UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO COMPEL THE PRODUCTION OF *BRADY* MATERIAL AND FOR AN ORDER TO SHOW CAUSE

On December 1, 2017, defendant Michael T. Flynn entered a plea of guilty to a single count of knowingly and willfully making material false statements to the Federal Bureau of Investigation ("FBI") regarding his contacts with the Government of Russia's Ambassador to the United States ("Russian Ambassador") during an interview with the FBI on January 24, 2017 ("January 24 interview"), in violation of 18 U.S.C. § 1001(a)(2). Prior to his guilty plea, the government provided to the defendant information that could arguably be construed as exculpatory to that offense. The defendant subsequently waived any right to additional discovery, as part of his guilty plea. Thereafter, this case was reassigned to this Court, which issued a Standing Order governing disclosures to the defendant. *See* Standing Order, *United States v. Flynn*, No. 17-cr-232 (D.D.C. Feb. 16, 2018) (Doc. 20) ("Standing Order"). Notwithstanding the defendant's waiver, the government provided more than 22,000 pages of additional discovery to the defendant. On December 18, 2018, the Court engaged in an "extension … of the plea colloquy." Hearing Transcript at 5, *United States v. Flynn*, No. 17-cr-232 (D.D.C. Dec. 18, 2018) ("12/18/2018 Hearing Tr."). During this inquiry, the defendant specifically denied having "any concerns that potential *Brady* material or other relevant material"

had not been provided to him. *Id.* at 8. The Court found that the defendant's earlier guilty plea was entered "knowingly, voluntarily, intelligently, and with fulsome and satisfactory advice of counsel." *Id.* at 7.

The defendant now files a motion to compel production of alleged *Brady* material and requests that the Court issue an order to show cause why the government should not be held in contempt for failing to comply with the Court's Standing Order. In so doing, the defendant misstates the facts of the case and misrepresents the nature and extent of the discovery that the government has provided. The defendant likewise misapplies *Brady v. Maryland*, 373 U.S. 83 (1963), seeking information that goes well beyond what could be favorable and material to his guilt or punishment. The defendant predicates much of his request on conspiracy theories, demanding that the government engage in a fishing expedition for documents that could offer support for those theories. Irrespective of whether such documents exist, a fact that the government does not concede here, the defendant fails to establish that such information is relevant—let alone favorable and material—in this criminal case.

Prior to addressing each of the defendant's requests in the body of this motion and attached appendix (Appendix A), the government sets forth the scope of its disclosure obligations, as appropriately cabined by the defendant's relevant conduct and the Court's considerations at sentencing. Next, as relevant to the defendant's requests and allegations of misconduct, the government details the extent and nature of its discovery productions to the defendant. As described herein, far from engaging in misconduct in this case, the government has complied, and will continue to comply, with its discovery and disclosure obligations, including those imposed pursuant to *Brady* and the Court's Standing Order. Therefore, the motion should be denied, and this case should proceed to sentencing.

BACKGROUND AND STATEMENT OF FACTS

A. Summary of the Defendant's Relevant Conduct

The defendant's sweeping *Brady* demand mischaracterizes what constitutes favorable and material information in the context of the false statements charge to which the defendant has pleaded guilty, and the aggravating conduct on which the government intends to rely at sentencing. As described in the Statement of Offense, this case is about multiple false statements that the defendant made to multiple Department of Justice entities. *See* Statement of Offense, *United States v. Flynn*, No. 17-cr-232 (D.D.C. Dec. 1, 2017) (Doc. 4) ("SOF"). Specifically, the defendant pleaded guilty to "willfully and knowingly" making material false statements about his communications with the Russian Ambassador during an interview with the FBI on January 24, 2017. Information, *United States v. Flynn*, No. 17-cr-232 (D.D.C. Nov. 30, 2017) (Doc. 1). The defendant's false statements concerned (i) conversations with the Russian Ambassador beginning on December 29, 2016, about the defendant's request that Russia refrain from escalating the situation in response to U.S. Sanctions against Russia; and (ii) conversations with the Russian Ambassador beginning on December 22, 2016, regarding the defendant's request that Russia vote against or delay a United Nations Security Council resolution. *See* SOF at ¶ 3-4.

In addition, in the Statement of Offense, the defendant admitted making other false statements on multiple documents that he filed on March 7, 2017, with the Department of Justice pursuant to the Foreign Agents Registration Act ("FARA"), which pertained to a project that he and his company worked on, beginning in July 2016, for the principal benefit of the Republic of Turkey. *See* SOF at ¶ 5. As the defendant acknowledged, in the filings he omitted the material fact that officials from the Republic of Turkey provided supervision and direction over the project, and made materially false statements. *See id.* Although the Information to which the defendant pleaded guilty did not reference FARA, the conduct was included because of its

relevance for sentencing, as described in the Statement of Offense, Presentence Investigation Report, and in the parties' sentencing submissions. *See* Government's Memorandum in Aid of Sentencing at 3-4, *United States v. Flynn*, No. 17-cr-232 (D.D.C. Dec. 4, 2018) (Doc. 46) ("Gov't Sent'g Memo"); Defendant's Memorandum in Aid of Sentencing at 7, *United States v. Flynn*, No. 17-cr-232 (D.D.C. Dec. 11, 2018) (Doc. 50) ("General Flynn does not take issue with the description of the nature and circumstances of the offense contained in the Government's sentencing memorandum and the Presentence Investigation Report").

There is no other criminal conduct to which the defendant has admitted guilt or on which the government intends to rely at sentencing.[1] This case does not involve, and the government does not ask that the Court consider at sentencing, an allegation that the defendant was "an agent of Russia." *See, e.g.,* Motion to Compel the Production of *Brady* Material and for an Order to Show Cause at 2, 6 (Request ##18, 20), *United States v. Flynn*, 17-cr-232 (D.D.C. Aug. 30, 2019) ("Mot. to Compel"). It does not involve conduct or communications before July 2016. *See, e.g.,* Mot. to Compel at 4-6 (Request ##8, 15, 16, 27). It does not involve allegations that the defendant *always* lied to the government about his foreign contacts. *Cf., e.g.,* Mot. to Compel at 2-3. It does not involve National Security Agency databases. *See* Flynn Brief in Support of Motion to Compel Production of *Brady* Material and for an Order to Show Cause at 8, *United States v. Flynn*, 17-cr-232 (D.D.C. Aug. 30, 2019) (Doc. 109) ("Brief in Support"). And it does not involve allegations about leaking classified information—by the defendant or others. *See, e.g.,* Mot. to Compel at 7 (Request #35); Brief in Support at 8.

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[1] Based on filings and assertions made by the defendant's new counsel, the government anticipates that the defendant's cooperation and candor with the government will be contested issues for the Court to consider at sentencing. Accordingly, the government will provide the defendant with the reports of his post-January 24, 2017 interviews. The government notes that the defendant had counsel present at all such interviews.

B. The Government Complied with *Brady* and the Standing Order, and Disclosed Arguably Exculpatory Information Before the Defendant Pleaded Guilty

The defendant's motion mischaracterizes what, how, and when discovery has been provided, and the nature of that discovery. It ignores that the government provided arguably exculpatory information to the defendant before his guilty plea on December 1, 2017, omits that the defendant waived the right to additional discovery as part of that guilty plea, and avoids mention that the defendant and his counsel represented to the Court—moments before he was scheduled to be sentenced—that the government had satisfied its *Brady* obligations. As detailed below, the government has fully complied with its disclosure obligations under *Brady* and the Court's Standing Order.

Brady requires the government to disclose all evidence that is "favorable to an accused . . . where the evidence is material either to guilt or punishment." *See, e.g., United States v. Bagley*, 473 U.S. 667, 667 (1985). Before the defendant first pleaded guilty, the government provided the defendant and his counsel information in its possession that could arguably be construed as exculpatory—some of the very information that the defendant now claims is being withheld. In late November 2017, the government provided the defendant with the FBI report for the defendant's January 24 interview. On November 30, 2017, before the defendant signed the plea agreement, the government made additional disclosures. It disclosed that as part of the Department of Justice ("DOJ") Inspector General's ("IG") review of allegations regarding actions by the DOJ and FBI in advance of the 2016 election, the IG identified electronic communications of one of the agents who interviewed the defendant on January 24, 2017, former Deputy Assistant Director ("DAD") Peter Strzok, that showed a preference for one of the candidates for President. The government further relayed to defense counsel that those communications were part of the IG's review, including the IG's assessment as to whether those

communications constituted misconduct by DAD Strzok. Additionally, the government informed defense counsel that DAD Strzok said that the defendant had a sure demeanor and did not give any indicators of deception during the January 24 interview, and that both of the interviewing agents had the impression at the time that the defendant was not lying or did not think he was lying. In response to these disclosures, the government answered questions from defense counsel.

