UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

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

MR. FLYNN'S MOTION FOR LEAVE TO FILE OVERLENGTH MOTION AND BRIEF AND TO FILE 50 MINUTES LATE

Michael T. Flynn ("Mr. Flynn") respectfully requests leave to file his Supplemental Motion to Withdraw Plea for Alternative Reasons in excess of the page limits specified in Local Criminal Rule 47(e). The motion is very fact intensive and counsel has acted reasonably to reduce the text as much as reasonably possible but believes that the full factual and legal issues cannot be fully presented to the Court in less than fifty (50) pages. Therefore, Mr. Flynn requests that leave be granted to file a combined motion and brief not exceeding fifty (50) pages. Moreover, due to a technical malfunction on counsel's computer, the brief was not filed pursuant to the Court's deadline of 12:00 p.m., for which counsel apologizes to the Court. Counsel requests that the Court consider the motion be timely filed even though it was approximately 50 minutes late. Counsel promptly notified the government when the technical error was discovered. The brief and its exhibits are attached to this motion.

Dated: January 29, 2020 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2020, a true and genuine copy of Mr. Flynn's Motion for Leave to Exceed Page Limits was served via electronic mail by the Court's CM/ECF system to all counsel of record, including:

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Respectfully submitted,

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UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

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

[PROPOSED] ORDER

Having considered Defendant's Motion for Leave to File Overlength Motion and Brief and File 45 Minutes Late, and for good cause shown, it is hereby ORDERED that:

The motion to Motion for Leave to File Overlength Motion and Brief is granted and Mr. Flynn's Motion and Brief, attached as Exhibit A, and its accompanying exhibits shall be deemed filed by the clerk.

It is FURTHER ORDERED that Defendant's request to file 45 minutes late is granted.

SO ORDERED.

Dated: _____

_____
Emmet G. Sullivan
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

SUPPLEMENTAL MOTION TO WITHDRAW PLEA OF GUILTY
AND BRIEF IN SUPPORT

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Table of Contents

More than a year ago, at the December 18, 2018, Sentencing Hearing, this Court declared that it could not "recall any incident in which the Court has ever accepted a plea of guilty from someone who maintained that he was not guilty," and that it did not "intend to start" that day.[1] Michael T. Flynn ("Mr. Flynn") *does* maintain that he is innocent of the 18 U.S.C. §1001 charges; and he did not lie to the FBI agents who interviewed him in the White House on January 24, 2017. As will be seen below, and at any evidentiary hearing ordered by this Court, Mr. Flynn's guilty plea (and later failure to withdraw it) was the result of the ineffective assistance of counsel provided by his former lawyers, who were in the grip of intractable conflicts of interest, and severely prejudiced him.

This brief provides this Court every reason to honor its commitment to protect a man who earnestly maintains his innocence. Mr. Flynn moved on January 13, 2020, to withdraw his plea of guilty because of the government's bad faith, vindictiveness, and breach of the plea agreement. ECF No. 151. This Supplemental Motion addresses alternate reasons why it would only be "fair and just" for the Court to permit Mr. Flynn to withdraw his plea. *United States v. Cray*, 47 F.3d 1203, 1206 (D.C. Cir. 1995).

First, Mr. Flynn's former counsel at Covington & Burling LLP ("Covington") developed what is often referred to as an "underlying work" lawyer-to-client conflict of interest early in the representation.[2] It arose from mistakes that the firm made in the Foreign Agents Registration Act (FARA) filings it had made for Mr. Flynn and his company Flynn Intel Group ("FIG"). Rather than disclosing the errors—and insisting Mr. Flynn obtain new counsel to fix the problem, or

[1] Hr'g Tr. Dec. 18, 2018 at 7.

[2] Geoffrey Hazard, William Hodes & Peter Jarvis, The Law of Lawyering, §10.07.6 (4th ed. 2015).

allowing Covington to continue the representation (and the fix), knowing the truth—the lawyers said nothing to Mr. Flynn, charged him hundreds of thousands of dollars to re-do its own prior work, and *still* did not take the readily available steps of amending or supplementing the FARA forms.

In August 2017, the Special Counsel's Office ("SCO") began to threaten Covington's work with criminal FARA-related charges by way of an indictment of Mr. Flynn's former business partner, Bijan Rafiekian. Covington's "underlying work" conflict of interest suddenly escalated into a non-consentable conflict of interest that tainted every moment up to and through the guilty plea in December 2017 and the Sentencing Hearing in this Court in December 2018. That pernicious conflict infected and prejudiced his defense until he retained new counsel in 2019.

As a result of this debilitating lawyer-to-client conflict of interest, the Covington lawyers lost all ability to provide the effective assistance of counsel that the Sixth Amendment requires. At every turn, the lawyers' interest was in obscuring their original errors, hiding the fact that they had never come clean with their client, and trying ever-harder to sweep their problems under the rug by arranging for and preserving a plea that Mr. Flynn wanted to withdraw.

Mindful of their own interests, Mr. Flynn's former counsel repeatedly gave him advice that was not "within the range of competence demanded of attorneys in criminal cases." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Repeatedly, "counsel actually acted in a manner that adversely affected [their] representation by doing something, or refraining from doing something, that [] non-conflicted counsel would not have done." *United States v. Taylor*, 139 F.3d 924, 930 (D.C. Cir. 1998). They did irreparable damage to Mr. Flynn.

They next kept the SCO's November 1, 2017, express concerns and demands about the conflict of interest from Mr. Flynn; and, they represented to the government that they discussed

the conflict—all while they worked to position themselves favorably at Mr. Flynn's expense. On the eve of his plea, they kept from him information they knew was crucial to his decision.

In this Circuit, a defendant seeking to withdraw a guilty plea before sentencing must establish the "prejudice" element by showing "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Taylor*, 139 F.3d at 929-30. In this case, the evidence will show that if Mr. Flynn had been given constitutionally adequate advice, he would *not* have pled guilty in 2017, and he *would* have withdrawn his plea in 2018. The taint of Covington's constitutional violations permeates this case.

In addition, there were defects in the Rule 11 plea colloquy. When this Court extended the colloquy in December 2018, among the questions this Court did not ask was if any additional promises or threats were made to Mr. Flynn. The answer to that question is yes, there were. Moreover, this Court ended the sentencing hearing noting that it had "many, many, many more questions" about the factual basis for the plea. Hr'g Tr. Dec. 18, 2018 at 50:12-13. Accordingly, withdrawal of the plea should be allowed pursuant to *Cray,* 47 F.3d 1203.

I. THE STANDARD FOR WITHDRAWING A GUILTY PLEA PRIOR TO SENTENCING.

The Federal Rules of Criminal Procedure allow for withdrawal of a guilty plea before sentencing "if the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B) (paraphrasing *Kercheval v. United States*, 274 U.S. 220, 224 (1927)). In this Circuit, the trial courts (and the appellate courts on review) consider three factors, the last of which is the most important: "(1) whether the defendant has asserted a viable claim of innocence; (2) whether the delay between the guilty plea and the motion to withdraw has substantially prejudiced the government's ability to prosecute the case; and (3) whether the guilty plea was

somehow tainted." *United States v. McCoy*, 215 F.3d 102, 106 (D.C. Cir. 2000). Mr. Flynn readily satisfies each of the three factors, and the taint is overwhelming.

A. Mr. Flynn Asserts a Viable Claim of Innocence.

"The District Court should not attempt to decide the merits of the proffered defense, thus determining the guilt or innocence of the defendant." *Everett v. United States*, 336 F.2d 979, 982 (D.C. Cir. 1964), *quoting Gearhart v. United States*, 272 F.2d 499, 502 (1959). Only if the district court concludes that the defendant has not alleged any cognizable claim for relief, or that the defendant's "conclusory allegations [are] unsupported by specifics," or that the defendant's allegations "in the face of the record are wholly incredible," may it summarily dismiss the motion." *Taylor*, 139 F.3d at 933.

Courts typically employ something of a sliding scale to decide whether a claim of innocence is "viable" in this context: where it is clear that a plea was constitutionally "tainted," a defendant needs to show correspondingly less to establish a viable claim of innocence. As this Circuit remarked in *Taylor*, "[t]he third [taint] factor is the "most important," and the standard for allowing withdrawal of a plea is fairly lenient when the defendant can show that the plea was entered unconstitutionally." 139 F.3d at 929 (internal citations omitted). *See also, McCoy, supra,* 215 F.3d at 106.

Mr. Flynn's claim of innocence is more than viable, and there is a very strong showing of constitutional taint here. Mr. Flynn would be able to start his defense with evidence that the FBI agents who interviewed him at the White House believed that he was *not* lying and maintained that belief in the face of objection and even derision from senior FBI colleagues. In addition, he would be able to present the actual recordings and transcripts of his calls with Russian Ambassador Kislyak, and he knew that the FBI already had those recordings and transcripts. In addition, Mr.

Flynn would presumably be able to present whatever 302s are now "missing," and countless other *Brady* disclosures that the government has dribbled over the last year. He would also be able to demand additional evidence the government continues to suppress. Mr. Flynn could present numerous other defenses and suppress evidence illegally obtained. The standard does not require Mr. Flynn prove he would be acquitted. It is enough to say that Mr. Flynn's claim of innocence is "viable," and it is.

B. The Government's Ability to Prosecute the Case has not been Substantially Prejudiced.

This Court should not tarry long over the second factor: whether the lapse in time between the original plea and the motion to withdraw the plea has "substantially prejudiced the government's ability to prosecute the case." *McCoy*, 215 F.3d at 106. The test does not depend upon whether the government will be annoyed or even inconvenienced. Not only must there be *substantial* prejudice, but the prejudice must go to the government's very ability to prosecute the case. No witnesses have died, the documents are readily available, and if the government ever had a case, it should still be able to prove it. Indeed, the defense and the government have been in active litigation over those records for much of the time since the original plea. *See United States v. Russell*, 686 F.2d 35, 40 (D.C. Cir. 1982) (holding that the government was not prejudiced where the government had not shown the unavailability of crucial witnesses or that its case was prejudiced by the passage of time).

Finally, although Mr. Flynn's chief argument about the "taint" that infected his case emanated from the ineffective assistance of his former counsel, the government's coercive tactics and other wrongful conduct contributed as well. Thus, any claim that the government might make about "substantial prejudice" would have to be discounted by the government's self-inflicted damages.

C. Sixth Amendment Violations—The Ineffectiveness of Mr. Flynn's Former Counsel—Tainted his Guilty Plea as well as the Subsequent Colloquy at his December 2018 Hearing.

The third and most important factor in determining whether a defendant should be permitted to withdraw a guilty plea before sentencing is "whether the guilty plea was somehow tainted." *United States v. McCoy*, 215 F.3d at 106. "Taint" in this context typically means that the plea was entered "unconstitutionally," which in turn often means that the plea was not "voluntary and intelligent" because it was based on advice of counsel that fell below the level of "reasonable competence" that is required to satisfy the Sixth Amendment. *Strickland*, 466 U.S. at 714. A year after *Strickland* was decided, the Supreme Court assimilated its test for claims of ineffective assistance of counsel to the context of guilty pleas in *Hill v. Lockhart*, 474 U.S. 52 (1985). This Circuit summarized the resulting rule as follows:

> The *Hill-Strickland* test requires the defendant to show both that counsel's advice was not 'within the range of competence demanded of attorneys in criminal cases,' and that as a result he was prejudiced, *i.e.* 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'

United States v. Horne, 987 F.2d 833, 835 (D.C. Cir. 1993) (internal citations omitted). Focusing on different language from *Strickland* and *Hill*, the same court summarized similarly a few years later:

> [a] defendant must [] show first, that his counsel's performance 'fell below an objective standard of reasonableness' by identifying specific 'acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,' and second a defendant 'must demonstrate that the deficiencies in his representation were prejudicial to his defense. He 'must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'

Taylor, 139 F.3d at 929-30 (citations omitted). Mr. Flynn meets those tests throughout this case, including with both his 2017 guilty plea and his colloquy with this Court. The multiple instances

in which Mr. Flynn's former lawyers' conflicts of interest and actions fell completely short of professional norms, thus depriving him of the constitutionally mandated effective assistance of counsel, nullified his opportunity to make informed decisions about his own case, and it grossly prejudiced his defense.

II. IF THE GOVERNMENT OPPOSES WITHDRAWAL OF THIS PLEA, AND IF ANY MATERIAL FACTS ARE ACTUALLY DISPUTED, THEN THIS COURT SHOULD HOLD AN EVIDENTIARY HEARING.

No hard and fast rule governs whether an evidentiary hearing is required before a court can properly adjudicate ineffective assistance of counsel claims, including those undergirding a motion to withdraw a guilty plea. Much depends on exactly what is being contested and what materials the court will have to consider in deciding the merits. In *Taylor*, 139 F.3d at 932-33, this Circuit wrote:

> Ordinarily, when a defendant seeks to withdraw a guilty plea on the basis of ineffective assistance of trial counsel the district court should hold an evidentiary hearing to determine the merits of the defendant's claims. . . . On the other hand, some claims of ineffective assistance of counsel can be resolved on the basis of the trial transcripts and pleadings alone.[3]

III. SUMMARY OF THE CONFLICTS AND ARGUMENTS

Mr. Flynn's former counsel at Covington made some initial errors or statements that were misunderstood in the FARA registration process and filings, which the SCO amplified, thereby creating an "underlying work" conflict of interest between the firm and its client. Because Covington attempted to hide the difficulty instead of addressing it forthrightly with Mr. Flynn, what began as a manageable conflict of interest devolved into an inescapable morass of ever-

[3] Since his rights have already been severely compromised by his prior counsel, as discussed in detail, *infra*, he also requests that any testimony that he give be heard *ex parte* so that it does not prejudice his Fifth Amendment rights. *See United States v. Tucker*, 2018 U.S. Dist. LEXIS 172319, 22-23 (D. N.H. 2018) (allowing a defendant seeking to withdraw his guilty plea to testify at a sealed hearing on an *ex parte* basis).

worsening and eventually non-consentable conflicts. Those conflicts led to a series of instances in which Covington provided ineffective assistance of counsel that irreparably tainted Mr. Flynn's guilty plea and the December 2018 hearing in this Court.

Had Mr. Flynn been timely and properly informed of the serious *self-interest* of his attorneys and the firm—and the ever-deepening conflict versus his own defense—he would not have permitted the representation to continue beyond August 2017 when Covington began to re-investigate the FARA issues. Had Mr. Flynn been informed of the facts, he would have retained an independent firm to provide a second opinion—not the original one that made mistakes it wouldn't own or correct.

By November 1, 2017, Special Counsel ["SCO"] notified Covington that it recognized Covington's conflict of interest from the FARA registration. Government counsel specified Mr. Flynn's liability for "false statements" in the FARA registration, and he told Covington to discuss it with Mr. Flynn. This etched the conflict in stone. Covington betrayed Mr. Flynn. His lawyers did not discuss this concrete attorney-to-client conflict with him. They did not insist he obtain independent counsel. They did not advise him Special Counsel had focused on FARA issues. They did not withdraw. Instead, his own lawyers kept it all a secret from him for weeks. Then, they tendered him defenseless and uninformed to SCO for two full days of proffers for everything the SCO wanted from Flynn on Russia and his own "exposure." They schooled him to "get through the proffer" to satisfy SCO, and instead of objecting or defending him in the face of a room full of government agents and lawyers, they even asked him questions to elicit the answers SCO wanted.

There is no dispute there was a serious conflict of interest. It is undeniable. Covington and SCO discussed it. That minute Mr. Van Grack informed Covington the SCO was considering FARA false statement charges against Mr. Flynn, the question became: Were the suspected false

statements the result of Covington's misfeasance or malfeasance, *or*, did Mr. Flynn lie to his lawyers?[4]

Showing that Mr. Flynn was truthful with his lawyers would cast aspersion on the competence, or perhaps even the honesty of the Covington lawyers and the reputation of "the Firm;" so would withdrawing from the representation of the highest profile figure in the SCO investigation. Thus, the SCO put Mr. Flynn's lawyers' interests in direct collision with Mr. Flynn's. Covington chose the "Flynn-lied-to-his-lawyers" option they had discussed by email the prior night.

These factors, especially the egregious taint of a lawyer-client conflict of interest known to the Covington lawyers and the government—but not immediately, fully, or ever accurately disclosed to Mr. Flynn—warrant granting this motion.[5] From every angle, this case presents stunning Sixth Amendment violations of Mr. Flynn's constitutional rights. "Long ago, the Supreme Court instructed that '[t]he right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client,' an admonition which we ourselves have had occasion to observe. 'Undivided allegiance and faithful, devoted service to a client,' the Court declared, 'are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision.'" *United States v. Hurt*, 543 F.2d 162 (D.C. Cir. 1976) (citing *Von*

[4] The obvious solution to this for the ethical lawyer would have been to inform the SCO that all mistakes, errors or omissions, if any, belonged to Covington and file an amended or supplemental form. Then, it should have informed Mr. Flynn immediately of the entire situation and given him the choice of how to proceed. Covington, however, proceeded to sacrifice Mr. Flynn in its own efforts to cooperate with Special Counsel—all behind his back—and quickly jumped on the "Flynn-lied-to-his-lawyer" bandwagon.

[5] Mr. Flynn acknowledges the government may make every effort to seek an indictment against him for all the charges prosecutors originally threatened.

Moltke v. Gillies, 332 U.S. 708, 725 (1948)). "[T]he 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired . . . If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired." *Glasser v. United States*, 315 U.S. 60, 70 (1942).

IV. THE EVER-DEEPENING CONFLICTS OF INTEREST RESULTING IN COVINGTON'S DEFECTIVE ASSISTANCE OF COUNSEL.

In late 2016, Mr. Flynn received an official inquiry letter from the Foreign Agents Registration Act ("FARA") unit of the DOJ. Mr. Flynn promptly turned to his personal counsel and attorney for Flynn Intel Group ("FIG,") Kristen Verderame.[6] She encouraged him to retain Robert Kelner—a nationally known FARA expert at the international powerhouse of Covington in Washington, D.C. Mr. Flynn, Ms. Verderame, and Mr. Flynn's son Michael G. Flynn met with Covington FARA lawyers Robert Kelner and Brian Smith extensively on January 2, 2017. ECF No. 151-12. Mr. Flynn provided Covington all documents, emails, and contracts he or FIG had, and gave the lawyers all the information he could remember—specifically pointing them to the emails for the details. *Id.* Significantly, Mr. Flynn told Covington that Bijan Rafiekian, his former

[6] FIG had only existed for a few months, and FIG was already closed because Mr. Flynn was a key member of the Presidential Transition Team. The three-month project for which FIG received the inquiry was its first of any significance. Moreover, upon advice of counsel, FIG had timely filed an "LDA" ["Lobbying Disclosure Act"] registration in September 2017—which often substitutes for a FARA filing. *Foreign Agents Registration Act*, United States Department of Justice, https://www.justice.gov/nsd-fara. According to the DOJ's response to a letter from Congress, the FARA unit of DOJ only issued 130 "inquiry letters" in the last 10 years from 2015. Ex. 35. Yet, on November 30, 2016, within approximately three weeks of the mere publication of Mr. Flynn's opinion piece in *The Hill*—an article that was critical of Fetullah Gulen and the powerful "Muslim Brotherhood"—and within thirteen days of Flynn's designation as the National Security Advisor for the new president—the FARA unit sent an "inquiry letter" to FIG.

partner in FIG, wrote the first draft of the op-ed, that was the primary object of the FARA section's letters. *Id.* at 17.

Mr. Flynn authorized Covington to investigate all the facts, work with multiple lawyers from multiple firms—including Robert Kelley, Kristen Verderame, attorneys for the public relations firm Sphere, and attorneys from Jones Day and Arent Fox. They also conferred and then met with the DOJ, interviewed many witnesses—all independently of each other and Mr. Flynn—and prepared and filed the FARA forms. *See also*, *United States v. Rafiekian*, 1:18-cr-00457, ECF No. 270-4. Kelner soon wrote the FARA section a letter where he first made a fateful error. He stated that Mr. Flynn "*initiated* the op-ed."[7] Somehow it morphed into a felony (as construed by the SCO), and Covington apparently never corrected or clarified it.

> Your letter asked several questions regarding an op-ed authored by General Flynn and published in *The Hill* newspaper on November 8, 2016. It is our current understanding that the op-ed was initiated by General Flynn himself, and that he intended the op-ed to summarize a number of his longstanding public statements and positions regarding issues related to Turkey, Syria, and the Islamic State in Iraq and Syria. We also believe that the op-ed may have been prepared in the context of FIG's representation of Inovo BV, as the draft op-ed was shared with a representative of Inovo BV prior to publication and the op-ed related to subject matters overlapping with FIG's representation of Inovo BV. Again, our efforts to understand the relevant facts are ongoing, and we will continue to keep you and the Department apprised as our efforts continue. Ex. 1.

This was one of many communications, meetings, and phone conferences between the FARA unit and Covington over the FIG filing.[8]

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[7] This happened despite Mr. Flynn's clear statement on January 2, 2017, that Mr. Rafiekian wrote the first draft of the op-ed, and despite Rafiekian having separately informed Covington of this fact and providing even more information shortly thereafter. ECF No. 151-12 at 17; ECF No. 150-5 at 7.

[8] On January 13, 2017, Heather Hunt replied to Covington's January 11, 2017, letter and said, "[b]ased on your letter and our previous communications, we anticipate that General Flynn and the Flynn Intel Group will be filing a FARA registration statement imminently. . . Please continue to keep us informed regarding your progress." Ex. 2. Hunt emailed Kelner many times over the

Hunt and the FARA unit did not leave it to Covington to keep them informed. Kelner recognized the unprecedented interest of the FARA unit in Mr. Flynn: "Heather Hunt [of FARA unit] has been all over us. She emailed and then left a voicemail yesterday afternoon asking for a call this weekend." * * * "We've never seen her this engaged in any matter (ever)." Ex. 5.

Meanwhile, on January 24, 2017, as we have briefed elsewhere, FBI Director Comey and Deputy Director McCabe dispatched Agents Strzok and "SSA 1" to the White House—deliberately contrary to DOJ and FBI policy and protocols—without notifying DOJ.[9]

A. The FARA Section and David Laufman at DOJ Pressure Covington for the FARA Filing, and Covington Magnifies Its Mistake.

On February 13, 2017, the day Mr. Flynn resigned from the White House, David Laufman, along with Heather Hunt of the FARA Unit, among others, had a call with Covington to pressure them to file the FARA forms immediately.[10] Ex. 5.

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following weeks—relentlessly checking in on the status of the filing. On January 19, 2017, Heather Hunt emailed Kelner, "Rob, any updates?" Kelner replied that Covington was working "expeditiously" to compile the registration, and the firm did. Ex. 3.

[9] This was actually the FBI's second surreptitious interview of Mr. Flynn—without informing him even so much as that he was the subject of their investigation. SSA 1 had "interviewed him" in a "sample Presidential Daily Briefing" ("PDB") on August 17, 2016—unbeknownst to anyone outside the FBI or DOJ until revealed in the recent Inspector General Report of December 9, 2019.

This also goes to Mr. Flynn's claim of actual innocence. Against the baseline interview the FBI surreptitiously obtained under the guise of the PDB (in August 2016), the agents conducted the White House interview and immediately reported back in three extensive briefings during which both agents assured the leadership of the DOJ and FBI they "saw no indications of deception," and they believed so strongly that Mr. Flynn was shooting straight with them that Strzok pushed back against Lisa Page's disbelief and Deputy Director McCabe's cries of "bullshit." ECF No. 133-2 at 4. This development is addressed in Flynn's Motion to Dismiss for Egregious Government Misconduct filed contemporaneously herewith.

[10] Even when it was filed, lawyers at Covington were not sure it was required, and the FARA expert at Arent Fox was adamant it was not required. Ex. 6.

The next day—Mr. Flynn's first day out of the White House, with media camped around his house 24/7—Rob Kelner and Brian Smith of Covington, and Kristen Verderame, called Mr. Flynn to give him a status update on the FARA issues. Mr. Flynn accepted their recommendation that it was better to file, and he instructed the lawyers to "be precise."[11]

On February 21, 2017, David Laufman, Heather Hunt, Tim Pugh, and multiple others from the FARA Unit telephone-conferenced with Covington. Ex. 8. Laufman directed the content, scope, and duration of the call. In this lengthy conversation, Kelner exacerbated his prior mistake, stating that "Flynn *wrote* [the op-ed]," and that Mr. Rafiekian, Mr. Flynn's former business partner, provided "input." Ex. 8 at 2. Kelner apparently misremembered or misspoke, but the SCO parlayed the description in the FARA form into a felony attributable to Mr. Flynn. Meanwhile, Covington—instead of owning any error and correcting it—began a campaign of obfuscation that deepened the conflicts, created Mr. Flynn's criminal exposure, and led to repeated instances of ineffective assistance of counsel.[12]

That evening, Heather Hunt requested a meeting the next day at Covington's offices to review the draft FARA filing in person. She and several others from the FARA unit, arrived and reviewed the FARA draft and discussed logistics. Mr. Smith made notes of matters to include in the filing, such as the New York meeting with Turkish officials, payments to Inovo, specifics of the Sphere contract, and Sphere's budget (if established). The team noted that if Turkey was involved, it must be listed on the filing, and they created various reminders. Finally, Ms. Hunt

[11] Ex. 7: Smith Notes of 2/14/17 call.

[12] Covington lawyer Brian Smith's notes of January 2, 2017, and reconfirmed in his 302 of June 21, 2018, show that Mr. Flynn stated Rafiekian wrote the first draft. ECF No. 151-12 at 17. ECF No. 150-5 at 7. Rafiekian told Covington this also, and the emails confirmed it. Ex. 10.

reminded the Covington team to file by email and send a check to cover filing fees by a courier.[13] Ex. 9.

Covington filed the forms on March 7, 2017. Hunt acknowledged receipt at 10:50 p.m., prompting Smith to remark to his colleagues, "They are working late at the FARA Unit." Ex.12.

Hardly had the FARA registration been uploaded on the FARA website when the onslaught of subpoenas began.[14] On May 17, 2017, Special Counsel was appointed, and the much-massaged "final" Flynn 302 was reentered for use by the SCO. Soon thereafter, the SCO issued a search warrant for all Flynn's electronic devices. Meanwhile, Covington's August 14, 2017, invoice alone was $726,000, having written off 10% of its actual time. Ex. 13 at 3.

B. By the Summer, SCO Takes Down Paul Manafort and Signals FARA Issues Are on its Radar.

In late May/early June 2017, Mr. McCabe's former Special Counsel Lisa Page left the SCO, FBI, and DOJ, soon followed by FBI Agent Peter Strzok who had interviewed Mr. Flynn at the White House. The Inspector General for DOJ had found thousands of texts proving an affair between Strzok and Page and their shared hatred of Trump and his supporters. ECF No. 133-2. The SCO did not notify Congress or anyone of the reason for the departure of two of its most important team members, but it did kick into high gear against its targets. On July 26, 2017, a swarm of FBI agents raided Paul Manafort's home in the pre-dawn hours. They ransacked his

[13] On March 3, 2017, Kelner emailed Hunt to tell her "we are not quite ready to file, but close." Hunt wanted more detail and demanded to know, "close as in later today, or close as in next week?" Kelner responded, Tuesday, March 7, 2017. Ex. 11.

[14] Covington received multiple subpoenas from the DOJ FARA unit, as well as subpoenas from the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, and then Special Counsel Office. In response to these subpoenas, Covington provided many thousands of documents in sixteen productions from April 2017 through October 2017 alone, and Mr. Flynn's legal fees exceeded two million dollars.

home and searched his wife in her nightgown in their bed.[15] The SCO was contemplating multiple charges against Manafort—including FARA. *Id.*

C. After Learning the SCO Has the FARA Filings in Its Sights, Covington Quietly Begins Its FARA Assessment Anew.

By August 10, 2017, Covington learned the SCO was examining Covington's FARA filing for FIG and Mr. Flynn. Covington began re-interviewing all FIG witnesses, redoing its entire FARA assessment, and even interviewing Robert Kelley (prior counsel for FIG). Covington never notified Mr. Flynn of what it was doing, or—even more important—*why*. This escalated the conflict to a new level and rendered a simple resolution impossible.

In late August 2017, Covington learned SCO was threatening an imminent indictment of FIG partner Bijan Rafiekian for FARA violations. On August 30, Covington emailed Mr. Flynn that there had "been a development" that was "not urgent," but the lawyers wanted to chat. Ex. 14.

The Flynns, who were at their home in Rhode Island, replied that they were heading to dinner with friends. Kelner and Anthony called them while the Flynns were *en route*. On that brief call, Kelner and Anthony relayed that Rafiekian was facing imminent indictment on FARA charges. The lawyers mentioned a "possible conflict," that Kelner might have to testify, but they assured Mr. Flynn they would still be able to "vigorously defend" his case. But this was not just another unfortunate, but manageable, conflict of interest. By this time, Covington now knew there was a distinct possibility that one of Mr. Flynn's lawyers not only might have to testify against his former partner Rafiekian, but that he would be required to testify against his own client. That instantly created a non-consentable conflict of interest that only worsened.

[15] Del Quentin Wilber and Byron Tau, *FBI Raided Home of Paul Manafort in Russia Probe*, WALL ST. J. (Aug. 9, 2017, 12:00 PM), https://www.wsj.com/articles/fbi-raided-home-of-paul-manafort-in-money-laundering-probe-1502294411.

Although the Covington lawyers knew they were in a conflict situation that should have led to their immediate withdrawal from the representation, they did not bother with a written or serious in-person explanation of the conflict. They did not insist that Mr. Flynn consult independent counsel to seek advice as to the wisdom of continuing to be represented by conflicted counsel. And even if the new conflict of interest had been *consentable*, they did not seek their client's informed consent. Beyond this, Mr. Flynn's former counsel failed even to bring to his attention the additional (also non-consentable) conflicts that they could see coming—but he obviously could not. What had begun as a simple mistake in doing the FARA filing suddenly had the potential of exposing *the Covington lawyers* to civil or criminal liability, significant headlines, and reputational risk. That the Covington lawyers thought that a "drive-by" cell-phone chat, while their client was on his way to dinner with his wife, was sufficient disclosure in these dire circumstances revealed their cavalier attitude and presaged far worse.

D. Judge Howell Unseals a Crime-Fraud Order in the Manafort FARA Case, and Covington's Fears of its Own Exposure Increase.

On the weekend of October 28-29, 2017, the Special Counsel's investigation reached full boil. SCO charged Paul Manafort and his longtime associate Rick Gates with multiple criminal violations, including FARA violations. On October 30, 2017, Judge Beryl Howell unsealed an order allowing the government access to Manafort's communications with his lawyers, applying the crime-fraud exception to the attorney-client privilege.[16]

The Covington lawyers knew that their work on the FARA filing for Mr. Flynn posed multiple risks for the firm. In an internal email, they noted that the SCO was *so far* unlikely to be

[16] As Judge Howell explained, "the [crime-fraud] exception comes into play when a privileged relationship is used to further a crime, fraud, or other fundamental misconduct." *In Re Grand Jury Investigation*, 2017 U.S. Dist. LEXIS 186420, *21-22 (D.D.C. Oct. 2, 2017).

able to obtain a similar crime-fraud order in the Flynn case, and *so far* was "stymied" in pursuing "a Flynn-lied-to-his-lawyers theory of a FARA violation." Ex. 15. Yet they were highly attuned to the risk that the situation could change and determined to proceed with extra caution to prevent their fear from becoming the reality. After the Manafort order was unsealed, Steven Anthony wrote to Rob Kelner:

> I just had a flash of a thought that we should consider, among many many factors with regard to Bob Kelley, the possibility that the SCO has decided it does not have, [with regard to] Flynn, the same level of showing of crime fraud exception as it had [with regard to] Manafort. And that the SCO currently feels stymied in pursuing a Flynn-lied-to-his-lawyers theory of a FARA violation. So, we should consider the conceivable risk that a disclosure of the Kelley declaration might break through a wall that the SCO currently considers impenetrable. [17]

Remarkably, Mr. Flynn's former lawyers still said nothing to their client about this important development and its impact on their ability to continue to represent him. Yet, the lawyers were aware of and responding to the increased pressure that they felt. The same day, Mr. Kelner forwarded to Mr. Anthony, without comment, a copy of the January 11, 2017, letter he had sent to FARA's Heather Hunt—the one in which Kelner had confused the difference between "writing," "publishing," or "initiating" an op-ed.

Heightening Covington's concerns about the SCO's apparent focus on its FARA filing, Kelner received a phone call from SCO prosecutor Brandon Van Grack at 4 p.m. on October 31, 2017, in which Mr. Van Grack demanded a meeting. Ex. X (4pm meeting email).

[17] Robert Kelley was FIG's lawyer—first consulted by Mr. Rafiekian—who filed the LDA registration for FIG in September 2016. Other emails show the Covington lawyers' surprise (or fear) about Kelley's candor in explaining his prior actions. Ex. 16. Mr. Kelley took full responsibility for the decision to file an LDA (as opposed to FARA) for FIG and for the contents of that filing—both in his declaration and on the witness stand in the Rafiekian case. Exs. 17, 18. Mr. Kelley was never charged with any wrongdoing.

E. The SCO Etches Covington's Conflict of Interest in Stone by Putting Covington on Notice of FARA Charges against Mr. Flynn, Along with Charges under 18 U.S.C. §1001.

The Covington team went to the Special Counsel's Office to meet with Mr. Van Grack and his colleague Zainab Ahmad. Van Grack etched Covington's conflict of interest in stone. He said the SCO saw Mr. Flynn's exposure as "(1) FARA (failure to register); (2) FARA false statements; and (3) false statements to government officials." Ex. 19. This was the "universe of charges" they were considering against Mr. Flynn. Ex. 19.

Kelner mentioned statutory immunity only in passing, but he did nothing to make a stand for it or Mr. Flynn. *Id* at 2.[18] He recognized there was exposure for his client in agreeing to a proffer with only a "queen for a day" agreement. *Id.* at 3. Van Grack claimed the proffer was not "supposed to be a 'gotcha' interview." *Id.* at 3. Anthony acknowledged "this would definitely be a leap of faith on our part." *Id.*

F. Remarkably, SCO Specifically Raises the Conflict of Interest with Covington and Instructs Covington to Discuss with Mr. Flynn.

The lawyer-to-client conflict became unescapable. Had there been *any* justification for Covington not withdrawing previously, or at least advising the client and insisting he obtain

[18] Immunity would seem particularly appropriate to demand for a national hero like Mr. Flynn—especially in light of the immunity grants freely awarded to at least five Clinton colleagues including Cheryl Mills, and Heather Samuelson—who destroyed evidence and Clinton emails—Brian Pagliano who set up her server, and others; not to mention SCO's decisions not to prosecute others who lied to them, such as former CIA Director James Woolsey (who attended the FIG NY meeting with Turkish officials) and Joseph Mifsud (whom they allowed to leave the country despite his lies); and, an apparent grant of immunity to Tony Podesta for many of the same offenses Manafort committed.) Michael Biesecker, *GOP lawmaker: FBI gave immunity to top Clinton aide*, AP (September 23, 2016), https://apnews.com/5eb9830643084dfa9fcbedd8b18b08e0/gop-lawmaker-fbi-gave-immunity-clinton-aides-testimony.

independent counsel to advise him on the entire situation, it evaporated at that moment. "There's one more issue I want to bring up," Van Grack told Anthony and Kelner, "Because Covington prepared the FARA registration, that would make you [Kelner] a fact witness. It isn't something we are considering." Kelner dug in. "If we were to get to that point, we would litigate it very aggressively." *Id.* Kelner replied: "[w]e saw what you guys did with Manafort, and we'll definitely raise it with our client." *Id.* at 4.

G. Covington Does Not Raise the Likely FARA Charges—Much Less the Stunning Conflict with Mr. Flynn.

Despite SCO's expressed concerns, and despite Kelner's promise to address with his client that remarkable fact that the SCO had just raised the conflict of interest and Mr. Kelner's position as a witness adverse to his own client, Kelner and Anthony said nothing to Mr. Flynn. Covington did not raise the preclusive conflict with their client on November 1st. They did not raise it when they met with Mr. Flynn three days later on November 4th. They did not raise it in proffer preparation. They did not raise it before the first proffer, and they did not raise it the night of the first proffer or the day of the second proffer. Indeed, they did not raise it until almost three weeks later—late Sunday, November 19th. Instead, the Covington lawyers created talking points for their own dealings with the SCO. Ex. 23.

H. Covington Calls SCO to Arrange a Deal for The Firm—Not Mr. Flynn.

Instead of withdrawing then or even just informing Mr. Flynn of this stunning development, on November 3, 2017, Covington called the SCO. Kelner said that the meeting two days earlier left the defense team with "a few critical questions as to whether we could get comfortable bringing [Flynn] in for a proffer." Ex. 20 at 1. Van Grack and Ahmad said the proffer had to happen because of "where we are in our investigation." *Id.* They said the focus of the first proffer was going to be on issues and activities Mr. Flynn was aware of or witnessed during the

transition and his time in the White House. *Id.* at 2. Specifically, Van Grack claimed that the "initial focus" would *not* be on topics "that could [] incriminate." *Id.* Ahmad clarified that "[w]e're eventually going to want to talk about everything. That will include topics he has criminal exposure on. We aren't interested in Turkey right now." *Id.*

Anthony got the point that the firm's own FARA problem could be postponed from its perspective. "Cutting to the chase, are you going to ask him 'what is Inovo' or do you intend to leave Turkey aside and talk about the types of things [Van Grack] was talking about?" *Id.* Notably, Anthony limited his concern to the FARA issues, as to which he and Covington had exposure. This is not the work of an unconflicted counsel whose sole interest is protecting his client's rights and interests.

Van Grack agreed to postpone discussion of issues as to which Covington had potential liability. He said "What I would propose is, right now, we want to talk with your client for more than one day. Right now, initially, we are fine not talking about Turkey or the FARA piece because our investigation is not focused on Turkey/FARA."[19] *Id.*

With that exchange, the false statements Mr. Flynn allegedly made to the FBI and all the "Russia collusion" issues were *on* the table first, where he had "exposure." His own lawyers teed him up to discuss what SCO really wanted. Simultaneously, Covington took the FARA issues off the table—the only risk of problems for the firm. *Id*. at 4.

I. Covington Met with Mr. Flynn the Next Day but Did Not Disclose the FARA Target, the Firm's FARA Liability, or Covington's Pernicious Lawyer-Client Conflict of Interest.

[19] This is a significant change from Van Grack's original position that listed FARA charges as first and second in the "universe" of three charges against Mr. Flynn.

On November 4, 2017, the Covington team met with Mr. Flynn to discuss the proffer and supposedly to update him on its conversations with SCO. They urged him to accept the proffer. They pointed out risks, and they advised Mr. Flynn that "the prosecutors seemed really worked up about the [January 24, 2017] FBI interview." Exs. 21, 22. Despite recognizing on October 30 (only 4 days earlier) the "impenetrable wall" of attorney-client privilege between Covington and Flynn—and the inability of SCO to prove a "Flynn-lied-to-his-lawyer case" on the FARA filing—they warned, however, that a proffer "may be our only way of talking them out of the indictment." *Id.* Covington's self-interest reared its head, and it cannot be disentangled from its advice to Mr. Flynn to proceed to discuss what the SCO wanted and divert attention from the firm's problematic FARA registration. Covington withheld information its fiduciary relationship with its client required it to disclose. It withheld the secret of the firm's FARA liability, that SCO identified a clear conflict of interest, that SCO had instructed Covington to discuss it with Mr. Flynn, that SCO identified two FARA charges at least, and that Covington needed to protect itself.

Anthony gave a list of twelve factors to consider about going in for a proffer, but there was not a mention of FARA. In fact, Covington did not raise FARA issues *at all* with Mr. Flynn. *Id.* When Mr. Flynn, *sua sponte,* asked about the charges, Anthony deflected, strongly encouraging the Flynns to participate in the proffer because it would give the SCO the chance to "get to know the real Mike Flynn…" Ex. Flynn).[20] Then Covington prepared talking points for a call with the SCO to set up the meeting. Ex. 23.

[20] The next day, NBC ran a story that described "sources" saying that the SCO was going to proceed with charges against Flynn. One paragraph was particularly clear: "If the elder Flynn is willing to cooperate with investigators to help his son, two of the sources said, it could also change his own fate, potentially limiting any legal consequences." Ex. 24. Kelner and Anthony had already predicted that if Mr. Flynn didn't proceed with the proffer, he would likely be indicted within weeks, and his son was at risk of indictment also.

Kelner called Van Grack the next day, and SCO agreed to postpone any discussion of the FARA issues. Van Grack suggested a two-day proffer, over consecutive days, "talking between 4-5 hours each day." Now Covington was being asked to prepare a client for a multiple day proffer in *days*. *Id*. Covington agreed to proffer sessions on November 16 and 17, 2017, and provided Mr. Flynn some preparation on November 15, 2017. Ex. 25. Still Covington did not disclose to Mr. Flynn that SCO included in its entire "universe of charges" his "FARA (failure to register);" and "FARA false statements." They did disclose the assertion of false statements to government officials regarding contacts with Russian officials during transition. Ex19.

The Covington lawyers continued to withhold the most important information: (i) that the prosecutors themselves had raised Covington's serious conflict of interest; (ii) the fact that the SCO had suggested calling Kelner as a witness; (iii) the lawyers had their own fear of the firm being subjected to the "Manafort treatment"; the headline risk of *Covington* in federal crime-fraud order because of their FARA filing; and, their own *criminal* exposure if the SCO deemed the lawyers co-conspirators instead of having the government operate on the theory of "Flynn-lied-to-his-lawyers" discussed in their internal email only days earlier. Ex. 15.

Van Grack told them if the "proffer tomorrow and Friday 'goes well,' they would want Flynn to come back in Monday to proceed to the proffer on Turkey/Inovo/FARA." Kelner said they had not prepared him for that. [Van Grack] said that "because of time pressures… they might need to tell us to be prepared to do the Turkey proffer Monday." Ex. 26.

J. Covington Still Did Not Discuss the Conflict with Flynn.

On the first day of the proffer, which was to start in the afternoon of November 16, 2017, Van Grack called Anthony to discuss whether they had talked with Mr. Flynn about the conflict. "Nothing to worry about," Anthony wrote to Kelner to report on the call. "They wanted to ask

what they'd previously asked: have we considered and disclosed to the client (a) RK's potentially being a fact witness and (b) Covington's own interest with respect to its prior advice to FIG/MF regarding FARA—and that the client is OK proceeding with us? Answer: yes." Ex. 27. Apparently, Mr. Anthony misled the government.[21]

K. Self-Interested Covington Subjected Flynn to Two Days of "Exposure" on Russia and "False Statements" to the FBI.

Covington subjected Mr. Flynn to two full days of proffers on the issues on which he had the greatest "exposure" while they hid their conflict of interest. Not only did they not object to any questions by the SCO, they asked questions of him themselves to elicit answers the SCO wanted, and they strongly encouraged him, the second day, to say what they deemed would "get him through the proffer" to the satisfaction of the SCO. Ex. 21.

After those two days of proffers, Covington acceded to SCO's scheduling demands, cancelled trips, including Mr. Flynn's return home, and took the weekend (November 18-19, 2017) to begin preparing on FARA issues so Mr. Flynn could start a third proffer session on Monday, November 20, 2017.

It was not until *Sunday afternoon*, *November 19, 2017, at 1:13 p.m*., when Mr. Flynn was at his lowest, that Covington partner Anthony finally sent Mr. Flynn with a written request for consent to a "potential" conflict of interest that would have taken an ethics expert to comprehend. Astonishingly, that email referenced and relied on the *wrong* ethics rules. Ex. 28. Mr. Flynn did

[21] Giving Mr. Anthony the benefit of the doubt, he must have been referring to the brief August 30 phone call, when Kelner and Anthony described "a development" that was "not urgent" in an email, then spoke to the Flynns as they were driving to dinner. The lawyers raised the possibility of Rafiekian being indicted on FARA charges; they mentioned "a conflict" but did not elaborate; and they assured Mr. Flynn they would "vigorously defend" the case. Exs.21, 22. That does not even constitute a cognizable "drive-by" of what was required.

not even read and reply to the email until noon the following day—an hour before his third day of proffers.

He had been told that his freedom and his son's freedom hung in the balance based on how these time-critical proffers went, and he would likely be indicted in days if the proffers "didn't go well"—which meant to SCO's satisfaction. The timing of Covington's "notice" letter was only to Covington's advantage and Mr. Flynn's complete disadvantage. He had been strongly encouraged by his self-interested counsel through the worst two days and increased his "exposure." Secretly-conflicted Covington counsel did him an irreparable disservice, while completely protecting itself. And then they did not even bother making their disclosure in person, so he could ask questions and discuss with them any concerns, nor did they advise him that he *should or must* consult independent counsel before making a decision, since their advice on the matter was, well, conflicted.

After replying to Anthony's email and expressing his uninformed but profound trust for his lawyers, Mr. Flynn proceeded through three more days of "proffers" with the SCO on FARA and tangential issues through November 29, 2017. The exchange of documents for a guilty plea began on November 27, 2017.

L. Before the Plea Documents were Even Shared with Mr. Flynn, Covington Was Gleefully Planning its Marketing Campaign Based on Flynn's Plea

They had barely started exchanging plea documents before Kelner wrote his partners an email on November 27, 2017, with his plan to capitalize for the firm on Mr. Flynn's plea.

