UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

MR. FLYNN'S MOTION TO DISMISS FOR EGREGIOUS GOVERNMENT MISCONDUCT AND IN THE INTEREST OF JUSTICE

Sidney Powell
Molly McCann
Sidney Powell, P.C.
2911 Turtle Creek Blvd.,
Suite 300
Dallas, Texas 75219
Tel: 214-707-1775
sidney@federalappeals.com
Admitted *Pro Hac Vice*
molly@federalappeals.com
Admitted *Pro Hac Vice*

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
lmckasson@harveybinnall.com
Admitted *Pro Hac Vice*

W. William Hodes
The William Hodes Law Firm
3658 Conservation Trail
The Villages, Florida 32162
Tel: (352) 399-0531
Fax: (352) 240-3489
Admitted *Pro Hac Vice*

Attorneys for Lt. General Michael T. Flynn (USA) (Retired)

TABLE OF CONTENTS

Michael T. Flynn ("Mr. Flynn") hereby moves to dismiss the charges against him for outrageous government misconduct and in the interest of justice.[1] This motion is based on exculpatory evidence ("*Brady*") as well as egregious government misconduct that was discovered after Mr. Flynn's Motion to Compel *Brady* Material (ECF No. 109) and related briefing.

Such exculpatory evidence and outrageous misconduct includes that on December 9, 2019, the Inspector General of the Department of Justice ("DOJ") issued its 478-page report on the "Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation" ("IG Report").[2] The IG Report illustrates the misconduct by the government as further detailed below.

Further, on December 15, 2019, the government produced to Mr. Flynn's defense team 637 pages of documents—including sixteen long-awaited FD-302s and 206 pages of corresponding FBI handwritten notes—all of interviews of Mr. Flynn. Additionally, in its Supplemental Sentencing Memorandum (which also breaches the plea agreement), the government included never-produced FD-302s of the government's interviews with Mr. Flynn's prior counsel at Covington & Burling ("Covington"), Robert Kelner and Brian Smith, from June 2018. ECF No.

[1] Contrary to a suggestion in this Court's recent opinion, Mr. Flynn did not previously move to dismiss the case against him. ECF No. 144 at 2. As the docket sheet and this Court's recital of motions show, this is Mr. Flynn's only Motion to Dismiss. In Mr. Flynn's previous filings, he made clear he *would ultimately move* for dismissal, that the evidence requested in his *Brady* motion would further support the basis for dismissal, and that the case should be dismissed. *See* ECF No. 133 at n.15.

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

150-4 through 150-6. The government also belatedly produced to Mr. Flynn FD-302s and related documents as recently as January 23, 2020. ECF No. 157.

These documents contain remarkable new *Brady* evidence that the prosecution has long suppressed. For instance, this evidence not only belies the bogus FARA "false statement" charges Mr. Van Grack leveraged against Covington and Mr. Flynn, but also demonstrates Mr. Van Grack knew these charges were bogus, yet sought to have Mr. Flynn make a false statement in his EDVA interview on June 25, 2019, and was encouraging subornation of perjury by Mr. Flynn. *See* ECF No. 151. Additionally, the IG Report shows that the government long suppressed evidence of shocking malfeasance by the leadership of the FBI and Supervisory Special Agent 1 ("SSA 1") that was favorable to Mr. Flynn's defense. For these reasons, and those outlined in prior briefing, Mr. Flynn moves to dismiss this entire prosecution for outrageous government misconduct and in the interest of justice.

This factually and legally baseless "investigation" and prosecution of Mr. Flynn has no precedent. From the FBI's insertion of SSA 1 into the August 17, 2016 presidential briefing of candidate Trump and Mr. Flynn, to the former Director of the FBI bragging and laughing on national television about his own cleverness and violations of FBI/DOJ rules in dispatching agents to the White House to interview the new President's National Security Advisor, to the still missing original FBI FD-302 of the January 24, 2017 interview—everything about this prosecution has violated long-standing standards and policy for the FBI and the DOJ. In addition to the myriad of breaches and irregularities identified in our prior filings, the IG Report released on December 9,

2019, reveals even more evidence of the FBI's deceitful and wrongful conduct that should have been disclosed to Mr. Flynn's defense.[3]

There were two FBI agents who interviewed Mr. Flynn in the White House on January 24, 2017—Agent Peter Strzok and SSA 1. The IG Report confirms both participated in government misconduct. As explained in further detail below, not only was Strzok so biased, calculated, and deceitful he had to be terminated from Mueller's investigation and then the FBI/DOJ, but it has also now been revealed that SSA 1 was surreptitiously inserted in the mock presidential briefing on August 17, 2016, to collect information and report on Mr. Trump and Mr. Flynn. Moreover, SSA 1 was involved in every aspect of the debacle that is Crossfire Hurricane and significant illegal surveillance resulting from it. Further, SSA 1 bore ultimate responsibility for four falsified applications to the FISA court and oversaw virtually every abuse inherent in Crossfire Hurricane—including suppression of exculpatory evidence. *See generally* IG Report.

Only the dismissal of this prosecution in its entirety would begin to get the attention of the government, the FBI, and the DOJ needed to impress upon them the "reprehensible nature of its acts and omissions." *United States* v. *Kohring*, 637 F.3d 895, 914 (9th Cir. 2011) (Fletcher, J., concurring in part and dissenting in part).

[3] Despite the defense, the government, and this Court agreeing to abate the schedule in this case because of the pending and admittedly-relevant IG Report (ECF No. 140 and this Court's Minute Order of November 27, 2019), this Court denied Mr. Flynn's Motion to Compel Production of *Brady* Evidence without allowing for additional briefing in light of that report or considering any of the deliberate government misconduct it disclosed. ECF Nos. 143 and 144. Mr. Flynn now moves to dismiss the indictment for the additional egregious misconduct documented in the IG Report, other recently produced materials, all previously briefed issues, and in the interest of justice.

