UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

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

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.

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).

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*

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[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

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

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[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

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[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).

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).

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[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.

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

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[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.

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

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[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.

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.

[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."

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

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[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

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

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.

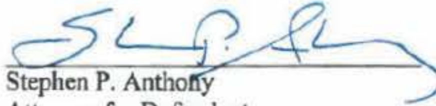
"Flynn-lied-to-his-lawyer" theory of the SCO the very subject they raised in their October 30, 2017 email and they effectively demolished the "impenetrable wall."

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).

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 *RAY*.

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,

[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.

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

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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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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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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.

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[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

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 20 17.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.

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

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[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).

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.

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

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/.

"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.

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

[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.

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

[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).

Dated: January 29, 2020

Respectfully submitted,

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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:

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
555 4th Street, NW
Washington, D.C. 20530

Respectfully submitted,

/s/ Jesse R. Binnall
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Document ID: 0.7.4262.5751-000001

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

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

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

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

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

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

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

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

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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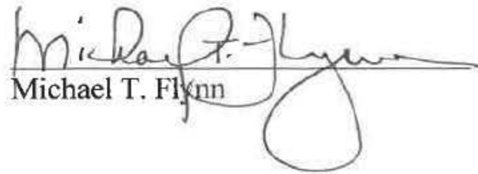
43. During the break in the hearing offered by the Court, my former attorneys were as shocked as I was at the colloquy and the way in which the hearing had proceeded. My wife Lori counseled me (and my attorneys) that we should accept the Court's offer to postpone sentencing.
44. In late spring 2019, 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.

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 29TH day of January, 2020.



Michael T. Flynn

White House Press Office

From: White House Press Office
Sent: Tuesday, February 11, 2020 5:18 PM
To: (b)(6) - Jeffrey Rosen Email Address
Subject: Pool Report # 4 - News from the Oval

From: Tom DeFrank <tdefrank@nationaljournal.com>
Sent: Tuesday, February 11, 2020 5:11 PM
Subject: Pool Report # 4 - News from the Oval

After the veterans' bill signing, POTUS spent about 13 minutes taking questions. Here are the headlines:

- He hasn't gotten involved in the Roger Stone sentencing matter even though he could have, but "I thought it was ridiculous...I thought the (original) recommendation was ridiculous, I thought the whole prosecution was ridiculous."

- He demurred when asked if he might consider commuting Stone's sentence.

- Blamed the severity of the original Stone sentencing proposal on some of the same prosecutors who worked for Robert Mueller; "They ought to be ashamed of themselves...I think it's been disgraceful."

- On two separate occasions he launched on Michael Bloomberg for going to a church and apologizing for his stop-and-frisk policies as NYC mayor. "He was practically crying...pathetic...he's a lightweight and and you're gonna find out. he's also one of the worst debaters I've ever seen."

"Our country doesn't need that kind of leadership."

"Romney is a disgrace."

More hard shots against Lt. Col. Vindman. More TK

Biden may be able to come back but it will be hard. "Obama took him off the garbage heap."

"I don't see how we lose but you never know."

Urge all to check the transcript carefully.

Tom DeFrank - National Journal
(b) (6)

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White House Press Office

From:	White House Press Office
Sent:	Tuesday, February 11, 2020 5:18 PM
To:	patrick.hovakimian4@usdoj.gov
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Urge all to check the transcript carefully.

Tom DeFrank - National Journal
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Greer, Megan L. (OLA)

From:	Greer, Megan L. (OLA)
Sent:	Tuesday, February 11, 2020 5:18 PM
To:	Boyd, Stephen E. (OLA); Escalona, Prim F. (OLA); Hankey, Mary Blanche (OLA)
Subject:	Filing
Attachments:	gov.uscourts.dcd.203583.286.0_5.pdf

Document ID: 0.7.4262.5049

White House Press Office

From: White House Press Office
Sent: Tuesday, February 11, 2020 5:29 PM
To: (b)(6) - Jeffrey Rosen Email Address
Subject: Pool Report #5 - Addendum and Lid

From: Tom DeFrank <tdefrank@nationaljournal.com>
Sent: Tuesday, February 11, 2020 5:27 PM
Subject: Pool Report #5 - Addendum and Lid

A travel/photo lid was called at 4:52.

Again, please check the transcript and cable news video.

Trump on Stone matter: "I have not been involved."

Asked if he knew the whistleblower's identity, he smiled and replied: "I don't want to say, but you'd be surprised."

He didn't break much new ground on Lt. Col. Vindman, but clearly he's still not happy with the ex-NSC officer. He went on at length about the transcript: "we had a totally accurate transcript." As for Vindman, "we sent him on his way" and the military can do whatever it wants.

As he has before, he described Adam Schiff as a sick person."

Tom DeFrank - National Journal
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Tom DeFrank - National Journal
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Escalona, Prim F. (OLA)

From:	Escalona, Prim F. (OLA)
Sent:	Tuesday, February 11, 2020 10:42 PM
To:	Boyd, Stephen E. (OLA)
Subject:	Document1
Attachments:	Document1.docx

Please read closely and double check everything.

DOJ Correspondence (SMO)

From:	DOJ Correspondence (SMO)
Sent:	Wednesday, February 12, 2020 11:31 AM
To:	Hankey, Mary Blanche (OLA)
Subject:	FW: Rep. Pascrell letter to DOJ
Attachments:	Rep Pascrell letter to AG Barr (2-11-20).pdf
Importance:	High

Hi Mary Blanche

Pls provide assignment guidance. Thanks.