With all of this information, the defendant and his counsel signed the plea agreement on November 30, 2017. In other words, before the defendant and his counsel signed the plea agreement, they knew that that IG was investigating one of the interviewing agents for misconduct, they knew that the interviewing agents believed the defendant did not give indicators of deception during the interview, and they possessed the January 24 interview report. The defendant and his counsel subsequently agreed to "waive certain rights afforded by the Constitution of the United States and/or by statute or rule," including "the right to any further discovery or disclosures of information not already provided at the time of the entry of your client's guilty plea." Plea Agreement at 6, *United States v. Flynn*, No. 17-cr-232 (D.D.C. Dec. 1, 2017) (Doc. 3) ("Plea Agmt"). The defendant also affirmed that "I am pleading guilty because I am in fact guilty of the offense identified in this Agreement." *Id.* at 10.

On December 1, 2017, the defendant pleaded guilty before the Honorable Rudolph Contreras, pursuant to the signed plea agreement. At the start of the hearing, Judge Contreras explained to the defendant that as part of his plea he was "going to be giving up a number of your rights, both statutory and constitutional, so it is critical that you understand everything that goes on here because I have to determine at the end whether you have given up those rights knowingly, voluntarily, and with the advice of your counsel." Hearing Transcript at 3, *United States v. Flynn*, 17-cr-232 (D.D.C. Dec. 1, 2017) ("12/1/2017 Hearing Tr."); *see also id.* at 9

("You would have the right to challenge the government's case against you by seeking to have the charges dismissed or having the evidence against you suppressed or thrown out. Do you understand you would have that right if you did not waive them?"). The defendant was then sworn in, and indicated that he wished to waive those rights. *Id.* at 3, 12. The defendant also affirmed that he accepted and agreed to the terms of the plea agreement. *Id.* at 19. At the end of the hearing, the defendant pleaded "[g]uilty," because he is "guilty and for no other reason[.]" *Id.* at 30.

Following the defendant's guilty plea before Judge Contreras, the case was randomly reassigned to this Court, which entered an initial Standing Order. On February 16, 2018, the Court entered a new Standing Order because the earlier order was a "prior version" that had been inadvertently entered. *See* Standing Order. In its February 16 Order, the Court explained that it entered the Standing Order because it does so "in every criminal case." *Id.* The Standing Order requires the government to produce "any evidence in its possession that is favorable to the defendant and material to either the defendant's guilt or punishment." Standing Order at 2. With respect to cases that are resolved pursuant to a guilty plea, such as this one, the Court ordered the government to produce "any exculpatory evidence in the government's possession." *Id.* at 2-3. That obligation does not extend to impeachment evidence. *See id.* at 3 n.1; *United States v. Ruiz*, 536 U.S. 622, 633 (2002) (government not required "to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant").[2]

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[2] While the government is not contesting the applicability of the Standing Order here, it notes that "[c]riminal defendants may waive both constitutional and statutory rights, provided they do so voluntarily and with knowledge of the nature and consequences of the waiver." *United States v. Mabry*, 536 F.3d 231, 236 (3d Cir. 2008) (citations omitted); *accord United States v. Guillen*, 561 F.3d 527, 530 (D.C. Cir. 2009); *see also Ruiz*, 536 U.S. at 629-30 (2002) ("A defendant, for example, may waive his right to remain silent, his right to a jury trial, or his right to counsel ...."). *See also United States v. Taylor,* 254 F. Supp. 3d 145, 159-60 (D.D.C. 2017) (concluding that the defendant could not rescind his otherwise-enforceable waiver of a

Five days after the Standing Order was issued, on February 21, 2018, the Court entered a Protective Order Governing Discovery. *United States v. Flynn*, No. 17-cr-232 (D.D.C. Feb. 21, 2018) (Doc. 22). A few weeks later, on March 13, 2018, the government began its extensive production of additional documents to the defendant. The government's production of materials comprises over 22,000 pages of documents, the overwhelming majority of which (over 21,000 pages) [3] pertain to the defendant's false statements on his March 7, 2017 FARA filing. The remainder are disclosures relating to the defendant's false statements to the FBI on January 24, 2017.

Contrary to defendant's assertions, the government has provided and will continue to provide all information in its possession favorable and material to guilt and punishment. The government is not in possession of *Brady* evidence that we "have repeatedly failed to produce." Brief in Support at 3. Nor has the government "affirmatively suppressed evidence (hiding *Brady* material)." *Id.* at 4. Remarkably, the supposed "suppressed" evidence cited by the defendant concerns Strzok's text messages with former FBI attorney Lisa Page. *Id.* at 12. The defendant's motion, however, conspicuously fails to mention that the government informed the defendant about those text messages and their import on November 30, 2017, *before* the defendant signed the plea agreement and before that information was publicly available. Later, the government informed the defendant that it had learned that there were additional text messages that it did not have at that time, and pledged to provide the defendant access to the messages when they became available. When those new text messages became available, the government ensured the

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right to further discovery where he had failed to demonstrate a valid reason to set aside his plea agreement), *appeal dismissed,* No. 17-3055, 2018 WL 4099683 (D.C. Cir. July 23, 2018).

[3] Most of the over 21,000 pages are productions that the government received from individuals connected to the defendant's FARA filings.

defendant had access to them. And when the government later came in possession of still more text messages, it provided text messages pertaining to the defendant that were not available to the public. Accordingly, far from suppressing evidence, the government provided timely and continuous information about the text messages—all of which the defendant and his counsel had in their possession before the proceeding on December 18, 2018, at which the defendant confirmed his guilty plea.

The defendant's complaints and accusations are even more incredible considering the extensive efforts the government has made to respond to numerous defense counsel requests, including to some of the very requests repeated in the defendant's motion. For instance, the defendant alleges that former FBI Deputy Director Andrew McCabe said, "'First we f**k Flynn, then we f**k Trump,' or words to that effect;" and that Deputy Director McCabe pressured the agents to change the January 24 interview report. *See* Mot. to Compel at 4, 6 (Request ##2, 22). Defense counsel first raised these allegations to the government on January 29, 2018, sourcing it to an email from a news reporter. Not only did the government inform defense counsel that it had no information indicating that the allegations were true, it conducted additional due diligence about this serious allegation. On February 2, 2018, the government disclosed to the defendant and his counsel that its due diligence confirmed that the allegations were false, and referenced its interview of the second interviewing agent,[4] who completely denied the allegations. Furthermore, on March 13, 2018, the government provided the defendant with a sworn statement from DAD Strzok, who also denied the allegations.

Nevertheless, on July 17, 2018, the defense revived the same allegations. This time, the defense claimed that the source was a staff member of the House Permanent Select Committee

[4] The name of the second interviewing agent remains under seal.

on Intelligence ("HPSCI"). The HPSCI staff member allegedly told the defendant that the second interviewing agent had told the staff member that after a debrief from the interviewing agents, Deputy Director McCabe said, "F**k Flynn." Once again, the government reviewed information and conducted interviews, and once again confirmed that the allegations were completely false. And after defendant and his counsel raised the accusation for a third time, on October 15, 2018, the government responded by producing interview reports that directly contradicted the false allegations. Despite possessing all of this information, defense counsel has again resurrected the false allegations, now for a fourth time. *See* Mot. to Compel at 4, 6 (Request ##2, 22).

Tellingly, the defendant's motion makes no mention of the defendant's scheduled sentencing hearing on December 18, 2018, which occurred after the government's voluminous production described above. That omission could be explained by the fact that the defendant and his counsel indicated at that hearing that they did not believe that the government had failed to provide *Brady* or helpful information. At the outset of the hearing, the Court indicated that it needed to "first ask Mr. Flynn certain questions to ensure that he entered his guilty plea knowingly, voluntarily, intelligently, and with fulsome and satisfactory advice of counsel." 12/18/2018 Hearing Tr. at 7. The defendant was then sworn in, and answered a series of questions from the Court. For instance, when asked by the Court, the defendant declined to withdraw his plea based on the fact that DAD Strzok was being investigated for misconduct (which the defendant knew before his initial guilty plea). *Id.* at 8-9. And when the Court asked if the defendant had "any concerns that you entered your guilty plea before you or your attorneys were able to review information that could have been *helpful* to your defense," the defendant responded, "No, Your Honor." *Id.* at 8 (emphasis added). The defendant also declined the Court's invitation to speak with his attorneys in a private room about the Court's questions or to

have the Court appoint "an independent attorney to speak with [the] defendant, review the defendant's file, and conduct necessary research to render a second opinion for [the defendant]." *Id.* at 9.