I. THIS COURT HAS THE AUTHORITY PURSUANT TO ITS SUPERVISORY POWERS TO DISMISS THIS PROSECUTION IN THE INTEREST OF JUSTICE.

"[G]uided by considerations of justice, and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505 (1983). The supervisory power of federal courts has a threefold purpose: "to implement a remedy for violation of recognized rights, to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, and finally, as a remedy designed to deter illegal conduct." *Id*.

The exercise of this authority can take many forms, including dismissal of a case altogether so long as the prosecutorial misconduct was harmful to the defendant. *Id.* at 505. A defendant seeking to dismiss a conviction for prosecutorial misconduct must show that he was prejudiced by the misconduct. *Bank of Nova Scotia v. United States,* 487 U.S. 250, 263 (1988). Prejudice is found when "the government's conduct had at least some impact" on the outcome. *United States v. Bundy*, No. 2:16-cr-046, Transcript of Proceedings at 13:1-2 (D. Nev. Jan. 8, 2018). Ex. 1.

Although dismissal is unusual, "[s]paring use, of course, does not mean no use. Even 'disfavored remedies' must be used in certain situations." *United States v. Omni Int'l Corp.*, 634 F. Supp. 1414, 1438 (D. Md. 1986). Dismissal is particularly appropriate when the government has engaged in conduct that perverts the rule of law and grossly abuses its power and might—as it has done against Mr. Flynn. Quoting Justice Brandeis, the D.C. Circuit noted that "[i]t is desirable that criminals should be detected. . . .It is also desirable that the government should not itself foster and pay for other crimes, when they are the means by which the [conviction] is to be obtained." *United States v. McCord*, 509 F.2d 334, 350 (D.C. Cir. 1974). This Circuit continued:

> This is so because the principle is not one of fairness to the defendant alone but rather, in Justice Brandeis' words, is one designed to 'maintain respect for law; . . .

> to promote confidence in the administration of justice; . . . to preserve the judicial process from contamination. . . .Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means- -to declare that the government may commit crimes in order to secure the conviction of a private criminal- -would bring terrible retribution.'

Id.

Although Ninth Circuit case law is not controlling, it is persuasive and useful in evaluating these issues. The Ninth Circuit has developed the most robust framework addressing this issue. In *Bundy*, the district court dismissed the case for egregious government misconduct after the prosecution suppressed *Brady* that "bolstered the defense and was useful to rebut the government's theory," and that the government had "failed to disclose potentially exculpatory, favorable and material information," including a number of FD-302s, an unredacted FBI TOC log, and more. *United States v. Bundy*, No. 2:16-cr-046, Transcript of Proceedings at 13:9-22 (D. Nev. Jan. 8, 2018). Ex. 1. The court in *Bundy* based its dismissal on two separate grounds— first, as a due process violation and second, as an exercise of its supervisory powers to deter illegal conduct. *United States v. Bundy*, 406 F. Supp. 3d 932, 935 (D. Nev. 2018).

The court explained that it could dismiss an indictment on the ground of "outrageous government conduct if the conduct amount[ed] to a due process violation," *United States v. Bundy*, No. 2:16-cr-046, Transcript of Proceedings at 8:18-20 (D. Nev. Jan. 8, 2018). Ex. 1. Such misconduct must be "attributable to and directed by the government" *Id.* at 9:7 (quoting *United States v. Barrera-Morena,* 951 F.2d 1089, 1092 (9th Cir. 1991)), and the government conduct must be "so grossly shocking and so outrageous as to violate the universal sense of justice." *Id.* at 9:2-3 (quoting *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991)).

Part of the rationale that undergirds this supervisory authority to deter conduct that is abhorrent to a "universal sense of justice," finds foundation in *Sorrells v. United States*: "it is the duty of the court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its courts." 287 U.S. 435, 446 (1932). *Sorrells* is a prohibition-era case where the court determined that "the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission…" *Id.* at 441.

This motion demonstrates the government's outrageous misconduct and the corresponding prejudice to Mr. Flynn that undoubtedly violated his rights. Accordingly, the prosecution should be dismissed.

II. THE IG REPORT DISCLOSES OUTRAGEOUS GOVERNMENT MISCONDUCT THAT MANDATES DISMISSAL OF THIS PROSECUTION.

There is a long and troubling history of misconduct in the DOJ and the FBI that has dramatically worsened over the years. In 2015, Henry F. Schuelke III returned a 500-page report to this Court in which he found "pervasive, systematic and intentional misconduct" in the DOJ, specifically with respect to suppressing evidence favorable to the defense.[4] Instead of correcting this, the DOJ lawyers immediately attempted to excuse the same misconduct in two related cases by claiming the exculpatory evidence was not material.[5] Those cases found their way to the Ninth Circuit.

---

[4] Henry F. Schuelke III, Special Counsel, *Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated Apr. 7, 2009, In re Special Proceedings*, No. 1:09-mc-00198-EGS (D.D.C. Mar. 15, 2012) (available at http://legaltimes.typepad.com/files/Stevens_report.pdf.)

[5] Foreign Intelligence Surveillance Court, *Document Regarding the Section 702 2018 Certification*, (Oct. 18, 2018) (Boasberg, J.) (available at

There, the Ninth Circuit was furious with the government's misconduct. Judge Betty Fletcher wrote separately to excoriate the prosecution's "flagrant, willful bad-faith misbehavior" which she said was "an affront to the integrity of our system of justice." *Kohring*, 637 F.3d at 914 (Fletcher, J., concurring in part and dissenting in part). Further, she found "[t]he prosecution's refusal to accept responsibility for its misconduct [] deeply troubling and indicat[ive] that a stronger remedy is necessary to impress upon it the reprehensible nature of its acts and omissions." *Id*. Even Judge Fletcher's strong language is insufficient for the outrageous conduct of the FBI and DOJ in Mr. Flynn's case.[6]

More recently, the government's lack of candor and suppression of evidence favorable to the defense has been playing out in the FBI, DOJ, and NSA's endless abuses of the government's

---

https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opin_18Oct18.pdf).

