhaps, a status conference in 90 days, if it -- if it makes sense to the Court.

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THE COURT: That's fine with the Court.

Mr. Flynn, why don't you join your attorney at the microphone. Mr. Flynn.

All right, sir. You've heard your attorney indicate that you would like to postpone this. Again, the Court's not making any promises. The Court was just being up front with you, like I've been up front with people for more than 30 years, and that's all I was doing. If you want to proceed today, I would proceed today, but I'm not making any promise as to what the sentence will be in the event you cooperate with that matter, about this or other matters. Do you understand that?

THE DEFENDANT: Yes, I understand Your Honor.

THE COURT: All right. Okay. Does the government have an objection to doing this?

MR. VAN GRACK: No, Your Honor.

THE COURT: All right. Let me just say this. I probably shouldn't. Having said that, I probably shouldn't. I don't agree with the Petraeus sentence. I'm sorry. I don't see how a four-star general gives classified information to someone not authorized to receive it and then is allowed to plead to a misdemeanor, but I don't know anything about it. Maybe there were extenuating circumstances. I don't know. It's none of my business, but it's just my opinion.

And that has no impact -- I would not take that into consideration in whatever sentence I impose here. Just based

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upon what I know about that case, I just disagreed with it. That's all.

MR. KELNER: Understood.

THE COURT: Counsel, what day would you want? I mean, I can probably accommodate -- the 12th is not a good date. March 12th is not a good date, but otherwise, if you want to suggest a date that's convenient for everyone, that's fine with me.

MR. ANTHONY: May I confer?

THE COURT: Sure.

(Discussion had off the record.)

MR. KELNER: Your Honor, after consulting with the government, we suggest a status report rather than a status conference.

THE COURT: Sure.

MR. KELNER: And for a date, I believe March 13th would work.

THE COURT: Any date you want now, that's fine, to file a status report. That's fine.

MR. KELNER: We propose March 13th for the status report.

THE COURT: Sure, that's fine. Let's just say by noon on the 13th of March.

MR. KELNER: Thank you, Your Honor.

THE COURT: All right. Anything further?

MR. KELNER: Nothing further from us.

THE COURT: From government counsel?

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MR. VAN GRACK: No, Your Honor.

THE COURT: Mr. Flynn, do you have any questions you want to ask me or your attorneys? Do you have any questions you want to ask me?

THE DEFENDANT: I have none, Your Honor.

THE COURT: All right. Excuse me one second.

(Brief pause in proceedings.)

THE COURT: Let me just throw this out. Let me just share this with you.

What I could do, and maybe it's not appropriate to do it now, and maybe it's not appropriate to do it in March. At some point -- it probably won't surprise you that I had many, many, many more questions, and at some point what I may do is share those questions with counsel so you can give some thought, maybe do some additional research to be prepared for an eventual sentencing. I'm not sure if I want to do that. I was not going to spend another hour and share those questions with you in open court today, had you decided to postpone sentencing, but I may do that. I'm not sure. These are questions that you would be prepared to answer anyway, such as, you know, how the government's investigation was impeded? What was the material impact of the criminality? Things like that.

MR. KELNER: Your Honor, I think we would find it very helpful, actually, and would welcome the opportunity.

THE COURT: I thought you might say that. I'll give it

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some thought, because my purpose is not to sandbag anyone. I want your best thoughts, your best answers about questions that are -- that I believe are very relevant and important, but it's not time to do that now, and it won't be time to do it before March 13th, but I may do that.

MR. KELNER: Thank you, Your Honor.

THE COURT: All right. Sure. Would the government find that of any benefit? You probably know the questions I'm going to ask anyway, impeding the investigation, materiality impact.

MR. VAN GRACK: We would not object to any clarification from the Court.

THE COURT: Okay. All right. Thank you, all. And happy holidays, everyone. Thank you.

MR. KELNER: Thank you, Your Honor.

(Proceedings adjourned at 1:01 p.m.)

C E R T I F I C A T E

I, Scott L. Wallace, RDR-CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Scott L. Wallace 12/18/18

Scott L. Wallace, RDR, CRR
Official Court Reporter

Date

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **v.** **MICHAEL T. FLYNN,** **Defendant**	**Crim. No. 17-232 (EGS)**

JOINT STATUS REPORT

The United States of America, by and through the U.S. Attorney for the District of Columbia, and Mr. Flynn through his counsel, file this joint status report to provide the Court with the current status of this matter.

On June 24, 2019, the Court ordered the parties to file another joint status report by no later than August 30, 2019. On August 21, 2019, the Court instructed that the status report address four topics: (1) the status of the defendant's cooperation; (2) whether the case is ready for sentencing; (3) suggested dates for the sentencing hearing, if appropriate; and (4) whether there are any issues that would require the Court's resolution prior to sentencing.

The parties are unable to reach a joint response on the above topics. Accordingly, our respective responses are set forth separately below. Considering these disagreements, the government respectfully requests that the Court schedule a status conference. Defense counsel suggests that a status conference before 30 days would be too soon, but leaves the scheduling of such, if any, to the discretion of the Court. The government is available on September 4th, 5th, 9th or 10th of 2019,

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or thereafter as the Court may order. Defense counsel are not available on those specific dates.

I. Counsel for the defendant advises the following:

1. Mr. Flynn's cooperation is complete. He not only cooperated extensively with the Special Counsel's office, but also with the prosecutors in the Eastern District of Virginia in the Rafiekian case. This cost Mr. Flynn more than 100 hours of his time and hundreds of thousands of dollars in additional legal fees. He even waived the attorney-client privilege and the protection of the work-product doctrine to enhance his cooperative effort.

2. The case is not ready for sentencing. As new counsel, we have only recently received the entire file, which occupies 13 hard drives, comprised of more than 300,000 documents, and we are still working with prior counsel to tie up some loose ends. The last of those hard drives was just uploaded to our document review system within the last 30 days. Despite our best efforts, it will still take a significant amount of time to complete our review. More troubling, there is much information that we do not have—and neither did prior counsel. Thus, the defense requests an additional 90 days before the next status report.

3. For the reasons set out above, the defense does not have any dates to suggest for sentencing.

4. There are serious issues to be addressed by the Court before we can proceed further. First, the government continues to deny our request for security

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clearances. Our attempts to resolve that issue with the government have come to a dead end, thus requiring the intervention of this Court.

Our client held the highest security clearance the government provides. We know—but not in any detail because of our lack of clearance—that he briefed and debriefed the DIA about his foreign contacts and travel. All that material is relevant to the charges against him, and it is most likely *Brady* material to boot. Although Mr. Flynn was a civilian at the time, that information remains classified--or at a minimum withheld from the defense.

There is other information relevant to the defense that is either classified or being suppressed by the government, not the least of which are the transcripts and recordings of the phone calls that supposedly underpin the charges against Mr. Flynn. The government has steadfastly refused to produce those – even to this Court. The Inspector General of the Department of Justice has completed one or more relevant reports that include classified sections, and he is completing additional reports that reportedly will include a large classified section – a significant portion of which will almost certainly relate to Mr. Flynn. We must have access to that information to represent our client consistently with his constitutional rights and our ethical obligations.

Second, the government has also failed to produce, among other things, the original or first draft of the FBI 302 of the interview of Mr. Flynn on January 24, 2017, and the 1A file which we have repeatedly requested, and any records or documents that show everyone who made changes to that 302.

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We expect to identify more issues for the Court promptly, and we will file the appropriate motions to address those issues as soon as possible. In the interest of efficiency, we will certainly continue to review the materials we do have simultaneously with addressing these additional issues.

II. The government advises the following:

1. The defendant's cooperation has ended.

2. The case is ready for sentencing, and the government proposes the following dates for a sentencing hearing: October 21-23, 2019, or November 1-15, 2019.

3. The government is not aware of any issues that require the Court's resolution prior to sentencing.

4. We take very seriously our discovery and disclosure obligations, to include those specifically imposed by the Court in this case. As we have previously communicated to defense counsel, discovery and disclosure of classified national security information, as defined under Executive Order 13526 and its predecessor Executive Orders, is governed by the procedures set forth under the Classified Information Procedures Act, 18 U.S.C. App. III. Sections 1-16 ("CIPA"), and specifically CIPA Section 4. A defendant and his/her cleared counsel in a criminal prosecution may only obtain access to classified U.S. government information when such classified material is deemed both "relevant" and "helpful to the defense." *See United States v. Yunis*, 867 F.2d 617, 623-24 (D.C. Cir. 1989).

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The government has exceeded its discovery and disclosure obligations in this matter, including those imposed pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and the Court's Standing Brady Order dated February 16, 2018. That includes the provision to the defendant of over 22,000 pages of documents. Among those documents are all versions in the government's possession of the FBI report of the January 24, 2017 interview of the defendant and the interviewing agents' notes. The defendant and his prior counsel were in possession of those notes and draft reports of the January 24 interview before his scheduled sentencing on December 18, 2018. The government has not provided any classified information to the defendant or his counsel, and the government is not aware of any classified information that requires disclosures to the defendant or his counsel under *Brady* or the Court's Standing *Brady* Order.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **Plaintiff,** **v.** **MICHAEL T. FLYNN,** **Defendant.**	**Criminal Action No. 17-232-EGS**

MR. FLYNN'S MOTION TO WITHDRAW PLEA OF GUILTY
AND UNOPPOSED MOTION FOR CONTINUANCE

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Michael T. Flynn ("Mr. Flynn") hereby moves to withdraw his plea because of the government's bad faith, vindictiveness, and breach of the plea agreement. *See* ECF No. 150. Mr. Flynn also requests a continuance of the sentencing date set for January 28, 2020, for thirty days or until February 27, 2020, or such other subsequent day that is convenient to the Court and counsel, and a corresponding extension of time to file any supplemental sentencing memorandum (from January 22, 2020, to February 21, 2020). The continuance is requested to allow time for the government to respond to the most recent aspects of this Motion and for Mr. Flynn to provide the additional briefing he needs to protect the record and his constitutional rights in light of significant developments in the last thirty days.

Mr. Flynn's counsel conferred with the government about the continuance requested herein beginning the morning of January 10, 2020, and provided a letter yesterday to include as the Certificate of Conference. The government's timely response is attached as the Certificate of Conference. Since that conference, Mr. Flynn has instructed counsel to request withdrawal of his plea because of the government's breach of the plea agreement. Accordingly, pursuant to *Puckett v. United States*, 556 U.S. 129 (2009),[1] Mr. Flynn files this Motion now in the interest of justice.

A. Background and Facts Relevant to the Issues Herein

By way of reminder, the small team of new counsel appeared for Mr. Flynn for the first time on June 17, 2019.[2] ECF No. 90, 91. Mr. Flynn and his defense team (past and current) spent

[1] This Motion to Withdraw addresses the issues and facts relevant to issues triggered by *Puckett* analysis. Mr. Flynn has substantial alternative reasons to move to withdraw his plea, and counsel will brief those for the court as soon as possible.

[2] By August 15, 2019, Mr. Flynn's new counsel received eighteen hard drives from former counsel at Covington & Burling LLP ("Covington"), which contained more than 330,000 documents. Present counsel has been working as diligently as possible since first appearing in June 2019. Present counsel provided the Court new and extensive briefings and motions on issues important to Mr. Flynn's defense—based primarily on information the government only began

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hundreds of hours trying to cooperate with the government in accordance with Mr. Flynn's plea agreement which requires him to provide truthful testimony.

Only after new counsel appeared, did the government *for the first time* demand an *admission and testimony* from Mr. Flynn that he *knew* and *intended* when he signed the FARA registration form that it contained several material false statements.[3] Not only was that demanded testimony a lie, but also, the prosecutors knew it was false, and would induce a breach.

That assertion/question/demand had not been raised nor made by the government in the previous year and a half—during any of Mr. Flynn's sixteen or more lengthy sessions with Mr. Van Grack and the EDVA prosecutors. Prosecutors did not raise it in preparation for his grand jury testimony the previous summer, nor did they raise it before the grand jury. ECF No. 150-2. The prosecutors did not raise this issue in his countless hours spent with the Special Counsel's Office ("SCO"). And, even more stunning, the prosecutors' new assertion that Mr. Flynn knew the statements in the FARA application were "false" when he authorized Covington to file the form, is squarely refuted by the draft of the plea agreement Covington negotiated with Mr. Van Grack himself which specifically struck from the "Statement of Offense" the language "as he then and there knew" with respect to the FARA filing.[4]

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dribbling out over the last year or so—since its first *Brady* production of March 4, 2018, and the Inspector General's Reports. We are a small team working on a shoe-string budget funded by thousands of hard-working patriots across the country who are making non-tax-deductible contributions primarily in amounts from $1 to $100 to www.MikeFlynnDefenseFund.com.

[3] Notably, Mr. Flynn hired the nationally known FARA experts at Covington who then billed hundreds of thousands of dollars to investigate independently and prepare the FARA filing in full and extensive coordination with David Laufman, Heather Hunt, and multiple members of the DOJ.

[4] Ex. 1 (Red-lined Statement of Offense).

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Among undersigned counsel's responses, during a heated exchange with Mr. Van Grack, defense counsel informed him he was demanding that Mr. Flynn lie. Counsel requested the government to identify any prior statement of Mr. Flynn's to that effect.[5] The prosecutors merely told counsel to check the hundreds of pages of Covington's notes, many of which were raw, the plea colloquy, and whatever information counsel could find regarding the plea negotiations. *Id.*

Prior to this unexpected and outrageous demand (by Mr. Van Grack and DOJ NSD Attorney Evan Turgeon ("Mr. Turgeon") in particular), the *Rafiekian* EDVA prosecutors had stated on the record in open court, and repeatedly told Mr. Flynn and new counsel, that they were not asserting in any way that Mr. Flynn was a co-conspirator in *United States v. Rafiekian*.[6] AUSA James Gillis advised in cooperation sessions with new counsel and Mr. Flynn that whatever the outcome of the *Rafiekian* trial, it would not adversely affect Mr. Flynn's sentencing recommendation.[7] Significantly, as counsel reminded the prosecutors, Mr. Flynn's plea agreement requires that he tell the truth in any testimony,[8] and he was fully prepared and willing to do so.

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[5] Ex. 2 (McKasson declaration).

[6] *See* Judge Trenga's Memorandum Opinion, *United States v. Rafiekian*, Case No. 1:18-cr-00457, ECF No. 372 at 11 ("Neither the original nor superseding indictment in this case references Flynn as a member of the alleged conspiracy or as an agent of the Turkish government; and in response to the Court's explicit questioning, the Government stated in open court that Flynn, who it planned to call as a witness, was not a member of the charged conspiracy and that it would not rely upon his testimony to establish the foundation for the admission of Alptekin's hearsay statements under Fed. R. Evid. 801(d)(2)(E))." *See also,* Ex. 3 excerpt from *United States v. Rafiekian*, Case No. 1:18-cr-00457, ECF No. 213, June 13, 2019 Hearing Tr. 65:9-22. ("…we do not contend that General Flynn was part of that conspiracy.").

[7] Memorandum Opposing Co-conspirator Designation of Non-Party Witness Michael T. Flynn. *United States v. Rafiekian*, 1:18-cr-00457, ECF 270, n.4. ("Mr. Gillis informed undersigned counsel and Mr. Flynn twice on June 6 alone that Mr. Flynn was not charged in this conspiracy, and they did not intend to charge him.").

[8] Ex. 4 (Flynn Plea Agreement).

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He rightly refused to lie for the government, and his new counsel would not allow him to do so, nor allow the government to bully him into acquiescence.

Remarkably, on June 26, 2019, in a preparation session for Mr. Flynn's likely testimony in *Rafiekian*, Mr. Van Grack, Mr. Turgeon, and EDVA prosecutors insisted that Mr. Flynn had lied to Covington lawyers about who wrote the opinion piece that appeared in *The Hill* on election day, November 8, 2016.[9] That was also false, as the defense team explained to the government with documentation. In fact, new counsel spent days scouring Covington's notes and other documents that unequivocally demonstrated that Mr. Flynn told them the truth. Emails, notes, and documents in the possession of Covington from January 2, 2017, prove that it had the information to make a correct FARA filing, *and* that the filing was substantially correct in all material respects.[10] If there were mistakes in the filing, they were the result of Covington's interviews of multiple people—including several lawyers; Covington's consultation with and demands from David Laufman, Heather Hunt, and multiple people with DOJ in and around the FARA section; and, Covington's own judgment calls and choices as it navigated this inscrutable area of the law.

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[9] *See* Judge Trenga's Memorandum Opinion, *United States v. Rafiekian,* Case No. 1:18-cr-457, ECF No. 372 at 31 ("Finally, the Government points to the op-ed published by Flynn on November 8, 2016 and Rafiekian's statement to Alptekin that 'a promise made is a promise kept' as sufficient evidence that Rafiekian was a Turkish agent. But there is no evidence that the op-ed had been requested by the Turkish government, either directly or through Alptekin; or that it was Rafiekian, as opposed to Flynn, who decided to have the op-ed published at that time.").

[10] Ex. 5 (Kelner Testimony and Defense Exhibits from *Rafiekian* trial). Moreover, the cover letter to the FARA filing must be read as part of the filing. Read together, it gives a reasonable and correct picture of the relationship, and it certainly identifies Turkey as a "principal beneficiary"—the primary purpose of the filing—the making of which was itself a judgment call. *See* Ex.6 (March 7, 2017 Covington Cover Letter for FARA Filing). *See* Ex.7 (Covington email before meeting with FARA section). Notably, the form itself contemplates amendment upon finding new information. *See* ECF No. 150-1. Covington never amended the filing. *See* Ex. 12 (Smith notes of January 2, 2017 meeting with Kelner, Kristen Verderame, and Mr. Flynn, including M. Flynn Jr.).

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Mr. Flynn was honest with his attorneys and provided all his documentation. He had spent tens of thousands of dollars to hire the FARA experts at Covington and allowed (and paid) them to conduct a full investigation. The registration was completed with substantial input from DOJ—including a very lengthy meeting, many phone calls, and DOJ's review and feedback on the draft filing. As Mr. Kelner admitted on the witness stand in *Rafiekian*, Covington added parts to the filing and exercised its judgment in what to include or exclude. *Id.*

Covington's "virtual transcripts" of Mr. Flynn's many interviews in his cooperation with Mr. Van Grack and the EDVA—and even 302s just attached to the government's sentencing memo but never produced by the government to Mr. Flynn—prove that Mr. Flynn repeatedly told Covington before the filing (from their first meeting onward), and the prosecutors knew:

- about Turkey's knowledge and "involvement in the project," providing emails and documents with Alptekin claiming to be communicating with government officials;[11]
- the focus of the project was to document concerns and any wrongdoing on the part of Fetullah Gulen who was believed to support radical Islam and cause problems in Turkey from his base in the United States. Everyone on the brief project knew that—as did

[11] Remarkably, this was *not* the assertion of the FARA filing. The actual FARA registration said that "Flynn Intel Group does not know whether or the extent to which the Republic of Turkey was involved *with its retention by INOVO* for the three-month project." ECF No. 150-1 at 44 (emphasis added). The representation in the FARA registration was true. The prosecutors manufactured the "false statement" by omitting the key words ["*with its retention by INOVO*"]. The government's omission completely changes the meaning of what was a correct statement in the FARA registration. To this day, there is no evidence of the extent of the involvement of the Republic of Turkey in *hiring INOVO*. Everyone knew they were being told about the "project." That was clear from the "green-light" email Covington had from early January. Ex. 5 (Kelner *Rafiekian* testimony).

As Judge Trenga found: "There is no evidence, not even in the hearsay statements from Alptekin to Rafiekian, that Alptekin, Inovo, or anyone associated with the Turkish government directed or controlled the work performed by FIG or Sphere personnel." *United States v. Rafiekian*, No. 1:18-cr-457, ECF No. 372 at 29.

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Covington. Documents show the two issues of Gulen and confidence in the business environment in Turkey to be inextricably intertwined and virtually synonymous;[12]

- Mr. Rafiekian *wrote* the first draft of the opinion piece published by *The Hill* as reflected in the notes of Covington FARA expert Brian Smith from Covington's first meeting with Mr. Flynn—confirmed by the recently filed (never produced) FBI 302 of Smith's interview in mid-2018;[13]

- Mr. Flynn could not testify that any Turkish government official gave him any instructions or had any control over the project.[14] Notably, neither could anyone else.

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[12] ECF No. 150-4 and 6; ECF No. 98-3 at Ex. 7 (Entitled Statement of the Problem: How do we restore confidence in the government of the Republic of Turkey and expose the Fethullah Gulen cult in the United States"); ECF No. 98-3 at Ex. 8 and 8-A (Covington Feb. 22, 2017 Notes: Commercial Activity→Crystalized → Gulen); ECF No. 150-5 at 4; 150-6 at 2.

[13] ECF No. 150-5, FBI 302 of Brian Smith on June 21, 2018, never produced by the government to Mr. Flynn (yet clear *Brady* evidence long exonerating Mr. Flynn of one of the prosecution's most ridiculous allegations regarding the "initiation" of the only op-ed written and published in connection with the project). Even the recently filed, never produced FBI 302s prove that **the FBI and prosecutors knew** in mid-2018 from Covington lawyer Brian Smith that he: "was aware of the September 2016 meeting in New York City (NYC) where FLYNN and RAFIEKIAN met with Turkish government officials." ECF No.150-5 at 5. "The meeting primarily focused on radical Islam. Briefly during the meeting, FIG described their business for ALPTEKIN/INOVO." *Id.* "The topic of GULEN was brought up by Turkish officials at the meeting." *Id.* The prosecutors' knowledge of Smith's true testimony did not stop them from trying to coerce Mr. Flynn into testifying differently a year later.

[14] Ex. 8 (June 25, 2018 Notes). This virtually verbatim transcript of Mr. Flynn's interview with Mr. Van Grack, Mr. Turgeon, and EDVA prosecutors in the presence of the FBI on June 25, 2018, is especially instructive. This interview was long before the government filed its motion for downward departure because of Mr. Flynn's substantial assistance and made its judicial admissions about his numerous contributions to this Court on December 18, 2017. Mr. Flynn was represented by Covington at the time; the firm did the transcription (to which the EDVA prosecutors referred new counsel for its accuracy); and, it preceded new counsel by one year.

Moreover, as Judge Trenga wrote: "On September 19, 2016, in a meeting arranged by Alptekin, Rafiekian, Flynn, and Brian McCauley met with Alptekin, MC, and then-Turkish Minister of Energy and Natural Resources Berat Albayrak ("BA"), President Erdogan's son-in-law, in New York City. *See* Trial Tr. 405:20-24, [Doc. No. 330] (McCauley). The meeting lasted about twenty-five to thirty minutes, *id.* at 409:13-14, 440:11-13, and mostly consisted of the Turkish officials expressing their negative opinions regarding Gulen, *see id.* at 440:18-441:8. During that meeting, there was no discussion concerning any work that FIG was doing or of FIG's relationship with Inovo or the Turkish government, nor was there any request from the Turkish officials or Alptekin for FIG to do anything. *Id.* at 440:14-17,442:1-3." *United States v. Rafiekian*, No. 1:18-cr-457, ECF No. 372 at 8.

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- Former FBI official Brian McCauley attended the New York meeting with the Turks. As McCauley testified in *Rafiekian*, the Turks gave no one instructions in that meeting, and Alptekin was not happy with any of FIG's work. McCauley slapped down most of his ideas. *See* Ex. 10.

- Significantly, Flynn also told Covington in their first meeting, that he briefed DIA before meeting the Turks in New York in September 2016.

In truth, it is Mr. Van Grack's "Statement of Offense" that is false or wrong—as Mr. Van Grack knew no later than June 21, 2018, when the FBI interviewed Brian Smith and created a 302 that proves Mr. Smith told the FBI that Flynn told Covington Rafiekian *wrote* the opinion piece.[15] Yet a year later, June 2019, Mr. Van Grack exploded at defense counsel because Mr. Flynn would not testify under oath that he made a "false statement" that was not false.

The prosecutors concocted the alleged "false statements" by their own misrepresentations, deceit, and omissions.[16] It is beyond ironic and completely outrageous that the prosecutors have persecuted Mr. Flynn, virtually bankrupted him, and put his entire family through unimaginable stress for three years. Mr. Flynn had long told the prosecutors that he had learned much with the

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[15] Even the FBI 302 of Brian Smith, recently filed, never produced to Mr. Flynn by the government, shows that Mr. Smith informed the government in 2018: "The topic of GULEN was brough up by Turkish official at the meeting." ECF No. 150-5 at 5. FLYNN had informed SMITH the meetings conducted by RAFIEKIAN on behalf of FIG were considered lobbying efforts." ECF No. 150-5 at 7. "RAFIEKIAN worked with an editor, Hank COX, to write the op-ed on GULEN." *Id.* "FLYNN informed SMITH it was his idea to write an op-ed. However, RAFIEKIAN, wrote the first draft of the op-ed about GULEN." *Id.* ECF No. 150-6 at 6. Further, "when asked what facts were provided to Covington about PC [Project Confidence], which contradict FIG's FARA filing, Kelner explained according to *Rafiekian*, GULEN was the problem and was destroying the confidence in Turkey. In order to increase confidence in Turkey, GULEN had to be stopped." ECF No. 150-6 at 6-7.

[16] Ex. 9 (Charts of Government's alleged "false statements" juxtaposed with actual FARA filing and evidence). Prosecutors created the "false statements" by omissions and distortions which changed the meaning of the actual filing or depended on judgment calls made by Covington.

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benefit of hindsight,[17] and that any problems with the FARA filing were not known to him at the time. On *June 25, 2018,* while represented by Covington—months before the government filed its sentencing motion and bragged about Mr. Flynn's full cooperation and special assistance at his scheduled sentencing in December 2018—Mr. Flynn specifically told them:

> I told this to you the other day, I don't go over the FARA filing with Bijan [Rafiekian] at all. I don't know if that makes any different to you all. But it wasn't . . . learn a lot of things in hindsight. Would it have adjusted what I, how I stated, how I filled out, can't say that it may have adjusted what I filled out; can't say it would or would not have.[18]

In short, the government has long known—from its "star cooperating witness" in the *Rafiekian* case:

- there was no conspiracy with Rafiekian;[19]
- there was no evidence that Turkish officials directed, controlled, or gave "instructions" to anyone at FIG for the project;[20]

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[17] Ex. 8 (June 25, 2018 Notes, page 10: "learn a lot of things in hindsight.").

[18] Ex. 8 (June 25, 2018 Notes, page 10).

[19] *See* Judge Trenga's Memorandum Opinion, *United States v. Rafiekian,* Case No. 1:18-cr-457, ECF No. 372 at 34-35 ("the Government claims "the three co-conspirators [Rafiekian, Flynn, and Alptekin] again gave substantially identical explanations [in the FARA filings] that the jury plainly deemed false and used as further evidence of a concerted agreement to lie. [Doc. No. 365 at 20]. But that contention ignores the lack of evidence to establish the presumed conspiracy, or any agreement, among these three individuals concerning the FARA filing, as discussed above. In fact, until the eve of trial, the Government contended that Flynn was not part of the alleged conspiracy." [Footnotes omitted].

Trenga also noted, "The Government's position with respect to Flynn is particularly telling… with full knowledge of Flynn's involvement, the Government told the Court as recently as June 13, 2019, that Flynn was not a member of the alleged conspiracy, *see* June 13, 2019 hearing TR 65:9-22, [Doc. No. 213], only to notify the Court of its change in position on July 3, 2019, *see* [Doc. No. 261], not because of Flynn's known involvement as outlined above, or any other involvement, but because it no longer planned to call Flynn as a witness pursuant to his cooperation agreement with the Government, even though Flynn was prepared to testify."). *Id*. at n.44.

[20] Judge Trenga heard the government's best evidence. *See* Judge Trenga's Memorandum Opinion, *United States v. Rafiekian,* Case No. 1:18-cr-457, ECF No. 372 at 8. That evidence

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- Mr. Flynn was speaking in many cases with the benefit of hindsight; and

- Mr. Flynn could not even say that he would have answered questions any differently now than he did when Covington filed the FARA registration.[21]

Still the government was satisfied with Mr. Flynn's cooperation as of December 2018—so satisfied that it filed its motion recommending probation because of his substantial assistance, and Mr. Van Grack was profuse in praising Mr. Flynn in open court. ECF No. 46, 47, and December 18, 2018 Hearing Tr. at 25:20- 27:22.

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included testimony from *government* witnesses: Alptekin was not pleased with the scope or substance of what was presented to him, which included a presentation by McCauley summarizing the findings of the investigation into Gulen and a mockup of the Gulenopoly board game conceived by Sphere. *See* Trial Tr. 720:2-8, 720:19-721:4, [ECF No. 333] (Courtovich); 526:25-527:8, [ECF No. 331] (Boston).

[21] Ex. 8 (June 25, 2018 Notes). Further, government witness former FBI Deputy Assistant Director Brian McCauley also proved there was no "direction or control" even by Alptekin—the Turkish businessman in *Rafiekian.* He testified: "Alptekin was angry and dissatisfied with everything FIG had done, including the report FIG gave him. FIG had not even done what Alptekin wanted or expected—at any juncture. There was no evidence of any particular act being requested by any of the Turkish ministers at the only brief "meet and greet" they had in NY late one night. (This is consistent with Flynn's grand jury testimony). McCauley further debunked the government's fictitious conspiracy when he testified that Flynn told Rafiekian to file with "DOJ.". Ex. 10 (McCauley *Rafiekian* testimony).