From: Greenbaum, Mark (b) (6)
Sent: Wednesday, February 12, 2020 9:10 AM
To: DOJ Correspondence (SMO) <Ex_DOJCorrespondence@jmd.usdoj.gov>
Subject: Rep. Pascrell letter to DOJ

Good morning: Rep. Pascrell would like to send the attached letter to the AG's office. Thank you!

Document ID: 0.7.4262.5057

White House Press Office

From: White House Press Office
Sent: Wednesday, February 12, 2020 11:49 AM
To: (b)(6) - Jeffrey Rosen Email Address
Subject: Remarks by President Trump at Signing Ceremony for S.153, The Supporting Veterans ir STEM Careers Act

The White

Office of the Press Secretary

FOR IMMEDIATE RELEASE
February 12, 2020

REMARKS BY PRESIDENT TRUMP
AT THE SIGNING CEREMONY FOR S.153,
THE SUPPORTING VETERANS IN STEM CAREERS ACT

Oval Office

February 11, 2020

4:13 P.M. EST

THE PRESIDENT: Okay. Thank you very much. We are today signing the Supporting Veterans in STEM Careers Act. It's a big deal and the people behind me have been so involved -- our senators, our congressmen. We're missing a few great senators because we're approving, I think, five judges today. And Marco Rubio was very much involved in this process and helped everybody very much and so I want to thank him.

But we're taking action to increase access to education and job opportunities in science, technology, engineering, math, and computer science for our amazing veterans and our military spouses, their military spouses.

I'm grateful to be joined today by Secretary Robert Wilkie, and senators that are just fantastic people. And they've worked for us so hard, and this is one of the many things they've been

doing. They just came from a great vote for those judges -- some of the judges. There'll be five today.

Senator Kevin Cramer of North Dakota -- thank you very much, Kevin. Senator John Hoeven of North Dakota. And they're going to be bringing their tremendous football team to the White House very shortly because they won the championship for their division, and it's a big deal. And they've won it for a lot of years, right?

SENATOR HOEVEN: Eight out of nine. Go Bison!

THE PRESIDENT: So what's going on in North Dakota that you won it so much?

SENATOR HOEVEN: It's a great program. I mean, eight out of nine. They got a 30-some-game winning streak going. And our first game next year is Oregon at Oregon, so that's going to be a lot of fun.

SENATOR CRAMER: They wanted to test that theory of winning too much. (Laughter.)

SENATOR HOEVEN: Yeah. They like that winning.

SENATOR CRAMER: Yeah. So far, not.

THE PRESIDENT: They're winning so much they can't stand it anymore, right? (Laughter.) No, but we look forward to seeing the team.

SENATOR HOEVEN: Thanks very much for inviting us.

THE PRESIDENT: We did it last year and we look forward to it. We had LSU here. We'll have -- we're going to be having the Super Bowl Champion very soon. They're really looking forward. A great coach. Andy Reid is a great coach. And he's been a great coach, and now he's got that big one and that was an amazing game. But they'll be coming very shortly.

I want to thank Senator Jerry Moran, who is a friend of mine,

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who has been incredible in every way. And we really -- when I think of Jerry, we did a lot of work together, but the thing he did that -- I don't know if people even know it, Jerry -- but something that couldn't be done for 44 years, they say, and that's Veterans Choice.

SENATOR MORAN: Thanks, Mr. President.

THE PRESIDENT: So I want to thank you, Jerry. That was incredible. (Applause.) I mean, it really -- Jerry was so, so knowledgeable. Active, but knowledgeable. A lot of people are active; not a lot of people are knowledgeable. (Laughter.)

And they got Veterans Choice. And that's one of the reasons, I think, the VA is doing so well, because people don't have to wait around for six weeks to see a doctor. They go out, they get the doctor, we pay the bill, and it works out incredibly well. It's been a tremendous success.

Representative Brian Babin. Thank you very much, Brian.

REPRESENTATIVE BABIN: Yes, sir.

THE PRESIDENT: Thank you, Brian. Thank you.

REPRESENTATIVE BABIN: It's good to be here. Good to be here, Mr. President.

THE PRESIDENT: Michael Waltz. Thank you, Michael.

REPRESENTATIVE WALTZ: Yes, sir. Thank you, sir.

THE PRESIDENT: Thanks, Michael.

REPRESENTATIVE WALTZ: All right.

THE PRESIDENT: Great job. And you're going to say a few words, a couple of you, if you want.

Andy Barr of Kentucky. Andy Barr, thank you very much. Hi,

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Andy. Good job today. I watched you at the hearing with our wonderful, high-interest man. He likes high interest rates, right? The Federal Reserve. He likes high interest rates.

Neal Dunn, thank you. Thank you, Neal.

REPRESENTATIVE DUNN: Thank you very much, Mr. President.

THE PRESIDENT: Thank you very much. I appreciate it.

Roger Marshall.

REPRESENTATIVE MARSHALL: Mr. President, congratulations. Another win for the veterans.

THE PRESIDENT: This is a good win. This is a really good -- and, B.J. Lawrence, I want to thank Veterans of Foreign Wars. Right?

MR. LAWRENCE: Thank you, Mr. President. Good seeing you.

THE PRESIDENT: Thank you very much. Here, let me have a hand there. Great job you're doing.

MR. LAWRENCE: Thank you, sir.

THE PRESIDENT: Lou Celli and the American Legion.

MR. CELLI: Thank you, Mr. President.

THE PRESIDENT: Thank you, Lou. Thank you, Lou, very much.

And Nate Anderson, Concerned Veterans for America.

MR. ANDERSON: Thank you, Mr. President.

