

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA

Plaintiff,

v.

MICHAEL T. FLYNN,

Defendant.

Criminal Action No. 17-232-EGS

**SUPPLEMENTAL BRIEF
IN SUPPORT OF MOTION TO WITHDRAW PLEA OF GUILTY**

Michael T. Flynn “Mr. Flynn” submits this supplemental brief to clarify and supplement his Motion to Withdraw Plea of Guilty.

To clarify the sequence of events, especially Mr. Van Grack’s responsibility for the redline draft that deleted the assertion that Mr. Flynn “then and there knew” there were “false statements” in the FARA registration form, ECF No. 151 at 12, also attached here as Exhibit 1 (highlighting added). The defense provides the following emails (attached as Exhibits 2-4):

- Monday, Nov. 27, 2017, at 6:21 pm: Brandon Van Grack sent the proposed plea documents to Covington & Burling LLP (“Covington”) lawyers.
- Monday, Nov. 27, 2017, at 6:31 pm: Robert Kelner passed the draft plea documents to the Covington team.
- Tuesday, Nov. 28, 2017, there was no email traffic on these issues found even internally throughout Covington team members and Mr. Van Grack.
- Wednesday, Nov. 29, 2017, at 8:55 am: Brandon Van Grack sent Robert Kelner and Steve Anthony an updated, PDF redlined version of the plea documents, that deleted “as he then and there knew” (this deleted the only language that implicated Mr. Flynn with any knowledge of any “false statements” in the FARA registration when he signed it).

- Wednesday, Nov. 29, 2017, at 7:49 pm: Brandon Van Grack wrote to Covington that he could not send the signed documents that night.¹

The import of this is that the Special Counsel’s Office (“SCO”) and Mr. Van Grack in particular knew full well that Mr. Flynn had consistently maintained that he did not know the FARA filings were false when he signed them, and during the plea process, *Mr. Flynn had refused to sign a statement that said he did.*

Even though *Mr. Van Grack and SCO deleted that crucial language themselves*, and Mr. Van Grack transmitted it back to Covington, Mr. Van Grack exploded at Mr. Flynn’s new counsel in the EDVA when she advised that Mr. Flynn would not lie and testify that he knowingly and intentionally signed a FARA registration containing any known “false statements.” Every step Mr. Van Grack, Mr. Turgeon, and other prosecutors have taken against Mr. Flynn since that moment has been retaliatory, vindictive, and in bad faith—including the government’s about-face in its sentencing memorandum of January 7, 2020.²

Shockingly, this evinces the strong inference the prosecutors themselves conspired to cause Mr. Flynn to make false statements in violation of 18 U.S.C. §1001, and they conspired and encouraged the subornation of perjury as they tried to force Mr. Flynn to say he lied to his lawyers when they knew their narrative was false and the FARA registration was correct.³

¹ This is the best information from the materials defense counsel have been able to review to date. Counsel are dealing with eighteen hard drives and more than 318,000 documents. Counsel spent the first two months cooperating with the EDVA. The defense has not had sufficient time to review this massive file and brief all the issues it raises in defense of Mr. Flynn. If counsel discover any additional or contradictory information, the defense will report it promptly.

² See ECF No. 151 at 12.

³ “Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both.” 18 U.S.C. § 1622.

Even worse, at the same time prosecutors pressured Mr. Flynn to commit false statement offenses⁴ and perjury, they held and suppressed the FBI 302 of Covington attorney Brian Smith (and two of Robert Kelner's) in which Mr. Smith advised Mr. Turgeon, James Gillis, FBI Agent Alfredo, and Mr. Van Grack, under penalty of §1001, that Mr. Flynn told him information that directly contradicted what the prosecution crafted and alleged as "false statements:"⁵