It is undisputed that Rafiekian sought legal advice for that very purpose—even from Covington. When Flynn received the FARA letter from DOJ, he was stunned. Mr. Flynn told the prosecutors in one of his many cooperation sessions: "I assumed Bob Kelley was briefed by Bijan on what was going on. Fast forward, I learned that Bijan had called here [Covington] to ask about FARA filing. I didn't know about that. He asked a couple of stupid questions that had nothing to do with FARA, but just political nonsense. I didn't find out about that until later on. Number one, that irritated me because he thought about that. He knew what FARA was. I've never talked to him about this. Other [than] sticking the document I got from DOJ in his chest was one of the last times I spoke to him. I was irritated that he had called up about FARA. For the cost of 10K to file FARA [to begin with] we're now sitting here," and "I'm not sure if we talked about that. You're scraping at cobwebs. I told Bijan that I had this conversation going on. I don't know what depth I discussed with him…" Again, this conversation was June 15, 2018, --long before new counsel appeared and before SCO expressed its delight with his substantial assistance. Ex. 11 (June 14, 2018 Covington Interview Notes).

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The only thing that changed in Mr. Flynn's case was the appearance of new, unconflicted counsel on Mr. Flynn's behalf, and Mr. Flynn's refusal to lie for the prosecution of Rafiekian with the representation, protection, and advocacy of his new defense team.

Defense counsel recently again advised the government that redlined edits to the "statement of offense," negotiated with Mr. Van Grack on November 30, 2017, specifically removed the language "as he then and there knew" regarding the allegedly "false" FARA statements.[22] Not only did Mr. Van Grack demand false testimony from Mr. Flynn about the alleged "false statements" in the FARA filing, but Mr. Van Grack also knew it was false because Mr. Flynn had explained it to him on June 25, 2018,[23] in preparation for his testimony to the grand jury for the *Rafiekian* indictment for which Mr. Van Grack touted Mr. Flynn's "substantial assistance."[24]

Undersigned counsel walked the prosecutors through notes and documents that proved the truth of the defense's statements on June 27, 2019. Instead of reevaluating the situation, Mr. Van Grack flew into a rage.[25] As the defense explained in *United States v. Rafiekian*, the prosecutors responded to this information from counsel for Mr. Flynn by doubling-down.[26] They scheduled an interview by the FBI with Mr. Kelner at Covington & Burling, which they later moved to the U.S.

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[22] Ex. 1 (Redlined Statement of Offense at page 6, yellow-highlighted language).

[23] Ex. 8 (June 25, 2018 Notes).

[24] A clear "shot across the bow" to Flynn and Covington, the government obtained the Rafiekian indictment only days before the scheduled sentencing before this Court. It worked—just in time to leverage it to confirm his plea of guilty in front of Judge Sullivan. Mr. Van Grack used the possibility of indicting Flynn in the *Rafiekian* case at the sentencing hearing to raise the specter of all the threats he had made to secure the plea a year earlier— including the indictment of Mr. Flynn's son.

[25] Ex. 2 (McKasson Declaration).

[26] *See, United States v. Rafiekian,* Case No. 1:18-cr-457, ECF No. 270.

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Attorney's office in Alexandria on July 3, 2019. Also, on July 3, 2019, an FBI Agent called the younger Michael Flynn directly to question him—despite knowing that he was represented by counsel. The Agent persisted in speaking with him even after he said to call his attorney. *See, United States v. Rafiekian,* Case No. 1:18-cr-457, ECF No. 270.

The prosecutors told the new defense lawyers that they would question Mr. Kelner in his July 3, 2019, interview about the Covington notes new counsel had just provided to the government—showing that Mr. Flynn had been fulsome with his counsel—but Mr. Turgeon did not do so. Instead, Mr. Turgeon carefully worded his questions to elicit responses from former counsel that were misleading at best, if not directly contradicted by the notes by Covington's notetaker and partner Brian Smith. *See, United States v. Rafiekian,* Case No. 1:18-cr-457, ECF No. 270.

Within minutes of concluding the interview of Mr. Kelner, AUSA James Gillis called defense counsel only to notify us that he would not be calling Mr. Flynn as a witness, and that counsel would be receiving a gag order that prohibited counsel from disclosing that fact. He did not even mention that the government had made the remarkable decision to re-cast Mr. Flynn as a co-conspirator—contrary to many prior representations—and that they would seek a ruling from this Court finding him to be a co-conspirator by a preponderance of the evidence in the high-profile *Rafiekian* proceeding in which he could not defend himself.[27] *See, United States v. Rafiekian,* Case No. 1:18-cr-457, ECF No. 270.

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[27] *See, United States v. Rafiekian,* Case No. 1:18-cr-457, ECF No. 270 for the full discussion of this information. As Judge Trenga wrote: "Then on July 3, 2019, the Government filed a Notice of Correction to the Record in which it advised the Court that it no longer planned to call Flynn as a witness in its case in chief. The Government also took the position for the first time, contrary to its earlier in-court statements, that Flynn was regarded as a co-conspirator and that it would seek to have his out-of-court statements introduced pursuant to Fed. R. Evid. 801(d)(2)(E)." (Citations Omitted) *See* Judge Trenga's Memorandum Opinion, *United States v. Rafiekian,* Case No. 1:18-cr-457, ECF No. 372 at 11.

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The prosecution has shown abject bad faith in pure retaliation against Mr. Flynn since he retained new counsel. This can only be because with new, unconflicted counsel, Mr. Flynn refused to lie for the prosecution. In pure spite, the government retaliated and sought to rescind its judicial admissions that Mr. Flynn was not a co-conspirator, obtained an *ex parte* emergency order from Judge Trenga, including a gag order, and moved up the date of a hearing on the issues without notice to counsel for Mr. Flynn.[28] An agent improperly contacted Michael Flynn Jr., see *supra.* The prosecutors placed him on the witness list solely to harass him and to raise the threat and anxiety of the family at this crucial time. The prosecutors completed the trial without calling him as a witness.

Justice is not a game, and there should be no room for such gamesmanship in the Department of Justice.

B. The Government's December 15, 2019 Extraordinary Production, the December Report of the Inspector General, this Court's Opinion Denying All *Brady* Requests, and the Government's New Sentencing Position and Memo Warrant This Continuance.

There have been extraordinary developments in this case in the last thirty days. In addition, in the process of preparing for sentencing, we found information we have not seen previously—despite our team's most diligent efforts. Due to the multiple issues, filings, productions, and developments outlined herein, however, the defense must have additional time to zealously provide their client the quality of representation to which he is entitled.

[28] Only then did Mr. Flynn's unconflicted new defense counsel file a motion to oppose his designation as a co-conspirator. *United States v. Rafiekian*, 1:18-cr-00457, ECF No. 270.

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1. The 478 Page IG Report Disclosed Stunning New Information About the Second Agent Who Interviewed Mr. Flynn.

On December 9, 2019, the Inspector General ("IG") for the Department of Justice issued the 478-page Report on FISA abuses. At the government's request on November 26, 2019, the parties agreed, and this Court issued an order, approving a delay for this Court's decision on Mr. Flynn's Motion to Compel because that Report was expected to "examine topics related to several matters raised by the defendant."[29] It certainly does.

2. On December 15, 2019, the Government Finally Produced 637 Pages of Long-Promised 302s and Handwritten Notes of Agents.

The government produced an additional 637 pages of discovery to Mr. Flynn only three weeks ago. Mr. Flynn's counsel has notified the government of problems with that production.[30] The production, consisting of 302s and notes requested multiple times since Oct. 11, 2019, includes crucial documents such as sixteen 302s consisting of 113 pages, as well as 206 pages of handwritten FBI notes. Mr. Flynn's counsel is still reviewing and digesting these documents as the handwritten notes are particularly difficult to read.

3. This Court's Ninety-Two Page Decision

The next day, on December 16, 2019, this Court issued a 92-page decision in which it rejected every request in Mr. Flynn's motion for exculpatory evidence, including requesting the required production of the inexplicably "missing" original 302 by the fired and infamous former

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[29] ECF No. 140 at 2.

[30] In the government's cover letter with its most recent production, it claims that it is producing documents with the Bates range of 700022699-23460; however, the production was missing the following Bates ranges: 700022699-22756, 23173-23213, 23247-23258, and 23267-23282. The production was also not produced in Bates order, making it very confusing to review. For example, Bates stamp 22953 appears before Bates stamp 22890. Ms. Ballantine promptly responded over the weekend with an effort to correct this, and the parties expect to resolve any issues.

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FBI Agent Peter Strzok. ECF No. 144. Despite the Court's grant of the parties' request for delay of that Order until the Report issued, the 92-page decision did not address the IG Report, and the Court did not afford the parties any time to brief the remarkable new information revealed in the IG Report and the effect of that information on Mr. Flynn's case. Mr. Flynn needs additional time to review and present information from that Report that does indeed bear on his case and to protect his constitutional rights.

4. The Government Obtained Two Extensions Before Filing Its Sentencing Memoranda Seeking to Revise History and Imprison Mr. Flynn.

Per the Court's Order, the government was to provide its supplemental sentencing memorandum on December 30, 2019. Unexpectedly, on December 20, 2019, the government requested from Mr. Flynn a letter outlining "the facts and circumstances that the defendant believes should be taken into consideration by the Departure Committee when determining whether the defendant merits a downward departure motion pursuant to USSG Section 5K1.1, 18 U.S.C. § 3553(e), and/or Fed. R. Crim. P. 35(b)." The government gave a deadline of noon, December 24, 2019 (Christmas Eve). Mr. Flynn replied and requested an extension to December 27, 2019. The government denied the request to the 27th, but it granted the defense an extension to 5 p.m. on December 26, 2019. This required the defense team to work through Christmas Eve and Christmas Day, only to receive "out-of-office for the week" replies from government lawyers to whom we sent the letter.

Mr. Flynn provided his letter to the government by its requested deadline of 5 p.m. on December 26, 2019. The government notified Mr. Flynn that it was likely unable to meet its deadline to this Court of December 30, 2019, due to "the holidays" and requested an extension to January 7, 2020. Mr. Flynn agreed with government's request despite having just been forced by the prosecutors to work through Christmas and Hanukkah themselves. Thus, the government

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sought and obtained an extension from this Court for its "supplemental" sentencing memorandum. On January 4, 2020, the government moved again to continue the sentencing deadline by 24 hours—again because of holiday schedules. ECF No. 149. The defense also agreed to this extension. Despite its multiple extension requests, the government still filed past this Court's noon deadline. ECF No. 150.

C. The Government's Sentencing Memo Dramatically Changed Its Position, Seeks to Withdraw Its Prior Motion and Recommendation, and Triggers the Necessity to File this Motion Now to Withdraw the Plea.[31]

In its "supplemental" sentencing memorandum, the government reverses its position on Mr. Flynn's sentencing.[32] It seeks to "withdraw" its motion filed a year ago pursuant to U.S.S.G. § 5K1.1 and to withdraw its recommendation that he receive probation. The prosecution seeks to rewrite history and send Mr. Flynn to prison. This about-face places the government in breach of the plea agreement and triggers application of the ramifications of the Supreme Court's decision in *Puckett*, 556 U.S. 129. *Puckett* requires any competent defense counsel in these circumstances to move to withdraw Mr. Flynn's guilty plea for this reason alone. *Id.* It would constitute ineffective assistance of counsel to fail to move to withdraw his plea now in light of the government's breach and change in sentencing recommendation.

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[31] The government's letter just received yesterday by way of "Certificate of Conference" which agrees to the Continuance requested, tries "to have its cake and eat it too." The government breached the plea agreement when it filed the new sentencing memo. Mr. Flynn now also needs time to brief many alternate reasons for the withdrawal of his plea.

[32] The government's "supplemental" memorandum is thirty-two pages in length (its original memorandum was merely six). ECF No. 150 and 46, respectively. It also contains 136 pages of exhibits, including 302s of Mr. Flynn's interview of June 25, 2018 as well as Mr. Flynn's previous counsel, Robert Kelner's (on June 21, 2018 and July 3, 2019) and Brian Smith's (June 21, 2018) interviews. Counsel was provided Mr. Flynn's interviews in the production on December 15, 2019. Counsel had not previously seen the attorney 302s or the more than 200 pages of handwritten notes of the agents that must be deciphered. ECF No. 150-1 – 150-6.

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Mr. Flynn has instructed counsel to file *this* Motion to withdraw his plea now. The defense must file a Supplemental Motion to Withdraw for alternative additional reasons as soon as possible. Mr. Flynn will not plead guilty. Furthermore, he will not accede to the government's demand that he "disavow" any statements made in his filings since he obtained new, unconflicted counsel. Michael T. Flynn is innocent. Mr. Flynn has cooperated with the government in good faith for two years. He gave the prosecution his full cooperation. "He held nothing back." He endured massive, unnecessary, and frankly counterproductive demands on his time, his family, his scarce resources, and his life. The same cannot be said for the prosecution which has operated in bad faith from the inception of the "investigation" and continues relentlessly through this specious prosecution.[33]

Because of the government's special role in the justice system and its extraordinary bargaining power, a plea agreement is strictly construed against the government. Unless the plea agreement reserves the government's right to withdraw a filed Section 5K1.1 motion and specifies the conduct that would trigger the government's right to withdraw, the government may not request withdrawal of the motion. *United States v. Padilla*, 183 F.3d 136, 141 (2nd Cir. 1999). The Flynn plea agreement contains no such reservation or specification, and the government is in breach.

The Department of Justice, specifically the Office of United States Attorney for the District of Columbia, reversed its sentencing position despite the many judicial admissions of the

[33] Notably, the first interview of Mr. Flynn was conducted surreptitiously by the FBI by the unprecedented and never-to-be repeated maneuver of slipping an agent into a sample presidential daily briefing to nominee Trump, Mr. Flynn, and a third person on August 17, 2016—two days after Strzok and Page texted about "the insurance policy discussed in McCabe's office and one day after they supposedly "opened" and investigation of Mr. Flynn. Office of the Inspector General, U.S. Dept. of Justice, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation*, 340-41, 426 (December 2019, revised).

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prosecutors from DOJ and EDVA, and despite the fact that virtually every premise undergirding the prosecutors' original memorandum still holds true. Compare ECF No. 150 to ECF No. 46-47.

Mr. Flynn has spent approximately one hundred hours cooperating with the government and has provided it thousands of documents, incurring millions of dollars in legal fees and expenses—requiring him to sell his home in Alexandria—all to cooperate with the government. As the government noted in its original memorandum, Mr. Flynn's "early cooperation was particularly valuable because he was one of the few people with long-term and firsthand insight regarding events at issue under investigation by the SCO…[which] likely affected the decisions of related firsthand witness to be forthcoming with the SCO and cooperate." ECF No. 46-1 at 5. Nothing reasonable or rational explains the government's breach.

Furthermore, as the government admitted, Mr. Flynn's "military and public service are exemplary. He served in the military for over 33 years, including five years in combat duty, led the Defense Intelligence Agency, and retired as a 3-star general. The Defendant's record of military and public service distinguish him from every other person who has been charged as part [of] the SCO's investigation." ECF No. 46 at 5. This all remains true today.

D. *Puckett Requires* Mr. Flynn Move to Withdraw His Plea.

The government's new Supplemental Memorandum in Aid of Sentencing recommends that this Court impose on Mr. Flynn a period of incarceration, and it specifically seeks to withdraw its previous motion. ECF No. 150. The government's position not only breaches the plea agreement, but it also violates Mr. Flynn's Due Process rights. It magnifies and further proves the government's abject bad faith and vindictiveness.

The terms of that agreement clearly state:

> If the government determines that your client has provided such substantial assistance, this Office *shall* file a departure motion pursuant to Section 5K1.1 of

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> the Sentencing Guidelines, which would afford your client an opportunity to persuade the Court that your client should be sentenced to a lesser period of incarceration and/or fine than indicated by the Sentencing Guidelines.[34]

Consistent therewith, on December 4, 2018, the government submitted its recommendation to this Court which concluded that "[g]iven the defendant's substantial assistance and other considerations . . . a sentence at the low end of the guideline range—including a sentence that does not impose a term of incarceration—is appropriate and warranted." ECF No. 46 at 1. In the December 18, 2018, sentencing hearing, the government represented to this Court that Mr. Flynn should receive probation and confirmed his "substantial assistance." The government based its decision on Mr. Flynn's cooperation both with the SCO, which was, according to the government, "very largely complete, completed at this point," and the extensive cooperation Mr. Flynn provided to the EDVA. Mr. Van Grack thoroughly praised Mr. Flynn, telling the Court: "I'd like to highlight that General Flynn has held nothing back, nothing in his extensive cooperation with the Special Counsel's Office. He's answered every question that's been asked. I believe they feel that he's answered them truthfully, and he has. He's complied with every request that's been made, as has his counsel. Nothing has been held back."[35] The government told the Court that Mr. Flynn "provided substantial assistance to the attorneys in the Eastern District of Virginia in obtaining th[e] charging document"[36] for its prosecution of Bijan Rafiekian and Ekim Alptekin.

Mr. Flynn was ready, willing, and able to testify consistently with his grand jury testimony. As late as June 2019, government prosecutors were still assuring current counsel that Mr. Flynn's

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[34] *See* Exhibit 4 (Plea Agreement) (emphasis added).

[35] Hr'g Tr. 46:8-14, Dec. 18, 2018.

[36] Hr'g Tr. 27:20-22, Dec. 18, 2018.

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cooperation would not be affected by the outcome of the *Rafiekian* case. The government's stunning and vindictive reversal of its earlier representations to this Court are incredible, vindictive, in bad faith, and breach the plea agreement.

Mr. Van Grack's obsession with attempting (and failing) to bully Mr. Flynn into testifying consistently with the government's fictional theory of the case in the *Rafiekian* matter—and admit guilt to "false statements" the government knows he did not make—is repugnant to the search for justice which cannot be found without first finding truth. His attempt to punish Mr. Flynn for standing firm for the truth is unlawful. *See Wade v. United States*, 504 U.S. 181 (1992) (review for an "unconstitutional motive"). The government's tactics in retaliation for Mr. Flynn's refusal to "compose" for the prosecution is also a due process violation that can and should be stopped dead in its tracks by this Court. *See United States v. Paramo,* 998 F.2d 1212, 1218-20 (3d Cir. 1993) (reversing a district court that refused to consider a prosecutorial vindictiveness claim when the prosecution withheld a 5K1.1 because the defendant decided to plead not guilty and proceed to trial). By attempting to punish Mr. Flynn for pushing back at Mr. Van Grack's attempts to coerce him into giving false testimony in the *Rafiekian* case, the prosecutor's retaliatory motive shows "actual vindictiveness." *Id.* at 1220.

"Long ago, the Supreme Court instructed that '(t)he right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client,' an admonition which we ourselves have had occasion to observe. 'Undivided allegiance and faithful, devoted service to a client,' the Court declared, 'are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision.'" *United States v. Hurt*, 543 F.2d 162 (D.C. Cir. 1976) (citing *Von Moltke v. Gillies*, 332 U.S. 708, 725 (1948)). Effective assistance of counsel requires counsel for Mr. Flynn to move to withdraw his

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plea, and Mr. Flynn has instructed counsel to do so now—for the reasons stated herein and for many alternate reasons we will present in a supplemental filing. *Puckett v. United States*, 556 U.S. 129 (2009). [37] In *Puckett*, the majority wrote: "such a breach is *undoubtedly* a violation of the defendant's rights"[38] and that if the government's "obligations are not met" under the plea agreement, "the defendant is entitled to seek a remedy"—which includes "allowing him to withdraw his plea."[39] The government is "obligated to uphold its side of the bargain"[40] in a plea agreement, and its failure to do so is grounds for withdrawal of the defendant's guilty plea. *Id.* Here the government breached the contract with its request to withdraw its motion and for incarceration of Mr. Flynn.

E. Conclusion

Accordingly, Mr. Flynn moves to withdraw his plea of guilty. The government breached the plea agreement, and future briefing will establish additional reasons. The government has agreed to a thirty-day continuance. He requests the continuance be granted in the interest of justice and to allow Mr. Flynn and his counsel to process, respond, and reply to the many ramifications from the significant developments and new information that has been disclosed in the last thirty days.

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[37] In *Puckett,* the Supreme Court applied the "plain error" standard and ruled against Puckett because defense counsel did not move to withdraw his plea in the district court when the Government defaulted on its plea-agreement obligations and sought additional incarceration—even though Mr. Puckett had committed an additional crime in the three years between his guilty plea and his sentencing. *Puckett*, 556 U.S. at 133.

[38] *Id.* at 136 (emphasis added).

[39] *Id.* at 137.

[40] *Id.* at 138.

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Dated: January 14, 2020

Reviewed, understood, and agreed,

/*s*/ Michael T. Flynn

Lt. General Michael T. Flynn (Ret.)

Respectfully submitted,

/s/ Sidney Powell

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CERTIFICATE OF CONFERENCE

The government's response to the Motion for Continuance is attached in the form of the letter Ms. Ballantine requested attached. Defense counsel contacted the government shortly before filing this Motion to Withdraw the Plea. The government had not replied at the time of filing.

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2020, a true and genuine copy of Mr. Flynn's Motion for Leave for Continuance of Sentencing was served via electronic mail by the Court's CM/ECF system to all counsel of record, including:

Jessie K. Liu, U.S. Attorney for the District of Columbia
Brandon L. Van Grack, Special Assistant U.S. Attorney
Jocelyn Ballantine, Assistant U.S. Attorney
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Respectfully submitted,

/*s*/ Jesse R. Binnall
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. MICHAEL T. FLYNN, Defendant.	Criminal No.: Violation: 18 U.S.C. § 1001 (False Statements)

STATEMENT OF THE OFFENSE

Pursuant to Federal Rule of Criminal Procedure 11, the United States of America and the defendant, MICHAEL T. FLYNN, stipulate and agree that the following facts are true and accurate. These facts do not constitute all of the facts known to the parties concerning the charged offense; they are being submitted to demonstrate that sufficient facts exist that the defendant committed the offense to which he is pleading guilty.

1. The defendant, MICHAEL T. FLYNN, who served as a surrogate and national security advisor for the presidential campaign of Donald J. Trump ("Campaign"), as a senior member of President-Elect Trump's Transition Team ("Presidential Transition Team"), and as the National Security Advisor ~~("NSA")~~ to President Trump, made materially false statements and omissions during an interview with the Federal Bureau of Investigation ("FBI") ~~that took place~~ on January 24, 2017, in Washington, D.C., ~~which is located in the District of Columbia, on January 24, 2017.~~ At the time of the interview, the FBI had an open investigation into the Government of Russia's ("Russia") efforts to interfere in the 2016 presidential election, including the nature of any links between individuals associated with the Campaign and Russia, and whether there was any coordination between the Campaign and Russia's efforts. ~~The FBI opened and coordinated the investigation in Washington, D.C.~~

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2. FLYNN's false statements and omissions impeded and otherwise had a material impact on the FBI's ongoing investigation into the existence of any links or coordination between individuals associated with the Campaign and Russia's efforts to interfere with the 2016 presidential election.

False Statements Regarding FLYNN's Request to the Russian Ambassador that Russia Not Escalate the Situation in Response to U.S. Sanctions against Russia

3. On or about January 24, 2017, FLYNN agreed to be interviewed by agents from the FBI ("January 24 voluntary interview"). During the ~~course of the~~ interview, FLYNN falsely stated that he did not ask Russia's Ambassador to the United States ("Russian Ambassador") to refrain from escalatinge the situation ~~with the United States~~ in response to sanctions that the United States had imposed against Russia. FLYNN also falsely stated that he did not remember a follow-up conversation ~~with the Russian Ambassador wherein~~ in which the Russian Ambassador stated that Russia had chosen to moderate its response to those sanctions as a result of FLYNN's request. In truth and in fact, however, FLYNN then and there knew that the following had occurred:

a. On or about December 28, 2016, then-President Barack Obama signed Executive Order 13757, which was to take effect the following day. The executive order announced sanctions against Russia in response to that government's actions intended to interfere with the 2016 presidential election ("U.S. Sanctions").

b. On or about December 28, 2016, the Russian Ambassador contacted FLYNN.

c. On or about December 29, 2016, FLYNN called a senior official of the ~~incoming National Security Council~~Presidential Transition Team

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("~~incoming NSC~~PTT official"), who was with other senior members of the Presidential Transition Team at the Mar-a-Lago resort in West Palm Beach, Florida, to ~~seek guidance on~~discuss what, if anything, to communicate to the Russian Ambassador about the U.S. Sanctions. On that call, FLYNN and the ~~incoming NSC~~PTT official discussed the U.S. Sanctions, including the potential impact of those sanctions on the incoming administration's foreign policy goals. The ~~incoming NSC~~PTT official and FLYNN also discussed that the members of the Presidential Transition Team at Mar-a-Lago did not want Russia to escalate the situation.

d. Immediately after his phone call with the ~~incoming NSC~~PTT official, FLYNN called the Russian Ambassador and requested that Russia not escalate the situation and only respond to the U.S. Sanctions in a reciprocal manner.

e. ~~On or about December 29, 2016,~~Shortly after his phone call with the Russian Ambassador, FLYNN spoke with the ~~incoming NSC~~PTT official to report on the substance of his call with the Russian Ambassador, including their discussion of the U.S. Sanctions.

f. On or about December 30, 2016, Russian President Vladimir Putin released a statement indicating that Russia would not take retaliatory measures in response to the U.S. Sanctions at that time.

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g. On or about December 31, 2016, the Russian Ambassador called FLYNN and ~~to~~ informed him that Russia had chosen not to ~~escalate the situation~~retaliate in response to FLYNN's request.

h. After his phone call with the Russian Ambassador, FLYNN spoke with senior members of the Presidential Transition Team about Russia's decision not to escalate the situation in response to FLYNN's request.

False Statements Regarding FLYNN's Request that Foreign Officials Vote Against or Delay a United Nations Security Council Resolution

4. During the January 24 voluntary interview, FLYNN ~~falsely stated that he called~~made additional false statements about calls he made to Russia and several other countries ~~in order to get a sense of where they stood with respect to a vote on~~regarding a resolution submitted by Egypt to the United Nations Security Council on December 21, 2016~~, by Egypt~~. Specifically FLYNN ~~also~~ falsely stated that he only asked ~~what~~ the countries' positions ~~were with respect to~~on the vote, and that he did not request that any of the countries take any particular action ~~with regard to~~on the resolution. FLYNN also falsely stated that the Russian Ambassador never described to him Russia's response to ~~the request~~ FLYNN's request ~~made~~ regarding the resolution. In truth and in fact, however, FLYNN then and there knew that the following had occurred:

a. On or about December 21, 2016, Egypt submitted a resolution to the United Nations Security Council on the issue of Israeli settlements ("resolution"). The United Nations Security Council was scheduled to vote on the resolution the following day.

b. On or about December 22, 2016, a very senior ~~official~~ member from the Presidential Transition Team directed FLYNN to contact officials from

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foreign governments, including Russia, to learn where each government stood on the resolution and to influence those governments~~' positions in the~~ to~~hopes of~~ delay~~ing~~ the vote or defeat~~ing~~ the resolution.

c. On or about December 22, 2016, FLYNN contacted the Russian Ambassador about the pending vote. FLYNN informed the Russian Ambassador about the incoming administration's opposition to the resolution, and requested that Russia vote against or delay the resolution.

d. On or about December 23, 2016, FLYNN again spoke with the Russian Ambassador, who informed FLYNN that if it came to a vote Russia would not ~~prevent the vote from occurring~~vote against the resolution.

Other False Statements Regarding FLYNN's Contacts with Foreign Governments

~~5.~~ On March 7, 2017, FLYNN filed multiple documents with the Department of Justice pursuant to the Foreign Agents Registration Act ("FARA") pertaining to a project performed by him and his company, the Flynn Intel Group, Inc. ("FIG"), for the principal benefit of the Republic of Turkey ("Turkey project"). ~~The project was initiated by a Turkish national who owned a Dutch company ("Company A").~~ In the FARA filings, FLYNN made materially ~~the following~~ false statements and omissions, including by: ~~(i)~~ falsely stating that (a) ~~FLYNN~~ FIG did not know whether or the extent to which the Republic of Turkey was involved ~~with FIG's retention in~~for the Turkey project,~~;~~ ~~(b) (ii) for the purposes of the Turkey project, Company A was not supervised or directed by a foreign government; (iii) Company A engaged FIG on the Turkey project in support of Company A's consulting work for a company in Israel; (iv)~~ the Turkey project was focused on improving U.S. business organizations' confidence regarding doing business in Turkey,~~;~~ and (c) ~~(v) on his own initiative, FLYNN published~~ an op-

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ed by FLYNN~~pertaining to Turkey~~published in *The Hill* on November 8, 2016, was written at his own initiative; and by omitting that officials from the Republic of Turkey provided supervision and direction over the Turkey project. ~~; and (vi) FIG paid Company A $80,000 as "Consultancy" fees. In truth and in fact, however, FLYNN then and there knew the following~~:

~~a. The Government of Turkey was directly involved in FIG's retention on the Turkey project;~~

~~b. The Government of Turkey supervised and directed the Turkey project;~~

~~c. The Turkey project was not in support of Company A's consulting work for an Israeli company;~~

~~d. The Turkey project was not focused on improving U.S. business organizations' confidence regarding doing business in Turkey;~~

~~e. FLYNN published the November 8, 2016 op-ed in support of the project; and~~

~~f.~~5. ~~The $80,000 FIG paid to Company A was not for consulting fees.~~

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ROBERT S. MUELLER, III
Special Counsel

By: _____
Brandon L. Van Grack
Zainab N. Ahmad
Senior Assistant Special Counsels
The Special Counsel's Office

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DEFENDANT'S ACCEPTANCE

The preceding statement is a summary, made for the purpose of providing the Court with a factual basis for my guilty plea to the charge against me. It does not include all of the facts known to me regarding this offense. I make this statement knowingly and voluntarily and because I am, in fact, guilty of the crime charged. No threats have been made to me nor am I under the influence of anything that could impede my ability to understand this Statement of the Offense fully.