THE PRESIDENT: Thank you very much. Thank you. Thanks. Good job. A young guy. (Laughter.)

Jared Lyon. We have a Derek Lyons. (Laughter.) I said --

where is Derek Lyons? He's around here someplace, right?

MR. LYONS: Back here, sir.

THE PRESIDENT: But I said -- terrific lawyer. Look at him back there. They're off just with two letters, right? One on the first name; one on the second name. But Jared Lyon, thank you very much. Student Veterans of America.

MR. LYON: Thank you, Mr. President.

THE PRESIDENT: Thank you very much. Great job.

MR. LYON: Thank you, sir.

THE PRESIDENT: Thank you.

Mona Dexter, Hiring Our Heroes.

MS. DEXTER: Thank you, Mr. President.

THE PRESIDENT: And that's a fantastic thing you do. Thank you, Mona. I hear it goes well.

And Elizabeth O'Brien, and that's Hiring -- working along with, Mona -- Hiring our Heroes. So thank you.

MS. O'BRIEN: Thank you, sir. Appreciate it.

THE PRESIDENT: Thank you very much. Appreciate it very much. Great job.

So this has been long in the making. They've wanted to do this for a long time. The bill directs the National Science Foundation to work with other federal agencies to expand veteran eligibility for STEM-related programs and encourages veteran participation in these critical fields. Incredible work and it's so good for our veterans. Our veterans are doing so well because of what we just spoke of with Jerry -- with Choice. It's amazing.

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And the other thing, Jerry, we can talk about is Accountability. I guess if you were going to, say, maybe rate them, Choice is probably number one, but Accountability something -- nobody thought it was possible to do that. And now if people don't take care of our veterans, they can be dismissed; they can be terminated.

And we had to work through civil service. We had to work through the unions. We had to work through a lot of things, but between you and Jerry and some of the people here, we got that done, too. So we have Accountability done. And, I guess, you've let go -- how many -- Robert, how many?

SECRETARY WILKIE: Over 8,000.

THE PRESIDENT: Over 8,000 people that weren't taking care of our vets. And they've been replaced with people that love our vets and love our country. But we had some people that were terrible. We had sadistic people. We had people that stole. We had a lot of people and you couldn't get rid of them, and now you just say, "You're fired. Get out."

My first year in office, I signed legislation to encourage employers to hire American veterans who have risked their lives protecting us. The unemployment rate among veterans has reached a record low. Veteran homelessness has fallen by more than 5 percent.

And totally and permanently disabled veterans have their federal student loan debt -- and you saw that we discharged their loan debt. These are veterans that are very, very seriously disabled. And they go to war -- they have loan debt before they go, and then they have a horrible thing happen to them, and then you'd have people coming after them for the money.

And I'll tell you what: That was a discharge of loan debt and I haven't heard one person say anything negative about it. And they leave -- I mean, in almost all cases, they leave and they're healthy. They go to war, they come back, and they have problems. But they had gone to college or they had gone to school. And we

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discharged that debt, and it's been a very great thing to do. It's something that everybody wanted to do, and very few people fought us on that.

The signing of this bill takes us one step closer to giving our veterans and their families the support that they so richly earned and deserve. And I want to thank you and I want to thank the great people behind me, because it was really them more than anybody else.

And we had a couple of people that we were having a hard time with. I was able to call a couple of people and we got their vote. But this was a tremendous thing that -- that we have.

And I'm going to ask a couple of people -- because this was just given to me by one of the folks. So, when the United States -- the market is setting a record. We set another record today. It will be the 144th time in a three-year period that I'm President. So, for 144 days, Kevin, we set a record stock market, which, to me, means 401(k) and it means jobs. That's what it means to me. To other people, it means other things. But it means we have a great economy.

And we have four trillion-dollar companies. One is Microsoft, one is Apple, one is Google, one is Amazon. So you have Amazon, Google, Apple, and Microsoft. And so, you have an M, you have an A, you have a G, and you have an A. You have "MAGA."

PARTICIPANT: MAGA! (Applause.)

THE PRESIDENT: Who would think of that, John? Huh? Look at that, John. You better report that tonight on Fox -- that great Fox. (Laughter.) Not what it used to be, John, but it's still pretty good. (Laughter.) Not what -- not like the old days, John. They put more Democrats on Fox now than they put Republicans, but that's all right. I think they get it.

Q It's a big country, sir.

THE PRESIDENT: We have big crowds. You've been great, John.

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So I think, maybe before we sign, I'd like to have a couple of the folks, if they'd like. And maybe we'll start with Robert, who's done a fantastic job at the VA.

SECRETARY WILKIE: Yes, sir.

THE PRESIDENT: You can talk a little bit about it.

SECRETARY WILKIE: Well, thank you. Thank you, sir. This is really important. You know, when we -- when we look at America's warriors, most of them, by the time they're 25, they've probably made more life-altering decisions than most Americans make in a lifetime.

And when you look at sailors and airmen who are mixing complex chemicals for fuel, for ships or planes, or artillerymen who are using complex calculus to send rounds downrange, they're the ones we need in science, technology, engineering, and math. They're the ones most ready to do it because they've actually done it in real life. And this is important for them and this is important for their families. It's a great step forward.

THE PRESIDENT: And you've done a great job.

SECRETARY WILKIE: Thank you, sir.

THE PRESIDENT: You know, a constant -- I shouldn't say this to these people, but you used to in the old days -- in all fairness, before Trump, but always for a little while until we got Choice and Accountability done -- every night, there'd be stories, these horror stories about the Vet- -- you know, the VA. And you'd have these horrible stories. Now it's running so well, and I want to thank you for the great job you've done. (Applause.)

