COVINGTON

BEIJING BRUSSELS LONDON LOS ANGELES
NEW YORK SAN FRANCISCO SEOUL
SHANGHAI SILICON VALLEY WASHINGTON

Robert K. Kelner

Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 5503
rkelner@cov.com

By E-Mail and First Class Mail

May 22, 2017

The Honorable Richard Burr
The Honorable Mark R. Warner
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Re: Subpoena to Lieutenant General Michael T. Flynn (Ret.)

Dear Chairman Burr and Vice Chairman Warner:

We write in response to the Senate Select Committee on Intelligence's subpoena dated May 10, 2017, requesting that our client, Lieutenant General Michael T. Flynn (Ret.), produce any documents he may have that are responsive to a broad range of requests covering an 18-month period of time. Specifically, the subpoena requests that he create a list of all meetings and all communications between himself and Russian officials, and that he produce records of all communications between himself and President Trump's campaign that were in any way related to Russia, for the period from June 16, 2015, to January 20, 2017.

In our May 8, 2017, letter to the Committee, we reiterated General Flynn's eagerness to give a full account of the facts and to answer the Committee's questions, should the circumstances permit, including assurances against unfair prosecution. We stated that, absent such assurances, General Flynn would respectfully decline your request for an interview and for the production of documents.

Our client's position remains unchanged. Producing documents that fall within the subpoena's broad scope would be a testimonial act, insofar as it would confirm or deny the existence of such documents. Under the Fifth Amendment to the United States Constitution and applicable court precedents, no person is required to offer testimony when he has "reasonable cause to apprehend danger from a direct answer," even when that person is entirely innocent and has committed no crime.[1] Indeed, the United States Supreme Court has "emphasized that one of the Fifth Amendment's basic functions . . . is to protect *innocent* men . . . who otherwise might be ensnared by ambiguous circumstances."[2] The Court held that even "truthful responses of an innocent witness" may provide the Government with evidence that could be used against

[1] *See Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (internal quotation marks omitted).

[2] *Id.* (emphasis in original) (internal quotation marks omitted).

the witness.[3] And, as courts have repeatedly held, the protection offered by the Fifth Amendment privilege extends to producing documents where the act of production itself is testimonial in nature.

The context in which the Committee has called for General Flynn's testimonial production of documents makes clear that he has more than a reasonable apprehension that any testimony he provides could be used against him. Multiple Members of Congress have demanded that he be investigated and even prosecuted. He is the target on nearly a daily basis of outrageous allegations, often attributed to anonymous sources in Congress or elsewhere in the United States Government, which, however fanciful on their face and unsubstantiated by evidence, feed the escalating public frenzy against him.[4] Additionally, in the intervening time since the Committee issued its subpoena, the Department of Justice has appointed a special counsel to investigate these and related matters. This environment creates a "reasonable cause to apprehend danger," giving rise to a constitutional right not to testify. A detailed explanation of the legal basis for respectfully declining to comply with the Committee's requests follows below.[5]

<u>The Fifth Amendment Privilege Bars Congress From Compelling A Witness to Provide Testimony Through The Act of Producing Documents</u>

The Fifth Amendment protects an individual from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This privilege applies in congressional investigations. In *Watkins v. United States,* Chief Justice Warren stressed that "the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. . . . Witnesses cannot be compelled to give evidence against themselves." 354 U.S. 178, 187-88 (1957). The Supreme Court later held in *United States v. Hubbell*, 530 U.S. 27, 34 (2000), that the right not to be compelled to give testimony against oneself applies as well to the compelled production of *documents* that would be "testimonial" in nature. Specifically, the act of producing documents in response to a subpoena may have a "compelled testimonial aspect" when "the act of production itself may implicitly communicate statements of fact" that the documents "existed, were in his possession or control, and were authentic." *Id.* at 36 (internal quotation marks omitted) (quoting *United States v. Doe*, 465 U.S. 605, 613 & n.11 (1984)).

---

[3] *Id.*

[4] These include leaks that purport to describe classified briefings, documents, and intelligence collection. Any actual leaks of classified information -- including reported leaks of signals intelligence -- constitute criminal offenses by government officials violating their duty to protect classified information.

[5] General Flynn reserves the right to assert, in connection with the subpoena, any other privilege or protection provided by the Constitution, statute, or common law.