The Court then asked specific questions of the defendant's counsel about discovery. The Court queried whether his counsel had "any concerns that potential *Brady* material or other relevant material was not provided to you," to which counsel responded, "No, Your Honor." *Id.* at 10. And when the Court questioned whether the defendant was "entitled to any additional information that has not been provided to you," counsel again responded, "No, Your Honor." *Id.* at 10-11. Only after the Court exhaustively questioned the defendant and his counsel about discovery, did the Court ask the defendant if he would like to proceed to sentencing, "[b]ecause you are guilty of this offense," to which the defendant responded, "Yes, Your Honor." *Id.* at 16.

Even after the Court's thorough inquiry into the voluntary nature of the defendant's guilty plea, the government has continued to produce information to the defendant and his counsel beyond the scope of the Court's Standing Order. When the government learned that another government agency intended to produce to Congress documents pertaining to the defendant, it provided 330 pages of those documents to the defendant as a courtesy. The production largely consisted of the defendant's questionnaires to obtain a security clearance and Department of Defense directives, and included no new information that was relevant to the defendant's false statements to the FBI on January 24, 2017.[5]

Additionally, when the defendant's counsel demanded a security clearance, the government informed counsel about the Classified Information Procedures Act ("CIPA") and

[5] The fact that the defendant passed a polygraph test in 2016, which the defendant and his counsel highlight in their motion, is not relevant to the defendant's false statements in this case, all of which occurred after that test was administered. *See* Mot. to Compel at 3.

United States v. Yunis, 867 F.2d 617, 623-24 (D.C. Cir. 1989) ("classified information is not discoverable on a mere showing of theoretical relevance . . . discovery in this context further requires that a defendant . . . [demonstrate] that [it] is at least 'helpful to the defense.'"), and invited defense counsel to make a specific request for classified information pursuant to *Yunis*. While the government was still awaiting a response to that email, defense counsel filed the instant motion and requested that the government be held in contempt. *See* Brief in Support at 3.

As the above history of discovery makes clear, far from engaging in misconduct in this case, the government has gone above and beyond its obligations to comply with the Court's Standing Order and to respond to the defendant's questions and requests.[6]

ARGUMENT

Notwithstanding his valid and enforceable waiver of discovery, the defendant now seeks 49 additional categories of information, none of which he is entitled to under the law. As described below, the majority of his requests are either irrelevant, or seek information that has already been provided to him. Ultimately, the motion is a fishing expedition. *See* Mot. to Compel at 9 ("The only way to achieve justice in this case is to provide transparency and *full disclosure of all information relevant to the defense of Mr. Flynn*.") (emphasis added); *see also* Brief in Support at 13 n.15 (seeking access to a classified information that may be "relevant" to the defendant). But *Brady* does not require an open file policy. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("We have never held that the Constitution demands an open file policy (however such a policy might work out in practice)"); *United States v. Caro-Muniz*, 406 F.3d 22,

[6] In separate filings, the defendant has alleged other instances of government misconduct that likewise have no basis in fact. *See, e.g.*, Supplemental Status Report, *United States v. Flynn*, No. 17-cr-232 (D.D.C. Sept. 30, 2019) (Doc. 121). The government will respond to each such allegation at the appropriate time.

29 (1st Cir. 2005) ("*Brady* does not permit a defendant to conduct an *in camera* fishing expedition through the government's files . . . ."); *Kasi v. Angelone*, 300 F.3d 487, 504 (4th Cir. 2002) ("Nor does the *Brady* right to obtain exculpatory evidence equate to a right to rummage through governmental files."). "Criminal discovery is not a game. It is integral to the quest for truth and the fair adjudication of guilt or innocence." *Taylor v. Illinois,* 484 U.S. 400, 419 (1988) (Brennan, J., dissenting).

To the extent the defendant's request concerns information that is favorable and material to his guilt or punishment, the government has already provided the requisite information. At this point in the proceedings, the defendant's guilt is not at issue. *See, e.g.,* Status Conference Transcript at 16, *United States v. Flynn*, 17-cr-232 (D.D.C. Sept. 10, 2019) ("9/10/2019 Status Conf. Tr.") ("I can't say right now exactly where it's headed, but I don't think it's going to be a motion to withdraw the plea"). He has pleaded guilty before one federal judge, and affirmed his guilty plea before a second federal judge (this Court). Accordingly, as the Court stated on September 10, 2019, the operative question is whether the requests would produce information helpful to the defendant's punishment at sentencing. 9/10/2019 Status Conf. Tr. at 10 ("analysis will focus on whether [the materials] are relevant and helpful with regard to Mr. Flynn's sentencing"). Once again, the government has provided, and will continue to provide, all such information.

A number of the defendant's requests seek access to classified information that may or may not exist. The discovery standard for classified information largely reflects the standard imposed in the Standing Order—it must be helpful to the defense. The discovery of classified information is governed by Section 4 of CIPA, 18 U.S.C., appx. III (2000). Although this "Section creates no new rights of or limits on discovery of a specific area of classified information . . . [,] it contemplates an application of the general law of discovery in criminal

cases to the classified information based on the sensitive nature of the classified information." *Yunis*, 867 F.2d at 621. Accordingly, to the extent that a defendant seeks documents and information that are classified, the District of Columbia Circuit imposes an additional requirement. Specifically, the court has held "that classified information is not discoverable on a mere showing of theoretical relevance in the face of the government's classified information privilege, but that the threshold for discovery in this context further requires that a defendant seeking classified information . . . [demonstrate] that [it] is at least 'helpful to the defense.'" *Id.* at 623 (citation omitted).

I. Material Requested by the Defendant That Is Favorable and Material to Punishment Has Been and Will Continue to be Produced

As described above, the foundation for identifying *Brady* material is the defendant's guilt and punishment. *See* Standing Order at 2. With respect to guilt, the relevant criminal conduct concerns the defendant's false statements to the FBI on January 24, 2017. With respect to punishment, the relevant criminal conduct includes the defendant's false statements in his FARA filings about the Turkey project. Additionally, information that undermines the defendant's knowing and willful state of mind when he made those false statements are pertinent to punishment. With that foundation, the government below categorically addresses the defendant's requests. The government also attaches an appendix responding to each individual request. *See* Appendix A.[7]

A majority of the defendant's requests pertain to materials that are not relevant to his false statements to the FBI on January 24, 2017, his false FARA filings about the Turkey project, or other legitimate sentencing considerations. For example, numerous requests involve

[7] The government's responses to the defendant's requests are not intended to, and should not be read to, concede the existence of such information in the government's holdings or attest to the veracity of the statements or allegations in the requests.

individuals who are not connected to the criminal case, such as Christopher Steele and Bruce Ohr. The report from Steele does not involve allegations connected to the defendant's criminal conduct; it contains allegations that occurred before the defendant ever spoke with the Russian Ambassador in December 2016. Similarly, the defendant's requests for information pertaining to whether he was an agent of Russia are irrelevant. *See, e.g.,* Mot. to Compel 5-6 (Request ##18, 20). The defendant is not charged with being an agent of Russia and the government has never alleged in this case that he was an agent of Russia. His criminal conduct pertains to false statements about his communications with Russian officials, not his affiliation with that country. Nevertheless, even if the allegation were relevant, the government has already provided the defendant with information in discovery that would undermine the contention that he was an agent of Russia.