You're not finished; you have a lot of plans.

SECRETARY WILKIE: No, I have a lot to do.

THE PRESIDENT: I know that. Thank you very much.

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SECRETARY WILKIE: Thank you, sir.

THE PRESIDENT: Kevin, how about you?

SENATOR CRAMER: Well, I would just say, I think it's interesting that you pointed out the MAGA companies, and these are some of the companies that are going to be looking for the type of talent that this program is going to help encourage. And it's great when you have a booming economy, but the biggest challenge is the workforce. And here, you're merging a supply and a demand and more supply, which is, I think, a winning situation all the way around.

Thank you. Congratulations.

THE PRESIDENT: And, you know, Kevin won a race that was unwinnable. The opponent he beat was unbeatable. They said the only man that might do it -- we discussed it, John --

SENATOR HOEVEN: Yeah. Yeah, we did.

THE PRESIDENT: -- is Kevin Cramer. And couldn't get him to do it. Finally, he decided to do it. His wife is an incredible woman. And he decided to do it. And I think you won by, like, 12 points or something, right?

SENATOR CRAMER: Every time you talk, it gets a little better, so -- (laughter). It was --

THE PRESIDENT: He won by a lot.

SENATOR CRAMER: It was 11. It was 11.

THE PRESIDENT: Eleven? Well, that's not bad. That wasn't too bad.

THE PRESIDENT: Anyway, well, great job and we appreciate it.

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SENATOR CRAMER: Thank you.

THE PRESIDENT: You've been fantastic. Really fantastic. John? Please.

SENATOR HOEVEN: Well, absolutely. There's a real shortage in these areas. So we're talking science, technology, energy -- or engineering, mathematics. And so this is a double win, right? This is a win for our veterans and this is a win for our economy because we need people in these professions.

In North Dakota, we're a big ag state, we're a big energy state; we're tying it together with technology. What better way to do it than to help our vets get this STEM education and then get them in these great jobs?

Again, double win for our veterans, for our economy.

THE PRESIDENT: And you're a great football state, too. (Laughter.)

SENATOR HOEVEN: Yeah, we really are. Bison! Go, Bison. Absolutely.

THE PRESIDENT: Thank you. Hey, Jerry, why don't you say something, and we'll finish off with the signing.

SENATOR MORAN: Thank you, Mr. President. First, let me thank you. From even before you were being sworn in, you prioritized veterans. You promised that you would serve those who served our country as President of the United States, and you have done so. You have been a champion for those who served our nation. And your Secretary, Secretary Wilkie, has been a great ally in that regard. He is somebody that we appreciate working with.

I'm honored now to chair the Senate Veterans Committee. I will do my best to do my duty to those who serve. It's an honor to stand here beside those who not only served their country, but now spend their time serving other veterans.

And so, we're a team and we'll work hard to make certain that those who served our nation get the respect.

This particular bill -- any time we can provide jobs, economic opportunity for veterans, we're doing something certainly good. But as our committee focuses on mental health and suicide, one of the best things that can happen to someone who is in the community, somebody who has returned home from battle, is to be a part of that community.

And earning a living and the self-esteem and the joy that comes from having a job helps us in all our battles in trying to make sure that every veteran, every place in the country has a bright future, that they're living the American Dream.

So, thank you, Mr. President.

THE PRESIDENT: Thank you, Jerry. Will you be making some adjust- -- a little adjustments, one way or the other, to Veterans Choice? Do you see that happening over a period of time?

SENATOR MORAN: Mr. President, we held a hearing last week in front of our committee, in which we had the Deputy Secretary with us to talk about its implementation. We want to do oversight and make sure that it's being done in a way that meets the needs of these men and women and the veterans they serve. So, yes.

THE PRESIDENT: Fantastic job. Thank you, Jerry.

SENATOR MORAN: Thank you. Thank you very much.

THE PRESIDENT: We appreciate it very much. Mike Pence? Please.

THE VICE PRESIDENT: Well, I don't think there's ever been a President in my lifetime who's done more for the men and women who have worn the uniform of the United States than President Donald Trump. And today is just the latest installment, Mr. President, in keeping the promises you made to the American people in 2016.

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We've reformed the VA through Veterans Choice and through Accountability. Eight thousand people no longer at the VA because they weren't providing the level of care that you demanded.

ut these members of the House and the Senate, and Chairman … level of care that you demanded. But these members of the House and the Senate, Chairman Moran, have a heart for our veterans. And today is just one more installment, in your commitment and the American people's commitment, to make sure that those who served our nation -- and they are our nation's best -- get America's best.

So, thank you, Mr. President.

THE PRESIDENT: Thank you, Mike, very much. Thank you very much.

Fellas, please, go ahead.

REPRESENTATIVE BANKS: Mr. President, as a veteran of the war in Afghanistan, your veteran record, as the Vice President said, is second to none. From Accountability at the VA, to the largest investment in modernizing electronic health records, on top of everything else that your administration has done, you're always going to be known as the veterans' President. And I, as a younger veteran (inaudible), we appreciate it very much. (Applause.)

THE PRESIDENT: I appreciate that. Very nice. Thank you.

REPRESENTATIVE BARR: Mr. President, you mentioned the hearing today with the Federal Reserve.

THE PRESIDENT: Right.

REPRESENTATIVE BARR: And what we heard today was, with this Trump economy, we have over 7 million more job openings in America than we have unemployed Americans. And many of those job openings are in the STEM fields.