A. *If the government fails to demonstrate prior knowledge of requested subpoenaed documents, the act of producing those documents is testimonial.*

Two Supreme Court precedents, *Fisher v. United States*, 425 U.S. 391 (1976) and *United States v. Hubbell*, as well as *Hubbell's* progeny, *United States v. Ponds*, 454 F.3d 313 (D.C. Cir. 2006), inform the determination of whether a production of documents in response to a subpoena has a testimonial character. *Fisher* involved IRS investigations in which the government learned that the investigated taxpayers had given their attorneys tax returns prepared by their accountants in the years in question. The Court highlighted that the subpoenaed documents belonged to the accountant and not the target of the investigation, were prepared by the accountant, and are "the kind usually prepared by an accountant working on the tax returns of his client." *Fisher*, 425 U.S. at 411. The Court concluded that insofar as the government was not relying on the taxpayer to prove the existence of the documents, production of the documents was not "testimonial" because "the existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." *Id.*

In contrast to *Fisher*, a case in which investigators already knew that documents existed and exactly where they were located, the investigators in *Hubbell* lacked "any prior knowledge of either the existence or the whereabouts" of the subpoenaed materials. *Hubbell*, 530 U.S. 27, 44-45. *Hubbell* arose out of the Whitewater investigation, in which Independent Counsel Kenneth Starr sought broad categories of information from Webster Hubbell, a target of the investigation. The subpoena included such requests as "any and all documents reflecting, referring, or relating to" the broad contours of the investigation, as well as "Hubbell's schedule of activities." *Id.* at 41, 47. In examining the broad requests in the subpoena, the Court emphasized that "it [was] apparent from the text of the subpoena itself that the prosecutor needed respondent's assistance both to identify potential sources of information and to produce those sources." *Id.* at 41. The Court ruled that the acts required to respond to such a broad subpoena were testimonial in nature, comparing them to "answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions." *Id.* at 41, 43.

The U.S. Court of Appeals for the District of Columbia Circuit applied *Hubbell* and *Fisher* in *United States v. Ponds*, framing the inquiry as concerning "an act of production that, in its testimonial character, falls somewhere between the response to a fishing expedition addressed in *United States v. Hubbell*, and the production of documents whose existence was a 'foregone conclusion' in *Fisher v. United States*." *United States v. Ponds*, 454 F.3d 313, 316 (D.C. Cir. 2006). The court emphasized that "[w]hether an act of production is sufficiently testimonial to implicate the Fifth Amendment . . . depends on the government's knowledge regarding the documents before they are produced." *Id.* at 320. Significantly, the *Ponds* court put the burden on the *government* to show that the act of production would not be testimonial, requiring the government to show its pre-subpoena knowledge of the "existence, possession, and authenticity of the subpoenaed documents with reasonable particularity such that the communication inherent in the act of production can be considered a foregone conclusion." *Id.* at 324 (internal citations omitted).

The court contrasted the concept of "reasonable particularity" with mere general knowledge of an event or topic, finding that mere "prior knowledge [of a topic] . . . cannot suffice to establish [the government's] prior knowledge of the existence and location of the documents relating or referring to those topics." *Id.* at 326. Ultimately, the court held that "[b]ecause the government has failed to show with reasonable particularity that it knew of the existence and location of most of the subpoenaed documents . . . Ponds' act of production was sufficiently testimonial to implicate his right against self-incrimination under the Fifth Amendment to the Constitution." *Id.* at 316.

B. Because the Committee's subpoena fails to demonstrate with reasonable particularity prior knowledge of the requested documents, General Flynn's act of production would be testimonial in nature.

The great breadth of the Committee's subpoena to General Flynn suggests that his act of producing the requested documents, if they even exist, would be testimonial in nature, given that the Committee has not demonstrated knowledge of the "existence, possession, and authenticity of the subpoenaed documents with reasonable particularity such that the communication inherent in the act of production can be considered a foregone conclusion." *Id.* at 324. Schedule A of the subpoena requests production of:

> 1. A list of all meetings between you and any Russian official or representative of Russian business interests which took place between June 16, 2015, and 12pm on January 20, 2017. For each meeting listed, please include the date, location, all individuals present, and complete copies of any notes taken by you or on your behalf.
>
> 2. All communications records, including electronic communications records such as e-mail or text messages, written correspondence, and phone records, of communications that took place between June 16, 2015, and 12pm on January 20 2017, to which you and any Russian official or representative of Russian business interests was a party.
>
> 3. All communications records, including electronic communications records such as e-mail or text message, written correspondence, and phone records, of communications related in any way to Russia, conducted between you and members and advisors of the Trump campaign prior to 12pm on January 20, 2017.