Many of the requests pertain to information in interview reports about meetings or discussions that occurred before or after the January 24 interview. In particular, some requests concern discussions at the FBI about conducting the interview, *see, e.g.,* Mot. to Compel at 5-9 (Request ##18, a., b., i.), and debriefs from the interviewing agents that occurred after the interview, *see, e.g., id.* (Request ##19, a., c., d., e., f.). The government has already provided the defendant with relevant information about those discussions and debriefs. Those disclosures include interview reports of DAD Strzok and the second interviewing agent, a memorandum from Deputy Director McCabe describing his call with the defendant on January 24, 2017, and interview summaries of persons who participated in the discussions or debriefs.[8] The

[8] As previously communicated to the Court and raised by the defendant as an issue for the first time, in some instances the government provided summaries of interviews, rather than the interview reports themselves. *See* Brief in Support at 13. Many of those interview reports contain privileged material, including classified information. Additionally, the majority of the interview reports are either not relevant to this case or could not reasonably be construed as favorable and material to the defendant's guilt or punishment. Information in those reports that

government also communicated to the defendant on November 30, 2017, before he signed the plea agreement, that DAD Strzok said that the defendant had a sure demeanor and did not give any indicators of deception during the interview, and that both interviewing agents had the impression at the time that the defendant was not lying or did not think he was lying. The documents provided by the government also show that the FBI asked the defendant for permission to conduct the interview, informed the defendant about the topic of the interview, interviewed the defendant in his own office, and afforded him multiple opportunities to correct his false statements by revisiting key questions. *See* Memorandum of Andrew McCabe dated January 24, 2017 (Doc. 56-1); FD-302 of Peter Strzok dated July 19, 2017 (Doc. 56-2).

While the government has thus already provided discovery relating to these requests for information about meetings or discussions that occurred before or after the January 24 interview, they are not—either collectively or individually—favorable and material to the defendant's sentencing. Whether or not the FBI or DOJ contacted members of the White House before the defendant's January 24 interview has no bearing on whether the defendant lied to the agents during that interview. Nor do any communications that the FBI or DOJ had with members of the White House after the interview, since by then the crime had already occurred.

Multiple requests pertain to the text messages between DAD Strzok and Page. *See, e.g.,* Mot. to Compel at 4-7 (Request ##6, 9, 10, 30, 31). As described in detail above, the government informed the defendant about the text messages and their import before he signed the plea agreement on November 30, 2017, including the fact that one of the agents, DAD Strzok, was under investigation for misconduct because of those text messages. The government

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could reasonably be construed as favorable and material to the defendant's guilt or punishment has been provided to the defendant in the form of summaries. Those summaries were provided to the Court on December 14, 2018; at that same time, the government provided the full interview reports to the court for *in camera* review.

has subsequently provided the defendant with access to the text messages, to the extent that they could reasonably be considered favorable and material to his sentencing. The text messages, however, are not exculpatory; they are impeaching of DAD Strzok. Moreover, both interviewing agents have been clear, since the beginning and in their documentation, that the defendant made false statements to them on January 24, 2017, about multiple topics.

Some of the remaining requests appear to be a blanket request for information, untethered on their face to any exculpatory information. *See, e.g.,* Mot. to Compel at 5-7 (Request ##9, 24, 26, 27, 33, 34, 36). Other requests pertain to information that does not exist. *See, e.g.,* Mot to. Compel at 4-5 (Request ##5, 11). Where possible, the government has attempted to respond to the requests by assuming that they are intended to obtain exculpatory information among the listed materials, to the extent such materials exist. For all such requests, the government is not aware of any information that would be favorable and material to the defendant at sentencing.[9]

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[9] The defendant's requested relief, that the government be held in civil contempt, must be denied because the defendant has failed to demonstrate through clear and convincing evidence that the government failed to comply with the Court's Standing Order.

"[C]ourts have the inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966). The civil contempt power "is essential to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice." *Broderick v. Donaldson*, 437 F.3d 1226, 1234 (D.C. Cir. 2006) (citation and quotation omitted). As the party moving for a civil contempt finding, the defendant bears the initial burden of demonstrating by clear and convincing evidence that: (1) there was a clear and unambiguous court order in place; (2) that order required certain conduct by the government; and (3) the government failed to comply with that order. *See Int'l Painters & Allied Trades Indus. Pension Fund v. ZAK Architectural Metal & Glass LLC*, 736 F.Supp.2d 35, 38 (D.D.C. 2010) (*citing Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993); *SEC v. Bilzerian*, 112 F.Supp.2d 12, 16 (D.D.C. 2000)). "'In the context of civil contempt, the clear and convincing standard requires a quantum of proof adequate to demonstrate a reasonable certainty that a violation occurred.'" *Phillips v. Mabus*, 894 F.Supp.2d 71, 91 (D.D.C. 2012) (quoting *Breen v. Tucker*, 821 F.Supp.2d 375, 383 (D.D.C. 2011)).

The defendant has failed to meet his burden. As detailed here, the defendant has not even demonstrated that the government failed to comply with the Court's Standing Order, let alone

II. The Defendant's Objective Is Dismissal of this Case, Not to Identify Information that Would Be Favorable and Material to His Sentencing

Finally, it bears emphasis that the defendant's filings—although captioned as a motion to compel production of *Brady* material—are in fact an effort by the defendant to have his case dismissed. Since the beginning of their involvement, the defendant's new counsel have sought to get the charges dropped, professed their client's actual innocence, and perpetuated conspiracy theories, all while stating that the defendant does not intend to withdraw his guilty plea. Certainly, true and credible *Brady* violations in a case could justify sanctions and other remedies, to include dismissal. In *this* case, however, nothing could be further from the truth.

From the beginning, the defendant's new counsel have sought to get the charges against the defendant dropped. His new counsel's first outreach to the government was an effort to get the Department of Justice to dismiss the case. Before even entering an appearance in the case, new counsel sent a letter to the Attorney General and Deputy Attorney General requesting that the Attorney General "dismiss the prosecution of General Flynn" and remove the prosecutors from the case. *See* 6/6/2019 Defense Counsel Letter to the Attorney General at 2 ("June 6 Letter") (Attachment 1). Defense counsel then made some of the same discovery requests that they made in the instant motion. Despite recently professing to the Court that they still need "a significant amount of time" to complete their review of information, *see* Joint Status Report, *United States v. Flynn*, No. 17-cr-232 (D.D.C. Aug. 30, 2019) (Doc. 107), defendant's new counsel needed no time to request that the case be dismissed and the prosecutors removed. Defense counsel did not need to complete their review of the facts to make their request, because

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that any such non-compliance was clear and convincing. The government has made every effort to comply with the Court's Standing Order, tendering more than 22,000 pages of material, including material directly in response to the defendant's questions. Accordingly, the defendant's request should be summarily denied.

their request did not rely on facts. With the same set of facts in December 2018, the defendant and his former counsel represented to the Court that they did not believe any other helpful information needed to be produced. *See* 12/18/2018 Hearing Tr. at 8-9. Confirming that the defendant and his new counsel are in search of a result, not the facts, defense counsel was recently interviewed on television and exclaimed, "I'm expecting, frankly, that we find evidence that warrants dismissal of the case for egregious government misconduct." Interview by Lou Dobbs Tonight with Sidney Powell, Fox Bus. (Aug. 30, 2019), https://video.foxbusiness.com/v/6081729582001/#sp=show-clips at 6:09. Defense counsel made the same admission to the Court at the Status Conference on September 10, 2019. *See* 9/10/2019 Status Conf. Tr. at 16 ("To show that the entire prosecution should be dismissed for egregious government misconduct and long-time suppression of *Brady* material.")

Lest there be any doubt about the defendant and his counsel's objective, the Court need only read the first page of their Brief in Support, which references an article, "*Why Innocent People Plead Guilty*." Brief in Support at 1 n.1; *see also id.* at 7 n.9 ("Mr. Flynn may also have other defenses that prior counsel did not explore."). In that same Fox Business interview, defense counsel protested that the defendant, "I believe, from everything I've seen now, should be completely exonerated." Interview by Lou Dobbs Tonight with Sidney Powell, Fox Bus. (Aug. 30, 2019), https://video.foxbusiness.com/v/6081729582001/#sp=show-clips at 6:50. All this despite the fact that the defendant has twice admitted his guilt, before two federal judges.

Relatedly, the defendant's arguments are premised on conspiracy theories. *See, e.g.*, June 6 Letter at 3 ("[I]t is increasingly apparent that General Flynn was targeted and taken out of the Trump administration for concocted and political purposes"); Brief in Support at 2 ("While prosecutors routinely recite their full knowledge of and compliance with their *Brady* obligations,

in truth they often scoff at them and continue to play games to win convictions at all costs").[10] The motion's most frequent target is the Special Counsel's Office. For example, the defendant and his counsel allege that the Special Counsel's Office manipulated or controlled the press. *See* Brief in Support at 4; June 6 Letter at 5-6 ("The General's plea was heavily manipulated while Brady evidence was suppressed, and the press was complicit"). The claim is divorced from facts and reality. The motion even attacks attorneys in the Special Counsel's Office who had no role in the criminal investigation of the defendant. *See* Brief in Support at 4. Similarly, the defendant spends more time citing irrelevant cases, such as Ted Stevens and Adam Lovinger, than reviewing the facts of this case. *See id.* at 2, 6, 7, 9, 10, 14-16. The defendant even alleges that there have been "egregious" Fourth Amendment violations,[11] but makes a list of claims unconnected to this case or the evidence on which the government relies. *Id.* at 8.