And so, as was mentioned before, this is a two-fer. We get

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to fill these STEM vacancies with the best and brightest our country has to offer these veteran heroes. And, at the same time, we get to fill these jobs, these employer jobs. And this follows on the other bill that you signed last year that enhanced the Forever GI Bill that provides STEM scholarships for these heroes.

So, thank you.

THE PRESIDENT: Thank you very much. Brian?

REPRESENTATIVE BABIN: Hey, Mr. President, as a veteran and also as the ranking member on the Science -- the Subcommittee on Space and Aeronautics, I can tell you we appreciate your leadership, and I agree that you have been, really, the most pro-vet President that I have seen in my lifetime.

THE PRESIDENT: Thank you, Brian.

EPRESENTATIVE BABIN: And I just want to thank my colleagues that have introduced this bill. And I was proud to be a co-sponsor of it. And STEM is where it's at. And if we want to catch up with our adversaries and stay ahead of them, I should say, then this could -- there's no more important thing that we can be doing.

Thank you for what you've done.

THE PRESIDENT: Good. Thank you, Brian. Thank you very much.

REPRESENTATIVE BABIN: Yes, sir. Yes, sir.

THE PRESIDENT: Please.

REPRESENTATIVE MARSHALL: Promises made and promises kept. Those veterans made a promise to serve our country. Candidate Trump made a promise to take care of the veterans, to rebuild our military. You've kept your promises, Mr. President. Thanks for keeping your promises. We're grateful.

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THE PRESIDENT: Thank you very much. Appreciate it. (Applause.) Please.

REPRESENTATIVE WALTZ: Mr. President, I would say to those MAGA companies: Talk is cheap. If you want to support your veterans, hire one. Right? Put your money where your mouth is; hire veterans. To Microsoft, Apple, Google, and Amazon: Talk is cheap in this town.

THE PRESIDENT: Yeah, it's a good point.

REPRESENTATIVE WALTZ: If you want to support a veteran, hire one.

And if we're going to keep up with the Chinese, if we're going to stay the world leader, then we have to put our best and brightest from the military and our best and brightest from the private sector.

THE PRESIDENT: Good. Very good point.

REPRESENTATIVE WALTZ: Great job.

RESPRESENTATIVE DUNN: Mr. President, I want to say thank you. But also, I want the veterans who are gathered to know that everybody really is pro-veteran. I mean, we do love you. We're proud of all the things that you've done.

I'm very grateful to have had the help of virtually everybody standing here, and certainly Secretary Wilkie, to introduce this bill.

I want to call out a few people who also deserve credit for that. One is Senator Marco Rubio. Another is Representative Alexander Lamar, who is no longer -- I'm sorry, Lamar Alexander -- who is no longer with us. He's -- in 2018, he was in the House and he helped me author that bill. And also, our Democrat co-sponsor, Conor Lamb, was on that and helped us get it across the floor this time.

So it's a -- it's a real win for the veterans. I'm a veteran, too. And I want to let (inaudible) say to Secretary Wilkie: I've spent the last two days on the MISSION Act and VA; I'm a ranking member of VA Health. And I have had two great days with the VA. I mean, a lot of great improvements for our veterans in health. Thank you very much. And thank you, Mr. President.

THE PRESIDENT: Thank you very much.

Would anybody like to say -- you're the ones that really should be speaking up. Would you like to say something? Please, go ahead.

MR. CELLI: Thank you, Mr. President. You know, no one knows more than veterans. The American Legion supports, obviously, our nation and our veterans. And no one knows more than veterans than what it takes to be technologically advanced. And they have the greatest stake in making sure that our country is at the forefront of technology when it comes to their weapons systems, when it comes to their information technology, and when it comes to cybersecurity. So this is really a win for every veteran that's out there. Thank you, sir.

THE PRESIDENT: Great. Thank you very much. Please.

MS. O'BRIEN: Thank you. On behalf of Hiring Our Heroes, thank you to you and to your administration for what you have done. I want to point out this isn't only an opportunity for us to provide paths into STEM for veterans, it's also an opportunity for us to welcome a chronically underemployed and unemployed population in our military spouses and put them to work by upskilling and reskilling them.

THE PRESIDENT: Great.

MS. O'BRIEN: So, thank you. Appreciate it.

THE PRESIDENT: Thank you. Please, go ahead.

MS. DEXTER: Well, as we continue to work to bridge the

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civilian-military divide in the business community and help build America's workforce with the best and the brightest -- you know, reiterating what Liz said -- this provides that opportunity to allow the veterans to upskill into what the current roles are, along with, you know, the support of the military spouses and employment.

THE PRESIDENT: Thank you.

MS. DEXTER: Thank you.

THE PRESIDENT: Great job. Thank you very much. Great.

Folks?

MR. LYON: Mr. President, just a big thank you. Student Veterans of America is representing nearly a million veterans who are in college using their GI Bill right now. And the top three majors that veterans are pursuing in college this moment are business, just like yourself, as well as science, technology, engineering, and math, and health-related fields.

So as we look at this post-9/11 era -- those veterans who have served in Iraq and Afghanistan -- we are looking at the most educated generation of veterans because the solid GI Bill that you have improved with the Forever GI Bill, as well as the members here have extended, and the great leadership of Secretary Wilkie to implement this law -- this is a great opportunity to help transitioning service members enter the workforce and to continue to educate our youth through K-12 education in the STEM fields. So just an all-around win, and thank you, Mr. President.

THE PRESIDENT: Great job. Thank you very much.

MR. ANDERSON: Mr. President, veterans experience unique challenges and unique solutions are often required to remedy that, so thank you. Thank you, Senator Wil- -- thank you, Secretary Wilkie, for pursuing policies that allow veterans to live healthy, prosperous lives after service.