I have read every word of this Statement of the Offense, or have had it read to me. Pursuant to Federal Rule of Criminal Procedure 11, 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.

Date:_____ _____

Michael T. Flynn
Defendant

ATTORNEYS' ACKNOWLEDGMENT

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.

Date: _____ _____

Robert K. Kelner
Attorney for Defendant

_____

Stephen P. Anthony
Attorneys for Defendant

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	
v.	**Criminal Action No. 1:17-cr-00232 (EGS)**
MICHAEL T. FLYNN,	
Defendant.	

DECLARATION OF LINDSAY R. MCKASSON

I, Lindsay R. McKasson declare:

1. I am an attorney at Harvey & Binnall, PLLC.

2. On June 27, 2019, I participated in a trial preparation session at the United States Attorney's Office for the Eastern District of Virginia in which General Flynn was being prepared for his testimony by the United States Attorneys.

3. On that day, I wrote contemporaneous notes during the meeting. A true and correct copy of those notes are attached hereto as **Exhibit 1**.

4. Later that afternoon, I transcribed my handwritten notes into types notes. A true and correct copy of those typed notes are attached hereto as **Exhibit 2**.

I swear that the foregoing is true and correct under the laws of the District of Columbia on this 13th day of January, 2020.

Lindsay R. McKasson

AMERICAN OVERSIGHT

EXHIBIT 1

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Document ID: 0.7.4280.6252-000006 20200831-0000767

EDVA

6/27/19 AUSA Mtg

- Jim Gillis
- Neil Hammerstorm
- Evan Turgeon - Nat'l Sec. Division
- John _____

- Testimony → consistent
- Cooperate
- Gave production
- Walk - through → Reviewing production
-

Neil: • Were the atty's who prepared FARA filing the one who were in the mtgs

- Evan: what's the point you are trying to make [re: Gulen packet]

- Evan:

- [Brandon joined]

- Confidence / Truth piece → always about Gulen
  - Facts never changed
  - FARA (b)
  - Bijan / Ekim came up w/ →
  - Whether U.S. got back to Turkey
  - Change in name only
  - Smt ~~of~~ false

AMERICAN OVERSIGHT

Jesse – Gov. had accurate info pre-filing

Sidney – FARA = where he fell is your case?
- look at the whole filing
- send prison FN

Bill: some ambiguous → false/misleading
- did not intentionally make false statements
- knowingly that he knew was wrong
- figured lawyers would get it right

John: Strut: Turkey was focused on bus. relations
- that's the story to portray
- I knew highest levels of govt
- telling FARA unit → bus. relations
- this is a false statement

Neil: → why not talk it in colloquy

Brandon: this agreement → extensive
- part of discussions
- this is language your client agreed
- strut of offense
- false statement was aware
- pushed back on some language
- did not willfully
- revising dates that already occurred
- ~~pushed back~~ in front of judge

AMERICAN OVERSIGHT

Sidney • Nothing in Statute → willfully / knowingly re FARA

Brandon • Doesn't make this an offense → ?
- First time client or counsel has made statute like that
- No representation — would have been falsity in ~~[illegible]~~ mitigation
- Omissions → facts about officials in Turkey
- Looks like you & have reviewed notes
- things he told us before
- one thing: well one thing not to go through Flynn, another thing that we didn't know
  - he provided them misleading/false information
- want to be clear: no false/misleading statements

Sidney: You're asking client to lie

Brandon No one is asking your client to lie
→ be careful about what you say
• DOJ ppl listening to this call → on the line

Sam: Factual discussion

AMERICAN OVERSIGHT

hm: What he believes to be true →
difficult for us to believe that
- drill down
- story may evolve
- not in any way to say anything but the truth
- not changing our LT
- absorb what you have given us
- Go back to Lowrey to lawyers
- What Brandon → saying: Your position is that they never gave false info to any lawyers at co. or to Kricker in their calls or documents

→ We have seen nothing to indicate that

- Have you asked them for typed up versions
- These specific interviews
- No typed up
- Interviews in them
- Direct yes or no from them
- Haven't confronted them on this
- Typed up notes from that time period
- Typed up notes would be contemporaneous notes
- Our experience → had access to only typing away

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- Specially typed up notes → email them to us
  - Contemporaneous, typed up notes from discussions w/ Lou Fagan
    - Yes?
    - Email them to us

Sidney — I don't think there are any

- Alex & Mike associate

Sidney: We are going to need some time

Brandon: We can talk after

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EXHIBIT 2

AMERICAN OVERSIGHT

Document ID: 0.7.4280.6252-000006 20200831-0000773

AUSA EDVA Notes
6/27/19, 9:30 a.m. [notes were hand-written at time of interview and typed on the same day]

Attendance:
- Jim Gillis
- Neil Hammerstorm
- Evan Turgeon – Nat. Sec.
- John _____ (AUSA)
- Sidney
- Jesse
- Lindsay
- Bill

Sidney: testimony is consistent, he will cooperate…[gave production]

- Walk through production

Evan: what's the point you are trying to make [re Gulen report/packet]

Neil: Were the atty's who prepare the FARA filing the ones who were in the meetings [that are reflected in the notes]?

Sidney: Yes

[Brandon joined the call]

John: confidence/truth project – always about Gulen
- We know that the focus never changed
- Paragraph 5(b) must be what you're talking about [Stmt of Offense]
- Bijan/Ekim came up these lies, but in reality they were trying to get Gulen back to Turkey
- Project name change, was a change in name only
- The statement is false

Jesse: Covington had accurate information pre-filing

Sidney: review the FARA in totality, from appellate perspective = where the hell is your case?
- look at the whole filing
- send prison for 15 years for writing op-ed?

Bill: some ambiguous or false/misleading information
- Did not intentionally make false statements

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Document ID: 0.7.4280.6252-000006 20200831-0000774

- He did not knowingly make the statements that he knew were wrong
- Gave the information to his lawyers and figured they would get it right

John: Statement given was that the Turkey project was on business relations
- That's the story they portrayed
- When in reality, during the General's telling, he admits that the highest levels of GoT (Govt of Turkey) were involved
- Telling FARA unit that this about business relations – that is a false statement

Neil: why not raise it in colloquy?

Brandon: This agreement was extensive
- He was part of the discussions
- This is the language your client agreed to
- Statement of Offense
- He was aware false statement
- General pushed back on some language, but not this language
- Did not willfully – why not say something?
- You are reviving conversations that already occurred
- He did not say anything in front of judge

Sidney: nothing in statement says willfully/knowingly re FARA

Brandon: [very heated]
- Without willfully/knowingly it doesn't make this an offense
- First time your client or counsel has made any statement like what you are saying
- No representation that this [what you're saying is the case] – would have been factor in mitigation
- Omissions – the facts about officials in Turkey
- Looks like you have reviewed the notes
- Things he told us before
- It's one thing to say that he did not go line by line through the FARA, it's another thing to say he didn't know
    - He provided them misleading/false information
- Want to be clear – you are saying that he did not provide any false/misleading statements to Covington?

Sidney: You are asking my client to lie
- Everything I have seen is consistent – if you have seen something, show us

Brandon: No one is asking your client to lie
- Be careful about what you say

AMERICAN OVERSIGHT

- Other people are listening on this call [on the line][1]

Jim: Let's go back to having a factual discussion
- What he believes to be true – it is difficult for us to believe that [what you're saying]
- I know sometimes when drilling down on facts that stories may evolve a bit
- I don't want him [General] to say anything but the truth
- And I am not changing that one bit
- We need to absorb what you have given us
- I think I know what Brandon was saying – clarify that your position is that he [General] never gave false information to any lawyers at Covington or to [Kristen?] whether orally or through documents?

Sidney: we have seen nothing to indicate that

Jim: You should go back to Covington lawyers
- Have you asked them for typed up versions?
- These specific interviews [before FARA filing]
- Are there no typed up interviews with them? [Sidney: I don't believe so]
- Ask them direct yes or no from them re their notes
- Have you confronted them with this? No
- Ask them for their typed up notes from that time period
- Their typed up notes would be contemporaneous notes
- Our experience → they [Covington] had associate furiously typing away
- You should ask them specifically re the typed up notes and ask them to email the notes to you
- Contemporaneous, typed up notes from discussions between Covington and Gen. Flynn

Sidney: I don't think there are any

Jim: two associates taking notes, Alex and a male

Sidney: we are going to need some time

Brandon: we can talk after [to the AUSA team]

[1] I also remember Sidney saying in response to this: Put the world on – just put the world on!

AMERICAN OVERSIGHT

Document ID: 0.7.4280.6252-000006 20200831-0000776

U.S. Department of Justice

The Special Counsel's Office

Washington, D.C. 20530

November 30, 2017

Robert K. Kelner
Stephen P. Anthony
Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956

Re: United States v. Michael T. Flynn

Dear Counsel:

This letter sets forth the full and complete plea offer to your client, Lieutenant General Michael T. Flynn (Ret.) (hereinafter referred to as "your client" or "defendant"), from the Special Counsel's Office (hereinafter also referred to as "the Government" or "this Office"). If your client accepts the terms and conditions of this offer, please have your client execute this document in the space provided below. Upon receipt of the executed document, this letter will become the Plea Agreement (hereinafter referred to as "this Agreement"). The terms of the offer are as follows:

1. Charges and Statutory Penalties

Your client agrees to plead guilty to the Criminal Information, a copy of which is attached, charging your client with making false statements to the Federal Bureau of Investigation in violation of 18 U.S.C. § 1001.

Your client understands that a violation of 18 U.S.C. § 1001 carries a maximum sentence of 5 years' imprisonment; a fine of $250,000, pursuant to 18 U.S.C. § 3571(b)(3); a term of supervised release of not more than 3 years, pursuant to 18 U.S.C. § 3583(b)(2); and an obligation to pay any applicable interest or penalties on fines and restitution not timely made.

In addition, your client agrees to pay a special assessment of $100 per felony conviction to the Clerk of the United States District Court for the District of Columbia. Your client also understands that, pursuant to 18 U.S.C. § 3572 and § 5E1.2 of the United States Sentencing Guidelines, *Guidelines Manual* (2016) (hereinafter "Sentencing Guidelines," "Guidelines," or "U.S.S.G."), the Court may also impose a fine that is sufficient to pay the federal government the costs of any imprisonment, term of supervised release, and period of probation.

2. Factual Stipulations

Your client agrees that the attached "Statement of the Offense" fairly and accurately describes your client's actions and involvement in the offense to which your client is pleading

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DOJ-OIP-20-0368, 20-0369, 20-0370, DOJ-EOUSA-20-0371-A-000160

Document ID: 0.7.4280.6252-000007

20200831-0000777

guilty. Please have your client sign and return the Statement of the Offense as a written proffer of evidence, along with this Agreement.

3. **Additional Charges**

In consideration of your client's guilty plea to the above offense, your client will not be further prosecuted criminally by this Office for the conduct set forth in the attached Statement of the Offense.

4. **Sentencing Guidelines Analysis**

Your client understands that the sentence in this case will be determined by the Court, pursuant to the factors set forth in 18 U.S.C. § 3553(a), including a consideration of the applicable guidelines and policies set forth in the Sentencing Guidelines. Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B), and to assist the Court in determining the appropriate sentence, the parties agree to the following:

A. Estimated Offense Level Under the Guidelines

The parties agree that the following Sentencing Guidelines sections apply:

U.S.S.G. §2B1.1(a)(2)	Base Offense Level:	6
	Total:	6

B. Acceptance of Responsibility

The Government agrees that a 2-level reduction will be appropriate, pursuant to U.S.S.G. § 3E1.1, provided that your client clearly demonstrates acceptance of responsibility, to the satisfaction of the Government, through your client's allocution, adherence to every provision of this Agreement, and conduct between entry of the plea and imposition of sentence.

Nothing in this Agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1, and/or imposition of an adjustment for obstruction of justice, pursuant to U.S.S.G. § 3C1.1, regardless of any agreement set forth above, should your client move to withdraw your client's guilty plea after it is entered, or should it be determined by the Government that your client has either (a) engaged in conduct, unknown to the Government at the time of the signing of this Agreement, that constitutes obstruction of justice, or (b) engaged in additional criminal conduct after signing this Agreement.

In accordance with the above, the applicable Guidelines Offense Level will be at least **4**.

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DOJ-OIP-20-0368, 20-0369, 20-0370, DOJ-EOUSA-20-0371-A-000161
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20200831-0000778

C. Estimated Criminal History Category

Based upon the information now available to this Office, your client has no criminal convictions.

Accordingly, your client is estimated to have zero criminal history points and your client's Criminal History Category is estimated to be I. Your client acknowledges that if additional convictions are discovered during the pre-sentence investigation by the United States Probation Office, your client's criminal history points may increase.

D. Estimated Applicable Guidelines Range

Based upon the agreed total offense level and the estimated criminal history category set forth above, your client's estimated Sentencing Guidelines range is zero months to six months' imprisonment (the "Estimated Guidelines Range"). In addition, the parties agree that, pursuant to U.S.S.G. § 5E1.2, should the Court impose a fine, at Guidelines level 4, the estimated applicable fine range is $500 to $9,500. Your client reserves the right to ask the Court not to impose any applicable fine.

The parties agree that, solely for the purposes of calculating the applicable range under the Sentencing Guidelines, neither a downward nor upward departure from the Estimated Guidelines Range set forth above is warranted, subject to the paragraphs regarding cooperation below. Accordingly, neither party will seek any departure or adjustment to the Estimated Guidelines Range, nor will either party suggest that the Court consider such a departure or adjustment, except as provided in the preceding sentence. Moreover, your client understands and acknowledges that the Estimated Guidelines Range agreed to by the parties is not binding on the Probation Office or the Court. Should the Court determine that a different guidelines range is applicable, your client will not be permitted to withdraw his guilty plea on that basis, and the Government and your client will still be bound by this Agreement.

Your client understands and acknowledges that the terms of this section apply only to conduct that occurred before the execution of this Agreement. Should your client commit any conduct after the execution of this Agreement that would form the basis for an increase in your client's base offense level or justify an upward departure (examples of which include, but are not limited to, obstruction of justice, failure to appear for a court proceeding, criminal conduct while pending sentencing, and false statements to law enforcement agents, the probation officer, or the Court), the Government is free under this Agreement to seek an increase in the base offense level based on that post-agreement conduct.

5. Agreement as to Sentencing Allocution

Based upon the information known to the Government at the time of the signing of this Agreement, the parties further agree that a sentence within the Estimated Guidelines Range

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DOJ-OIP-20-0368, 20-0369, 20-0370, DOJ-EOUSA-20-0371-A-000162

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would constitute a reasonable sentence in light of all of the factors set forth in 18 U.S.C. § 3553(a), should such a sentence be subject to appellate review notwithstanding the appeal waiver provided below.

6. **Reservation of Allocution**

The Government and your client reserve the right to describe fully, both orally and in writing, to the sentencing judge, the nature and seriousness of your client's misconduct, including any misconduct not described in the charges to which your client is pleading guilty.

The parties also reserve the right to inform the presentence report writer and the Court of any relevant facts, to dispute any factual inaccuracies in the presentence report, and to contest any matters not provided for in this Agreement. In the event that the Court considers any Sentencing Guidelines adjustments, departures, or calculations different from any agreements contained in this Agreement, or contemplates a sentence outside the Guidelines range based upon the general sentencing factors listed in 18 U.S.C. § 3553(a), the parties reserve the right to answer any related inquiries from the Court. In addition, if in this Agreement the parties have agreed to recommend or refrain from recommending to the Court a particular resolution of any sentencing issue, the parties reserve the right to full allocution in any post-sentence litigation. The parties retain the full right of allocution in connection with any post-sentence motion which may be filed in this matter and/or any proceeding(s) before the Bureau of Prisons. In addition, your client acknowledges that the Government is not obligated and currently does not intend to file any post-sentence downward departure motion in this case pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure.

7. **Court Not Bound by this Agreement or the Sentencing Guidelines**

Your client understands that the sentence in this case will be imposed in accordance with 18 U.S.C. § 3553(a), upon consideration of the Sentencing Guidelines. Your client further understands that the sentence to be imposed is a matter solely within the discretion of the Court. Your client acknowledges that the Court is not obligated to follow any recommendation of the Government at the time of sentencing or to grant a downward departure based on your client's substantial assistance to the Government, even if the Government files a motion pursuant to Section 5K1.1 of the Sentencing Guidelines. Your client understands that neither the Government's recommendation nor the Sentencing Guidelines are binding on the Court.

Your client acknowledges that your client's entry of a guilty plea to the charged offense authorizes the Court to impose any sentence, up to and including the statutory maximum sentence, which may be greater than the applicable Guidelines range. The Government cannot, and does not, make any promise or representation as to what sentence your client will receive. Moreover, it is understood that your client will have no right to withdraw your client's plea of guilty should the Court impose a sentence that is outside the Guidelines range or if the Court does not follow the Government's sentencing recommendation. The Government and your client will be bound by this Agreement, regardless of the sentence imposed by the Court. Any effort by your client to withdraw the guilty plea because of the length of the sentence shall constitute a breach of this Agreement.

AMERICAN OVERSIGHT
DOJ-OIP-20-0368, 20-0369, 20-0370, DOJ-EOUSA-20-0371-A-000163
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20200831-0000780

8. **Cooperation**

Your client agrees to cooperate with this Office on the following terms and conditions:

(a) Your client shall cooperate fully, truthfully, completely, and forthrightly with this Office and other Federal, state, and local law enforcement authorities identified by this Office in any and all matters as to which this Office deems the cooperation relevant. Your client acknowledges that your client's cooperation may include, but will not necessarily be limited to: answering questions; providing sworn written statements; taking government-administered polygraph examination(s); and participating in covert law enforcement activities. Any refusal by your client to cooperate fully, truthfully, completely, and forthrightly as directed by this Office and other Federal, state, and local law enforcement authorities identified by this Office in any and all matters in which this Office deems your client's assistance relevant will constitute a breach of this Agreement by your client, and will relieve this Office of its obligations under this Agreement, including, but not limited to, its obligation to inform this Court of any assistance your client has provided. Your client agrees, however, that such breach by your client will not constitute a basis for withdrawal of your client's plea of guilty or otherwise relieve your client of your client's obligations under this Agreement.

(b) Your client shall promptly turn over to this Office, or other law enforcement authorities, or direct such law enforcement authorities to, any and all evidence of crimes about which your client is aware; all contraband and proceeds of such crimes; and all assets traceable to the proceeds of such crimes. Your client agrees to the forfeiture of all assets which are proceeds of crimes or traceable to such proceeds of crimes.

(c) Your client shall submit a full and complete accounting of all your client's financial assets, whether such assets are in your client's name or in the name of a third party.

(d) Your client acknowledges and understands that, during the course of the cooperation outlined in this Agreement, your client will be interviewed by law enforcement agents and/or Government attorneys. Your client waives any right to have counsel present during these interviews and agrees to meet with law enforcement agents and Government attorneys outside of the presence of counsel. If, at some future point, you or your client desire to have counsel present during interviews by law enforcement agents and/or Government attorneys, and you communicate this decision in writing to this Office, this Office will honor this request, and this change will have no effect on any other terms and conditions of this Agreement.

(e) Your client shall testify fully, completely and truthfully before any and all Grand Juries in the District of Columbia and elsewhere, and at any and all trials of cases or other court proceedings in the District of Columbia and elsewhere, at which your client's testimony may be deemed relevant by the Government.

(f) Your client understands and acknowledges that nothing in this Agreement allows your client to commit any criminal violation of local, state or federal law during the period of your client's cooperation with law enforcement authorities or at any time prior to the sentencing

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DOJ-OIP-20-0368, 20-0369, 20-0370, DOJ-EOUSA-20-0371-A-000164

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in this case. The commission of a criminal offense during the period of your client's cooperation or at any time prior to sentencing will constitute a breach of this Agreement and will relieve the Government of all of its obligations under this Agreement, including, but not limited to, its obligation to inform this Court of any assistance your client has provided. However, your client acknowledges and agrees that such a breach of this Agreement will not entitle your client to withdraw your client's plea of guilty or relieve your client of the obligations under this Agreement.

(g) Your client agrees that the sentencing in this case may be delayed until your client's efforts to cooperate have been completed, as determined by the Government, so that the Court will have the benefit of all relevant information before a sentence is imposed.

9. Waivers

A. Venue

Your client waives any challenge to venue in the District of Columbia.

B. Statute of Limitations

Your client agrees that, should the conviction following your client's plea of guilty pursuant to this Agreement be vacated for any reason, any prosecution, based on the conduct set forth in the attached Statement of the Offense, that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement (including any counts that the Government has agreed not to prosecute or to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against your client, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution of conduct set forth in the attached Statement of the Offense that is not time-barred on the date that this Agreement is signed.

C. Trial Rights

Your client understands that by pleading guilty in this case your client agrees to waive certain rights afforded by the Constitution of the United States and/or by statute or rule. Your client agrees to forgo the right to any further discovery or disclosures of information not already provided at the time of the entry of your client's guilty plea. Your client also agrees to waive, among other rights, the right to be indicted by a Grand Jury, the right to plead not guilty, and the right to a jury trial. If there were a jury trial, your client would have the right to be represented by counsel, to confront and cross-examine witnesses against your client, to challenge the admissibility of evidence offered against your client, to compel witnesses to appear for the purpose of testifying and presenting other evidence on your client's behalf, and to choose whether to testify. If there were a jury trial and your client chose not to testify at that trial, your client would have the right to have the jury instructed that your client's failure to testify could not be held against your client. Your client would further have the right to have the jury instructed that your client is presumed innocent until proven guilty, and that the burden would be

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DOJ-OIP-20-0368, 20-0369, 20-0370, DOJ-EOUSA-20-0371-A-000165
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20200831-0000782

on the United States to prove your client's guilt beyond a reasonable doubt. If your client were found guilty after a trial, your client would have the right to appeal your client's conviction. Your client understands that the Fifth Amendment to the Constitution of the United States protects your client from the use of compelled self-incriminating statements in a criminal prosecution. By entering a plea of guilty, your client knowingly and voluntarily waives or gives up your client's right against compelled self-incrimination.

Your client acknowledges discussing with you Rule 11(f) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence, which ordinarily limit the admissibility of statements made by a defendant in the course of plea discussions or plea proceedings if a guilty plea is later withdrawn. Your client knowingly and voluntarily waives the rights that arise under these rules in the event your client withdraws your client's guilty plea or withdraws from this Agreement after signing it.

Your client also agrees to waive all constitutional and statutory rights to a speedy sentence and agrees that the plea of guilty pursuant to this Agreement will be entered at a time decided upon by the parties with the concurrence of the Court. Your client understands that the date for sentencing will be set by the Court.

D. Appeal Rights

Your client understands that federal law, specifically 18 U.S.C. § 3742, affords defendants the right to appeal their sentences in certain circumstances. Your client agrees to waive the right to appeal the sentence in this case, including but not limited to any term of imprisonment, fine, forfeiture, award of restitution, term or condition of supervised release, authority of the Court to set conditions of release, and the manner in which the sentence was determined, except to the extent the Court sentences your client above the statutory maximum or guidelines range determined by the Court or your client claims that your client received ineffective assistance of counsel, in which case your client would have the right to appeal the illegal sentence or above-guidelines sentence or raise on appeal a claim of ineffective assistance of counsel, but not to raise on appeal other issues regarding the sentencing. In agreeing to this waiver, your client is aware that your client's sentence has yet to be determined by the Court. Realizing the uncertainty in estimating what sentence the Court ultimately will impose, your client knowingly and willingly waives your client's right to appeal the sentence, to the extent noted above, in exchange for the concessions made by the Government in this Agreement.

E. Collateral Attack

Your client also waives any right to challenge the conviction entered or sentence imposed under this Agreement or otherwise attempt to modify or change the sentence or the manner in which it was determined in any collateral attack, including, but not limited to, a motion brought under 28 U.S.C. § 2255 or Federal Rule of Civil Procedure 60(b), except to the extent such a motion is based on newly discovered evidence or on a claim that your client received ineffective assistance of counsel. Your client reserves the right to file a motion brought under 18 U.S.C. § 3582(c)(2), but agrees to waive the right to appeal the denial of such a motion.

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DOJ-OIP-20-0368, 20-0369, 20-0370, DOJ-EOUSA-20-0371-A-000166

Document ID: 0.7.4280.6252-000007 20200831-0000783

F. Privacy Act and FOIA Rights

Your client also agrees to waive all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including and without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a, for the duration of the Special Counsel's investigation.

10. Restitution

Your client understands that the Court has an obligation to determine whether, and in what amount, mandatory restitution applies in this case under 18 U.S.C. § 3663A. The Government and your client agree that mandatory restitution does not apply in this case.

11. Breach of Agreement

Your client understands and agrees that, if after entering this Agreement, your client fails specifically to perform or to fulfill completely each and every one of your client's obligations under this Agreement, or engages in any criminal activity prior to sentencing, your client will have breached this Agreement. In the event of such a breach: (a) the Government will be free from its obligations under this Agreement; (b) your client will not have the right to withdraw the guilty plea; (c) your client will be fully subject to criminal prosecution for any other crimes, including perjury and obstruction of justice; and (d) the Government will be free to use against your client, directly and indirectly, in any criminal or civil proceeding, all statements made by your client and any of the information or materials provided by your client, including such statements, information, and materials provided pursuant to this Agreement or during the course of any debriefings conducted in anticipation of, or after entry of, this Agreement, whether or not the debriefings were previously characterized as "off-the-record" debriefings, and including your client's statements made during proceedings before the Court pursuant to Rule 11 of the Federal Rules of Criminal Procedure.

Your client understands and agrees that the Government shall be required to prove a breach of this Agreement only by a preponderance of the evidence, except where such breach is based on a violation of federal, state, or local criminal law, which the Government need prove only by probable cause in order to establish a breach of this Agreement.

Nothing in this Agreement shall be construed to permit your client to commit perjury, to make false statements or declarations, to obstruct justice, or to protect your client from prosecution for any crimes not included within this Agreement or committed by your client after the execution of this Agreement. Your client understands and agrees that the Government reserves the right to prosecute your client for any such offenses. Your client further understands that any perjury, false statements or declarations, or obstruction of justice relating to your client's obligations under this Agreement shall constitute a breach of this Agreement. In the event of such a breach, your client will not be allowed to withdraw your client's guilty plea.

AMERICAN OVERSIGHT

DOJ-OIP-20-0368, 20-0369, 20-0370, DOJ-EOUSA-20-0371-A-000167

Document ID: 0.7.4280.6252-000007 20200831-0000784

12. Government's Obligations

The Government will bring to the Court's attention at the time of sentencing the nature and extent of your client's cooperation or lack of cooperation. The Government will evaluate the full nature and extent of your client's cooperation to determine whether your client has provided substantial assistance in the investigation or prosecution of another person who has committed an offense. If the Government determines that your client has provided such substantial assistance, this Office shall file a departure motion pursuant to Section 5K1.1 of the Sentencing Guidelines, which would afford your client an opportunity to persuade the Court that your client should be sentenced to a lesser period of incarceration and/or fine than indicated by the Sentencing Guidelines. The determination of whether your client has provided substantial assistance warranting the filing of a motion pursuant to Section 5K1.1 of the Sentencing Guidelines is within the sole discretion of the Government and is not reviewable by the Court. In the event your client should fail to perform specifically and fulfill completely each and every one of your client's obligations under this Agreement, the Government will be free from its obligations under this Agreement, and will have no obligation to present your client's case to the Departure Guideline Committee or file a departure motion pursuant to Section 5K1.1 of the Sentencing Guidelines.

13. Complete Agreement

No agreements, promises, understandings, or representations have been made by the parties or their counsel other than those contained in writing herein, nor will any such agreements, promises, understandings, or representations be made unless committed to writing and signed by your client, defense counsel, and the Special Counsel's Office.

Your client further understands that this Agreement is binding only upon the Special Counsel's Office. This Agreement does not bind any other United States Attorney's Office, nor does it bind any other state, local, or federal prosecutor. It also does not bar or compromise any civil, tax, or administrative claim pending or that may be made against your client.

If the foregoing terms and conditions are satisfactory, your client may so indicate by signing this Agreement and the Statement of the Offense, and returning both to me no later than November 30, 2017.

Sincerely yours,

ROBERT S. MUELLER, III
Special Counsel

By: _____
Brandon L. Van Grack
Zainab N. Ahmad
Senior Assistant Special Counsels
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DOJ-OIP-20-0368, 20-0369, 20-0370, DOJ-EOUSA-20-0371-A-000168

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DEFENDANT'S ACCEPTANCE

I have read every page of this Agreement and have discussed it with my attorneys, Robert K. Kelner and Stephen P. Anthony. I fully understand this Agreement and agree to it without reservation. I do this voluntarily and of my own free will, intending to be legally bound. No threats have been made to me nor am I under the influence of anything that could impede my ability to understand this Agreement fully. I am pleading guilty because I am in fact guilty of the offense identified in this Agreement.

I reaffirm that absolutely no promises, agreements, understandings, or conditions have been made or entered into in connection with my decision to plead guilty except those set forth in this Agreement. I am satisfied with the legal services provided by my attorneys in connection with this Agreement and matters related to it.

Date: 11/30/17

Lieutenant General Michael T. Flynn (Ret.)
Defendant

ATTORNEYS' ACKNOWLEDGMENT

I have read every page of this Agreement, reviewed this Agreement with my client, Lieutenant General Michael T. Flynn (Ret.), and fully discussed the provisions of this Agreement with my client. These pages accurately and completely set forth the entire Agreement. I concur in my client's desire to plead guilty as set forth in this Agreement.