[6] The Honorable Alex Kozinski cited to case law in a preface to *The Georgetown Law Journal* that is also helpful. Hon. Alex Kozinski, Preface, n.120, 44 GEO. L.J. ANN. REV. CRIM. PROC (2015):

> See *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2010); *United States v. Kott*, 423 Fed. App'x 736 (9th Cir. 2011); s*ee also* [Sidney Powell, *Licensed to Lie* 190-201], 231 (2014), holding that the prosecution had yet again violated *Brady* by failing to disclose the very evidence deemed material in the Stevens case, a panel of my court vacated both defendants' convictions and remanded for a new trial. Judge Betty Fletcher lambasted the prosecution's "flagrant, willful bad-faith misbehavior" as "an affront to the integrity of our system of justice" and found "[t]he prosecution's refusal to accept responsibility for its misconduct [] deeply troubling and indicat[ive] that a stronger remedy is necessary to impress upon it the reprehensible nature of its acts and omissions." *Kohring*, 637 F.3d at 914 (Fletcher, J., concurring in part and dissenting in part); see *Kott*, 423 Fed. App'x at 738 (Fletcher, J., concurring in part and dissenting in part) ("Despite their assurances that they take this matter seriously, the government attorneys have attempted to minimize the extent and seriousness of the prosecutorial misconduct and even assert that Kott received a fair trial . . . . The government's stance on appeal leads me to conclude that it still has failed to fully grasp the egregiousness of its misconduct, as well as the importance of its constitutionally imposed discovery obligations.").

powerful surveillance apparatus. The abuses became so overwhelming that Judge Rosemary Collyer wrote and later partially declassified a 99-page decision in 2016 in which she excoriated the FBI and NSA for their lack of candor and abuses of the search queries of the NSA database.[7] Not only did the last administration—especially from late 2015-16—dramatically increase the abuse of "about queries" in the NSA database, which Judge Collyer noted was "a very serious Fourth Amendment issue," but it also expanded the distribution of the illegally obtained information among federal agencies.[8] *See also* ECF No. 109 at 8.

In October 2019, Judge Boasberg, also sitting on the FISC, publicly released a heavily redacted opinion describing the FBI's repeated non-compliant queries of Section 702 information and relaxed procedures that have led to systemic Fourth Amendment violations at that agency.[9] Judge Boasberg wrote, "In a number of cases, a single improper decision or assessment resulted

---

[7] Foreign Intelligence Surveillance Court, *FISC Memorandum and Order*, (Apr. 26, 2018) (Collyer, R.) (available at https://www.dni.gov/files/documents/icotr/51117/2016_Cert_FISC_Memo_Opin_Order_Apr_2017.pdf) at 19, 87 (noting that 85% of the queries targeting American citizens were unauthorized and illegal), n. 69 (saying "the improper access granted the [redacted] contractors was apparently in place [redacted] and seems to have been the result of deliberate decision making" including by lawyers); *see also* Charlie Savage, *NSA Gets More Latitude to Share Intercepted Communications*, THE N.Y. TIMES (Jan. 12, 2017) (reporting that Attorney General Loretta Lynch signed new rules for the NSA that permitted the agency to share raw intelligence with sixteen other agencies, thereby increasing the likelihood that personal information would be improperly disclosed), https://www.nytimes.com/2017/01/12/us/politics/nsa-gets-more-latitude-to-share-intercepted-communications.html; *See also* Exec. Order No. 12,333, 3 C.F.R. 200 (1982), as amended by Exec. Order No. 13, 284, 68 Fed. Reg. 4075 (Jan. 23, 2003). Judge Collyer just stepped down early from serving as Chief Judge of the FISA court, and Judge Boasberg was assigned to the role.

[8] *Id.* at 19.

[9] *Supra* n. 5.

in the use of query terms corresponding to a large number of individuals, including U.S. persons." *Id.* at 68. He continued:

> During March 24-27, 2017, the FBI conducted queries using identifiers for over 70,000 communication facilities "associated with" persons with access to FBI facilities and systems. *See* Nov. 22, 2017, Notice at 2. [Redacted] proceeded with those queries notwithstanding advice from the office of General Counsel (OGC) that they should not be conducted without approval by OGC and the National Security Division (NSD) of the Department of Justice.

Id. at 69.

These are flagrant and deliberate violations of law that affect the Fourth Amendment rights of thousands of Americans.[10] Further, these violations directly impact Mr. Flynn, who was the subject of a felony leak of classified information and was illegally unmasked by the prior administration.

On December 9, 2019, the Inspector General for the Department of Justice has released his tome—reporting on the FBI's deliberate deceit, malfeasance, and misfeasance in its applications for FISA warrants against Carter Page and the overarching Crossfire Hurricane investigation, which also targeted Mr. Flynn and enabled the FBI to obtain—illegally—the communications of hundreds of people, including Mr. Flynn. *See generally* IG Report.

A. The December 2019 IG Report is Replete with Information Exculpatory to Mr. Flynn and Damning of the FBI's Conduct Employed Against Him.

The IG Report reveals information that is exculpatory, material, and favorable to the defense, which the government did not previously disclose to Mr. Flynn. Mr. Flynn is one of the four people originally targeted by the FBI in Crossfire Hurricane because of his purported "ties to

[10] Foreign Intelligence Surveillance Court, *In Re Carter W. Page, A U.S. Person*, No. 16-1182, 17-52, 17-375, 17-679 (Jan. 7, 2020) (Boasberg, J.) (available at https://www.fisc.uscourts.gov/sites/default/files/FISC%20Declassifed%20Order%2016-1182%2017-52%2017-375%2017-679%20%20200123.pdf).