In sum, the subpoena demands a list of "*all* meetings" with "*any* Russian official," "*all* communication records" with "*any* Russian official," and "*all* communication records . . . related *in any way* to Russia" conducted with unnamed "members and advisors of the Trump campaign," that occurred over an 18-month period. The broad sweep and lack of specificity of these demands clearly reflect that the Committee does not have specific knowledge regarding

the existence of any particular responsive documents. *See United States v. Doe*, 465 U.S. 605, 613 n.12 (1984) ("The most plausible inference to be drawn from the broad-sweeping subpoenas is that the Government [is] unable to prove that the subpoenaed documents exist . . . .").

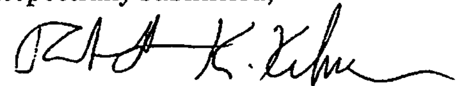
The first demand for a list of all meetings with any Russian official (or "representative of Russian business interests") over 18 months fails for want of specifying particular individuals, locations, or dates. Moreover, this is not merely a demand to produce existing documents. It is actually an interrogatory demanding that General Flynn create a new document containing information that the Committee seeks to discover. This is a demand for direct testimony, not merely a testimonial act of production. As in *Hubbell*, General Flynn's compilation of such a list would be akin to him "answering a series of interrogatories asking [him] to disclose the existence and location of [meetings] fitting certain broad descriptions." *Hubbell*, 530 U.S. at 41. The Court in *Hubbell* held that the witness could not be compelled to prepare such a list without violating his Fifth Amendment privilege. Finally, the nebulous term "representative of Russian business interests" necessarily would require General Flynn, in responding to the request, to testify as to who is or is not a "representative of Russian business interests." This too constitutes direct testimony that is clearly covered by the Fifth Amendment privilege.

The subpoena's second and third demands are even broader in scope than the first, given their request for *all* communication records with *any* Russian official. The complete lack of specificity in the request makes clear that, unlike in *Fisher*, the existence of any document responsive to the Committee's request is far from a "foregone conclusion." *Fisher*, 425 U.S. at 411. The fact that the subpoena also demands all documents in the custody, control or possession of General Flynn's "agents, employees, or representatives" underscores that the Committee does not know whether responsive documents exist, who may possess them, or where they are located. Were General Flynn to provide responsive documents, he would be providing compelled testimony about "the documents' existence, custody, and authenticity." *Hubbell*, 530 U.S. at 28. This is precisely the sort of testimonial information that the Fifth Amendment privilege is designed to protect from compelled disclosure. *See In re Grand Jury Subpoena, Dated Apr. 18, 2003*, 383 F.3d 905, 911 (9th Cir. 2004) (finding an act of production to be testimonial in nature where a "subpoena seeks all documents within a category but fails to describe those documents with any specificity . . . .").

The Committee must demonstrate more than general knowledge that a meeting may have occurred; the Committee must demonstrate "knowledge of the existence and possession of the *actual documents*" in order to prove that the existence and location of the documents is a "foregone conclusion." *Id.* at 910 (emphasis added). The Committee simply has not met its burden of showing its "pre-subpoena knowledge of the existence, possession, and authenticity of the subpoenaed documents with reasonable particularity." *Ponds*, 454 F.3d at 324.

Instead, as in *Hubbell*, the Committee's broad demands makes it "apparent from the text of the subpoena itself" that the Committee needs General Flynn's "assistance both to identify potential sources of information and to produce those sources." *Hubbell*, 530 U.S. at 41. As a consequence, the subpoena seeks to compel General Flynn to offer testimony through the act of producing documents that may or may not exist. In these circumstances, General Flynn is entitled to, and does, invoke his Fifth Amendment privilege against production of documents.

Respectfully submitted,



Robert K. Kelner
Stephen P. Anthony
Brian D. Smith