Date: 11/30/17

Robert K. Kelner
Attorney for Defendant

Stephen P. Anthony
Attorney for Defendant

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20200831-0000786

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **Plaintiff,** **v.** **MICHAEL T. FLYNN,** **Defendant.**	**Criminal Action No. 17-232-EGS**

MR. FLYNN'S MOTION TO DISMISS FOR EGREGIOUS GOVERNMENT MISCONDUCT AND IN THE INTEREST OF JUSTICE

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20200831-0000118

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Michael T. Flynn ("Mr. Flynn") hereby moves to dismiss the charges against him for outrageous government misconduct and in the interest of justice.[1] This motion is based on exculpatory evidence ("*Brady*") as well as egregious government misconduct that was discovered after Mr. Flynn's Motion to Compel *Brady* Material (ECF No. 109) and related briefing.

Such exculpatory evidence and outrageous misconduct includes that on December 9, 2019, the Inspector General of the Department of Justice ("DOJ") issued its 478-page report on the "Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation" ("IG Report").[2] The IG Report illustrates the misconduct by the government as further detailed below.

Further, on December 15, 2019, the government produced to Mr. Flynn's defense team 637 pages of documents—including sixteen long-awaited FD-302s and 206 pages of corresponding FBI handwritten notes—all of interviews of Mr. Flynn. Additionally, in its Supplemental Sentencing Memorandum (which also breaches the plea agreement), the government included never-produced FD-302s of the government's interviews with Mr. Flynn's prior counsel at Covington & Burling ("Covington"), Robert Kelner and Brian Smith, from June 2018. ECF No.

[1] Contrary to a suggestion in this Court's recent opinion, Mr. Flynn did not previously move to dismiss the case against him. ECF No. 144 at 2. As the docket sheet and this Court's recital of motions show, this is Mr. Flynn's only Motion to Dismiss. In Mr. Flynn's previous filings, he made clear he *would ultimately move* for dismissal, that the evidence requested in his *Brady* motion would further support the basis for dismissal, and that the case should be dismissed. *See* ECF No. 133 at n.15.

[2] *See* U.S. Department of Justice (DOJ) Office of the Inspector General (OIG), *A Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation,* Oversight and Review Division Report 20-012 Revised (December 2019) https://www.justice.gov/storage/120919-examination.pdf (hereinafter, "IG Report").

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150-4 through 150-6. The government also belatedly produced to Mr. Flynn FD-302s and related documents as recently as January 23, 2020. ECF No. 157.

These documents contain remarkable new *Brady* evidence that the prosecution has long suppressed. For instance, this evidence not only belies the bogus FARA "false statement" charges Mr. Van Grack leveraged against Covington and Mr. Flynn, but also demonstrates Mr. Van Grack knew these charges were bogus, yet sought to have Mr. Flynn make a false statement in his EDVA interview on June 25, 2019, and was encouraging subornation of perjury by Mr. Flynn. *See* ECF No. 151. Additionally, the IG Report shows that the government long suppressed evidence of shocking malfeasance by the leadership of the FBI and Supervisory Special Agent 1 ("SSA 1") that was favorable to Mr. Flynn's defense. For these reasons, and those outlined in prior briefing, Mr. Flynn moves to dismiss this entire prosecution for outrageous government misconduct and in the interest of justice.

This factually and legally baseless "investigation" and prosecution of Mr. Flynn has no precedent. From the FBI's insertion of SSA 1 into the August 17, 2016 presidential briefing of candidate Trump and Mr. Flynn, to the former Director of the FBI bragging and laughing on national television about his own cleverness and violations of FBI/DOJ rules in dispatching agents to the White House to interview the new President's National Security Advisor, to the still missing original FBI FD-302 of the January 24, 2017 interview—everything about this prosecution has violated long-standing standards and policy for the FBI and the DOJ. In addition to the myriad of breaches and irregularities identified in our prior filings, the IG Report released on December 9,

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2019, reveals even more evidence of the FBI's deceitful and wrongful conduct that should have been disclosed to Mr. Flynn's defense.[3]

There were two FBI agents who interviewed Mr. Flynn in the White House on January 24, 2017—Agent Peter Strzok and SSA 1. The IG Report confirms both participated in government misconduct. As explained in further detail below, not only was Strzok so biased, calculated, and deceitful he had to be terminated from Mueller's investigation and then the FBI/DOJ, but it has also now been revealed that SSA 1 was surreptitiously inserted in the mock presidential briefing on August 17, 2016, to collect information and report on Mr. Trump and Mr. Flynn. Moreover, SSA 1 was involved in every aspect of the debacle that is Crossfire Hurricane and significant illegal surveillance resulting from it. Further, SSA 1 bore ultimate responsibility for four falsified applications to the FISA court and oversaw virtually every abuse inherent in Crossfire Hurricane—including suppression of exculpatory evidence. *See generally* IG Report.

Only the dismissal of this prosecution in its entirety would begin to get the attention of the government, the FBI, and the DOJ needed to impress upon them the "reprehensible nature of its acts and omissions." *United States* v. *Kohring*, 637 F.3d 895, 914 (9th Cir. 2011) (Fletcher, J., concurring in part and dissenting in part).

[3] Despite the defense, the government, and this Court agreeing to abate the schedule in this case because of the pending and admittedly-relevant IG Report (ECF No. 140 and this Court's Minute Order of November 27, 2019), this Court denied Mr. Flynn's Motion to Compel Production of *Brady* Evidence without allowing for additional briefing in light of that report or considering any of the deliberate government misconduct it disclosed. ECF Nos. 143 and 144. Mr. Flynn now moves to dismiss the indictment for the additional egregious misconduct documented in the IG Report, other recently produced materials, all previously briefed issues, and in the interest of justice.

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I. THIS COURT HAS THE AUTHORITY PURSUANT TO ITS SUPERVISORY POWERS TO DISMISS THIS PROSECUTION IN THE INTEREST OF JUSTICE.

"[G]uided by considerations of justice, and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505 (1983). The supervisory power of federal courts has a threefold purpose: "to implement a remedy for violation of recognized rights, to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, and finally, as a remedy designed to deter illegal conduct." *Id*.

The exercise of this authority can take many forms, including dismissal of a case altogether so long as the prosecutorial misconduct was harmful to the defendant. *Id.* at 505. A defendant seeking to dismiss a conviction for prosecutorial misconduct must show that he was prejudiced by the misconduct. *Bank of Nova Scotia v. United States,* 487 U.S. 250, 263 (1988). Prejudice is found when "the government's conduct had at least some impact" on the outcome. *United States v. Bundy*, No. 2:16-cr-046, Transcript of Proceedings at 13:1-2 (D. Nev. Jan. 8, 2018). Ex. 1.

Although dismissal is unusual, "[s]paring use, of course, does not mean no use. Even 'disfavored remedies' must be used in certain situations." *United States v. Omni Int'l Corp.*, 634 F. Supp. 1414, 1438 (D. Md. 1986). Dismissal is particularly appropriate when the government has engaged in conduct that perverts the rule of law and grossly abuses its power and might—as it has done against Mr. Flynn. Quoting Justice Brandeis, the D.C. Circuit noted that "[i]t is desirable that criminals should be detected. . . .It is also desirable that the government should not itself foster and pay for other crimes, when they are the means by which the [conviction] is to be obtained." *United States v. McCord*, 509 F.2d 334, 350 (D.C. Cir. 1974). This Circuit continued:

> This is so because the principle is not one of fairness to the defendant alone but rather, in Justice Brandeis' words, is one designed to 'maintain respect for law; . . .

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> to promote confidence in the administration of justice; . . . to preserve the judicial process from contamination. . . .Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means- -to declare that the government may commit crimes in order to secure the conviction of a private criminal- -would bring terrible retribution.'

Id.

Although Ninth Circuit case law is not controlling, it is persuasive and useful in evaluating these issues. The Ninth Circuit has developed the most robust framework addressing this issue. In *Bundy*, the district court dismissed the case for egregious government misconduct after the prosecution suppressed *Brady* that "bolstered the defense and was useful to rebut the government's theory," and that the government had "failed to disclose potentially exculpatory, favorable and material information," including a number of FD-302s, an unredacted FBI TOC log, and more. *United States v. Bundy*, No. 2:16-cr-046, Transcript of Proceedings at 13:9-22 (D. Nev. Jan. 8, 2018). Ex. 1. The court in *Bundy* based its dismissal on two separate grounds— first, as a due process violation and second, as an exercise of its supervisory powers to deter illegal conduct. *United States v. Bundy*, 406 F. Supp. 3d 932, 935 (D. Nev. 2018).

The court explained that it could dismiss an indictment on the ground of "outrageous government conduct if the conduct amount[ed] to a due process violation," *United States v. Bundy*, No. 2:16-cr-046, Transcript of Proceedings at 8:18-20 (D. Nev. Jan. 8, 2018). Ex. 1. Such misconduct must be "attributable to and directed by the government" *Id.* at 9:7 (quoting *United States v. Barrera-Morena,* 951 F.2d 1089, 1092 (9th Cir. 1991)), and the government conduct must be "so grossly shocking and so outrageous as to violate the universal sense of justice." *Id.* at 9:2-3 (quoting *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991)).

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Part of the rationale that undergirds this supervisory authority to deter conduct that is abhorrent to a "universal sense of justice," finds foundation in *Sorrells v. United States*: "it is the duty of the court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its courts." 287 U.S. 435, 446 (1932). *Sorrells* is a prohibition-era case where the court determined that "the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission…" *Id.* at 441.

This motion demonstrates the government's outrageous misconduct and the corresponding prejudice to Mr. Flynn that undoubtedly violated his rights. Accordingly, the prosecution should be dismissed.

II. THE IG REPORT DISCLOSES OUTRAGEOUS GOVERNMENT MISCONDUCT THAT MANDATES DISMISSAL OF THIS PROSECUTION.

There is a long and troubling history of misconduct in the DOJ and the FBI that has dramatically worsened over the years. In 2015, Henry F. Schuelke III returned a 500-page report to this Court in which he found "pervasive, systematic and intentional misconduct" in the DOJ, specifically with respect to suppressing evidence favorable to the defense.[4] Instead of correcting this, the DOJ lawyers immediately attempted to excuse the same misconduct in two related cases by claiming the exculpatory evidence was not material.[5] Those cases found their way to the Ninth Circuit.

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[4] Henry F. Schuelke III, Special Counsel, *Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated Apr. 7, 2009, In re Special Proceedings*, No. 1:09-mc-00198-EGS (D.D.C. Mar. 15, 2012) (available at http://legaltimes.typepad.com/files/Stevens_report.pdf.)

[5] Foreign Intelligence Surveillance Court, *Document Regarding the Section 702 2018 Certification*, (Oct. 18, 2018) (Boasberg, J.) (available at

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There, the Ninth Circuit was furious with the government's misconduct. Judge Betty Fletcher wrote separately to excoriate the prosecution's "flagrant, willful bad-faith misbehavior" which she said was "an affront to the integrity of our system of justice." *Kohring*, 637 F.3d at 914 (Fletcher, J., concurring in part and dissenting in part). Further, she found "[t]he prosecution's refusal to accept responsibility for its misconduct [] deeply troubling and indicat[ive] that a stronger remedy is necessary to impress upon it the reprehensible nature of its acts and omissions." *Id*. Even Judge Fletcher's strong language is insufficient for the outrageous conduct of the FBI and DOJ in Mr. Flynn's case.[6]

More recently, the government's lack of candor and suppression of evidence favorable to the defense has been playing out in the FBI, DOJ, and NSA's endless abuses of the government's

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https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opin_18Oct18.pdf).

[6] The Honorable Alex Kozinski cited to case law in a preface to *The Georgetown Law Journal* that is also helpful. Hon. Alex Kozinski, Preface, n.120, 44 GEO. L.J. ANN. REV. CRIM. PROC (2015):

> See *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2010); *United States v. Kott*, 423 Fed. App'x 736 (9th Cir. 2011); s*ee also* [Sidney Powell, *Licensed to Lie* 190-201], 231 (2014), holding that the prosecution had yet again violated *Brady* by failing to disclose the very evidence deemed material in the Stevens case, a panel of my court vacated both defendants' convictions and remanded for a new trial. Judge Betty Fletcher lambasted the prosecution's "flagrant, willful bad-faith misbehavior" as "an affront to the integrity of our system of justice" and found "[t]he prosecution's refusal to accept responsibility for its misconduct [] deeply troubling and indicat[ive] that a stronger remedy is necessary to impress upon it the reprehensible nature of its acts and omissions." *Kohring*, 637 F.3d at 914 (Fletcher, J., concurring in part and dissenting in part); see *Kott*, 423 Fed. App'x at 738 (Fletcher, J., concurring in part and dissenting in part) ("Despite their assurances that they take this matter seriously, the government attorneys have attempted to minimize the extent and seriousness of the prosecutorial misconduct and even assert that Kott received a fair trial . . . . The government's stance on appeal leads me to conclude that it still has failed to fully grasp the egregiousness of its misconduct, as well as the importance of its constitutionally imposed discovery obligations.").

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powerful surveillance apparatus. The abuses became so overwhelming that Judge Rosemary Collyer wrote and later partially declassified a 99-page decision in 2016 in which she excoriated the FBI and NSA for their lack of candor and abuses of the search queries of the NSA database.[7] Not only did the last administration—especially from late 2015-16—dramatically increase the abuse of "about queries" in the NSA database, which Judge Collyer noted was "a very serious Fourth Amendment issue," but it also expanded the distribution of the illegally obtained information among federal agencies.[8] *See also* ECF No. 109 at 8.

In October 2019, Judge Boasberg, also sitting on the FISC, publicly released a heavily redacted opinion describing the FBI's repeated non-compliant queries of Section 702 information and relaxed procedures that have led to systemic Fourth Amendment violations at that agency.[9] Judge Boasberg wrote, "In a number of cases, a single improper decision or assessment resulted

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[7] Foreign Intelligence Surveillance Court, *FISC Memorandum and Order*, (Apr. 26, 2018) (Collyer, R.) (available at https://www.dni.gov/files/documents/icotr/51117/2016_Cert_FISC_Memo_Opin_Order_Apr_2017.pdf) at 19, 87 (noting that 85% of the queries targeting American citizens were unauthorized and illegal), n. 69 (saying "the improper access granted the [redacted] contractors was apparently in place [redacted] and seems to have been the result of deliberate decision making" including by lawyers); *see also* Charlie Savage, *NSA Gets More Latitude to Share Intercepted Communications*, THE N.Y. TIMES (Jan. 12, 2017) (reporting that Attorney General Loretta Lynch signed new rules for the NSA that permitted the agency to share raw intelligence with sixteen other agencies, thereby increasing the likelihood that personal information would be improperly disclosed), https://www.nytimes.com/2017/01/12/us/politics/nsa-gets-more-latitude-to-share-intercepted-communications.html; *See also* Exec. Order No. 12,333, 3 C.F.R. 200 (1982), as amended by Exec. Order No. 13, 284, 68 Fed. Reg. 4075 (Jan. 23, 2003). Judge Collyer just stepped down early from serving as Chief Judge of the FISA court, and Judge Boasberg was assigned to the role.

[8] *Id.* at 19.

[9] *Supra* n. 5.

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in the use of query terms corresponding to a large number of individuals, including U.S. persons." *Id.* at 68. He continued:

> During March 24-27, 2017, the FBI conducted queries using identifiers for over 70,000 communication facilities "associated with" persons with access to FBI facilities and systems. *See* Nov. 22, 2017, Notice at 2. [Redacted] proceeded with those queries notwithstanding advice from the office of General Counsel (OGC) that they should not be conducted without approval by OGC and the National Security Division (NSD) of the Department of Justice.

Id. at 69.

These are flagrant and deliberate violations of law that affect the Fourth Amendment rights of thousands of Americans.[10] Further, these violations directly impact Mr. Flynn, who was the subject of a felony leak of classified information and was illegally unmasked by the prior administration.

On December 9, 2019, the Inspector General for the Department of Justice has released his tome—reporting on the FBI's deliberate deceit, malfeasance, and misfeasance in its applications for FISA warrants against Carter Page and the overarching Crossfire Hurricane investigation, which also targeted Mr. Flynn and enabled the FBI to obtain—illegally—the communications of hundreds of people, including Mr. Flynn. *See generally* IG Report.

A. The December 2019 IG Report is Replete with Information Exculpatory to Mr. Flynn and Damning of the FBI's Conduct Employed Against Him.

The IG Report reveals information that is exculpatory, material, and favorable to the defense, which the government did not previously disclose to Mr. Flynn. Mr. Flynn is one of the four people originally targeted by the FBI in Crossfire Hurricane because of his purported "ties to

[10] Foreign Intelligence Surveillance Court, *In Re Carter W. Page, A U.S. Person*, No. 16-1182, 17-52, 17-375, 17-679 (Jan. 7, 2020) (Boasberg, J.) (available at https://www.fisc.uscourts.gov/sites/default/files/FISC%20Declassifed%20Order%2016-1182%2017-52%2017-375%2017-679%20%20200123.pdf).

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Russia."[11] The IG Report is a scathing indictment of the conduct of the leadership and small group in the FBI that ran this operation against Mr. Flynn. This is especially true for the two FBI agents who interviewed Mr. Flynn on January 24, 2017, and on whose remarkably edited FD-302 the felonious "false statement" allegations depend, Strzok and SSA 1.[12] To the extent he could, under the limitations of his role in the DOJ, IG Horowitz exposed lies, misrepresentations, and material omissions in four applications for FISA warrants to the FISC.[13] The IG Report shows Strzok and SSA 1 repeatedly and deliberately hid exculpatory evidence from the FISC. Moreover, as IG Horowitz testified in front of the Homeland Security Committee, he "could not rule out" political preferences and bias as the explanation for the government misconduct he found at every turn.[14]

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[11] The innocence of Mr. Flynn's supposed "Russia ties" is thoroughly documented in reports of the DIA which show the extent to which Mr. Flynn was working with the government—just as Carter Page was—but this Court has denied this exculpatory information to Mr. Flynn's defense. ECF No. 144. The DIA information negates the FBI's sheer pretext for "investigating" Mr. Flynn. Members of Congress are also interested in exculpatory information. Ex. 2.

[12] The government asserts that the name of SSA 1 is covered by the Protective Order, but that name was known to Ms. Powell before she became counsel to Mr. Flynn, and the agent's name has been published throughout the media.

[13] For example, the Inspector General could not interview persons with the CIA and only had access to documents that were sent to the DOJ or the FBI. He could not question former FBI Director Comey on certain issues because Mr. Comey refused to accept a security clearance for that purpose and did not cooperate with the Inspector General's investigation. "Certain former FBI employees who agreed to interviews, including Comey and Mr. Baker, chose not to request that their security clearances be reinstated for their OIG interviews. Therefore, we were unable to provide classified information or documents to them during their interviews to develop their testimony, or to assist their recollections of relevant events." IG Report at 12. As Attorney General Barr noted, this meant that Comey "couldn't be questioned about classified matters." Pete Williams, *Interview with Attorney General William Barr* (Dec. 10, 2019), NBC News, https://www.youtube.com/watch?v=LRKFo0JmuBc.

[14] C-SPAN, *Justice Dept. IG Testifies on Origins of FBI's Russia Inquiry*, C-SPAN.COM, Dec. 18, 2019, https://www.c-span.org/video/?467350-1/justice-department-inspector-general-testifies-origins-fbis-russia-inquiry.

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Indeed, there were no satisfactory explanations for the many violations, falsehoods, and errors the Inspector General found.

B. From the IG Report, Extraordinary Facts About SSA 1 Emerge that Should Have Been Disclosed to Mr. Flynn as *Brady* Evidence Prior to his Plea.

SSA 1 also played a much larger role in the FBI's Crossfire Hurricane than the defense was led to believe. He was in fact the Supervisor of Crossfire Hurricane. IG Report at 305. He helped pick the team. *Id*. at 65. The agents reported to him. *Id.* Then, he reported operational activities to Strzok. *Id.* Even more remarkable, DOJ official Bruce Ohr provided information collected by Christopher Steele ("Steele") (through his contract with Fusion GPS[15]) to the FBI "out of the blue." *Id.* at 99. SSA 1 reviewed this information. *Id.* at 100. SSA 1 knew that Steele was "desperate that Mr. Trump not get elected." *Id.* at n. 217. He was responsible for making sure the FISA applications were *verified* by providing a "factual accuracy review,"[16] yet he included false and incomplete information for the court, and he failed to inform the court of significant exculpatory information. *See generally* IG Report.

One of the FBI lawyers falsified a document in support of one of the FISA applications.[17] IG Report at 160. Aside from falsifying documents, the IG Report confirmed SSA 1, through his

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[15] *See* IG Report at 95-96.

[16] IG Report at 151.

[17] This unnamed FBI lawyer is likely Kevin Clinesmith. Jerry Dunleavy, *FBI Lawyer Under Criminal Investigation Altered Document to Say Carter Page 'was Not a Source' for Another Agency*, WASH. EXAMIN'R (Dec. 9, 2019), https://www.washingtonexaminer.com/news/fbi-lawyer-under-criminal-investigation-altered-document-to-say-carter-page-was-not-a-source-for-another-agency ("in a scathing July 2018 inspector general report on the FBI's Clinton emails investigation, Clinesmith was criticized at least 56 times as being one of the FBI officials who conveyed a bias against Mr. Trump in instant messages, along with Peter Strzok and FBI lawyer Lisa Page, both of whom have left the Bureau."). As documented in the June 2018 IG Report, Clinesmith played a pivotal role in the small group working against Mr. Flynn. Both he and Sally Moyer, FBI Unit Chief in the Office of General Counsel, had extreme anti-Trump bias as reflected

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supervision of Case Agent 1,[18] withheld exculpatory information from the court that was material to its determination regarding the warrants. *Id.* at 232-33. Shockingly, as further briefed below, SSA 1 also participated surreptitiously in a presidential briefing with candidate Trump and Mr. Flynn for the express purpose of taking notes, monitoring anything Mr. Flynn said, and in particular, observing and recording anything Mr. Flynn or Mr. Trump said or did that might be of interest to the FBI in its "investigation." IG Report at 340.

In addition to myriad problems with Christopher Steele, the IG Report confirmed that other unverified information from another source (Source 2, likely Stefan Halper[19]), was used to obtain FISA warrants to wiretap Carter Page (and thereby reach Mr. Flynn). IG Report at 313-33. Source 2 was closed by the FBI in 2011; however, Source 2 was re-opened by Case Agent 1. *Id.* Case Agent 1 reported to SSA 1 during Crossfire Hurricane. *Id.* at 81. Source 2's involvement in the Crossfire Hurricane investigation arose out of Case Agent 1's pre-existing relationship with Source 2. *Id.* at 313. "SSA 1 told the OIG that he did not know about Source 2, or know that Case Agent 1 was Source 2's handler, prior to Case Agent 1 proposing the meeting [on August 11, 2016], which SSA 1 approved." *Id.* Notably, there was "no supporting documentation" to support that

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in the aforementioned IG Report. Clinesmith texted Sally Moyer after Hillary Clinton's loss, "I am numb." Moyer replied, "I can't stop crying," and "You promised me this wouldn't happen. YOU PROMISED." In the course of comforting Moyer, Clinesmith said, "I am so stressed about what I could have done differently." *See* U.S. Department of Justice (DOJ) Office of the Inspector General (OIG), *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election* at 417 (June 2018) https://www.justice.gov/file/1071991/download.

[18] IG Report at 81.

[19] Madeline Osburn, *FBI Terminated Anti-Trump Source Stefan Halper 'For Cause' in 2011*, THE FEDERALIST (Dec. 9, 2019), https://thefederalist.com/2019/12/09/fbi-terminated-anti-trump-source-stefan-halper-for-cause-in-2011/.

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"Source 2 has routinely provided reliable information that has been corroborated by the FBI." *Id.* at 418 ("Appendix One"). Despite the lack of documentation, it was relied upon in the first FISA application. *Id.* Notably, Mr. Flynn requested information relating to Source 2/Halper in his Motion to Compel the Production of *Brady* Material and for an Order to Show Cause. ECF No. 111 at 4; ECF No. 116 at 1 (relating to additional material for Col. (Ret.) James Baker who ran Halper through the Department of Defense Office ONA). That request was denied. ECF No. 143.

C. SSA 1's Deceitful Participation in the Presidential Briefing Alone is So Egregious It Requires Dismissal.

Strzok and Lisa Page texted about an "insurance policy" on August 15, 2016.[20] They opened the FBI "investigation" of Mr. Flynn on August 16, 2016. IG Report at 2. The very next day, SSA 1 snuck into what was represented to candidate Trump and Mr. Flynn as a presidential briefing. IG Report at 340. It appears that the "insurance policy" on candidate Trump was "taking out" Mr. Flynn. As explained in the IG Report:

> …during the presidential election campaign, the FBI was invited by ODNI to provide a baseline counterintelligence and security briefing (security briefing) as part of ODNI's strategic intelligence briefing given to members of both the Trump campaign and the Clinton campaign… We also learned that, because Flynn was expected to attend the first such briefing for members of the Trump campaign on August 17, 2016, the FBI viewed that briefing as a possible opportunity to collect information potentially relevant to the Crossfire Hurricane and Flynn investigations. We found no evidence that the FBI consulted with the Department leadership or ODNI officials about this plan.

IG Report at 340.

While SSA 1's stated purpose of the presidential briefing on August 17, 2016, was "to provide the recipients 'a baseline on the presence and threat posed by foreign intelligence services

[20] U.S. Department of Justice (DOJ) Office of the Inspector General (OIG), *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election* at 404 (June 2018) https://www.justice.gov/file/1071991/download.

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to the National Security of the U.S,'" IG Report at xviii (Executive Summary), the IG Report confirmed that, in actuality, the Trump campaign was never given any defensive briefing about the alleged national security threats. IG Report at 55. Thus, SSA 1's participation in that presidential briefing was a calculated subterfuge to record and report for "investigative purposes" anything Mr. Flynn and Mr. Trump said in that meeting. IG Report at 408. The agent was there only because Mr. Flynn was there. IG Report at 340. Ironically, Mr. Flynn arranged this meeting with ODNI James Clapper for the benefit of candidate Trump.

More specifically, as the Inspector General explained further in his testimony to Congress on December 11, 2019, SSA 1 surreptitiously interviewed and sized-up Mr. Flynn on August 17, 2016, under the "pretext" of being part of what was actually a presidential briefing but reported dishonestly to others as a "defensive briefing."[21] The IG Report states:

> In August 2016, the supervisor of the Crossfire Hurricane investigation, SSA 1, participated on behalf of the FBI in an ODNI strategic intelligence briefing given to candidate Trump and his national security advisors, including Flynn, and in a separate briefing given to candidate Clinton and her national security advisors. The stated purpose of the FBI's participation in the counterintelligence and security portion of the briefing was to provide the recipients 'a baseline on the presence and threat posed by foreign intelligence services to the National Security of the U.S.' However, we found the FBI also had an investigative purpose when it specifically selected SSA 1, a supervisor for the Crossfire Hurricane investigation, to provide the FBI briefings. SSA 1 was selected, in part, because Flynn, who would be attending the briefing with candidate Trump, was a subject in one of the ongoing investigations related to Crossfire Hurricane. SSA 1 told us that the briefing provided him 'the opportunity to gain assessment and possibly some level of familiarity with [Flynn]. So, should we get to the point where we need to do a subject interview…I would have that to fall back on.'
>
> After the meeting, SSA 1 drafted an Electronic Communication (EC) documenting his participation in the ODNI strategic intelligence briefing attended by Trump, Flynn, and another advisor, and added the EC to the Crossfire Hurricane

[21] C-SPAN, *Inspector General Report on Origins of FBI's Russia Inquiry*, C-SPAN.COM, Dec. 11, 2019, https://www.c-span.org/video/?466593-1/justice-department-ig-horowitz-defends-report-highlights-fisa-problems.

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> investigative file. The EC described the purpose, location, and attendees of the briefing, and recounted in summary fashion the portion of the briefing SSA 1 provided. Woven into the briefing summary were questions posed to SSA 1 by Trump and Flynn, and SSA l's responses, as well as comments made by Trump and Flynn. SSA 1 told us that he documented those instances where he was engaged by the attendees, as well as anything related to the FBI or pertinent to the Crossfire Hurricane investigation, such as comments about the Russian Federation. SSA 1 said that he also documented information that may not have been relevant at the time he recorded it, but might prove relevant in the future.

IG Report at 407-08.

In clear and certain terms, the Inspector General found "members of the Crossfire Hurricane team repeatedly failed to provide OI [Office of Intelligence] with all relevant information." IG Report at 362. SSA 1 even "speculated" that Steele's information was corroborated—when it was not—and he was responsible for numerous "inaccuracies," "omissions," and "unsupported statements" in the FISA applications. *See generally* IG Report at Chs. 5, 9. The last two FISA warrants including the one entered specifically for the benefit of the SCO were illegal. Any and all evidence derived from those warrants regarding Mr. Flynn must be suppressed.