Russia."[11] The IG Report is a scathing indictment of the conduct of the leadership and small group in the FBI that ran this operation against Mr. Flynn. This is especially true for the two FBI agents who interviewed Mr. Flynn on January 24, 2017, and on whose remarkably edited FD-302 the felonious "false statement" allegations depend, Strzok and SSA 1.[12] To the extent he could, under the limitations of his role in the DOJ, IG Horowitz exposed lies, misrepresentations, and material omissions in four applications for FISA warrants to the FISC.[13] The IG Report shows Strzok and SSA 1 repeatedly and deliberately hid exculpatory evidence from the FISC. Moreover, as IG Horowitz testified in front of the Homeland Security Committee, he "could not rule out" political preferences and bias as the explanation for the government misconduct he found at every turn.[14]

---

[11] The innocence of Mr. Flynn's supposed "Russia ties" is thoroughly documented in reports of the DIA which show the extent to which Mr. Flynn was working with the government—just as Carter Page was—but this Court has denied this exculpatory information to Mr. Flynn's defense. ECF No. 144. The DIA information negates the FBI's sheer pretext for "investigating" Mr. Flynn. Members of Congress are also interested in exculpatory information. Ex. 2.

[12] The government asserts that the name of SSA 1 is covered by the Protective Order, but that name was known to Ms. Powell before she became counsel to Mr. Flynn, and the agent's name has been published throughout the media.

[13] For example, the Inspector General could not interview persons with the CIA and only had access to documents that were sent to the DOJ or the FBI. He could not question former FBI Director Comey on certain issues because Mr. Comey refused to accept a security clearance for that purpose and did not cooperate with the Inspector General's investigation. "Certain former FBI employees who agreed to interviews, including Comey and Mr. Baker, chose not to request that their security clearances be reinstated for their OIG interviews. Therefore, we were unable to provide classified information or documents to them during their interviews to develop their testimony, or to assist their recollections of relevant events." IG Report at 12. As Attorney General Barr noted, this meant that Comey "couldn't be questioned about classified matters." Pete Williams, *Interview with Attorney General William Barr* (Dec. 10, 2019), NBC News, https://www.youtube.com/watch?v=LRKFo0JmuBc.

[14] C-SPAN, *Justice Dept. IG Testifies on Origins of FBI's Russia Inquiry*, C-SPAN.COM, Dec. 18, 2019, https://www.c-span.org/video/?467350-1/justice-department-inspector-general-testifies-origins-fbis-russia-inquiry.

Indeed, there were no satisfactory explanations for the many violations, falsehoods, and errors the Inspector General found.

B. From the IG Report, Extraordinary Facts About SSA 1 Emerge that Should Have Been Disclosed to Mr. Flynn as *Brady* Evidence Prior to his Plea.

SSA 1 also played a much larger role in the FBI's Crossfire Hurricane than the defense was led to believe. He was in fact the Supervisor of Crossfire Hurricane. IG Report at 305. He helped pick the team. *Id*. at 65. The agents reported to him. *Id.* Then, he reported operational activities to Strzok. *Id.* Even more remarkable, DOJ official Bruce Ohr provided information collected by Christopher Steele ("Steele") (through his contract with Fusion GPS[15]) to the FBI "out of the blue." *Id.* at 99. SSA 1 reviewed this information. *Id.* at 100. SSA 1 knew that Steele was "desperate that Mr. Trump not get elected." *Id.* at n. 217. He was responsible for making sure the FISA applications were *verified* by providing a "factual accuracy review,"[16] yet he included false and incomplete information for the court, and he failed to inform the court of significant exculpatory information. *See generally* IG Report.

One of the FBI lawyers falsified a document in support of one of the FISA applications.[17] IG Report at 160. Aside from falsifying documents, the IG Report confirmed SSA 1, through his

---

[15] *See* IG Report at 95-96.

[16] IG Report at 151.

[17] This unnamed FBI lawyer is likely Kevin Clinesmith. Jerry Dunleavy, *FBI Lawyer Under Criminal Investigation Altered Document to Say Carter Page 'was Not a Source' for Another Agency*, WASH. EXAMIN'R (Dec. 9, 2019), https://www.washingtonexaminer.com/news/fbi-lawyer-under-criminal-investigation-altered-document-to-say-carter-page-was-not-a-source-for-another-agency ("in a scathing July 2018 inspector general report on the FBI's Clinton emails investigation, Clinesmith was criticized at least 56 times as being one of the FBI officials who conveyed a bias against Mr. Trump in instant messages, along with Peter Strzok and FBI lawyer Lisa Page, both of whom have left the Bureau."). As documented in the June 2018 IG Report, Clinesmith played a pivotal role in the small group working against Mr. Flynn. Both he and Sally Moyer, FBI Unit Chief in the Office of General Counsel, had extreme anti-Trump bias as reflected

supervision of Case Agent 1,[18] withheld exculpatory information from the court that was material to its determination regarding the warrants. *Id.* at 232-33. Shockingly, as further briefed below, SSA 1 also participated surreptitiously in a presidential briefing with candidate Trump and Mr. Flynn for the express purpose of taking notes, monitoring anything Mr. Flynn said, and in particular, observing and recording anything Mr. Flynn or Mr. Trump said or did that might be of interest to the FBI in its "investigation." IG Report at 340.

In addition to myriad problems with Christopher Steele, the IG Report confirmed that other unverified information from another source (Source 2, likely Stefan Halper[19]), was used to obtain FISA warrants to wiretap Carter Page (and thereby reach Mr. Flynn). IG Report at 313-33. Source 2 was closed by the FBI in 2011; however, Source 2 was re-opened by Case Agent 1. *Id.* Case Agent 1 reported to SSA 1 during Crossfire Hurricane. *Id.* at 81. Source 2's involvement in the Crossfire Hurricane investigation arose out of Case Agent 1's pre-existing relationship with Source 2. *Id.* at 313. "SSA 1 told the OIG that he did not know about Source 2, or know that Case Agent 1 was Source 2's handler, prior to Case Agent 1 proposing the meeting [on August 11, 2016], which SSA 1 approved." *Id.* Notably, there was "no supporting documentation" to support that

---

in the aforementioned IG Report. Clinesmith texted Sally Moyer after Hillary Clinton's loss, "I am numb." Moyer replied, "I can't stop crying," and "You promised me this wouldn't happen. YOU PROMISED." In the course of comforting Moyer, Clinesmith said, "I am so stressed about what I could have done differently." *See* U.S. Department of Justice (DOJ) Office of the Inspector General (OIG), *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election* at 417 (June 2018) https://www.justice.gov/file/1071991/download.