> I've been thinking about this. Assuming we reach a resolution of the Flynn case this week, after that resolution is fully public, including the FARA discussion, I would feel free to issue a meatier client advisory on FARA. I am trying, as time permits, to work up a draft. After that goes out, I am thinking we could do a client briefing in DC, one in NY, and one in LA. We would need to generate a unique slide deck for this, based partly on the advisory. We could perhaps divide and conquer, pairing

> with Zack and Derek, so that we could cover more locations quickly. Just sending out announcements of the events would be good advertising.
>
> This may be a lot to bite off, with the holidays coming up, but we may as well strike when the iron is hot, and I think Flynn would be fine with that, since the chances of our getting paid for his case are looking grim.
>
> Ex. 29.

Brian Smith agreed:

> I agree. I had a conversation last week with Derek, encouraging him and Zack to take advantage of the environment while you and I are constrained from doing so. I like the idea of client briefings, coupled with an advisory. I'm happy to help draft the advisory and update our prior decks, of course.
>
> All that said, I really worry about a press backlash if we launch something right on the heels of a plea. I agree that the General won't mind, but we could take a beating in the press if it's too close to the plea.
>
> With that in mind, we should definitely include Zack and Derek (to make it less of "Flynn's lawyers"). And I think some space from the plea is wise, notwithstanding the challenge that presents with the holidays and doing events while attention is high.
>
> Honestly, I think the attention will remain high, and you doing an event on FARA will generate a lot of attention itself. *Id.*

Their concern for their own reputations, and what marketing advantage they could gain—rather than their client's welfare—is obvious and grossly unethical.

M. Covington Does Not Share with Mr. Flynn the Crucial Details of the Government's Last-Minute "Disclosure."

On November 30, 2017, the day before Mr. Flynn's plea, the SCO has said it disclosed to Covington that "one of the agents who interviewed Mr. Flynn was being investigated by the DOJ Inspector General" and had electronic communications that "showed a preference for one of the

candidates for President."[22] The SCO also said it disclosed that the agents said Mr. Flynn had a "sure demeanor," and "did not give any indicators of deception" and that the agents "had the impression at the time that Mr. Flynn was not lying or did not think he was lying." But, Kelner and Anthony did not transmit this important information from the SCO to Mr. Flynn. Whether an oversight or deliberate strategy to keep Mr. Flynn from changing his mind about the plea, by that time, it would have exposed Covington to significant reputational risk—at a minimum—*and* scuttle the big marketing campaign.

Mr. Flynn even specifically instructed Anthony and Kelner to call SCO immediately and ask if the agents believed that he lied. Ex. 21. However, when Kelner and Anthony returned to the room where Mr. Flynn was about to sign the plea agreement, they did not inform the Flynns that Van Grack said, "both agents said 'they saw no indication of deception,'" he had "a sure demeanor," and they "did not believe he was lying or he did not believe he was lying." Ex.21. Rather, they said "the agents stood by their statement." Not only had Mr. Flynn neither been properly informed nor properly consented (if such were even possible) to the pernicious conflict of interest impairing his lawyers, but he also signed the plea without being fully informed of or understanding the government's eleventh-hour disclosure. Ex. 21. The SCO rushed them into court the next morning for Judge Contreras to accept Mr. Flynn's plea.

N. Covington Receives Awards for Flynn's Guilty Plea.

[22] The SCO put nothing in writing. Van Grack said nothing to explain the full breadth of the text messages, nor did Van Grack even name Strzok. He did not disclose the massive quantity of messages or the significant ramifications. ECF No. 133-2. Ironically, through 2018, as more news came out, Kelner and Anthony assumed that the President would fire Mueller or pardon Mr. Flynn. Cite email. Indeed, Anthony never anticipated "filing anything in this case, ever." Ex. 30.

The publicity poured in for Covington. *American Lawyer* named Kelner and Anthony "Litigators of the Week" for Mr. Flynn's plea. Ex. 30. Emails of congratulations and digital backslapping flew.[23] Ex. 31. But the publicity was not all good. On December 30, 2017, Kelner shared the news that "the Government of Israel decided not to retain us to provide FARA advice. While our work on the Flynn matter seems to have initially drawn them to us, the Prime Minister's Office apparently saw things differently and decided that our Flynn representation was a minus not a plus." Ex. 32.[24]

What came next was more evidence of Sixth Amendment violations by Covington. On January 29, 2018, Kelner received an email from a *New York Times* reporter saying that it was the reporter's understanding that "SSA1" (the Agent who interviewed Flynn with Strzok) "was pressured by McCabe to change [his] 302." Ex. 33. Kelner contacted Van Grack and Ahmad and had two conversations over the next two days. While Kelner questioned the SCO, he did not follow-up, much less file a motion to obtain *Brady* evidence. Moreover, these seem to be the questions he was supposed to have asked before Mr. Flynn signed the plea.

O. March 13, 2018, SCO Began Producing Exculpatory Evidence, Which Continues to this Day.

[23] The accolade was sent to all the attorneys and paralegals in the firm, to the marketing department, and to the management committee. Ex. 30. Anthony emailed the other lawyers involved in the case, bragging that it represented their "well-deserved recognition – to be added to your growing clips collection." Ex. 31.

[24] While the loss of this one potential client was a disappointment, it does not take much to imagine how much worse it would have been if they were called upon to testify against Michael T. Flynn or be subject to civil or criminal penalties for any mishandling of FIG's FARA filing in the height of the SCO operation, or even named in a crime-fraud order as in Manafort's case. The Covington lawyers had every reason to keep the Flynn plea from blowing up.

The SCO finally began producing *Brady* documents in March 2018. Soon an entirely different picture emerged. With every disclosure and IG Report of the last eighteen months, it has become increasingly clear the FBI was not trying to learn facts from Mr. Flynn on January 24, 2017. Rather, the Agents were executing a well-planned, high-level trap that began at least as far back as August 15, 2016, when Strzok and Page texted about the "insurance policy" they discussed in McCabe's office, opened the "investigation" on Mr. Flynn the next day, and inserted SSA 1 surreptitiously into the "sample PDB" the next day to investigate and assess Mr. Flynn. The IG reported:

> "[T]he FBI also had an investigative purpose when it specifically selected SSA 1, a supervisor for the Crossfire Hurricane investigation, to provide the FBI briefings. SSA 1 was selected, in part, because Flynn, who would be attending the briefing with candidate Trump, was a subject in one of the ongoing investigations related to Crossfire Hurricane. SSA 1 told us that the briefing provided him 'the opportunity to gain assessment and possibly some level of familiarity with [Flynn]. So, should we get to the point where we need to do a subject interview…I would have that to fall back on."[25]

P. Covington Recognized Significant Defenses as in 2018, the Attorneys Kept Mr. Flynn on "The Path."

Covington recognized significant defenses were arising from the government's productions in 2018, but the Covington lawyers repeatedly pointed out the worse-case scenario and the parade of horribles to Mr. Flynn, filed no *Brady* motion, and kept Mr. Flynn on "the path." Even worse, even though there was plenty of time and reason to reconsider everything, they took

[25] *See* U.S. Department of Justice (DOJ) Office of the Inspector General (OIG), *A Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation,* Oversight and Review Division Report 20-012 Revised (December 2019), https://www.justice.gov/storage/120919-examination.pdf (last accessed January 2, 2020), (hereinafter *Review of Four FISA Applications and Other Aspects of FBI's Crossfire Hurricane Investigation),* at 408.

no action to withdraw or insist he consult new counsel for an unconflicted perspective on the many issues that arose. Keeping control of Mr. Flynn, so they could keep him from straying, was clearly part of the Covington agenda.

Q. For the Hearing in this Court, Covington Prepared Flynn Only to Affirm His Plea.

Despite all the new *Brady* material produced and Mr. Flynn's numerous concerns and questions about withdrawing his plea, when it came time to prepare for the scheduled sentencing hearing, December 18, 2018, Anthony and Kelner were clear to Mr. Flynn: he should not withdraw his plea. They warned that if Judge Sullivan asked if he wanted to withdraw his guilty plea he must say, no, because the Court would simply be giving Mr. Flynn the "rope to hang [him]self." When the December 18, 2018, national-news-breaking hearing stunned everyone, and the Flynns accepted this Court's offer to discuss the issue among themselves, the Flynns *instructed* counsel to accept the delay. *See* ECF No. 133 at 17.[26]

V. COVINGTON & BURLING'S LAWYER-TO-CLIENT CONFLICTS OF INTEREST WERE EITHER NON-CONSENTABLE OR NOT VALIDLY CONSENTED TO.

A. Non-Consentable Conflicts of Interest.

Non-consentable conflicts of interest come in two flavors. The first type of conflict—*not* relied on by Mr. Flynn in earlier briefings—but mentioned by this Court in its Memorandum

[26] In Spring 2019, Covington finally insisted, and Mr. Flynn sought new counsel, who in turn sought expert ethics counsel immediately. Both new lawyers instantly recognized the conflict of interest held by Covington. Kelner soon became a witness in the EDVA case against Mr. Flynn's former partner, Rafiekian, and Van Grack and Turgeon proved he was adverse to Mr. Flynn. Kelner's testimony played an important part in convincing the EDVA jury to convict Rafiekian for conspiracy and acting as a foreign agent; however, Judge Trenga acquitted him. *United States v. Rafiekian*, 1:18-cr-457-AJT-1, ECF No. 372.

Opinion at ECF No. 144 at 81-89, arises under Rule 1.7(a) of the D.C. Rules of Professional Conduct. That rule flatly states that "[a] lawyer shall not advance two or more adverse positions in the same matter." That form of non-consentability is often referred to as arising "by operation of law,"[27] and does not apply to this case.

The second form of non-consentability—squarely presented here—requires reading Rules 1.7(b) and 1.7(c) together. The point of Rule 1.7(c) is that all the conflicts set out in Rule 1.7 (b)—including lawyer-to-client "personal interest" conflicts—are disqualifying unless two conditions are *both* met. Obtaining informed client consent under Rule 1.7(c)(1) is meaningless unless Rule 1.7(c)(2) has *also* been satisfied. That subparagraph puts the onus on *the lawyer* to first make a judgment that the representation is proper: "the lawyer *reasonably believes* that the lawyer *will* be able to provide competent and diligent representation to each affected client" (emphasis added).

If the lawyer cannot satisfy Rule 1.7(c)(2), then the lawyer cannot ethically even *ask* for client consent under Rule 1.7(c)(1). In that situation, the second form of non-consentability arises from what might be called "discretionary judgment."[28] Conflicts falling into this category are non-consentable because the client will never even be given a chance to consent. An ethical lawyer will voluntarily withdraw from the representation, and all lawyers will be *required* to withdraw by D.C. Rules of Professional Conduct Rule 1.16(a)(1) in any event.[29]

Although the second form of non-consentability depends upon the judgment of the lawyer on the scene, that judgment is itself further cabined by the Rules of Professional Conduct. D.C.

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[27] Hazard, Hodes & Jarvis, supra n. 2 at §12.30.

[28] Hazard, Hodes & Jarvis, supra n. 2 at §12.31.

[29] Rule 1.16(a) states in part that "a lawyer shall not represent a client or, where representation has commenced, *shall withdraw from the representation* of a client if: (1) The representation *will* result in violation of the Rules of Professional Conduct or other law" (emphasis added).

Rule 1.7(c)(2) sets the standard for even seeking client consent at the lawyer's "reasonable belief," but those terms are then defined in Rule 1.0(a) and Rule 1.0(j). Under the former, "belief" is established if the person—here the lawyers at Covington— "actually supposed the fact in question to be true." But for such a belief to be "reasonable," the latter definition specifies that it must be associated with "the conduct of a reasonably prudent and competent lawyer."

The concept of a "reasonably prudent and competent lawyer" is an ethics-related term of art, has some objective meaning, and is given further (indirect) elaboration in the Comments to the Rules:

> The underlying premise [of paragraph (b) and (c)] is that *disclosure* and *informed consent* are required before assuming a representation if there is any reason to doubt the lawyer's ability to provide *wholehearted and zealous* representation of a client or if a client might reasonably consider the representation of its interests to be adversely affected by the lawyer's assumption of the other representation in question. Although *the lawyer* must be satisfied that the representation can be wholeheartedly and zealously undertaken, *if an objective observer would have any reasonable doubt on that issue*, the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interests.

Comment [7] to Rule 1.7 (emphases added).

Under the remarkable circumstances of this case, it would be absurd to maintain that Mr. Flynn's former counsel could have had a "reasonable belief" that they *already had* or *could ever* "provide competent and diligent representation" to their client when their own interests were at equal risk and the choice was "him or us." At minimum, the Covington defense team lawyers had misstated or allowed the government to misinterpret their statement of the origins of Mr. Flynn's election day op-ed in the FARA filing they prepared. They never corrected it in any supplemental filing. They never made an amended filing. They never admitted any role in the travesty. At the same time, they discussed among themselves their *own* potential civil and criminal FARA liability, they feared entry of a crime-fraud order, and they were leery of substantial "headline risks."

Anything antagonizing the omnipotent SCO jeopardized tipping the delicate balance they struggled to maintain, and they effectively positioned themselves to minimize these and other risks.

Especially telling is the fact that despite multiple opportunities to discuss this crucial problem in person with Mr. Flynn and answer his questions face-to-face, from August until November 19, 2017, when they nominally sought his written "consent" in an extremely problematic email that is discussed below. They chose not to do so. They certainly did not advise him of the advisability—much less the *necessity*—of consulting non-conflicted counsel before making any decision to proceed with the firm.

Even this partial inventory of the lawyers' and law firm's interests that were at risk during the representation renders any purported belief in its integrity wholly untenable and, in the language of the applicable rules, wholly *unreasonable*. No reasonable lawyers or law firm could possibly meet the "reasonable belief" standard when its own work product has put the lawyers and the law firm at serious risk of criminal exposure, reputational damage, "headline risk," and civil liability—not merely the loss of an advantage in a business transaction or civil dispute. No law firm could possibly meet the "reasonable belief" standard in the face of even a minimal risk of its own possible criminal exposure—especially when confronted by an aggressive Special Counsel and the FARA unit of the Department of Justice that Covington itself acknowledged had an unprecedented interest in this matter.

Judging the severity of conflicts of interest to determine whether they rise to the level of non-consentability is especially risky when lawyer-client conflicts are at issue, because the judgment must be made by the very lawyers and law firms whose interests are threatened. There is an ever-present danger, therefore, that the lawyer will—consciously or not—*underestimate* the dangers faced by the client. By contrast, in client-to-client conflicts, at least the lawyer is

mediating between interests *other than his own*. In this case, not only was the conflict between lawyer and client, the most insidious of all, but the evidence of Covington's self-interest was so significant and dangerous that it could not *reasonably* be set aside.

Lawyer-to-client conflicts also demand the most rigorous review, because if the lawyer *does* proceed to seek the client's consent, the client will have no good way of judging whether the disclosure and explanation of the conflict has itself been compromised by the self-interest of the lawyer seeking consent.

Clients rightly have a bias *towards* trusting the lawyers they have earlier chosen—in whom they have invested hundreds of thousands of dollars, months of time, and developed a trusting relationship. Moreover, they have no realistic ability to double-check the sincerity of the request for consent. This is especially true when any purported "notice" is presented when the client is in the worst possible position, under enormous stress, and watching his life unravel. Indeed, the particular insidiousness of lawyer-to-client conflicts is that even the most well-intentioned lawyer can never be certain whether what would ordinarily have been a reasonable judgment call was tainted by his own self-interest, and if so, to what extent.

The lawyer-client conflicts of interest that are presented here are well recognized not only in legal ethics generally, but in longstanding Sixth Amendment jurisprudence. As the D.C. Circuit said over forty years ago:

> To be sure, most conflicts of interest seen in criminal litigation arise out of a lawyer's dual representation of co-defendants, but the constitutional principle is not narrowly confined to instances of that type. The cases reflect the sensitivity of the judiciary to an obligation to apply the principle whenever counsel is so situated that the caliber of his services may be substantially diluted. *Competition between the client's interests and counsel's own interests plainly threatens that result, and we have no doubt that the conflict corrupts the relationship when counsel's duty to his client calls for a course of action which concern for himself suggests that he avoid*. (emphasis added).

United States v. Hurt, 543 F.2d 162, 166 (D.C. Cir. 1976) (internal citations omitted.)[30]

B. Even if Any Aspects of the Dramatic Covington-Flynn Conflicts of Interest were Consentable, Mr. Flynn's Purported Consent was not "Informed."

Even *if* the egregious conflicts of interest described throughout *were* consentable, much more would be required before any waiver (or consent) could be deemed valid.[31] The D.C. Rules of Professional Conduct include a number of formal definitions, including Rule 1.0(e) which states that: "'[i]nformed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated *adequate information* and *explanation* about the *material risks* of and *reasonably available alternatives* to the proposed course of conduct." (emphasis added).

Making this already high standard even tougher to meet, Comment [27] to Rule 1.7 provides in part: "Disclosure and informed consent are not mere formalities. Adequate disclosure requires such disclosure of the parties and their interests and positions as to enable each potential client to make a fully informed decision as to whether to proceed with the contemplated representation." More tellingly, Comment [28] to Rule 1.7 contains the important reminder that "under the District of Columbia substantive law, *the lawyer bears the burden of proof that informed consent was secured.*" (emphasis added).

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[30] Cf., *Ambush v. Engelberg*, 282 F. Supp.3d 58 (D.D.C. 2017), in which this Court recognized that a "personal interest" conflict of interest was cognizable for purposes of a motion to disqualify counsel, before it denied the motion chiefly on standing grounds.

[31] In its Memorandum Opinion of December 16, 2019, this Court repeatedly stressed that during Mr. Flynn's original guilty plea and his later colloquy with the Court at the Sentencing Hearing, he was accompanied by and able to consult with his former counsel. ECF No. 144 at 2, 4, 9, 31, and 90. Moreover, this Court noted that *former counsel* had assured *the government* that Mr. Flynn had been made aware of possible conflicts of interests inherent in the representation, and that Mr. Flynn had waived those conflicts [Memorandum Opinion, ECF. No. 144 at 83]. As shown here, the Court's observations were presumably correct, but the assurances given by former counsel were not.

As the facts discussed above establish, Covington did not give Mr. Flynn adequate or honest information at any stage. It was not until November 19, 2017, two days after the proffer sessions began, and on the eve of the FARA proffers themselves, that Steven Anthony wrote a long email to Mr. Flynn, belatedly seeking his consent. He sought Mr. Flynn's "informed consent" to permit the representation to continue despite the intractable and pernicious conflict under which Covington had already been representing him. Mr. Flynn responded by email at noon the next day, as he was about to go into the third (FARA) proffer. Ex. 28. He did not have time to consult any un-conflicted lawyer before consenting, even if Covington had insisted he do so, which it did not.

Although the Anthony email nominally explained the elements of an "underlying work" conflict of interest, correctly noted the additional difficulty that the Covington lawyers might be called *by the government* as fact witnesses *against* Mr. Flynn, and offered Mr. Flynn an opportunity to consult with independent counsel, it did not advise him that he *should* do so—much less *insist*, and it was far too little and far too late. Covington should have withdrawn in August, three months earlier, when new counsel could have appeared and amended the FARA registration to correct any mistakes, clarify the situation, and fight for Mr. Flynn. Instead Covington charged Mr. Flynn hundreds of thousands of extra fees to reinvestigate its own flawed prior work.

The lawyers passed over weeks of time and at least three face-to-face meetings with Mr. Flynn before the first proffer. They ignored SCO's pointed request to discuss the most threatening conflict with Mr. Flynn—that Mr. Kelner could become an adverse witness to his own client and the "Flynn-lied-to-his-lawyer" theory of his criminal conduct that Covington had every incentive to adopt. Instead, the lawyers acted for the firm's interest by pushing the FARA issues to the later

days by which time SCO had Mr. Flynn undefended on the §1001 charges about Russia and his own exposure.

If all of this were not enough, Mr. Anthony's email negated any semblance of validity to the very request for consent—let alone Mr. Flynn's supposed agreement to provide that consent. In the November 19, 2017 email, Mr. Anthony stated that "under Rule 1.7 of the D.C. rules of professional conduct, a lawyer shall not represent a client if there is *a significant risk* that the representation will be *materially limited* by a personal interest of the lawyer, unless the client gives informed consent." (emphasis added). But the D.C. Rules say no such thing. What Mr. Anthony actually quoted was language from the American Bar Association Model Rules of Professional Conduct; he made no mention of the actually applicable (and stricter) D.C. Bar rule.

The applicable language in D.C. Rule 1.7 creates a much lower threshold at which a lawyer must bow out: "the lawyer's professional judgment on behalf of the client will be *or reasonably may be adversely affected* by . . . the lawyer's own financial, business, property, or personal interests." (emphasis added). The D.C. standard and the ABA standard quoted by Anthony are dramatically different. "Adversely affected" judgment is much more likely to occur than representation that is "materially limited." And, risks that "reasonably may be" presented will occur far more often than "significant risks."

Seeking client consent under the wrong rule and an inapplicable standard, Covington cannot even plausibly *claim* to have satisfied its obligation to make an "adequate disclosure" to Mr. Flynn to enable him "to make a fully informed decision." D.C. Rule 1.7 Comment [27]. And it certainly was neither timely nor fulsome. The firm cannot shoulder the burden of persuasion—presumably to this Court—that informed consent had been secured. D.C. Rule 1.7 Comment [28]. It decidedly was not.

Beyond this, even if Mr. Anthony had checked the applicable rules of professional conduct he had been practicing under for many years, his recitation of the risks posed by both of the conflicts in play—*underlying work and adverse testimony*—was generic and bland. There is nothing in his advice that would bring home to a layperson in the crisis, and under stress, Mr. Flynn faced that would alert him to the seriousness and outrageousness of the matter.[32] Even worse, the greatest damage had already been done. His own lawyers had served Mr. Flynn up on a "silver platter" to the SCO to facilitate its "Russia investigation" and increased Mr. Flynn's risk of criminal exposure, innocent misstatements, unrefreshed recollection—and all in the unprecedented pressure of trying to "get through" the proffer to SCO's satisfaction—with no understanding of the real ramifications to himself.

Time and again, the conflicts caused Covington to favor its own interests over those of its client, and, *as a result*, the lawyers repeatedly violated the constitutionally mandated standard of the Sixth Amendment.

VI. BECAUSE OF THE PERVASIVE CONFLICTS OF INTEREST, COVINGTON REPEATEDLY FAILED TO PROVIDE MR. FLYNN WITH THE CONSTITUTIONALLY MANDATED EFFECTIVE ASSISTANCE OF COUNSEL. AS A CONSEQUENCE, HIS DEFENSE WAS IRREPARABLYPREEJUDICED.

To meet the prevailing standard in this Circuit for withdrawing a guilty plea on the ground of the ineffectiveness of his counsel, Mr. Flynn must demonstrate both that counsel's advice or performance was "not within the range of competence demanded of attorneys in criminal cases," and that "there is a reasonable probability that, but for counsel's errors, he would not have

[32] Mr. Anthony contented himself with these words, which are essentially tautological and both self-serving and self-congratulatory: "We do not believe that our commitment, dedication, and ability to effectively represent you will be adversely affected by our own interests, and we believe that we will be able to provide you with competent and diligent representation." He provided no reason or fact on which such a "belief" could have rested.

pleaded guilty and would have insisted on going to trial." *United States v. Horne*, 987 F.2d 833, 835 (D.C. Cir. 1993) (internal citations and quotation marks omitted). That standard is the result of the Supreme Court's assimilation, in *Hill v. Lockhart*, 474 U.S. 52 (1985), of the general standard for showing ineffectiveness of counsel set out in *Strickland v. Washington*, 466 U.S. 668, 714 (1984). Mr. Flynn's former lawyers from Covington repeatedly acted *outside* the range of competence demanded of attorneys in criminal cases. Because of these failings, Mr. Flynn was essentially on his own (at best) and battling two opponents simultaneously (at worst). As a result, his defense was prejudiced and his ability to make knowing and intelligent decisions in his own interest was destroyed.

In terms of the second prong of the *Horne* test, there is not merely a "reasonable probability that absent counsel's failings he would not have pleaded guilty. There is certainty. If his own lawyers had not withheld critical information from him at the time of the first plea, and had not continued to obscure their own role in creating his predicament, Mr. Flynn would *not* have pled guilty in 2017, and he *would* have withdrawn his plea in 2018.

A. Covington Withheld Crucial Information from Mr. Flynn that the SCO Disclosed Immediately Before Flynn Signed the Plea Agreement.

At perhaps the single most crucial moment of the whole case, Mr. Flynn's former counsel betrayed his trust by withholding the very pieces of information Mr. Flynn needed to make his final decision whether to plead guilty on November 30, 2017. Covington should have shared with Mr. Flynn the precise information the government disclosed to them at the last minute.[33] The

[33] Any "disclosure" by the government—especially when prefaced with a claim of "no legal or ethical obligation to share"—should have been reduced to writing by the government and then shown to the client and personally acknowledged in further writing signed by the client. This was a case of national and international importance. It changed the President of the United States' administration. It altered the course of history and the life of a man and his entire family hung in the balance.

lawyers did not do so. The Flynns did not hear or understand what the government had advised it told Covington at the eleventh hour. ECF No. 122 at 16. This remarkable and directly prejudicial failure of Mr. Flynn's former counsel to provide the effective assistance of counsel required by the Sixth Amendment at the most crucial time is sufficient alone to require withdrawal of his plea.[34] It is wholly unreasonable and outside the range of acceptable lawyerly behavior, let alone competence, for counsel—*not the government, but the defendant's own counsel*—to withhold crucial information that effectively *disables* the defendant from making a truly voluntary or intelligent decision whether or not to plead guilty.

The information that counsel withheld concerned prior statements that the two FBI agents who interviewed Mr. Flynn in the White House had made about his "sure demeanor," the lack of "indicators of deception," and similar observations. Exs. Michael Flynn Declaration;Lori Flynn Declaration.

In an earlier round of briefing in this case, the government represented that it had communicated this information *to the defendant* on the day that the plea agreement was signed, November 30, 2017 [Gov't's Opp'n, ECF No. 122 at 16]. In its December 16, 2019 Opinion, moreover, this Court accepted and relied on that representation [Memorandum Opinion, ECF No. 144 at 32].As the Flynn Declarations demonstrate, however, that representation was mistaken: the government almost certainly made a disclosure to the defendant's *counsel* on that day, but Covington *did not then communicate the information to the defendant himself*. Of course, in the vast majority of cases, communication to counsel *is* communication to the client, but it was not that day.

But that merely makes the point—if it needed making—that Mr. Flynn's former attorneys acted far outside of ordinary professional norms. Whether one consults formal Rules of Professional Conduct, the traditions and lore of the legal profession, or case law discussing the meaning of the "assistance of counsel" provision in the Sixth Amendment, the core values of loyalty and zealous service always loom large.

B. Covington Continued to Fail to Act on Mr. Flynn's Behalf as New Evidence Came to Light After His Plea.

Covington repeatedly failed to reevaluate its position in light of significant developments in the case, or to encourage Mr. Flynn to seek new counsel when the developments arose that further invalidated the advice they had already given him. They repeatedly convinced him to "stay on the path" they had placed him on and to discount or render meaningless the astonishing facts that began surfacing from the day after he entered his rushed and misinformed plea.

Moreover, the Covington lawyers had most of 2018, production upon production of *Brady* evidence from the government, and ample time before the next court appearance, in which they could have fully and honestly discussed the conflict of interest with Mr. Flynn. At any time during all of 2018, had Covington been forthright and ethical, Mr. Flynn would have been able to consult meaningfully with non-conflicted counsel well in advance of the December 18, 2018, sentencing hearing in this Court. Instead, time and time again, they persuaded him to "stay on the path."

C. By December 18, 2018, Covington Prepared Mr. Flynn to Reaffirm his Plea of Guilty and Nothing Else.

Before the Sentencing Hearing of December 18, 2018, Mr. Flynn's lawyers essentially advised him only to "stay the path," say as little as possible, *and refuse to consider any suggestion by the Court that he might want to withdraw his plea*. Ex. 21. They explicitly told him: "If the

judge offers you a chance to withdraw your plea, he is giving you the rope to hang yourself. Don't do it." *Id.*

That advice is the capstone showing how Mr. Flynn's former counsel provided nothing but ineffective and self-interested assistance of counsel to the last. Not coincidentally, it also satisfies the prejudice prong of *Hill v. Lockhart*, 474 U.S. 52 (1985). *See Berkeley*, 567 F.3d at 708. The "result" of the prior proceedings in this case would have been different at every turn. Absent the actual secret self-interest of Mr. Flynn's conflicted former counsel: (i) he would have terminated Covington in August 2017; (ii) he would not have gone into the proffer; (iii) he would not have pled guilty in 2017; and, (iv) he would have withdrawn his plea in 2018. This is confirmed by the change in his defense immediately upon his retention of unconflicted and tenacious lawyers whose allegiance and devotion are only to him.

D. Covington Knew Special Counsel's Statements in the Statement of Offense Regarding the FARA Filing Were False or Wrong, But Covington Simply Stood Down.

Covington's internal emails show it knew the "false statements" asserted by the government in the FARA filing were either false, made by someone other than Flynn, included because of Covington's own judgment calls, or were falsely crafted by the government. *See* ECF No. 150-1 at 35-68. Covington simply stood down.

Covington possessed, from its first conversation with Michael Flynn and the emails provided to it in early January 2017 by Flynn, his former partner Rafiekian, and then-FIG counsel Kristen Verderame, ample information and documents to make a correct FARA filing. The choice

of information to include in that filing was made primarily by Covington lawyers Smith and Kelner who advertised their expertise as FARA lawyers.[35]

i. The "Smoking Gun" Email Shows Covington Knew the SCO's Assertions Were False.

The email Ex. 34 alone requires withdrawal of the plea and dismissal of this case. On November 27, 2017, three days before the rushed plea of Mr. Flynn, Brian Smith, Kelner, Anthony and other Covington lawyers exchanged a stunning email. It copied the full Covington team on Mr. Flynn's defense, including senior partner Michael Chertoff:

> "Paragraph 5 of the Statement (regarding FARA) is hardly brief or passing, as they suggested it would be. Several of the 'false statements' are contradicted by the caveats or qualifications in the filing. For example, the Statement says 'Flynn made' false statements that are, in the filing, attributed to Arent Fox and the accounting records."

Kelner acknowledges having made "the same point about the caveats" to SCO. Ex. 34. Smith's own quotation marks around "false statements" and "Flynn made" show Smith knew it was the SCO's allegations that were false. Moreover, it suggests that Covington had an understanding with SCO to keep any FARA comments "brief or passing"—about which they were disappointed on their own behalf.

ii. Covington did not inform Mr. Flynn that it was the alleged "false statements" in the Statement of Offense that were false.

Despite Covington's significant re-investigation of all the FARA issues after August 10, 2017, they did not make certain Mr. Flynn understood it was the government's allegations in the Statement of Offense regarding the FARA filing that were the actual falsehoods.[36] For reasons

[35] ECF No. 151-5.

[36] Despite the huge importance of *Brady v. Maryland*, 373 U.S. 83 (1963) to any criminal defendant, and the documented and well-publicized "epidemic of *Brady* violations" in this country, Covington did not make a written *Brady* demand before walking Mr. Flynn into the proffer and a plea that signed away his rights. It finally made a *Brady* demand a year later, but watered-it down

new counsel cannot imagine, Brian Smith also thought it was "helpful" that "the double negatives in the Information and the Statement" "make it hard to comprehend." Ex. 34.

iii. Covington Counseled Flynn to Sign A Statement of Offense It Knew Was False.

Despite knowing the government's allegations regarding false FARA statements in the Statement of Offense were false or wrong, Covington counseled Mr. Flynn to sign the Statement of Offense. Ex. 21.

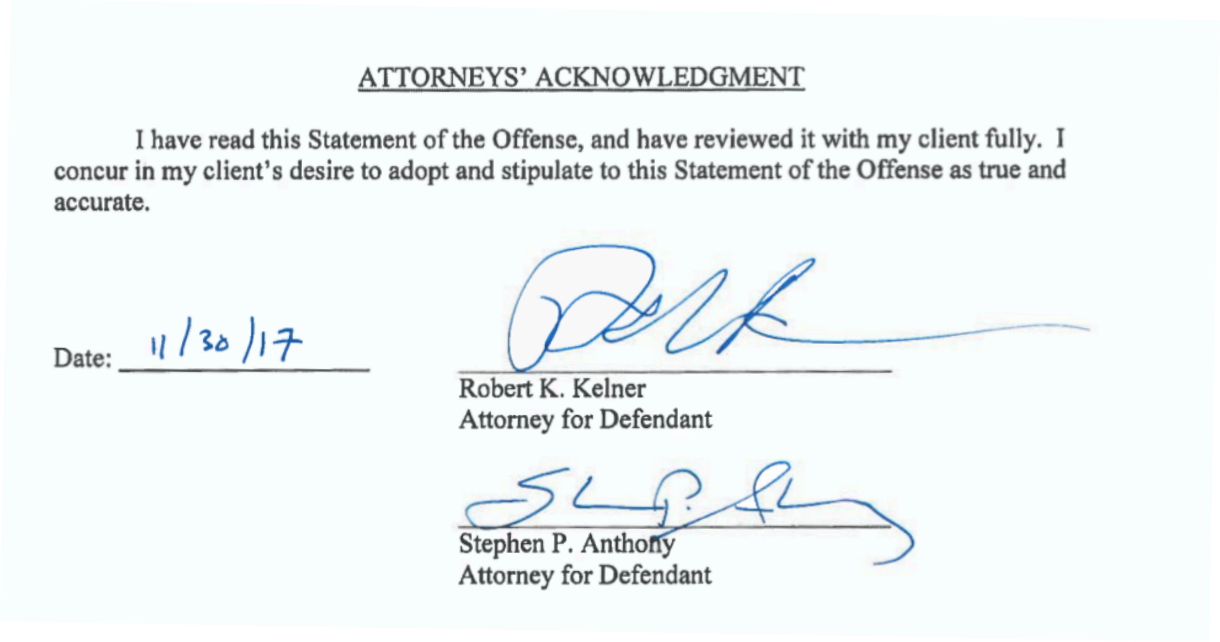
iv. Covington *Signed* an Attorney's Acknowledgement of the Statement of Offense.

Kelner and Anthony themselves signed the Statement of Offense for the plea even though they knew they had provided predominantly correct information to the government, and that mistakes, if any, were their own or the government's—not Flynn's.[37] Nonetheless, they joined the

in deference to the SCO, and it never followed up. Indeed, the defense did not even have the "final Flynn 302" McCabe approved until November 20, 2017. Although some courts have held the duty to produce exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963) does not extend to persons who have not been indicted, competent counsel would have insisted on *Brady* disclosures before permitting Mr. Flynn to walk into a proffer with SCO—not to mention before relinquishing his rights pursuant to a plea. *See White v. United States*, 858 F.2d 416 (8th Cir. 1988) (adopting the Sixth Circuit's framework that acknowledged a *Brady* claim can attack a guilty plea); *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995) (holding that "a defendant challenging the voluntariness of a guilty plea may assert a *Brady* claim"); *United States v. Webb*, 277 Fed.Appx. 775 (10th Cir. 2016) (noting that *Ruiz* only addressed impeachment and pointing to other Circuits that have held the government is still required to produce exculpatory evidence in the plea stage); *United States v. McCoy*, 636 Fed.Appx. 996 (11th Cir. 2016) ("This Court has not decided whether a guilty plea waives a *Brady* claim."). *See United States v. Saffarinia*, 2019 U.S. Dist. LEXIS 176174 (citing *United States v. Hsia*, 24 F. Supp. 2d 14 (D.D.C. 1998) (court no longer trusting the government).

[37] Conflations and choices of words muddied the ridiculous point of who wrote the op-ed. There was no dispute that Rafiekian wrote the first draft. The documents also showed that. ECF No. 150-5 at 7.

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



ATTORNEYS' ACKNOWLEDGMENT

I have read this Statement of the Offense, and have reviewed it with my client fully. I concur in my client's desire to adopt and stipulate to this Statement of the Offense as true and accurate.

Date: 11/30/17

Robert K. Kelner
Attorney for Defendant

Stephen P. Anthony
Attorney for Defendant

VII. THE LAW OF THIS CIRCUIT REQUIRES ALLOWING MR. FLYNN TO WITHDRAW HIS PLEA.

United States v. Cray, 47 F.3d 1203 (D.C. Cir. 1995), which this Court requested counsel address, denied withdrawal of a guilty plea because there was no violation of Rule 11. As more recent circuit decisions hold, Rule 11 violation is only one of the reasons that warrants granting a motion to withdraw a plea. Here, Sixth Amendment violations taint Mr. Flynn's plea, and it cannot stand.[38] *United States v. McCoy*, 215 F.3d 102, 107 (D.C. Cir. 2000) ("A plea based upon advice of counsel that 'falls below the level of reasonable competence such that the defendant does not receive effective assistance' is neither voluntary nor intelligent.") (internal citation omitted).

[38] "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). *E.g., Cuyler v. Sullivan,* 446 U. S. 335 (1980); *Holloway v. Arkansas,* 435 U. S. 475, 481 (1978).

In *United States v. Taylor*, this Circuit also hammered out parameters for a defendant to benefit from the relaxed *Cuyler v. Sullivan* standard which allows a presumption of prejudice because of an actual conflict of interest. 139 F.3d at 929. Relying on *Cuyler*, this Court wrote that "prejudice[] will be presumed if the defendant demonstrates that counsel actively represented conflicting interests, and that the conflict adversely affected his lawyer's performance." A defendant must "show that his counsel advanced his own, or another client's, interest to the detriment of the defendant. *Id.* at 930. Counsel must know of the conflict, but "if an attorney fails to make a legitimate argument, because of the attorney's conflicting interest…than the *Cuyler* standard is met. *Id.* Mr. Flynn must show that "counsel actually acted in a manner that adversely affected his representation by doing something, or refraining from doing something, that a non-conflicted counsel would not have done." *Id.* Mr. Flynn's case is painfully replete with evidence of Covington acting secretly in its self-interest and to Mr. Flynn's prejudice.

In *United States v. Berkeley*, this Circuit again addressed a conflict of interest and ineffective assistance of counsel as the basis for a plea withdrawal. In that 2009 case, the court reiterated that "prejudice is presumed…if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." 567 F.3d 703, 708 (D.C. Cir. 2009).[39]

Finally, in *United States v. McCoy* (five years after *Cray*), this Circuit applied the two-prong *Strickland* standard to a defendant's request to withdraw his plea based upon ineffective

[39] The defendant claimed that his counsel failed to pursue an entrapment defense, because he knew it would require testimony from a former client, thereby necessitating his own withdrawal from the case. *Id.* at 709. The Court took issue with only one element of the defendant's argument—defense counsel did not know the necessary fact that would have alerted him to the looming conflict. Without his attorney's knowledge of the conflict, the court held the defendant's "logical chain collapses." *Id.* at 709.

assistance of counsel when the defendant's lawyer calculated the wrong jail sentence he was facing with his plea. 215 F.3d 102 (D.C. Cir. 2000). The Court held that such a mistake in "fail[ing] to follow the formula specified on the face of the guidelines" was deficient performance under *Strickland*. *Id*. at 108. The court found that McCoy did not need to "prove[] he would have gone to trial," only that there was "a reasonable probability" that "but for counsel's mistake he would not have pled guilty." *Id.* Significantly, this Circuit remanded the denial of McCoy's motion to withdraw to the district court with instruction to grant withdrawal. Id. Mr. Flynn satisfies *Strickland*'s test—with or without the more relaxed presumption of *Cuyler*. Most of all, Mr. Flynn meets the "lenient" standard for plea withdrawal pre-sentencing, because he has demonstrated that it is only "fair and just" to grant his motion.

There is not merely a "reasonable probability" that Mr. Flynn would have proceeded differently had his own lawyers been honest with him, there is certainty: (1) he would have hired a different law firm to redo the FARA investigation in August if he had been fully informed; (2) he never would have agreed to a proffer; (3) he would not have been disarmed and effectively unrepresented in the proffer—much less tried to please SCO; (4) he would not have pleaded guilty; and (5) he would have *withdrawn* his plea in December 2018. There are no subtle judgments about "prejudice" here. Covington could not represent the colliding interests of itself vis-à-vis the omnipotent SCO and also represent Mr. Flynn.

VIII. RULE 11 FAILURES ALSO SUPPORT WITHDRAWAL PURSUANT TO *CRAY*.

In what was scheduled to be a sentencing hearing on December 18, 2018, this Court began an unexpected "extended" colloquy with Mr. Flynn. His counsel had prepared him only to refuse to withdraw his plea—lest this Court be "giving him rope to hang himself." Flynn declaration.

That plea colloquy did not, however, inquire into whether any undisclosed promises or threats induced the plea agreement. Moreover, the Court specifically expressed its dissatisfaction with the underlying facts supposedly supporting the factual basis for the plea. *United States v. Cray*, 47 F.3d 1203, 1207 (D.C. Cir. 1995) ("Where the defendant has shown his plea was taken in violation of Rule 11, we have never hesitated to correct the error.)"

As previously discussed, there was substantial pressure on Mr. Flynn to participate in a quick proffer and reach a quick plea agreement with the government. The government leveraged the threat of charges against Mr. Flynn's son to induce that agreement. Yet the government's decision not to charge his son was not reduced to writing as part of the plea agreement; it was a secret, side deal between counsel. Yet, that "understanding" was one of two necessary pre-conditions for Mr. Flynn to enter into the plea agreement. The government and Mr. Flynn's prior counsel chose not to disclose that agreement to this court. By doing so, they concealed from this Court that the plea was driven by threats and promises that were foreign to the plea agreement, thus showing that the plea was not voluntary. That evidence is now in plain view, and the government's conduct since the plea was entered on December 1, 2017, shows as much. Exs. 21, 22.

Moreover, the Court did not complete the full colloquy to ensure that Mr. Flynn fully understood the conduct that was required for his actions to be considered a violation of 18 U.S.C. § 1001. While the Court did ask him about whether he considered himself guilty, it did not inquire into the basis of that belief. That was crucial here because it may have been that Mr. Flynn was pleading guilty to take responsibility for something that was not criminal activity.

Finally, the Court was not satisfied with the factual basis for the plea. It said it had "many, many, many questions." Hr'g Tr. Dec. 18, 2018 at 20. The Court, sensing the materiality issues in the case, specifically left those questions open for another day. *Id.* at 50.[40]

IX. CONCLUSION

For these reasons, and/or those briefed at ECF No. 151, this Court should allow Mr. Flynn to withdraw his plea. Indeed, the government should agree that this plea be allowed to be withdrawn. Not only was Mr. Flynn denied his Sixth Amendment right to "zealous counsel" devoted solely to his interests, he was misled, misinformed and betrayed by counsel mired in non-consentable conflicts of interests that only worsened to Mr. Flynn's increasing prejudice.

In addition, when this Court unexpectedly extended his Rule 11 colloquy, it did not address a fundamental point that would invalidate his plea, and it ended the hearing with significant dissatisfaction over the information underlying the factual basis for his plea and with "many, many,

[40] The element of materiality boils down to whether a misstatement "has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed." *United States v. Gaudin,* 515 U.S. 506, 522-23 (1995). In applying this rule, courts analyze the statement that was made and the decision that the agency was considering. *Universal Health Services, Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 2002-03 (2016). For a misstatement to be material, the agency must show that it would have made a different decision had the defendant told the truth.

The government alleges misstatements that were not material because the FBI agents did not come to the White House for a legitimate investigative purpose; they did not come to investigate an alleged crime. Instead, they came to get leverage over Mr. Flynn at a time when they felt the new administration was still disorganized. So they ignored policies and procedures. They went around the Department of Justice and the White House Counsel's office, and they walked into the National Security Advisor's office under false pretenses. They decided not to confront Mr. Flynn with any alleged misstatement not for a legitimate law enforcement purpose, but rather because they did not know if the effort to purge him from his office would be successful. If it was not, they wanted to maintain a collegial working relationship with him. If Mr. Flynn had answered the questions the way in which they imagine he should, nothing at all would have changed in the actions the FBI would have taken.

many questions" remaining. There is every reason in this case that the Court must exercise its discretion and allow withdrawal of the plea. It is the only "fair and just" result short of dismissing the entire prosecution for outrageous and egregious government misconduct.

Dated: January 23, 2020

Respectfully submitted,

/s/ Jesse R. Binnall
Jesse R. Binnall
Lindsay R. McKasson
Harvey & Binnall, PLLC
717 King Street, Suite 300
Alexandria, VA 22314
Tel: (703) 888-1943
Fax: (703) 888-1930
jbinnall@harveybinnall.com
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W. William Hodes
The William Hodes Law Firm
3658 Conservation Trail
The Villages, Florida 32162
Tel: (352) 399-0531
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/s/ Sidney Powell
Sidney Powell
Molly McCann
Sidney Powell, P.C.
2911 Turtle Creek Blvd.,
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Dallas, Texas 75219
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sidney@federalappeals.com
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molly@federalappeals.com
Admitted *Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2020 a true and genuine copy of this Supp. Motion to Withdraw Plea of Guilty and Brief in Support was served via electronic mail by the Court's CM/ECF system to all counsel of record, including:

Jessie K. Liu, U.S. Attorney for the District of Columbia
Brandon L. Van Grack, Special Assistant U.S. Attorney
Jocelyn Ballantine, Assistant U.S. Attorney
555 4th Street, NW
Washington, D.C. 20530

Respectfully submitted,

/*s*/ Jesse R. Binnall
Jesse R. Binnall, VSB# 79272
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jbinnall@harveybinnall.com

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SHANGHAI SILICON VALLEY WASHINGTON

Robert K. Kelner

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T +1 202 662 5503
rkelner@cov.com

January 11, 2017

Ms. Heather H. Hunt
Registration Unit
U.S. Department of Justice
600 E Street, N.W.
Washington, D.C. 20004

Re: Flynn Intel Group, Inc.