THE PRESIDENT: Thank you very much. Great job. Great job.

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THE PRESIDENT: Thank you very much. Great job. Great job everybody. So let's do the signing, right?

You see a man named Chuck Grassley. You don't get better than Chuck, right? (Laughter.) That's great. Thank you.

(The bill is signed.) (Applause.)

Here you go. Go ahead. So you go ahead; just pass them out.

(Ceremonial signing pens are distributed.)

So thank you very much. This is a great honor. And we'll just do this, because some people like to see this. Can you see that, fellas, okay?

I don't know if they're going to ask questions, but it might not be on this subject.

Q Mr. President --

THE PRESIDENT: It should be on the subject. Go ahead. Ask on -- ask on stem cells [sic].

Q On a separate subject, if I can -- (laughter) --

THE PRESIDENT: Oh, I'm shocked. I'm shocked. I'm shocked.

Q Can you -- you seemed, from your tweet today, that you were upset about the Roger Stone sentencing. Did you --

THE PRESIDENT: Yeah, I thought it was ridiculous that -- that of that --

Q Did you ask the Justice Department to change that?

THE PRESIDENT: No, I didn't speak with the Just- -- I'd be able to do it if I wanted. I have the absolute right to do it. I stay out of things to a degree that people wouldn't believe. But I didn't speak to them. I thought the recommendation was

ridiculous. I thought the whole prosecution was ridiculous.

And I look at others that haven't been prosecuted or -- I don't know where it is now. But when you see that, I thought it was an insult to our country. And it shouldn't happen. And we'll see what -- what goes on there. But that was a -- that was a horrible aberration.

These are the -- I guess, the same Mueller people that put everybody through hell. And I think it's a disgrace. No, I have not been involved with it at all.

Q Would you consider commuting or --

THE PRESIDENT: I don't want to talk about that now. I think it was a disgraceful recommendation.

Q But do you think it would be appropriate --

THE PRESIDENT: They ought to be ashamed of themselves -- what they've done to General Flynn, what they've done to others. And then the really guilty ones -- people that have committed major crimes -- are getting away with it. I think it's disgrace. We'll see what happens.

Go ahead, John.

Q I was going to say, Mr. President, you took on Michael Bloomberg -- and Brad Parscale, did as well -- over stop-and-frisk. Yet, in 2016 and 2018, you praised Rudy Giuliani for the stop-and-frisk program. So what's different about what Bloomberg said from what you believe the program (inaudible)?

THE PRESIDENT: Well, I'll tell you what: I looked at it and I watched him pander at a church and practically beg for forgiveness. I wouldn't have begged for forgiveness. I mean, he was doing his job at the time. And then he -- when he went up to the church, I thought it was disgraceful. But I put something out and it was so -- it was pretty nasty. And I thought, you know, I'm looking to bring the country together, not divide the country

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further.

But when he went up to a church and he apologized for everything he has ever done, that was only for getting votes. And I think probably people understand that.

Yeah, please.

Q Mr. President, you are traveling to India later this month.

THE PRESIDENT: I am.

Q Can you tell us something about --

THE PRESIDENT: I am. I spoke with Prime Minister Modi and it's going to be very -- I don't know who's going, but it's -- he said we will have millions and millions of people.

My only problem is -- so, last night, we probably had 40- or 50,000 people. Far more than anyone else. But when we have 50,000 people nowadays, fellas, I'm not going to feel so good -- (laughter) -- because he thinks we'll have 5- to 7 million people just from the airport to the new stadium. (Laughter.)

And, you know, it's the largest stadium in the world. He's building it now. It's almost complete and it's the largest in the world. And he's a friend of mine. He's a great gentleman. And I look forward to going to India. So we'll be going at the end of the month.

Q Do you plan to sign a trade deal with the Indians when you travel?

THE PRESIDENT: They would like to do something, and we'll see. If we can make the right deal, we'll do it.

Q Mr. President, do you know who "anonymous" is?

THE PRESIDENT: I don't want to say, but you'd be surprised.

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You would be surprised, but I don't want to say.

Q Then can you talk a little bit more about some of the recent departures from the White House, including the Vindman twins and --

THE PRESIDENT: No, well --

Q -- and pending departures?

THE PRESIDENT: Yeah, I obviously wasn't happy with the job he did. First of all, he reported a false call. That wasn't what was said on the call. What was said on the call was totally appropriate. And I call it a "perfect call." I always will call it a "perfect call." And it wasn't one call; it was two calls. There were two perfect calls. There was no setup. There was no anything. And he reported it totally differently.

And then they all went wild when I said that we have transcripts of the calls. And they turned out to be totally accurate transcripts. And if anybody felt there was any changes, we let them make it because it didn't matter. So we had accurate -- totally accurate transcripts. And it turned out that what he reported was very different.

And also, when you look at Vindman's -- the person he reports to -- said horrible things: avoided the chain of command, leaked, did a lot of bad things. And so we sent him on his way to a much different location and the military can handle him any way they want. General Milley has him now. I congratulate General Milley. He can have him, but -- and his brother also.

So we'll -- we'll find out what happened. I mean, we'll find out. But he reported very inaccurate things. You understand that, John. When you look at his report and then when you look at what, actually, the exact the words - fortunately, I had the words, because otherwise we would have had a lot of people lying. And we were able to do it. So fortunately, we had transcripts of those calls.

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I think you guys all agree with that. Right?

PARTICIPANT: Yes, it was.