[18] IG Report at 81.

[19] Madeline Osburn, *FBI Terminated Anti-Trump Source Stefan Halper 'For Cause' in 2011*, THE FEDERALIST (Dec. 9, 2019), https://thefederalist.com/2019/12/09/fbi-terminated-anti-trump-source-stefan-halper-for-cause-in-2011/.

"Source 2 has routinely provided reliable information that has been corroborated by the FBI." *Id.* at 418 ("Appendix One"). Despite the lack of documentation, it was relied upon in the first FISA application. *Id.* Notably, Mr. Flynn requested information relating to Source 2/Halper in his Motion to Compel the Production of *Brady* Material and for an Order to Show Cause. ECF No. 111 at 4; ECF No. 116 at 1 (relating to additional material for Col. (Ret.) James Baker who ran Halper through the Department of Defense Office ONA). That request was denied. ECF No. 143.

C. SSA 1's Deceitful Participation in the Presidential Briefing Alone is So Egregious It Requires Dismissal.

Strzok and Lisa Page texted about an "insurance policy" on August 15, 2016.[20] They opened the FBI "investigation" of Mr. Flynn on August 16, 2016. IG Report at 2. The very next day, SSA 1 snuck into what was represented to candidate Trump and Mr. Flynn as a presidential briefing. IG Report at 340. It appears that the "insurance policy" on candidate Trump was "taking out" Mr. Flynn. As explained in the IG Report:

> …during the presidential election campaign, the FBI was invited by ODNI to provide a baseline counterintelligence and security briefing (security briefing) as part of ODNI's strategic intelligence briefing given to members of both the Trump campaign and the Clinton campaign… We also learned that, because Flynn was expected to attend the first such briefing for members of the Trump campaign on August 17, 2016, the FBI viewed that briefing as a possible opportunity to collect information potentially relevant to the Crossfire Hurricane and Flynn investigations. We found no evidence that the FBI consulted with the Department leadership or ODNI officials about this plan.

IG Report at 340.

While SSA 1's stated purpose of the presidential briefing on August 17, 2016, was "to provide the recipients 'a baseline on the presence and threat posed by foreign intelligence services

[20] U.S. Department of Justice (DOJ) Office of the Inspector General (OIG), *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election* at 404 (June 2018) https://www.justice.gov/file/1071991/download.

to the National Security of the U.S,'" IG Report at xviii (Executive Summary), the IG Report confirmed that, in actuality, the Trump campaign was never given any defensive briefing about the alleged national security threats. IG Report at 55. Thus, SSA 1's participation in that presidential briefing was a calculated subterfuge to record and report for "investigative purposes" anything Mr. Flynn and Mr. Trump said in that meeting. IG Report at 408. The agent was there only because Mr. Flynn was there. IG Report at 340. Ironically, Mr. Flynn arranged this meeting with ODNI James Clapper for the benefit of candidate Trump.

More specifically, as the Inspector General explained further in his testimony to Congress on December 11, 2019, SSA 1 surreptitiously interviewed and sized-up Mr. Flynn on August 17, 2016, under the "pretext" of being part of what was actually a presidential briefing but reported dishonestly to others as a "defensive briefing."[21] The IG Report states:

> In August 2016, the supervisor of the Crossfire Hurricane investigation, SSA 1, participated on behalf of the FBI in an ODNI strategic intelligence briefing given to candidate Trump and his national security advisors, including Flynn, and in a separate briefing given to candidate Clinton and her national security advisors. The stated purpose of the FBI's participation in the counterintelligence and security portion of the briefing was to provide the recipients 'a baseline on the presence and threat posed by foreign intelligence services to the National Security of the U.S.' However, we found the FBI also had an investigative purpose when it specifically selected SSA 1, a supervisor for the Crossfire Hurricane investigation, to provide the FBI briefings. SSA 1 was selected, in part, because Flynn, who would be attending the briefing with candidate Trump, was a subject in one of the ongoing investigations related to Crossfire Hurricane. SSA 1 told us that the briefing provided him 'the opportunity to gain assessment and possibly some level of familiarity with [Flynn]. So, should we get to the point where we need to do a subject interview…I would have that to fall back on.'
>
> After the meeting, SSA 1 drafted an Electronic Communication (EC) documenting his participation in the ODNI strategic intelligence briefing attended by Trump, Flynn, and another advisor, and added the EC to the Crossfire Hurricane

[21] C-SPAN, *Inspector General Report on Origins of FBI's Russia Inquiry*, C-SPAN.COM, Dec. 11, 2019, https://www.c-span.org/video/?466593-1/justice-department-ig-horowitz-defends-report-highlights-fisa-problems.

> investigative file. The EC described the purpose, location, and attendees of the briefing, and recounted in summary fashion the portion of the briefing SSA 1 provided. Woven into the briefing summary were questions posed to SSA 1 by Trump and Flynn, and SSA l's responses, as well as comments made by Trump and Flynn. SSA 1 told us that he documented those instances where he was engaged by the attendees, as well as anything related to the FBI or pertinent to the Crossfire Hurricane investigation, such as comments about the Russian Federation. SSA 1 said that he also documented information that may not have been relevant at the time he recorded it, but might prove relevant in the future.

IG Report at 407-08.