Dear Ms. Hunt:

On behalf of our clients, Lieutenant General Michael T. Flynn and the Flynn Intel Group, Inc. ("FIG"), this letter provides an initial response to your November 30, 2016, letter to General Flynn and FIG regarding a potential obligation to register under the Foreign Agents Registration Act ("FARA"). As a preliminary matter, we appreciate the several telephone conversations that you and I have had over the last several days concerning our review of this matter and the steps we are taking to respond to your inquiry letter.

As I noted in our initial conversation, the existence of your letter was not known to General Flynn and FIG until approximately December 24, 2016, because FIG generally suspended its activities in mid-November, including the use of the office to which the letter was sent. As soon as the letter was discovered, FIG contacted the FARA Registration Unit to discuss a timeline for responding. Since that time, we have been working diligently to gather and review information necessary to understand the activities relevant to your letter, and we intend to respond more fully as soon as we are capable of doing so.

As I shared in our recent telephone conversation, based on currently available information, we anticipate that General Flynn and FIG likely will file a FARA registration statement and supplemental statement for FIG's representation of Inovo BV, in lieu of the Lobbying Disclosure Act ("LDA") filing that FIG filed on September 30, 2016. Although the LDA filing disclosed FIG's engagement by Inovo BV, in hindsight it seems likely that the subject matter of FIG's representation of Inovo BV may have called for registration under FARA rather than under the LDA.

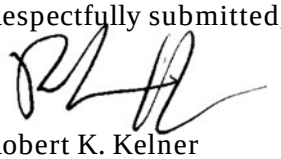
As discussed with you, our review has been complicated by a number of factors, including challenges in recovering e-mails and other documents because FIG began shutting down in mid-November, prior to your letter. In addition, as I shared with you, we have not yet reached a final determination as to the foreign principal(s) to be listed in a FARA registration. We are also continuing to assess the role of various consultants and employees who performed work for Inovo BV in order to determine whether any of them are required to file short-form FARA registrations.

Your letter asked several questions regarding an op-ed authored by General Flynn and published in *The Hill* newspaper on November 8, 2016. It is our current understanding that the op-ed was initiated by General Flynn himself, and that he intended the op-ed to summarize a number of his longstanding public statements and positions regarding issues related to Turkey, Syria, and the Islamic State in Iraq and Syria. We also believe that the op-ed may have been prepared in the context of FIG's representation of Inovo BV, as the draft op-ed was shared with a representative of Inovo BV prior to publication and the op-ed related to subject matters overlapping with FIG's representation of Inovo BV. Again, our efforts to understand the relevant facts are ongoing, and we will continue to keep you and the Department apprised as our efforts continue.

As we have discussed, the FARA registration that FIG and General Flynn likely will file would include various details required to be disclosed under FARA, including information responsive to other questions posed in your inquiry letter. We are moving as quickly as reasonably possible to assemble the necessary information, and we will continue to remain in close touch with the FARA Registration Unit.

As always, please contact me if you have any questions about this matter.

Respectfully submitted,



Robert K. Kelner

cc: Clifford Rones

FW: Flynn Intel Group, Inc.

From: "Kelner, Robert" <rkelner@cov.com>
To: "Langton, Alexandra" <"/o=covington & burling/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=54610707d47f404ba9511efe701f1f09-lang">, "Smith, Brian" <"/o=covington & burling/ou=cb/cn=recipients/cn=c&b.cbpowa02.smithbd">
Date: Sat, 21 Jan 2017 14:34:41 -0500

Re: below, looking over the questions in her original letter, I think it's going to be easiest to just send a cover letter from me with the registration that responds to her original questions. I will take a shot at drafting the letter. We know enough now to answer the questions, though in some instances (namely re the Turkish Government role), we will have to say we do not know for sure.

Robert Kelner

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

COVINGTON

From: Hunt, Heather H. (NSD) [mailto:Heather.Hunt@usdoj.gov]
Sent: Friday, January 13, 2017 6:37 PM
To: Kelner, Robert
Cc: Smith, Brian
Subject: Flynn Intel Group, Inc.

Rob –

Thank you for your letter of January 11, 2017, and for your efforts to resolve this matter expeditiously. Based on your letter and our previous communications, we anticipate that General Flynn and the Flynn Intel Group will be filing a FARA registration statement imminently. We understand that the registration statement will include answers to the questions we posed in our letter of November 30, 2016. If the registration statement does not fully respond to our questions, we ask that you provide a supplemental letter. Please continue to keep us informed regarding your progress.

Best Regards,
Heather

Heather H. Hunt
Chief, FARA Registration Unit
Counterintelligence and Export Control Section
National Security Division
U.S. Department of Justice
Washington, DC 20530
(202) 233-0776/0777

Re: Flynn

From: "Hunt, Heather H. (NSD)" <heather.hunt@usdoj.gov>
To: "Kelner, Robert" <rkelner@cov.com>
Date: Thu, 19 Jan 2017 22:51:56 -0500

Thank you for the update.

> On Jan 19, 2017, at 8:50 PM, Kelner, Robert <rkelner@cov.com> wrote:
>
> We are working expeditiously on compiling a registration based on available records.
>
> Rob
>
> Sent from my iPhone
>
>> On Jan 19, 2017, at 4:53 PM, Hunt, Heather H. (NSD)
<Heather.Hunt@usdoj.gov> wrote:
>>
>> Rob -
>> Any updates?
>> Heather
>

RE: GEN Flynn meeting

From: "Kelner, Robert" <"/o=covington & burling/ou=cb/cn=recipients/cn=c&b.cbpowa01.kelnerrk">
To: K Verderame <kverderame@ponderainternational.com>
Cc: "Smith, Brian" <bdsmith@cov.com>
Date: Thu, 09 Feb 2017 17:28:05 -0500

OK. It's also my wife's birthday….. But we'll figure that out. In some ways that time might be easier for me than this weekend. Does he want to meet here at Covington?

Meantime, Heather Hunt has kind of been all over us. She emailed and then left a voicemail yesterday afternoon asking for a call this weekend (because I had indicated I thought this weekend was the earliest we could meet with our client). She said she just needed to know when we will be coming in to meet her, so she can arrange her schedule. We've never seen her this engaged in any matter (ever). I'll let her know tomorrow we wouldn't be prepared to meet her until later next week sometime.

Best,
Rob

Robert Kelner

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

[cid:image001.jpg@01D282F9.DF5B35D0]

From: K Verderame [mailto:kverderame@ponderainternational.com]
Sent: Thursday, February 09, 2017 5:20 PM
To: Kelner, Robert; Smith, Brian
Subject: GEN Flynn meeting

The only time he can do this (and your spouses are going to kill you) is Tuesday at 6 pm. Please apologize to your wives for me!!!

K

Attachments:
image001.jpg (2 KB)
http://cbentvault01dc.cov.com/EnterpriseVault/ViewMessage.asp?VaultId=127967E82C2BB114CBA93692D726B7D3D1110000cbentvaultsite&SavesetId=201706107135995~201702092228070000~Z~F07716C8D09AB7B82C20E2B6A030AED1&AttachmentId=1image001.jpg

<TABLE/></BODY></HTML>

Re: FARA

From: "Hunt, Heather H. (NSD)" <heather.hunt@usdoj.gov>
To: "Kelner, Robert" <rkelner@cov.com>
Date: Sat, 18 Feb 2017 09:46:30 -0500

Okay. Thanks. So 2pm on Tuesday and let's talk briefly sometime on Monday. Have a good weekend.

> On Feb 18, 2017, at 8:27 AM, Kelner, Robert <rkelner@cov.com> wrote:
>
> Yes.
>
> Sent from my iPhone
>
>> On Feb 18, 2017, at 8:48 AM, Hunt, Heather H. (NSD) <Heather.Hunt@usdoj.gov> wrote:
>>
>> Does 2pm work for you?
>>
>>> On Feb 18, 2017, at 7:39 AM, Kelner, Robert <rkelner@cov.com> wrote:
>>>
>>> Ok.
>>>
>>> Sent from my iPhone
>>>
>>>> On Feb 18, 2017, at 8:35 AM, Hunt, Heather H. (NSD) <Heather.Hunt@usdoj.gov> wrote:
>>>>
>>>> Thank you for getting back with me on a Saturday morning. I can do 1pm although it might be tight. I will be in touch as I need to coordinate with others.Also, let's talk by phone real quick on Monday if you are able.
>>>>
>>>>> On Feb 18, 2017, at 7:19 AM, Kelner, Robert <rkelner@cov.com> wrote:
>>>>>
>>>>> Would 1pm work for you?
>>>>>
>>>>> Sent from my iPhone
>>>>>
>>>>>> On Feb 18, 2017, at 7:06 AM, Hunt, Heather H. (NSD) <Heather.Hunt@usdoj.gov> wrote:
>>>>>>
>>>>>> Rob -
>>>>>> What time is good on Tuesday afternoon?
>>>>>> Heather
>>>>>>
>>>>>> On Feb 13, 2017, at 12:30 PM, Kelner, Robert <rkelner@cov.com<mailto:rkelner@cov.com>> wrote:
>>>>>>
>>>>>> ok
>>>>>>
>>>>>>
>>>>>> Robert Kelner
>>>>>>
>>>>>> Covington & Burling LLP
>>>>>> One CityCenter, 850 Tenth Street, NW
>>>>>> Washington, DC 20001-4956
>>>>>> T +1 202 662 5503 | rkelner@cov.com<mailto:rkelner@cov.com>
>>>>>> www.cov.com<http://www.cov.com>

>>>>>>
>>>>>> <image002.jpg>
>>>>>> This message is from a law firm and may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply e-mail that this message has been inadvertently transmitted to you and delete this e-mail from your system. Thank you for your cooperation.
>>>>>>
>>>>>>
>>>>>>
>>>>>> From: Hunt, Heather H. (NSD) [mailto:Heather.Hunt@usdoj.gov]
>>>>>> Sent: Monday, February 13, 2017 1:27 PM
>>>>>> To: Kelner, Robert
>>>>>> Subject: RE: FARA
>>>>>>
>>>>>> Let's tentatively set a call for 3pm, but I may need to make it a few minutes after that.
>>>>>> thanks
>>>>>>
>>>>>> From: Kelner, Robert [mailto:rkelner@cov.com]
>>>>>> Sent: Monday, February 13, 2017 12:43 PM
>>>>>> To: Hunt, Heather H. (NSD) <hhunt@jmd.usdoj.gov<mailto:hhunt@jmd.usdoj.gov>>
>>>>>> Subject: RE: FARA
>>>>>>
>>>>>> I could talk at 3pm today.
>>>>>>
>>>>>> Rob
>>>>>>
>>>>>>
>>>>>> Robert Kelner
>>>>>>
>>>>>> Covington & Burling LLP
>>>>>> One CityCenter, 850 Tenth Street, NW
>>>>>> Washington, DC 20001-4956
>>>>>> T +1 202 662 5503 | rkelner@cov.com<mailto:rkelner@cov.com>
>>>>>> www.cov.com<http://www.cov.com>
>>>>>>
>>>>>> <image003.jpg>
>>>>>> This message is from a law firm and may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply e-mail that this message has been inadvertently transmitted to you and delete this e-mail from your system. Thank you for your cooperation.
>>>>>>
>>>>>>
>>>>>>
>>>>>> From: Hunt, Heather H. (NSD) [mailto:Heather.Hunt@usdoj.gov]
>>>>>> Sent: Monday, February 13, 2017 12:29 PM
>>>>>> To: Kelner, Robert
>>>>>> Subject: FARA
>>>>>>
>>>>>> Rob –
>>>>>> Any updates? Are you available for a call after 3pm today?
>>>>>> Thanks,
>>>>>> Heather

Arent Fox

Arent Fox LLP / Attorneys at Law
Los Angeles, CA / New York, NY / San Francisco, CA / Washington, DC
www.arentfox.com

Matthew M. Nolan
Partner
202.857.6013 DIRECT
202.857.6395 FAX
matthew.nolan@arentfox.com

January 18, 2017

Mr. Ekim Alptekin
Burhaniye Mahallesi Tasocaklari Sokak
Bogazici Palmiye Evleri B Kapisi C Blok No :10
34676 Beylerbeyi Burhaniye -ISTANBUL
TURKEY

Re: **Advice on Regulations for the Foreign Economic Relations Board of Turkey**

Dear Mr. Alptekin:

You have asked for our advice regarding the regulations for the Foreign Economic Relations Board of Turkey (DEIK), specifically, the applicability of this regulation to your election as the Chairman of The Turkish-American Business Council (TAIK) one of the Business Councils of the Foreign Economic Relations Board of Turkey.

In particular, you have asked us to prepare a Memo on the procedure of the election TAIK Chairman and if TAIK Chairman position could be construed as a Turkish government position or an independent position for purposes of the Foreign Agents Registration Act (FARA). We note that a new structure for TAIK was adopted on September 20, 2014 with the regulation numbered 29125, *Regulation on Working Principles and Procedures of Foreign Economic Relations Board and Business Councils,* which was issued by the Ministry of Economy to regulate the working principles and procedures of DEIK and its business councils.

We provide a summary of the relevant facts, our summary conclusions, and a more detailed legal analysis below. If you disagree with any of the facts stated, please advise us immediately, as it is critical to have complete and correct facts in completing the legal analysis and any change in the facts could affect the conclusions as stated.

I. Summary Conclusions

Based on the facts provided, we do not believe TAIK should be considered an entity or agent of the Government of Turkey (GOT) such that any U.S agents hired by TAIK would be required to register under FARA rather than under the Lobbying Disclosure Act (LDA). While the GOT's 2014 decrees and approval/veto authority does indicate some potential GOT involvement in TAIK activities and governance, the facts as presented do not indicate that: (a) the GOT is directing the activities of TAIK; (b) TAIK should be treated as part of the GOT; or (c) the GOT has caused TAIK to engage FIC or other U.S. consultants.

a. Even if TAIK were to be considered an agent or part of the GOT, Mr. Alptekin' s activities with respect to INOVO BV (INOVO), RATIO Oil Exploration LP (RATIO), and Flynn Intel Group (FIG), would appear to be independent of his position with TAIK and his/INOVO's actions were not directed, controlled or requested by TAIK. Accordingly, a FARA registration would not be required – an LDA registration, which was filed, would appear to be sufficient to meet U.S disclosure requirements.

II. Facts

A. Ekim Alptekin, INOVO BV and the Flynn Intel Group Contract

Mr. Ekim Alptekin is a Turkish Businessman and founder and president of EA Havacilik A.Ş, a major shareholder of Eclipse Aerospace; an Albuquerque, New Mexico-based aircraft manufacturer. Eclipse Aerospace was awarded the Commercial Leadership Award by the American Turkish Council in 2011. Ekim Alptekin is commercially active in the Real Estate and Defense industries through his companies EA Gayrimenkul Geliştirme İnşaat Yatırım and ATH Savunma ve Güvenlik Çözümleri A.Ş. and currently serves the Chairman of TAIK . He also serves as an Honorary Consul to the Republic of Albania, and represents the Republic of Turkey in the Board of the United States Nowruz Commission. He is a member of the European Council of Foreign Relations (ECFR) and the Turkish Industry and Business Association TÜSİAD.

INOVO is a Dutch company incorporated in 2005 to provide Turkey-related consultancy services. Ekim Alptekin is the sole owner of INOVO BV. The company has always been in good standing and has represented companies such as Motorola Solutions or international law firms with regard to their plans to invest or do business in Turkey.

INOVO is representing RATIO, a private sector Israeli company, that owns a 15% share in the Leviathan gas consortium in Israel that wants to export gas into Turkey. INOVO was engaged in March 2016 by RATIO to advice on the investment climate in Turkey. As part of this contract RATIO also asked INOVO to provide geopolitical reporting with a special interest in Turkey's continued alignment with the West/United States.

After some period of time, RATIO determined that the limited reporting on such matters by INOVO was insufficient and RATIO requested that INOVO outsource this service to more expert providers. INOVO subsequently reached out to FIG in August 2016 with the question to measure the strength and challenges of Turkish American relations. The agreement was for 3 months which would only be renewed if both parties so agreed. There was a lack of confidence in the relationship and at some point, while discussing the exact scope of the contract, FIG Lobbyist Mr. Kelley suggested activities to increase the level of confidence in the relationship. He also indicated that FIG might end up having discussions in Congress, and to this end and he should consider registering under the Lobbying Disclosure Act. Mr. Alptekin and Mr. Kelley agreed to be on the safe side of things and Mr. Kelley registered as the lobbyist. Although the initial aim was merely passive geopolitical reporting, Mr. Alptekin and Mr. Kelly agreed that at some time in the future there might be a lobbying component and a PR component. The lobbying PR components ultimately never took place. Mr. Alptekin and Mr. Kelly had several interactions about this. FIG introduced Mr. Alptekin to Sphere Consulting as their PR company and during the first meeting in October. Sphere Consulting explained that a 3 month contract was not enough and little could be done. Mr. Alptekin argued INOVO should be reimbursed for part of the retainer since both the Lobbying and PR components never materialized. INOVO never hired Sphere Consulting.

On election Day, November 8, 2016, in "The Hill", a US political newspaper, General Flynn authored a strongly worded opinion piece condemning the cleric Fetullah Gulen who lives in the U.S. and Gulen's U.S activities, and calling upon the U.S government to support the Turkish Government. The article was subsequently linked by certain reporters to the contract FIG had with INOVO and Mr. Alptekin.

Mr. Alptekin told the press that he had very few interactions with General Flynn. They never discussed details of the contract between INOVO and FIG; and they never discussed his personal involvement. When Mr. Alptekin met him in person, the General independently expressed his concern about Radical Islam and said he feel Turkey should do more on combatting it. He did not commit to or announce that he had any intentions of writing an article; nor did Mr. Alptekin never ask him to do so. He never consulted Mr. Alptekin on this, or asked his opinion. If he had, Mr. Alptekin would have strongly advised against publishing an article along the lines of his opinion letter that appeared in the Hill on election day.

A subsequent article (http://dailycaller.com/2016/11/24/michael-flynns-consulting-firm-may-have-violated-federal-lobbying-law/) was published without asking Mr. Alptekin for a comment. The author Chuck Ross did check Mr. Alptekin' s Linkedin profile but never contacted him for a comment. The second article that appeared was in Politico. When Mr. Alptekin reacted, Politico authored a minor amendment to the article but reported the two assumptions that were first drawn by the Daily Caller article: 1. Ekim Alptekin via TAIK is an extension of the Turkish government and 2. General Flynn has written the article as a Lobbyist in the context of the INOVO/FIG contract.

B. DEIK and The Turkish-American Business Council (TAIK)

DEIK's mission is to assist in managing the foreign economic relations of the Turkish private sector. DEIK monitors the economic, commercial, industrial and financial relations of Turkey with foreign countries or international communities, to support the establishment and development of such relations; provides opinions and suggestions; collects information and statistical data; performs works in order to enhance the import of Turkey and to encourage the international investments for export; prepares strategies for general economic matters or in respect of sectors for relations with several countries, regions, institutions and establishes business councils (Article 5 of the Regulation).

As of November 2014, DEIK has 99 founding institutions, 121 business councils, and approximately 900 member companies which form these councils, as well as 2000 representatives from the member companies.

DEIK's organs are the General Assembly, Board of Directors, Executive Board, Board of Auditors, Business Councils, High Advisory Board and Advisory Boards. (Article 6 of the Regulation).

DEIK does not receive government funding. In addition to the corporate members of DEIK, Union of Chambers and Commodity Exchanges of Turkey (TOBB) and Turkish Exporters' Association ("TIM"). DEIK's Board of Directors is composed of thirty five members including the Chairman of the Board. DEIK's Board of Directors is composed of five permanent members, who are the representatives of certain founding institutions - namely TOBB, TIM, Turkish Industrialist and Businessmen's Association ("TUSİAD"), Independent Industrialist and Businessmen's Association ("MUSIAD"), Turkish Contractors Association ("TMB") and business council leaders, representative of other founding institutions and other members elected among other General Assembly delegates. **DEIK's Chairman is assigned among the Board members by the Turkish Minister of Economy (Article 9 of the Regulation).**

The Executive Board is composed of the Chairman of the Executive Board and twelve members who are elected among and by the members of the Board of Directors. The Chairman of the Board of Directors also functions as the Chairman of the Executive Board. Five members of the Executive Board are elected among the representatives of TOBB, TIM, TUSIAD, MUSIAD and TMB; two members among the representatives of other founding institutions, four members among the business council chairmen while one other is elected among other General Assembly delegates. Two vice chairmen are elected among and by the Executive Board members (Article 12 of the Regulation)

It is through Business Councils that DEIK establishes corporate cooperation (Article 14-15 of the Regulation)

There are three different types of business councils, namely Country Business Councils, Sectoral Business Councils, and Special Purpose Business Councils. Business Councils are established through cooperation agreements signed with foreign counterparts with the purpose of promoting business relations with these countries. Bilateral country councils which are founded in 114 countries as of February 2015 have been gathered under 8 regional councils (in Africa, America, Asia-Pacific, Eurasia, the European Union, South East Europe, the Gulf and the Middle East). Business Councils consist of two parties, one is the Turkish party and the other one is a counterpart institution in the relevant country, which is usually a representative body of the respective country's private sector. Councils meet regularly each year at "Business Councils Joint Meetings". Each sectoral and special purpose business council within DEIK convenes a separate General Assembly annually and a general assembly meeting with an election every two years. Each business council elects its own Executive Committee during these general assembly meetings. The Executive Committee members then elect the Chairman for the Business Council.

Executive Boards of the Business Councils meet at regular intervals to discuss bilateral or multilateral cooperation opportunities, challenges and current developments. The executive boards are responsible for developing recommendations about the policies, solutions and mechanism which are necessary to improve commercial and economic relations within the framework of the main strategies designated by the Board of Directors, and doing research in order to identify related opportunities. Several sectoral business councils have been established within the body of DEIK in order to improve Turkey's place in the global value chain and promote the export of services. Health Tourism Business Council, Education Economy Business Council, Energy Business Council, Logistics Business Council, and International Technical Consultancy Business Council continue their operations.

High Advisory Board of DEIK convenes at least once annually under the chairmanship of the Turkish Minister of Economy to determine DEIK's annual activities and harmonization and evaluation of them with Turkey's economic strategies and interests. Members of the Board are assigned by the Minister (Article 17 of the Regulation).

TAIK is one of the Business Councils of DEIK. TAIK was formed as the first business council in Turkey in 1985 with the aim to enhance trade and investment relations between the United States of America and Turkey. TAIK is organized pursuant to Government decree, but is composed of and acts for member companies. TAIK's vision is primarily to increase the trade and investment volume between the US and Turkey; to be recognized as a reliable source of information and networking channel on bilateral trade issues for both countries and to make the US companies view Turkish companies as a key partner and Turkey as a destination for direct investments in the region. TAIK operates with a mission to create platforms to facilitate the development of economic relations between the U.S. and Turkey through its wide spectrum of activities such as conferences, forums, business summits, lobbying visits, networking luncheons and dinners, educational site visits, etc.

TAIK's Executive Board consists of top-level executives of the leading companies in Turkey. The Executive Board is elected by the General Assembly of DEIK/Turkey-Americas Business Councils in every 2 years and the Board elects its Chairman and the Vice Chairmen. TAIK operates under DEIK, but has a separate membership and separate budget from DEIK. It does not receive government funding. TAIK's budget only comes from its member companies and event sponsors. TAIK's Executive Board is elected every 2 years by the General Assembly of DEIK and Turkey American Business Councils. It consists of senior executives from Turkish companies.

Prior to September 2012, DEIK operated as an independent organization composed of various business chambers and commodity exchanges with a budget determined by the Union of Chambers and Commodity Exchanges of Turkey (TOBB). TOBB, in turn, derived its budget from assessment s on various member Chambers of Commerce and Commodity Exchanges, and is subject to control indirectly by the Government of Turkey. However, in September 2014, DEIK's authorization law and governance structure significantly changed. The Turkish Government Ministry of the Economy issued revised regulations which expanded the Ministry of Economy's authority over the operations of DEIK, including the ability to cancel or revise the institution, appointing the Chairman and certain other officials, designating 25 members of the General Assembly, potential funding from the Ministry, and other authority.

Mr. Alptekin was transparently elected into office as Chairman of TAIK by other peer company members of TAIK on October 25, 2016.[1] The executive committee list in **Appendix A** has the list of private Turkish companies which voted to elect Mr. Alptekin. These companies has been member of TAIK for many years. Mr. Alptekin was elected by the votes of business

[1] Please see the Minutes of Ordinary General Assembly Meeting of TAIK dated October 26, 2015; Minutes of the Meeting of the Executive Committee of TAIK dated October 26, 2015; General Assembly Meeting List of Attendees; Suggestions for the General Assembly Presiding Committee; Meeting Agenda and pictures of the TAIK meeting in **Appendix A.**

entities not by any government entity representative. The position of Chairman at TAIK is voluntary: Mr. Alptekin receives no salary or compensation from TAIK or the Government. Some limited expenses incurred as Chairman may be reimbursed, but major expenses, such as travel to the annual American Turkish Council Conference in the United States, is paid for out of personal or company funds.

We note that documents leaked by Wikileaks indicate that certain individuals with close ties to the Turkish government have tried to convince the Turkish government to influence TAIK's elections. None of these emails were on Mr. Alptekin' s behalf; quite the contrary. The same leaks only show emails to members of the Cabinet asking for an intervention to favor another candidate. TAIK regulations and procedures, however, do not allow for an intervention.

C. **Turkish Government Control of DEIK / Under the New Regulation**

DEIK adopted a new structure on September 20, 2014 with the regulation numbered 29125, *Regulation on Working Principles and Procedures of Foreign Economic Relations Board and Business Councils,* which was issued by the Ministry of Economy to regulate the working principles and procedures of DEIK and its business councils ("Regulation"). Please see the Regulation in **Appendix B.**

Under the Regulation, the Ministry of Economy ("Ministry") may designate or cancel the status of the founding institutions (Article 4 of the Regulation), designate the twenty-five members of the General Assembly (Article 7 of the Regulation) and designate or remove the Chairman of the Board of Directors (Article 4 of the Regulation). Business Councils are established by the Ministry with the proposal of the Board of Directors (Article 14 of the Regulation). The Chairmen of the business councils and the executive committee members may be discharged by the Minister or upon the proposal of the Board of Directors with the approval of Ministry. In the event that the members of the executive committee and the chairman are discharged or a vacancy in the membership or presidency is occurred for any reason, the new chairman shall be assigned with the approval of the Ministry upon the proposal of the Board of Directors and the members shall be assigned by the members of the executive committee from among the associate members to serve until the following date of election (Article 16 of the Regulation). The Secretary General shall be assigned upon the approval of the Ministry and with the proposal of the Board of Directors (Article 19 of the Regulation). DEIK may open representative agencies at home or abroad upon the approval of the Ministry (Article 16 of the Regulation). Ministry allocates income to DEIK among other contributions fees and donations (Article 24 of Regulation). Under the regulation, the directives covering the working principles and procedures such as the way of work of DEIK bodies, relationships with each other, the principles of the right to elect and be elected, budget, accounting, human resources shall take effect upon the approval of the Ministry (Article 27 of the Regulation)

III. The Law

The Foreign Agents Registration Act of 1938, as amended (FARA)[2], requires persons acting as "agents" of foreign "principals" in a political or quasi-political capacity to register and make periodic public disclosure of their relationship with the foreign principal, as well as activities, receipts and disbursements in support of those activities. Disclosure of the required information is intended to facilitate evaluation by the government and the American people of the statements and activities of foreign agents. FARA was originally enacted in 1938 in reaction to certain subversive and propaganda activities by Nazi and Communist agents operating in the United States, and continues to this day as a way of ensuring disclosure of any foreign interests lobbying or conducting media campaigns in the United States. The Department of Justice, FARA Registration Unit of the Counterespionage Section in the National Security Division is responsible for the administration and enforcement of FARA.

A. Activities Covered

FARA covers a variety of activities by the agent on behalf of a foreign principal. They include:

a) Engaging in political activities;

b) Acting as public relations counsel, publicity agent, information service employee or political consultant;

c) Soliciting, collecting, disbursing, or dispensing contributions, loans money or other things of value in the United States;

d) Representing the interests of the foreign principal before any agency or official of the United States. [3]

The range of activities covered is quite broad, and basically covers any form of lobbying, media interaction, and public relations campaigns conducted on behalf of a foreign principal. In recent years there has been an increased emphasis on public relations firms' activities on behalf of foreign governments.

[2] 22 U.S.C. §611, et seq.
[3] 22 U.S.C. §611(c).

B. Who are Foreign Principals?

All foreign governments are explicitly defined as foreign principals. The term also covers:

a) Foreign political parties;

b) A person or organization based outside the United States, except U.S. citizens;

c) A partnership**, association**, corporation, **organization**, or other combination of persons inside the United States that is **organized under the laws of a foreign country**; and

d) A partnership, association, corporation, organization, or other combination of persons inside the United States that has its principal place of business in a foreign country.[4]

Thus the definition specifically encompasses foreign governments and trade associations. Further, the definition of foreign government includes any group or agency that the foreign government delegates authority to operate on its behalf.[5]

C. Who is An Agent?

This is perhaps the topic that is most subject to interpretation under FARA. The law defines an agent as:

> "any person who acts as an agent**, representative, employee, or servant,** or any person who acts in any other capacity **at the order, request, or under the direction or control** of a foreign principal or of a person any of whose activities are directly or indirectly supervised, controlled, financed, or subsidized, in whole or in major part, by a foreign principal, . . .[6]

The FARA definition of agent is quite broad, and treats an agent as any person acting under the direction, control of a foreign principal. Note there are several exemptions for certain categories of agents, such as:

[4] 22 U.S.C. §611(b).
[5] 22 U.S.C. §611(e).
[6] 22 U.S.C. §611(c).

1. diplomats and officials of foreign governments;
2. an agent whose foreign principal is a government of a foreign country the defense of which the President deems vital to the interests of the United States;
3. the activities involved do not serve predominantly a foreign interest;
4. persons soliciting or collecting funds for medical aid and assistance, or for food and clothing (e.g. the Red Crescent);
5. a person engaging solely in activities in furtherance of bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts;
6. lawyers representing foreign principal in courts or other legal proceedings as long as the attorney does not attempt to influence policy and the request of the foreign client; and;
7. any agent engaged in lobbying for the foreign principal and is registered under Lobbying Disclosure Act.[7]

D. Interpreting the Agency Relationship

While there have been few cases interpreting FARA, the courts have considered what type of relationship exists triggering a FARA registration requirement. In *United States v. German-American Vocational League*[8] the 3rd Circuit Court interpreted the meaning of an agency relationship under FARA as applied to a group of German-Americans acting as Nazi propagandists. The Court considered and rejected an argument that there was no written employment contract with the Germany Reich, hence no agency. Instead the Court applied a traditional *Restatement* Standard to determine the existence of agency under FARA:[9]

> The true test, we think, was whether agency in fact existed, with the term agency defined substantially as in the Restatement of Agency, Section 1, which states it to be: 'The relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his **control, and consent** by the other so to act.'[10]

The court then applied a control test to the German agents to find that an agency relationship existed which triggered a FARA registration requirement.

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[7] 22 U.S.C. §613.
[8] 153 F. 2d 860 (3rd Cir, cert. denied 329 U.S. 760 (1946)
[9] Id. at 862.
[10] Id at 864.

More recently, in 1982 the federal courts considered a FARA registration requirement in the context of whether the Irish National Aid Committee (INAC) in the US was the event of the Irish Republican Army.[11] In affirming the lower court decision requiring INAC to register, the Circuit Court commented on the type of relationship that triggers a FARA filing, finding that registration is not required unless the relationship between the foreign principal and the U.S party is of a nature that requires registration to fulfill the "informative" purposes of FARA:

> We add these few additional words to what Judge Haight has written because, while we agree with his construction of the Act, **we wish to express a note of caution concerning the statute's coverage of those who act at the "request" of a foreign principal.** As the District Court held, "(I) t is sufficient to establish agency under the Act that defendant is a 'representative' of the IRA, or acts as its 'request.' " We agree that the agency relationship sufficient to require registration need not, as INAC urges, meet the standard of the Restatement (Second) of Agency with its focus on "control" of the agent by the principal. Control is an appropriate criterion for a determination of common law agency because the agent contemplated by the Restatement has the power to bind his principal. In determining agency for purposes of the Foreign Agents Registration Act, however, **our concern is not whether the agent can impose liability upon his principal but whether the relationship warrants registration by the agent to carry out the informative purposes of the Act.**
>
> Nevertheless, while we acknowledge that the Act requires registration by a person who acts, in specified ways, at a foreign principal's "request," we caution that this word is not to be understood in its most predatory sense. Such an interpretation would sweep within the statute's scope many forms of conduct that Congress did not intend to regulate. **The exact perimeters of a "request" under the Act are difficult to locate, falling somewhere between a command and a plea. Despite this uncertainty, the surrounding circumstances will normally provide sufficient indication as to whether a "request" by a "foreign principal" requires the recipient to register as an "agent.**"
>
> [emphasis added, footnotes and citation omitted][12]

There has been some criticism of the INAC decision as it creates some uncertainty regarding the concept of requiring FARA registration based on its more expensive reading of agency and the link to FARA's "informative purposes." Nevertheless, the current jurisprudence indicates that there must be some form of "control" relationship exercised by the foreign principal that the agent has consented to, or at least actions at the "request" of the foreign principal which the agent construes as some form more required action.

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[11] *United States v. Irish National Aid Committee (INAC)*, 668 F 2d 159 (2d Cir. 1982) *aff'g* 530 F. Supp. 241 (SDNY 1981)..

[12] 686 F2d 159-160.

E. Lobbying Disclosure Act Exception

There is an exception to filing a FARA registration for certain foreign parties who engage lobbyists in the United States. The Lobbying Disclosure Act of 1995 (LDA), 2 U.S.C. § 1601, removed from FARA a class of agents who are engaged in lobbying activities and who register under the LDA. This Act is administered by Congress. The LDA requires disclosure of lobbying activities, including the issue lobbied and expenditures related to such lobbying. A party engaged in lobbying activity by a foreign principal may register under the LDA instead of FARA if the individual is lobbying on behalf of foreign individuals or entities (companies) for private and nonpolitical activities in furtherance of trade or commerce. If, however, the individual providing lobbying services is representing a foreign government or foreign political party with the objective of influencing U.S. policy, then a FARA registration is required.

IV. Analysis/Application of Law to TAIK and Mr. Alptekin

The questions presented are:

1. Are TAIK and DEIK entities or extensions of the Turkish Government, such that any activities by TAIK would require Registration under FARA.

2. Is Mr. Alptekin, as Chairman of TAIK, a representative or agent of the Government of Turkey which would require any agents hired in the U.S. s to register under FARA rather than the LDA?

We consider each question separately below.

1. Are TAIK and DEIK entities or extensions of the Turkish Government, such that any activities by TAIK would require Registration under FARA.

Whether TAIK is an entity affiliated with the Government of Turkey is significant because if it is considered an entity or agent of the GOT, then actions by any party hired by TAIK in the United States for lobbying or public relations work would trigger FARA filing requirements, instead of an LDA filing (which was made). In such a case, a US agent hired by TAIK could be deemed an agent of the GOT.

FARA itself does not define what constitutes a government agency, or an organization controlled by or affiliated with same, nor does it define who is an agent of a foreign government. In general, a foreign government is considered to include the government of a foreign country, or any agency, department, ministry, or political subdivision thereof. [13] In other U.S. laws, some context is provided. For example, under the U.S. Foreign Corrupt Practices Act (FCPA), it is unlawful for U.S persons to pay bribes to *"any officer or employee of a foreign government or any department, agency or instrumentality thereof [. . .] or any person acting in an official*

[13] See, e.g. 18 U.S.C. §11; 17 C.F.R. §240.3b-4 (securities law),

capacity for or on behalf of any such government, department, agency, or instrumentality."[14] Similarly, in other laws an "agent" of a foreign government has been defined to include an individual or entity that operates subject to the direction and control of a foreign government.[15] Under some U.S laws, government has been interpreted to include state owned Under the FCPA, the definition has been interpreted to include state owned enterprises (SOEs).

The facts of this case are unusual in that the GOT does have some involvement in DEIK/TAIK's activities. As we understand it, DEIK and TAIK were created out of a Government decree which authorized the formation of DEIK and its business councils, including TAIK. The GOT has authority to cancel or revoke the status of TAIK as a business council, may remove the Chairman of the Board of TAIK, and any new Chairman must be approved by the Ministry of the Economy (MOE). Further the MOE approves TAIK's budget and allocation of funds for its activities. At least once per year the MOE meets with the DEIK advisory board to harmonize DEIKs activities with Turkey's economic strategies and interests. So it is clear that there is some level of government participation/control.

However, DEIK/TAIK also exhibits the characteristics of a private business association. The purposes of DEIK/TAIK are decidedly private sector oriented – to enhance trade and investment relations for its members. Its members are all private sector companies, and TAIK's Executive Board is comprised entirely of private sector company representatives, who are elected by the membership. Programs and activities are developed and approved by the private membership and Board. It operates much like a trade association in the United States, on behalf of its members.

Recently another branch of the U.S. Government has considered the status of Turkish trade associations. By coincidence we represent the Turkish steel producer, Icdas Enerji which is involved in a government subsidies case. The question presented was whether financial assistance provided by the Turkish Steel Exporter's Association ("TSEA"), part of the Istanbul Mineral and Metals Exporters Association ("IMMIB"), should be treated as a government subsidy to Icdas Enerji. We believe the governing decrees for IMMIB are similar to DEIK and TAIK. In the Icdas Enerji subsidy case, the U.S. Department of Commerce preliminarily found "that" there is no evidence on the record of a monetary contribution from the GOT to TSEA's financial accounts."[16] Since TSEA did in fact provide financial support to Icdas Enerji in the case, the implication is that the GOT was not involved and did not direct TSEA's action.

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[14] 15 U.S.C. §78dd-1(f)(1).

[15] See 18 U.S.C. §951(d).

[16] See Decision Memorandum for Preliminary Results of Countervailing Duty 2014 Administrative Review of Steel Concrete Reinforcing Bar from the Republic of Turkey, Admin review C-489-819, December 5, 2105, p11.

Further, in the last twenty years of conduct, we do not know of a single instance in which a Turkish trade association was considered an extension of the GOT in the United States. On the contrary, Turkish trade associations have always been viewed as member driven organizations supporting their respective ember's interests. Turkish trade association events are generally held with other private sector groups like the American Turkish Council, and attendees are generally private sector Turkish members of TAIK.

Accordingly, while GOT's participation in DEIK and TAIK's governance structure and policy planning clearly exists, based on the facts presented we believe the better argument is that this level of potential interference, without more, is not sufficient to have TAIK treated as an extension or agent of the GOT. Rather, TAIK continues to operate as a predominantly private sector membership organization. Of course this conclusion would be directly affected if the GOT were to exert more direct authority over TAIK activities or to dictate the positions or policies of TAIK.

2. Is Mr. Alptekin, as Chairman of TAIK, a representative or agent of the Government of Turkey which would require any agents hired in the U.S. s to register under FARA rather than the LDA?

However, even if TAIK were to be found to be a an extension or agent of the GOT, a second question would still exist with respect to Mr. Alptekin' s activities. Mr. Alptekin is both chairman of TAIK, and also a prominent private sector businessman who operates numerous private businesses including Havacilik A.Ş. in Turkey and Eclipse Aerospace in the United States. He has significant business interests and activities completely independent of and apart from TAIK. Further, Mr. Alptekin' s position as Chair of TAIK is completely voluntary: he receives no salary or compensation for his activities on behalf of TAIK. In fact, his position as Chair of TAIK can be attributed in large part to his status as a prominent respected and recognized business leader.

If TAIK were considered an agent of the GOT, and Mr. Alptekin was acting in his capacity as Chairman of TAIK in retaining U.S agents to engage in political activities or public relations, or meet with U.S government officials, then those activities could trigger a FARA filing requirement. If, however, Mr. Alptekin were acting for his private sector companies in retaining U.S. agents or consultants, then a filing under the LDA for potential lobbying contacts would be appropriate.

Based on the facts provided and included in this Memo, Mr. Alptekin was not acting in his capacity as Chair of TAIK when INOVO hired FIG to provide monitoring and reporting services with respect to Turkish American relations. TAIK did not request that FIG be hired, nor does TAIK appear to have any involvement. Rather, INOVO hired FIG to assist it in its representation of a private Israeli company, RATIO in providing advice with respect to the current state of U.S. – Turkish relations. It does not appear from the facts that Mr. Alptekin was operating for TAIK, or at the request TAIK, in any of these activities. Unless there are additional

a facts that would suggest some linkage with TAIK, we do not believe the above noted activities can be attributed to Mr. Alptekin' s position in TAIK, and FARA does not confer an automatic filing requirement under these circumstances. Accordingly, we believe that an LDA filing would have been sufficient under these facts.

Moreover, based on the facts it is unclear whether any activity beyond simple monitoring and reporting actually occurred. FIG was retained and filed under the LDA out of an abundance of caution, but it is not clear that any contacts with US Government officials or politicians actually occurred. The public relations firm, Sphere Consulting was never retained. If these activities never occurred, then the whole premise for filing under the LDA or FARA could be questioned.

Please feel free to contact the undersigned should you have any questions.

Sincerely,

Matthew M. Nolan
Arent Fox LLP

MMN/nb

Conference w/ Flynn

2-14-17 4:30 pm

RK, KV, M Flynn, Lori.

KV: Spoke before

Documents in email to look @ leisure*?*

w/ final? to read more carefully

RK: David Laufman call. HH, CR on call.

Unrelated to stuff in the press.

Time to collect and interview – facts.

Possible draft registration. Decision of client.

When talking? He asked. Call and let us know able to talk.

Read it: File or subpoena may follow.

If file, possible they'll still look. Take a lot of wind away.

Focus is whether you register. Could audit the filing.

Subpoena less likely.

MF: YESTERDAY?

RK: Yes.

RK: Where we are. Told them in Jan we expected to file.

Emails, docs, interviews — little evidence of business/commercial.

Except after the fact letter.

Not discussed previously – after the fact.

Talk to people involved. Little on oil field.

Focus on Gulen, at time of FIG? focus on Gulen/Turkey

Meeting with government in September — tied to Confidence.

Op-ed distributed by Sphere — paid through contract.

Op-ed on same topic→ Gulen

LDA only if Turkey not directing and not prin. beneficiary.

Email – Green light. Bijan insists, not Confidence.

Other view – Ekim/Ratio, business, green light unrelated.

We could fight it out. Would likely pursue. Court. Expensive. Might win – but big fight

Media storm. Conspiracy theories, etc.

MF: Filing late – legality.

Smart thing to file. Be precise.

RK: Take time with the draft.

High level — don't have the detail.

Gaps to explore?

Meet w/Heather with the document.

Address any of her concerns.

Could send cover letter. Simple letter summarizing the position

Cogent explanation of our position.

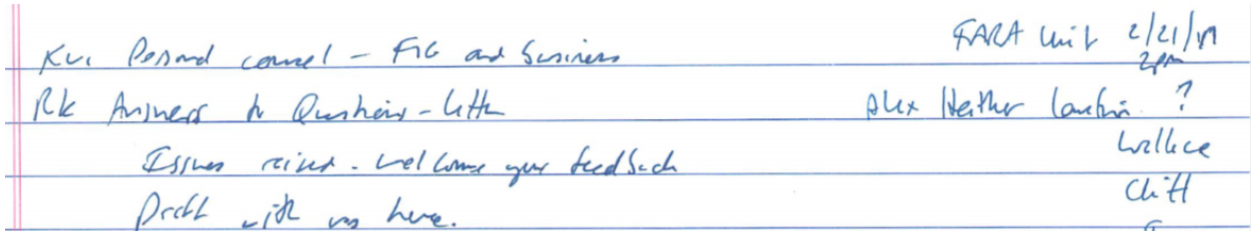
Careful of public statements. Interconnected. Can all blow back.

Notes in upper right corner: Payments added to chart.