THE PRESIDENT: Wasn't it nice? After they said these horrible things and made up these horrible, horrible lies about what was said in the call -- and then I said, "Here is the call." I had a transcript. If I didn't have a transcript, it would've been my word against their word.

But there were other people on that call. There were many people on that call -- Mike Pompeo. And I know that. When I speak to the head of state of countries, presidents, prime ministers, etcetera -- there are always a lot of people on those calls, especially form the other countries, I imagine. I don't know that for a fact, but I know for a fact that we have a lot of people on those calls.

Who would say something wrong? I wouldn't say it wrong anyway, but who would say it wrong when you have -- when a call is loaded up with, you know, sometimes as many as 25 people, sometimes as many as 3 or 4 or 2. But there's always people on those calls. I fully know that. But that was a perfect call, and it wasn't reported the way it was reported -- like, "oh it was so terrible." That was a very nice call. That was a very friendly call.

A couple of things: The President, as you know, of Ukraine stated very strongly that there was no pressure, there was no anything, there was nothing wrong. And it was really a very sad state of affairs that our country wasted that much time on nothing -- on nothing. And I want to thank our three senators that are here for agreeing with me.

I mean, you had one grandstander. He's always been a grandstander.

Q Are there more departures to come?

THE PRESIDENT: Oh, sure. Oh, sure. Absolutely.

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Q Mr. President, when you say that --

THE PRESIDENT: There always are.

Q When you -- when you say that the military can deal with Vindman any way that they want, are you sugg- --

THE PRESIDENT: Yeah, no, well, that's up to them.

Q Are you suggesting he should face --

THE PRESIDENT: He is now -- he's -- he's over with the military.

Q Do you think he needs to face disciplinary action?

THE PRESIDENT: That's going to be up to the military. We'll have to see. But if you look at what happened, I mean, they're going to certainly, I would imagine, take a look at that. But, no, I think what he did was just reported a false call.

If you look at what he said, and then -- and I'll tell you, the one worse was -- you look at Shifty Schiff. Take a look at what he did. He made up my conversation. And then we dropped the transcript, and he almost had a heart attack.

Didn't he say eight "quid pro quos"? Think of it. So eight times I said the same thing, according to Shifty Schiff. If I ever did that -- so you say it once. Now you say it again. We're talking about a man that I never even met before. Now you say it a third time, a fourth time, a fifth time, a sixth time, seven times, eight times. Eight times he said that I asked for the exact same thing in one call.

After the third time, they'd have to take you away, okay? He's a sick person. Schiff is a very corrupt politician and he's a sick person. So he made up -- totally made up. And because he's shielded, which a lot of people didn't know -- but because he's shielded by the halls of Congress -- you know, in terms of what he says -- you can say anything you want

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what he says -- you can say anything you want.

He made up a story; it was total fiction. And then at the end, he said, "Don't call me, I'll call you." That's a mob statement. Very famous statement in numerous movies, one in particular. That's a mob statement. "Don't call me, I'll call you." He said that I said that. He said that I said, eight times, "quid pro quo." Well, there were no times "quid pro quo." Nothing. That whole thing was corrupt and a disgrace.

And Romney is a disgrace for voting against. He's a disgrace.

Okay. Anybody else?

Q Mr. President, can I ask you to elaborate a little bit more on stop-and-frisk? It's going to big a big issue in the coming days.

THE PRESIDENT: Sure.

Q Do you support that policy? And is it, as you said in a tweet --

THE PRESIDENT: I support anything we can do to get down crime and to get rid of drugs. But I think when a man is with stop-and-frisk his whole life, and then he decides to go Democrat, and he goes to a church and he's practically crying -- he looked like hell. He's practically crying, saying how -- what a horrible thing he did. I think that's so disingenuous. You know what I'm talking about, fellas. That was so -- of Bloomberg.

Look, he's a lightweight. He's a lightweight. You're going to find that out. He's also one of the worst debaters I've ever seen. And his presence is zero. So he will spend his three, four, five million dollars. Maybe they will take it away. Frankly, I'd rather run against Bloomberg than Bernie Sanders, because Sanders has real followers -- whether you like him or not, whether you agree with him or not. I happen to think it's terrible what he says. But he has followers. Bloomberg is just buying his way in.

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But we're going to find out what happens. We're going to find out. But when you watch -- go back to the church, where he apologized for everything he ever did, practically -- and he looked pathetic. Our country doesn't need that kind of leadership. Thank you all very much.

Q What do you think of the Biden campaign?

THE PRESIDENT: It's stumbling. It's mumbling. Not pretty. But we'll see how he does. You never know. You never know. The only time you knew for sure was the Trump campaign. Trump was going to win.

Q Do you think he can turn it around in South Carolina?

THE PRESIDENT: He can always turn it around. You know, I think it's not going to be easy. I think he can turn it around, yeah. I think he has a shot. He's got probably almost as good a shot as anyone, but he's going to have to work. He's going to have to work very hard, much harder than they thought.

Don't forget, when he first ran I called him "1 percent Joe," because every time he ran, he only got 1 percent. And then Obama took him off the garbage heap. But he only got 1 percent. Right, John? You know that. One percent Joe. But now he's -- what? -- 19 percent Joe. It's better. He's doing better. He's made a lot of progress.

But it's going to be -- it's going to be very interesting. I think we have -- we're going to have a very interesting Democrat race and I think we're going to have a very interesting election.

But our country is doing better than it's ever done. We've rebuilt our military. Thanks to the people back here, we've taken care of our vets at a level that they've never been taken care of before. Jerry -- I mean, never even close. And it's really something that we're very proud of.