An objective view of SSA 1's purported handwritten notes with the FD-302 of the January 24, 2017 interview of Mr. Flynn that Lisa Page instructed Agent Strzok to edit on February 10, 2017, reveals equally troubling "inaccuracies," "omissions," and "unsupported statements." [22] The

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[22] As previously briefed by Mr. Flynn, aside from the fact that the FD-302 was in a "deliberative process" for weeks and material changes were made to it with the knowledge and instruction of Counsel to McCabe (Lisa Page) on the night of February 10, 2017, there are statements in the FD-302 that find no support in the notes of either agent. ECF No. 129-2 at 14-17 (Sections 6 through 9). The changes include the addition of the line "'or if KISLYAK described any Russian response to a request by FLYNN.'" That question and answer do not appear in the notes. *Id.* This Court excused those additions by pointing out that agents also include information from their memory. ECF No. 144 at 41. That simply makes finding the original FD-302 that much more important—as it would have been the freshest version. The FD-302 that serves as the basis for the false statements charge against Mr. Flynn was altered weeks after the interview and long past the five days in which a FD-302 is to be finalized under FBI rules.

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IG Report evinces that Mr. Flynn has still not been provided with all the evidence of egregious government misconduct dishonestly wielded to destroy the National Security Advisor to President Trump as part of their larger anti-Trump scheme.

D. The Inspector General Abhorred this Conduct as did FBI Director Christopher Wray.

This intolerable breach of trust and deceitful conduct by the FBI leadership and SSA 1 alone is enough to warrant dismissal of all charges against Mr. Flynn. Current FBI Director Christopher Wray immediately responded to the IG Report to confirm that this would not happen again.[23] It was simply so outrageous there was not a formal policy to foreclose it at the time. No rational person could have anticipated that anyone entrusted with the "Fidelity, Bravery, and Integrity" of the FBI would suggest such an operation against a presidential nominee.

The case against Mr. Flynn should be dismissed immediately for this egregious abuse of power and trust, and for the prosecution's failure to disclose it to the defense from November 29, 2017, until the release of the IG Report—more than two years later.[24]

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[23] Press Release, FBI Director Christopher Wray's Response to Inspector General Report (Dec. 9, 2019) (on file with FBI.gov), https://www.fbi.gov/news/pressrel/press-releases/fbi-director-christopher-wray-response-to-inspector-general-report.

[24] The electronic communication written by SSA 1 arising from the presidential briefing was approved by Strzok. It was uploaded into Sentinel August 30, 2016. IG Report at 343 and n. 479. In truth, but unknown to Mr. Flynn until the release of this Report, SSA1 was actually there because he was investigating the candidate's national security advisor as being "an agent of Russia." This report of that interaction including purported statements by Mr. Flynn was put it in a sub-file of the Crossfire Hurricane file. That, and the DOJ document completely exonerating Mr. Flynn of that slanderous assertion, has never been produced to Mr. Flynn. This was extraordinary *Brady* and *Giglio* information that should have been provided to Mr. Flynn by Mr. Van Grack no later than upon entry of this Court's *Brady* order.

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III. SUPPRESSION OF UNDENIABLE *BRADY* EVIDENCE MANDATES DISMISSAL OF THIS CASE.

This Court should dismiss this prosecution for the government's recurring *Brady* violations revealed or disclosed only since December 9, 2019. As Glen Greenwald wrote: "the FBI's gross abuse of its power – its serial deceit – is so grave and manifest that it requires little effort to demonstrate it. In sum, the IG Report documents multiple instances in which the FBI – in order to convince a FISA court to allow it to spy on former Trump campaign operative Carter Page during the 2016 election – manipulated documents, concealed crucial exonerating evidence, and touted what it knew were unreliable if not outright false claims."[25]

The IG Report is damning evidence of *Brady* violations and outrageous government misconduct by the FBI agents who deceitfully listened to Mr. Flynn on August 17, 2016, and interviewed him on January 24, 2017. Neither time did they even advise him he was under investigation. He had no warnings—not even those given to government employees. The entire scenario was planned and rehearsed to keep from alerting him to the seriousness of it all. Surely, such alleged conduct cannot be a foundation for a federal felony. *Sorrells,* 287 U.S. at 442 ("A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.").

Remarkably, FBI agents continued to alter and manipulate Mr. Flynn's January 24, 2017 FD-302 until it met the approval of Deputy Director McCabe's Special Counsel and McCabe

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[25] Glen Greenwald, *The Inspector General's Report on 2016 FBI Spying Reveals a Scandal of Historic Magnitude: Not Only for the FBI but Also the U.S. Media*, The Intercept, https://theintercept.com/2019/12/12/the-inspector-generals-report-on-2016-fb-i-spying-reveals-a-scandal-of-historic-magnitude-not-only-for-the-fbi-but-also-the-u-s-media/?comments=1 (Dec. 12, 2019, 11:44 AM).

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approved it. As previously explained, SSA 1 was responsible for false and wrong information repeatedly presented to the FISA court. The government and that agent failed to provide this exculpatory evidence to that court at every turn. The same agents and the prosecutors also failed to provide such important *Brady* material to Mr. Flynn.[26]

Mr. Van Grack's suppression of this crucial *Brady* information—and his failure to disclose that SSA 1 had a "baseline" read on Mr. Flynn—demands dismissal of this case.[27] The

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[26] See Judge Boasberg opinion, *see supra* n. 11. Mr. Flynn's communications were obtained in violation of the Fourth Amendment—whether through illegal FISA abuses or abuses of the NSA database or mishandling Presidential Transition Team Materials.

In the January 2020 FISC report, Judge Boasberg wrote that "due in large part to the work of the Office of the Inspector General," the Court has received notice of "material misstatements and omissions in the applications filed by the government in the above-captioned dockets [16-1182, 17-52, 17-375, 17-769]." Order Regarding Handling and Disposition of Information at 1 (1/7/20). The DOJ acknowledges "there was insufficient predication to establish probable cause to believe that [Carter] Page was acting as an agent of a foreign power" with respect to when it filed its applications, "if not earlier." *Id*. The FBI was sequestering documents it acquired pursuant to the listed docket numbers but did not give a deadline or methods of sequestration – merely promising to update the court. *Id.* As of January 7, 2020, no update had been received. *Id*. As a result of the situation, the Court ordered that the government make a submission of the FBI's handling of information obtained pursuant to these dockets, including: detailed steps taken to restrict access in unminimized form, detailed steps taken to restrict access to such information in other forms, timetable for completion of steps, explanation of the "further review of the OIG Report" and "related investigations and any litigation" that would require retention of the above information, and an explanation of why the retention comports with FISA. *Id.* at 2. This is a developing issue that Mr. Flynn wants to preserve in light of Judge Boasberg's holding that the FISA warrant was invalid, thereby invalidating information illegally obtained that likely relates to Mr. Flynn.

[27] The Government's misconduct also provides further support for Mr. Flynn's motion to withdraw his plea, filed contemporaneously herewith. A defendant's plea is only valid if it was entered knowingly and intelligently. *See e.g*., *Hill v. Lockhart, 474 U.S. 52 (1985).* But, "this test suffices only in the "absen[ce of] misrepresentation or other impermissible conduct by state agents. *Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir. 1988). "[T]he validity of the plea must be reassessed if it resulted from "impermissible conduct by state agents." *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (quoting *Brady v. Maryland*, 397 U.S. 742, 757 (1970)). "[E]ven a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution." *Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir. 1988). After all, "if a defendant may not raise a *Brady* claim after a guilty plea,

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government's suppression (or destruction) of the original FD-302 of the interview of January 24, 2017 is now even more important. That SSA 1 participated in two interviews of Mr. Flynn and immediately reported to multiple people—as did Strzok—that Mr. Flynn was being honest with the agents dramatically magnifies the importance of SSA 1's statements and perceptions as written on January 24, 2017.

Another stunning revelation in the IG Report is that SSA 1 played a large part in the lies to the FISA court from the first application on Carter Page onward. *See supra* 12. Much like the fabricated FISA application based on the "Steele dossier" used against Carter Page, the FBI knew this was nonsense because Mr. Flynn worked with the FBI as allies for years, including as head of the Defense Intelligence Agency ("DIA"), and he continued working with the DIA on all his foreign contacts thereafter—including contacts in Russia and Turkey.[28] Mr. Flynn requested this DIA information in his Motion to Compel *Brady* Material. ECF No. 133 at 29-30.

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prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas." *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995). A majority of the Circuits agree that *Brady* violations can be the basis to withdraw a plea.

The D.C. District Court held that the government's suppression of *Brady* was sufficient to permit him to withdraw his plea *post-sentencing*—despite the high standard of "manifest injustice." *United States v. Nelson,* 59 F. Supp. 3d 15, 17 (D.D.C. 2014) (holding a suppressed exculpatory email sufficient to withdraw the plea); *see also, United States v. Lough*, 203 F. Supp. 3d 747 (N.D. W. Va. 2016) (granting a motion to withdraw a guilty plea where counsel *was not aware* that, and therefore did not inform the defendant that, *a substantial portion of the government's evidence against the defendant could have been suppressed* because of the invalidity of the government's warrant that led to the collection of that evidence. *Id.* at 753-54. This failure stripped defendant of "close assistance of competent counsel," thus his guilty plea was not knowingly entered. *Id.* at 754-55. These are additional grounds to allow Mr. Flynn to withdraw his plea. ECF No. 151.

[28] The documentation of his work with the DIA after he retired is a significant part of the *Brady* evidence the government has refused to produce to Mr. Flynn.

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The government's conduct in this case shows contempt for the law at every turn. Mr. Flynn was targeted and deliberately destroyed by corrupt factions within the FBI and intelligence community. While Mr. Flynn's case is not even the focus of the IG Report, the Report reveals illegal, wrongful, and improper conduct that affected Mr. Flynn, and is the subject of an ongoing criminal investigation by United States Attorney John Durham. Both Attorney General Barr and John Durham issued statements on the heels of the Inspector General's Report to clarify that more information was being discovered in Mr. Durham's investigation, and, as Mr. Durham stated: "[W]e advised the Inspector General that we do not agree with some of the report's conclusions as to predication and how the FBI case was opened."[29] The defense expects additional information to be developed that exonerates Mr. Flynn.

"Exercising the inherent authority [of the court] is most appropriate in particular fact situations that do not lend themselves to rules of general application. *Omni Int'l Corp.*, 634 F. Supp. at 1438. That is certainly the case here, where Mr. Flynn's facts arise in the midst of what has been exposed as a shamefully abusive and corrupt period in FBI history, an operation that has sparked a massive investigation by the Inspector General, and now an ongoing criminal investigation by United States Attorney John Durham. At bottom, Mr. Flynn was framed and set-up by his own government in a shockingly inappropriate and wrongful conduct by the "leadership" of the FBI, DOJ, and "intelligence officials." The FBI "leadership" schemed to interview Mr. Flynn twice—with no warning—not just of his rights—but even of the fact that they were investigating him. This was a coordinated, deliberate, unconscionable, and result-driven

[29] U.S. Attorney John H. Durham, Statement (Dec. 9, 2019) (transcript available at https://www.justice.gov/usao-ct/pr/statement-us-attorney-john-h-durham).

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mechanism to create a "crime" they clearly sought. This abuse of power is so pernicious it undermines the very foundations of our constitutional republic.

Even though the investigation pertains to the abuses of the FISA process, not the FBI and DOJ's misconduct regarding Mr. Flynn, the IG Report simultaneously documents at least some of FISA process abuses and misconduct against Mr. Flynn. The IG Report is replete with exculpatory evidence that, had it been known to Mr. Flynn, he never would have pled guilty. The government's suppression of evidence drove a three-star military veteran of multiple conflicts to plead to a crime he did not believe he committed. It now raises the specter that the foremost intelligence officer of this generation, a combat veteran and war hero, will serve time behind bars. This is not only manifestly unjust, it makes a mockery of *Brady* and due process. *See United States v. Brown*, 250 F.3d 811, 818 (3d Cir. 2001) (acknowledging that a *Brady* violation is "closely bound to due process guarantees"); *Campbell v. Marshall*, 769 F.2d 314, 321 (6th Cir. 1985) (determining that "in *Tollet* and the *Brady* trilogy, the Supreme Court did not intend to insulate all misconduct of constitutional proportions from judicial scrutiny solely because that misconduct was followed by a plea which otherwise passes constitutional muster as knowing and intelligent").

IV. THE GOVERNMENT'S ROLE IN DEMANDING, RUSHING, REVIEWING, AND COORDINATING THE FARA FILING FORECLOSES USE OF IT TO PROSECUTE FLYNN.

As briefed extensively in Mr. Flynn's Supplemental Motion to Withdraw His Plea (ECF No. 150), David Laufman, former Chief of the U.S. Department of Justice's Counterintelligence and Export Control Section, and the FARA Unit of the DOJ were adamant that Flynn Intel Group ("FIG") file a FARA registration even though FARA experts at Covington and at Arent Fox were not sure that one was warranted. Indeed, Matthew Nolan, FARA expert at Arent Fox, was adamant that no filing was required in this case. Ex. 3.

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Mr. Flynn wanted to "do the right thing." He authorized his lawyers to "be precise," complete the task, and file the registration. Ex. 4. Moreover, in September 2016, FIG Partner Bijan Rafiekian had timely sought legal counsel requesting to file a FARA, but he was advised by attorney Robert Kelley to file an LDA instead. Ex. 5. An LDA filing is the largest single exception to the requirement of filing FARA, and in many cases, filing an LDA satisfies FARA. 22 U.S.C. § 613(h) (2019).

Mr. Laufman applied extraordinary pressure on Covington and repeatedly inserted himself and others including multiple members of the FARA division—into the planning, content, and filing of FIG's registration. ECF No. 151 at n. 3 and at 4-5. There is no valid FARA offense against Mr. Flynn. The extraordinary involvement of the FARA Unit and Mr. Laufman in this process (as fully briefed in ECF No. 98-7 at 11) should foreclose or estop any use of the registration against Mr. Flynn. *Sorrells*, 287 U.S. at 444 (quoting *Butts v. United States*, 273 F. 35 (8th Cir. 1921)) ("The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it.").

V. PROSECUTORS CREATED THE "FALSE STATEMENTS" IN THE FARA FILINGS AND SOUGHT TO SUBORN PERJURY.

As we briefed in full previously at ECF No. 133 and ECF No. 151, the SCO in general and Mr. Van Grack in particular, cooked-up the "false statements" in the FARA filing and have long been in possession of statements by Covington lawyer Brian Smith that completely contradict the government's assertions of any wrongdoing by Mr. Flynn on the FARA registration. The same documents show that Mr. Van Grack sought to have Mr. Flynn make affirmative false statements in his June 2019 interview with the FBI and EDVA prosecutors, and Mr. Turgeon, and compounded that atrocity by demanding Mr. Flynn testify falsely on the same point in the

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Rafiekian trial. Mr. Van Grack has spent the last year taking retaliatory action against Mr. Flynn over the same issues as the defense has briefed.

CONCLUSION

The government's misconduct undoubtedly harmed and prejudiced Mr. Flynn. For these reasons, if the United States Department of Justice does not come forth to meet its most solemn duty and move to dismiss this travesty, this Court should dismiss this prosecution because of the government's outrageous and egregious misconduct directed specifically against Lt. General Michael T. Flynn (Retired). "[I]t is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it." *Sorrells*, 287 U.S. at 444-45 (quoting *Butts*, 273 F. at 38).

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2020, a true and genuine copy of Mr. Flynn's Motion to Dismiss for Egregious Government Misconduct and in the Interest of Justice was served via electronic mail by the Court's CM/ECF system to all counsel of record, including:

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **Plaintiff,** **v.** **MICHAEL T. FLYNN,** **Defendant.**	**Criminal Action No. 17-232-EGS**

SUPPLEMENTAL MOTION TO WITHDRAW PLEA OF GUILTY
AND BRIEF IN SUPPORT

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More than a year ago, at the December 18, 2018, Sentencing Hearing, this Court declared that it could not "recall any incident in which the Court has ever accepted a plea of guilty from someone who maintained that he was not guilty," and that it did not "intend to start" that day.[1] Michael T. Flynn ("Mr. Flynn") *does* maintain that he is innocent of the 18 U.S.C. §1001 charges; and he did not lie to the FBI agents who interviewed him in the White House on January 24, 2017. As will be seen below, and at any evidentiary hearing ordered by this Court, Mr. Flynn's guilty plea (and later failure to withdraw it) was the result of the ineffective assistance of counsel provided by his former lawyers, who were in the grip of intractable conflicts of interest, and severely prejudiced him.

This brief provides this Court every reason to honor its commitment to protect a man who earnestly maintains his innocence. Mr. Flynn moved on January 13, 2020, to withdraw his plea of guilty because of the government's bad faith, vindictiveness, and breach of the plea agreement. ECF No. 151. This Supplemental Motion addresses alternate reasons why it would only be "fair and just" for the Court to permit Mr. Flynn to withdraw his plea. *United States v. Cray*, 47 F.3d 1203, 1206 (D.C. Cir. 1995).

First, Mr. Flynn's former counsel at Covington & Burling LLP ("Covington") developed what is often referred to as an "underlying work" lawyer-to-client conflict of interest early in the representation.[2] It arose from mistakes that the firm made in the Foreign Agents Registration Act (FARA) filings it had made for Mr. Flynn and his company Flynn Intel Group ("FIG"). Rather than disclosing the errors—and insisting Mr. Flynn obtain new counsel to fix the problem, or

[1] Hr'g Tr. Dec. 18, 2018 at 7.

[2] Geoffrey Hazard, William Hodes & Peter Jarvis, The Law of Lawyering, §10.07.6 (4th ed. 2015).

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allowing Covington to continue the representation (and the fix), knowing the truth—the lawyers said nothing to Mr. Flynn, charged him hundreds of thousands of dollars to re-do its own prior work, and *still* did not take the readily available steps of amending or supplementing the FARA forms.

In August 2017, the Special Counsel's Office ("SCO") began to threaten Covington's work with criminal FARA-related charges by way of an indictment of Mr. Flynn's former business partner, Bijan Rafiekian. Covington's "underlying work" conflict of interest suddenly escalated into a non-consentable conflict of interest that tainted every moment up to and through the guilty plea in December 2017 and the Sentencing Hearing in this Court in December 2018. That pernicious conflict infected and prejudiced his defense until he retained new counsel in 2019.

As a result of this debilitating lawyer-to-client conflict of interest, the Covington lawyers lost all ability to provide the effective assistance of counsel that the Sixth Amendment requires. At every turn, the lawyers' interest was in obscuring their original errors, hiding the fact that they had never come clean with their client, and trying ever-harder to sweep their problems under the rug by arranging for and preserving a plea that Mr. Flynn wanted to withdraw.

Mindful of their own interests, Mr. Flynn's former counsel repeatedly gave him advice that was not "within the range of competence demanded of attorneys in criminal cases." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Repeatedly, "counsel actually acted in a manner that adversely affected [their] representation by doing something, or refraining from doing something, that [] non-conflicted counsel would not have done." *United States v. Taylor*, 139 F.3d 924, 930 (D.C. Cir. 1998). They did irreparable damage to Mr. Flynn.

They next kept the SCO's November 1, 2017, express concerns and demands about the conflict of interest from Mr. Flynn; and, they represented to the government that they discussed

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the conflict—all while they worked to position themselves favorably at Mr. Flynn's expense. On the eve of his plea, they kept from him information they knew was crucial to his decision.

In this Circuit, a defendant seeking to withdraw a guilty plea before sentencing must establish the "prejudice" element by showing "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Taylor*, 139 F.3d at 929-30. In this case, the evidence will show that if Mr. Flynn had been given constitutionally adequate advice, he would *not* have pled guilty in 2017, and he *would* have withdrawn his plea in 2018. The taint of Covington's constitutional violations permeates this case.

In addition, there were defects in the Rule 11 plea colloquy. When this Court extended the colloquy in December 2018, among the questions this Court did not ask was if any additional promises or threats were made to Mr. Flynn. The answer to that question is yes, there were. Moreover, this Court ended the sentencing hearing noting that it had "many, many, many more questions" about the factual basis for the plea. Hr'g Tr. Dec. 18, 2018 at 50:12-13. Accordingly, withdrawal of the plea should be allowed pursuant to *Cray,* 47 F.3d 1203.

I. THE STANDARD FOR WITHDRAWING A GUILTY PLEA PRIOR TO SENTENCING.

The Federal Rules of Criminal Procedure allow for withdrawal of a guilty plea before sentencing "if the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B) (paraphrasing *Kercheval v. United States*, 274 U.S. 220, 224 (1927)). In this Circuit, the trial courts (and the appellate courts on review) consider three factors, the last of which is the most important: "(1) whether the defendant has asserted a viable claim of innocence; (2) whether the delay between the guilty plea and the motion to withdraw has substantially prejudiced the government's ability to prosecute the case; and (3) whether the guilty plea was

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somehow tainted." *United States v. McCoy*, 215 F.3d 102, 106 (D.C. Cir. 2000). Mr. Flynn readily satisfies each of the three factors, and the taint is overwhelming.

A. Mr. Flynn Asserts a Viable Claim of Innocence.

"The District Court should not attempt to decide the merits of the proffered defense, thus determining the guilt or innocence of the defendant." *Everett v. United States*, 336 F.2d 979, 982 (D.C. Cir. 1964), *quoting Gearhart v. United States*, 272 F.2d 499, 502 (1959). Only if the district court concludes that the defendant has not alleged any cognizable claim for relief, or that the defendant's "conclusory allegations [are] unsupported by specifics," or that the defendant's allegations "in the face of the record are wholly incredible," may it summarily dismiss the motion." *Taylor*, 139 F.3d at 933.

Courts typically employ something of a sliding scale to decide whether a claim of innocence is "viable" in this context: where it is clear that a plea was constitutionally "tainted," a defendant needs to show correspondingly less to establish a viable claim of innocence. As this Circuit remarked in *Taylor*, "[t]he third [taint] factor is the "most important," and the standard for allowing withdrawal of a plea is fairly lenient when the defendant can show that the plea was entered unconstitutionally." 139 F.3d at 929 (internal citations omitted). *See also, McCoy, supra,* 215 F.3d at 106.

Mr. Flynn's claim of innocence is more than viable, and there is a very strong showing of constitutional taint here. Mr. Flynn would be able to start his defense with evidence that the FBI agents who interviewed him at the White House believed that he was *not* lying and maintained that belief in the face of objection and even derision from senior FBI colleagues. In addition, he would be able to present the actual recordings and transcripts of his calls with Russian Ambassador Kislyak, and he knew that the FBI already had those recordings and transcripts. In addition, Mr.

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Flynn would presumably be able to present whatever 302s are now "missing," and countless other *Brady* disclosures that the government has dribbled over the last year. He would also be able to demand additional evidence the government continues to suppress. Mr. Flynn could present numerous other defenses and suppress evidence illegally obtained. The standard does not require Mr. Flynn prove he would be acquitted. It is enough to say that Mr. Flynn's claim of innocence is "viable," and it is.

B. The Government's Ability to Prosecute the Case has not been Substantially Prejudiced.

This Court should not tarry long over the second factor: whether the lapse in time between the original plea and the motion to withdraw the plea has "substantially prejudiced the government's ability to prosecute the case." *McCoy*, 215 F.3d at 106. The test does not depend upon whether the government will be annoyed or even inconvenienced. Not only must there be *substantial* prejudice, but the prejudice must go to the government's very ability to prosecute the case. No witnesses have died, the documents are readily available, and if the government ever had a case, it should still be able to prove it. Indeed, the defense and the government have been in active litigation over those records for much of the time since the original plea. *See United States v. Russell*, 686 F.2d 35, 40 (D.C. Cir. 1982) (holding that the government was not prejudiced where the government had not shown the unavailability of crucial witnesses or that its case was prejudiced by the passage of time).

Finally, although Mr. Flynn's chief argument about the "taint" that infected his case emanated from the ineffective assistance of his former counsel, the government's coercive tactics and other wrongful conduct contributed as well. Thus, any claim that the government might make about "substantial prejudice" would have to be discounted by the government's self-inflicted damages.

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C. Sixth Amendment Violations—The Ineffectiveness of Mr. Flynn's Former Counsel—Tainted his Guilty Plea as well as the Subsequent Colloquy at his December 2018 Hearing.

The third and most important factor in determining whether a defendant should be permitted to withdraw a guilty plea before sentencing is "whether the guilty plea was somehow tainted." *United States v. McCoy*, 215 F.3d at 106. "Taint" in this context typically means that the plea was entered "unconstitutionally," which in turn often means that the plea was not "voluntary and intelligent" because it was based on advice of counsel that fell below the level of "reasonable competence" that is required to satisfy the Sixth Amendment. *Strickland*, 466 U.S. at 714. A year after *Strickland* was decided, the Supreme Court assimilated its test for claims of ineffective assistance of counsel to the context of guilty pleas in *Hill v. Lockhart*, 474 U.S. 52 (1985). This Circuit summarized the resulting rule as follows:

> The *Hill-Strickland* test requires the defendant to show both that counsel's advice was not 'within the range of competence demanded of attorneys in criminal cases,' and that as a result he was prejudiced, *i.e.* 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'

United States v. Horne, 987 F.2d 833, 835 (D.C. Cir. 1993) (internal citations omitted). Focusing on different language from *Strickland* and *Hill*, the same court summarized similarly a few years later:

> [a] defendant must [] show first, that his counsel's performance 'fell below an objective standard of reasonableness' by identifying specific 'acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,' and second a defendant 'must demonstrate that the deficiencies in his representation were prejudicial to his defense. He 'must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'

Taylor, 139 F.3d at 929-30 (citations omitted). Mr. Flynn meets those tests throughout this case, including with both his 2017 guilty plea and his colloquy with this Court. The multiple instances

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in which Mr. Flynn's former lawyers' conflicts of interest and actions fell completely short of professional norms, thus depriving him of the constitutionally mandated effective assistance of counsel, nullified his opportunity to make informed decisions about his own case, and it grossly prejudiced his defense.

II. IF THE GOVERNMENT OPPOSES WITHDRAWAL OF THIS PLEA, AND IF ANY MATERIAL FACTS ARE ACTUALLY DISPUTED, THEN THIS COURT SHOULD HOLD AN EVIDENTIARY HEARING.

No hard and fast rule governs whether an evidentiary hearing is required before a court can properly adjudicate ineffective assistance of counsel claims, including those undergirding a motion to withdraw a guilty plea. Much depends on exactly what is being contested and what materials the court will have to consider in deciding the merits. In *Taylor*, 139 F.3d at 932-33, this Circuit wrote:

> Ordinarily, when a defendant seeks to withdraw a guilty plea on the basis of ineffective assistance of trial counsel the district court should hold an evidentiary hearing to determine the merits of the defendant's claims. . . . On the other hand, some claims of ineffective assistance of counsel can be resolved on the basis of the trial transcripts and pleadings alone.[3]

III. SUMMARY OF THE CONFLICTS AND ARGUMENTS

Mr. Flynn's former counsel at Covington made some initial errors or statements that were misunderstood in the FARA registration process and filings, which the SCO amplified, thereby creating an "underlying work" conflict of interest between the firm and its client. Because Covington attempted to hide the difficulty instead of addressing it forthrightly with Mr. Flynn, what began as a manageable conflict of interest devolved into an inescapable morass of ever-

[3] Since his rights have already been severely compromised by his prior counsel, as discussed in detail, *infra*, he also requests that any testimony that he give be heard *ex parte* so that it does not prejudice his Fifth Amendment rights. *See United States v. Tucker*, 2018 U.S. Dist. LEXIS 172319, 22-23 (D. N.H. 2018) (allowing a defendant seeking to withdraw his guilty plea to testify at a sealed hearing on an *ex parte* basis).

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worsening and eventually non-consentable conflicts. Those conflicts led to a series of instances in which Covington provided ineffective assistance of counsel that irreparably tainted Mr. Flynn's guilty plea and the December 2018 hearing in this Court.

Had Mr. Flynn been timely and properly informed of the serious *self-interest* of his attorneys and the firm—and the ever-deepening conflict versus his own defense—he would not have permitted the representation to continue beyond August 2017 when Covington began to re-investigate the FARA issues. Had Mr. Flynn been informed of the facts, he would have retained an independent firm to provide a second opinion—not the original one that made mistakes it wouldn't own or correct.

By November 1, 2017, Special Counsel ["SCO"] notified Covington that it recognized Covington's conflict of interest from the FARA registration. Government counsel specified Mr. Flynn's liability for "false statements" in the FARA registration, and he told Covington to discuss it with Mr. Flynn. This etched the conflict in stone. Covington betrayed Mr. Flynn. His lawyers did not discuss this concrete attorney-to-client conflict with him. They did not insist he obtain independent counsel. They did not advise him Special Counsel had focused on FARA issues. They did not withdraw. Instead, his own lawyers kept it all a secret from him for weeks. Then, they tendered him defenseless and uninformed to SCO for two full days of proffers for everything the SCO wanted from Flynn on Russia and his own "exposure." They schooled him to "get through the proffer" to satisfy SCO, and instead of objecting or defending him in the face of a room full of government agents and lawyers, they even asked him questions to elicit the answers SCO wanted.

There is no dispute there was a serious conflict of interest. It is undeniable. Covington and SCO discussed it. That minute Mr. Van Grack informed Covington the SCO was considering FARA false statement charges against Mr. Flynn, the question became: Were the suspected false

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statements the result of Covington's misfeasance or malfeasance, *or*, did Mr. Flynn lie to his lawyers?[4]

Showing that Mr. Flynn was truthful with his lawyers would cast aspersion on the competence, or perhaps even the honesty of the Covington lawyers and the reputation of "the Firm;" so would withdrawing from the representation of the highest profile figure in the SCO investigation. Thus, the SCO put Mr. Flynn's lawyers' interests in direct collision with Mr. Flynn's. Covington chose the "Flynn-lied-to-his-lawyers" option they had discussed by email the prior night.