Kept this from being factor

FCPA interconnected

Transcription of Brian Smith FARA Unit Meeting Notes from 2/21/2017 2.pm

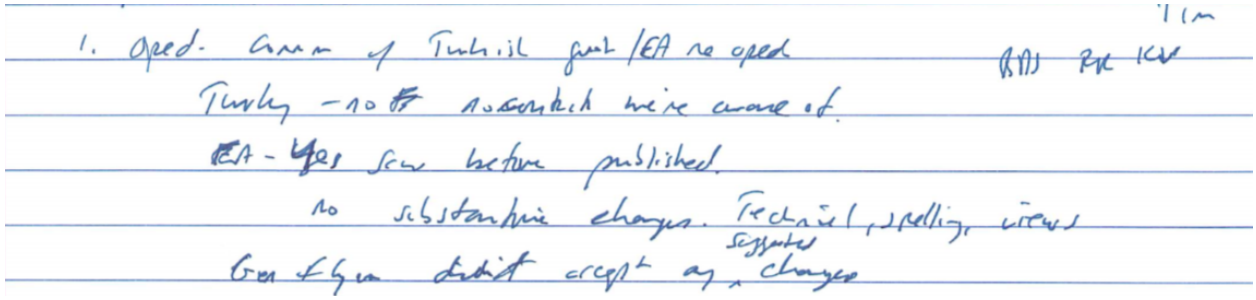


KV Personal counsel – FIG and business

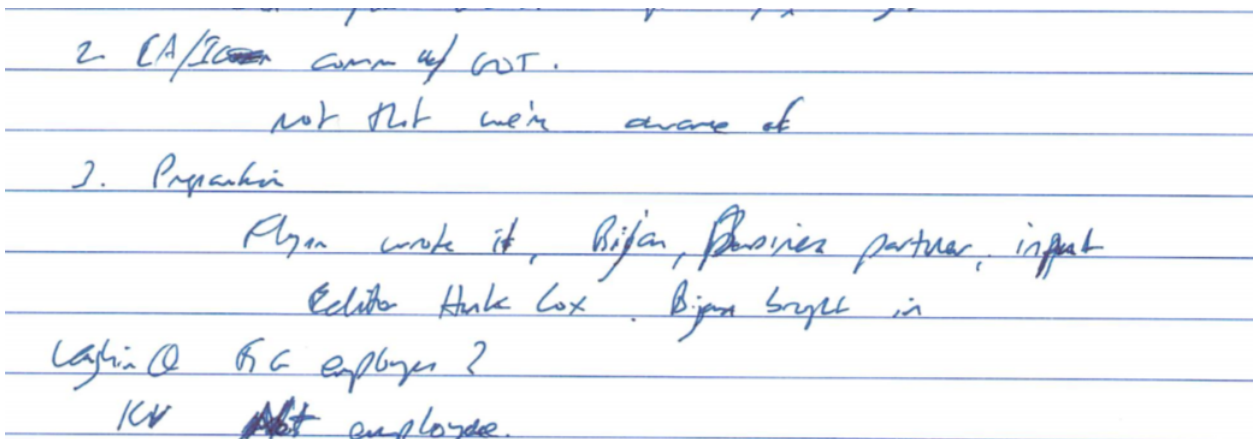
FARA Unit 2/21/17
2pm
Alex Heather Laufmin?
Heather [Hunt]
David Laufman
Wallace
Cliff
Tim [Pugh]
BDS, RK, KV

RK Answers to Questions – letter

Issues revised – welcome your feedback
Draft with us here



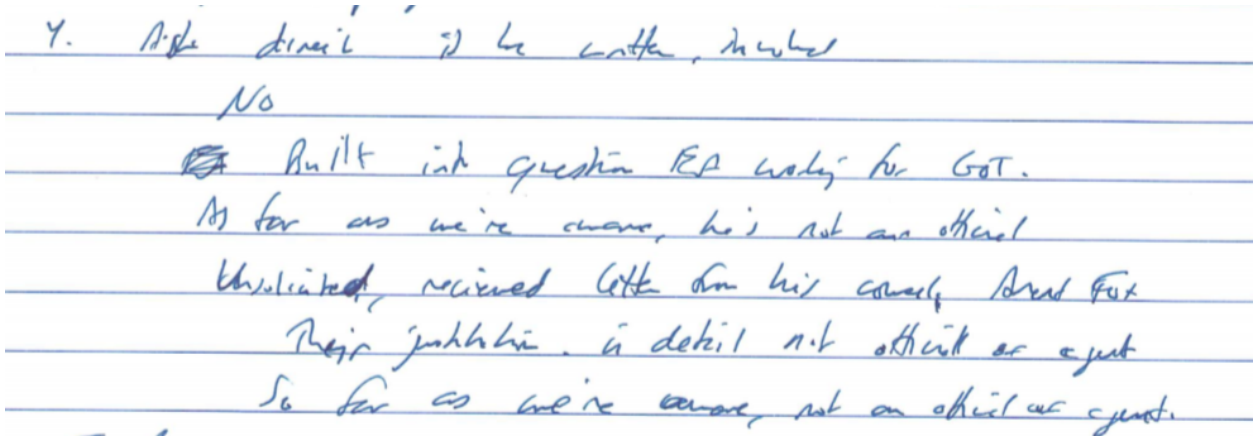
1. Op Ed – Comm w/ Turkish govt/EA re Op Ed
   Turkey – no contacts we're aware of
   EA – Yes saw before published
   No substantive changes. Technical, spelling, views
   Gen Flynn didn't accept any suggested changes



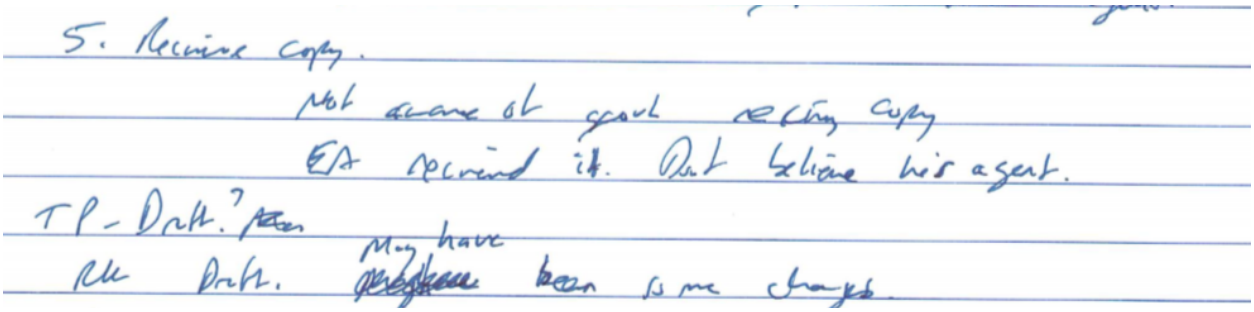
2. EA/I comm w/ GOT
Not that we're aware of

3. Preparation
Flynn wrote it, Bijan, Business partner, input
Editor Hank Cox. Bijan brought in.

Laufman Q: FG Employee?
KV: Not employee

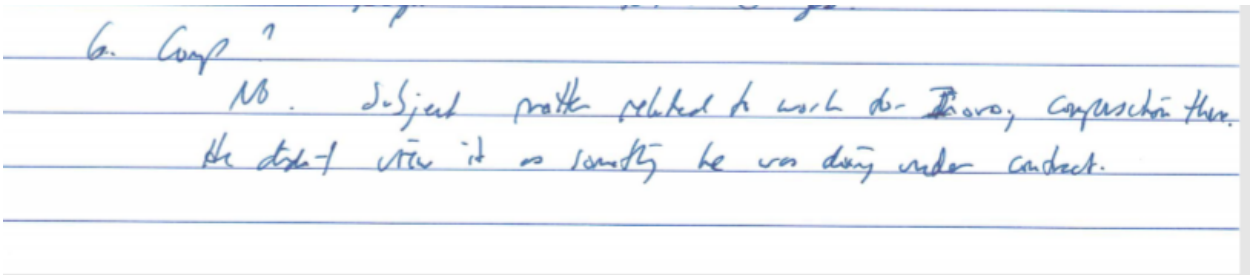


4. So far as we're aware, not an official or agent
Any direct it be written, involved
No
Built into question EA working for GOT
As far as we're aware, he's not an official
Unsolicited, received letter from his counsel, Arent Fox
Their justification In detail not official or agent.

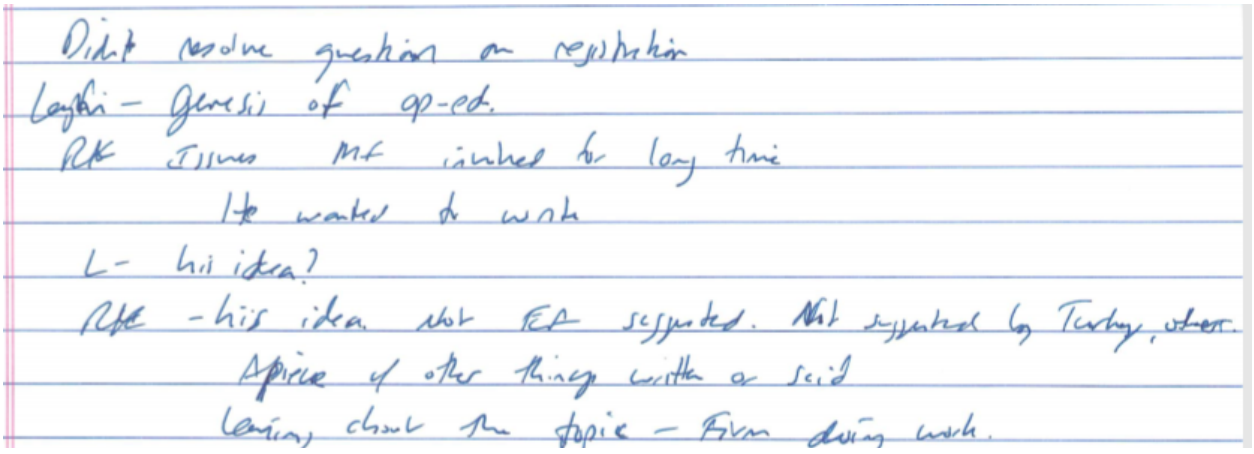


5. Receive Copy
Not aware of govt receiving copy
EA received it. Don't believe he's agent.

TP: Draft?
RK: Draft. May have been some changes.



6. Comp?
No. Subject matter related to work for Inovo; compensation there.
He didn't view it as something he was doing under contract.



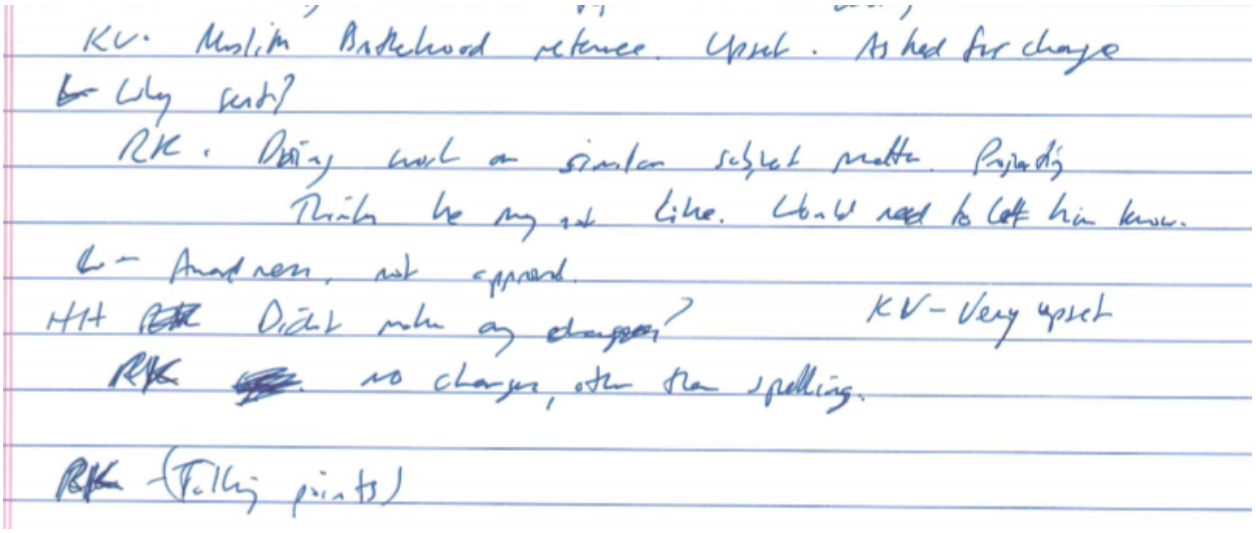
Didn't resolve question on registration

Laufman: Genesis of op-ed

RK Issues MF involved for long time
He wants to write

Laufman: His idea?

RK: His idea. Not EA suggested. Not suggested by Turkey, other
Apiece w/ other things written or said
Learning about the topic – from doing work


KV. Muslim Brotherhood reference. Upset. Asked for change
Why sent?
RK. Doing work on similar subject matter. Projecting
Thinks he may not like. Would need to let him know.
Awareness, not approval
HH Didn't make any changes? KV – Very upset
RK no changes, other than spelling.
RK (Talking points)

KV: Muslim Brotherhood reference. Upset. Asked for change.

Laufman: Why sent?

RK: Doing work on similar subject matter. Projecting.
Thinks he may not like. Would need to let him know.

Laufman: Awareness, not approval

HH: Didn't make any changes?

KV: Very Upset

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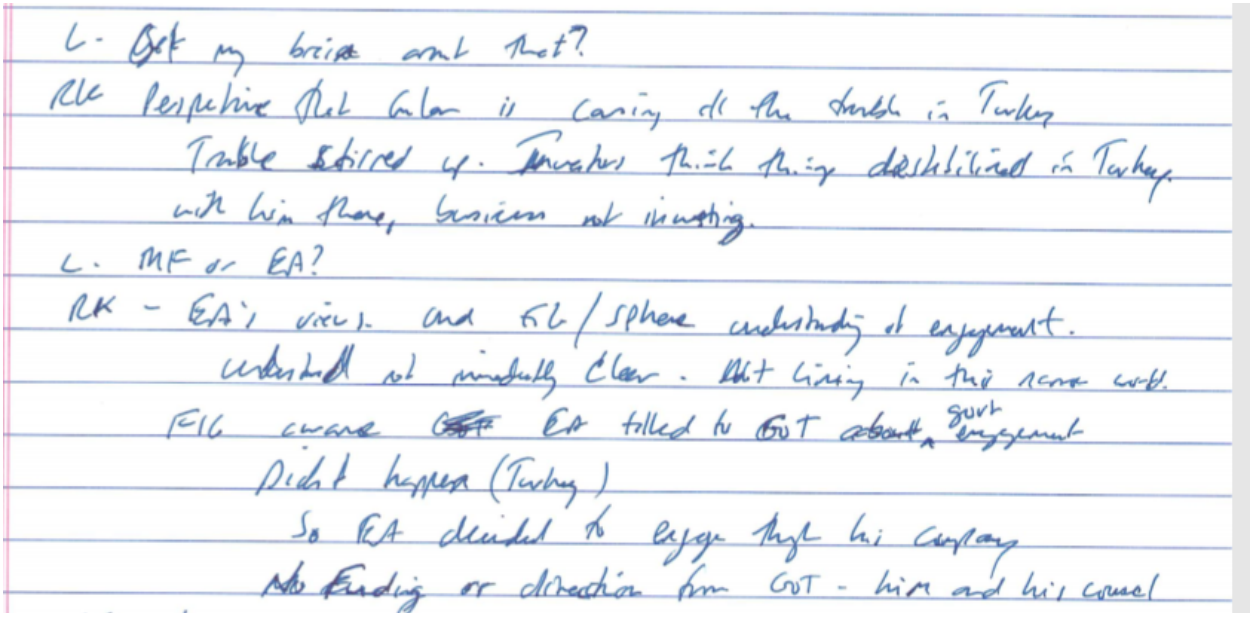

L. Get my brain around that?
RK Perspective that Gulen is causing all the trouble in Turkey
Trouble stirred up. Investors think things destabilized in Turkey with him there, businesses not investing
L. MF or EA?
RK - EA's views and FG/Sphere understanding of engagement.
understand not immediately clear. Not living in this narrow world.
FIG aware EA talked to GOT about govt engagement
Didn't happen (Turkey)
So EA decided to engage through his company
No funding or direction from GOT - him and his counsel

Laufman Get my brain around that?

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Not living in this narrow world.
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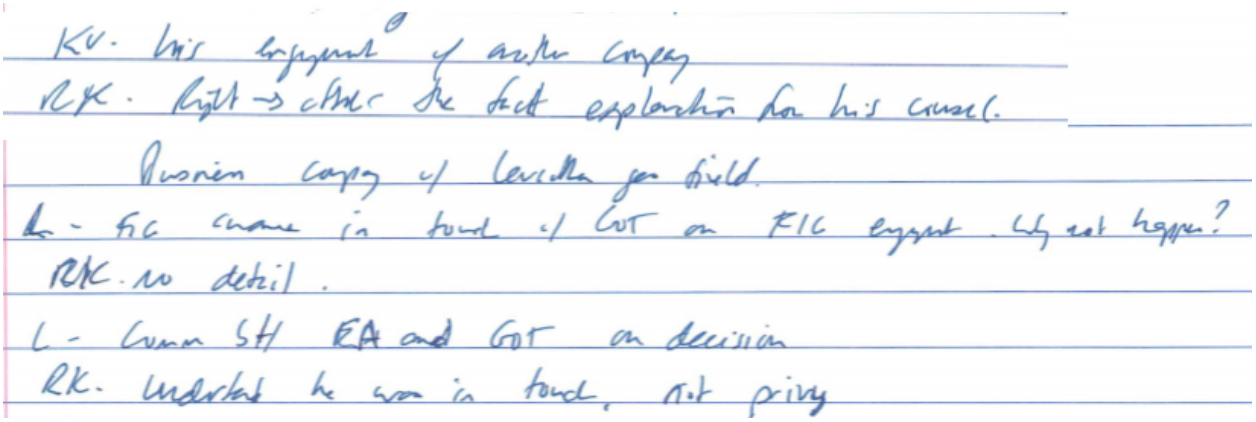


KV. his engagement of another company
RK. Right → after the fact explanation from his counsel.
Russian copy of Leviathan gas field
L - FIG aware in touch of GOT on FIG engagt. Why not happen?
RK. no detail.
L - Comm bt/ EA and GOT on decision
RK. Understand he was in touch, not privy

KV His engagement w/ another company

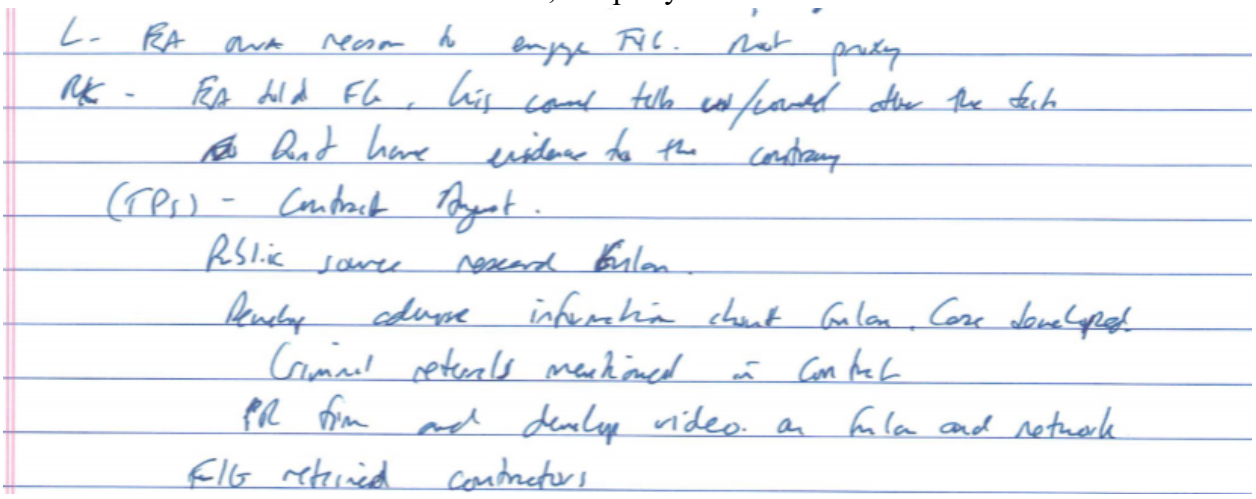
RK Right >> after the fact explanation from his counsel
Business copy w/ Leviathan gas field

Laufman FIG aware in touchw/ GOT on FIG engagement. Why not happen?

RK No detail

Laufman Comm bt/ EA and GOT on decision

RK Understand he was in touch, not privy



L - EA own reason to engage FIG. Not proxy.
RK - EA told FG. His counsel tells us/counsel after the fact
Don't have evidence to the contrary
(TPs) - Contract August.
Public source research Gulen.
Develop adverse information about Gulan. Case developed.
Criminal referrals mentioned in contract
PR firm and develop video on Gulen and network
FIG retained contractors

L EA own reason to engage FIG. Not proxy.

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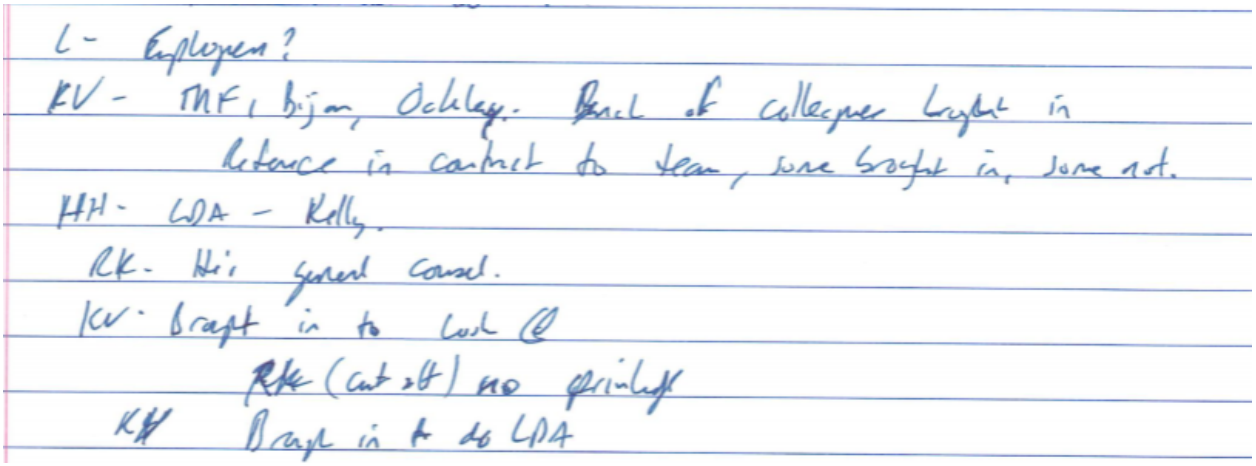
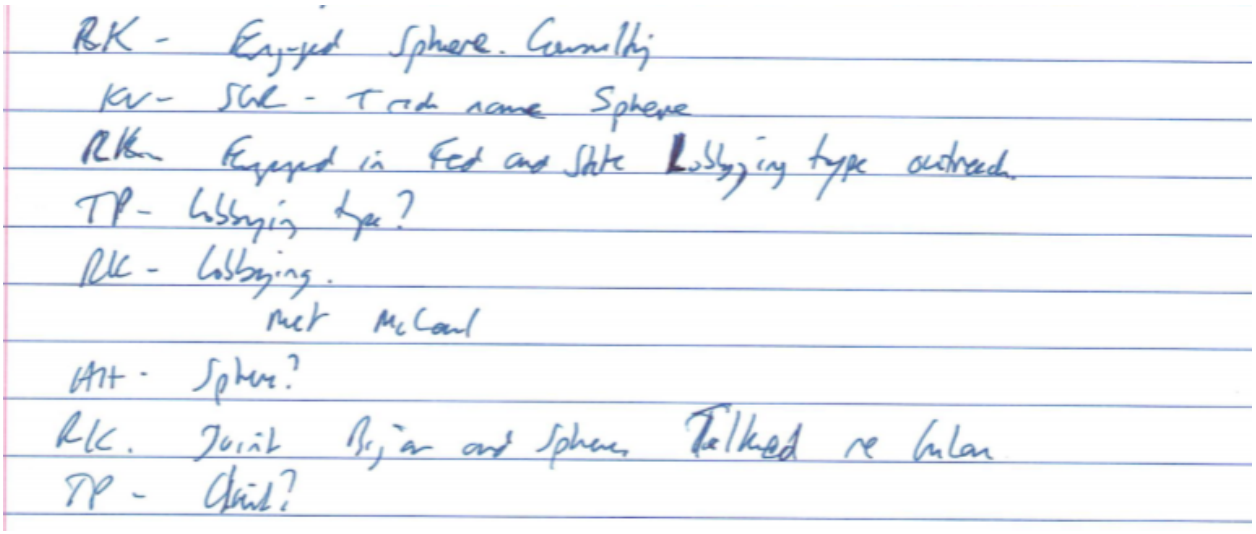
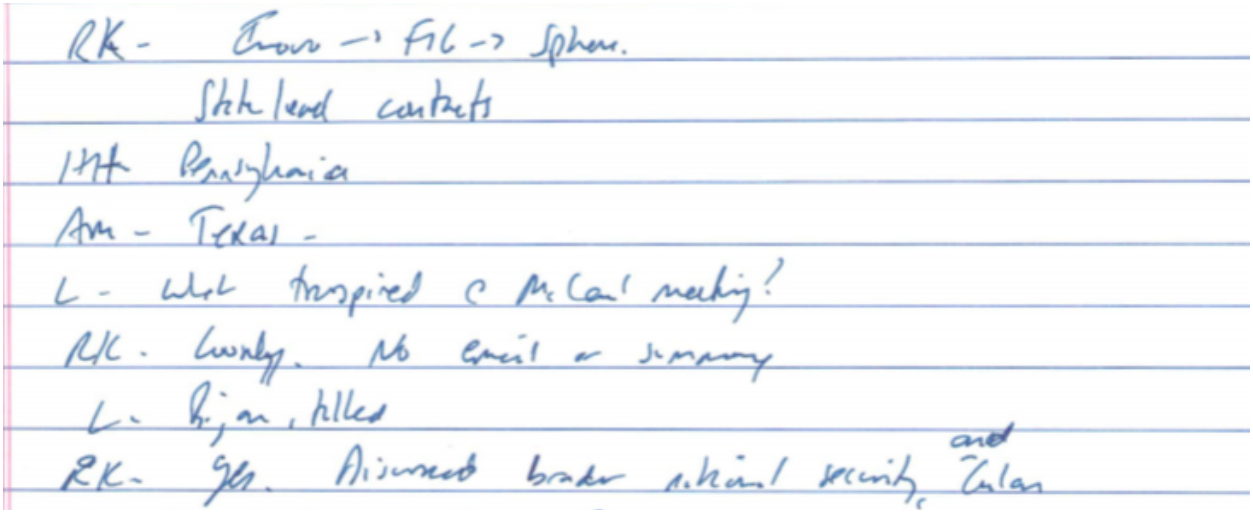


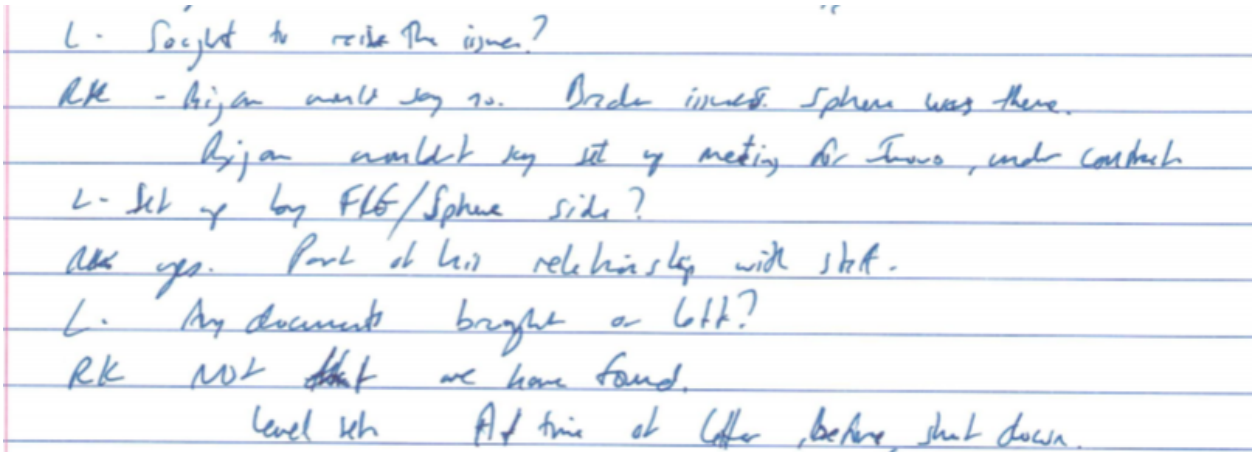
Laufman	Employees?
KV	MF, Bijan, Oakley. Bunch of colleagues brought in Reference in contract to team, some brought in, some not
HH	LDA – Kelly
RK	He's general counsel
KV	Brought in to look @
RK	(cut off) no privilege
KV	Brought in to do LDA



RK	Engaged Sphere consulting
KV	SGR – Trade name Sphere
RK	Engaged in Fed and State lobbying type outreach
TP	Lobbying type?
RK	Lobbying Met McCaul
UKNOWN	Sphere?
RK	Joint Bijan and Sphere. Talked re Gulen
TP	Client?



RK	Inovo > FIG > Sphere State level contacts
HH	Pennsylvania
AM	Texas
Laufman	What transpired @ McCaul meeting?
RK	Loosley. No email or summary
Laufman	Bijan, talked
RK	Yes. Discussed broader national security and Gulen



L - Sought to raise the issue?
RK - Bijan would say no. Broader issues. Sphere was there.
Bijan wouldn't say set up meeting for Inovo, under contract
L - Set up by FIG/Sphere side?
RK yes. Part of his relationship with staff.
L. Any documents brought or left?
RK Not that we have found.
Level set At time of letter, before, shut down.

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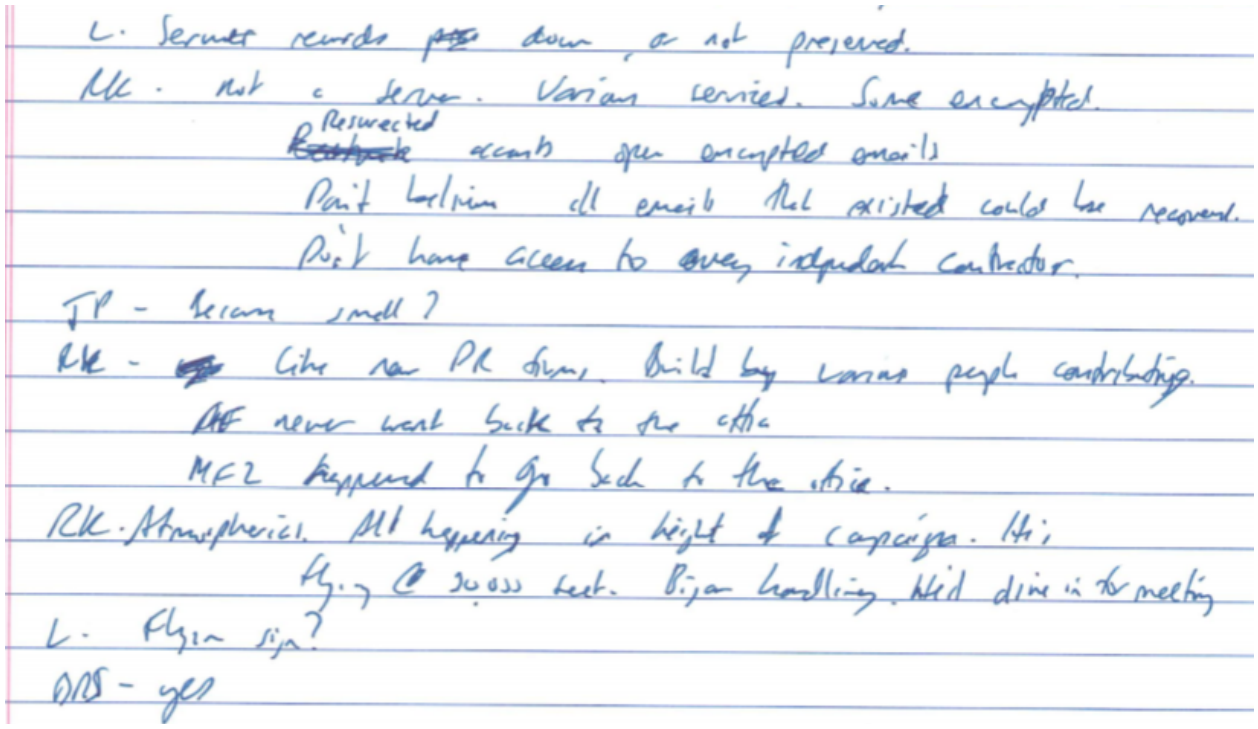
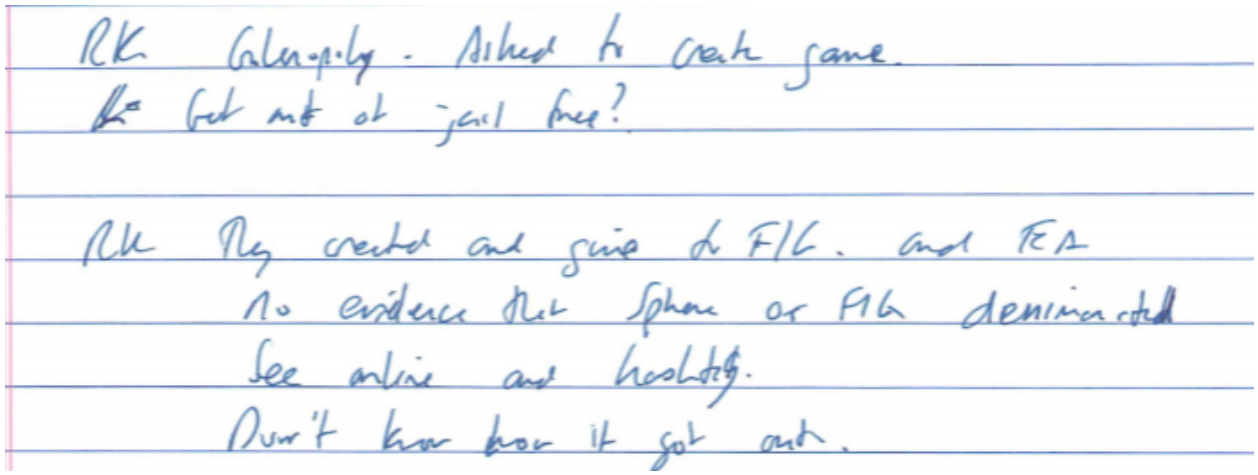


Laufman	Server records down, or not preserved
RK	Not a server. Various services. Some encrypted. Resurrected accounts open encrypted emails Don't believe all emails that existed could be recovered Don't have access to every independent contractor
TP	Because small?
RK	Like new PR firms. Build by various people contributing. MF never went back to the office MF2 happened to go back to the office
RK	Atmospherics. All happening in height of campaign. He's flying @ 30,000 feet. Bijan handling. He'd dive in for meeting.
Laufman	Flynn sign?
BDS	Yes

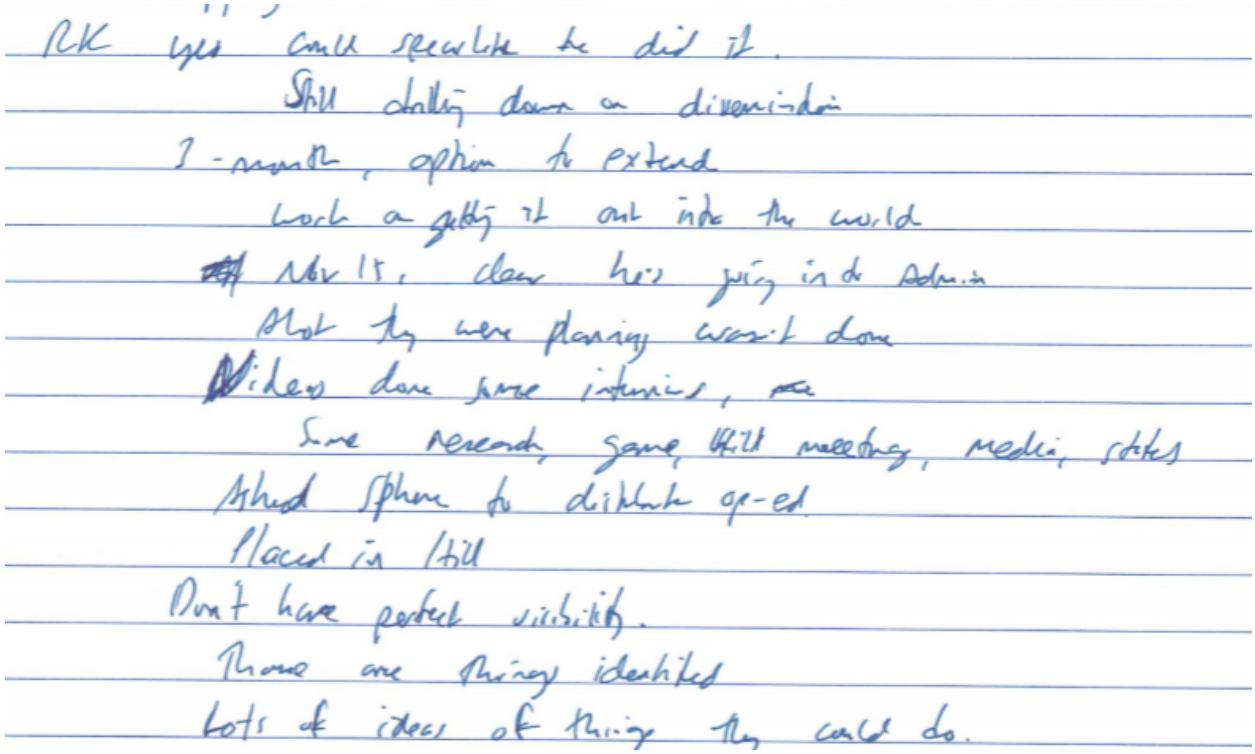


RK Gulenopoly. Asked to create game.

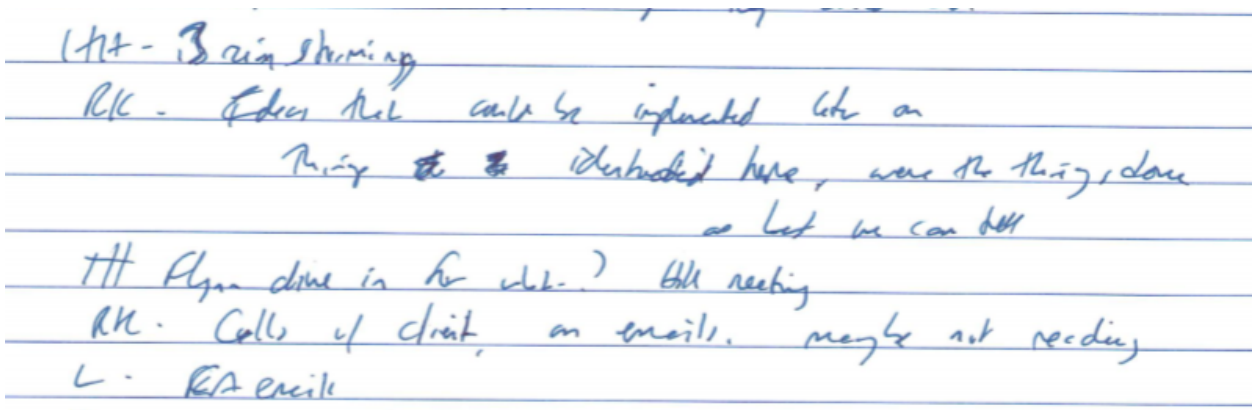
Laufman Get out of jail free?

RK They created and give to FIG. And EA
No evidence that Sphere or FIG disseminated
See online and hashtag
Don't know how it got out

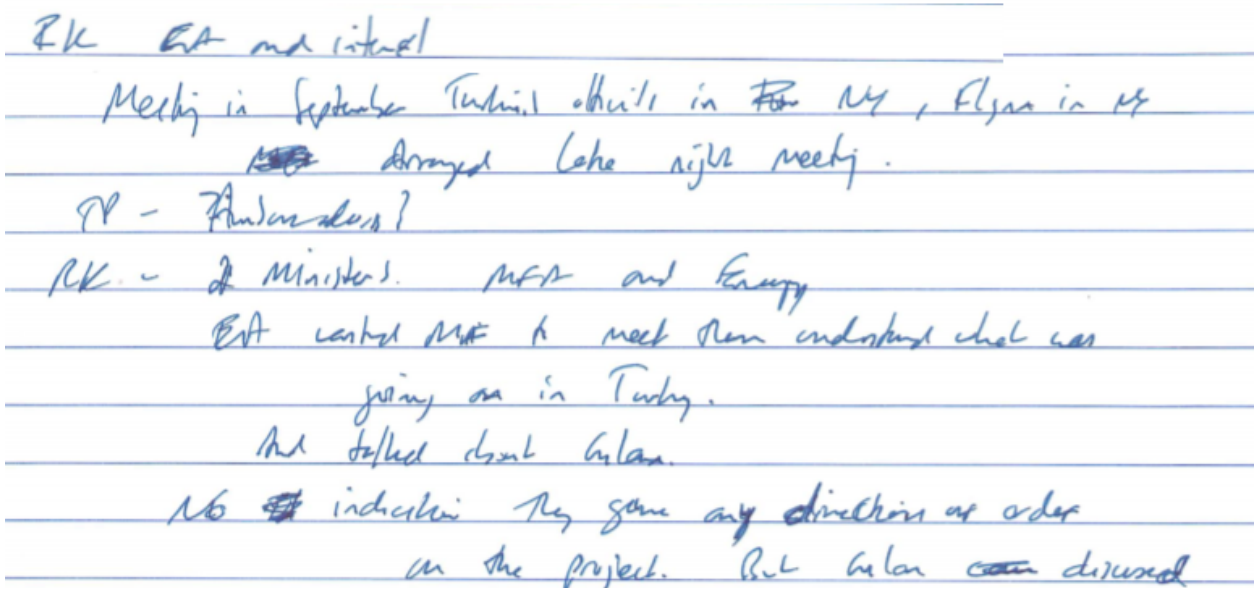
HH Copy given to EA



RK Yes could speculate he did it
Still drilling down on dissemination
3-month, option to extend
Work on getting it out into the world
Nov 15, clear he's going in to Admin
A lot they were planning wasn't done
Video done some interviews
Some research, game, Hill meeting, media, states
Asked Sphere to distribute Op Ed
Placed in Hill
Don't have perfect visibility
Those are things identified
Lots of ideas of things they could do

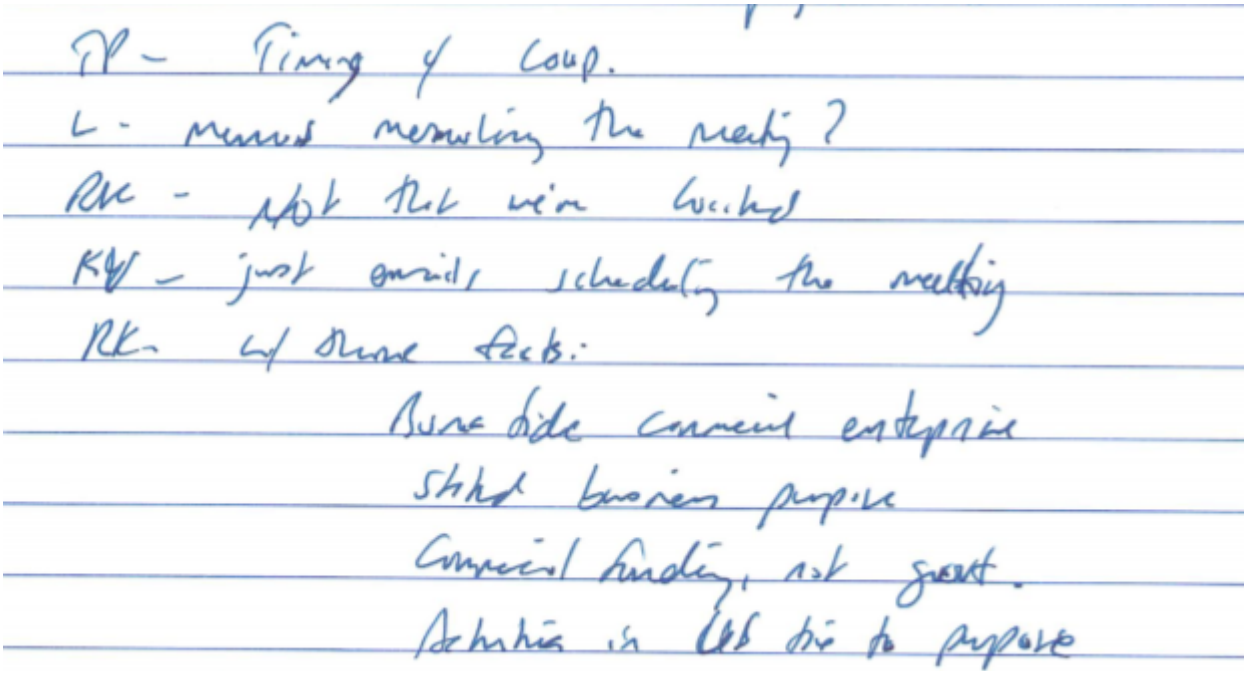


HH	Brain storming
RK	Ideas that could be implemented later on Things identified here were the things done as best we can tell
HH	Flynn dive in for what? Hill meeting
RK	Calls w/ client on emails. Maybe not reading
Laufman	EA Emails



RK	EA and internal Meeting in September Turkish officials in NY, Flynn in NY Arranged late night meeting
TP	Ambassadors?