In clear and certain terms, the Inspector General found "members of the Crossfire Hurricane team repeatedly failed to provide OI [Office of Intelligence] with all relevant information." IG Report at 362. SSA 1 even "speculated" that Steele's information was corroborated—when it was not—and he was responsible for numerous "inaccuracies," "omissions," and "unsupported statements" in the FISA applications. *See generally* IG Report at Chs. 5, 9. The last two FISA warrants including the one entered specifically for the benefit of the SCO were illegal. Any and all evidence derived from those warrants regarding Mr. Flynn must be suppressed.

An objective view of SSA 1's purported handwritten notes with the FD-302 of the January 24, 2017 interview of Mr. Flynn that Lisa Page instructed Agent Strzok to edit on February 10, 2017, reveals equally troubling "inaccuracies," "omissions," and "unsupported statements."[22] The

[22] As previously briefed by Mr. Flynn, aside from the fact that the FD-302 was in a "deliberative process" for weeks and material changes were made to it with the knowledge and instruction of Counsel to McCabe (Lisa Page) on the night of February 10, 2017, there are statements in the FD-302 that find no support in the notes of either agent. ECF No. 129-2 at 14-17 (Sections 6 through 9). The changes include the addition of the line "'or if KISLYAK described any Russian response to a request by FLYNN.'" That question and answer do not appear in the notes. *Id.* This Court excused those additions by pointing out that agents also include information from their memory. ECF No. 144 at 41. That simply makes finding the original FD-302 that much more important—as it would have been the freshest version. The FD-302 that serves as the basis for the false statements charge against Mr. Flynn was altered weeks after the interview and long past the five days in which a FD-302 is to be finalized under FBI rules.

IG Report evinces that Mr. Flynn has still not been provided with all the evidence of egregious government misconduct dishonestly wielded to destroy the National Security Advisor to President Trump as part of their larger anti-Trump scheme.

D. The Inspector General Abhorred this Conduct as did FBI Director Christopher Wray.

This intolerable breach of trust and deceitful conduct by the FBI leadership and SSA 1 alone is enough to warrant dismissal of all charges against Mr. Flynn. Current FBI Director Christopher Wray immediately responded to the IG Report to confirm that this would not happen again.[23] It was simply so outrageous there was not a formal policy to foreclose it at the time. No rational person could have anticipated that anyone entrusted with the "Fidelity, Bravery, and Integrity" of the FBI would suggest such an operation against a presidential nominee.

The case against Mr. Flynn should be dismissed immediately for this egregious abuse of power and trust, and for the prosecution's failure to disclose it to the defense from November 29, 2017, until the release of the IG Report—more than two years later.[24]

---

[23] Press Release, FBI Director Christopher Wray's Response to Inspector General Report (Dec. 9, 2019) (on file with FBI.gov), https://www.fbi.gov/news/pressrel/press-releases/fbi-director-christopher-wray-response-to-inspector-general-report.

[24] The electronic communication written by SSA 1 arising from the presidential briefing was approved by Strzok. It was uploaded into Sentinel August 30, 2016. IG Report at 343 and n. 479. In truth, but unknown to Mr. Flynn until the release of this Report, SSA1 was actually there because he was investigating the candidate's national security advisor as being "an agent of Russia." This report of that interaction including purported statements by Mr. Flynn was put it in a sub-file of the Crossfire Hurricane file. That, and the DOJ document completely exonerating Mr. Flynn of that slanderous assertion, has never been produced to Mr. Flynn. This was extraordinary *Brady* and *Giglio* information that should have been provided to Mr. Flynn by Mr. Van Grack no later than upon entry of this Court's *Brady* order.

III. SUPPRESSION OF UNDENIABLE *BRADY* EVIDENCE MANDATES DISMISSAL OF THIS CASE.

This Court should dismiss this prosecution for the government's recurring *Brady* violations revealed or disclosed only since December 9, 2019. As Glen Greenwald wrote: "the FBI's gross abuse of its power – its serial deceit – is so grave and manifest that it requires little effort to demonstrate it. In sum, the IG Report documents multiple instances in which the FBI – in order to convince a FISA court to allow it to spy on former Trump campaign operative Carter Page during the 2016 election – manipulated documents, concealed crucial exonerating evidence, and touted what it knew were unreliable if not outright false claims."[25]

The IG Report is damning evidence of *Brady* violations and outrageous government misconduct by the FBI agents who deceitfully listened to Mr. Flynn on August 17, 2016, and interviewed him on January 24, 2017. Neither time did they even advise him he was under investigation. He had no warnings—not even those given to government employees. The entire scenario was planned and rehearsed to keep from alerting him to the seriousness of it all. Surely, such alleged conduct cannot be a foundation for a federal felony. *Sorrells,* 287 U.S. at 442 ("A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.").

Remarkably, FBI agents continued to alter and manipulate Mr. Flynn's January 24, 2017 FD-302 until it met the approval of Deputy Director McCabe's Special Counsel and McCabe

[25] Glen Greenwald, *The Inspector General's Report on 2016 FBI Spying Reveals a Scandal of Historic Magnitude: Not Only for the FBI but Also the U.S. Media*, The Intercept, https://theintercept.com/2019/12/12/the-inspector-generals-report-on-2016-fb-i-spying-reveals-a-scandal-of-historic-magnitude-not-only-for-the-fbi-but-also-the-u-s-media/?comments=1 (Dec. 12, 2019, 11:44 AM).

approved it. As previously explained, SSA 1 was responsible for false and wrong information repeatedly presented to the FISA court. The government and that agent failed to provide this exculpatory evidence to that court at every turn. The same agents and the prosecutors also failed to provide such important *Brady* material to Mr. Flynn.[26]

Mr. Van Grack's suppression of this crucial *Brady* information—and his failure to disclose that SSA 1 had a "baseline" read on Mr. Flynn—demands dismissal of this case.[27] The

---

[26] See Judge Boasberg opinion, *see supra* n. 11. Mr. Flynn's communications were obtained in violation of the Fourth Amendment—whether through illegal FISA abuses or abuses of the NSA database or mishandling Presidential Transition Team Materials.