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[10] Tellingly, one of the defendant's requests was suggested by the aforementioned HPSCI staff member, "to get it out there on Fox." *See* Email from Barbara Ledeen to Robert Kelner (Dec. 13, 2018, 12:21 AM EST), "Re: From Derek Harvey from HIPSI [sic]" (Attachment 2); Mot. to Compel at 5 (Request #13).

[11] Unsurprisingly, the defendant's discussion of the Fourth Amendment makes no mention of the defendant's plea agreement, where the defendant waived the right "to challenge the admissibility of evidence offered against [him]," Plea Agmt at 6, or Judge Contreras' warning to the same effect during the defendant's first guilty plea. 12/1/2017 Hearing Tr. at 9 ("You would have the right to challenge the government's case against you by seeking to have the charges dismissed or having the evidence against you suppressed or thrown out. Do you understand you would have that right if you did not waive them?").

CONCLUSION

The defendant's motion is not a search for *Brady* material. It is a fishing expedition in hopes of advancing conspiracy theories related to the U.S. government's investigation into Russian interference in the 2016 presidential election. The government has already provided any evidence that could reasonably be construed as favorable and material for the defendant at sentencing. Accordingly, the motion should be denied.

Respectfully submitted,

JESSIE K. LIU
United States Attorney
D.C. Bar No. 472845

By: _____*/s/*_____

Brandon L. Van Grack
Special Assistant U.S. Attorney
950 Pennsylvania Ave., NW
Washington, DC 20530
(202) 233-0968

Jocelyn Ballantine
Assistant United States Attorney
555 4th Street, NW
Washington, D.C. 20530
(202) 252-7252

Dated: October 1, 2019

CERTIFICATE OF SERVICE

I, Brandon L. Van Grack, certify that I caused to be served a copy of the foregoing by electronic means on counsel of record for the defendant on October 1, 2019.

/s/

Brandon L. Van Grack
950 Pennsylvania Ave., NW
Washington, DC 20530
(202) 233-0968

Attorney for the United States of America

APPENDIX A

Below are the government's specific responses to each request. Where possible, the government has attempted to respond to the requests by assuming that they are intended to obtain exculpatory information among the listed materials, to the extent such materials exist. The government's responses are not intended to, and should not be read to, indicate that any requested information exists within the government's holdings.

- Request #1: Not relevant. The government is not aware of information that Christopher Steele provided that is relevant to the defendant's false statements to the Federal Bureau of Investigation ("FBI") on January 24, 2017, or to his punishment.

- Request #2: Already provided. The government has already provided responsive information to the defendant, including the January 24 interview report, all drafts of the interview report, and the handwritten notes of the interviewing agents. The government has also provided to the defendant reports of interviews with the second interviewing agent, who attests to the accuracy of the final January 24 interview report.

- Request #3: Not relevant. The government is not aware of any information that Nellie Ohr may have provided that is relevant to the defendant's false statements to the FBI on January 24, 2017, or to his punishment. The government's response includes consideration of the defendant's September 23, 2019 amendment.

- Request #4: Not relevant. The government is not aware of information relating to the listed persons that is relevant to the defendant's false statements to the FBI on January 24, 2017, or to his punishment. The government's response includes consideration of the defendant's September 23, 2019 amendment.

- Request #5: Item does not exist. The reference in the Report of the Special Counsel on Russian Interference in the 2016 Election ("Special Counsel Report") to an interview of the defendant dated January 19, 2017, is a typographical error. It should read "January 19, 2018," which is an interview of the defendant at which the defendant's counsel were present.

- Request #6: Already provided. The government has already provided the defendant with access to text messages between former FBI attorney Lisa Page and former FBI Deputy Assistant Director ("DAD") Peter Strzok, including text messages pertaining to the defendant that are not publicly available.

- Request #7: Already provided. The government has already provided any information that could reasonably be construed as favorable and material to sentencing.

- Request #8: Not relevant. The topic is not relevant to the defendant's false statements to the FBI on January 24, 2017, or to his punishment. The government's response includes consideration of the defendant's September 23, 2019 amendment.

- Request #9: Already provided. The government has already provided the defendant with access to any text messages between Page and DAD Strzok that could reasonably be construed as favorable and material to sentencing.

- Request #10: Already provided. The government has already provided the defendant with access to text messages between Page and DAD Strzok that could reasonably be construed as favorable and material to the sentencing. The government's production to the defendant on March 13, 2018, occurred shortly after the Court issued the Protective Order Governing Discovery, *United States v. Flynn*, 17-cr-232 (D.D.C. Feb. 21, 2018) (Doc. 22), and over eight months before the defendant reaffirmed his guilt before this Court.

- Request #11: Not relevant. The topic is unrelated to the defendant's false statements to the FBI on January 24, 2017, or to his punishment.

- Request #12: Already provided/not relevant. The government has already provided any information from interview reports of former FBI Director James Comey that could reasonably be construed as favorable and material to sentencing.

- Request #13: To the extent the defendant is referring to Director Comey's congressional testimony after he was fired, the government does not possess unredacted copies of such testimony that is not publicly available.

- Request #14: Already provided. The government has already provided any information from the interview of Director Comey dated November 15, 2017, that could reasonably be construed as favorable and material to sentencing.

- Request #15: The government is not aware of any information in possession of the Defense Intelligence Agency that is favorable and material to sentencing, including the information that the government provided on August 16, 2019. Specifically, the information of which the government is aware, including that August 16 production, is either inculpatory or has no relevance to the defendant's false statements to the FBI on January 24, 2017, or to the FARA Unit.

- Request #16: Not relevant. The topic is unrelated to the defendant's false statements to the FBI on January 24, 2017, or to his punishment. The government appreciates the correction included in the defendant's September 23, 2019 amendment.

- Request #17: Not relevant. Any briefings or meetings that occurred after January 24, 2017, among the listed individuals are not relevant to whether defendant made false statements to the FBI on January 24, 2017, or to his punishment.

- Request #18: Already provided. The government has already provided the defendant with information from former National Security Division Acting Assistant Attorney General Mary McCord's interview report that could reasonably be construed as favorable and material to sentencing.

- Request #19: Already provided. The government has already provided the defendant with information from former Department of Justice ("DOJ") Deputy Attorney General Sally Yates' interview report that could reasonably be construed as favorable and material to sentencing. The meetings Deputy Attorney General Yates had with persons in the White House after the January 24 interview are not relevant to whether defendant made false statements to the FBI on January 24, 2017, or to his punishment. The government has already provided the defendant with all drafts in its possession of the January 24 interview.

- Request #20: Already provided/not relevant. The government has already provided the defendant with information from the internal DOJ document about the defendant not being "an agent of Russia." That information, however, is not relevant to whether defendant made false statements to the FBI on January 24, 2017. The defendant is not charged with and has not been accused by the government in this case of being "an agent of Russia."

- Request #21: Not relevant. The government is not aware of information that Department of State Deputy Assistant Secretary Kathleen Kavalec may have provided that is relevant to the defendant's false statements to the FBI on January 24, 2017, or to his punishment.

- Request #22: Already provided. The government has already provided extensive evidence to the defendant disproving this allegation, including statements from both interviewing agents. The government is not aware of evidence that former FBI Deputy Director Andrew McCabe said "First we f**k Flynn, then we f**k Trump," or words to that effect.

- Request #23: Not relevant. The topic is unrelated to the defendant's false statements to the FBI on January 24, 2017, or to his punishment.

- Request #24: The request is overly broad, and does not pertain to information that would be favorable and material to sentencing.

- Request #25: Not relevant. The government is not aware of information relating to DOJ attorney Bruce Ohr that is relevant to the defendant's false statements to the FBI on January 24, 2017, or to his punishment.

- Request #26: The request is overly broad, and does not pertain to information that would be favorable and material to sentencing.

- Request #27: The request is overly broad, and does not pertain to information that would be favorable and material to sentencing.