RK 2 Ministers. MFA and Energy
EA wanted MF to meet them and understand what was going on in Turkey
And talked about Gulen
No indication they gave any directions or order on the project. But Gulen discussed



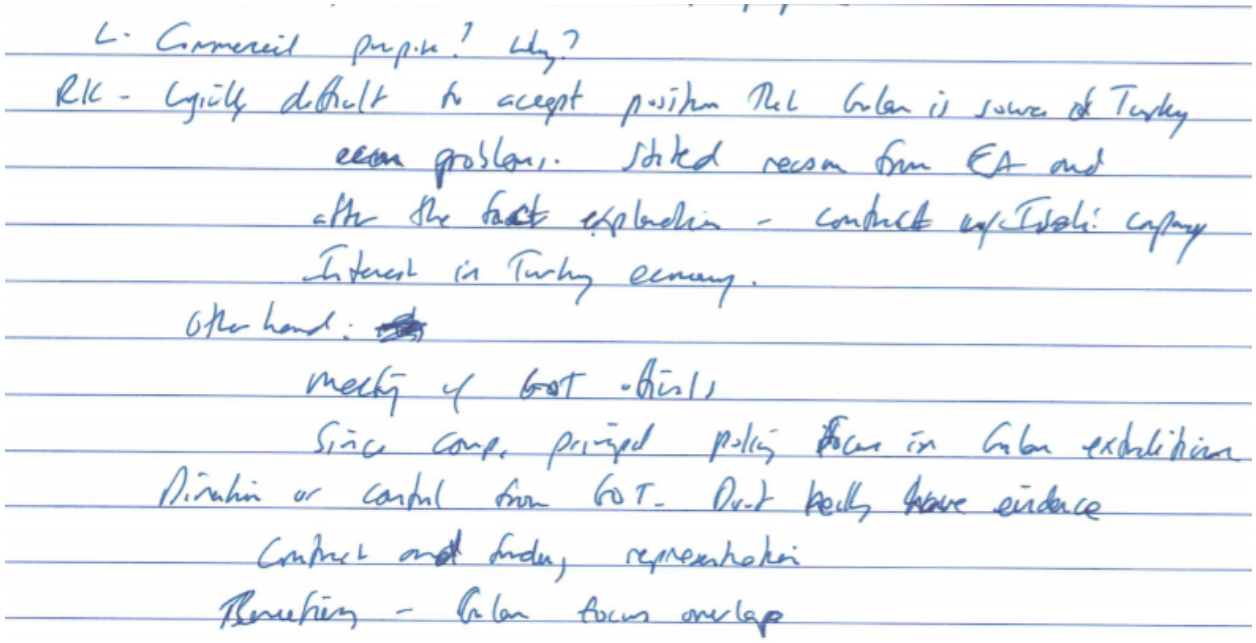
TP Timing w/ coup

Laufman memos memorializing the meeting?

RK Not that we've located

KV Just emails scheduling the meeting

RK w/ these facts:
Bona fide commercial enterprise
Stated business purpose
Commercial funding, not govt
Activities in US tie to purpose



L. Commercial purpose? Why?
RK - Logically difficult to accept position that Gulen is source of Turkey econ problems. Stated reason from EA and after the fact explanation - contract w/ Israeli company interest in Turkey economy.
Other hand:
Meeting w/ GOT officials
Since coup, principal policy focus in Gulen extradition
Direction or control from GOT. Don't really have evidence
Contract and funding, representation
Beneficiary - Gulen focus overlap

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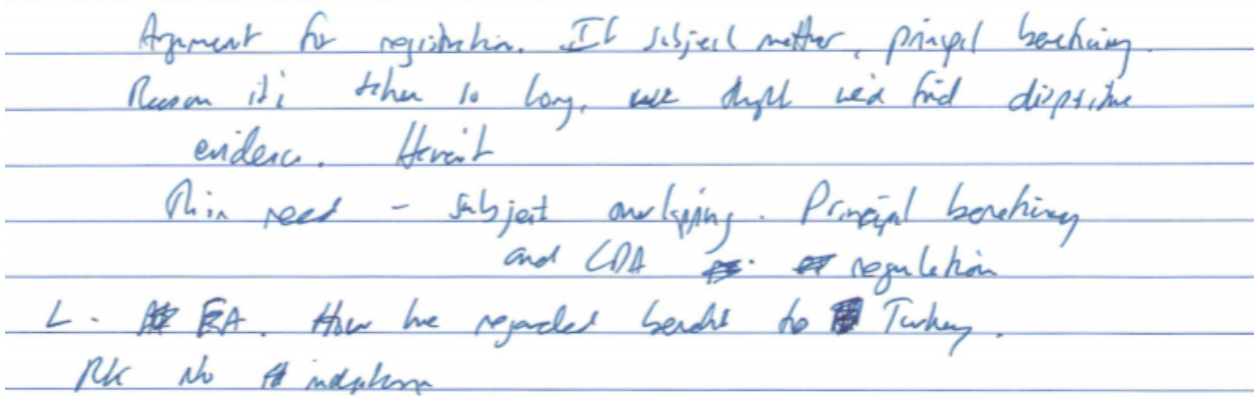

Argument for registration. If subject matter, principal beneficiary.
Reason it's taken so long. We thought we'd find dispositive evidence. Haven't.
Thin reed - subject overlapping. Principal beneficiary and LDA regulation
L. EA. How he regarded benefit to Turkey.
RK No indication

RK cont'd Argument for registration. If subject matter, principal beneficiary
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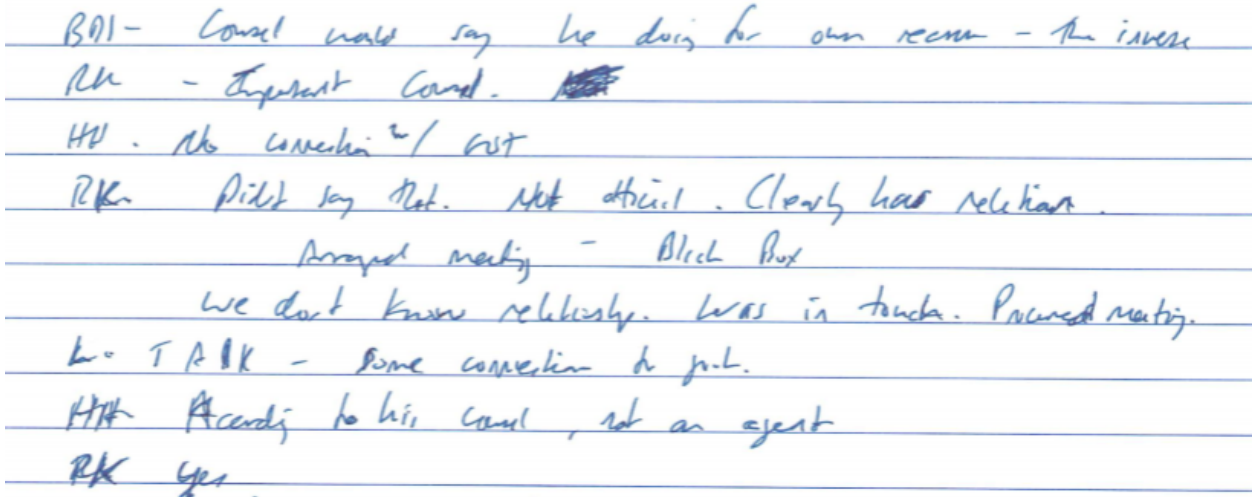
Laufman EA. How he regarded benefits to Turkey.

RK No indication



BDS Counsel would say he doing for own reason – the inverse

RK Important counsel

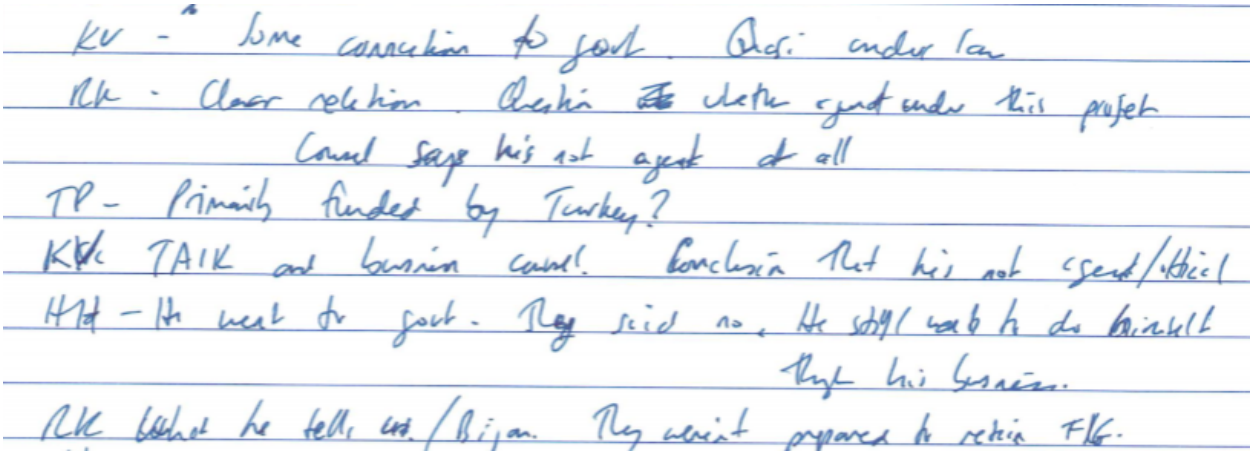
HH No connection w/ GOT

RK Didn't say that. Not official. Clearly has relation.
Arranged meeting – black box
We don't know relationship. Was in touch. Procured meeting.

Laufman TAIK – some connection to govt

HH According to his counsel, not an agent

RK Yes



KV - some connection to govt. Quasi under law
RK - Clear relation. Question whether agent under this project. Counsel says he's not agent at all
TP - Primarily funded by Turkey?
KV TAIK and business counsel. Conclusion that he's not agent/official
HH - He went to govt. They said no. He still wants to do himself through his business.
RK What he tells us/Bijan. They weren't prepared to retain FIG.

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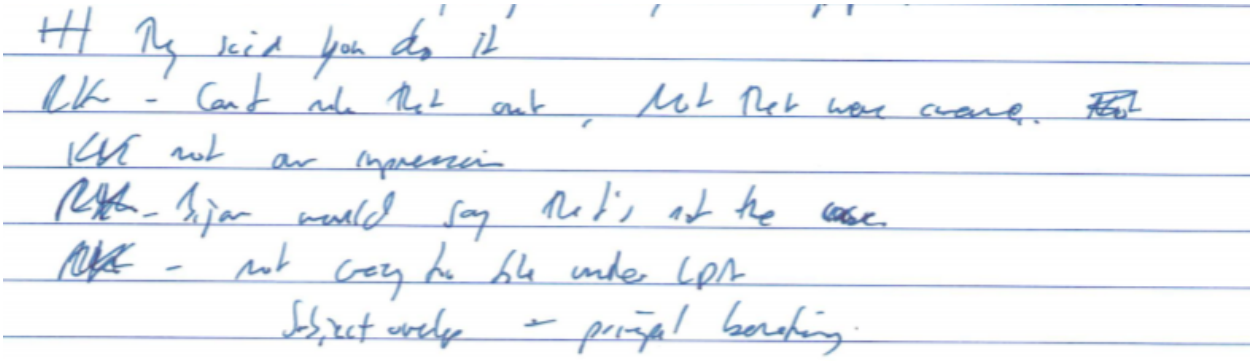

HH They said you do it
RK - Can't rule that out, not that we're aware.
KV not our impression
RK - Bijan would say that's not the case.
RK - not crazy to file under LDA
Subject overlap – principal beneficiary

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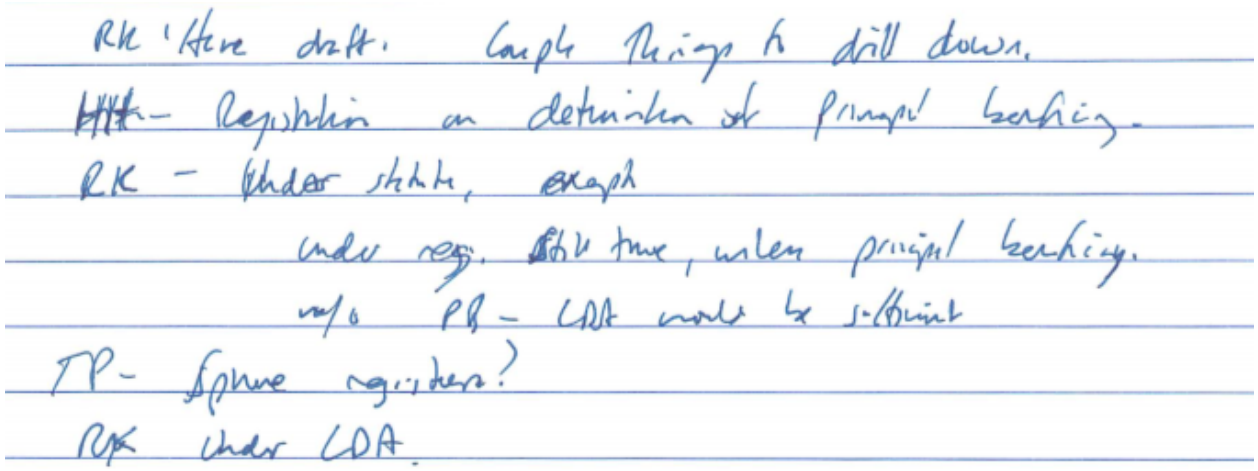


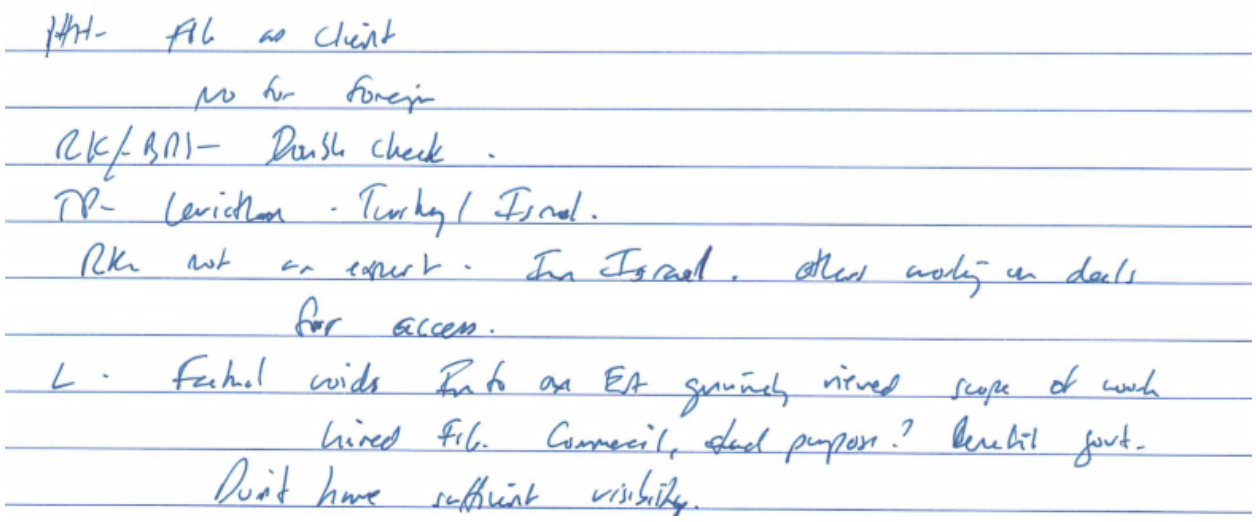
RK Have draft. Couple things to drill down.

HH – Registration on determination of principal beneficiary.

RK – Under statute, exempt
Under reg, still true unless principal beneficiary
w/o PB – LDA would be sufficient

TP – Sphere register?

RK Under LDA.



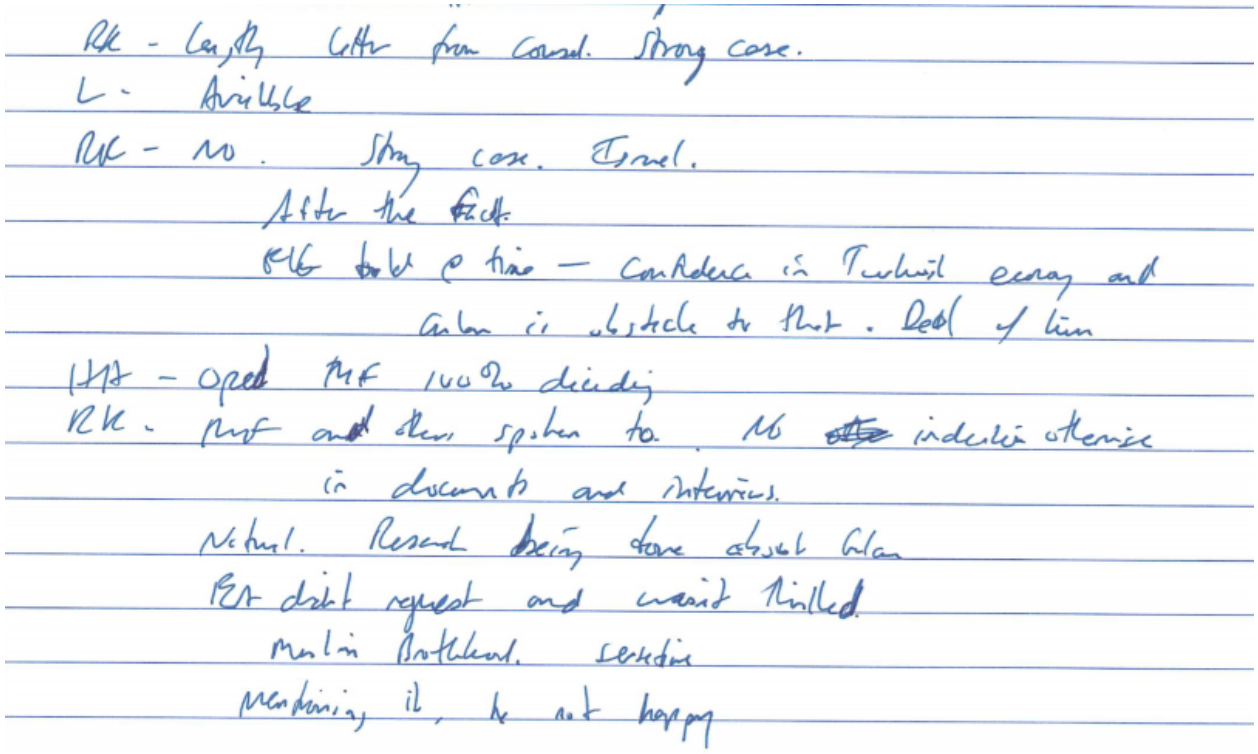
HH FIG as client
Not for foreign

RK/BDS Double check

TP Leviathan – Turkey/Israel

RK Not an expert. In Israel. Others working on deals for access

Laufman Factual voids info on EA genuinely viewed scope of work
Hired FIG. Commercial, dual purpose? Benefit govt
Don't have sufficient visibility



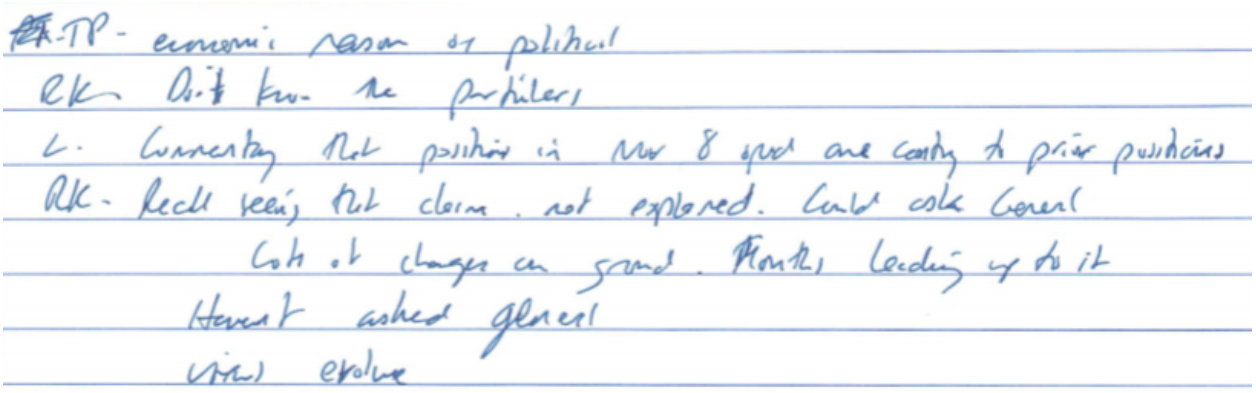
RK Lengthy letter from counsel. Strong case.

Laufman Available

RK No. Strong case. Israel
After the fact
FIG told @ time – confidence in Turkish economy and
Gulen is obstacle to that. Deal w/ him

HH Op-ed MF 100% deciding

RK MF and others spoken to. No indication otherwise in documents and interviews
Natural. Research being done about Gulen.
EA didn't request and wasn't thrilled
Muslim brotherhood. Sensitive.
Mentioning it, he not happy



TP - economic reason or political
RK - don't know the particulars
L - Commentary that position in Nov 8 op-ed are contrary to prior positions
RK - Recall seeing that claim. not explored. Could ask General
Lots of changes on ground. Months leading up to it
Haven't asked General
Views evolve

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RK Don't know the particulars

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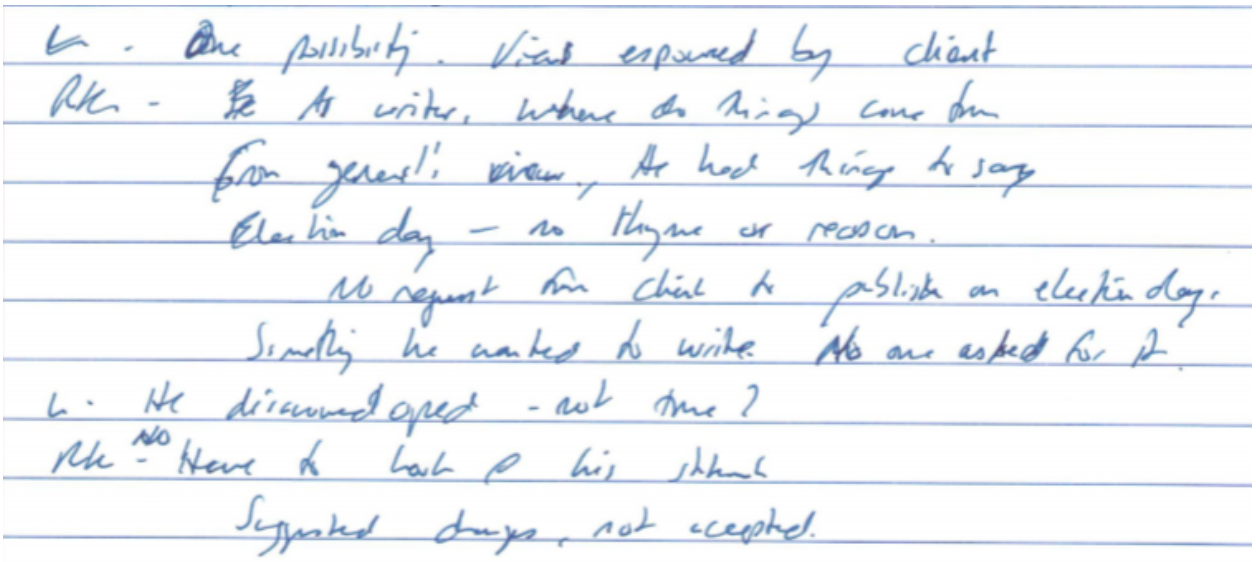


L - One possibility. Views espoused by client
RK - As writer, where do things come from
From general's view, he had things to say
Election day – no rhyme or reason
No request from client to publish on election day.
Simply he wanted to write. No one asked for it.
L - He discussed op-ed - not true?
RK - No. Have to look @ his statements
Suggested drafts, not accepted.

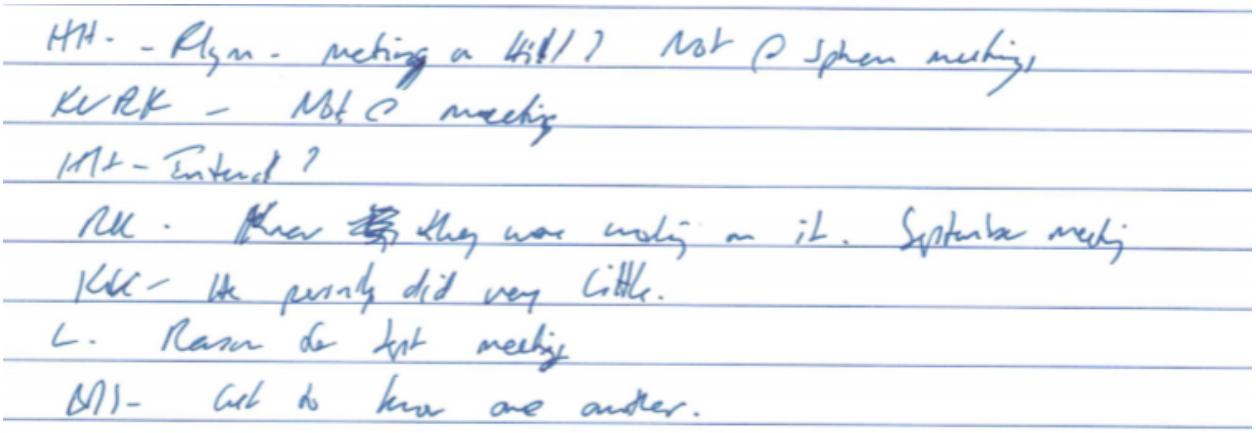
Laufman One possibility. Views espoused by client

RK As writer, where do things come from
From general's view, he had things to say
Election day – no rhyme or reason
No request from client to publish on election day

Something he wanted to write. No one asked for it

Laufman He disavowed op-ed – not true?

RK No.
Have to look @ his statement
Suggested changes, not accepted



HH Flynn – meeting on Hill? Not @ Sphere meetings

KV/RK Not @ meeting

HH Internal?

RK Knew they were working on it. September meeting

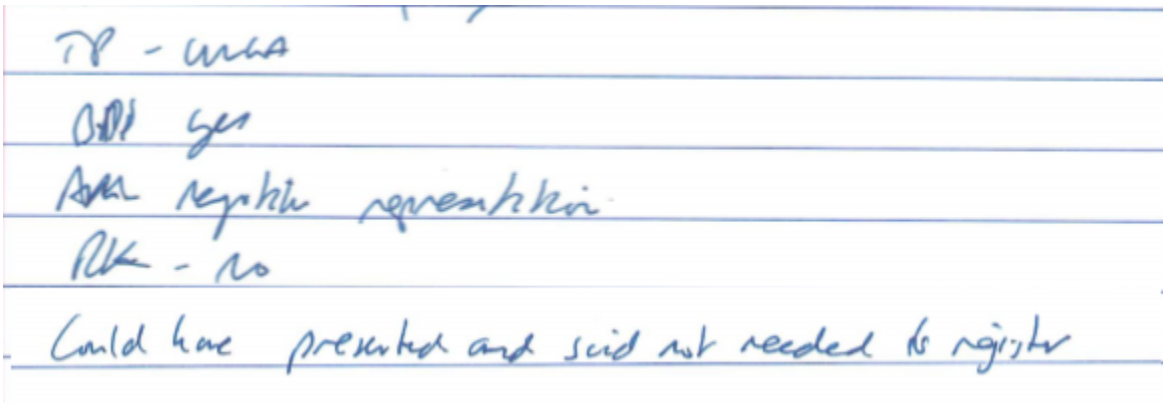
KV He personally did very little

Laufman Reason for Sept meeting?

BDS Get to know one another

Laufman Topic/reason

BRS Didn't specify



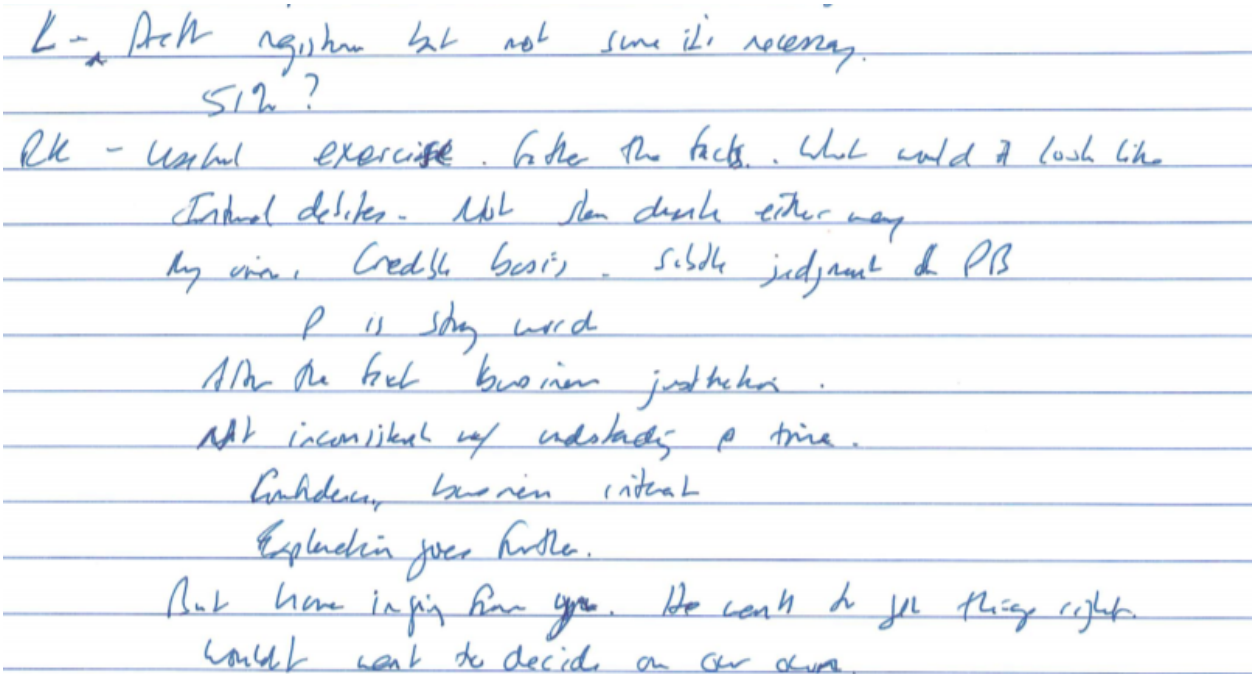
TP - UNGA

BRS Yes

AM negotiate representation

RK - no

Could have presented and said not needed to register



L – After registration but not sure it's necessary

51%?

RK - Useful exercise. Gather the facts. What would it look like

Internal debates – not slam dunk either way

My view. Credible basis. Subdk judgment of PB

P is strong word

After the fact known unknowns.

Not inconsistent w understanding @ time.

Confidence known critical

Explanation goes further.

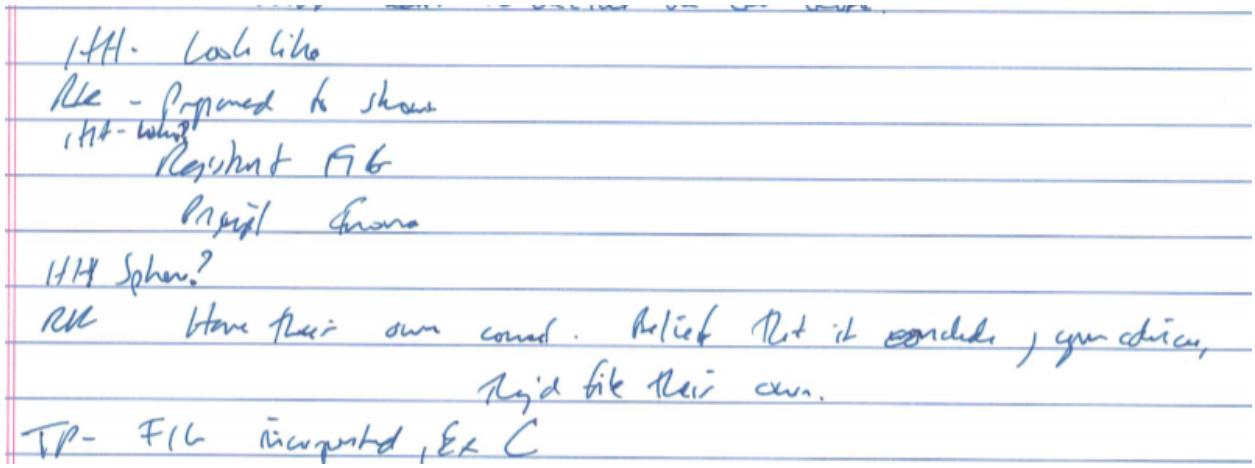
But know ingig from you. We can't do all things right.

Couldn't want to decide on our own.

Laufman After registration but not sure it's necessary
51%?

RK Useful exercise. Gather the facts. What would it look like
Internal debates – not slam dunk either way

My view: credible basis – subtle judgment of PB
P is strong word
After the fact business justification
Not inconsistent w/understanding @ time
Confidence business interest
Explanation goes further
But have inquiry from you. He wants to get things right.
Wouldn't want to decide on our own.



HH Looks like

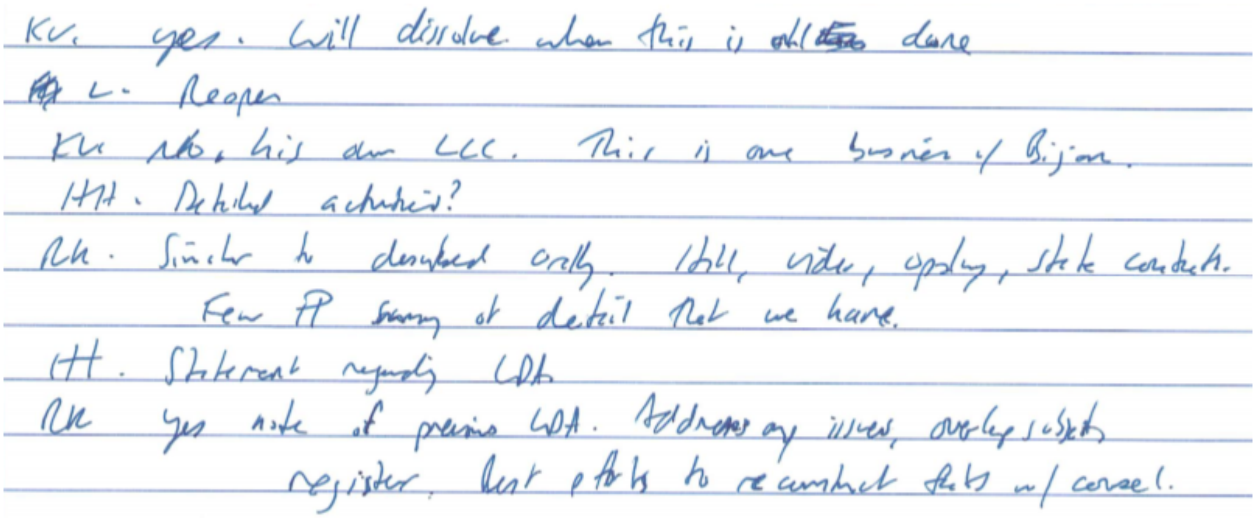
RK Prepared to show

HH Who? Registrant FIG
Principal Inovo

HH Sphere?

RK Have their own counsel. Belief that if conclude, your advice
They'd file their own

TP FIG incorporated, Ex C


KV. yes. Will dissolve when this is all done
L. Reopen
KV No, his own LLC. This is one business w/ Bijan.
HH. Detailed activities?
RK. Similar to described orally. Hill, video, opoly, state contacts.
Few ¶ summary of detail that we have.
HH. Statement regarding LDA
RK yes note of previous LDA. Address any issues, overlap subjects
register, best efforts to reconstruct facts w/ counsel.

KV	Yes. Will dissolve when this is all done
Laufman	Reopen
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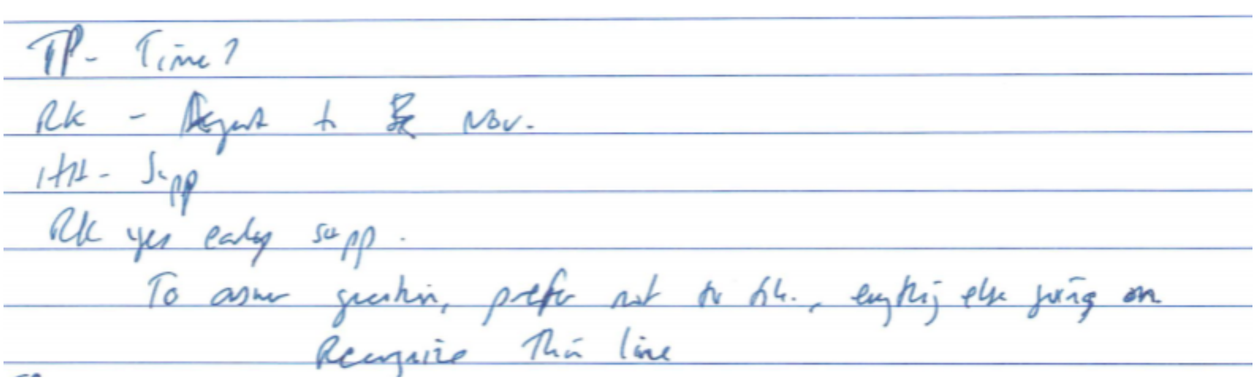
TP - Time?
RK - August to Nov.
HH - Supp
RK yes early supp.
To answer question, prefer not to [illegible] everything else going on
Recognize this line

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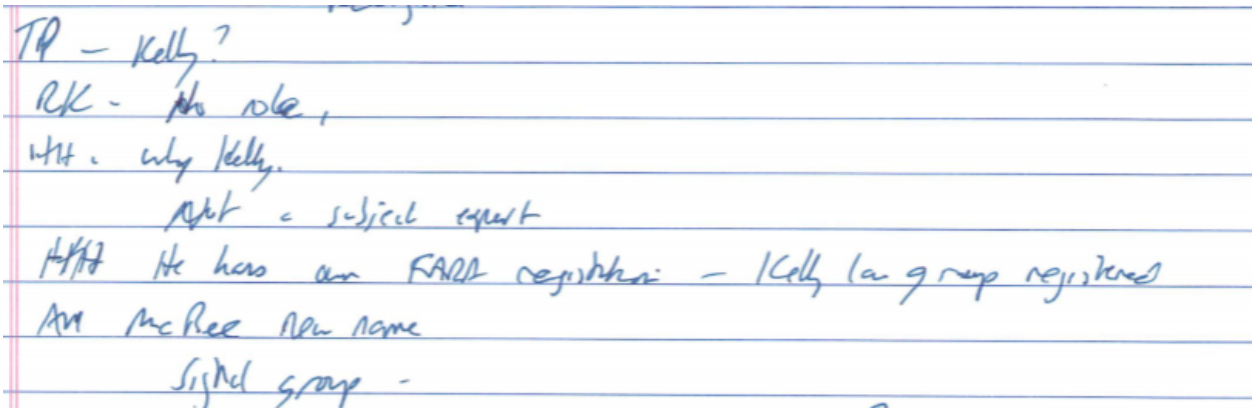


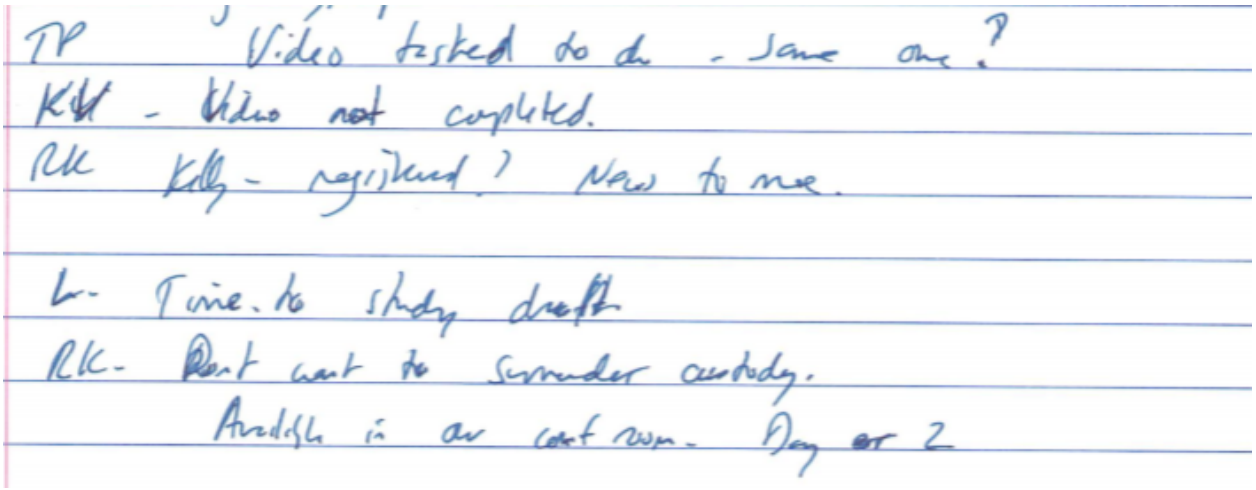
TP Kelly?

RK No role

HH Why Kelly
Not a subject expert

HH? He has own FARA registration – Kelly law group registered

AM McBree new name
Signal group



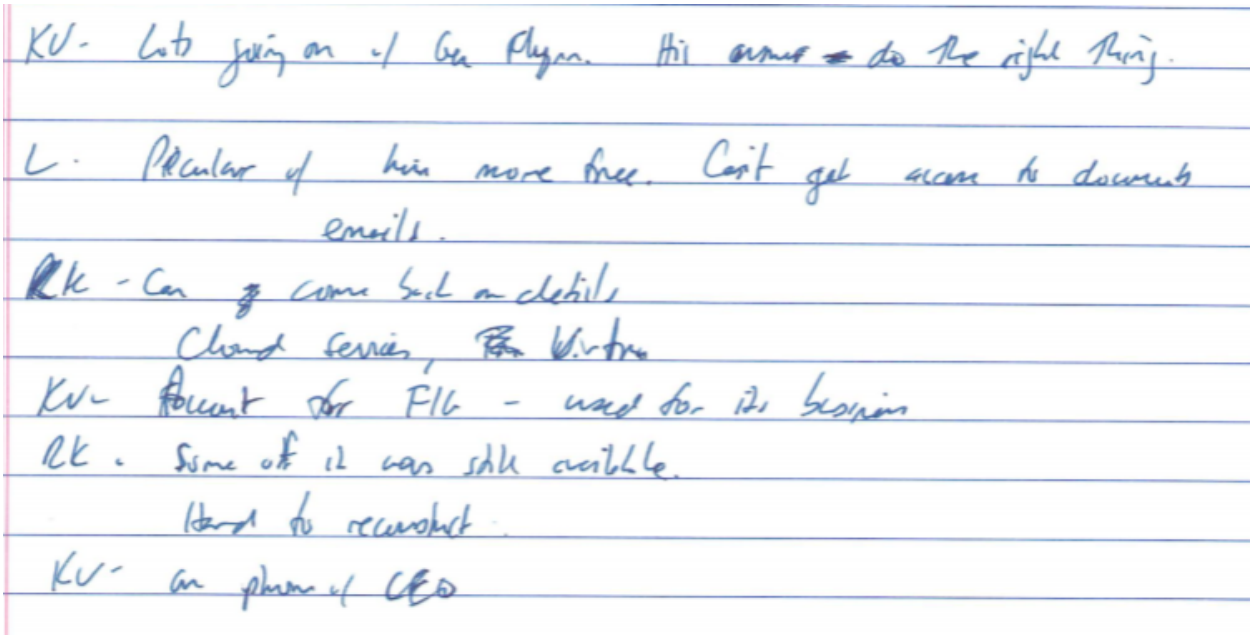
TP Video tasked to do – same one?