You look at the economy -- I mean, we have the best economy

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we've ever had. We have the best employment numbers we've ever had: African American, Asian American, Hispanic American.

We're going to protect our Second Amendment. The Democrats want to take away the guns. They want to take away everyone's gun. They want to destroy the Second Amendment.

So when you add it all up, you know, I don't see how we lose, but you never know. It's politics. Right, fellas? Thank you all very much. Thank you.

END 4:46 P.M. EST

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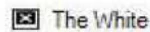
White House Press Office

From: White House Press Office
Sent: Wednesday, February 12, 2020 11:49 AM
To: patrick.hovakimian4@usdoj.gov
Subject: Remarks by President Trump at Signing Ceremony for S.153, The Supporting Veterans ir STEM Careers Act


The White

Office of the Press Secretary

FOR IMMEDIATE RELEASE
February 12, 2020

REMARKS BY PRESIDENT TRUMP
AT THE SIGNING CEREMONY FOR S.153,
THE SUPPORTING VETERANS IN STEM CAREERS ACT

Oval Office

February 11, 2020

4:13 P.M. EST

Duplicative Material

White House Press Office

From:	White House Press Office
Sent:	Thursday, February 20, 2020 2:29 PM
To:	(b)(6) - Jeffrey Rosen Email
Subject:	Travel pool report #1: Rolling to Hope for Prisoners event

From: "Rogers, Katie" <katie.rogers@nytimes.com>
Date: February 20, 2020 at 11:25:03 AM PST
Subject: Travel pool report #1: Rolling to Hope for Prisoners event

Motorcade is rolling at 11:24 am to the Las Vegas Metropolitan Police Department, where POTUS is going to deliver a commencement speech for the Hope for Prisoners graduating class.

Your pooler has asked about any White House reaction to the sentencing of Roger Stone.

Back to the event: It will be streamed on the White House YouTube page, and here are some excerpted remarks passed along from the White House:

Excerpts from President Donald J. Trump's Commencement Address at Hope for Prisoners Graduation Ceremony (as prepared)

...

We are here to reaffirm that America is a nation that believes in REDEMPTION. We believe in Second Chances. And we want returning citizens to rebuild their lives – and to help us rebuild our country.

...

Today we declare that you are made by God for a great and noble purpose. You are valued members of our American family and we are determined to help you succeed.

...

When I ran for president, I pledged to fight for those who have been forgotten, neglected,

overlooked, and ignored by politicians in our nation's capital.

...

When I learned about the case of Alice Johnson, it was clear to me that there were injustices in our sentencing laws that caused people who made small mistakes to pay a huge price.

...

To redress unfairness in the justice system, just over one year ago I led the effort to pass landmark Criminal Justice Reform. Others had tried and failed, but we got it done.

...

We have begun a nationwide campaign to encourage businesses to expand Second Chance Hiring. When we say Hire American, we mean ALL AMERICANS.

...

Together, we are building the most prosperous economy—and the most inclusive society—ever to exist. We want EVERY CITIZEN to join in America's unparalleled success and EVERY COMMUNITY to take part in America's extraordinary rise.

...

The unemployment rate for African Americans, Hispanic Americans, and Asian Americans has reached the lowest levels in history. African American poverty has declined to the lowest rate ever recorded.

...

In fact, the Trump economy might be the best Criminal Justice Reform of all. Our jobs market is so strong that businesses are recruiting former prisoners off the sidelines in great numbers.

...

There is more opportunity, more equality, and more potential in America today than in any society in the history of the world.

...

Katie Rogers
White House Correspondent
The New York Times
(b) (6)

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Katie Rogers
White House Correspondent
The New York Times
(b) (6)

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White House Press Office

From: White House Press Office
Sent: Thursday, February 20, 2020 2:29 PM
To: patrick.hovakimian4@usdoj.gov
Subject: Travel pool report #1: Rolling to Hope for Prisoners event

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Katie Rogers
White House Correspondent
The New York Times
(b) (6)

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Katie Rogers
White House Correspondent
The New York Times
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White House Press Office

From:	White House Press Office
Sent:	Thursday, February 20, 2020 3:24 PM
To:	patrick.hovakimian4@usdoj.gov
Subject:	Travel pool report #3: NEWS - POTUS on Roger Stone - "very good chance of exoneratio

From: "Rogers, Katie" <katie.rogers@nytimes.com>
Date: February 20, 2020 at 12:08:27 PM PST
Subject: Travel pool report #3: NEWS - POTUS on Roger Stone - "very good chance of exoneration"

From the stage at the commencement ceremony, POTUS had this to say about Roger Stone's sentencing:

"I want to address today's sentencing of a man, Roger Stone. I'm following this very closely and I want to see it play out to its fullest because Roger has a very good chance of exoneration in my opinion."

Calls him a "character" and says he likes him. "He's a smart guy, he's a little different, but those are sometimes the most interesting. But he's a good person. His family is fantastic."

"Roger was never involved in the Trump campaign for president. Early on before I announced he may have done a little consulting work or something. He's a person who he knows a lot of people having to do with politics. It's my strong opinion that the forewoman of the jury ... is totally tainted."

On fully pardoning Jon Ponder, a former bank robber, three-time convicted felon and host of this event: "We are giving him absolute consideration and I have a feeling he's going to get that full pardon. I'm going to give him an early congratulations, alright?"

He recognized Sheldon and Miriam Adelson, also at this event. "What a family. Miriam is a great doctor. She doesn't have to be a doctor. You can trust me, her husband doesn't need the money. But she devotes her life to addiction."

Recognized Jared Kushner on criminal justice reform: "He does a lot. He works hard."

Event is ongoing.

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