- Request #28: Not relevant. The request is unrelated to the defendant's false statements to the FBI on January 24, 2017, or to his punishment.

- Request #29: As described in the Special Counsel Report, after the defendant pleaded guilty on December 1, 2017, former Deputy National Security Advisor K.T. McFarland stated in an interview that the defendant relayed to her that he had conversations with the Russian Ambassador in December 2016, about which the defendant made false statements to the FBI on January 24, 2017. *See* SPECIAL COUNSEL ROBERT S. MUELLER III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (Mar. 2019) ("Special Counsel Report"), Vol. I. at 169-73.

- Request #30: Not relevant. The topic is unrelated to the defendant's false statements to the FBI on January 24, 2017, or to his punishment.

- Request #31: Not relevant. The request is unrelated to the defendant's false statements to the FBI on January 24, 2017, or to his punishment.

- Request #32: Not helpful. Whether or not such information exists, it does not pertain to information that would be favorable and material to sentencing.

- Request #33: Already provided. The government has already provided the defendant with all *Brady* material; it is not obligated to provide *Giglio* material pursuant to the Court's Standing Order, *United States v. Flynn*, 17-cr-232 (D.D.C. Feb. 16, 2018) (Doc. 20).

- Request #34: Not helpful. Whether or not such information exists, it does not pertain to information that would be favorable and material to sentencing.

- Request #35: Not relevant. Former Director of National Intelligence James Clapper had no role in the criminal investigation of the defendant, and the government is not aware of information relating to Director Clapper that is relevant to the defendant's false statements to the FBI on January 24, 2017, or to his punishment.

- Request #36: Not helpful. The request does not pertain to information that would be favorable and material to sentencing. The government also notes that the Special Counsel Report states that the Acting Attorney General confirmed, in memoranda, the Special Counsel's authority to investigate the defendant. *See* Special Counsel Report, Vol. I at 11-12.

- Request #37: Not relevant/not helpful. The request is unrelated to the defendant's false statements to the FBI on January 24, 2017, or to his punishment.

- Request #38. Not helpful. The government is not aware of information from Jim Woolsey that would be favorable and material to sentencing.

- Request #39: The first part of the request concerns internal, deliberative Department of Justice communications that are not discoverable. As for notes of the interactions between the Department of Justice and the defendant's counsel, defendant's counsel participated in those interactions and possess their own notes.

- Request #40: Not helpful. The government has already provided the defendant with the interviewing agents' handwritten notes of the January 24 interview. The limited redactions of those notes do not refer to information that would be favorable and material to sentencing.

- Request a.: Already provided. The government has already provided any information from interviews with Deputy Director McCabe that could reasonably be construed as favorable and material to sentencing.

- Request b.: Already provided/not helpful. As discussed above, debriefings/meetings that occurred before the January 24 interview are not favorable and material to sentencing for making false statements to the FBI on January 24, 2017. Nevertheless, the government has already provided to the defendant any information that could reasonably be construed as favorable and material to sentencing about such pre-interview discussions, including the language quoted in the request.

- Request c.: Already provided/not helpful. The government has already provided any information about such post-interview debriefings that could reasonably be construed as favorable and material to sentencing.

- Request d.: Already provided. The government has already provided any information from former Principle Associate Deputy Attorney General Matthew Axelrod's interview report that could reasonably be construed as favorable and material to sentencing.

- Request e.: Already provided. The government has already provided any information from Acting Assistant Attorney General McCord's interview report that could reasonably be construed as favorable and material to sentencing, including the information quoted in the request.

- Request f.: Already provided. The government has already provided any information from Deputy Attorney General Yates' interview report that could reasonably be construed as favorable and material to sentencing, including the information quoted in the request.

- Request g.: The requested information pertains to information that is inculpatory, and not helpful to the defendant. As the government communicated to the defendant on May 25, 2018, the Special Counsel's Office ("SCO") conducted interviews and reviewed documents that referenced statements the defendant made to White House and transition officials about the defendant's conversations with the Russian Ambassador. That investigative activity yielded information consistent with the defendant's publicly reported statements and his statements to the SCO, in which the defendant initially denied having discussed sanctions with the Russian Ambassador. Those are the same denials that the defendant made to the FBI on January 24, 2017. After February 8, 2017, however, the defendant stated that he could not be certain that sanctions never came up in his conversations with the Russian Ambassador.

- Request h.: Already provided/not helpful. The government had previously provided information from the interview reports of the listed persons pertaining to the defendant's desire to register "the right way" with the DOJ. The only listed person who made such a statement was Brian McCauley; the quoted language in the request comes from a government disclosure about McCauley. That prior disclosure is consistent with McCauley's public testimony at trial in *United States v. Rafiekian*, 18-457 (E.D. Va. July 23, 2019), as well as interviews conducted by prosecutors in the Eastern District of Virginia. To the government's knowledge, McCauley is the only listed person who indicated that the defendant expressed a desire to register "the right way." The government, however, has not accused the defendant of willfully failing to register under FARA. Rather, the defendant willfully made false statements and omissions in his FARA filings.

- Request i.: Already provided/not helpful. The government has already provided any information from the interview of Director Comey dated November 15, 2017, that could reasonably be construed as favorable and material to sentencing.

ATTACHMENT 1

SIDNEY POWELL, P.C.
Federal Appeals in Complex Commercial Litigation
[redacted]

June 6, 2019

The Honorable William Barr
Attorney General

The Honorable Jeffrey Rosen
Deputy Attorney General

United States Department of Justice
950 Pennsylvania Avenue N.W.
Washington, DC 20530

Re: Internal review, *Brady*, IG Report, Declassification, and Lt. General Michael Flynn (retired)

Dear Attorney General Barr and Deputy Attorney General Rosen:

I write on behalf of Lt. General (Retired) Michael Flynn, and as a former Assistant United States Attorney of ten-years-service under nine United States Attorneys from both political parties, as a lawyer dedicated to the rule of law, and a firm believer in the mandate of *Berger v. United States* that the role of the United States is to "seek justice—not convictions." It is my fervent hope that you and the Department of Justice will use this case to restore integrity and trust in the Department and reinstate clear application of the Rule of Law.

Covington and Burling has moved to withdraw, and I will soon appear on the record on behalf of General Flynn. They are not aware of this communication which I will treat with the utmost confidentiality. My goal is to encourage and allow the Department to address these issues internally for the benefit of all concerned—especially the Department itself. Despite what he and his family have been through, General Flynn firmly believes in our justice system and hopes to be a positive and forceful spokesperson for it in the future.

This letter is a preliminary outreach primarily to provide you with an outline and notice of likely exculpatory information we ask you to watch for as you and your appointed investigators—independent of the SCO—are re-examining the possible corruption of our beloved government institutions for what appears to be political purposes and to suggest a just resolution if the evidence shows what we believe to be true.

To that end, we request:

(i) The appointment of new government counsel with *no connection to the Special Counsel team of attorneys or agents* to conduct review of the entire Flynn case for *Brady* material that has not been produced and prosecutorial misconduct writ large.

(ii) A determination of when, how, and on what basis the first investigation of General Flynn began.

(iii) The preservation of all electronic devices issued to anyone by Special Counsel and preservation of their text messages, emails, and any other means of electronic communications.

(iv) A review of currently classified information that we believe to be *Brady* for declassification, or at a minimum, production to me of a summary of that information.

(v) Interviews of additional witnesses we can identify that the Special Counsel did not interview because they would have created exculpatory information.

(vi) Consideration of the specific targeting of General Flynn and the disparate way in which he was treated as compared to others similarly situated—even by SCO.

(vii) At the end of this internal review, we believe there will be ample justification for the Department to follow the precedent of the Ted Stevens case and move to dismiss the prosecution of General Flynn in the interest of justice—whether it be we ink a simple joint motion or *sua sponte* by the Department.

Current Status:

General Flynn is from a generational military family. He served this country in the military for more than 33 years—highly decorated—with five of those years in direct combat. His entire life has been devoted to service to this nation. As ingrained in him from childhood, he immediately took responsibility for what the SCO said he did wrong, entered a plea of guilty to one count of 18 U.S.C. §1001, and he has been cooperating fully with SCO—and now the ED VA—well beyond his cooperation agreement. His sentencing was scheduled before Judge Emmet G. Sullivan Jr. on December 18, 2018, pursuant to the plea agreement. The SCO recommended Flynn receive probation.