KV Video not completed

RK Kelly – registered? News to me

Laufman Time to study draft

RK Don't want to surrender custody
Available in our conf room. Day or 2



KV Lots going on w/ Gen Flynn. His answer – do the right thing

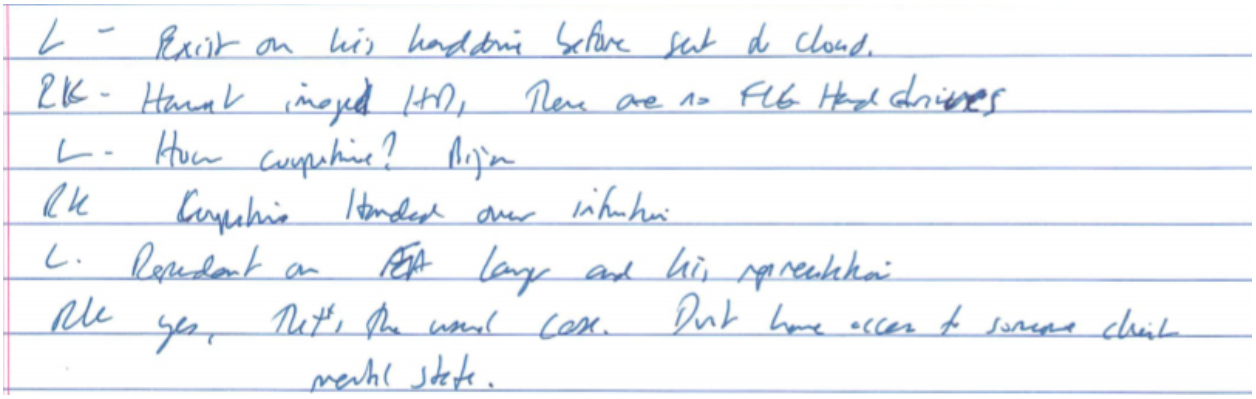
Laufman Peculiar w/ him more free. Can't get access to documents emails

RK Can get back on details
Cloud services, Virtru

KV Account for FIG – used for its business

RK Some of it was still available
Hard to reconstruct

KV On phone w/ CEO



L - Exist on his hard drive before sent to cloud.
RK - Haven't imaged HD, There are no FIG Hard drives
L - How cooperative? Bijan
RK Cooperative Handed over information
L. Dependent on EA lawyer and his representation
RK yes, that's the usual case. Don't have access to someone client mental state.

Laufman Exist on his hard drive before sent to cloud

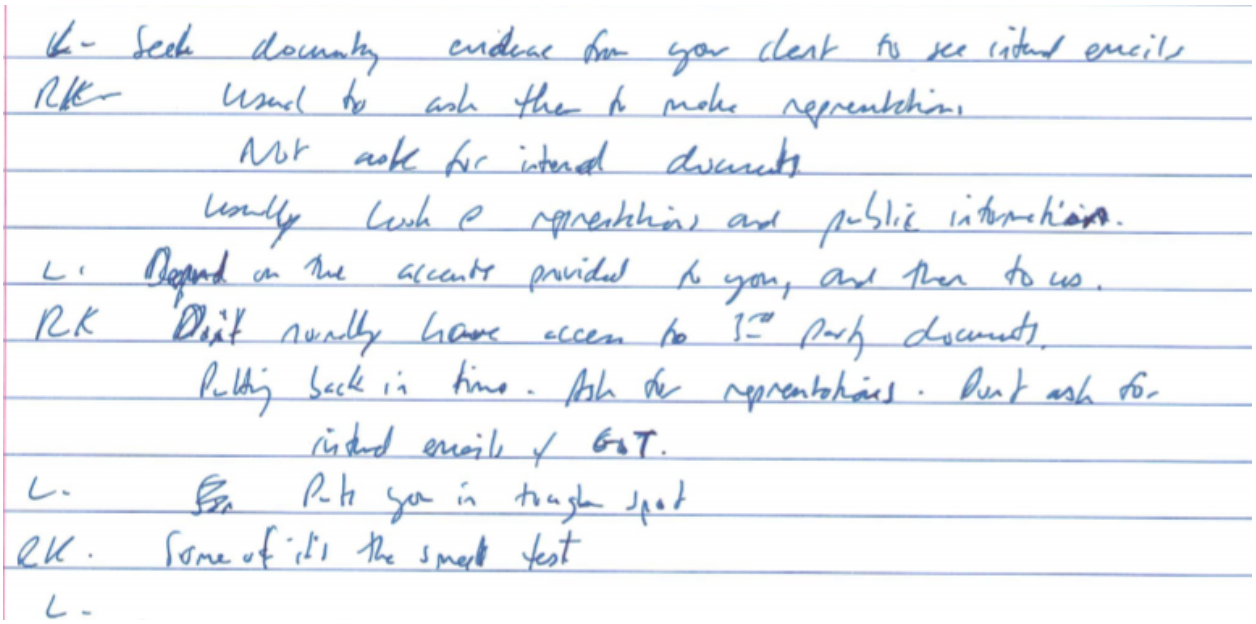
RK Haven't imaged HDs, there are no FIG hard drives

Laufman How cooperative? Bijan

RK Cooperative. Handed over information

Laufman Dependent on EA lawyer and his representation

RK Yes, that's the usual case. Don't have access to someone client
Mental state



L - Seek documentary evidence from your client to see internal emails
RK Usual to ask them to make representations.
Not ask for internal documents
Usually look @ representations and public information.
L. Depend on the accounts provided to you, and then to us.
RK Don't usually have access to 3rd Party documents.
Pulling back in time. Ask for representations. Don't ask for internal emails / G&T.
L. Eg. Put you in tough spot
RK. Some of it's the smell test
L -

Laufman Seek documentary evidence from your client to see internal emails

RK Usual to ask them to make representations
Not ask for internal documents

Usually look @ representations and public information

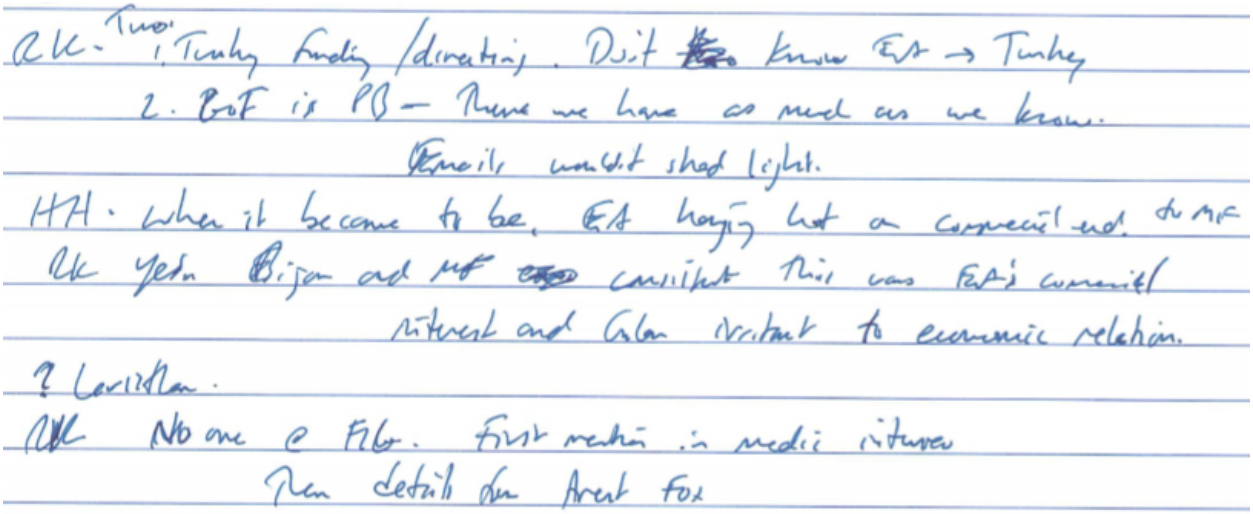
Laufman Depend on the accounts provided to you, and then to us

RK Don't normally have access to 3rd party documents.
Putting back in time. Ask for representations. Don't ask for internal emails w/ GOT

Laufman Puts you in tough spot

RK Some of it's the smell test

Laufman (blank line)



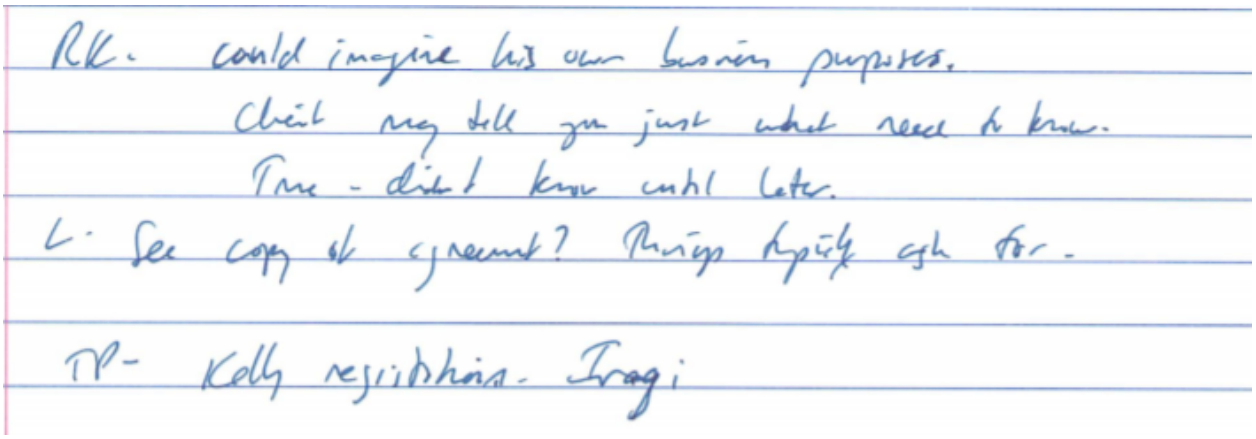
RK Two: (1) Turkey funding/directing. Don't know EA > Turkey
(2) GOT is PB - there we have as much as we know. Emails wouldn't shed light

HH When it comes to be, EA hanging hat on a connection end. to MF

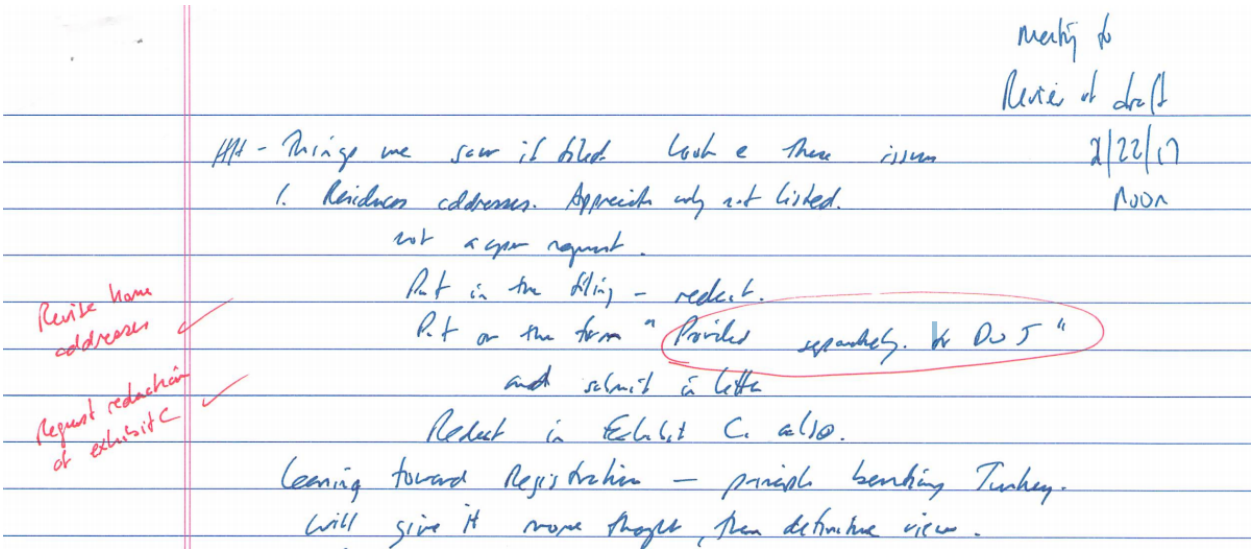
RK Yes Bijan and MF consistent this was EA's commercial
Interest and Gulen irritant to economic relation

Leviathan

RK No one @ FIG. First mention in media interview
Then details from Arent Fox



RK	Could imagine his own business purpose Client may tell you just what need to know True – didn't know until later
Laufman	See copy of agreement? Things typically ask for
TP	Kelly registration. Iraqi



Meeting to
Review of draft
2/22/17
noon

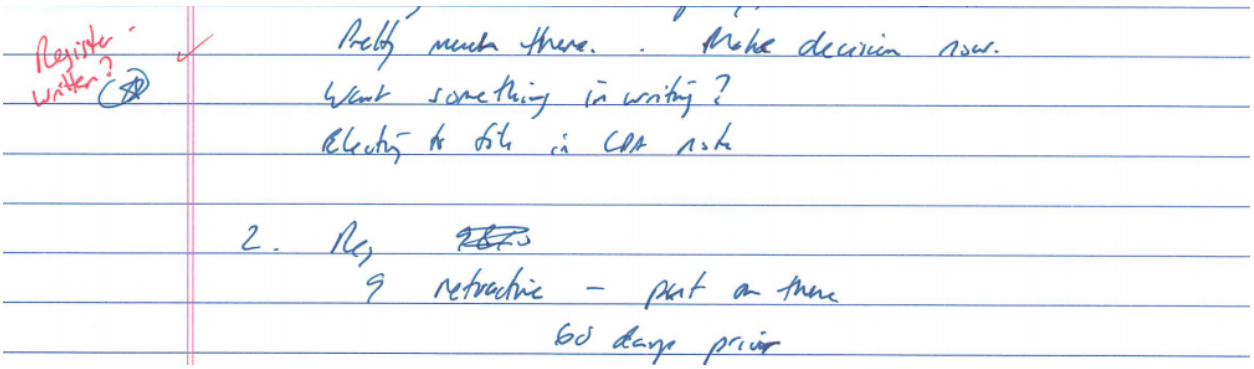
HH – Things we saw if filed. Look @ these issues.

1. Residences addresses. Appreciate why not listed.
   Not @ upon request.
   Put in the filing – redact.
   Put on the form "Provided separately for DOJ"
   and submit in letter
   Redact in Exhibit C. also.

Revise home Addresses ✓

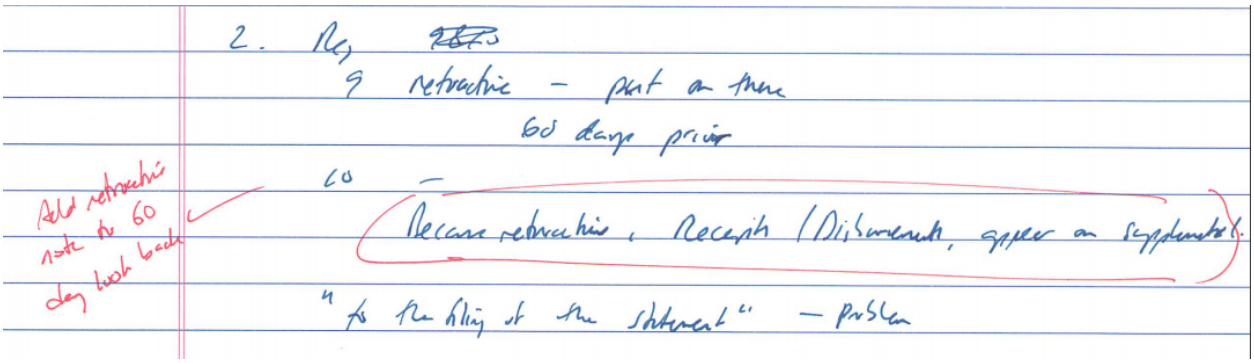
Request redaction ✓ In Exhibit C

Leaning toward Registration – principle benefiting Turkey.
Will give it more thought, the definitive view.



Register – Written? * ✓

Pretty much there. Make decision now.
Want something in writing?
Electing to file in LDA note

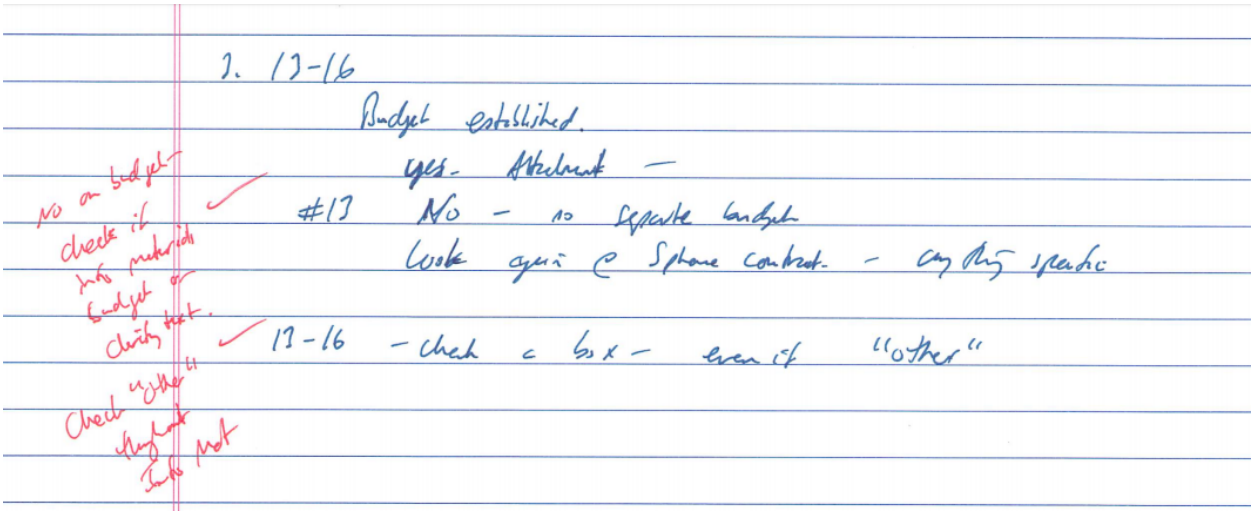


2. Reg
   9 retroactive – put on there
   60 days prior

Add retroactive
Note to 60
Day look back ✓

10 –
Because retroactive, receipts/disbursements, appear on supplemental.

"to the filing of the statement" – problem



3. 13-16

Budget established
Yes. Attachment –

No on budget
check if
info materials
budget or
clarify debt ✓

#13 No – no separate budget
Look again @ Sphere contract – anything specific

13 – 16 – check a box – even if "other"

Check "other"
Throughout
Info note

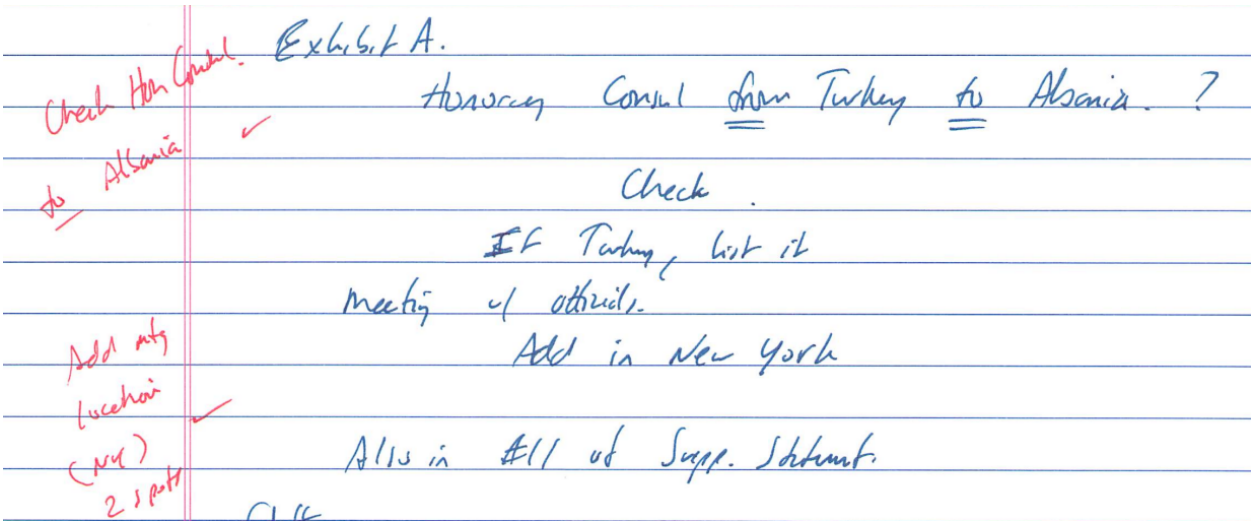


Exhibit A

Check Hon Consul To Albania ✓ — Honorary Consul from Turkey to Albania. ?

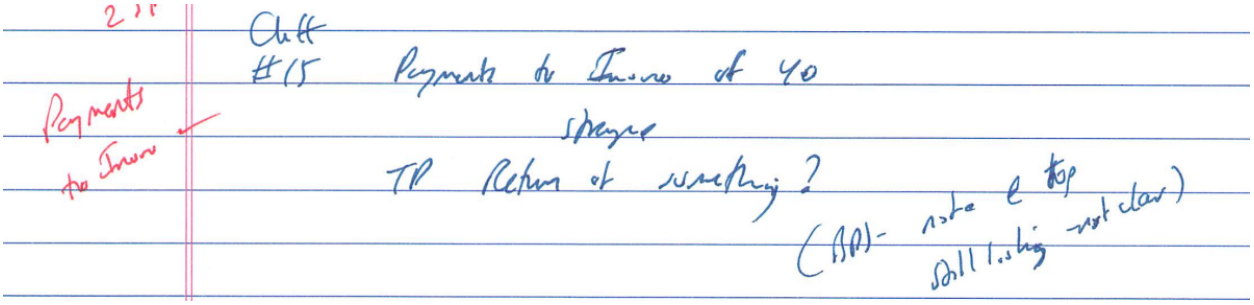
Check.

If Turkey, list it

Meeting w/ officials.

Add mtg luncheon (NY) 2 spots ✓ — Add in New York

Also in #11 of Supp. Statement.



Cliff

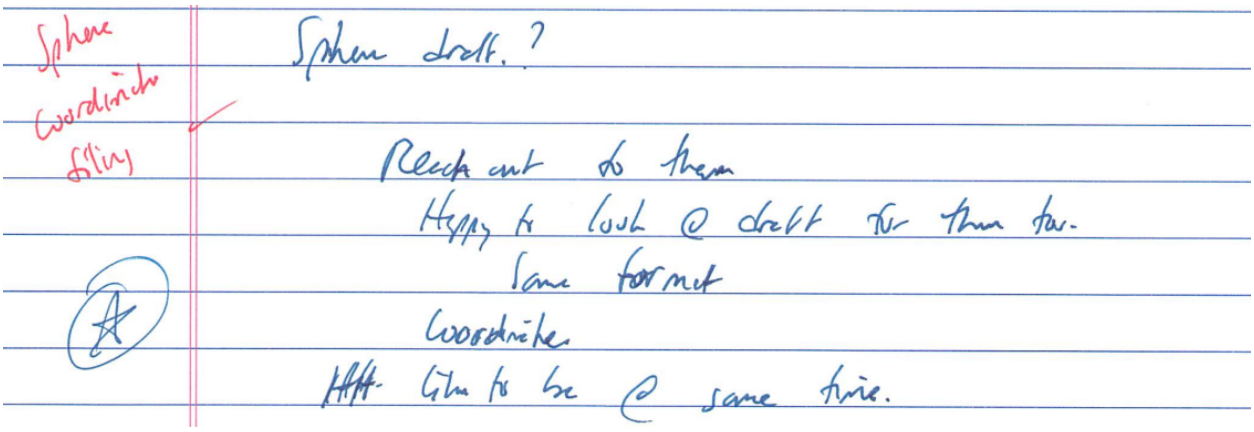
#15 Payments to Inovo of 40

Strange

TP Return of something?

(BPI – note @ top

Still looking – not clear)



Sphere coordinates filing ✓

Sphere draft. ?

Reach out to them

Happy to look @ draft for them tom.

Same format

* Coordinate

HH – like to be @ same time.

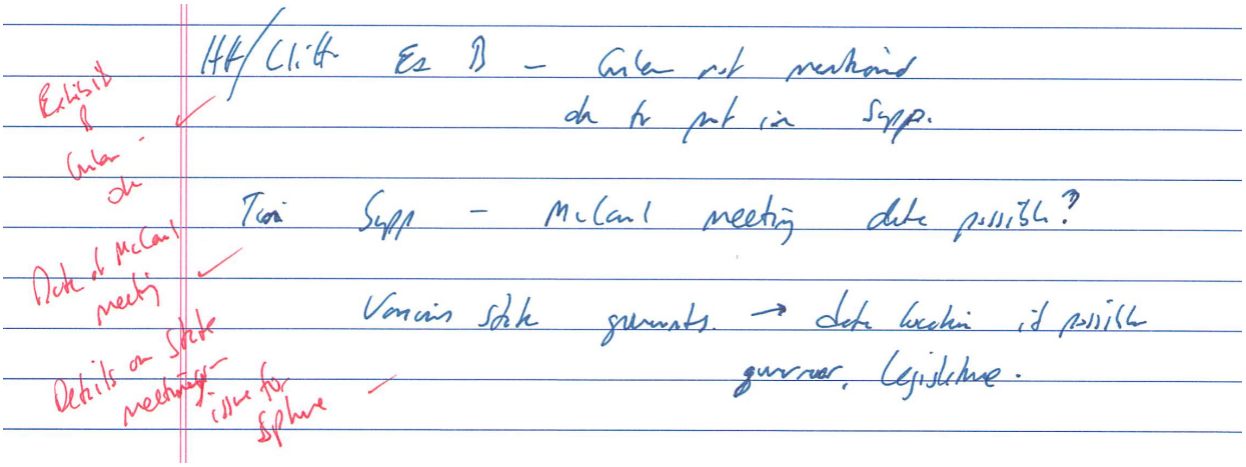


Exhibit B ✓
Gulen - OK

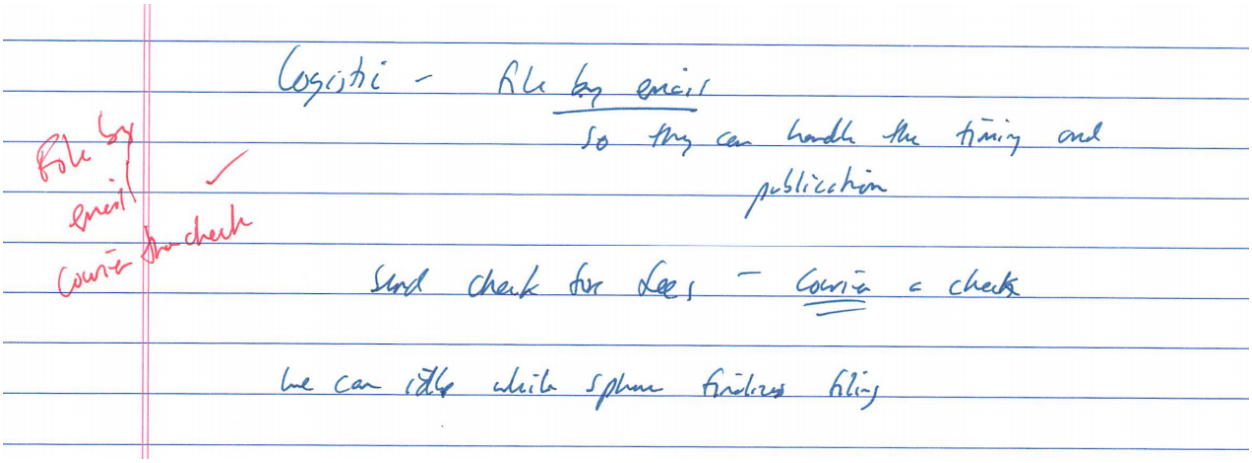
HH/Cliff – Ex B – Gulen not mentioned
Ok to put in supp.

To Supp - McCaul meeting date possible?

Date of McCaul Meeting ✓

Various State governments. → Date location if possible governor, legislative

Details on State Meetings – Issue for Sphere ✓



Logistic – file by email

File by email ✓

Courier the check

So they can handle the timing and Publication

Send check for fees – Courier a check

We can idle while Sphere finalizes filing

From: Bijan Kian <kian@flynnintelgroup.com>
Sent: Wednesday, November 2, 2016 10:36 PM
To: Ekim Alptekin <ekimalptekin@gmail.com>; Bob Kelley <kelley@flynnintelgroup.com>
Subject: Getting Turkey Wrong
Attach: GETTING TURKEY WRONG.docx

Ekim:

A promise made is a promise kept. Please see attached 1000 word article. I appreciate it if you take a look and give me your thoughts at your earliest convenience. I am not certain how much of the text will survive review and edits but as you can see, the humble author is not shy.

I am copying Bob as we move forward with executing the plan.

All the best,

Bijan

Hon. Bijan R. Kian
Vice Chairman of the Board of Directors
Flynn Intel Group, Inc.

703-313-7040 (office)
858-449-8997 (mobile)
kian@flynnintelgroup.com

<https://ci3.googleusercontent.com/proxy/5sJv2UqRFQjfJfxguQ-_N5W0AmT4njw iSe_1Yuz9lWhk0DXu67-QCYtShVY-rTNfvx4-JKSFFh65easSV_gog66tmx4FRNk5mgheXWj jds32m8njX-3vwWLzzqGW3XJehiDb7nbmC9IaoU7vWCvTn27O1yAkvIk9q6Zb--MXrbo_a2A 5syObS0-RYM8F5RMS353apAo8PitBoVE=s0-d-e1-ft#https://docs.google.com/uc?e xport=download&id=0B1UG7lJu76t5N2h5MUVVLTVQS1U&revid=0B1UG7lJu76t5NkEvek R5TVUzQW41NjM0UWR5S1A3aEN5QWFrPQ>

GETTING TURKEY WRONG.docx .tdf (138.5 kb)
<https://www.virtru.com/start/#v=2.0.0&d=https%3A%2F%2Fstorage.virtru.co m%2Fapi%2Fpolicies%2Fb81dabb3-01d2-4f57-8f9e-ccbe8e2cc9db%2Fdata%2Fmetad ata&dk=kqQKqmWhrNchheV3gFQN7GX2SFbAj2J85qAdtwBZDl8%3D&di=bSCkUN0kf8IxIzn cJyOgwg%3D%3D&a=f2060212-c779-479c-a2e2-d6b4bb4641cf>

Re: Flynn

From: "Kelner, Robert" <"/o=covington & burling/ou=cb/cn=recipients/cn=c&b.cbpowa01.kelnerrk">
To: "Hunt, Heather H. (NSD)" <heather.hunt@usdoj.gov>
Cc: "Smith, Brian" <bdsmith@cov.com>
Date: Fri, 03 Mar 2017 10:19:38 -0500

Looks like Tuesday. Finalizing some things. Expect General to sign Monday. And then we'd file Tuesday, and Sphere would file same day.

Sent from my iPhone

> On Mar 3, 2017, at 10:15 AM, Hunt, Heather H. (NSD) <Heather.Hunt@usdoj.gov> wrote:
>
> Okay. Close as in later today or close as in next week? Call on my mobile. 202-598-7101.
>
>> On Mar 3, 2017, at 10:10 AM, Kelner, Robert <rkelner@cov.com> wrote:
>>
>> We are not quite ready to file, but close. I'll try to catch you by phone today to discuss status.
>>
>> Rob
>>
>> Sent from my iPhone

Fwd: Flynn Intel Group, Inc.

From: "Kelner, Robert" <rkelner@cov.com>
To: kverderame@ponderainternational.com
Cc: "Smith, Brian" <bdsmith@cov.com>, "Anthony, Stephen" <santhony@cov.com>, "Langton, Alexandra" <alangton@cov.com>
Date: Tue, 07 Mar 2017 23:04:11 -0500
Attachments: Unnamed Attachment (68 bytes); image001.png (2.66 kB)

They are working late at the FARA Unit.

Sent from my iPhone

Begin forwarded message:

> **From:** "Hunt, Heather H. (NSD)" Heather.Hunt@usdoj.gov>
> **Date:** March 7, 2017 at 10:50:18 PM EST
> **To:** "Smith, Brian" bdsmith@cov.com>
> **Cc:** "Kelner, Robert" rkelner@cov.com>
> **Subject: RE: Flynn Intel Group, Inc.**
>
> Brian –
>
> Thank you for your email. This is to advise you that we are in receipt of the FARA filing for Flynn Intel Group, Inc. (6:02pm on March 7, 2017). We will process the filing as quickly as possible, including your request to redact residential addresses and your request to include Rob Kelner's cover letter as part of the public file.
>
> Please contact me if you have any questions or concerns.
>
> Thank you,
>
> Heather
>
> **Heather H. Hunt**
>
> Chief, FARA Registration Unit
>
> Counterintelligence and Export Control Section
>
> National Security Division
>
> U.S. Department of Justice
>
> Washington, DC 20530
>
> (202) 233-0776/0777
>
> heather.hunt@usdoj.gov
>
> ---
>
> **From:** Smith, Brian [mailto:bdsmith@cov.com]
> **Sent:** Tuesday, March 7, 2017 6:02 PM
> **To:** Hunt, Heather H. (NSD) hhunt@jmd.usdoj.gov>

Cc: Kelner, Robert rkelner@cov.com>
Subject: Flynn Intel Group, Inc.

Dear Ms. Hunt,

Attached please find a cover letter, registration statement, exhibits, short forms, and terminating supplemental statement of the Flynn Intel Group, Inc. These materials are being provided by e-mail pursuant to our conversations. Additionally pursuant to our conversations, the information below is being provided separately.

We respectfully request that the Registration Unit redact residential addresses that appear on pages 8 and 10 of Exhibit C.

The following residential addresses are being provided to the Department separately:

Lt. Gen. Michael T. Flynn (Ret.)

411 North Pitt Street

Alexandria, VA 22314

Bijan Rafiekian

9700 Avenel Farm Dr.

Rockville, MD 20850

Philip Oakley

11400 Quailwood Dr.

Fairfax Station, VA 23039

A check for $610, for the initial registration and the terminating supplemental statement, will be sent separately by courier to your office.

Further to your conversation with Mr. Kelner, we respectfully request that his attached cover letter be included in the Unit's public file regarding this registration.

Please let us know if you have any questions.

Brian

Brian D. Smith

Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 5090 | bdsmith@cov.com
www.cov.com

COVINGTON

BEIJING BRUSSELS DUBAI JOHANNESBURG 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

December 15, 2017

BY U.S. MAIL

General Michael T. Flynn
Flynn Intel Group, Inc.
44 Canal Center Plaza
Alexandria, VA 22314

Re: Regulatory Advice, Acct. No. 039305.00001

Dear General Flynn:

Enclosed is our statement for professional services rendered by the firm during the period November 1, 2017 through November 30, 2017, in connection with the above-referenced account. Please feel free to call me if you have any questions.

Best regards.

Sincerely yours,

Robert K. Kelner

Enclosure

COVINGTON

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

Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 6000

General Michael T. Flynn
Flynn Intel Group, Inc.
44 Canal Center Plaza
Alexandria, VA 22314

December 13, 2017

Invoice: 60783193
Account: 039305.00001
Attorney: Robert K. Kelner

General Michael T. Flynn

Re: Regulatory Advice

For professional services rendered in connection with the above referenced matter through November 30, 2017:

Fees:	**$**	**562,122.50**
Disbursements	**$**	**916.43**
Total Fees and Disbursements:	**$**	**563,038.93**
TOTAL AMOUNT DUE:	**USD $**	**563,038.93**

Outstanding Invoices

Date	Invoice Number	Fee & Charges	VAT	Total	Credits	Balance
03/31/17	60750975	85,656.92	0.00	85,656.92	0.00	85,656.92
05/04/17	60754148	161,561.56	0.00	161,561.56	0.00	161,561.56
06/30/17	60763038	680,176.14	0.00	680,176.14	0.00	680,176.14
07/24/17	60765642	618,299.94	0.00	618,299.94	0.00	618,299.94
08/14/17	60769062	726,393.94	0.00	726,393.94	0.00	726,393.94
09/21/17	60774291	501,170.05	0.00	501,170.05	0.00	501,170.05
10/19/17	60776641	303,965.27	0.00	303,965.27	0.00	303,965.27
11/30/17	60780970	293,882.85	0.00	293,882.85	0.00	293,882.85
Totals $		**3,371,106.67**	**0.00**	**3,371,106.67**	**0.00**	**3,371,106.67**

COVINGTON

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

Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 6000

Remittance Page

Client Name	General Michael T. Flynn
Matter Name	Regulatory Advice
Date Of Invoice	December 13, 2017
Matter Number	039305.00001
Invoice Number	60783193
Total Amount Due	$563,038.93

Please Submit Remittance to:

Covington & Burling LLP
Attention: Accounting Department
One CityCenter
850 Tenth Street N.W.
Washington D.C. 20001
Fed. Id. No. 53-0188411
(202) 662-6000

Wire Instructions:

US Dollar Payments ($)

Citibank N.A 1101 Pennsylvania Avenue, N.W. Suite 900 Washington, DC 20004	ABA: 254070116 Account No. 9250403781 Account Name: Covington & Burling LLP Swift Code: CITIUS33

Please reference invoice number

Please send remittance details to collections@cov.com

Re: call?

From: MTFLYNN <rpatriot@mailsol.net>
To: "Anthony, Stephen" <santhony@cov.com>
Cc: "Kelner, Robert" <rkelner@cov.com>, flynnlmmm@mailsol.net
Date: Wed, 30 Aug 2017 16:14:27 -0400

Rob, I assume we're using the conference call number?

Mike

Michael T Flynn

Lt. Gen. (R), U.S. Army
CEO, Resilient Patriot LLC
NYT Bestselling Author, The Field of Fight:
How We Can Win the War Against Radical Islam and Its Allies
https://www.amazon.com/Field-Fight-Global-Against-Radical/dp/1250106222

On Aug 30, 2017, at 15:54, Anthony, Stephen <santhony@cov.com> wrote:

> Same for me. Or I could start at 4:30.
>
> Sent from my iPhone
>
> On Aug 30, 2017, at 3:52 PM, Kelner, Robert <rkelner@cov.com<mailto:rkelner@cov.com>> wrote:
>
> Would you prefer to talk after dinner? It's not urgent, but we do need to update you on a development. I could talk later tonight if easier for you.
>
> Robert Kelner
>
> Covington & Burling LLP
> One CityCenter, 850 Tenth Street, NW
> Washington, DC 20001-4956
> T +1 202 662 5503 | rkelner@cov.com<mailto:rkelner@cov.com>
> www.cov.com<http://www.cov.com>
>
> <image001.jpg>
>
>
> From: MTFLYNN [mailto:rpatriot@mailsol.net]
> Sent: Wednesday, August 30, 2017 3:49 PM

To: Kelner, Robert <rkelner@cov.com<mailto:rkelner@cov.com>>
Cc: Anthony, Stephen <santhony@cov.com<mailto:santhony@cov.com>>;
flynnlmmm@mailsol.net<mailto:flynnlmmm@mailsol.net>
Subject: Re: call?

Rob,

Five is good. We have dinner reservations at 5:30, so we will be in our car if that's okay.

Mike

Michael T Flynn
Lt. Gen. (R), U.S. Army
CEO, Resilient Patriot LLC
NYT Bestselling Author, The Field of Fight:
How We Can Win the War Against Radical Islam and Its Allies
https://www.amazon.com/Field-Fight-Global-Against-Radical/dp/1250106222

On Aug 30, 2017, at 15:31, Kelner, Robert <rkelner@cov.com<mailto:rkelner@cov.com>> wrote:
General, are you free for a call with me and Steve at 5pm today?

Robert Kelner

Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 5503 | rkelner@cov.com<mailto:rkelner@cov.com>
www.cov.com<http://www.cov.com>

<image001.jpg>

Fwd: Chief Judge Howell's Order re Manafort's FARA Lawyer

From: "Anthony, Stephen" <santhony@cov.com>
To: "Kelner, Robert" <rkelner@cov.com>, "Polack, Roger" <rpolack@cov.com>, "Chertoff, Michael" <mchertoff@cov.com>, "DeBold, Joshua" <jdebold@cov.com>, "Smith, Brian" <bdsmith@cov.com>, "Langton, Alexandra" <alangton@cov.com>
Date: Mon, 30 Oct 2017 21:49:25 -0400

I just had a flash of a thought that we should consider, among many many factors with regard to Bob Kelley, the possibility that the SCO has decided it does not have, wrt Flynn, the same level of showing of crime-fraud exception as it had wrt Manafort. And that the SCO currently feels stymied in pursuing a Flynn-lied-to-his-lawyers theory of a FARA violation. So, we should consider the conceivable risk that a disclosure of the Kelley declaration might break through a wall that the SCO currently considers impenetrable. Much to consider...

Sent from my iPhone

Begin forwarded message:

> **From:** "Anthony, Stephen" <santhony@cov.com>
> **Date:** October 30, 2017 at 9:32:19 PM EDT
> **To:** "Polack, Roger" <RPolack@cov.com>, "Kelner, Robert" <rkelner@cov.com>, "Chertoff, Michael" <mchertoff@cov.com>, "DeBold, Joshua" <jdebold@cov.com>, "Smith, Brian" <bdsmith@cov.com>, "Langton, Alexandra" <ALangton@cov.com>
> **Cc:** "Anthony, Stephen" <santhony@cov.com>
> **Subject: Chief Judge Howell's Order re Manafort's FARA Lawyer**
>
> Attached (if I succeeded in attaching).
>
> <f.pdf>
>
> Sent from my iPhone

Re: Robert Kelley Declaration

From: "Anthony, Stephen" <"/o=covington & burling/ou=cb/cn=recipients/cn=c&b.cbpowa01.anthonysp">
To: "Chertoff, Michael" <mchertoff@cov.com>
Date: Sat, 28 Oct 2017 07:33:37 -0400

I tip my cap to Kelley for his candor in this.

Sent from my iPhone

On Oct 28, 2017, at 7:16 AM, Chertoff, Michael <mchertoff@cov.com<mailto:mchertoff@cov.com>> wrote:

Home run.

From: Kelner, Robert
Sent: Saturday, October 28, 2017 12:33 AM
To: Anthony, Stephen
Cc: Polack, Roger; Chertoff, Michael; DeBold, Joshua; Smith, Brian; Langton, Alexandra
Subject: Re: Robert Kelley Declaration

I'm just getting to this now. I think it came out great, all things considered. It reads like it's in his voice and not heavily lawyered at all, which it wasn't. The mix of things he included adds to its credibility. It does what we hoped it would do. Thanks, Steve, for great work in bringing this to a conclusion. Frankly, there are not many lawyers who would be as frank as Kelley has been here.

Sent from my iPhone

On Oct 27, 2017, at 9:45 PM, Anthony, Stephen <santhony@cov.com<mailto:santhony@cov.com>> wrote:

See the attached. I believe our private investigator has succeeded in getting a declaration from FIG's counsel that (a) makes clear that Bijan/FIG intended to make a FARA filing, (b) establishes that counsel gave legal advice that FIG did not need to file under FARA, (c) shows that it was the lawyer who spontaneously came up with the idea of not filing under FARA, and (d) confesses that it was the lawyer's idea to put the [inaccurate] information on the LDA filing, with no input from anyone else. There are a few points that Bob Kelley throws in that I would not have scripted (e.g., his assertion that no one told him about the NY meeting with Turkish officials), but he does not say or imply that that fact would have changed his advice — indeed, he specifies that he didn't ask any further questions when he spoke to Bijan. So, the record now establishes that FIG acted on advice of counsel, having truthfully answered all of the questions that its counsel saw fit to ask. Further, it's helpful to us that the attached declaration was drafted to summarize the facts that Kelley recollected in speaking with a private investigator (not Flynn's lawyers, who weren't there), and no one even suggested to Kelley that he omit any of the facts he recollected—this is a true rendition of his memory, and thus will not be vulnerable on cross-examination.

Sent from my iPhone

Begin forwarded message:

From: George Kucik <gkucik@columbiaprocess.com<mailto:gkucik@columbiaprocess.com>>
Date: October 27, 2017 at 6:40:33 PM EDT
To: "Anthony, Stephen" <santhony@cov.com<mailto:santhony@cov.com>>
Subject: RK Signed Declaration

I just met with Mr. Kelley. He carefully reviewed the declaration and stated: "This is great!. I'll sign it." He initialed the first two pages and signed the last page. He then said, "You did a great job. That's exactly what I said."

Please see attached.

--
George Kucik
Columbia Process and Investigative Services, LLC
5406 Connecticut Avenue, NW, Suite 108
Washington, DC, 20015
Office (202) 686-5000
Cell (<tel:%28240%29%20507-3669>202) 497-1415
Email Gkucik@columbiaprocess.com<mailto:Gkucik@columbiaprocess.com>

<RK Declaration Signed.PDF>

DECLARATION OF ROBERT K. KELLEY

1. My name is Robert Kelley. I am over 18 and competent to testify. The information contained herein is true and correct and is based on my personal knowledge.

2. I attended law school at the University of California, Berkeley from 1969-1972. I am a member of the District of Columbia Bar and licensed to practice law in D.C.

3. My background includes the Foreign Service in Germany (1966-1969), Law School at the University of California, Berkeley (1969-1972), Wilmer, Cutler, & Pickering Law Firm (1972-1975), Senate Intelligence Committee (1975-1976), Chief of Staff for Senator Charles Mathias (1977), U.S. Embassy in Iraq (2003-2005), Chief Counsel to the National Security Sub-Committee of the U.S. House of Representatives (2006).

4. Currently, I have my own law firm, The Law Offices of Robert Kelley. My practice includes representing foreign governments as well as other persons and businesses.

5. I knew Bijan Kian when he was at the U.S. Export/Import Bank. He was one of three guys nominated by the President to run the bank.

6. Bijan co-founded the Nowruz Commission which was set up to coordinate a Persian Spring festival each year on the first day of Spring. Bijan was the Vice Chairman and I was the Secretary General.