These factors, especially the egregious taint of a lawyer-client conflict of interest known to the Covington lawyers and the government—but not immediately, fully, or ever accurately disclosed to Mr. Flynn—warrant granting this motion.[5] From every angle, this case presents stunning Sixth Amendment violations of Mr. Flynn's constitutional rights. "Long ago, the Supreme Court instructed that '[t]he right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client,' an admonition which we ourselves have had occasion to observe. 'Undivided allegiance and faithful, devoted service to a client,' the Court declared, 'are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision.'" *United States v. Hurt*, 543 F.2d 162 (D.C. Cir. 1976) (citing *Von*

[4] The obvious solution to this for the ethical lawyer would have been to inform the SCO that all mistakes, errors or omissions, if any, belonged to Covington and file an amended or supplemental form. Then, it should have informed Mr. Flynn immediately of the entire situation and given him the choice of how to proceed. Covington, however, proceeded to sacrifice Mr. Flynn in its own efforts to cooperate with Special Counsel—all behind his back—and quickly jumped on the "Flynn-lied-to-his-lawyer" bandwagon.

[5] Mr. Flynn acknowledges the government may make every effort to seek an indictment against him for all the charges prosecutors originally threatened.

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Moltke v. Gillies, 332 U.S. 708, 725 (1948)). "[T]he 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired . . . If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired." *Glasser v. United States*, 315 U.S. 60, 70 (1942).

IV. THE EVER-DEEPENING CONFLICTS OF INTEREST RESULTING IN COVINGTON'S DEFECTIVE ASSISTANCE OF COUNSEL.

In late 2016, Mr. Flynn received an official inquiry letter from the Foreign Agents Registration Act ("FARA") unit of the DOJ. Mr. Flynn promptly turned to his personal counsel and attorney for Flynn Intel Group ("FIG,") Kristen Verderame.[6] She encouraged him to retain Robert Kelner—a nationally known FARA expert at the international powerhouse of Covington in Washington, D.C. Mr. Flynn, Ms. Verderame, and Mr. Flynn's son Michael G. Flynn met with Covington FARA lawyers Robert Kelner and Brian Smith extensively on January 2, 2017. ECF No. 151-12. Mr. Flynn provided Covington all documents, emails, and contracts he or FIG had, and gave the lawyers all the information he could remember—specifically pointing them to the emails for the details. *Id.* Significantly, Mr. Flynn told Covington that Bijan Rafiekian, his former

[6] FIG had only existed for a few months, and FIG was already closed because Mr. Flynn was a key member of the Presidential Transition Team. The three-month project for which FIG received the inquiry was its first of any significance. Moreover, upon advice of counsel, FIG had timely filed an "LDA" ["Lobbying Disclosure Act"] registration in September 2017—which often substitutes for a FARA filing. *Foreign Agents Registration Act*, United States Department of Justice, https://www.justice.gov/nsd-fara. According to the DOJ's response to a letter from Congress, the FARA unit of DOJ only issued 130 "inquiry letters" in the last 10 years from 2015. Ex. 35. Yet, on November 30, 2016, within approximately three weeks of the mere publication of Mr. Flynn's opinion piece in *The Hill*—an article that was critical of Fetullah Gulen and the powerful "Muslim Brotherhood"—and within thirteen days of Flynn's designation as the National Security Advisor for the new president—the FARA unit sent an "inquiry letter" to FIG.

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partner in FIG, wrote the first draft of the op-ed, that was the primary object of the FARA section's letters. *Id.* at 17.

Mr. Flynn authorized Covington to investigate all the facts, work with multiple lawyers from multiple firms—including Robert Kelley, Kristen Verderame, attorneys for the public relations firm Sphere, and attorneys from Jones Day and Arent Fox. They also conferred and then met with the DOJ, interviewed many witnesses—all independently of each other and Mr. Flynn—and prepared and filed the FARA forms. *See also*, *United States v. Rafiekian*, 1:18-cr-00457, ECF No. 270-4. Kelner soon wrote the FARA section a letter where he first made a fateful error. He stated that Mr. Flynn "*initiated* the op-ed."[7] Somehow it morphed into a felony (as construed by the SCO), and Covington apparently never corrected or clarified it.

> Your letter asked several questions regarding an op-ed authored by General Flynn and published in *The Hill* newspaper on November 8, 2016. It is our current understanding that the op-ed was initiated by General Flynn himself, and that he intended the op-ed to summarize a number of his longstanding public statements and positions regarding issues related to Turkey, Syria, and the Islamic State in Iraq and Syria. We also believe that the op-ed may have been prepared in the context of FIG's representation of Inovo BV, as the draft op-ed was shared with a representative of Inovo BV prior to publication and the op-ed related to subject matters overlapping with FIG's representation of Inovo BV. Again, our efforts to understand the relevant facts are ongoing, and we will continue to keep you and the Department apprised as our efforts continue. Ex. 1.

This was one of many communications, meetings, and phone conferences between the FARA unit and Covington over the FIG filing.[8]

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[7] This happened despite Mr. Flynn's clear statement on January 2, 2017, that Mr. Rafiekian wrote the first draft of the op-ed, and despite Rafiekian having separately informed Covington of this fact and providing even more information shortly thereafter. ECF No. 151-12 at 17; ECF No. 150-5 at 7.

[8] On January 13, 2017, Heather Hunt replied to Covington's January 11, 2017, letter and said, "[b]ased on your letter and our previous communications, we anticipate that General Flynn and the Flynn Intel Group will be filing a FARA registration statement imminently. . . Please continue to keep us informed regarding your progress." Ex. 2. Hunt emailed Kelner many times over the

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Hunt and the FARA unit did not leave it to Covington to keep them informed. Kelner recognized the unprecedented interest of the FARA unit in Mr. Flynn: "Heather Hunt [of FARA unit] has been all over us. She emailed and then left a voicemail yesterday afternoon asking for a call this weekend." * * * "We've never seen her this engaged in any matter (ever)." Ex. 5.

Meanwhile, on January 24, 2017, as we have briefed elsewhere, FBI Director Comey and Deputy Director McCabe dispatched Agents Strzok and "SSA 1" to the White House—deliberately contrary to DOJ and FBI policy and protocols—without notifying DOJ.[9]

A. The FARA Section and David Laufman at DOJ Pressure Covington for the FARA Filing, and Covington Magnifies Its Mistake.

On February 13, 2017, the day Mr. Flynn resigned from the White House, David Laufman, along with Heather Hunt of the FARA Unit, among others, had a call with Covington to pressure them to file the FARA forms immediately.[10] Ex. 5.

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following weeks—relentlessly checking in on the status of the filing. On January 19, 2017, Heather Hunt emailed Kelner, "Rob, any updates?" Kelner replied that Covington was working "expeditiously" to compile the registration, and the firm did. Ex. 3.

[9] This was actually the FBI's second surreptitious interview of Mr. Flynn—without informing him even so much as that he was the subject of their investigation. SSA 1 had "interviewed him" in a "sample Presidential Daily Briefing" ("PDB") on August 17, 2016—unbeknownst to anyone outside the FBI or DOJ until revealed in the recent Inspector General Report of December 9, 2019.

This also goes to Mr. Flynn's claim of actual innocence. Against the baseline interview the FBI surreptitiously obtained under the guise of the PDB (in August 2016), the agents conducted the White House interview and immediately reported back in three extensive briefings during which both agents assured the leadership of the DOJ and FBI they "saw no indications of deception," and they believed so strongly that Mr. Flynn was shooting straight with them that Strzok pushed back against Lisa Page's disbelief and Deputy Director McCabe's cries of "bullshit." ECF No. 133-2 at 4. This development is addressed in Flynn's Motion to Dismiss for Egregious Government Misconduct filed contemporaneously herewith.

[10] Even when it was filed, lawyers at Covington were not sure it was required, and the FARA expert at Arent Fox was adamant it was not required. Ex. 6.

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The next day—Mr. Flynn's first day out of the White House, with media camped around his house 24/7—Rob Kelner and Brian Smith of Covington, and Kristen Verderame, called Mr. Flynn to give him a status update on the FARA issues. Mr. Flynn accepted their recommendation that it was better to file, and he instructed the lawyers to "be precise."[11]

On February 21, 2017, David Laufman, Heather Hunt, Tim Pugh, and multiple others from the FARA Unit telephone-conferenced with Covington. Ex. 8. Laufman directed the content, scope, and duration of the call. In this lengthy conversation, Kelner exacerbated his prior mistake, stating that "Flynn *wrote* [the op-ed]," and that Mr. Rafiekian, Mr. Flynn's former business partner, provided "input." Ex. 8 at 2. Kelner apparently misremembered or misspoke, but the SCO parlayed the description in the FARA form into a felony attributable to Mr. Flynn. Meanwhile, Covington—instead of owning any error and correcting it—began a campaign of obfuscation that deepened the conflicts, created Mr. Flynn's criminal exposure, and led to repeated instances of ineffective assistance of counsel.[12]

That evening, Heather Hunt requested a meeting the next day at Covington's offices to review the draft FARA filing in person. She and several others from the FARA unit, arrived and reviewed the FARA draft and discussed logistics. Mr. Smith made notes of matters to include in the filing, such as the New York meeting with Turkish officials, payments to Inovo, specifics of the Sphere contract, and Sphere's budget (if established). The team noted that if Turkey was involved, it must be listed on the filing, and they created various reminders. Finally, Ms. Hunt

[11] Ex. 7: Smith Notes of 2/14/17 call.

[12] Covington lawyer Brian Smith's notes of January 2, 2017, and reconfirmed in his 302 of June 21, 2018, show that Mr. Flynn stated Rafiekian wrote the first draft. ECF No. 151-12 at 17. ECF No. 150-5 at 7. Rafiekian told Covington this also, and the emails confirmed it. Ex. 10.

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reminded the Covington team to file by email and send a check to cover filing fees by a courier.[13] Ex. 9.

Covington filed the forms on March 7, 2017. Hunt acknowledged receipt at 10:50 p.m., prompting Smith to remark to his colleagues, "They are working late at the FARA Unit." Ex.12.

Hardly had the FARA registration been uploaded on the FARA website when the onslaught of subpoenas began.[14] On May 17, 2017, Special Counsel was appointed, and the much-massaged "final" Flynn 302 was reentered for use by the SCO. Soon thereafter, the SCO issued a search warrant for all Flynn's electronic devices. Meanwhile, Covington's August 14, 2017, invoice alone was $726,000, having written off 10% of its actual time. Ex. 13 at 3.

B. By the Summer, SCO Takes Down Paul Manafort and Signals FARA Issues Are on its Radar.

In late May/early June 2017, Mr. McCabe's former Special Counsel Lisa Page left the SCO, FBI, and DOJ, soon followed by FBI Agent Peter Strzok who had interviewed Mr. Flynn at the White House. The Inspector General for DOJ had found thousands of texts proving an affair between Strzok and Page and their shared hatred of Trump and his supporters. ECF No. 133-2. The SCO did not notify Congress or anyone of the reason for the departure of two of its most important team members, but it did kick into high gear against its targets. On July 26, 2017, a swarm of FBI agents raided Paul Manafort's home in the pre-dawn hours. They ransacked his

[13] On March 3, 2017, Kelner emailed Hunt to tell her "we are not quite ready to file, but close." Hunt wanted more detail and demanded to know, "close as in later today, or close as in next week?" Kelner responded, Tuesday, March 7, 2017. Ex. 11.

[14] Covington received multiple subpoenas from the DOJ FARA unit, as well as subpoenas from the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, and then Special Counsel Office. In response to these subpoenas, Covington provided many thousands of documents in sixteen productions from April 2017 through October 2017 alone, and Mr. Flynn's legal fees exceeded two million dollars.

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home and searched his wife in her nightgown in their bed.[15] The SCO was contemplating multiple charges against Manafort—including FARA. *Id.*

C. After Learning the SCO Has the FARA Filings in Its Sights, Covington Quietly Begins Its FARA Assessment Anew.

By August 10, 2017, Covington learned the SCO was examining Covington's FARA filing for FIG and Mr. Flynn. Covington began re-interviewing all FIG witnesses, redoing its entire FARA assessment, and even interviewing Robert Kelley (prior counsel for FIG). Covington never notified Mr. Flynn of what it was doing, or—even more important—*why*. This escalated the conflict to a new level and rendered a simple resolution impossible.

In late August 2017, Covington learned SCO was threatening an imminent indictment of FIG partner Bijan Rafiekian for FARA violations. On August 30, Covington emailed Mr. Flynn that there had "been a development" that was "not urgent," but the lawyers wanted to chat. Ex. 14.

The Flynns, who were at their home in Rhode Island, replied that they were heading to dinner with friends. Kelner and Anthony called them while the Flynns were *en route*. On that brief call, Kelner and Anthony relayed that Rafiekian was facing imminent indictment on FARA charges. The lawyers mentioned a "possible conflict," that Kelner might have to testify, but they assured Mr. Flynn they would still be able to "vigorously defend" his case. But this was not just another unfortunate, but manageable, conflict of interest. By this time, Covington now knew there was a distinct possibility that one of Mr. Flynn's lawyers not only might have to testify against his former partner Rafiekian, but that he would be required to testify against his own client. That instantly created a non-consentable conflict of interest that only worsened.

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[15] Del Quentin Wilber and Byron Tau, *FBI Raided Home of Paul Manafort in Russia Probe*, WALL ST. J. (Aug. 9, 2017, 12:00 PM), https://www.wsj.com/articles/fbi-raided-home-of-paul-manafort-in-money-laundering-probe-1502294411.

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Although the Covington lawyers knew they were in a conflict situation that should have led to their immediate withdrawal from the representation, they did not bother with a written or serious in-person explanation of the conflict. They did not insist that Mr. Flynn consult independent counsel to seek advice as to the wisdom of continuing to be represented by conflicted counsel. And even if the new conflict of interest had been *consentable*, they did not seek their client's informed consent. Beyond this, Mr. Flynn's former counsel failed even to bring to his attention the additional (also non-consentable) conflicts that they could see coming—but he obviously could not. What had begun as a simple mistake in doing the FARA filing suddenly had the potential of exposing *the Covington lawyers* to civil or criminal liability, significant headlines, and reputational risk. That the Covington lawyers thought that a "drive-by" cell-phone chat, while their client was on his way to dinner with his wife, was sufficient disclosure in these dire circumstances revealed their cavalier attitude and presaged far worse.

D. Judge Howell Unseals a Crime-Fraud Order in the Manafort FARA Case, and Covington's Fears of its Own Exposure Increase.

On the weekend of October 28-29, 2017, the Special Counsel's investigation reached full boil. SCO charged Paul Manafort and his longtime associate Rick Gates with multiple criminal violations, including FARA violations. On October 30, 2017, Judge Beryl Howell unsealed an order allowing the government access to Manafort's communications with his lawyers, applying the crime-fraud exception to the attorney-client privilege.[16]

The Covington lawyers knew that their work on the FARA filing for Mr. Flynn posed multiple risks for the firm. In an internal email, they noted that the SCO was *so far* unlikely to be

[16] As Judge Howell explained, "the [crime-fraud] exception comes into play when a privileged relationship is used to further a crime, fraud, or other fundamental misconduct." *In Re Grand Jury Investigation*, 2017 U.S. Dist. LEXIS 186420, *21-22 (D.D.C. Oct. 2, 2017).

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able to obtain a similar crime-fraud order in the Flynn case, and *so far* was "stymied" in pursuing "a Flynn-lied-to-his-lawyers theory of a FARA violation." Ex. 15. Yet they were highly attuned to the risk that the situation could change and determined to proceed with extra caution to prevent their fear from becoming the reality. After the Manafort order was unsealed, Steven Anthony wrote to Rob Kelner:

> I just had a flash of a thought that we should consider, among many many factors with regard to Bob Kelley, the possibility that the SCO has decided it does not have, [with regard to] Flynn, the same level of showing of crime fraud exception as it had [with regard to] Manafort. And that the SCO currently feels stymied in pursuing a Flynn-lied-to-his-lawyers theory of a FARA violation. So, we should consider the conceivable risk that a disclosure of the Kelley declaration might break through a wall that the SCO currently considers impenetrable. [17]

Remarkably, Mr. Flynn's former lawyers still said nothing to their client about this important development and its impact on their ability to continue to represent him. Yet, the lawyers were aware of and responding to the increased pressure that they felt. The same day, Mr. Kelner forwarded to Mr. Anthony, without comment, a copy of the January 11, 2017, letter he had sent to FARA's Heather Hunt—the one in which Kelner had confused the difference between "writing," "publishing," or "initiating" an op-ed.

Heightening Covington's concerns about the SCO's apparent focus on its FARA filing, Kelner received a phone call from SCO prosecutor Brandon Van Grack at 4 p.m. on October 31, 2017, in which Mr. Van Grack demanded a meeting. Ex. X (4pm meeting email).

[17] Robert Kelley was FIG's lawyer—first consulted by Mr. Rafiekian—who filed the LDA registration for FIG in September 2016. Other emails show the Covington lawyers' surprise (or fear) about Kelley's candor in explaining his prior actions. Ex. 16. Mr. Kelley took full responsibility for the decision to file an LDA (as opposed to FARA) for FIG and for the contents of that filing—both in his declaration and on the witness stand in the Rafiekian case. Exs. 17, 18. Mr. Kelley was never charged with any wrongdoing.

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E. The SCO Etches Covington's Conflict of Interest in Stone by Putting Covington on Notice of FARA Charges against Mr. Flynn, Along with Charges under 18 U.S.C. §1001.

The Covington team went to the Special Counsel's Office to meet with Mr. Van Grack and his colleague Zainab Ahmad. Van Grack etched Covington's conflict of interest in stone. He said the SCO saw Mr. Flynn's exposure as "(1) FARA (failure to register); (2) FARA false statements; and (3) false statements to government officials." Ex. 19. This was the "universe of charges" they were considering against Mr. Flynn. Ex. 19.

Kelner mentioned statutory immunity only in passing, but he did nothing to make a stand for it or Mr. Flynn. *Id* at 2.[18] He recognized there was exposure for his client in agreeing to a proffer with only a "queen for a day" agreement. *Id.* at 3. Van Grack claimed the proffer was not "supposed to be a 'gotcha' interview." *Id.* at 3. Anthony acknowledged "this would definitely be a leap of faith on our part." *Id.*

F. Remarkably, SCO Specifically Raises the Conflict of Interest with Covington and Instructs Covington to Discuss with Mr. Flynn.

The lawyer-to-client conflict became unescapable. Had there been *any* justification for Covington not withdrawing previously, or at least advising the client and insisting he obtain

[18] Immunity would seem particularly appropriate to demand for a national hero like Mr. Flynn—especially in light of the immunity grants freely awarded to at least five Clinton colleagues including Cheryl Mills, and Heather Samuelson—who destroyed evidence and Clinton emails—Brian Pagliano who set up her server, and others; not to mention SCO's decisions not to prosecute others who lied to them, such as former CIA Director James Woolsey (who attended the FIG NY meeting with Turkish officials) and Joseph Mifsud (whom they allowed to leave the country despite his lies); and, an apparent grant of immunity to Tony Podesta for many of the same offenses Manafort committed.) Michael Biesecker, *GOP lawmaker: FBI gave immunity to top Clinton aide*, AP (September 23, 2016), https://apnews.com/5eb9830643084dfa9fcbedd8b18b08e0/gop-lawmaker-fbi-gave-immunity-clinton-aides-testimony.

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independent counsel to advise him on the entire situation, it evaporated at that moment. "There's one more issue I want to bring up," Van Grack told Anthony and Kelner, "Because Covington prepared the FARA registration, that would make you [Kelner] a fact witness. It isn't something we are considering." Kelner dug in. "If we were to get to that point, we would litigate it very aggressively." *Id.* Kelner replied: "[w]e saw what you guys did with Manafort, and we'll definitely raise it with our client." *Id.* at 4.

G. Covington Does Not Raise the Likely FARA Charges—Much Less the Stunning Conflict with Mr. Flynn.

Despite SCO's expressed concerns, and despite Kelner's promise to address with his client that remarkable fact that the SCO had just raised the conflict of interest and Mr. Kelner's position as a witness adverse to his own client, Kelner and Anthony said nothing to Mr. Flynn. Covington did not raise the preclusive conflict with their client on November 1st. They did not raise it when they met with Mr. Flynn three days later on November 4th. They did not raise it in proffer preparation. They did not raise it before the first proffer, and they did not raise it the night of the first proffer or the day of the second proffer. Indeed, they did not raise it until almost three weeks later—late Sunday, November 19th. Instead, the Covington lawyers created talking points for their own dealings with the SCO. Ex. 23.

H. Covington Calls SCO to Arrange a Deal for The Firm—Not Mr. Flynn.

Instead of withdrawing then or even just informing Mr. Flynn of this stunning development, on November 3, 2017, Covington called the SCO. Kelner said that the meeting two days earlier left the defense team with "a few critical questions as to whether we could get comfortable bringing [Flynn] in for a proffer." Ex. 20 at 1. Van Grack and Ahmad said the proffer had to happen because of "where we are in our investigation." *Id.* They said the focus of the first proffer was going to be on issues and activities Mr. Flynn was aware of or witnessed during the

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transition and his time in the White House. *Id.* at 2. Specifically, Van Grack claimed that the "initial focus" would *not* be on topics "that could [] incriminate." *Id.* Ahmad clarified that "[w]e're eventually going to want to talk about everything. That will include topics he has criminal exposure on. We aren't interested in Turkey right now." *Id.*

Anthony got the point that the firm's own FARA problem could be postponed from its perspective. "Cutting to the chase, are you going to ask him 'what is Inovo' or do you intend to leave Turkey aside and talk about the types of things [Van Grack] was talking about?" *Id.* Notably, Anthony limited his concern to the FARA issues, as to which he and Covington had exposure. This is not the work of an unconflicted counsel whose sole interest is protecting his client's rights and interests.

Van Grack agreed to postpone discussion of issues as to which Covington had potential liability. He said "What I would propose is, right now, we want to talk with your client for more than one day. Right now, initially, we are fine not talking about Turkey or the FARA piece because our investigation is not focused on Turkey/FARA."[19] *Id.*

With that exchange, the false statements Mr. Flynn allegedly made to the FBI and all the "Russia collusion" issues were *on* the table first, where he had "exposure." His own lawyers teed him up to discuss what SCO really wanted. Simultaneously, Covington took the FARA issues off the table—the only risk of problems for the firm. *Id*. at 4.

I. Covington Met with Mr. Flynn the Next Day but Did Not Disclose the FARA Target, the Firm's FARA Liability, or Covington's Pernicious Lawyer-Client Conflict of Interest.

[19] This is a significant change from Van Grack's original position that listed FARA charges as first and second in the "universe" of three charges against Mr. Flynn.

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On November 4, 2017, the Covington team met with Mr. Flynn to discuss the proffer and supposedly to update him on its conversations with SCO. They urged him to accept the proffer. They pointed out risks, and they advised Mr. Flynn that "the prosecutors seemed really worked up about the [January 24, 2017] FBI interview." Exs. 21, 22. Despite recognizing on October 30 (only 4 days earlier) the "impenetrable wall" of attorney-client privilege between Covington and Flynn—and the inability of SCO to prove a "Flynn-lied-to-his-lawyer case" on the FARA filing—they warned, however, that a proffer "may be our only way of talking them out of the indictment." *Id.* Covington's self-interest reared its head, and it cannot be disentangled from its advice to Mr. Flynn to proceed to discuss what the SCO wanted and divert attention from the firm's problematic FARA registration. Covington withheld information its fiduciary relationship with its client required it to disclose. It withheld the secret of the firm's FARA liability, that SCO identified a clear conflict of interest, that SCO had instructed Covington to discuss it with Mr. Flynn, that SCO identified two FARA charges at least, and that Covington needed to protect itself.

Anthony gave a list of twelve factors to consider about going in for a proffer, but there was not a mention of FARA. In fact, Covington did not raise FARA issues *at all* with Mr. Flynn. *Id.* When Mr. Flynn, *sua sponte,* asked about the charges, Anthony deflected, strongly encouraging the Flynns to participate in the proffer because it would give the SCO the chance to "get to know the real Mike Flynn…" Ex. Flynn).[20] Then Covington prepared talking points for a call with the SCO to set up the meeting. Ex. 23.

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[20] The next day, NBC ran a story that described "sources" saying that the SCO was going to proceed with charges against Flynn. One paragraph was particularly clear: "If the elder Flynn is willing to cooperate with investigators to help his son, two of the sources said, it could also change his own fate, potentially limiting any legal consequences." Ex. 24. Kelner and Anthony had already predicted that if Mr. Flynn didn't proceed with the proffer, he would likely be indicted within weeks, and his son was at risk of indictment also.

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Kelner called Van Grack the next day, and SCO agreed to postpone any discussion of the FARA issues. Van Grack suggested a two-day proffer, over consecutive days, "talking between 4-5 hours each day." Now Covington was being asked to prepare a client for a multiple day proffer in *days*. *Id*. Covington agreed to proffer sessions on November 16 and 17, 2017, and provided Mr. Flynn some preparation on November 15, 2017. Ex. 25. Still Covington did not disclose to Mr. Flynn that SCO included in its entire "universe of charges" his "FARA (failure to register);" and "FARA false statements." They did disclose the assertion of false statements to government officials regarding contacts with Russian officials during transition. Ex19.

The Covington lawyers continued to withhold the most important information: (i) that the prosecutors themselves had raised Covington's serious conflict of interest; (ii) the fact that the SCO had suggested calling Kelner as a witness; (iii) the lawyers had their own fear of the firm being subjected to the "Manafort treatment"; the headline risk of *Covington* in federal crime-fraud order because of their FARA filing; and, their own *criminal* exposure if the SCO deemed the lawyers co-conspirators instead of having the government operate on the theory of "Flynn-lied-to-his-lawyers" discussed in their internal email only days earlier. Ex. 15.

Van Grack told them if the "proffer tomorrow and Friday 'goes well,' they would want Flynn to come back in Monday to proceed to the proffer on Turkey/Inovo/FARA." Kelner said they had not prepared him for that. [Van Grack] said that "because of time pressures… they might need to tell us to be prepared to do the Turkey proffer Monday." Ex. 26.

J. Covington Still Did Not Discuss the Conflict with Flynn.

On the first day of the proffer, which was to start in the afternoon of November 16, 2017, Van Grack called Anthony to discuss whether they had talked with Mr. Flynn about the conflict. "Nothing to worry about," Anthony wrote to Kelner to report on the call. "They wanted to ask

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what they'd previously asked: have we considered and disclosed to the client (a) RK's potentially being a fact witness and (b) Covington's own interest with respect to its prior advice to FIG/MF regarding FARA—and that the client is OK proceeding with us? Answer: yes." Ex. 27. Apparently, Mr. Anthony misled the government.[21]

K. Self-Interested Covington Subjected Flynn to Two Days of "Exposure" on Russia and "False Statements" to the FBI.

Covington subjected Mr. Flynn to two full days of proffers on the issues on which he had the greatest "exposure" while they hid their conflict of interest. Not only did they not object to any questions by the SCO, they asked questions of him themselves to elicit answers the SCO wanted, and they strongly encouraged him, the second day, to say what they deemed would "get him through the proffer" to the satisfaction of the SCO. Ex. 21.

After those two days of proffers, Covington acceded to SCO's scheduling demands, cancelled trips, including Mr. Flynn's return home, and took the weekend (November 18-19, 2017) to begin preparing on FARA issues so Mr. Flynn could start a third proffer session on Monday, November 20, 2017.

It was not until *Sunday afternoon*, *November 19, 2017, at 1:13 p.m*., when Mr. Flynn was at his lowest, that Covington partner Anthony finally sent Mr. Flynn with a written request for consent to a "potential" conflict of interest that would have taken an ethics expert to comprehend. Astonishingly, that email referenced and relied on the *wrong* ethics rules. Ex. 28. Mr. Flynn did

[21] Giving Mr. Anthony the benefit of the doubt, he must have been referring to the brief August 30 phone call, when Kelner and Anthony described "a development" that was "not urgent" in an email, then spoke to the Flynns as they were driving to dinner. The lawyers raised the possibility of Rafiekian being indicted on FARA charges; they mentioned "a conflict" but did not elaborate; and they assured Mr. Flynn they would "vigorously defend" the case. Exs.21, 22. That does not even constitute a cognizable "drive-by" of what was required.

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not even read and reply to the email until noon the following day—an hour before his third day of proffers.

He had been told that his freedom and his son's freedom hung in the balance based on how these time-critical proffers went, and he would likely be indicted in days if the proffers "didn't go well"—which meant to SCO's satisfaction. The timing of Covington's "notice" letter was only to Covington's advantage and Mr. Flynn's complete disadvantage. He had been strongly encouraged by his self-interested counsel through the worst two days and increased his "exposure." Secretly-conflicted Covington counsel did him an irreparable disservice, while completely protecting itself. And then they did not even bother making their disclosure in person, so he could ask questions and discuss with them any concerns, nor did they advise him that he *should or must* consult independent counsel before making a decision, since their advice on the matter was, well, conflicted.

After replying to Anthony's email and expressing his uninformed but profound trust for his lawyers, Mr. Flynn proceeded through three more days of "proffers" with the SCO on FARA and tangential issues through November 29, 2017. The exchange of documents for a guilty plea began on November 27, 2017.

L. Before the Plea Documents were Even Shared with Mr. Flynn, Covington Was Gleefully Planning its Marketing Campaign Based on Flynn's Plea

They had barely started exchanging plea documents before Kelner wrote his partners an email on November 27, 2017, with his plan to capitalize for the firm on Mr. Flynn's plea.