At the hearing, however, Judge Sullivan launched a tirade, effectively accusing Flynn of working for a foreign power while he was in the White House and committing treason. Judge Sullivan made clear he intends to send him to prison. Judge Sullivan was completely wrong on the facts of the case, and his rant seems to have come straight from MSNBC comments of the previous night. After a short break in the court proceedings, the Judge returned to the bench and made something of a retraction of his most egregious choice of words.

However, severe damage was done. The press ran wild with the treason suggestion unabated for an hour, and it morphed into days of media speculation about General Flynn, the President, the Mueller probe, and treason. Judge Sullivan postponed the sentencing to give Flynn more time to

provide more cooperation in the possibility that *might* lessen the prison sentence Sullivan strongly suggested he will impose—despite DOJ's recommendation. He also left open a question as to the materiality of General Flynn's statements to the FBI Agents. Shortly after the hearing, Judge Sullivan imposed strict travel restrictions on General Flynn and required him to surrender his passport. The General was forced to sell his home two years ago to fund his legal defense and still needs a legal defense fund. He has effectively been on probation since 2017.

SCO has long advised that his cooperation with that office is complete, however General Flynn continues to cooperate in the EDVA conspiracy, §951 and §1001 prosecution of his former business partner, who misled him in many ways, and that trial is scheduled for July 15. General Flynn will continue to cooperate with the EDVA regardless of what happens in response to this request or when.

Friday, May 16, Judge Sullivan entered minute orders requiring the government to file on the open docket transcripts of all recordings of General Flynn with Russian officials along with an unredacted copy of the Mueller report as to all sections that apply to General Flynn. He also ordered production of the actual recordings to him on a DVD. The "voicemail recording" to which the docket text refers was already in the Mueller Report, Vol. II at 6, 120-21. We just learned from the required production of the transcript of the message that SCO selectively removed words that changed the tone of and significantly clarified John Dowd's message to Rob Kelner of Covington and Burling.

We anticipate that General Flynn's sentencing would be set for late August or September, and I will request an additional 90 days in our status report due June 14.

Brief background.

I'm sure you know more about this now than I do—as we anxiously await more information from the Inspector General and declassification of more 302s, FISA applications and other information. However, as more evidence has come to light, it is increasingly apparent that General Flynn was targeted and taken out of the Trump administration for concocted and political purposes. We believe there is specific evidence of that fact. He was the tip of the spear aimed at President Trump. From the time Flynn was fired from the Obama administration as DIA, it is public knowledge that General Flynn was a sharp, vocal, and effective critic of the Obama administration and Mrs. Clinton for Benghazi, the fight against ISIS, and the Iran Nuclear deal. Mr. Obama personally attempted to persuade incoming President Trump not to hire General Flynn. I have been told Flynn is the only name Obama mentioned to Mr. Trump.

From former Director Comey's bragging on national television (just two days before Flynn's scheduled 18 December sentencing) about how he dispatched two agents to ambush-interrogate Flynn—a special tactic carefully planned and executed for the Trump administration in its first few chaotic days—to new evidence surfacing daily, it appears the FBI and DOJ under Loretta Lynch and Sally Yates broke all protocols, used the ancient Logan Act as a pretext, ran a back-channel with Peter Strzok to Vice President Pence's office, began an investigation on Flynn even before that of which we were aware, illegally unmasked him, illegally leaked his conversation

with Kislyak, got him fired, and yet still cleared him of any wrongdoing until Mr. Mueller appeared.

General Flynn was the victim of egregious Fourth Amendment violations. His call with Kislyak—as Mr. Van Grack was forced to admit in Judge Sullivan's court on December 18—was perfectly lawful, and SCO did not even consider charging him with a Logan Act violation—much less treason. There was no "Logan Act violation," and everyone knew it.[1] Yet General Flynn was illegally unmasked by the Obama administration and his call leaked to explode the "Russia collusion" narrative in the press. The FBI interview was worse than "entrapment." He was led to believe he was having a casual conversation with friends about a training exercise from a day or two before, when in truth, it was a set-up—tantamount to a "frame"—manipulated by Yates, Comey, Strzok, McCabe, and others to take General Flynn out of the administration. SCO then used it to pressure him to try to take out President Trump.

***Brady/Giglio* Request.**

Judge Sullivan entered a *Brady* order as soon as he was assigned the case. Under the terms of a protective order already in place, I request review and production of the following information that is likely *Brady/Giglio* material as to General Flynn:

1. We have information that the British Embassy delivered a classified document shortly after Trump's election to the PTT, likely also to Susan Rice, and perhaps to others that destroys Steele's credibility, disavows him, and declares him untrustworthy. It apparently went into the safe for the PTT office. SCO made clear it was aware of and very concerned about this document, was told by a witness with personal knowledge about it, yet SCO did not even take notes about the document. Notably, there is no mention of it in the Mueller Report.

2. The original draft of the Flynn 302 and all subsequent drafts, including the A-1 file that shows everyone who had possession of it. It appears that SCO has never produced the original 302. There were multiple drafts. It stayed in "deliberative/draft" stage for an inordinate time. Who influenced it, how, and why?

3. All documents, notes, information, FBI 302s, or testimony regarding Nellie Ohr's research on General Flynn.

4. All payments and instructions by the FBI, CIA, and/or DOD to Stephan Halper going back as far as 2014 regarding General Flynn and/or Svetlana Lokhova.

[1] No one has ever been prosecuted under the Logan Act. Charges were brought in 1803 but dropped. Sally Yates' attempted resurrection of this never-prosecuted statute was obviously a pretext—as by its plain text, it would not apply to a member of the President-Elect's transition team who had every right to speak to the Russian Ambassador. In fact, SCO admitted as much at the hearing in Judge Sullivan's court on December 18. FBI 302s of McCabe, McCord, Yates, Strzok, and Page admit as much also. Regardless, as incoming NSA to the President-Elect, General Flynn was doing his job when he spoke to Kislyak.

Mr. Halper, and perhaps Cambridge Professor Christopher Andrew (MI5 tie) and Mr. Richard Dearlove of MI6, played a role in setting-up and then relentlessly smearing Flynn with allegations of an illicit relationship with Ms. Svetlana Lokhova—a British national and academic of Russian origin and living in London. She has just filed suit over the defamation, including a detailed timeline. We have information that that Halper was paid through the Office of Net Assessment, and that it was illegal. David Shedd (former Deputy Director of DIA) and Mike Vickers, who were CIA officers, were likely responsible for it. Someone in DOD Office of Net Assessment, I believe it was James H. Baker (an Obama "plant"), who paid Halper, met with David Ignatius on a monthly basis. Halper was paid four times what his "studies" were worth. Shedd was fired from DIA for fraud, and DIA had a moratorium on CI during this time because of a major 4th Amendment violation. Shedd met with VP Pence twice during the transition.

5. The Mueller/Weissmann report discloses that Flynn was under investigation previously. Vol. II at pp. 24, 26. When did surveillance first begin on Flynn? Was there a FISA warrant or application ever made on Flynn? If so, what was the basis; who wrote it, and who approved it? Or was he just illegally surveilled? Why was the Trump team not defensively briefed on this? This supposedly predates "Russia collusion." The Mueller Report is the first General Flynn, or apparently the President, was notified of that startling fact—as General Flynn had a security clearance, was briefing DIA on his travel to and from Russia to give a speech set up by his speaker's bureau, and no one voiced any concerns. That briefing alone is *Brady* material that has not been produced.

6. Transcripts, recordings, notes, and 302s of any interactions with human sources tasked against General Flynn since he left DIA.

7. The unredacted Page-Strzok text messages as well and text messages, emails and other electronic communications to, from or between Andrew McCabe, James Comey, Rod Rosenstein, Bruce Ohr, Nellie Ohr, Andrew Weissmann, Tashina Gauhar, [redacted] Zainab Ahmad regarding General Flynn or the FISA applications or any illegal surveillance that would have reached General Flynn's communications.

8. **The General's plea was heavily manipulated while Brady evidence was suppressed, and the press was complicit.** When did the Inspector General of the DOJ notify SCO of the extremely biased Strzok-Page text messages and to what extent?[2] It appears to have been in July. When did the press start pushing for answers on Strzok-Page departure and texts? And, who at SCO (Weissmann? Van Grack?) persuaded the press to sit on the Strzok story until the very day after Flynn's guilty plea was taken in court?