7. Bijan called me up last year and said that his company had to register with FARA, the Foreign Agents Registration Act. At this time, I was not affiliated with FIG, Flynn Intel Group. It is important to note that I remember he said: "We have to register with FARA at the Justice Department." FARA is an Act, the Foreign Agents Registration Act, but it's administered by the National Security Division of the Department of Justice. You just register on line. Bijan asked me to come out to his house to assist with the registration.

8. A few days later, on a Sunday afternoon, I went to Bijan's house. It was in September of 2016. While there, I said to Bijan: "Is this a foreign government or a foreign political party?" Bijan replied: "No, it's a foreign private company." I said: "Well, you don't have to register at FARA if it's a foreign private company." I asked Bijan if they were going to do any lobbying. Bijan told me that they might. I then said: "You can register with the U.S. Congress under the LDA which is the Lobby Disclosure Act." I also showed him the Federal Register that says it is not necessary for a private company to register with FARA. I did not ask any

additional questions nor did I see the contract. I only asked if it was a private company.

9. Later that same week, I registered the company under the LDA.

10. On the form I had to put down what the company would lobby about. I had no idea so I put the registrant will advise the client on U.S. domestic and foreign policy regarding S.1635 and the House counterpart, and H.R. 1735 and the Senate counterpart. I made this decision on my own without guidance from anyone else.

11. The form also requested the name of who would lobby for the company. I put my name down. Somebody had to put a name down so I decided I would put my name down. I never actually did any lobbying. I made this decision on my own without guidance from anyone else.

12. In October Bijan asked me if I would like to be general counsel and a principal for the Flynn Intel Group. This was a few days after I filed for registration under the LDA. I agreed. Bijan took my picture in front of the Flynn logo at their office at 44 Canal Square, Alexandria, VA., and put it on the website.

13. The next thing was after the November 8th election. Bijan called me and told me to terminate the registration. The reason he gave me was that he was involved with the transition team of President Elect Trump and he was not allowed to be a lobbyist. I terminated the registration. This was on-line.

14. One day in December, on a Friday, I went to the FIG office at 44 Canal Square for a meeting with Bijan. While there, we got Ekim Alptekin on the phone. We called him. Ekim said that his company, INOVA, was a private company and it had no government funding and no relation to the Turkish government. Then Ekim sent us an e-mail to the Flynn Intel Group to that effect. That is, INOVA didn't receive any government funds or have any relationship with any government. It was just a one line e-mail to Bijan. I saw the e-mail.

15. While at this meeting, we received a call from General Flynn. He asked that we reach out to another attorney from Jones Day. I did not make the call but I understand that Bijan did reach out.

16. My involvement with FIG was limited. I did not know about or have any involvement with the op-ed in the Hill Newspaper by General Flynn. Nor did I know about any meeting in New York with Turkish government officials or any other matter involving the Flynn Intel Group. To be complete, on one occasion Bijan asked me to draft a letter to a company in Boston MA. Later, I was told to

disregard writing the letter. On another occasion, Bijan asked that I coordinate a meeting with a friend of mine to see if they were interested in working with FIG. We met two times but nothing ever formed out of these meetings.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on October 27, 2017.

Robert K. Kelley

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,	)	Case 1:18-cr-00457
	)	
Plaintiff,	)	
	)	
v.	)	Alexandria, Virginia
	)	July 18, 2019
BIJAN RAFIEKIAN,	)	9:00 a.m.
	)	
Defendant.	)	Day 4 (AM Session)
	)	Pages 659 - 799

TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE ANTHONY J. TRENGA

UNITED STATES DISTRICT COURT JUDGE

AND A JURY

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

Q. Did you have a role with the Nowruz Commission?
A. I was secretary general. I was -- I attended the board meetings, but I was not on the board.
Q. Did you provide legal services at all for the Nowruz Commission?
A. No.
Q. And Mr. Rafiekian, did he have a role in it as well?
A. Yes, he was the vice chairman.
Q. And did there come a time -- again, we're talking about the second half of 2016 -- when Mr. Rafiekian contacted you about a legal matter?
A. Yes.
Q. Do you recall about when that happened?
A. It was in the first week of September 2016.
Q. And do you recall how he contacted you? In telephone? In person?
A. Yes, telephone. He telephoned me. And he knew my number from -- it was a friend.
Q. And what did you understand him to be interested in legal advice about?
A. He said that we have to register at FARA, the Justice Department Foreign Agents Registration Act. And if you could come out, he said, to assist me with the registration.
Q. When you say "we," was he talking about a particular business company?

A. I don't know. I don't know.
Q. Okay.
A. It was Flynn Intelligence Group, I think.
Q. Okay. And what did you know about the Flynn Intel Group at the time when Mr. Rafiekian --
A. I don't know anything about him.
Q. You just knew --
A. At the time.
Q. Okay. And what did you learn in your initial discussion with Mr. Rafiekian about the Flynn Intel Group and what he was interested in?
A. Well, I -- I assumed that I was not a part of the Flynn Intelligence Group and I should steer away from -- I didn't -- did not want to pry about how much the money they're making or -- it was a client.
Q. And when Mr. Rafiekian contacted you, how specific was he in describing the issue?
A. He said that I have to -- the firm has to register at the Foreign Agents Registration Act.
Q. And following this initial contact, did there come a time when a meeting took place?
A. Sunday afternoon -- or in early September.
Q. Do you recall where that was?
A. In his house.
Q. Was anyone else present?

A. No.
Q. And did you gather further information at that meeting at Mr. Rafiekian's home?
A. No. I said that I was -- is it a foreign government or a foreign political party, and he said, no, it's a private company.

And I said, You don't have to register at FARA. You can register at LD -- Lobbying Disclosure Act in the Congress.
Q. About how many times in your career had you had a client in some fashion inquire or led you to discuss with them the Foreign Agents Registration Act versus the LDA?
A. About 30 times.
Q. Thirty times.
A. I represented -- at the Law Office of John Sears, I represented South Africa and Belize Ambique and Japan Airlines and Japan automobile manufacturers. And I filed for both of them, all of them, four of them, every six months for ten years.
Q. You mentioned a minute ago, is there a common alternative to the Foreign Agents Registration Act, FARA?
A. There's the Lobbying Disclosure Act. The Foreign Agents Registration Act was passed in 1938 by Congress and signed into law by F.D.R. And it was a disclosures statute and you can do anything you want, but you have to disclose it to the government and to the American people. The public records are

on file.

And in 1995, the -- the Congress passed the Lobbying Disclosure Act, which removed a class of lobbyists for the governments and foreign governments and foreign political parties.

Q. Under what circumstances in your practice did you typically advise a client to file under the LDA versus FARA?

A. I didn't. I made the decision in 1993 to register at FARA -- oh, LDA, Lobbying Disclosure Act, for the Japanese automobile manufacturers because I was lobbying and I fell under the statute.

Q. Let's go back to the day you met with Mr. Rafiekian at his home.

What -- did you learn anything that led you to reach a conclusion about whether FARA or the LDA was the proper place to register?

A. Yeah. I said that the -- it was a -- I asked the question: Is it a foreign government or foreign political party?

And they said no -- and he said, no, it was a private company.

And I said, You don't have to register at Foreign Agents Registration Act. You can register in the U.S. Congress.

And I asked him, Will lobbying be involved?

And I said -- he said, It might.

And I said, You can register at Lobbying Disclosure Act.

Q. Why is the fact that the contract was with a private company an important consideration for you?

A. Well, the 1995 act removed a class of lobbyists who are representing a foreign company and -- or the private company altogether, American companies, and they didn't have to register at FARA.

Q. And you testified a few minutes ago that Mr. Rafiekian in his initial contact with you said, I need to register with FARA.

Is that a fair summary?

A. Yes.

Q. And what was it that made you steer --

A. It was a private company and it didn't have to register at -- he didn't have to register at FARA.

Q. Was that the advice you gave Mr. Rafiekian?

A. Yes.

Q. About how soon after this meeting with Mr. Rafiekian do you recall you filed the Lobbying Disclosure Act registration?

A. I think it was in September or a couple weeks afterwards.

Q. Where did you find -- how did you gather the information that you used to fill out the form?

A. I knew how to fill out the form.

Q. Where did you gather the factual information that you entered?

A. Oh, I called -- I asked Bijan what was the address of the private company, and he said it was the Netherlands and he gave me his address and I wrote it down. And so the client was a Dutch company.

Q. Do you recall the name of the company?

A. Inovo.

MR. MACDOUGALL: Your Honor, to avoid having competing exhibits, I would like to use the government's exhibits with this witness.

THE COURT: That's fine.

MR. GIBBS: No objection, Judge.

BY MR. MACDOUGALL:

Q. Mr. Kelley, I would like you to please have a look at what's been previously marked as Government Exhibit 166. And that's just for identification right now.

Thank you, Mr. Burns.

A. 166.

Q. Yes, sir.

A. I've got it, I think. It's the lobbying registration -- Lobbying Registration Act, Government Exhibit 166.

Q. Okay. Could you tell the jury or tell the Court if you recognize this document?

A. Yes.

Q. And if you'd just repeat, please, what it is.
A. The lobbying registration. It's LDA -- LD-1 disclosure form. It says it at the top.
Q. Did you prepare this yourself?
A. Yes.
Q. Do you recall about what date?
A. Something -- I remember in late September.
Q. Did anyone help you do this or did you do this yourself?
A. I used an intern, Sam Soberie (ph), who is the -- is sitting at the front desk, and later he was a paralegal or something.
Q. Is it at your law firm?
A. Yeah.
Q. Okay. So it was a paralegal or intern at your law firm?
A. Yeah.
Q. Okay. And where did you file this form once you completed it for Flynn Intel Group?
A. The clerk of the Senate or the -- the Senate -- Secretary of the Senate and the clerk of the House. It was filed online. It was different than earlier when I went to the Japanese Automobile Manufacturers Association and I -- they didn't have it online and it was a clerk of the House, and it was papers everywhere.
Q. So you filed this online and I take it you affixed your signature electronically as well; is that right?

A. Yes.

MR. MACDOUGALL: Your Honor, the defense would move the admission of Government Exhibit 166.

THE COURT: I believe it's already in.

MR. GIBBS: Yeah. And there will be no objection. But I think it is, and just to confirm that, but if it's not in, we have no objection.

THE COURT: All right. Exhibit 166 is in.

THE WITNESS: There should be a second page to this. There's only one page. My digital signature is on the other side of -- oh, here.

BY MR. MACDOUGALL:

Q. Do you have the entire document, Mr. Kelley?

A. Yes. I took it out of the plastic.

Q. That's perfectly fine.

A. Yeah.

Q. Are you able to see --

A. It says September 30th, 9/30/2016, digitally signed by Robert Kelley.

Q. Just a few questions about this document.

MR. MACDOUGALL: If I could ask it to be published to the jury, Your Honor.

THE COURT: Yes.

BY MR. MACDOUGALL:

Q. Who is registrant under this Lobbying Disclosure Act form

that you completed after meeting with Rafiekian --
A. Flynn Intelligence Group is the line of the registrant.
Q. What's the address for Flynn Intel Group?
A. 44 Canal Center Plaza. I call it 44 Canal Square, Alexandria, Virginia.
Q. Mr. Kelley --
A. It was on the Potomac River.
Q. Mr. Kelley, who is listed as the individual contact on the form?
A. Me.
Q. Why did you list --
A. Since the -- I was filling out the form and I was -- it made sense to put myself down as the contact person.
Q. And did you believe that you would be doing any lobbying for Flynn Intel Group and Mr. Alptekin --
A. I think so, yeah.
Q. Is that right?
A. Yes, yes.
Q. And is that the reason that you put yourself down as the contact?
A. Yes.
Q. Going forward, after you filed the Lobbying Disclosure Act form after Flynn Intel Group, what discussions, if any, did you have regarding a regular working relationship with that firm?

A. Well, Bijan asked me to be the general counsel of the Flynn Intelligence Group, and I didn't move from -- I didn't have an office in the Flynn Intelligence Group. I stayed at 14th and K, Jefferson Waterman law firm.

Q. That was your law firm?

A. Yes. And I thought of him as a client.

Q. In your experience, is that completely usual that a lawyer may remain physically present in a law firm while providing general counsel?

A. Yes.

Q. Along those same lines, did you have an office at the Flynn Intel Group ever?

A. No.

Q. How about an e-mail address?

A. I think I had an e-mail, but I never checked it. I -- my wife have to ask about Twitter.

Q. I understand. I do too.

Tell me the reason why you never checked your e-mail box beyond just a lack of --

A. Well, I was -- you know, if you have 15 things to check, it's not sensible. I -- if a person wanted to send me an e-mail, they knew this e-mail address.

Q. It was really important to call you, right?

A. Yes. And Bijan traditionally called me.

Q. One more question on Government Exhibit 166. Mr. Kelley,

could you have a look, please, at line item 12, which you will find at the very bottom of the first page?

A. Yes.

Q. That asked a question: Specific lobbying issues (current and anticipated.)

What did you respond there?

A. I responded the registrant will advise on U.S. domestic and foreign policy, period, and S.1635 and the House counterpart H.1735 and the Senate counterpart.

Q. Let's take those one at a time. S.1635, what was that about?

A. I think it was the National Defense Authorization Act.

Q. And S stands for Senate; is that right?

A. Huh?

Q. S in the S.165 [sic] stands for Senate?

A. Yes, yes, the U.S. Senate.

Q. And the other entry is H.R.1735. And HR stands for House of Representatives, right?

A. Yes.

Q. Okay. What was that about? What --

A. I think it was the State Department authorization bill.

Q. Why did you enter those statutes here where the form asked for specific lobbying issues current and anticipated?

A. Well, it was not -- it was the committee action. And the Senate Foreign Relations Committee and the Senate Armed

Services Committee, they had hearings. And they -- one Pompeo goes to the hearing on the budget of the State Department. I know the guy that prepared the binder. And he doesn't ask -- the congressmen do not ask questions of Pompeo, but why are we in Yemen or why is NATO demanding to increase the contribution. They don't ask about the budget.

And I knew that the -- from my experience with the Japan automobile -- automobile manufactures and the Japan airlines, that private company is interested in U.S. foreign policy and defense policy and the State Department.

Q. So that was your best estimate at the time?

A. Yes.

Q. And did Mr. Rafiekian ask you to put that in?

A. No. I just put it in myself.

Q. Could you please have a look -- in the same binder, Mr. Kelley, at Government Exhibit 168 for identification?

A. It is the --

Q. And you're welcome to take it out of the sleeve if you'd like.

A. Okay.

Q. Do you recognize that document?

A. It's the Department of State Authorities Act fiscal year 2017.

Q. And on the upper right-hand corner of the first page, there's a numerical designation that follows.

A. S.1635.
Q. And how does that relate to the entry you had made on the --
A. I made the entry following the -- I was going to monitor the State Department authorization bill. They call it the authorization bill and for the next year fiscal year 2017. And they had -- typically they would have a lot of hearings. And Pompeo would come up and Secretary of -- Secretary of State Tillerson, was it, and he testified but not on the budget, the -- but the process.
Q. So in other words, Exhibit 169 was one of the pieces of legislation you cited in the --
A. Yes.
Q. -- application; is that right?
A. I was going to monitor the committee hearings.
MR. MACDOUGALL: Your Honor, may I ask the Court to take -- I'm sorry -- Government Exhibit 168, may I ask the Court to take judicial notice of --
THE COURT: 168 or 169?
MR. MACDOUGALL: Well, it's 168 initially, then 169 --
THE COURT: Right. I believe they're both in evidence. They're already in evidence.
MR. GIBBS: They are.
MR. MACDOUGALL: Thank you, Your Honor.

BY MR. MACDOUGALL:

Q. So I'm sorry, I misspoke. Mr. Kelley, if you could have a look quickly at Government Exhibit 169, which should be right after that in the binder?

A. Yes. Okay. Defense Authorization Act for fiscal year 2016.

Q. And how does that document relate to the entry you made in -- on space 12 of the --

A. Well, I know it was -- after the fact, I knew it was vetoed, but -- by President Obama, but it was -- it was the process that I was interested in, not the bill number. And they have -- Richard Thornberry -- Mac -- William Mac Thornberry, I went to see him for when I represented the vice president of Iraq and the -- I was in Iraq for two years in 2003 through 2005. And I had a Top Secret clearance. And I was organizing a company at the -- the senators and representatives, and they came about every three days and -- for the period of time for two years. And it was 350 or something. And --

Q. So were you paid by the Flynn Intel Group for the legal work you did?

A. Yes.

Q. Do you recall how much?

A. I think $10,000.

Q. Do you remember who paid you?

CERTIFICATE OF REPORTER

I, Tonia Harris, an Official Court Reporter for the Eastern District of Virginia, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the Jury trial in the case of the **UNITED STATES OF AMERICA versus BIJAN RAFIEKIAN**, Criminal Action No. 1:18-CR-457, in said court on the 18th day of July, 2019.

I further certify that the foregoing 116 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, my computer realtime display, together with the backup tape recording of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this July 18, 2019.

Tonia M. Harris, RPR
Official Court Reporter

COVINGTON & BURLING LLP

Privileged and Confidential November 1, 2017

Memorandum

To: Rob Kelner, Steve Anthony, Brian Smith, Mike Chertoff, Josh Debold, and Roger Polack

From: Alexandra Langton

Re: November 1, 2017 Notes from Covington's Meeting with the Special Counsel's Office

On November 1, 2017, Robert Kelner ("Rob"), Stephen Anthony ("Steve"), and Alexandra Langton met Brandon Van Grack ("BVG") and Zainab Ahmad ("ZA") at the Special Counsel's Office ("SCO") at 395 E Street SW, Washington, DC from approximately 1:00p.m. to 1:45p.m. This memorandum summarizes the discussion at that meeting. Information in brackets is information that I have added for context or clarification. Information separated by asterisks indicates non-verbal gestures.

I. Summary of the Meeting

BVG: We wanted to invite you here because we know if has been a couple of months since we've spoken. You guys have been very cooperative with us and quiet in the media and we really appreciate that.

We have a number of decisions points that we are going to have to make and we wanted to gage your interest in talking to us before we have to make those decisions. General Flynn has said on a number of things regarding having a story to tell and we'd like to explore that.

Rob: General Flynn very much wants to cooperate. We have spent a lot of time talking to him about what he knows. At the end of the day, there are a few things we don't quite know what to make of. There are some issues not related to Russia that he has questions about. You all might have specific things you could present to him to refresh his recollection. We don't think that there is a "smoking gun," but we are open to making General Flynn available.

BVG: There is information that you or your client might not be aware of. From where we're sitting, there might still be value in sitting down with your client. We have a good sense of what Flynn knows and what Flynn doesn't know.

Rob: Refreshing recollection is key with General Flynn. He often doesn't have a sense of what is important and tends to forget even mundane things.

BVG: We're at a point where we can have a conversation with Flynn with prompts. I will say, the value of whatever information he has will be different now than it will be in two weeks or a month. We're interested in talking to him even if he doesn't think he has a smoking gun.

Steve: What sort of protections are you willing offer so his words aren't against him?

BVG: A proffer letter.

Rob: Queen for a day?

BVG: *Nods*

Rob: We would need to discuss that. We need to get comfortable with the situation. We would feel better with something stronger than a proffer letter like statutory immunity.

Steve: I have to ask, where are you guys going with respect to charges against General Flynn?

BVG: (1) FARA (failure to register); (2) FARA false statements; and (3) false statements to government officials regarding contacts with Russian officials during the transition.

Steve: On the last point, do you mean the White House interview?

BVG: False statements at an FBI interview at the White House.

Rob: Frankly, we are surprised by that. That is not consistent with what we have learned from press reports and other sources.

Steve: Would you be willing to give us the 302?

BVG: We're not currently in a posture where we're providing that information. We're certainly willing to hear what you have to say if you think that we're wrong.

ZA: We're not saying no; we'll think about it. You might be entitled to it soon anyway. We feel like we know all we can know short of talking to him. We're at a fork in the road and we want to talk to him (General Flynn) to decide how to move forward.

Rob: He would be willing to tell his story if you are, in good faith, willing to tell us that if he comes in and you think that he is being truthful, that you may not take action against him. However, it could be that the interview is just a way for the SCO to get information to help its case against General Flynn.

ZA: Look, all options are on the table . . . no pros? We are like a typical USA's office. We want to get all the facts. It doesn't have to be that he has a smoking gun. We haven't thought a lot about deals. It would all depend on how the interview with Flynn goes.

Steve: I'm just imagining getting ready for trial to begin, thinking to myself, "jeez, why did I let my client do this interview?" I don't know if it makes sense to expose ourselves with only a proffer letter in return.

BVG: We feel confident that your client has value to provide. This isn't supposed to be a "gotcha" interview. This is meant to get input from your client for our broader investigation.

Rob: I can imagine ways in which we come in. Agreeing only to a proffer could put him at risk. We don't want our client charged or found guilty of a felony offense. We don't think he has committed a felony offense.[1] It would be helpful to get more details about where you are going.

ZA: We've given you the universe of charges. I don't know if we can provide any additional assurances beyond what we've already mentioned. If he gives us useful information, we can talk and negotiate from there. You don't know everything he knows.

BVG: No decisions have been made with respect to Flynn because we want to talk to him first. Turkey or FARA wouldn't necessarily be the focus. Questions about the campaign would not be the first thing we talk about. There are things that we know that you and your client would not necessarily have focused on.

Steve: This would definitely be a leap of faith on our part.

ZA: The information is much more valuable for us than it might be in a traditional context. Non-smoking gun information is valuable to us.

BVG: Yes, our mission here is to answer questions.

Rob: And you believe this is information that he *actually* has?

BVG/ZA: Yes. *Both nodding emphatically.*

Rob: We have spent a lot of time a lot of time trying to elicit information from him. He doesn't have the memory of a lawyer. It would be a very time-consuming process.

Steve: You said that the information would be more valuable today than it would be a month from now?

BVG: Yes.

ZA: *Nods.*

BVG: There's one more issue I want to bring up. One of the charges we mentioned was false statements under FARA. Because Covington prepared the FARA registration, that would make you (Rob) a fact witness. It isn't something we are considering.

Rob: If we were to get to that point, we would litigate it very aggressively.

ZA: We're not saying it's not waivable. We just want to make sure you talk it through with your client.

---

[1] Zainab made a note of this point.

Rob: Well, we say what you guys did with Manafort, and we'll definitely raise it with our client.

BVG/ZA: *Both visibly uncomfortable.*

Rob: When do you guys want to hear back from us?

BVG: By the end of the week if possible.

Rob: That's going to be hard for a variety of reasons.

Steve: One of which is I am going to be in Oregon for another matter.

BVG: Let's plan on talking on Tuesday morning.

Rob: Thank you for the accommodation.

All: Small talk about Portland coffee.

COVINGTON & BURLING LLP

Privileged & Confidential

November 3, 2017

Memorandum

To: Rob Kelner, Steve Anthony, Brian Smith, Mike Chertoff, Josh Debold, and Roger Polack

From: Alexandra Langton

Re: November 3, 2017 Notes from Covington's Call with Special Counsel's Office

On November 3, 2017, Robert Kelner ("Rob"), Stephen Anthony ("Steve"), and Alexandra Langton had a call with Brandon Van Grack ("BVG") and Zainab Ahmad ("ZA") at the Special Counsel's Office ("SCO") from approximately 8:30a.m. to 9:10a.m. This memorandum summarizes the discussion on that call.

I. Summary of the Call

Rob: I know we had said we'd talk on Tuesday, but we wanted to have at least an interim conversation today. We have been thinking about the discussion the other day and that has left us with a few critical questions as to whether we could get comfortable bringing him in for a proffer.

You suggested that there is something General Flynn knows that would be valuable to your investigation, although it wouldn't be as valuable several weeks from now. You also said you're confident that he knows this information and you want to ask him about it. You haven't given us a sense about the topic. That leaves us in a situation where we'd be bringing him in completely cold as to that issue without us having any chance to test with him his recollection. It would be in everyone's interest to not bring him in cold. Is it a meeting? Something that happened in the WH? Is it classified? Do you have more specific information so we can assess whether he can give you what you need and we could bring him in. That's the first of a couple of key issues. I'll stop there to let you react.

BVG: I'm glad you raised that. One of the important takeaways is understanding that there is value we think your client has. The timing point is related to where we are in the broader investigation and not necessarily the notion of the specific information. I want to make sure we separate the two. The timing issues relates to where we are in the investigation.

ZA: Another way to say that is this is the best moment for us to talk to General Flynn and hear his story based on where we are in our investigation. We don't necessarily agree with your characterization of this being best for everyone. This is the right moment given the arch of our investigation to hear him out.

BVG: Perhaps a slight misunderstanding on or end. There isn't a particular question that we think General Flynn is going to answer. There are a number of different points, communications, perceptions, and meetings that are helpful to our investigation. This is not a situation where there is one particular question from one day where we know he has the answer. It is broader than that. Broadly, the focus of the questions would be:

- Communications your client had during transition with foreign officials, including Russian officials.
- Whether anyone provided him directions on those communication.
- Communications he is aware of that other members of the transition had with foreign officials.
- Communications he had with foreign officials during his time at the WH.
- Communications other people had with foreign officials.

Steve: We had a slightly different takeaway from our meeting. We're still interested in exploring this. I don't think it's in anyone's interest to reach a misinformed conclusion that we have to keep him away from you. We'd like to get to yes. We'd like to explore how we could make this work. Are the topics you want to ask about inculpatory? Are there questions you view as being relevant to exposure to some other person or do you want to ask about things that are the subject of the charges against him?

BVG: I do take your point. I think we represented what the charges are: FARA and false statements. There are a number of them. When we talk about topics that could in incrimination. Those wouldn't be our initial focus. The only incriminating thing would be false making a false statement. If he's being truthful about what was said, I don't think we would be setting your client up for culpability.

ZA: We're eventually going to want to talk about everything. That will include topics he has criminal exposure on. We aren't interested in Turkey right now. We're asking him to come in because we think he has information that will shed criminality on other actors. It will cover everything.

Steve: Cutting to the chase, are you going to ask him "what is Inovo" or do you intend to leave Turkey aside and talk about the types of things Brandon was talking about?

BVG: When you talk about a general proffer, at some point, your client will need to have a truthful discussion about any topic we'd want to talk about. What I would propose is, right now, we want to talk to your client initially for more than one day. Right now, initially, we are fine not talking about Turkey or the FARA piece because our investigation is not focused on Turkey/FARA. In terms of broader next steps, at some point, we would need to have that conversation.

Rob: There are a number of issues. Regarding contacts with foreign officials during the transition or his time at the WH, without getting into attorney-client conversations, this is a topic on which he doesn't necessarily have a granular recollection on every interaction. It is not an incredibly attractive topic on which to bring somebody in to pass a test of candor. Frankly, if you asked me about meetings I had with clients, I don't know if I could pull it off with any precision. To ask someone about meetings and calls during an incredibly busy period of his life as an evaluation of candor is not a particularly attractive option. What I am hearing now is that you want a general proffer.

BVG: I want to make sure we all have clarity. I will just say a couple of things. It seems like you think there is a specific topic we think he can answer. That's true; we have multiple topics. This is a multiple question exam and not a single question exam. Just to be clear, we're interested in a broader range of topics than it seems that you walked away with.

Rob: What we thought was that there was some topic or episode where he had information regarding your investigation of some third party. If that were the case, we were contemplating a limited proffer on that topic. We now see that we misunderstood and what I'm hearing now is more of a conventional, general proffer. You also want the ability to question him on the variety of topics on which he has exposure. Is that a fair description?

BVG: I want to be sincere. The reason why it is important to knowing there is value is that there is a broad range of topics and information that General Flynn has. We feel confident having him coming in and being truthful will be helpful. I don't think there is exposure for your client. The only potential exposure is false statements by your client. That's the exposure of anyone coming in for a proffer.

Steve: You mean false statements during the interview?

BVG: That's right. I thought you were clear in our meeting about the importance of the use of prompts. I can set him up and say, you were in Mar-a-Lago on this date, show him the record, and set him up that way. We have prompts that can help jog his memory and a lot of information you might not have.

Rob: I want to reiterate something we said the other day. We've spent a lot of time with him. It can be difficult to reconstruct a recollection. Not because of any intention on his part to conceal, there is sometimes a quality of fogginess to consider that requires a lot of work. That's one reason why this requires a good bit of thought. I think I clearly understand what you're asking and what is on the table. It is going to be a tough call for us.

Steve: I think where, possibly, the misunderstanding came from is our discussion of how this is different from a typical white collar case. I think it was in the course of that conversation, you guys gave us reasons to persuade us that this would be something we could wisely do. I think your premise is there are topics that wouldn't have exposure to him, and topics that are of interest in your investigation. I take it that this could have real value to you and General Flynn could do himself good even if he's talking about topics that wouldn't be obvious to us or to him.

Rob: We don't think there's a FARA violation. We don't think he made false statements. You think he did. Inevitably, what that means is he's going to come in and give you answers to questions, and you won't agree with his answers to at least some of the questions. I sense there will be numerous points of disagreement as to what happened. That's why coming in for a general proffer, although we would like to get to yes, is difficult. We feel we have strong defenses across these issues and you feel differently. It doesn't tee up a situation where you will nod and accept his answers.

BVG: This is not a usual situation. If all we were charging someone with a false statement, we wouldn't need to have this conversation with your client at all because the only crime is he lied and this opportunity wouldn't present itself. We think there is other information he has that doesn't involve criminal activity he did. If we were in EDVA, we would not be having this conversation because if it is false statements; there's nothing your client could provide. I don't think you walked away with the wrong impression. We want to talk about information he has that doesn't have to do with his potential criminal activity.

Second, to the extent your questions involve Turkey/FARA, I would propose our initial session doesn't cover Turkey/FARA. In terms of a long-term proffer, that would have to be on the table. In terms of our priorities for our broader investigation, we would be fine having the initial sessions be focused on his time as NSA, the transition, etc.

Rob: I think we understand that clarification. We just want to note a couple factual points. Apart from the fact that this is a guy who doesn't have a detailed catalogue of dates, times, and places, he also was not in fact a central player in the campaign in the way that he was perceived to be publically. He did, certainly, spend a lot of time with the candidate traveling, but I want to make sure you guys are aware of that.

BVG: That's not a surprise to us and that doesn't change our prior representation.

Rob: Ok, good. The information he has is not as encyclopedic as others' might be. We had also asked about seeing the 302. You said that you would think about it. We would like to renew that request in the context of figuring this out. We have not thought of the FBI interview as being a significant point of exposure. If we are wrong about that, it would be clarifying to see why you think we're wrong. That's why the 302 is important. It seemed that you were highlighting the FBI interview in particular.

BVG: The answer right now is not at this time in terms of sharing the 302 because it might reveal more about our investigation and other investigative priorities. It is about what has been widely reported regarding the December 29, 2017 call. We can't now because I have confidence that your client will be able to provide helpful information on those communications.

Rob: There are a few other points, but I want to talk to Steve about it first. We'll caucus on our end and we might circle back with a couple other questions.

BVG: Let me say two things before we leave. I would still like to set a time on Tuesday to talk. I would propose 9:00a.m. on Tuesday. I have not circulated our standard proffer letter. I will send it to you guys. If we do move forward, we can talk about the specifics of the proffer letter on Tuesday.

Steve: We appreciate you working in good faith with us. Thank you.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

DECLARATION OF MICHAEL T. FLYNN

I, Michael T. Flynn, declare:

1. I am a citizen of the United States and more than 18 years old.
2. I served over thirty-three years in the United States Army. Five of those years I spent deployed in active combat in Afghanistan, Iraq, and elsewhere around the world in support of United States foreign policy objectives.
3. I was a life-long Democrat and President Barack Obama twice appointed me to positions that required Senate confirmation. In my final military assignment, I served as head of the Defense Intelligence Agency (DIA) until September 2014.
4. On December 1, 2017 (reiterated on December 18, 2018), I pled guilty to lying to agents of the FBI.
5. I am innocent of this crime, and I request to withdraw my plea.
6. In December 2016, while I was working on then President-Elect Trump's transition team, I received a letter from the FARA unit at the Department of Justice. In that letter I learned that the FARA unit sought information about work that my former business, the Flynn Intel

Group, did for a company called Inovo BV that related to Turkey. I responded by seeking out respected counsel who were known and respected FARA lawyers; I chose Rob Kelner and his colleagues at Covington & Burling. I met with Covington lawyers on several occasions about FIG's FARA issues. I gave them the information they requested and answered their questions truthfully. The most important instruction I gave them was to "be precise."

7. On January 20, 2017, I entered office as the President's National Security Advisor. Four days later, FBI Deputy Director McCabe called me and asked if I would meet with a couple of FBI agents at the White House. I agreed.

8. While I was willing to oblige Deputy Director McCabe by meeting with a couple of agents on the fourth day of the new administration, I was extremely busy and only had a limited amount of time to give them. I tried to answer their questions as best I could during that brief meeting before again moving on to a schedule packed with new presidential and national security requirements.

9. I was an intelligence officer for over 33 years. Since 1981 and throughout my military and government career, I have held the highest-level security clearances our government provides. When FBI agents came to the White House on January 24, 2017, I did not lie to them. I believed I was honest with them to the best of my recollection at the time.

10. I still don't remember if I discussed sanctions on a phone call with Ambassador Kislyak nor do I remember if we discussed the details of a UN vote on Israel. In regards to the sanctions issue, I told the agents that tit-for-tat is a phrase I use, which suggests that the topic of sanctions could have been raised. The phone calls with Kislyak are still events of

which I do not have a clear memory and it related to a general category of information (phone calls about foreign policy) that are both sensitive and classified.

11. My baseline reaction to questions posed by people outside of my superiors, immediate command, or office of responsibility is to protect sensitive or classified information, except upon "need to know" and the proper level of security clearance. That type of filter is ingrained in me and virtually automatic after a lifetime of honoring my duty to protect the most important national and military secrets.

12. I am and was fully aware that federal officials routinely monitor, record, and transcribe such conversations with foreign officials.

13. Of course, I was embarrassed and angered by the furor that erupted in the press over the felonious leak of highly sensitive and classified information that was my phone call with Ambassador Kislyak. It was distracting to my work to be the center of such a commotion and it was upsetting to be the cause of disruption to the busy and important work in support of the new President of the United States.

14. I resigned as National Security Advisor on February 13, 2017.

15. I believe my resignation letter to President Trump stated quite accurately what happened and both he and the Vice President graciously accepted my apology. The transition period was an incredibly intense time. I was communicating with representatives of multiple foreign countries on countless and varied issues every day. Frankly, of the national security dangers and concerns that weighed on our minds at that time, "sanctions" on Russia were far from the most pressing threat or concern. We were dealing with many more serious crises around the world. The calls with Ambassador Kislyak were brief and few; they were no more exceptional than my numerous calls and personal interactions with senior

representatives of governments from around the world during an exceedingly demanding work schedule.

16. After I left the White House, I agreed to engage Kelner, his colleague Stephen Anthony, and other Covington lawyers to represent me in any FBI investigations and, eventually, the Special Counsel's Office investigation. They also continued to represent me and FIG in regards to FARA related issues. At one of my first meetings with Mr. Kelner and Mr. Anthony they asked me if I "had anything" on President Trump, as it would provide much more leverage with the government. I told them from the beginning that I was unaware of President Trump doing anything wrong.

17. With respect to the FARA filing, my Covington counsel did not explain to me that there were any problems with the FARA filing that required Covington to re-examine any of the issues in August 2017. I would have hired independent counsel to reevaluate the FARA filing and amend it if necessary, had I known the severity of the conflict.

18. To the best of my recollection, and from my re-examination of the emails from August 2017, the vast majority of email traffic between me and Covington during that time was focused on the creation of my Legal Defense Fund to pay my skyrocketing legal defense fees (by that time approaching $3 million). To that end, we put our Alexandria, Virginia home on the market in late November or early December 2017 timeframe to help pay the rising legal bills that we were incurring. We then moved to our family home in Rhode Island.

19. In late August 2017, my wife and I were in Rhode Island. Kelner and Anthony emailed us to arrange a telephone call. The call then occurred while we were driving to have dinner with some friends. It was an approximately 15-minute phone call, where we had pulled off

to the side of a highway. They informed us that there was a development regarding a conflict of interest. They also mentioned the possibility of Bijan being indicted. Speaking to the conflict of interest, they stated that they were prepared to defend us vigorously, if the conflict became an issue. We told them we trusted them.

20. In November 2017, the Special Counsel's Office (SCO) created sudden and intense time-pressure on me to plead guilty. On November 4, 2017, I believe, my Covington attorneys told my wife and me that the Special Counsel's Office (SCO) wanted to conduct a proffer session with me. They told me the SCO "had yet to make a decision about how to proceed with me" and doing a proffer session would be a good way to let the SCO prosecutors "get to know the real Mike Flynn." During this same meeting, my previous lawyers, Mr. Kelner and Mr. Anthony proceeded to walk us through a series of items—essentially describing the risks of doing the proffer. From this meeting, I believe the following day, I agreed to do the proffer, primarily based on my understanding that they said if the proffer went well, being indicted would be less likely; otherwise my indictment would be soon. They did not raise FARA issues with me that day or anything about a conflict of interest.

21. November 16, 2017, was the first day of the proffer with the SCO. That same evening, after concluding the first proffer, we returned to the Covington offices where my attorneys told me that the first day's proffer did not go well and then proceeded to walk me through a litany of conceivable charges I was facing and told me that I was looking at the possibility of "fifteen years in prison."

22. They reiterated the threat of charges against me, my son, as well as the potential of a long term prison sentence. That evening, we discussed and they encouraged me to use words

and phrases they believed would help me "get through" the next day's proffer and satisfy the special counsel, phrases that are not part of my normal vocabulary.

23. During the second day of the proffer, I used words and phrases that were not really my own voice, and I regret that—just as I regret pleading guilty. People think that a three-star general must know everything, but I was a fish-out-of-water in a terrifying and completely foreign situation, with none of the legal skills necessary to deal with the many things being thrown at me. I hired the team of the best lawyers I had been told I could find, and I relied on them completely. One of the ways a person becomes a 3-star general is by being a good soldier, taking orders, being part of a team, and trusting the people who provide information and support. Lori and I trusted Mr. Kelner and Mr. Anthony to guide us through the most stressful experience of our lives, in a completely incomprehensible situation. I have never felt more powerless. I should have stood my ground firmly for what I knew to be the truth—that I did not lie to the agents, and I should have told this Court on December 18, 2018, that I needed to consult new counsel. My relationship with Covington disintegrated soon thereafter.

24. This effort to "say-what-they-want" approach during the proffer was noted by one of the interviewing agents, who stopped me at some point to ask whether what I was saying was something that really happened, or whether I was just speculating—analyzing the past with the benefit of hindsight. I agreed with the agent I was mostly speculating.

25. I recall Mr. Kelner's mention of a conflict of interest in late August in a brief phone call, but I did not attach any serious significance to it. Likewise, I did not understand the legalistic email I received on November 19, 2017, the eve of my third day of proffers—

almost three months later. We trusted my attorneys and expected them to put my interests first—as they said they would do.

26. To have devoted my life to my country, only to be accused of crimes, slandered in the media with false and outrageous claims, and have my family threatened was an unimaginable nightmare—one that those who have not walked in these shoes will find difficult to comprehend.

27. Following the four-day proffer, on November 22, 2017, Kelner and Anthony called my wife and me as we were driving home to Rhode Island to spend Thanksgiving with family to tell me the SCO planned to bring charges and that I should consider a plea.

28. The week leading up to November 30, 2017, Kelner and Anthony advised that if I did not plead, I would be indicted on multiple counts and that my son, Michael G. Flynn could or would face indictment. They repeated that I would be looking at the potential of fifteen years in prison, and said that I would be subjected to "the Manafort treatment."

29. On November 30, 2017, as plea negotiations with the SCO were coming to a head, I reiterated to my former lawyers, specifically Robert Kelner and Stephen Anthony, that I did not believe that I had lied in my White House interview with the FBI agents. I reminded them that I had spoken to representatives of well over thirty countries, many in a single 24-hour period, during that very busy holiday season and presidential transition period. In fact, some of these calls occurred while I was supposedly on "vacation" out of the country. Although I may have had an incomplete memory of the many details of certain conversations when speaking to the agents, I did not consciously or intentionally lie.

30. During this same day, later in the afternoon, Kelner and Anthony explained their view of how the government would go about proving its case and urged me to accept the plea deal

that was on the table. They walked me through the "Final 302" in detail. They explained if I did not accept the plea deal, that I should "expect to be indicted the next day."

31. Still struggling with the decision whether to plead guilty, I asked my former attorneys to make further inquiry with the SCO prosecutors about whether the FBI agents believed that I had lied to them. In the preceding months leading up to this moment, I had read articles and heard rumors that the agents did not believe that I lied, something I also firmly believed.

32. Mr. Kelner and Mr. Anthony left the room to call the SCO prosecutors. When they returned, they informed my wife and me that they had been told that the "agents stand by their statements." Because I was then unaware that the agents had made the statements described in this Declaration, and because I was unaware of what had passed between my former lawyers and the SCO outside of the room, I then understood them to be telling me that the FBI agents believed that I had lied.

33. My Covington attorneys counseled me to sign the Statement of Offense.

34. I agreed to plead guilty that next day, December 1, 2017, because of the intense pressure from the Special Counsel's Office, which included a threat to indict my son Michael, and the lack of crucial information from my counsel. The SCO had already made Michael the subject of their investigation and taken all his files and communications devices (computer, phone, files, and thumb drive). At the time, Michael and his wife had a four-month old baby. Nonetheless, I would not have pled guilty if my former lawyers had informed me that both agents who interviewed me at the White House on January 24, 2017, had advised that a) I displayed a "sure demeanor;" b) I "did not give any indications of deception"; and

c) both agents believed there was "no indication that I was lying, or that I believed I was lying."

35. At no time before my plea did my former lawyers explain or disclose this to me. Had I been informed of these disclosures, I never would have pled guilty. Moreover, I would have expected my Covington counsel to refuse to allow me to plead guilty with that information.

36. I have spent my entire adult life accepting great responsibility. I accepted the plea agreement to stop the pain and threats to my family and to accept responsibility for what the government I have defended and served for more than thirty-three years said I did wrong. However, if my counsel had informed me both agents said I showed "sure demeanor," "did not give any indications of deception," and that I showed "no indication that I was lying, or that I believed I was lying," I would not have signed the plea agreement, or entered a guilty plea.

37. My former lawyers from Covington also assured me on November 30, 2017, that if I accepted the plea, my son Michael would be left in peace. After I signed the plea, the attorneys returned to the room and confirmed that the SCO would no longer be pursuing my son.

38. It was well after I pled guilty on December 1, 2017, that I heard or read that the agents had stated that they did not believe that I had lied during the January 24, 2017, White House interview (and the other information described in this Declaration). Still later, I heard it reported that former FBI Director Comey and FBI Deputy Director McCabe testified to Congress that the agents did not believe I lied. After learning this information, I reiterated

to my former attorneys numerous times that I did not lie to the agents and questioned if I might be able to withdraw my plea.

39. Each time I raised this issue with my former attorneys, they urged me to stick with my plea deal, "it was a good deal," or the government would indict me for multiple other offenses and also drag my son back into the crosshairs. Their constant refrain was to "stay on the path" with the deal they had negotiated.

40. In the days leading up to the December 18, 2018, sentencing hearing, Robert Kelner and Steven Anthony continued to urge me to "stay on the path." They predicted (correctly) that the government would recommend a term of probation and that my son would not be further targeted.

41. However, during the December 2018 hearing, Judge Sullivan's decision to proceed with an extended plea colloquy took both me and my former counsel completely by surprise. They had not prepared me for what occurred. The Court's comments that day stunned me. The entire experience was surreal, and that day was one of the worst days of my life.

42. My Covington attorneys had only prepared me for a simple hearing in which I would be sentenced to probation, as the government had agreed. I was not prepared for this Court's plea colloquy, much less to decide, on the spot, whether I should withdraw my plea, consult with independent counsel, or continue to follow my existing lawyers' advice. Prior to the sentencing hearing, they counseled me that if the Court were to ask me if I wanted to withdraw my plea, that I should say "no," because "the Court would be giving you the rope to hang yourself." Regretfully, I followed my lawyers' strong advice to confirm my plea even though it was all I could do to not cry out "no" when this Court asked me if I was guilty.

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

44. In late spring 2019, when Covington actually insisted I seek "independent counsel," I did. New counsel immediately identified the conflict of interest and I then terminated Covington.

45. I realize my statement and determination to assert my innocence means the prosecutors, who already seek to imprison me, may retaliate further by seeking additional charges against me and dramatically increasing the penalty I face.

46. I express my profound apology to this Court, my family, the President, our country, and all who have supported and had faith in me throughout this incomprehensible ordeal. I tried to "accept responsibility" by admitting to offenses I understood the government I love and trusted said I committed. In truth, I never lied. My guilty plea has rankled me throughout this process, and while I allowed myself to succumb to the threats from the government to save my family, I believe that I was grossly misled about what really happened.

47. I will not confirm a plea of guilty I should never have entered. I have served my country honorably all my life, and accepted responsibility for myself and others from a young age (as my sister Clare wrote to you in her beautiful letter on behalf of my siblings). As God is my witness, the truth is I am innocent of these charges and any other alleged "criminal conduct," and I request to withdraw my plea of guilty, and I will fight to restore my good name.