- "[A]ccording to Rafiekian, GULEN was the problem and was destroying the confidence in Turkey. In order to increase confidence in Turkey, Gulen had to be stopped." Robert Kelner 302 of June 21, 2018; ECF No. 150-6 at 7.
- "RAFIEKIAN worked with an editor, Hank COX, to write the op-ed on GULEN." Brian Smith 302 of June 21, 2018, ECF No. 150-5 at 7. "Flynn informed Smith it was his idea to write an op-ed. However Rafiekian wrote the first draft of the op-ed about Gulen." Smith 302, ECF No. 150-5 at 7. And, per FLYNN, "RAFIEKIAN wrote the first draft of the op-ed about GULEN." ECF. No. 150-5 at 7.
- "Smith was aware of the September 2016 meeting in New York City (NYC) where FLYNN and RAFIEKIAN met with Turkish government officials... The topic of GULEN was brought up by Turkish officials at the meeting." Brian Smith 302 of 06/21/2018; ECF No. 150-5 at 5.⁶

⁴ If Mr. Flynn had "admitted" what was demanded in his EDVA interview, he could have been prosecuted for false statements as there was an FBI agent in the room who was creating a 302 for each of his interviews. The defense received sixteen of those FBI 302s were among the 637 pages just given to the defense on December 15, 2019. To have *testified* in the Rafiekian trial as demanded would have created a perjury count, as the prosecutors could have then used Covington lawyer Brian Smith to prove otherwise.

⁵ The "false" statements the prosecutors allege in the Statement of Offense are either correct, not attributable to Mr. Flynn, or created by the distortions and conflation of the prosecutors—and Mr. Van Grack knew that also. *See* ECF No. 151-9. The prosecution also knew Covington interviewed Flynn and Rafiekian separately, and there was no evidence of a conspiracy between them regarding FARA. "Fast forward, I learned that Bijan had called here [Covington] to ask about FARA filing. I didn't know about that. He asked a couple of stupid questions that had nothing to do with FARA, but just political nonsense. I didn't find out about that until later on. Number one, that irritated me because he thought about that. He knew what FARA was. I've never talked to him about this." Mr. Flynn to SCO and EDVA attorneys in June 14, 2018. ECF No. 151-11 at 8.

⁶ Covington knew Mr. Flynn briefed the DIA on this meeting, and the government refused to produce to Mr. Flynn the information about that briefing. The New York meeting was also attended by former CIA Director James Woolsey (who was interviewed by SCO) (Brian Smith 302 of June 21, 2018, ECF No. 150-5 at 5)—and by former FBI Deputy Assistant Director Brian

- Covington had emails since January 2017, including one stating: “Gentlemen – I just finished in Ankara after several meetings today with Min of Economy Zeybecki and MFA Cavusoglu. I have a green light to discuss confidentiality, budget and the scope of the contract.” ECF. No. 151-5 at 13.

The government slipped the Smith and Kelner 302s in its sentencing filing of January 7, 2020. This is the first time the defense has seen them. This striking *Brady* material reveals that the government knew since at least June 2018—long before Mr. Van Grack exploded at defense counsel, threatened Mr. Flynn, and retaliated against him and his son—that Covington lawyers’ statements prove Mr. Flynn had indeed told the truth to his lawyers.

These documents also show Mr. Van Grack knew there were no false statements in the FARA filing as he either created them himself or wrongly attributed them to Mr. Flynn and/or conflated “published” with “written by” in his prosecution. Mr. Smith’s (and Mr. Kelner’s) statements were made under application of the same statute for which Mr. Flynn stands accused of a felony.

The prosecutors suppressed lawyers’ statements in FBI 302s directly contradict any assertion of “false statements” by Mr. Flynn in the FARA filing.

Dated: January 16, 2020

Respectfully submitted,

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McCauley who testified *for the government* in *Rafiekian* that the Turkish officials gave no instructions. Brian Smith notes, Jan. 2, 2017; ECF No. 150-2.

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2020, a true and genuine copy of Mr. Flynn's Errata Sheet 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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