[2] On 07/26/17, Strzok is interviewed under advice of rights—obviously more than General Flynn received. Was that Weissmann?

Suddenly, SCO was making extreme threats and placing enormous pressure on General Flynn to enter a guilty plea. Sometime after Mueller was notified by the IG of the extremely biased Strzok-Page text messages, Mueller went to Rosenstein to get authority to target Michael Flynn, Jr.

Flynn, Jr., who had a four-month-old baby, was required to produce his phones and computers. Suddenly, General Flynn was threatened with the public arrest, search of his home, the indictment of his son, the Manafort treatment, etc.

The eleventh hour before General Flynn signed the plea agreement, SCO notified defense counsel by phone only that "electronic communications" of one agent (Strzok) "showed a preference for one of the candidates for President," the IG was assessing whether that constituted misconduct, and that the agents did not think Flynn was lying at the time.

It would seem the press was in league with SCO to conceal the information of the Strzok-Page texts until after Flynn entered his guilty plea. Flynn entered his plea in open court before Judge Contreras on December 1 (who almost immediately thereafter recused for no disclosed reason), and on December 2, WaPo published an article exposing that Strzok and Page had made "politically-charged texts disparaging Trump."

Judge Sullivan took the case on December 7, 2017, and entered a *Brady* order on December 12, updating it on February 16, 2018. That order that required production of all *Brady* even though a guilty plea had been entered. Despite a protective order, SCO remained silent until March 13, 2018, when it provided its first *Brady* production which then included a hyperlink to then publicly available Strzok-Page texts.

The timeline makes it obvious that Mr. Van Grack, Ms. Ahmad, and SCO deliberately suppressed remarkable *Brady* material both devasting to the credibility of the agent who led the ambush-interview of General Flynn as well as evidence supporting the General's own truthfulness, while they sought every means to put the utmost pressure on him to compel a guilty plea—to the point of using threats against his son—and manipulated the press to hide the truth in the process.

9. Unredacted copies of all **Comey memos** that mention or deal with any investigation, surveillance, interviews, or use of a CHS against General Flynn.

10. An unredacted version of **Comey's testimony** before all Congressional committees.

11. Comey 302 of 11/15/17 and all **Comey 302s** that bear on or mention Flynn.

12. The briefings Flynn provided to DIA before and after his trip to Russia speaking to RT.

13. Any information, recordings, 302s, about Joseph Mifsud's presence and involvement in spying on General Flynn and presence at the RT dinner in Russia on December 17, 2015. We believe Mifsud was working for/at behest/with Brennan.

14. All details, notes, memoranda, 302s of the McCabe/Strzok meeting with VP Pence hinted by Mueller at Vol II: 34. Note Peter Strzok's Russia analyst was married to Pence's Chief of Staff, Josh Pitcock. This meeting was never revealed to General Flynn.

15. Mary McCord 302s or interviews, including when she advised the FBI that the Logan Act was "a stretch," that the FBI had concluded Flynn did not have 'a clandestine relationship with Russia,' there was no further need to interview him, and a 302 of 7/17/17 when she went to the White House with Sally Yates to discuss Flynn.

16. Any 302s or notes of Sally Yates, including when she advised that she was "not clear what the FBI was doing to investigate Flynn," that the interview on January 24 broke protocols, and that the agents believed he was telling the truth. Also, we request the 302s or notes for or of her meetings with White House Counsel, or materials she reviewed in preparation for those meetings.

17. **An internal DOJ document dated January 30, 2017, in which the FBI advised DOJ that Flynn was not acting as an agent of Russia.**

18. FBI 302s and notes of interviews of Michael Boston regarding Flynn's lack of involvement in Flynn Intel Group work on the Turkey project.

19. An unredacted version of all information provided by Kathleen Kavlec at the Department of State to the FBI.

20. All evidence that McCabe said words during a senior-attended FBI meeting/video conference to the effect of: "First we fuck Flynn, then we fuck Trump."

21. The two-page EC that supposedly began the Russia investigation.

22. We believe all of the information that underlies the bogus FISA applications is *Brady* as to Flynn as well, including anything that undermines Steele's credibility, because the FISA applications were a ruse to coverup all of the illegal spying and FISA abuses that had been going on for some time—including of General Flynn—and evidence egregious government misconduct.

23. Given the unusual involvement Andrew Weissmann and Ms. Ahmad had in DOJ with Bruce Ohr, Christopher Steele, the FBI and the FISA applications, we request all Bruce Ohr 302s of his debriefings regarding Steele and the role of Weissmann and Ahmad as

their involvement may have infected the entire investigation and prosecution of General Flynn.

24. Testimony of all persons who signed FISA applications whether those applications—regarding Flynn or anyone that would have reached Flynn's communications—were approved or rejected.

25. Unredacted versions of all FISA applications related to the Russia matter, whether approved or rejected, since 2015, involving Flynn or reaching Flynn's communications with anyone.

26. Information identifying reporters paid by Fusion GPS and/or the Penn Quarter group to push the "Russia Collusion" hoax and any stories about General Flynn and any testimony or statements about how the reporters were used.

27. KT McFarland's 302s, notes of interviews of her or her own notes, and text messages with General Flynn from "The Passing of the Baton" through on and around December 29, 2015, and until Flynn's resignation. The 302s should reflect that she initially lied to FBI agents but was shown her statements or text messages from that time and given an opportunity to correct her statements—unlike General Flynn. She also had counsel and was aware of the purpose of the interview by then.

28. Any new information on the SCO's destruction of the cell phones of Strzok and Page after being advised of their abject bias and text messages. What efforts were made to recover those texts? Were any recovered from any source? NSA? This raises a significant spoliation issue and provides additional reasons to obtain, preserve and retrieve information from the phones of all other members of SCO to obtain communications from Strzok and Page in addition to others now implicated in highly questionable conduct—such as Weissmann and Ahmad with Bruce Ohr, Nellie Ohr, Baker, McCabe, Comey, and Christopher Steele.

29. Any information regarding FBI [redacted] eradication of cell phone data, texts, emails, information belonging to Peter Strzok and Lisa Page that created the "gap" identified by the IG and caused important information to be destroyed.

30. The subjects of Strzok's failures in any polygraph examinations after the MYE began.

31. Evidence that Clapper specifically targeted General Flynn for removal/destruction and on whose orders.

32. We request production of any *Brady/Giglio* you may have found already in your separate investigations (and by the IG) of which we are not aware.

33. We would appreciate the government's agreement to whatever extension of time is necessary on the Flynn case to allow further review of his case by me and by the Department. We would also appreciate the government's agreement to remove his travel restrictions and allow him to travel freely within the United States.

34. We also request a transcript and copies of the recordings of General Flynn's calls with Ambassador Kislyak or anyone else that were reviewed or used in any way by the FBI or SCO.

We have information that there are additional witnesses who have never been interviewed by SCO but who have information exculpatory as to General Flynn. We will consult with them and would like to provide their names to you for interviews by new government counsel reviewing the prior conduct if you believe they would be helpful.

As an officer of the Court in the highest sense of the words, I cannot thank Attorney General Barr and you enough for all that you are doing to restore trust in the Department and the Rule of Law. We appreciate your attention to and consideration of these important issues, and I look forward to your reply. My cell is [redacted]. I will continue working on a more comprehensive analysis of these issues. I would like to schedule a meeting to discuss this further at your earliest convenience and provide you additional information. Please let me know when.

Sincerely,

Sidney Powell

cc: The Honorable William Barr
Attorney General of the United States

Confidential to AG/DAG

ATTACHMENT 2

From: Kelner, Robert
To: BVG; ZNA
Cc: Anthony, Stephen; Langton, Alexandra
Subject: FW: From Derek Harvey from HIPSI
Date: Thursday, December 13, 2018 8:54:14 AM

Brandon and Zainab:

I received this email overnight from Barbara Ledeen. We are not responding to it. In keeping with General Flynn's obligations under his cooperation agreement, we are producing this to you, as it appears to be another message from Derek Harvey. Thank you.

Rob

Robert Kelner

Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956
[redacted]

From: Barbara Ledeen <[redacted]
Sent: Thursday, December 13, 2018 12:21 AM
To: Kelner, Robert [redacted]
Subject: From Derek Harvey from HIPSI

Judge needs to ask for Comey and Strzok transcripts. I would hope the Judge would ask for Comey and Strzok transcripts from HPSCI to show they thought he did not lie. Nunes says judge probably won't but he wanted to get it out there on Fox tonight.