48. To the best of my recollection, the foregoing is true and correct.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on 29th day of January, 2020.

Michael T. Flynn

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

DECLARATION OF LORI J. FLYNN

I, Lori J. Flynn, understand the obligations of an oath. Being duly sworn, I state the following:

1. I am a citizen of the United States and more than 18 years old.
2. I am the wife of LTG Michael T. Flynn, U.S. Army, (Ret). We have been happily married for 38 years.
3. In late August of 2017, Mike and I were driving to meet friends for dinner. We were running late. Mike's attorneys at Covington & Burling called us, and we pulled over to the side of the road to take their call.
4. The discussion lasted about 15 minutes, and they relayed to us that Bijan Rafiekian was likely going to be indicted any day. They told us that it was possible that Rob could be called as a witness against Flynn Intel Group, which could pose a conflict of interest for them. They said we could hire a separate firm to represent FIG. I remember thinking we have invested so much time and money with Covington up to this point; the thought of changing law firms or adding another firm at this late date was scary. They assured us that

they would represent us zealously. Our impression was that ok, if there was a conflict, our lawyers saw no reason that they couldn't continue to represent us. We left the conversation thinking it was no big deal. Covington could handle it.

5. In early November, Mike and I met with Covington and discussed doing a proffer with the SCO. They said it was our decision, but that it might be a good way for the SCO to "see the real Gen. Flynn." Never did I understand how dangerous such an interview could be, given his imprecise memories during that time, or how detrimental to his case it could be, and never during that meeting did they advise us of any conflict created for the firm regarding FARA. The proffer was always referred to as a positive thing that they recommended would help him in the long run.
6. On November 30, 2017, Mike and I were led to the conference room at C&B to discuss the plea agreement and court appearance on December 1. We spent hours talking about how surreal it all was that we were in this situation because we knew Mike didn't lie to the FBI.
7. Steve Anthony went over a 302 and Steve showed all the statements where the SCO would say Mike lied.
8. Also, Steve said Mike could be charged with FARA charges as well.
9. They told us Mike would have no chance at a fair trial in a D.C. courtroom and that there was a 96% conviction rate.
10. They told us Mike would get the "Manafort" treatment and SCO would indict him the next day if he didn't accept the plea.
11. Most important was the fact that the SCO was considering charging our son Michael if Mike didn't accept the plea. That was unacceptable to us.

12. We had heard a rumor that the FBI agents didn't think Mike lied at all in the interview that occurred on January 24, 2017, so we asked Rob [Kelner] and Steve [Anthony] if there was any way they could call the SCO to specifically call the agents and ask if that was the case. Rob and Steve left the room and came back and said that both agents were sticking with their stories in the 302.
13. They both asked if we wanted some privacy to talk and we agreed. We couldn't believe there was no other way and the pressure we were facing was painful. With the understanding that the agents stood by the 302 and believed Mike lied to them, he accepted the plea agreement.
14. To the best of my recollection, the foregoing is true and correct.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on 29th day of January, 2020.

Lori J. Flynn

Re: talking points

From: "Anthony, Stephen" <"/o=covington & burling/ou=cb/cn=recipients/cn=c&b.cbpowa01.anthonysp">
To: "Kelner, Robert" <rkelner@cov.com>
Date: Mon, 06 Nov 2017 20:46:59 -0500

Prepping a witness but will look at 10 pm. Thanks for doing.

Sent from my iPhone

On Nov 6, 2017, at 8:11 PM, Kelner, Robert <rkelner@cov.com<mailto:rkelner@cov.com>> wrote:

My day got away from me, and I am only now turning to batting out draft talking points for our 9am call with BVG and ZNA tomorrow. See what you think of the points below:

Good morning. We have spent a lot of time thinking about our discussions last week and talking the issues through with our client.

We've considered carefully your request to interview General Flynn under a proffer agreement.

To cut to the chase, we are prepared to bring him in to answer your questions. As you proposed, we would hold questions on the Inovo contract for a subsequent proffer.

We will need some time to get him ready to meet with you, and having time to do that adequately is important to us. We can talk about timing in a bit.

We do want to make a few things clear.

First, as we said when we met with you recently, General Flynn has always wanted to cooperate with the Special Counsel's investigation, and as Brandon may recall, even before the Special Counsel was appointed, we offered to answer questions about documents we were producing.

Second, we are very, very cognizant of the various risks of bringing a client who has been told he's a target in to be interviewed, with the limited immunity provided in a proffer letter (especially, if we may editorialize briefly, the rather stingy proffer letters currently in use by the Department of Justice….)

We are nonetheless taking those risks, and General Flynn is taking those risks, in the interest of cooperating as fully as we can, but also because we hope and expect that you will emerge from the proffer with a clearer view of the facts, which we believe should weigh heavily against any felony charges against General Flynn. We want you to have the benefit of the information he can share, as you make the judgments that you need to make.

Finally, just to make sure that you do not misinterpret our decision to let General Flynn participate in the proffer, we do want to reiterate that we are firmly of the view that he did not commit any felony offenses. There are no circumstances under which he would plea to a felony offense. Regardless, even without any commitment by the SCO regarding charging decisions, he is prepared to be interviewed.

Robert Kelner

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you are not the intended recipient, please immediately advise the sender by reply e-mail that this message has been inadvertently transmitted to you and delete this e-mail from your system. Thank you for your cooperation.

Attachments:
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http://cbentvault01dc.cov.com/EnterpriseVault/ViewMessage.asp?VaultId=18A5452219D0EAE4B83DD2B08CB4525721110000cbentvaultsite&SavesetId=201803070462125~201711070147010000~Z~F00B205650F0CAE0C9857BB58E0A5141&AttachmentId=1image001.jpg

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U.S. NEWS

Mueller Has Enough Evidence to Bring Charges in Flynn Investigation

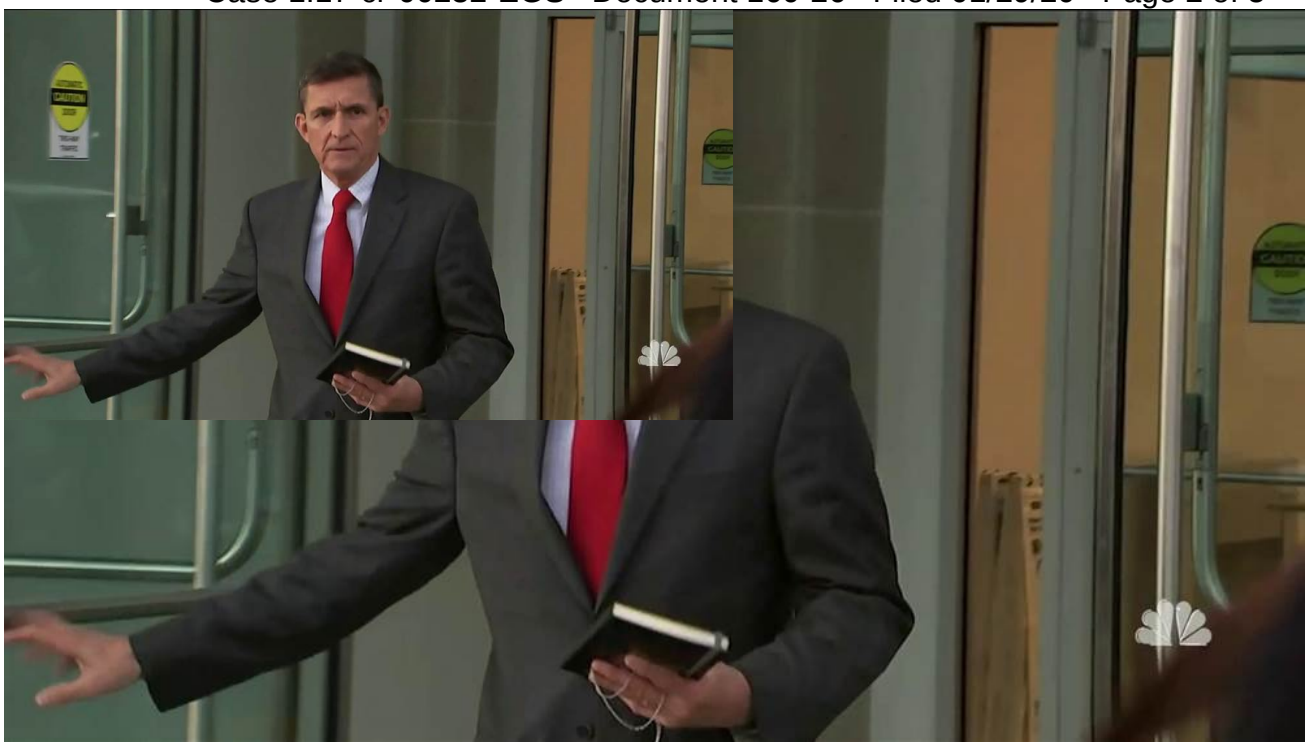
Retired Lt. Gen. Michael T. Flynn talks to the media as he arrives with his son Michael G. Flynn, left, at Trump Tower in New York on Nov. 17, 2016. Carolyn Kaster / AP file

Nov. 5, 2017, 10:09 AM EST / Updated Nov. 5, 2017, 8:41 PM EST

By Julia Ainsley, Carol E. Lee and Ken Dilanian

WASHINGTON – Federal investigators have gathered enough evidence to bring charges in their investigation of President Donald Trump's former national security adviser and his son as part of the probe into Russia's intervention in the 2016 election, according to multiple sources familiar with the investigation.

Michael T. Flynn, who was fired after just 24 days on the job, was one of the first Trump associates to come under scrutiny in the federal probe now led by Special Counsel Robert Mueller into possible collusion between Moscow and the Trump campaign.



Mueller Has Enough Evidence to Bring Charges in Flynn Investigation

NOV. 5, 201702:10

Mueller is applying renewed pressure on Flynn following his indictment of Trump campaign chairman Paul Manafort, three sources familiar with the investigation told NBC News.

The investigators are speaking to multiple witnesses in coming days to gain more information surrounding Flynn's lobbying work, including whether he laundered money or lied to federal agents about his overseas contacts, according to three sources familiar with the investigation.

From left, retired Lt. Gen. Michael T. Flynn, his son Michael G. Flynn, and Boris Epshteyn, a spokesman for President-elect Donald Trump, board an elevator at Trump Tower in New York on Nov. 17, 2016. Carolyn Kaster / AP file

Mueller's team is also examining whether Flynn attempted to orchestrate the removal of a chief rival of Turkish President Recep Erdogan from the U.S. to Turkey in exchange for millions of dollars, two officials said.

A spokesperson for the special counsel had no comment.

Related: Mike Flynn's Son Is Subject of Federal Russia Investigation

Flynn's son, Michael G. Flynn, who worked closely with his father, accompanied him during the campaign and briefly worked on the presidential transition, could be indicted separately or at the same time as his father, according to three sources familiar with the investigation.

If the elder Flynn is willing to cooperate with investigators in order to help his son, two of the sources said, it could also change his own fate, potentially limiting any legal consequences.

The pressure on Flynn is the latest signal that Mueller is moving at a rapid and steady pace in his investigation. Last week, investigators unsealed indictments of Manafort and Manafort's business partner Rick Gates. They pleaded not guilty.

Michael G. Flynn at an RT event with his father Ret. Lt. Gen. Mike Flynn in Moscow in 2015. RT

Investigators also revealed Monday that former Trump campaign adviser George Papadopoulos had pleaded guilty to lying to federal officials and had been cooperating with Mueller's investigation.

If the senior Flynn is charged, he would be the first current or former Trump administration official formally accused of criminal wrongdoing by the Mueller team.

So far, the probe has only ensnared campaign officials, and the White House has argued that the connection to the president is minimal. An indictment of the president's former national security adviser and his son would scramble that dynamic.

Related: Flynn, Manafort Are Key Figures in Mueller's Russia Probe

A former senior law enforcement official said that in the weeks after Trump's inauguration the FBI was asked to conduct a new review of Turkey's 2016 request to extradite Fethullah Gulen, an elderly Muslim cleric living in the U.S. whom President Erdogan blames for orchestrating a coup to overthrow him.

The FBI pushed back on the request because Turkey had supplied no additional information that could incriminate Gulen following a review of the case during the Obama administration, the official said. It is unclear whether the request to investigate Gulen came from Flynn or through the typical diplomatic channels at the State Department.

U.S.-based cleric Fethullah Gulen, whose followers Turkey blames for a failed coup, speaks to journalists at his home in Saylorsburg, Pennsylvania, on July 16, 2016.
Greg Savoy / REUTERS TV / Reuters, file

The FBI is also investigating former CIA Director Jim Woolsey's account to The Wall Street Journal – which he confirmed to MSNBC – that Flynn and Turkish officials discussed a potential plan to forcibly remove Gulen from the country in September 2016, according to sources close to Woolsey, who say the former director has spoken to FBI agents working for Mueller about the matter.

Flynn was fired in February following public revelations that he had lied to Vice President Pence about his dealings with the Russian ambassador to the U.S., Sergey Kislyak.

Flynn's lawyer, Robert Kelner, declined to comment.

The younger Flynn's lawyer, Barry Coburn, declined to comment.

Father and Son

Both Flynns have for months been subjects of the Mueller investigation.

The elder Flynn, an Army lieutenant general, was pushed out as head of the Defense Intelligence Agency in 2014 and retired from the military. He then founded a lobbying firm, Flynn Intel Group, where his son worked closely with him. The younger Flynn was involved in the daily operations of his father's firm and functioned as his chief of staff. He often attended meetings with his father and would communicate with prospective clients.

The elder Flynn was paid $530,000 last year for work the Justice Department says benefited the government of Turkey. The elder Flynn did not register as a foreign lobbyist at the time, but did so retroactively this year. The issue has been part of Mueller's probe.

FBI Director Robert Mueller testifies before a Senate Judiciary Committee hearing ion oversight of the FBI on June 19, 2013 in Washington.
Tom Williams / CQ-Roll Call file

His lawyer later said Flynn didn't need to register because his client was a Turkish businessman and not a government official, but had opted to do so retroactively.

According to Flynn's Justice Department filing, the Flynn Intel Group was hired to gather information about Gulen, and to produce a short film about its findings.

During the contract, which ended the day after Trump won the election, Flynn had at least one meeting, in September 2016, with Turkish officials, according to officials. Woolsey says that it included a discussion about kidnapping Gulen and flying him to Turkey.

Flynn also was paid some $35,000 in 2015 by Russian state television for a speech in Moscow at a gala where he sat next to Russian President Vladimir Putin. The younger Flynn accompanied him on that trip. The trip raised concerns among federal officials.

NBC News has reported that others under scrutiny by Mueller include Carter Page, a Trump campaign ally; Jared Kushner, the president's son-in-law and senior White House adviser; and the president's son, Donald Trump Jr. They have denied any collusion with Russia.

Exclusive: Michael Flynn's Son is A Subject of Russia Investigation

SEPT. 13, 201701:50

President Trump has denied any collusion with Russia during the campaign and has called the investigation a politically motivated witch hunt.

Kelner has declined to comment when asked if Flynn denies colluding with the Russian election interference effort.

Turkey has long demanded the U.S. extradite Gulen, saying he is considered a terrorist. Erdogan forcefully renewed that request after the attempted coup against him in July 2016. U.S. officials have said the Justice Department has not found sufficient evidence linking Gulen to the coup attempt despite the boxes of documents Turkey has submitted to the U.S. that Ankara says back up its claim.

Extradition requests are processed through the U.S. justice system and are not determined by the White House or other agencies.

Any quid-pro-quo deal such as the alleged agreement between Flynn and Turkey would be illegal, officials said.

Julia Ainsley

Julia Ainsley is a correspondent covering the Department of Homeland Security and the Department of Justice for the NBC News Investigative Unit.

Carol E. Lee

Carol E. Lee is an NBC News correspondent.

Ken Dilanian

Ken Dilanian is a correspondent covering intelligence and national security for the NBC News Investigative Unit.

RE: status

From: "Langton, Alexandra" <alangton@cov.com>
To: "Kelner, Robert" <"/o=covington & burling/ou=cb/cn=recipients/cn=c&b.cbpowa01.kelnerrk">, "Smith, Brian" <"/o=covington & burling/ou=cb/cn=recipients/cn=c&b.cbpowa02.smithbd">, "Polack, Roger" <"/o=covington & burling/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=7d7e836d400a47d799f871ab9352509c-pola">, "DeBold, Joshua" <"/o=covington & burling/ou=cb/cn=recipients/cn=deboldjn">
Cc: "Anthony, Stephen" <"/o=covington & burling/ou=cb/cn=recipients/cn=c&b.cbpowa01.anthonysp">, "Chertoff, Michael" <"/o=covington & burling/ou=cb/cn=recipients/cn=chertoffm">
Date: Wed, 15 Nov 2017 14:42:47 -0500

Yes, we'll start working on this today.

From: Kelner, Robert
Sent: Wednesday, November 15, 2017 2:41 PM
To: Smith, Brian <bdsmith@cov.com>; Polack, Roger <RPolack@cov.com>; Langton, Alexandra <ALangton@cov.com>; DeBold, Joshua <jdebold@cov.com>
Cc: Anthony, Stephen <santhony@cov.com>; Chertoff, Michael <mchertoff@cov.com>
Subject: status

We finished prepping General Flynn for the proffer tomorrow and Friday.

Steve and I just spoke with Brandon Van Grack. He said that if the proffer tomorrow and Friday "goes well," they likely would want Flynn to come back in Monday to proceed to the proffer on Turkey/Inovo/FARA. We said that we've not yet prepared him for that. Brandon said politely that because of time pressures they have related to something else in their investigation, he wasn't sure, but they might need to tell us to be prepared to do the Turkey proffer Monday. We said we would plan accordingly, and would be ready to prep him this weekend for a proffer session Monday. General Flynn was going to head to RI this weekend but we will tell him he needs to stay here. I will change some weekend travel plans to be ready for this.

Alex and Roger: Because of this, we need to turn asap to pulling together Turkey/Inovo documents. Because that story is complex, I think we need an outline of how we will walk him through the Turkey/Inovo/FARA filing story and associated emails, texts, and documents. Alex, though you will be at the proffer tomorrow, you are probably in the best position to craft the outline and to help oversee pulling this together, with help from Roger. Can you get started on it today?

Brian, are you around this weekend because if this goes forward, I'd like you to help prep him on Turkey/FARA?

To be clear, this all turns on whether tomorrow and Friday "go well," and they may have a very different idea of what "well" means than we do.

Robert Kelner

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COVINGTON

RE: status

From: "Kelner, Robert" <rkelner@cov.com>
To: "Anthony, Stephen" <santhony@cov.com>
Date: Wed, 15 Nov 2017 15:39:10 -0500

I have some thoughts on this. More questions than thoughts.

Robert Kelner

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COVINGTON

From: Anthony, Stephen
Sent: Wednesday, November 15, 2017 2:44 PM
To: Kelner, Robert <rkelner@cov.com>
Subject: RE: status

Dropping ccs: I was thinking during the BVG call that we (i.e., the general public) may see significant developments before Thanksgiving or the Monday following Thanksgiving.

From: Kelner, Robert
Sent: Wednesday, November 15, 2017 2:41 PM
To: Smith, Brian <bdsmith@cov.com>; Polack, Roger <RPolack@cov.com>; Langton, Alexandra <ALangton@cov.com>; DeBold, Joshua <jdebold@cov.com>
Cc: Anthony, Stephen <santhony@cov.com>; Chertoff, Michael <mchertoff@cov.com>
Subject: status

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position to craft the outline and to help oversee pulling this together, with help from Roger. Can you get started on it today?

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Robert Kelner

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COVINGTON

RE: Brandon/Zainab call

From: "Kelner, Robert" <rkelner@cov.com>
To: "Anthony, Stephen" <santhony@cov.com>
Date: Thu, 16 Nov 2017 10:50:04 -0500

Though I would make a pretty good defense witness….

Robert Kelner

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COVINGTON

From: Anthony, Stephen
Sent: Thursday, November 16, 2017 10:46 AM
To: Kelner, Robert <rkelner@cov.com>
Subject: RE: Brandon/Zainab call

Ah. I see.

From: Kelner, Robert
Sent: Thursday, November 16, 2017 10:45 AM
To: Anthony, Stephen <santhony@cov.com>
Subject: RE: Brandon/Zainab call

Agree. My point is that even if they don't try to DQ, we would litigate (likely) calling a Covington lawyer as a fact witness.

Robert Kelner

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COVINGTON

From: Anthony, Stephen
Sent: Thursday, November 16, 2017 10:37 AM
To: Kelner, Robert <rkelner@cov.com>
Subject: Re: Brandon/Zainab call

Yes, although I don't read it as a threat to move to DQ us; rather, as a punctilious exercise in making sure the SCO isn't later criticized. Like: they are checking that box.

Sent from my iPhone

On Nov 16, 2017, at 10:30 AM, Kelner, Robert <rkelner@cov.com> wrote:

> Got it. Likely, as our client would say. If they raise it again with him there, I am going to repeat my point that we are prepared to litigate that issue aggressively.
>
> Sent from my iPhone
>
> On Nov 16, 2017, at 10:13 AM, Anthony, Stephen <santhony@cov.com> wrote:
>
> > Nothing to worry about. They wanted to ask what they'd previously asked: have we considered and disclosed to the client (a) RK's potentially being a fact witness and (b) Covington's own interest with respect to its prior advice to FIG/MF regarding FARA -- and that the client is OK proceeding with us? Answer: yes. I repeated what we had said in the face-to-face meeting: we are aware of those issues, and, while we are going to keep to ourselves the substance of our discussions with our client and don't waive any A/C privilege, I can assure them the client has been made aware of those matters as well, and that he has knowingly consented to going forward with us as his counsel. I added, with a little acerbity, that you and I are the firm's General Counsels, and that partners come to us for advice on these issues. They chuckled appreciatively. I believe what triggered

this is that a higher-up (Mueller, or maybe Dreeben) told them to make sure they had covered this with us.

Re: PRIVILEGED & CONFIDENTIAL -- Covington Engagement

From: MTFLYNN <rpatriot@mailsol.net>
To: "Anthony, Stephen" <santhony@cov.com>
Cc: "Kelner, Robert" <rkelner@cov.com>, LORI-IV <flynnlmmm@mailsol.net>
Date: Mon, 20 Nov 2017 12:00:38 -0500

Steve,

Thanks for laying this out. It is very clearly stated.

As we've discussed, Lori and I are very confident in you and Rob (and the rest of the team) and, we've felt from day one, Covington, with both of your leadership and guidance, have counseled beyond what we could imagine.

We're good going forward with you all and very much trust that you will continue to guide us through this difficult time.

Thank you.

Mike

Michael T Flynn

Lt. Gen. (R), U.S. ARMY

On Nov 19, 2017, at 13:13, Anthony, Stephen <santhony@cov.com<mailto:santhony@cov.com>> wrote:

PRIVILEGED & CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

Mike,

As you know, the Special Counsel's Office (SCO) is challenging the accuracy of the FARA filing that Covington prepared and filed on behalf of you and FIG Inc. This brings to a head a topic that we raised and discussed with you on August 30 and in subsequent discussions with you.

As we have discussed, under the D.C. rules of professional conduct, we are required to advise a client if a representation involves a conflict of interest between our firm and the client, so that the client can decide whether to proceed with the representation. This email summarizes in writing our previous explanation of our firm's potential conflict in handling this matter. By this email we seek your informed consent to the conflict.

When someone (here, the SCO) challenges the work product of a law firm, that challenge raises the potential of a conflict of interest between the client for whom the work was done (you) and the law firm that did the work (us). For example, the client might take the position that he gave the lawyers the correct information and that the lawyers made a mistake that shouldn't be attributed to the client.

The SCO's stance toward you also raises the prospect that the SCO may obtain the testimony of Rob (and/or other Covington attorneys) as a fact witness regarding what you told him and what you didn't tell him. The SCO could seek to penetrate the attorney-

client privilege and compel Rob to testify about your communications with Covington. The SCO could then use that testimony against you – for example, to argue that you lied to your lawyers, thereby causing a false FARA filing.

Additionally, we discussed with you the proposition that, any time a law firm's work product is challenged, the lawyers potentially have two interests in mind: (a) the client's interest, and (b) the lawyers' own interest in defending their own prior work. Put another way, it raises the prospect that we will be looking over our shoulder at the same time as we are defending you going forward. You should know that our awareness that our own prior work is being called into question could – even unconsciously – color our advice to you regarding whether to be interviewed by the SCO about the FARA filing, and regarding what to do going forward.

Under Rule 1.7 of the D.C. rules of professional conduct, a lawyer shall not represent a client if there is a significant risk that the representation will be materially limited by a personal interest of the lawyer, unless the client gives informed consent. As described above, our continued representation of you creates a potential conflict under Rule 1.7, because it involves prior work of our law firm, namely our preparation of the FARA filing. Defending a client in a criminal investigation raising issues regarding a law firm's prior legal work may generate a conflict of interest when there is a plausible claim that the prior work was deficient, especially if there are alternative strategies for handling the matter, and one strategy is better for the law firm and a different strategy is better for the client. In that instance, the potential exists that the law firm will pursue the criminal defense strategy that is better for the firm so as to protect its prior work from blame. In this situation, it could be argued that any deficiencies in the FARA filing are (wholly or partly) the fault of Covington. Conceivably, the firm could handle the defense of the criminal investigation so as to minimize that issue. For example, the firm could recommend strategies that avoid criticism of the decisions it made in preparing the FARA filing.

The most likely alternative to your consenting to our continued representation of you in SCO investigation is that you will need to identify and engage other lawyers to handle the SCO matter. Although Covington's continued defense of you in the SCO investigation creates a potential conflict, as described above, we do not believe that our commitment, dedication, and ability to effectively represent you will be adversely affected by our own interests, and we believe that we will be able to provide you with competent and diligent representation.

Nevertheless, in deciding whether to consent to the conflict, you should consider carefully how our prior work for you and our desire to protect our firm's interests may affect you. Although there is no requirement that you do so, because this is an important decision, you may want to consult independent counsel before deciding whether to consent.

As we previously told you, we cannot advise you regarding a conflict of interest between you and us. We therefore recommended on August 30 that you obtain advice from a lawyer independent of Covington. In a later conversation with you, we suggested the name of Tom Mason of Harris, Wiltshire & Grannis LLP (direct dial: (202) 730-1302), a respected lawyer who practices in the area of lawyers' professional duties. As we mentioned, Tom has told us he has determined his firm has no conflicts, and he is willing to be engaged by you for a reduced, fixed fee.

You have decided not to seek independent advice from Tom or from another lawyer. We respect that that's your decision to make.

Now that your discussions with the SCO have progressed to the point where you are prepared to answer questions about the FARA filing, we wanted to put in writing the understandings between us. We ask you to confirm that we have alerted you to the existence of an actual or potential conflict of interest between you and us, that we suggested you seek advice from an independent lawyer about this, and that you have decided to consent to any such conflict and wish to continue moving forward with us as your counsel.

Steve

Stephen Anthony

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Washington, DC 20001-4956
T +1 202 662 5105 | santhony@cov.com<mailto:santhony@cov.com>
www.cov.com<http://www.cov.com>

RE: FARA client development

From: "Smith, Brian" <"/o=covington & burling/ou=cb/cn=recipients/cn=c&b.cbpowa02.smithbd">
To: "Kelner, Robert" <rkelner@cov.com>
Cc: "Anthony, Stephen" <santhony@cov.com>
Date: Mon, 27 Nov 2017 17:25:09 -0500

I agree. I had a conversation last week with Derek, encouraging him and Zack to take advantage of the environment while you and I are constrained from doing so. I like the idea of client briefings, coupled with an advisory. I'm happy to help draft the advisory and update our prior decks, of course.

All that said, I really worry about a press backlash if we launch something right on the heels of a plea. I agree that the General won't mind, but we could take a beating in the press if it's too close to the plea.

With that in mind, we should definitely include Zack and Derek (to make it less of "Flynn's lawyers"). And I think some space from the plea is wise, notwithstanding the challenge that presents with the holidays and doing events while attention is high.

Honestly, I think the attention will remain high, and you doing an event on FARA will generate a lot of attention itself.

From: Kelner, Robert
Sent: Monday, November 27, 2017 3:32 PM
To: Smith, Brian <bdsmith@cov.com>
Cc: Anthony, Stephen <santhony@cov.com>
Subject: FARA client development

I've been thinking about this. Assuming we reach a resolution of the Flynn case this week, after that resolution is fully public, including the FARA discussion, I would feel free to issue a meatier client advisory on FARA. I am trying, as time permits, to work up a draft. After that goes out, I am thinking we could do a client briefing in DC, one in NY, and one in LA. We would need to generate a unique slide deck for this, based partly on the advisory. We could perhaps divide and conquer, pairing with Zack and Derek, so that we could cover more locations quickly. Just sending out announcements of the events would be good advertising.

This may be a lot to bite off, with the holidays coming up, but we may as well strike when the iron is hot, and I think Flynn would be fine with that, since the chances of our getting paid for his case are looking grim.

Steve, let me know if you see any issues with this.

Robert Kelner

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www.cov.com<http://www.cov.com>

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http://cbentvault01dc.cov.com/EnterpriseVault/ViewMessage.asp?

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<TABLE/></BODY></HTML>

AmLaw Litigators of the Week: Rob Kelner and Steve Anthony

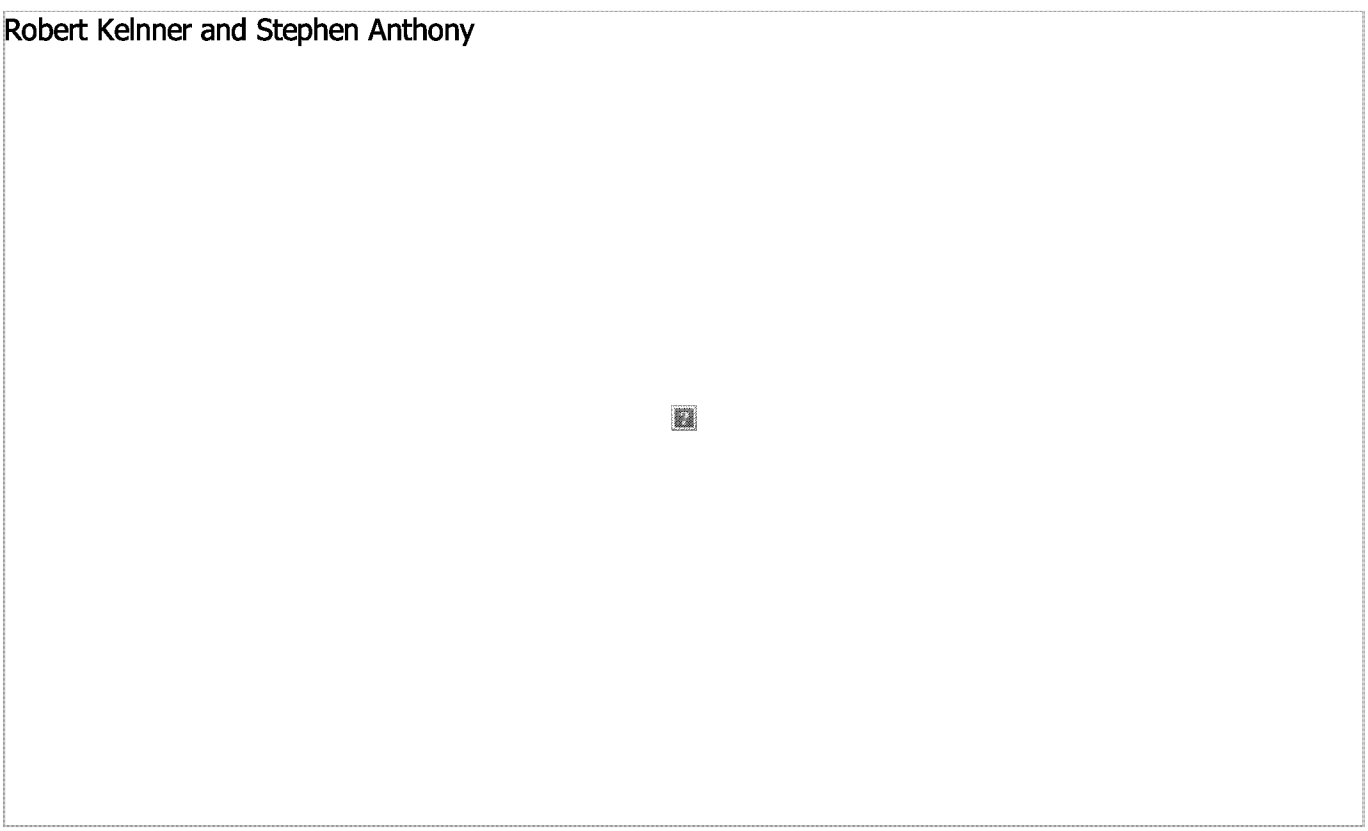
From: "Hall, John" <jhall@cov.com>
To: Attorneys All <attorneysall@cov.com>, Marketing All <marketingall@cov.com>, Paralegals All <paralegalsall@cov.com>, Staff Attorneys <staffattorneys@cov.com>, Management Committee <managementcommittee2@cov.com>, LSS <lss@cov.com>
Date: Fri, 08 Dec 2017 10:39:13 -0500

Colleagues: No doubt most of you saw the photos and video of our colleagues, Rob Kelner and Steve Anthony, accompanying their client Lt. Gen. Michael Flynn to his plea hearing in federal court in Washington last Friday. Those images appeared on every news outlet around the world. Not surprisingly, Rob and Steve were named this morning as the American Lawyer's "Litigators of the Week." Pasted below is the terrific story. It is a wonderful tribute to Rob's and Steve's and their team's outstanding and careful work on this highest-of-high-profile matters. And it is yet another confirmation of Covington's place at the very top of the global legal industry's white collar defense and investigations practices. Please join me in congratulating them! John

Litigators of the Week: Covington Pair Score the Plea Deal Read Round the World

By **Cogan Schneier** | December 07, 2017

Robert Kelnner and Stephen Anthony



Robert Kelner and Stephen Anthony

For the past year, Lt. Gen. Michael Flynn has reportedly faced a laundry list of potential criminal charges—everything from money laundering to violating the Logan Act to conspiracy to kidnap a Turkish cleric.

That's why when news broke last week that Flynn, the former National Security Adviser to President Donald Trump, would plead guilty in federal court to a single count of lying to federal investigators, it sent shockwaves not only through the media, but also through the Washington, D.C. legal community.

While we may never know what Robert Mueller III, the dogged special counsel, had on Flynn, it's hard to imagine a much better outcome for the retired general. That **deal** is a testament to the work of his lawyers, a team at Covington & Burling led by partners Robert Kelner and Stephen Anthony.

Kelner and Anthony declined comment, but their peers in the white collar bar are clearly impressed by the result they achieved.

"It's the lawyers who need to assess litigation risk and optimal outcome, then advise their client," said Jacob Frenkel, chair of the government investigations practice at Dickinson Wright and a former federal prosecutor. "They clearly negotiated effectively and enjoyed the trust and confidence of their client, which is essential in such life-altering cases."

If found guilty of any number of the crimes for which Mueller was reportedly investigating, Flynn could have served decades in prison. In fact, the government's **statement of the offense**, filed in court, even notes that Flynn lied in documents he filed to the Justice Department pursuant to the Foreign Agents Registration Act. Yet Flynn was not charged with any FARA violation.

Former Trump campaign chairman Paul Manafort was not so lucky; he pleaded not guilty to a 12-count indictment including FARA charges in October and could face at least a decade in prison.

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"My understanding is that [the deal] kept the government away from Flynn's son as a potential target, and also, at least in theory, could result in little or no jail time," Walker said. "Obviously under the circumstances I think it is a good result for Flynn and that his lawyers did a strong job in achieving that result for him."

For Kelner and Anthony, that success appears to stem from their years of experience, a multi-disciplinary approach to the case and consistent media strategy.

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Still, the work is far from over for the Covington team. Multiple congressional committees are entrenched in ongoing investigations into Flynn. Just Wednesday, a letter from a top Democrat on the House Oversight and Government Reform Committee revealed whistleblower allegations that Flynn texted a former business partner minutes after the inauguration to indicate they were "good to go" on a deal to build nuclear reactors in the Middle East.

Notably, the New York Times' story on the letter stated that "a lawyer for Mr. Flynn declined to comment."

Expect to read more lines like that in stories about Flynn for months to come.

Re: Brian, Alex, Roger, Josh: Your well-deserved recognition — to be added to your growing clips collection

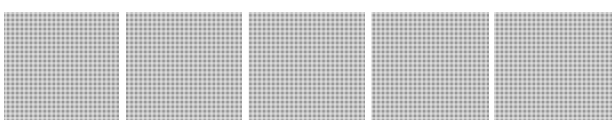
From: "Chertoff, Michael" <mchertoff@cov.com>
To: "Anthony, Stephen" <santhony@cov.com>, "Smith, Brian" <bdsmith@cov.com>, "Langton, Alexandra" <alangton@cov.com>, "Polack, Roger" <rpolack@cov.com>, "DeBold, Joshua" <jdebold@cov.com>
Cc: "Kelner, Robert" <rkelner@cov.com>
Date: Fri, 08 Dec 2017 07:29:07 -0500

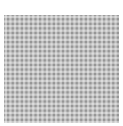
Congratulations!

From: Anthony, Stephen
Sent: Friday, December 08, 2017 12:54 AM
To: Smith, Brian; Langton, Alexandra; Polack, Roger; DeBold, Joshua
Cc: Kelner, Robert; Chertoff, Michael
Subject: Brian, Alex, Roger, Josh: Your well-deserved recognition — to be added to your growing clips collection

Litigators of the Week: Covington Pair Score the Plea Deal Read Round the World

By **Cogan Schneier** | December 07, 2017





Robert Kelnner and Stephen Anthony

For the past year, Lt. Gen. Michael Flynn has reportedly faced a laundry list of potential criminal charges—everything from money laundering to violating the Logan Act to conspiracy to kidnap a Turkish cleric.

That's why when news broke last week that Flynn, the former National Security Adviser to President Donald Trump, would plead guilty in federal court to a single count of lying to federal investigators, it sent shockwaves

not only through the media, but also through the Washington, D.C. legal community.

While we may never know what Robert Mueller III, the dogged special counsel, had on Flynn, it's hard to imagine a much better outcome for the retired general. That **deal** is a testament to the work of his lawyers, a team at Covington & Burling led by partners Robert Kelner and Stephen Anthony.

Kelner and Anthony declined comment, but their peers in the white collar bar are clearly impressed by the result they achieved.

"It's the lawyers who need to assess litigation risk and optimal outcome, then advise their client," said Jacob Frenkel, chair of the government investigations practice at Dickinson Wright and a former federal prosecutor. "They clearly negotiated effectively and enjoyed the trust and confidence of their client, which is essential in such life-altering cases."

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SHARE ON FACEBOOK

SHARE ON TWITTER

Sent from my iPhone

Israel representation

From: "Kelner, Robert" <rkelner@cov.com>
To: "Zakheim, Roger" <rzakheim@cov.com>, "Hindin, Doron" <dhindin@cov.com>, "Hester, Timothy" <thester@cov.com>, "Garland, James" <jgarland@cov.com>, "Anthony, Stephen" <santhony@cov.com>, "Smith, Brian" <bdsmith@cov.com>, "Parks, Zachary" <zparks@cov.com>
Date: Sat, 30 Dec 2017 12:59:58 -0500

I received a call this week letting me know that the Government of Israel decided not to retain us to provide FARA advice. While our work on the Flynn matter seems to have initially drawn them to us, the Prime Minister's Office apparently saw things differently and decided that our Flynn representation was a minus and not a plus. They were worried about optics. I suspect they may be worried about other things, too. So they will not be engaging us. They asked for references to other firms and I gave them a few names. Just wanted to let you all know.

Rob

Sent from my iPhone

FW: Joe Pianka

From: "Kelner, Robert" <"/o=covington & burling/ou=cb/cn=recipients/cn=c&b.cbpowa01.kelnerrk">
To: BVG <bvg@usdoj.gov>, ZNA <zna@usdoj.gov>
Cc: "Anthony, Stephen" <santhony@cov.com>
Bcc: "Langton, Alexandra" <alangton@cov.com>, "Chertoff, Michael" <mchertoff@cov.com>, "Smith, Brian" <bdsmith@cov.com>
Date: Mon, 29 Jan 2018 21:54:35 -0500

Brandon and Zainab:

We just received this rather disturbing email from the New York Times. We'd like to discuss this with you tomorrow.

Rob

Robert Kelner

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

COVINGTON

From: Mark Mazzetti [mailto:mazzetti@nytimes.com]
Sent: Monday, January 29, 2018 8:36 PM
To: Kelner, Robert <rkelner@cov.com>
Subject: Joe Pianka

Can we talk? Tonight or tomorrow AM?
Our understanding is that Joe Pianka interviewed Flynn and went to IG and said he was pressured by McCabe to change 302. It's in IG report and one of the reasons Wray pushed McCabe to leave.
We've been told that Hill has informed Flynn and legal team

Sent from my iPhone

Re: Plea Documents

From: "Kelner, Robert" <"/o=covington & burling/ou=cb/cn=recipients/cn=c&b.cbpowa01.anthonysp">
To: "Smith, Brian" <bdsmith@cov.com>
Cc: "Langton, Alexandra" <alangton@cov.com>, "Polack, Roger" <rpolack@cov.com>, "Chertoff, Michael" <mchertoff@cov.com>, "Anthony, Stephen" <santhony@cov.com>, "DeBold, Joshua" <jdebold@cov.com>
Date: Mon, 27 Nov 2017 20:05:52 -0500

Your point about the caveats in the FARA filings is one I made as well (not surprisingly).

Sent from my iPhone

On Nov 27, 2017, at 7:51 PM, Anthony, Stephen <santhony@cov.com<mailto:santhony@cov.com>> wrote:

All good points. Paragraph 2 of the Statement will grab a headline, no?

From: Smith, Brian
Sent: Monday, November 27, 2017 7:50 PM
To: Kelner, Robert <rkelner@cov.com<mailto:rkelner@cov.com>>; Langton, Alexandra <ALangton@cov.com<mailto:ALangton@cov.com>>; Polack, Roger <RPolack@cov.com<mailto:RPolack@cov.com>>; Chertoff, Michael <mchertoff@cov.com<mailto:mchertoff@cov.com>>; DeBold, Joshua <jdebold@cov.com<mailto:jdebold@cov.com>>
Cc: Anthony, Stephen <santhony@cov.com<mailto:santhony@cov.com>>
Subject: RE: Plea Documents

My reactions:

- The double negatives in the Information (and the Statement) are helpful in that they make the false statements hard to comprehend.
- The parts of the Statement that will get the most attention are paragraph 3.c. (conversation with "incoming NSC official") and paragraph 4.b. ("senior official from the Presidential Transition Team directed Flynn…").
- Paragraph 5 of the Statement (regarding FARA) is hardly brief or passing, as they suggested it would be. Several of the "false statements" are contradicted by the caveats or qualifications in the filing. For example, the Statement says "Flynn made" false statements that are, in the filing, attributed to Arent Fox and the accounting records.
- In page 5 of the Plea, he waives the right to be accompanied by counsel at subsequent interviews.

From: Kelner, Robert
Sent: Monday, November 27, 2017 6:31 PM
To: Langton, Alexandra <ALangton@cov.com<mailto:ALangton@cov.com>>; Smith, Brian <bdsmith@cov.com<mailto:bdsmith@cov.com>>; Polack, Roger <RPolack@cov.com<mailto:RPolack@cov.com>>; Chertoff, Michael <mchertoff@cov.com<mailto:mchertoff@cov.com>>; DeBold, Joshua <jdebold@cov.com<mailto:jdebold@cov.com>>
Cc: Anthony, Stephen <santhony@cov.com<mailto:santhony@cov.com>>
Subject: FW: Plea Documents

Draft plea papers from the SCO.

Robert Kelner

Covington & Burling LLP

One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 5503 | rkelner@cov.com<mailto:rkelner@cov.com>
www.cov.com<http://www.cov.com>

From: BVG [mailto:BVG@usdoj.gov]
Sent: Monday, November 27, 2017 6:21 PM
To: Kelner, Robert <rkelner@cov.com<mailto:rkelner@cov.com>>; Anthony, Stephen <santhony@cov.com<mailto:santhony@cov.com>>
Cc: ZNA <ZNA@usdoj.gov<mailto:ZNA@usdoj.gov>>
Subject: Plea Documents

Rob and Steve, after our meeting this morning and subsequent discussions with the Special Counsel, attached is our proposed plea offer. Rather than call you right now to address all of the points you've raised, I'd propose that you first review the documents since they address some of your concerns. That would also give you the opportunity to raise any remaining questions or concerns now that you have the documents in hand. We're available to talk later this evening at your convenience or connect tomorrow at 11:15 (which unfortunately is the earliest we'd be able to talk tomorrow).

Please let us know.
Brandon

Brandon L. Van Grack
The Special Counsel's Office
(202) 514-0529

Attachments:
image001.jpg (2 KB)
http://cbentvault01dc.cov.com/EnterpriseVault/ViewMessage.asp?VaultId=1C868D1B9E0E2BE49838A464981CCD7B91110000cbentvaultsite&SavesetId=201803302448307~201711280105540000~Z~E110813DB8751FA1BABE8C543E53FAD1&AttachmentId=1image001.jpg

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