In the January 2020 FISC report, Judge Boasberg wrote that "due in large part to the work of the Office of the Inspector General," the Court has received notice of "material misstatements and omissions in the applications filed by the government in the above-captioned dockets [16-1182, 17-52, 17-375, 17-769]." Order Regarding Handling and Disposition of Information at 1 (1/7/20). The DOJ acknowledges "there was insufficient predication to establish probable cause to believe that [Carter] Page was acting as an agent of a foreign power" with respect to when it filed its applications, "if not earlier." *Id*. The FBI was sequestering documents it acquired pursuant to the listed docket numbers but did not give a deadline or methods of sequestration – merely promising to update the court. *Id.* As of January 7, 2020, no update had been received. *Id*. As a result of the situation, the Court ordered that the government make a submission of the FBI's handling of information obtained pursuant to these dockets, including: detailed steps taken to restrict access in unminimized form, detailed steps taken to restrict access to such information in other forms, timetable for completion of steps, explanation of the "further review of the OIG Report" and "related investigations and any litigation" that would require retention of the above information, and an explanation of why the retention comports with FISA. *Id.* at 2. This is a developing issue that Mr. Flynn wants to preserve in light of Judge Boasberg's holding that the FISA warrant was invalid, thereby invalidating information illegally obtained that likely relates to Mr. Flynn.

[27] The Government's misconduct also provides further support for Mr. Flynn's motion to withdraw his plea, filed contemporaneously herewith. A defendant's plea is only valid if it was entered knowingly and intelligently. *See e.g.*, *Hill v. Lockhart, 474 U.S. 52 (1985).* But, "this test suffices only in the "absen[ce of] misrepresentation or other impermissible conduct by state agents. *Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir. 1988). "[T]he validity of the plea must be reassessed if it resulted from "impermissible conduct by state agents." *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (quoting *Brady v. Maryland*, 397 U.S. 742, 757 (1970)). "[E]ven a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution." *Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir. 1988). After all, "if a defendant may not raise a *Brady* claim after a guilty plea,

government's suppression (or destruction) of the original FD-302 of the interview of January 24, 2017 is now even more important. That SSA 1 participated in two interviews of Mr. Flynn and immediately reported to multiple people—as did Strzok—that Mr. Flynn was being honest with the agents dramatically magnifies the importance of SSA 1's statements and perceptions as written on January 24, 2017.

Another stunning revelation in the IG Report is that SSA 1 played a large part in the lies to the FISA court from the first application on Carter Page onward. *See supra* 12. Much like the fabricated FISA application based on the "Steele dossier" used against Carter Page, the FBI knew this was nonsense because Mr. Flynn worked with the FBI as allies for years, including as head of the Defense Intelligence Agency ("DIA"), and he continued working with the DIA on all his foreign contacts thereafter—including contacts in Russia and Turkey.[28] Mr. Flynn requested this DIA information in his Motion to Compel *Brady* Material. ECF No. 133 at 29-30.

---

prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas." *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995). A majority of the Circuits agree that *Brady* violations can be the basis to withdraw a plea.

The D.C. District Court held that the government's suppression of *Brady* was sufficient to permit him to withdraw his plea *post-sentencing*—despite the high standard of "manifest injustice." *United States v. Nelson,* 59 F. Supp. 3d 15, 17 (D.D.C. 2014) (holding a suppressed exculpatory email sufficient to withdraw the plea); *see also, United States v. Lough*, 203 F. Supp. 3d 747 (N.D. W. Va. 2016) (granting a motion to withdraw a guilty plea where counsel *was not aware* that, and therefore did not inform the defendant that, *a substantial portion of the government's evidence against the defendant could have been suppressed* because of the invalidity of the government's warrant that led to the collection of that evidence. *Id.* at 753-54. This failure stripped defendant of "close assistance of competent counsel," thus his guilty plea was not knowingly entered. *Id.* at 754-55. These are additional grounds to allow Mr. Flynn to withdraw his plea. ECF No. 151.

[28] The documentation of his work with the DIA after he retired is a significant part of the *Brady* evidence the government has refused to produce to Mr. Flynn.

The government's conduct in this case shows contempt for the law at every turn. Mr. Flynn was targeted and deliberately destroyed by corrupt factions within the FBI and intelligence community. While Mr. Flynn's case is not even the focus of the IG Report, the Report reveals illegal, wrongful, and improper conduct that affected Mr. Flynn, and is the subject of an ongoing criminal investigation by United States Attorney John Durham. Both Attorney General Barr and John Durham issued statements on the heels of the Inspector General's Report to clarify that more information was being discovered in Mr. Durham's investigation, and, as Mr. Durham stated: "[W]e advised the Inspector General that we do not agree with some of the report's conclusions as to predication and how the FBI case was opened."[29] The defense expects additional information to be developed that exonerates Mr. Flynn.

"Exercising the inherent authority [of the court] is most appropriate in particular fact situations that do not lend themselves to rules of general application. *Omni Int'l Corp.*, 634 F. Supp. at 1438. That is certainly the case here, where Mr. Flynn's facts arise in the midst of what has been exposed as a shamefully abusive and corrupt period in FBI history, an operation that has sparked a massive investigation by the Inspector General, and now an ongoing criminal investigation by United States Attorney John Durham. At bottom, Mr. Flynn was framed and set-up by his own government in a shockingly inappropriate and wrongful conduct by the "leadership" of the FBI, DOJ, and "intelligence officials." The FBI "leadership" schemed to interview Mr. Flynn twice—with no warning—not just of his rights—but even of the fact that they were investigating him. This was a coordinated, deliberate, unconscionable, and result-driven

[29] U.S. Attorney John H. Durham, Statement (Dec. 9, 2019) (transcript available at https://www.justice.gov/usao-ct/pr/statement-us-attorney-john-h-durham).

mechanism to create a "crime" they clearly sought. This abuse of power is so pernicious it undermines the very foundations of our constitutional republic.