> I've been thinking about this. Assuming we reach a resolution of the Flynn case this week, after that resolution is fully public, including the FARA discussion, I would feel free to issue a meatier client advisory on FARA. I am trying, as time permits, to work up a draft. After that goes out, I am thinking we could do a client briefing in DC, one in NY, and one in LA. We would need to generate a unique slide deck for this, based partly on the advisory. We could perhaps divide and conquer, pairing

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> with Zack and Derek, so that we could cover more locations quickly. Just sending out announcements of the events would be good advertising.
>
> This may be a lot to bite off, with the holidays coming up, but we may as well strike when the iron is hot, and I think Flynn would be fine with that, since the chances of our getting paid for his case are looking grim.
>
> Ex. 29.

Brian Smith agreed:

> I agree. I had a conversation last week with Derek, encouraging him and Zack to take advantage of the environment while you and I are constrained from doing so. I like the idea of client briefings, coupled with an advisory. I'm happy to help draft the advisory and update our prior decks, of course.
>
> All that said, I really worry about a press backlash if we launch something right on the heels of a plea. I agree that the General won't mind, but we could take a beating in the press if it's too close to the plea.
>
> With that in mind, we should definitely include Zack and Derek (to make it less of "Flynn's lawyers"). And I think some space from the plea is wise, notwithstanding the challenge that presents with the holidays and doing events while attention is high.
>
> Honestly, I think the attention will remain high, and you doing an event on FARA will generate a lot of attention itself. *Id.*

Their concern for their own reputations, and what marketing advantage they could gain—rather than their client's welfare—is obvious and grossly unethical.

M. Covington Does Not Share with Mr. Flynn the Crucial Details of the Government's Last-Minute "Disclosure."

On November 30, 2017, the day before Mr. Flynn's plea, the SCO has said it disclosed to Covington that "one of the agents who interviewed Mr. Flynn was being investigated by the DOJ Inspector General" and had electronic communications that "showed a preference for one of the

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candidates for President."[22] The SCO also said it disclosed that the agents said Mr. Flynn had a "sure demeanor," and "did not give any indicators of deception" and that the agents "had the impression at the time that Mr. Flynn was not lying or did not think he was lying." But, Kelner and Anthony did not transmit this important information from the SCO to Mr. Flynn. Whether an oversight or deliberate strategy to keep Mr. Flynn from changing his mind about the plea, by that time, it would have exposed Covington to significant reputational risk—at a minimum—*and* scuttle the big marketing campaign.

Mr. Flynn even specifically instructed Anthony and Kelner to call SCO immediately and ask if the agents believed that he lied. Ex. 21. However, when Kelner and Anthony returned to the room where Mr. Flynn was about to sign the plea agreement, they did not inform the Flynns that Van Grack said, "both agents said 'they saw no indication of deception,'" he had "a sure demeanor," and they "did not believe he was lying or he did not believe he was lying." Ex.21. Rather, they said "the agents stood by their statement." Not only had Mr. Flynn neither been properly informed nor properly consented (if such were even possible) to the pernicious conflict of interest impairing his lawyers, but he also signed the plea without being fully informed of or understanding the government's eleventh-hour disclosure. Ex. 21. The SCO rushed them into court the next morning for Judge Contreras to accept Mr. Flynn's plea.

N. Covington Receives Awards for Flynn's Guilty Plea.

[22] The SCO put nothing in writing. Van Grack said nothing to explain the full breadth of the text messages, nor did Van Grack even name Strzok. He did not disclose the massive quantity of messages or the significant ramifications. ECF No. 133-2. Ironically, through 2018, as more news came out, Kelner and Anthony assumed that the President would fire Mueller or pardon Mr. Flynn. Cite email. Indeed, Anthony never anticipated "filing anything in this case, ever." Ex. 30.

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The publicity poured in for Covington. *American Lawyer* named Kelner and Anthony "Litigators of the Week" for Mr. Flynn's plea. Ex. 30. Emails of congratulations and digital backslapping flew.[23] Ex. 31. But the publicity was not all good. On December 30, 2017, Kelner shared the news that "the Government of Israel decided not to retain us to provide FARA advice. While our work on the Flynn matter seems to have initially drawn them to us, the Prime Minister's Office apparently saw things differently and decided that our Flynn representation was a minus not a plus." Ex. 32.[24]

What came next was more evidence of Sixth Amendment violations by Covington. On January 29, 2018, Kelner received an email from a *New York Times* reporter saying that it was the reporter's understanding that "SSA1" (the Agent who interviewed Flynn with Strzok) "was pressured by McCabe to change [his] 302." Ex. 33. Kelner contacted Van Grack and Ahmad and had two conversations over the next two days. While Kelner questioned the SCO, he did not follow-up, much less file a motion to obtain *Brady* evidence. Moreover, these seem to be the questions he was supposed to have asked before Mr. Flynn signed the plea.

O. March 13, 2018, SCO Began Producing Exculpatory Evidence, Which Continues to this Day.

[23] The accolade was sent to all the attorneys and paralegals in the firm, to the marketing department, and to the management committee. Ex. 30. Anthony emailed the other lawyers involved in the case, bragging that it represented their "well-deserved recognition – to be added to your growing clips collection." Ex. 31.

[24] While the loss of this one potential client was a disappointment, it does not take much to imagine how much worse it would have been if they were called upon to testify against Michael T. Flynn or be subject to civil or criminal penalties for any mishandling of FIG's FARA filing in the height of the SCO operation, or even named in a crime-fraud order as in Manafort's case. The Covington lawyers had every reason to keep the Flynn plea from blowing up.

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The SCO finally began producing *Brady* documents in March 2018. Soon an entirely different picture emerged. With every disclosure and IG Report of the last eighteen months, it has become increasingly clear the FBI was not trying to learn facts from Mr. Flynn on January 24, 2017. Rather, the Agents were executing a well-planned, high-level trap that began at least as far back as August 15, 2016, when Strzok and Page texted about the "insurance policy" they discussed in McCabe's office, opened the "investigation" on Mr. Flynn the next day, and inserted SSA 1 surreptitiously into the "sample PDB" the next day to investigate and assess Mr. Flynn. The IG reported:

> "[T]he FBI also had an investigative purpose when it specifically selected SSA 1, a supervisor for the Crossfire Hurricane investigation, to provide the FBI briefings. SSA 1 was selected, in part, because Flynn, who would be attending the briefing with candidate Trump, was a subject in one of the ongoing investigations related to Crossfire Hurricane. SSA 1 told us that the briefing provided him 'the opportunity to gain assessment and possibly some level of familiarity with [Flynn]. So, should we get to the point where we need to do a subject interview…I would have that to fall back on."[25]

P. Covington Recognized Significant Defenses as in 2018, the Attorneys Kept Mr. Flynn on "The Path."

Covington recognized significant defenses were arising from the government's productions in 2018, but the Covington lawyers repeatedly pointed out the worse-case scenario and the parade of horribles to Mr. Flynn, filed no *Brady* motion, and kept Mr. Flynn on "the path." Even worse, even though there was plenty of time and reason to reconsider everything, they took

[25] *See* U.S. Department of Justice (DOJ) Office of the Inspector General (OIG), *A Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation,* Oversight and Review Division Report 20-012 Revised (December 2019), https://www.justice.gov/storage/120919-examination.pdf (last accessed January 2, 2020), (hereinafter *Review of Four FISA Applications and Other Aspects of FBI's Crossfire Hurricane Investigation),* at 408.

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no action to withdraw or insist he consult new counsel for an unconflicted perspective on the many issues that arose. Keeping control of Mr. Flynn, so they could keep him from straying, was clearly part of the Covington agenda.

Q. For the Hearing in this Court, Covington Prepared Flynn Only to Affirm His Plea.

Despite all the new *Brady* material produced and Mr. Flynn's numerous concerns and questions about withdrawing his plea, when it came time to prepare for the scheduled sentencing hearing, December 18, 2018, Anthony and Kelner were clear to Mr. Flynn: he should not withdraw his plea. They warned that if Judge Sullivan asked if he wanted to withdraw his guilty plea he must say, no, because the Court would simply be giving Mr. Flynn the "rope to hang [him]self." When the December 18, 2018, national-news-breaking hearing stunned everyone, and the Flynns accepted this Court's offer to discuss the issue among themselves, the Flynns *instructed* counsel to accept the delay. *See* ECF No. 133 at 17.[26]

V. COVINGTON & BURLING'S LAWYER-TO-CLIENT CONFLICTS OF INTEREST WERE EITHER NON-CONSENTABLE OR NOT VALIDLY CONSENTED TO.

A. Non-Consentable Conflicts of Interest.

Non-consentable conflicts of interest come in two flavors. The first type of conflict—*not* relied on by Mr. Flynn in earlier briefings—but mentioned by this Court in its Memorandum

[26] In Spring 2019, Covington finally insisted, and Mr. Flynn sought new counsel, who in turn sought expert ethics counsel immediately. Both new lawyers instantly recognized the conflict of interest held by Covington. Kelner soon became a witness in the EDVA case against Mr. Flynn's former partner, Rafiekian, and Van Grack and Turgeon proved he was adverse to Mr. Flynn. Kelner's testimony played an important part in convincing the EDVA jury to convict Rafiekian for conspiracy and acting as a foreign agent; however, Judge Trenga acquitted him. *United States v. Rafiekian*, 1:18-cr-457-AJT-1, ECF No. 372.

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Opinion at ECF No. 144 at 81-89, arises under Rule 1.7(a) of the D.C. Rules of Professional Conduct. That rule flatly states that "[a] lawyer shall not advance two or more adverse positions in the same matter." That form of non-consentability is often referred to as arising "by operation of law,"[27] and does not apply to this case.

The second form of non-consentability—squarely presented here—requires reading Rules 1.7(b) and 1.7(c) together. The point of Rule 1.7(c) is that all the conflicts set out in Rule 1.7 (b)—including lawyer-to-client "personal interest" conflicts—are disqualifying unless two conditions are *both* met. Obtaining informed client consent under Rule 1.7(c)(1) is meaningless unless Rule 1.7(c)(2) has *also* been satisfied. That subparagraph puts the onus on *the lawyer* to first make a judgment that the representation is proper: "the lawyer *reasonably believes* that the lawyer *will* be able to provide competent and diligent representation to each affected client" (emphasis added).

If the lawyer cannot satisfy Rule 1.7(c)(2), then the lawyer cannot ethically even *ask* for client consent under Rule 1.7(c)(1). In that situation, the second form of non-consentability arises from what might be called "discretionary judgment."[28] Conflicts falling into this category are non-consentable because the client will never even be given a chance to consent. An ethical lawyer will voluntarily withdraw from the representation, and all lawyers will be *required* to withdraw by D.C. Rules of Professional Conduct Rule 1.16(a)(1) in any event.[29]

Although the second form of non-consentability depends upon the judgment of the lawyer on the scene, that judgment is itself further cabined by the Rules of Professional Conduct. D.C.

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[27] Hazard, Hodes & Jarvis, supra n. 2 at §12.30.

[28] Hazard, Hodes & Jarvis, supra n. 2 at §12.31.

[29] Rule 1.16(a) states in part that "a lawyer shall not represent a client or, where representation has commenced, *shall withdraw from the representation* of a client if: (1) The representation *will* result in violation of the Rules of Professional Conduct or other law" (emphasis added).

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Rule 1.7(c)(2) sets the standard for even seeking client consent at the lawyer's "reasonable belief," but those terms are then defined in Rule 1.0(a) and Rule 1.0(j). Under the former, "belief" is established if the person—here the lawyers at Covington— "actually supposed the fact in question to be true." But for such a belief to be "reasonable," the latter definition specifies that it must be associated with "the conduct of a reasonably prudent and competent lawyer."

The concept of a "reasonably prudent and competent lawyer" is an ethics-related term of art, has some objective meaning, and is given further (indirect) elaboration in the Comments to the Rules:

> The underlying premise [of paragraph (b) and (c)] is that *disclosure* and *informed consent* are required before assuming a representation if there is any reason to doubt the lawyer's ability to provide *wholehearted and zealous* representation of a client or if a client might reasonably consider the representation of its interests to be adversely affected by the lawyer's assumption of the other representation in question. Although *the lawyer* must be satisfied that the representation can be wholeheartedly and zealously undertaken, *if an objective observer would have any reasonable doubt on that issue*, the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interests.

Comment [7] to Rule 1.7 (emphases added).

Under the remarkable circumstances of this case, it would be absurd to maintain that Mr. Flynn's former counsel could have had a "reasonable belief" that they *already had* or *could ever* "provide competent and diligent representation" to their client when their own interests were at equal risk and the choice was "him or us." At minimum, the Covington defense team lawyers had misstated or allowed the government to misinterpret their statement of the origins of Mr. Flynn's election day op-ed in the FARA filing they prepared. They never corrected it in any supplemental filing. They never made an amended filing. They never admitted any role in the travesty. At the same time, they discussed among themselves their *own* potential civil and criminal FARA liability, they feared entry of a crime-fraud order, and they were leery of substantial "headline risks."

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Anything antagonizing the omnipotent SCO jeopardized tipping the delicate balance they struggled to maintain, and they effectively positioned themselves to minimize these and other risks.

Especially telling is the fact that despite multiple opportunities to discuss this crucial problem in person with Mr. Flynn and answer his questions face-to-face, from August until November 19, 2017, when they nominally sought his written "consent" in an extremely problematic email that is discussed below. They chose not to do so. They certainly did not advise him of the advisability—much less the *necessity*—of consulting non-conflicted counsel before making any decision to proceed with the firm.

Even this partial inventory of the lawyers' and law firm's interests that were at risk during the representation renders any purported belief in its integrity wholly untenable and, in the language of the applicable rules, wholly *unreasonable*. No reasonable lawyers or law firm could possibly meet the "reasonable belief" standard when its own work product has put the lawyers and the law firm at serious risk of criminal exposure, reputational damage, "headline risk," and civil liability—not merely the loss of an advantage in a business transaction or civil dispute. No law firm could possibly meet the "reasonable belief" standard in the face of even a minimal risk of its own possible criminal exposure—especially when confronted by an aggressive Special Counsel and the FARA unit of the Department of Justice that Covington itself acknowledged had an unprecedented interest in this matter.

Judging the severity of conflicts of interest to determine whether they rise to the level of non-consentability is especially risky when lawyer-client conflicts are at issue, because the judgment must be made by the very lawyers and law firms whose interests are threatened. There is an ever-present danger, therefore, that the lawyer will—consciously or not—*underestimate* the dangers faced by the client. By contrast, in client-to-client conflicts, at least the lawyer is

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mediating between interests *other than his own*. In this case, not only was the conflict between lawyer and client, the most insidious of all, but the evidence of Covington's self-interest was so significant and dangerous that it could not *reasonably* be set aside.

Lawyer-to-client conflicts also demand the most rigorous review, because if the lawyer *does* proceed to seek the client's consent, the client will have no good way of judging whether the disclosure and explanation of the conflict has itself been compromised by the self-interest of the lawyer seeking consent.

Clients rightly have a bias *towards* trusting the lawyers they have earlier chosen—in whom they have invested hundreds of thousands of dollars, months of time, and developed a trusting relationship. Moreover, they have no realistic ability to double-check the sincerity of the request for consent. This is especially true when any purported "notice" is presented when the client is in the worst possible position, under enormous stress, and watching his life unravel. Indeed, the particular insidiousness of lawyer-to-client conflicts is that even the most well-intentioned lawyer can never be certain whether what would ordinarily have been a reasonable judgment call was tainted by his own self-interest, and if so, to what extent.

The lawyer-client conflicts of interest that are presented here are well recognized not only in legal ethics generally, but in longstanding Sixth Amendment jurisprudence. As the D.C. Circuit said over forty years ago:

> To be sure, most conflicts of interest seen in criminal litigation arise out of a lawyer's dual representation of co-defendants, but the constitutional principle is not narrowly confined to instances of that type. The cases reflect the sensitivity of the judiciary to an obligation to apply the principle whenever counsel is so situated that the caliber of his services may be substantially diluted. *Competition between the client's interests and counsel's own interests plainly threatens that result, and we have no doubt that the conflict corrupts the relationship when counsel's duty to his client calls for a course of action which concern for himself suggests that he avoid*. (emphasis added).

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United States v. Hurt, 543 F.2d 162, 166 (D.C. Cir. 1976) (internal citations omitted.)[30]

B. Even if Any Aspects of the Dramatic Covington-Flynn Conflicts of Interest were Consentable, Mr. Flynn's Purported Consent was not "Informed."

Even *if* the egregious conflicts of interest described throughout *were* consentable, much more would be required before any waiver (or consent) could be deemed valid.[31] The D.C. Rules of Professional Conduct include a number of formal definitions, including Rule 1.0(e) which states that: "'[i]nformed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated *adequate information* and *explanation* about the *material risks* of and *reasonably available alternatives* to the proposed course of conduct." (emphasis added).

Making this already high standard even tougher to meet, Comment [27] to Rule 1.7 provides in part: "Disclosure and informed consent are not mere formalities. Adequate disclosure requires such disclosure of the parties and their interests and positions as to enable each potential client to make a fully informed decision as to whether to proceed with the contemplated representation." More tellingly, Comment [28] to Rule 1.7 contains the important reminder that "under the District of Columbia substantive law, *the lawyer bears the burden of proof that informed consent was secured.*" (emphasis added).

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[30] Cf., *Ambush v. Engelberg*, 282 F. Supp.3d 58 (D.D.C. 2017), in which this Court recognized that a "personal interest" conflict of interest was cognizable for purposes of a motion to disqualify counsel, before it denied the motion chiefly on standing grounds.

[31] In its Memorandum Opinion of December 16, 2019, this Court repeatedly stressed that during Mr. Flynn's original guilty plea and his later colloquy with the Court at the Sentencing Hearing, he was accompanied by and able to consult with his former counsel. ECF No. 144 at 2, 4, 9, 31, and 90. Moreover, this Court noted that *former counsel* had assured *the government* that Mr. Flynn had been made aware of possible conflicts of interests inherent in the representation, and that Mr. Flynn had waived those conflicts [Memorandum Opinion, ECF. No. 144 at 83]. As shown here, the Court's observations were presumably correct, but the assurances given by former counsel were not.

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As the facts discussed above establish, Covington did not give Mr. Flynn adequate or honest information at any stage. It was not until November 19, 2017, two days after the proffer sessions began, and on the eve of the FARA proffers themselves, that Steven Anthony wrote a long email to Mr. Flynn, belatedly seeking his consent. He sought Mr. Flynn's "informed consent" to permit the representation to continue despite the intractable and pernicious conflict under which Covington had already been representing him. Mr. Flynn responded by email at noon the next day, as he was about to go into the third (FARA) proffer. Ex. 28. He did not have time to consult any un-conflicted lawyer before consenting, even if Covington had insisted he do so, which it did not.

Although the Anthony email nominally explained the elements of an "underlying work" conflict of interest, correctly noted the additional difficulty that the Covington lawyers might be called *by the government* as fact witnesses *against* Mr. Flynn, and offered Mr. Flynn an opportunity to consult with independent counsel, it did not advise him that he *should* do so—much less *insist*, and it was far too little and far too late. Covington should have withdrawn in August, three months earlier, when new counsel could have appeared and amended the FARA registration to correct any mistakes, clarify the situation, and fight for Mr. Flynn. Instead Covington charged Mr. Flynn hundreds of thousands of extra fees to reinvestigate its own flawed prior work.

The lawyers passed over weeks of time and at least three face-to-face meetings with Mr. Flynn before the first proffer. They ignored SCO's pointed request to discuss the most threatening conflict with Mr. Flynn—that Mr. Kelner could become an adverse witness to his own client and the "Flynn-lied-to-his-lawyer" theory of his criminal conduct that Covington had every incentive to adopt. Instead, the lawyers acted for the firm's interest by pushing the FARA issues to the later

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days by which time SCO had Mr. Flynn undefended on the §1001 charges about Russia and his own exposure.

If all of this were not enough, Mr. Anthony's email negated any semblance of validity to the very request for consent—let alone Mr. Flynn's supposed agreement to provide that consent. In the November 19, 2017 email, Mr. Anthony stated that "under Rule 1.7 of the D.C. rules of professional conduct, a lawyer shall not represent a client if there is *a significant risk* that the representation will be *materially limited* by a personal interest of the lawyer, unless the client gives informed consent." (emphasis added). But the D.C. Rules say no such thing. What Mr. Anthony actually quoted was language from the American Bar Association Model Rules of Professional Conduct; he made no mention of the actually applicable (and stricter) D.C. Bar rule.

The applicable language in D.C. Rule 1.7 creates a much lower threshold at which a lawyer must bow out: "the lawyer's professional judgment on behalf of the client will be *or reasonably may be adversely affected* by . . . the lawyer's own financial, business, property, or personal interests." (emphasis added). The D.C. standard and the ABA standard quoted by Anthony are dramatically different. "Adversely affected" judgment is much more likely to occur than representation that is "materially limited." And, risks that "reasonably may be" presented will occur far more often than "significant risks."

Seeking client consent under the wrong rule and an inapplicable standard, Covington cannot even plausibly *claim* to have satisfied its obligation to make an "adequate disclosure" to Mr. Flynn to enable him "to make a fully informed decision." D.C. Rule 1.7 Comment [27]. And it certainly was neither timely nor fulsome. The firm cannot shoulder the burden of persuasion—presumably to this Court—that informed consent had been secured. D.C. Rule 1.7 Comment [28]. It decidedly was not.

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Beyond this, even if Mr. Anthony had checked the applicable rules of professional conduct he had been practicing under for many years, his recitation of the risks posed by both of the conflicts in play—*underlying work and adverse testimony*—was generic and bland. There is nothing in his advice that would bring home to a layperson in the crisis, and under stress, Mr. Flynn faced that would alert him to the seriousness and outrageousness of the matter.[32] Even worse, the greatest damage had already been done. His own lawyers had served Mr. Flynn up on a "silver platter" to the SCO to facilitate its "Russia investigation" and increased Mr. Flynn's risk of criminal exposure, innocent misstatements, unrefreshed recollection—and all in the unprecedented pressure of trying to "get through" the proffer to SCO's satisfaction—with no understanding of the real ramifications to himself.

Time and again, the conflicts caused Covington to favor its own interests over those of its client, and, *as a result*, the lawyers repeatedly violated the constitutionally mandated standard of the Sixth Amendment.

VI. BECAUSE OF THE PERVASIVE CONFLICTS OF INTEREST, COVINGTON REPEATEDLY FAILED TO PROVIDE MR. FLYNN WITH THE CONSTITUTIONALLY MANDATED EFFECTIVE ASSISTANCE OF COUNSEL. AS A CONSEQUENCE, HIS DEFENSE WAS IRREPARABLYPREEJUDICED.

To meet the prevailing standard in this Circuit for withdrawing a guilty plea on the ground of the ineffectiveness of his counsel, Mr. Flynn must demonstrate both that counsel's advice or performance was "not within the range of competence demanded of attorneys in criminal cases," and that "there is a reasonable probability that, but for counsel's errors, he would not have

[32] Mr. Anthony contented himself with these words, which are essentially tautological and both self-serving and self-congratulatory: "We do not believe that our commitment, dedication, and ability to effectively represent you will be adversely affected by our own interests, and we believe that we will be able to provide you with competent and diligent representation." He provided no reason or fact on which such a "belief" could have rested.

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pleaded guilty and would have insisted on going to trial." *United States v. Horne*, 987 F.2d 833, 835 (D.C. Cir. 1993) (internal citations and quotation marks omitted). That standard is the result of the Supreme Court's assimilation, in *Hill v. Lockhart*, 474 U.S. 52 (1985), of the general standard for showing ineffectiveness of counsel set out in *Strickland v. Washington*, 466 U.S. 668, 714 (1984). Mr. Flynn's former lawyers from Covington repeatedly acted *outside* the range of competence demanded of attorneys in criminal cases. Because of these failings, Mr. Flynn was essentially on his own (at best) and battling two opponents simultaneously (at worst). As a result, his defense was prejudiced and his ability to make knowing and intelligent decisions in his own interest was destroyed.

In terms of the second prong of the *Horne* test, there is not merely a "reasonable probability that absent counsel's failings he would not have pleaded guilty. There is certainty. If his own lawyers had not withheld critical information from him at the time of the first plea, and had not continued to obscure their own role in creating his predicament, Mr. Flynn would *not* have pled guilty in 2017, and he *would* have withdrawn his plea in 2018.

A. Covington Withheld Crucial Information from Mr. Flynn that the SCO Disclosed Immediately Before Flynn Signed the Plea Agreement.

At perhaps the single most crucial moment of the whole case, Mr. Flynn's former counsel betrayed his trust by withholding the very pieces of information Mr. Flynn needed to make his final decision whether to plead guilty on November 30, 2017. Covington should have shared with Mr. Flynn the precise information the government disclosed to them at the last minute.[33] The

[33] Any "disclosure" by the government—especially when prefaced with a claim of "no legal or ethical obligation to share"—should have been reduced to writing by the government and then shown to the client and personally acknowledged in further writing signed by the client. This was a case of national and international importance. It changed the President of the United States' administration. It altered the course of history and the life of a man and his entire family hung in the balance.

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lawyers did not do so. The Flynns did not hear or understand what the government had advised it told Covington at the eleventh hour. ECF No. 122 at 16. This remarkable and directly prejudicial failure of Mr. Flynn's former counsel to provide the effective assistance of counsel required by the Sixth Amendment at the most crucial time is sufficient alone to require withdrawal of his plea.[34] It is wholly unreasonable and outside the range of acceptable lawyerly behavior, let alone competence, for counsel—*not the government, but the defendant's own counsel*—to withhold crucial information that effectively *disables* the defendant from making a truly voluntary or intelligent decision whether or not to plead guilty.

The information that counsel withheld concerned prior statements that the two FBI agents who interviewed Mr. Flynn in the White House had made about his "sure demeanor," the lack of "indicators of deception," and similar observations. Exs. Michael Flynn Declaration;Lori Flynn Declaration.

In an earlier round of briefing in this case, the government represented that it had communicated this information *to the defendant* on the day that the plea agreement was signed, November 30, 2017 [Gov't's Opp'n, ECF No. 122 at 16]. In its December 16, 2019 Opinion, moreover, this Court accepted and relied on that representation [Memorandum Opinion, ECF No. 144 at 32].As the Flynn Declarations demonstrate, however, that representation was mistaken: the government almost certainly made a disclosure to the defendant's *counsel* on that day, but Covington *did not then communicate the information to the defendant himself*. Of course, in the vast majority of cases, communication to counsel *is* communication to the client, but it was not that day.

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But that merely makes the point—if it needed making—that Mr. Flynn's former attorneys acted far outside of ordinary professional norms. Whether one consults formal Rules of Professional Conduct, the traditions and lore of the legal profession, or case law discussing the meaning of the "assistance of counsel" provision in the Sixth Amendment, the core values of loyalty and zealous service always loom large.

B. Covington Continued to Fail to Act on Mr. Flynn's Behalf as New Evidence Came to Light After His Plea.

Covington repeatedly failed to reevaluate its position in light of significant developments in the case, or to encourage Mr. Flynn to seek new counsel when the developments arose that further invalidated the advice they had already given him. They repeatedly convinced him to "stay on the path" they had placed him on and to discount or render meaningless the astonishing facts that began surfacing from the day after he entered his rushed and misinformed plea.

Moreover, the Covington lawyers had most of 2018, production upon production of *Brady* evidence from the government, and ample time before the next court appearance, in which they could have fully and honestly discussed the conflict of interest with Mr. Flynn. At any time during all of 2018, had Covington been forthright and ethical, Mr. Flynn would have been able to consult meaningfully with non-conflicted counsel well in advance of the December 18, 2018, sentencing hearing in this Court. Instead, time and time again, they persuaded him to "stay on the path."

C. By December 18, 2018, Covington Prepared Mr. Flynn to Reaffirm his Plea of Guilty and Nothing Else.

Before the Sentencing Hearing of December 18, 2018, Mr. Flynn's lawyers essentially advised him only to "stay the path," say as little as possible, *and refuse to consider any suggestion by the Court that he might want to withdraw his plea*. Ex. 21. They explicitly told him: "If the

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judge offers you a chance to withdraw your plea, he is giving you the rope to hang yourself. Don't do it." *Id.*

That advice is the capstone showing how Mr. Flynn's former counsel provided nothing but ineffective and self-interested assistance of counsel to the last. Not coincidentally, it also satisfies the prejudice prong of *Hill v. Lockhart*, 474 U.S. 52 (1985). *See Berkeley*, 567 F.3d at 708. The "result" of the prior proceedings in this case would have been different at every turn. Absent the actual secret self-interest of Mr. Flynn's conflicted former counsel: (i) he would have terminated Covington in August 2017; (ii) he would not have gone into the proffer; (iii) he would not have pled guilty in 2017; and, (iv) he would have withdrawn his plea in 2018. This is confirmed by the change in his defense immediately upon his retention of unconflicted and tenacious lawyers whose allegiance and devotion are only to him.

D. Covington Knew Special Counsel's Statements in the Statement of Offense Regarding the FARA Filing Were False or Wrong, But Covington Simply Stood Down.

Covington's internal emails show it knew the "false statements" asserted by the government in the FARA filing were either false, made by someone other than Flynn, included because of Covington's own judgment calls, or were falsely crafted by the government. *See* ECF No. 150-1 at 35-68. Covington simply stood down.

Covington possessed, from its first conversation with Michael Flynn and the emails provided to it in early January 2017 by Flynn, his former partner Rafiekian, and then-FIG counsel Kristen Verderame, ample information and documents to make a correct FARA filing. The choice

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of information to include in that filing was made primarily by Covington lawyers Smith and Kelner who advertised their expertise as FARA lawyers.[35]

i. The "Smoking Gun" Email Shows Covington Knew the SCO's Assertions Were False.