Even though the investigation pertains to the abuses of the FISA process, not the FBI and DOJ's misconduct regarding Mr. Flynn, the IG Report simultaneously documents at least some of FISA process abuses and misconduct against Mr. Flynn. The IG Report is replete with exculpatory evidence that, had it been known to Mr. Flynn, he never would have pled guilty. The government's suppression of evidence drove a three-star military veteran of multiple conflicts to plead to a crime he did not believe he committed. It now raises the specter that the foremost intelligence officer of this generation, a combat veteran and war hero, will serve time behind bars. This is not only manifestly unjust, it makes a mockery of *Brady* and due process. *See United States v. Brown*, 250 F.3d 811, 818 (3d Cir. 2001) (acknowledging that a *Brady* violation is "closely bound to due process guarantees"); *Campbell v. Marshall*, 769 F.2d 314, 321 (6th Cir. 1985) (determining that "in *Tollet* and the *Brady* trilogy, the Supreme Court did not intend to insulate all misconduct of constitutional proportions from judicial scrutiny solely because that misconduct was followed by a plea which otherwise passes constitutional muster as knowing and intelligent").

IV. THE GOVERNMENT'S ROLE IN DEMANDING, RUSHING, REVIEWING, AND COORDINATING THE FARA FILING FORECLOSES USE OF IT TO PROSECUTE FLYNN.

As briefed extensively in Mr. Flynn's Supplemental Motion to Withdraw His Plea (ECF No. 150), David Laufman, former Chief of the U.S. Department of Justice's Counterintelligence and Export Control Section, and the FARA Unit of the DOJ were adamant that Flynn Intel Group ("FIG") file a FARA registration even though FARA experts at Covington and at Arent Fox were not sure that one was warranted. Indeed, Matthew Nolan, FARA expert at Arent Fox, was adamant that no filing was required in this case. Ex. 3.

Mr. Flynn wanted to "do the right thing." He authorized his lawyers to "be precise," complete the task, and file the registration. Ex. 4. Moreover, in September 2016, FIG Partner Bijan Rafiekian had timely sought legal counsel requesting to file a FARA, but he was advised by attorney Robert Kelley to file an LDA instead. Ex. 5. An LDA filing is the largest single exception to the requirement of filing FARA, and in many cases, filing an LDA satisfies FARA. 22 U.S.C. § 613(h) (2019).

Mr. Laufman applied extraordinary pressure on Covington and repeatedly inserted himself and others including multiple members of the FARA division—into the planning, content, and filing of FIG's registration. ECF No. 151 at n. 3 and at 4-5. There is no valid FARA offense against Mr. Flynn. The extraordinary involvement of the FARA Unit and Mr. Laufman in this process (as fully briefed in ECF No. 98-7 at 11) should foreclose or estop any use of the registration against Mr. Flynn. *Sorrells*, 287 U.S. at 444 (quoting *Butts v. United States*, 273 F. 35 (8th Cir. 1921)) ("The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it.").

V. PROSECUTORS CREATED THE "FALSE STATEMENTS" IN THE FARA FILINGS AND SOUGHT TO SUBORN PERJURY.

As we briefed in full previously at ECF No. 133 and ECF No. 151, the SCO in general and Mr. Van Grack in particular, cooked-up the "false statements" in the FARA filing and have long been in possession of statements by Covington lawyer Brian Smith that completely contradict the government's assertions of any wrongdoing by Mr. Flynn on the FARA registration. The same documents show that Mr. Van Grack sought to have Mr. Flynn make affirmative false statements in his June 2019 interview with the FBI and EDVA prosecutors, and Mr. Turgeon, and compounded that atrocity by demanding Mr. Flynn testify falsely on the same point in the

Rafiekian trial. Mr. Van Grack has spent the last year taking retaliatory action against Mr. Flynn over the same issues as the defense has briefed.

CONCLUSION

The government's misconduct undoubtedly harmed and prejudiced Mr. Flynn. For these reasons, if the United States Department of Justice does not come forth to meet its most solemn duty and move to dismiss this travesty, this Court should dismiss this prosecution because of the government's outrageous and egregious misconduct directed specifically against Lt. General Michael T. Flynn (Retired). "[I]t is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it." *Sorrells*, 287 U.S. at 444-45 (quoting *Butts*, 273 F. at 38).

Dated: January 29, 2020

Respectfully submitted,

/s/ Sidney Powell

Sidney Powell
Molly McCann
Sidney Powell, P.C.
2911 Turtle Creek Blvd.,
Suite 300
Dallas, Texas 75219
Tel: 214-707-1775
sidney@federalappeals.com
Admitted *Pro Hac Vice*
molly@federalappeals.com
Admitted *Pro Hac Vice*

/s/ Jesse R. Binnall

W. William Hodes
The William Hodes Law Firm
3658 Conservation Trail
The Villages, Florida 32162

Jesse R. Binnall
Lindsay R. McKasson
Harvey & Binnall, PLLC

Tel: (352) 399-0531
Fax: (352) 240-3489
Admitted *Pro Hac Vice*

717 King Street, Suite 300
Alexandria, VA 22314
Tel: (703) 888-1943
Fax: (703) 888-1930
jbinnall@harveybinnall.com
lmckasson@harveybinnall.com
Admitted *Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2020, a true and genuine copy of Mr. Flynn's Motion to Dismiss for Egregious Government Misconduct and in the Interest of Justice was served via electronic mail by the Court's CM/ECF system to all counsel of record, including:

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

Respectfully submitted,

/*s*/ Jesse R. Binnall
Jesse R. Binnall, VSB # 79272
HARVEY & BINNALL, PLLC
717 King Street, Suite 300
Alexandria, VA 22314
Tel: (703) 888-1943
Fax: (703) 888-1930
jbinnall@harveybinnall.com