The email Ex. 34 alone requires withdrawal of the plea and dismissal of this case. On November 27, 2017, three days before the rushed plea of Mr. Flynn, Brian Smith, Kelner, Anthony and other Covington lawyers exchanged a stunning email. It copied the full Covington team on Mr. Flynn's defense, including senior partner Michael Chertoff:

> "Paragraph 5 of the Statement (regarding FARA) is hardly brief or passing, as they suggested it would be. Several of the 'false statements' are contradicted by the caveats or qualifications in the filing. For example, the Statement says 'Flynn made' false statements that are, in the filing, attributed to Arent Fox and the accounting records."

Kelner acknowledges having made "the same point about the caveats" to SCO. Ex. 34. Smith's own quotation marks around "false statements" and "Flynn made" show Smith knew it was the SCO's allegations that were false. Moreover, it suggests that Covington had an understanding with SCO to keep any FARA comments "brief or passing"—about which they were disappointed on their own behalf.

ii. Covington did not inform Mr. Flynn that it was the alleged "false statements" in the Statement of Offense that were false.

Despite Covington's significant re-investigation of all the FARA issues after August 10, 2017, they did not make certain Mr. Flynn understood it was the government's allegations in the Statement of Offense regarding the FARA filing that were the actual falsehoods.[36] For reasons

[35] ECF No. 151-5.

[36] Despite the huge importance of *Brady v. Maryland*, 373 U.S. 83 (1963) to any criminal defendant, and the documented and well-publicized "epidemic of *Brady* violations" in this country, Covington did not make a written *Brady* demand before walking Mr. Flynn into the proffer and a plea that signed away his rights. It finally made a *Brady* demand a year later, but watered-it down

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new counsel cannot imagine, Brian Smith also thought it was "helpful" that "the double negatives in the Information and the Statement" "make it hard to comprehend." Ex. 34.

iii. Covington Counseled Flynn to Sign A Statement of Offense It Knew Was False.

Despite knowing the government's allegations regarding false FARA statements in the Statement of Offense were false or wrong, Covington counseled Mr. Flynn to sign the Statement of Offense. Ex. 21.

iv. Covington *Signed* an Attorney's Acknowledgement of the Statement of Offense.

Kelner and Anthony themselves signed the Statement of Offense for the plea even though they knew they had provided predominantly correct information to the government, and that mistakes, if any, were their own or the government's—not Flynn's.[37] Nonetheless, they joined the

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in deference to the SCO, and it never followed up. Indeed, the defense did not even have the "final Flynn 302" McCabe approved until November 20, 2017. Although some courts have held the duty to produce exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963) does not extend to persons who have not been indicted, competent counsel would have insisted on *Brady* disclosures before permitting Mr. Flynn to walk into a proffer with SCO—not to mention before relinquishing his rights pursuant to a plea. *See White v. United States*, 858 F.2d 416 (8th Cir. 1988) (adopting the Sixth Circuit's framework that acknowledged a *Brady* claim can attack a guilty plea); *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995) (holding that "a defendant challenging the voluntariness of a guilty plea may assert a *Brady* claim"); *United States v. Webb*, 277 Fed.Appx. 775 (10th Cir. 2016) (noting that *Ruiz* only addressed impeachment and pointing to other Circuits that have held the government is still required to produce exculpatory evidence in the plea stage); *United States v. McCoy*, 636 Fed.Appx. 996 (11th Cir. 2016) ("This Court has not decided whether a guilty plea waives a *Brady* claim."). *See United States v. Saffarinia*, 2019 U.S. Dist. LEXIS 176174 (citing *United States v. Hsia*, 24 F. Supp. 2d 14 (D.D.C. 1998) (court no longer trusting the government).

[37] Conflations and choices of words muddied the ridiculous point of who wrote the op-ed. There was no dispute that Rafiekian wrote the first draft. The documents also showed that. ECF No. 150-5 at 7.

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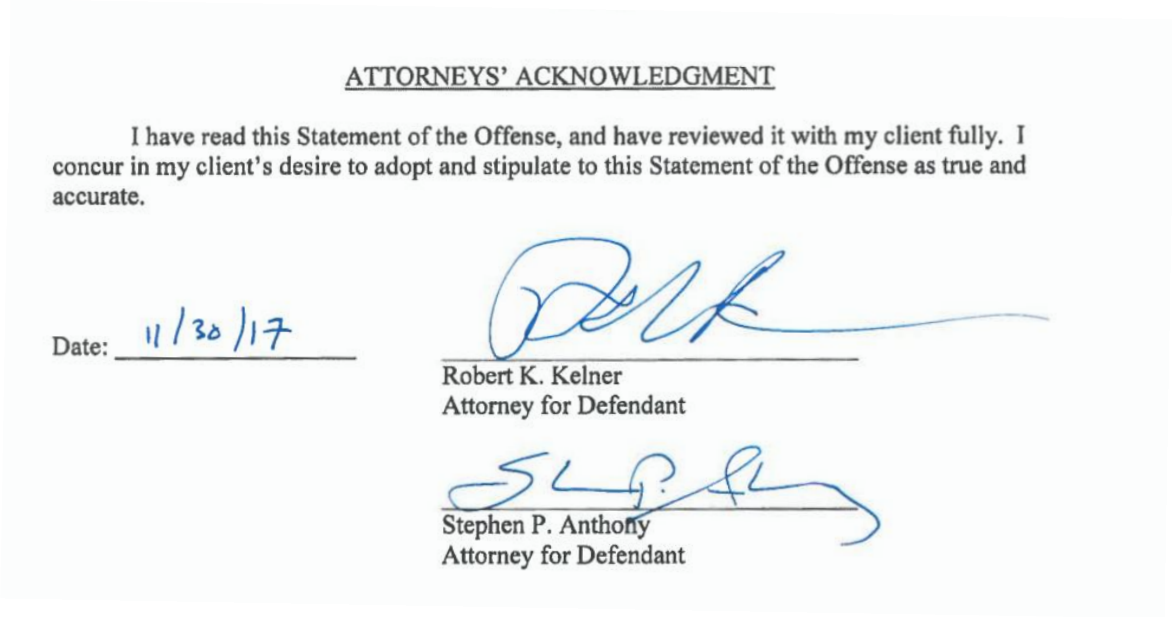
"Flynn-lied-to-his-lawyer" theory of the SCO—the very subject they raised in their October 30, 2017 email and they effectively demolished the "impenetrable wall."



ATTORNEYS' ACKNOWLEDGMENT

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.

Date: 11/30/17

Robert K. Kelner
Attorney for Defendant

Stephen P. Anthony
Attorney for Defendant

VII. THE LAW OF THIS CIRCUIT REQUIRES ALLOWING MR. FLYNN TO WITHDRAW HIS PLEA.

United States v. Cray, 47 F.3d 1203 (D.C. Cir. 1995), which this Court requested counsel address, denied withdrawal of a guilty plea because there was no violation of Rule 11. As more recent circuit decisions hold, Rule 11 violation is only one of the reasons that warrants granting a motion to withdraw a plea. Here, Sixth Amendment violations taint Mr. Flynn's plea, and it cannot stand.[38] *United States v. McCoy*, 215 F.3d 102, 107 (D.C. Cir. 2000) ("A plea based upon advice of counsel that 'falls below the level of reasonable competence such that the defendant does not receive effective assistance' is neither voluntary nor intelligent.") (internal citation omitted).

[38] "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). *E.g., Cuyler v. Sullivan,* 446 U. S. 335 (1980); *Holloway v. Arkansas,* 435 U. S. 475, 481 (1978).

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In *United States v. Taylor*, this Circuit also hammered out parameters for a defendant to benefit from the relaxed *Cuyler v. Sullivan* standard which allows a presumption of prejudice because of an actual conflict of interest. 139 F.3d at 929. Relying on *Cuyler*, this Court wrote that "prejudice[] will be presumed if the defendant demonstrates that counsel actively represented conflicting interests, and that the conflict adversely affected his lawyer's performance." A defendant must "show that his counsel advanced his own, or another client's, interest to the detriment of the defendant. *Id.* at 930. Counsel must know of the conflict, but "if an attorney fails to make a legitimate argument, because of the attorney's conflicting interest…than the *Cuyler* standard is met. *Id.* Mr. Flynn must show that "counsel actually acted in a manner that adversely affected his representation by doing something, or refraining from doing something, that a non-conflicted counsel would not have done." *Id.* Mr. Flynn's case is painfully replete with evidence of Covington acting secretly in its self-interest and to Mr. Flynn's prejudice.

In *United States v. Berkeley*, this Circuit again addressed a conflict of interest and ineffective assistance of counsel as the basis for a plea withdrawal. In that 2009 case, the court reiterated that "prejudice is presumed…if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." 567 F.3d 703, 708 (D.C. Cir. 2009).[39]

Finally, in *United States v. McCoy* (five years after *Cray*), this Circuit applied the two-prong *Strickland* standard to a defendant's request to withdraw his plea based upon ineffective

[39] The defendant claimed that his counsel failed to pursue an entrapment defense, because he knew it would require testimony from a former client, thereby necessitating his own withdrawal from the case. *Id.* at 709. The Court took issue with only one element of the defendant's argument—defense counsel did not know the necessary fact that would have alerted him to the looming conflict. Without his attorney's knowledge of the conflict, the court held the defendant's "logical chain collapses." *Id.* at 709.

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assistance of counsel when the defendant's lawyer calculated the wrong jail sentence he was facing with his plea. 215 F.3d 102 (D.C. Cir. 2000). The Court held that such a mistake in "fail[ing] to follow the formula specified on the face of the guidelines" was deficient performance under *Strickland*. *Id*. at 108. The court found that McCoy did not need to "prove[] he would have gone to trial," only that there was "a reasonable probability" that "but for counsel's mistake he would not have pled guilty." *Id.* Significantly, this Circuit remanded the denial of McCoy's motion to withdraw to the district court with instruction to grant withdrawal. Id. Mr. Flynn satisfies *Strickland*'s test—with or without the more relaxed presumption of *Cuyler*. Most of all, Mr. Flynn meets the "lenient" standard for plea withdrawal pre-sentencing, because he has demonstrated that it is only "fair and just" to grant his motion.

There is not merely a "reasonable probability" that Mr. Flynn would have proceeded differently had his own lawyers been honest with him, there is certainty: (1) he would have hired a different law firm to redo the FARA investigation in August if he had been fully informed; (2) he never would have agreed to a proffer; (3) he would not have been disarmed and effectively unrepresented in the proffer—much less tried to please SCO; (4) he would not have pleaded guilty; and (5) he would have *withdrawn* his plea in December 2018. There are no subtle judgments about "prejudice" here. Covington could not represent the colliding interests of itself vis-à-vis the omnipotent SCO and also represent Mr. Flynn.

VIII. RULE 11 FAILURES ALSO SUPPORT WITHDRAWAL PURSUANT TO *CRAY*.

In what was scheduled to be a sentencing hearing on December 18, 2018, this Court began an unexpected "extended" colloquy with Mr. Flynn. His counsel had prepared him only to refuse to withdraw his plea—lest this Court be "giving him rope to hang himself." Flynn declaration.

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That plea colloquy did not, however, inquire into whether any undisclosed promises or threats induced the plea agreement. Moreover, the Court specifically expressed its dissatisfaction with the underlying facts supposedly supporting the factual basis for the plea. *United States v. Cray*, 47 F.3d 1203, 1207 (D.C. Cir. 1995) ("Where the defendant has shown his plea was taken in violation of Rule 11, we have never hesitated to correct the error.)"

As previously discussed, there was substantial pressure on Mr. Flynn to participate in a quick proffer and reach a quick plea agreement with the government. The government leveraged the threat of charges against Mr. Flynn's son to induce that agreement. Yet the government's decision not to charge his son was not reduced to writing as part of the plea agreement; it was a secret, side deal between counsel. Yet, that "understanding" was one of two necessary pre-conditions for Mr. Flynn to enter into the plea agreement. The government and Mr. Flynn's prior counsel chose not to disclose that agreement to this court. By doing so, they concealed from this Court that the plea was driven by threats and promises that were foreign to the plea agreement, thus showing that the plea was not voluntary. That evidence is now in plain view, and the government's conduct since the plea was entered on December 1, 2017, shows as much. Exs. 21, 22.

Moreover, the Court did not complete the full colloquy to ensure that Mr. Flynn fully understood the conduct that was required for his actions to be considered a violation of 18 U.S.C. § 1001. While the Court did ask him about whether he considered himself guilty, it did not inquire into the basis of that belief. That was crucial here because it may have been that Mr. Flynn was pleading guilty to take responsibility for something that was not criminal activity.

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Finally, the Court was not satisfied with the factual basis for the plea. It said it had "many, many, many questions." Hr'g Tr. Dec. 18, 2018 at 20. The Court, sensing the materiality issues in the case, specifically left those questions open for another day. *Id.* at 50.[40]

IX. CONCLUSION

For these reasons, and/or those briefed at ECF No. 151, this Court should allow Mr. Flynn to withdraw his plea. Indeed, the government should agree that this plea be allowed to be withdrawn. Not only was Mr. Flynn denied his Sixth Amendment right to "zealous counsel" devoted solely to his interests, he was misled, misinformed and betrayed by counsel mired in non-consentable conflicts of interests that only worsened to Mr. Flynn's increasing prejudice.

In addition, when this Court unexpectedly extended his Rule 11 colloquy, it did not address a fundamental point that would invalidate his plea, and it ended the hearing with significant dissatisfaction over the information underlying the factual basis for his plea and with "many, many,

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[40] The element of materiality boils down to whether a misstatement "has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed." *United States v. Gaudin,* 515 U.S. 506, 522-23 (1995). In applying this rule, courts analyze the statement that was made and the decision that the agency was considering. *Universal Health Services, Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 2002-03 (2016). For a misstatement to be material, the agency must show that it would have made a different decision had the defendant told the truth.

The government alleges misstatements that were not material because the FBI agents did not come to the White House for a legitimate investigative purpose; they did not come to investigate an alleged crime. Instead, they came to get leverage over Mr. Flynn at a time when they felt the new administration was still disorganized. So they ignored policies and procedures. They went around the Department of Justice and the White House Counsel's office, and they walked into the National Security Advisor's office under false pretenses. They decided not to confront Mr. Flynn with any alleged misstatement not for a legitimate law enforcement purpose, but rather because they did not know if the effort to purge him from his office would be successful. If it was not, they wanted to maintain a collegial working relationship with him. If Mr. Flynn had answered the questions the way in which they imagine he should, nothing at all would have changed in the actions the FBI would have taken.

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many questions" remaining. There is every reason in this case that the Court must exercise its discretion and allow withdrawal of the plea. It is the only "fair and just" result short of dismissing the entire prosecution for outrageous and egregious government misconduct.

Dated: January 23, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2020 a true and genuine copy of this Supp. Motion to Withdraw Plea of Guilty and Brief in Support was served via electronic mail by the Court's CM/ECF system to all counsel of record, including:

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Brandon L. Van Grack, Special Assistant U.S. Attorney
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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **Plaintiff,** **v.** **MICHAEL T. FLYNN,** **Defendant.**	**Criminal Action No. 17-232-EGS**

DECLARATION OF MICHAEL T. FLYNN

I, Michael T. Flynn, declare:

1. I am a citizen of the United States and more than 18 years old.
2. I served over thirty-three years in the United States Army. Five of those years I spent deployed in active combat in Afghanistan, Iraq, and elsewhere around the world in support of United States foreign policy objectives.
3. I was a life-long Democrat and President Barack Obama twice appointed me to positions that required Senate confirmation. In my final military assignment, I served as head of the Defense Intelligence Agency (DIA) until September 2014.
4. On December 1, 2017 (reiterated on December 18, 2018), I pled guilty to lying to agents of the FBI.
5. I am innocent of this crime, and I request to withdraw my plea.
6. In December 2016, while I was working on then President-Elect Trump's transition team, I received a letter from the FARA unit at the Department of Justice. In that letter I learned that the FARA unit sought information about work that my former business, the Flynn Intel

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Group, did for a company called Inovo BV that related to Turkey. I responded by seeking out respected counsel who were known and respected FARA lawyers; I chose Rob Kelner and his colleagues at Covington & Burling. I met with Covington lawyers on several occasions about FIG's FARA issues. I gave them the information they requested and answered their questions truthfully. The most important instruction I gave them was to "be precise."

7. On January 20, 2017, I entered office as the President's National Security Advisor. Four days later, FBI Deputy Director McCabe called me and asked if I would meet with a couple of FBI agents at the White House. I agreed.

8. While I was willing to oblige Deputy Director McCabe by meeting with a couple of agents on the fourth day of the new administration, I was extremely busy and only had a limited amount of time to give them. I tried to answer their questions as best I could during that brief meeting before again moving on to a schedule packed with new presidential and national security requirements.

9. I was an intelligence officer for over 33 years. Since 1981 and throughout my military and government career, I have held the highest-level security clearances our government provides. When FBI agents came to the White House on January 24, 2017, I did not lie to them. I believed I was honest with them to the best of my recollection at the time.

10. I still don't remember if I discussed sanctions on a phone call with Ambassador Kislyak nor do I remember if we discussed the details of a UN vote on Israel. In regards to the sanctions issue, I told the agents that tit-for-tat is a phrase I use, which suggests that the topic of sanctions could have been raised. The phone calls with Kislyak are still events of

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which I do not have a clear memory and it related to a general category of information (phone calls about foreign policy) that are both sensitive and classified.

11. My baseline reaction to questions posed by people outside of my superiors, immediate command, or office of responsibility is to protect sensitive or classified information, except upon "need to know" and the proper level of security clearance. That type of filter is ingrained in me and virtually automatic after a lifetime of honoring my duty to protect the most important national and military secrets.

12. I am and was fully aware that federal officials routinely monitor, record, and transcribe such conversations with foreign officials.

13. Of course, I was embarrassed and angered by the furor that erupted in the press over the felonious leak of highly sensitive and classified information that was my phone call with Ambassador Kislyak. It was distracting to my work to be the center of such a commotion and it was upsetting to be the cause of disruption to the busy and important work in support of the new President of the United States.

14. I resigned as National Security Advisor on February 13, 2017.

15. I believe my resignation letter to President Trump stated quite accurately what happened and both he and the Vice President graciously accepted my apology. The transition period was an incredibly intense time. I was communicating with representatives of multiple foreign countries on countless and varied issues every day. Frankly, of the national security dangers and concerns that weighed on our minds at that time, "sanctions" on Russia were far from the most pressing threat or concern. We were dealing with many more serious crises around the world. The calls with Ambassador Kislyak were brief and few; they were no more exceptional than my numerous calls and personal interactions with senior

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representatives of governments from around the world during an exceedingly demanding work schedule.

16. After I left the White House, I agreed to engage Kelner, his colleague Stephen Anthony, and other Covington lawyers to represent me in any FBI investigations and, eventually, the Special Counsel's Office investigation. They also continued to represent me and FIG in regards to FARA related issues. At one of my first meetings with Mr. Kelner and Mr. Anthony they asked me if I "had anything" on President Trump, as it would provide much more leverage with the government. I told them from the beginning that I was unaware of President Trump doing anything wrong.

17. With respect to the FARA filing, my Covington counsel did not explain to me that there were any problems with the FARA filing that required Covington to re-examine any of the issues in August 2017. I would have hired independent counsel to reevaluate the FARA filing and amend it if necessary, had I known the severity of the conflict.

18. To the best of my recollection, and from my re-examination of the emails from August 2017, the vast majority of email traffic between me and Covington during that time was focused on the creation of my Legal Defense Fund to pay my skyrocketing legal defense fees (by that time approaching $3 million). To that end, we put our Alexandria, Virginia home on the market in late November or early December 2017 timeframe to help pay the rising legal bills that we were incurring. We then moved to our family home in Rhode Island.

19. In late August 2017, my wife and I were in Rhode Island. Kelner and Anthony emailed us to arrange a telephone call. The call then occurred while we were driving to have dinner with some friends. It was an approximately 15-minute phone call, where we had pulled off

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to the side of a highway. They informed us that there was a development regarding a conflict of interest. They also mentioned the possibility of Bijan being indicted. Speaking to the conflict of interest, they stated that they were prepared to defend us vigorously, if the conflict became an issue. We told them we trusted them.

20. In November 2017, the Special Counsel's Office (SCO) created sudden and intense time-pressure on me to plead guilty. On November 4, 2017, I believe, my Covington attorneys told my wife and me that the Special Counsel's Office (SCO) wanted to conduct a proffer session with me. They told me the SCO "had yet to make a decision about how to proceed with me" and doing a proffer session would be a good way to let the SCO prosecutors "get to know the real Mike Flynn." During this same meeting, my previous lawyers, Mr. Kelner and Mr. Anthony proceeded to walk us through a series of items—essentially describing the risks of doing the proffer. From this meeting, I believe the following day, I agreed to do the proffer, primarily based on my understanding that they said if the proffer went well, being indicted would be less likely; otherwise my indictment would be soon. They did not raise FARA issues with me that day or anything about a conflict of interest.

21. November 16, 2017, was the first day of the proffer with the SCO. That same evening, after concluding the first proffer, we returned to the Covington offices where my attorneys told me that the first day's proffer did not go well and then proceeded to walk me through a litany of conceivable charges I was facing and told me that I was looking at the possibility of "fifteen years in prison."

22. They reiterated the threat of charges against me, my son, as well as the potential of a long term prison sentence. That evening, we discussed and they encouraged me to use words

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and phrases they believed would help me "get through" the next day's proffer and satisfy the special counsel, phrases that are not part of my normal vocabulary.

23. During the second day of the proffer, I used words and phrases that were not really my own voice, and I regret that—just as I regret pleading guilty. People think that a three-star general must know everything, but I was a fish-out-of-water in a terrifying and completely foreign situation, with none of the legal skills necessary to deal with the many things being thrown at me. I hired the team of the best lawyers I had been told I could find, and I relied on them completely. One of the ways a person becomes a 3-star general is by being a good soldier, taking orders, being part of a team, and trusting the people who provide information and support. Lori and I trusted Mr. Kelner and Mr. Anthony to guide us through the most stressful experience of our lives, in a completely incomprehensible situation. I have never felt more powerless. I should have stood my ground firmly for what I knew to be the truth—that I did not lie to the agents, and I should have told this Court on December 18, 2018, that I needed to consult new counsel. My relationship with Covington disintegrated soon thereafter.

24. This effort to "say-what-they-want" approach during the proffer was noted by one of the interviewing agents, who stopped me at some point to ask whether what I was saying was something that really happened, or whether I was just speculating—analyzing the past with the benefit of hindsight. I agreed with the agent I was mostly speculating.

25. I recall Mr. Kelner's mention of a conflict of interest in late August in a brief phone call, but I did not attach any serious significance to it. Likewise, I did not understand the legalistic email I received on November 19, 2017, the eve of my third day of proffers—

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almost three months later. We trusted my attorneys and expected them to put my interests first—as they said they would do.

26. To have devoted my life to my country, only to be accused of crimes, slandered in the media with false and outrageous claims, and have my family threatened was an unimaginable nightmare—one that those who have not walked in these shoes will find difficult to comprehend.

27. Following the four-day proffer, on November 22, 2017, Kelner and Anthony called my wife and me as we were driving home to Rhode Island to spend Thanksgiving with family to tell me the SCO planned to bring charges and that I should consider a plea.

28. The week leading up to November 30, 2017, Kelner and Anthony advised that if I did not plead, I would be indicted on multiple counts and that my son, Michael G. Flynn could or would face indictment. They repeated that I would be looking at the potential of fifteen years in prison, and said that I would be subjected to "the Manafort treatment."

29. On November 30, 2017, as plea negotiations with the SCO were coming to a head, I reiterated to my former lawyers, specifically Robert Kelner and Stephen Anthony, that I did not believe that I had lied in my White House interview with the FBI agents. I reminded them that I had spoken to representatives of well over thirty countries, many in a single 24-hour period, during that very busy holiday season and presidential transition period. In fact, some of these calls occurred while I was supposedly on "vacation" out of the country. Although I may have had an incomplete memory of the many details of certain conversations when speaking to the agents, I did not consciously or intentionally lie.

30. During this same day, later in the afternoon, Kelner and Anthony explained their view of how the government would go about proving its case and urged me to accept the plea deal

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that was on the table. They walked me through the "Final 302" in detail. They explained if I did not accept the plea deal, that I should "expect to be indicted the next day."

31. Still struggling with the decision whether to plead guilty, I asked my former attorneys to make further inquiry with the SCO prosecutors about whether the FBI agents believed that I had lied to them. In the preceding months leading up to this moment, I had read articles and heard rumors that the agents did not believe that I lied, something I also firmly believed.

32. Mr. Kelner and Mr. Anthony left the room to call the SCO prosecutors. When they returned, they informed my wife and me that they had been told that the "agents stand by their statements." Because I was then unaware that the agents had made the statements described in this Declaration, and because I was unaware of what had passed between my former lawyers and the SCO outside of the room, I then understood them to be telling me that the FBI agents believed that I had lied.

33. My Covington attorneys counseled me to sign the Statement of Offense.

34. I agreed to plead guilty that next day, December 1, 2017, because of the intense pressure from the Special Counsel's Office, which included a threat to indict my son Michael, and the lack of crucial information from my counsel. The SCO had already made Michael the subject of their investigation and taken all his files and communications devices (computer, phone, files, and thumb drive). At the time, Michael and his wife had a four-month old baby. Nonetheless, I would not have pled guilty if my former lawyers had informed me that both agents who interviewed me at the White House on January 24, 2017, had advised that a) I displayed a "sure demeanor;" b) I "did not give any indications of deception"; and

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c) both agents believed there was "no indication that I was lying, or that I believed I was lying."

35. At no time before my plea did my former lawyers explain or disclose this to me. Had I been informed of these disclosures, I never would have pled guilty. Moreover, I would have expected my Covington counsel to refuse to allow me to plead guilty with that information.

36. I have spent my entire adult life accepting great responsibility. I accepted the plea agreement to stop the pain and threats to my family and to accept responsibility for what the government I have defended and served for more than thirty-three years said I did wrong. However, if my counsel had informed me both agents said I showed "sure demeanor," "did not give any indications of deception," and that I showed "no indication that I was lying, or that I believed I was lying," I would not have signed the plea agreement, or entered a guilty plea.

37. My former lawyers from Covington also assured me on November 30, 2017, that if I accepted the plea, my son Michael would be left in peace. After I signed the plea, the attorneys returned to the room and confirmed that the SCO would no longer be pursuing my son.

38. It was well after I pled guilty on December 1, 2017, that I heard or read that the agents had stated that they did not believe that I had lied during the January 24, 2017, White House interview (and the other information described in this Declaration). Still later, I heard it reported that former FBI Director Comey and FBI Deputy Director McCabe testified to Congress that the agents did not believe I lied. After learning this information, I reiterated

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to my former attorneys numerous times that I did not lie to the agents and questioned if I might be able to withdraw my plea.

39. Each time I raised this issue with my former attorneys, they urged me to stick with my plea deal, "it was a good deal," or the government would indict me for multiple other offenses and also drag my son back into the crosshairs. Their constant refrain was to "stay on the path" with the deal they had negotiated.

40. In the days leading up to the December 18, 2018, sentencing hearing, Robert Kelner and Steven Anthony continued to urge me to "stay on the path." They predicted (correctly) that the government would recommend a term of probation and that my son would not be further targeted.

41. However, during the December 2018 hearing, Judge Sullivan's decision to proceed with an extended plea colloquy took both me and my former counsel completely by surprise. They had not prepared me for what occurred. The Court's comments that day stunned me. The entire experience was surreal, and that day was one of the worst days of my life.

42. My Covington attorneys had only prepared me for a simple hearing in which I would be sentenced to probation, as the government had agreed. I was not prepared for this Court's plea colloquy, much less to decide, on the spot, whether I should withdraw my plea, consult with independent counsel, or continue to follow my existing lawyers' advice. Prior to the sentencing hearing, they counseled me that if the Court were to ask me if I wanted to withdraw my plea, that I should say "no," because "the Court would be giving you the rope to hang yourself." Regretfully, I followed my lawyers' strong advice to confirm my plea even though it was all I could do to not cry out "no" when this Court asked me if I was guilty.

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43. During the break in the hearing offered by the Court, my former attorneys were as shocked as I was at the colloquy and the way in which the hearing had proceeded. My wife Lori counseled me (and my attorneys) that we should accept the Court's offer to postpone sentencing.

44. In late spring 2019, when Covington actually insisted I seek "independent counsel," I did. New counsel immediately identified the conflict of interest and I then terminated Covington.

45. I realize my statement and determination to assert my innocence means the prosecutors, who already seek to imprison me, may retaliate further by seeking additional charges against me and dramatically increasing the penalty I face.

46. I express my profound apology to this Court, my family, the President, our country, and all who have supported and had faith in me throughout this incomprehensible ordeal. I tried to "accept responsibility" by admitting to offenses I understood the government I love and trusted said I committed. In truth, I never lied. My guilty plea has rankled me throughout this process, and while I allowed myself to succumb to the threats from the government to save my family, I believe that I was grossly misled about what really happened.

47. I will not confirm a plea of guilty I should never have entered. I have served my country honorably all my life, and accepted responsibility for myself and others from a young age (as my sister Clare wrote to you in her beautiful letter on behalf of my siblings). As God is my witness, the truth is I am innocent of these charges and any other alleged "criminal conduct," and I request to withdraw my plea of guilty, and I will fight to restore my good name.

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48. To the best of my recollection, the foregoing is true and correct.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on 19th day of January, 2020.

Michael T. Flynn

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