PROSECUTORS INVITE EMMET SULLIVAN TO THROW THE BOOK AT MIKE FLYNN

Technically, the scathing sentencing memo for Mike Flynn the government just submitted calls for the same sentence they called for in December 2018, when he was first set to be sentenced, something they note explicitly: a guidelines sentence of 0-6 months in prison.

> [T]he government recommends that the court sentence the defendant within the applicable Guidelines range of 0 to 6 months of incarceration.
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> [snip]
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> The government notes its decision to withdraw its motion for substantial assistance has no impact on the applicable Guidelines range, which will remain 0 to 6 months of incarceration.

But in their sentencing disparity section, they argue Flynn's actions are worse than those of George Papadopoulos and Alex van der Zwaan (because of his position of trust and security clearance) and Rick Gates and James Wolfe (because they accepted responsibility), all of whom served prison time.

Along the way, they give Judge Emmet Sullivan all the ammunition he needs and write the memo in such a way as to invite him to, at least, sentence Flynn at the top of a guidelines sentence, 6 months of prison.

Before Flynn fired the very competent Rob Kelner and hired Fox News firebreather Sidney Powell and then blew up his cooperation deal, the government had argued he should be sentenced at the low end of that range, meaning probation. They justify implying he should get a real

prison sentence now because of the way he undermined the prosecution of his former partner, Bijan Kian, and reneged on his acceptance of responsibility.

> Given the serious nature of the defendant's offense, his apparent failure to accept responsibility, his failure to complete his cooperation in — and his affirmative efforts to undermine — the prosecution of Bijan Rafiekian, and the need to promote respect for the law and adequately deter such criminal conduct, the government recommends that the court sentence the defendant within the applicable Guidelines range of 0 to 6 months of incarceration.

The government lays out two ways Flynn undermined the Bijan Kian prosecution

Flynn's reversal on the Kian case is important because — according to the cooperation addendum submitted in 2018 — that's the one investigation in which he provided "substantial cooperation.

> Notably, only the assistance he had provided in the Rafiekian case was deemed "substantial."

Over the last six months, Flynn has negated all that cooperation.

> In light of the complete record, including actions subsequent to December 18, 2018, that negate the benefits of much of the defendant's earlier cooperation, the government no longer deems the defendant's assistance "substantial."

The government substantiates that Flynn changed

his testimony by including Kian trial exhibits, Flynn's grand jury testimony, a Flynn 302, two Rob Kelner 302s (two), and the 302 from another of the lawyers who helped submit his FARA filing. After having substantiated *that* Flynn reneged on his cooperation, the government then lays out another way Flynn undermined Kian's prosecution — by contesting that he was Kian's co-conspirator.

> Remarkably, the defendant, through his counsel, then affirmatively intervened in the Rafiekian case and filed a memorandum opposing the government's theory of admissibility on the grounds that the defendant was not charged or alleged as a coconspirator. See Flynn Memorandum Opposing Designation, United States v. Bijan Rafiekian, No. 18-cr-457 (E.D. Va July 8, 2019) (Doc. 270). This action was wholly inconsistent with the defendant assisting (let alone substantially assisting) or cooperating with the government in that case.12 Accordingly, while the defendant initially helped the prosecutors in EDVA bring the Rafiekian case, he ultimately hindered their prosecution of it.

The government then rebuts first one counterargument Flynn might make — that he should get credit for cooperating anyway since he waived privilege so his Covington lawyers could testify.

> 12 Any claim by the defendant that the Rafiekian prosecution was aided by his agreement to waive the attorney-client privilege and the attorney work-product doctrine regarding his attorneys' preparation and filing of the FARA documents would be unfounded. The defendant explicitly did not waive any privileges or protections with respect to the preparation and filing of the FARA documents. No waiver occurred because the government (and the

> defendant's attorneys) did not believe a waiver for such information was necessary—information provided to a lawyer for the purposes of a public filing is not privileged. The district judge in Rafiekian agreed with that conclusion, and permitted the defendant's attorneys to testify about what the defendant and Rafiekian told them because those statements were not privileged or protected as opinion work product. See United States v. Rafiekian, No. 18-cr-457, 2019 WL 3021769, at *2, 17-19 (E.D. Va. July 9, 2019).

And they obliquely rebut an argument that Powell has already made — that EDVA prosecutors chose not to call Flynn only to retaliate against him.

> 13 The government does not believe it is prudent or necessary to relitigate before this Court every factual dispute between the defendant and the Rafiekian prosecutors. The above explanation of the decision not to call the defendant as a witness in the Rafiekian trial is provided as background for the Court to understand the basis for the government's decision to exercise its discretion to determine that the defendant has not provided substantial assistance to the government. The government is not asking this Court to make factual determinations concerning the defendant's interactions with the Rafiekian prosecutors, other than the undisputed fact that the defendant affirmatively litigated against the admission of evidence by the government in that case.

Finally, they quote a Kian filing saying for them what they therefore don't have to say in such an inflammatory way: Flynn tried to game the Kian prosecution in such a way that he got to benefit from the plea deal without admitting

his guilt.

> Rafiekian's counsel characterized the "new Flynn version of events" as "an unbelievable explanation, intended to make Flynn look less culpable than his signed December 1, 2017 Statement of Offense and consistent with his position at his sentencing hearing. In short, Flynn wants to benefit off his plea agreement without actually being guilty of anything." See Defendant's Memorandum Regarding Correction at 5, United States v. Bijan Rafiekian, No. 18- cr-457 (E.D. Va. July 5, 2019) (Doc. 262).

The government asks Judge Sullivan to allocute Flynn again

Which may be why the government twice asks Judge Sullivan to force Flynn to admit his guilt again if he wants credit for it in sentencing.

> Indeed, the government has reason to believe, through representations by the defendant's counsel, that the defendant has retreated from his acceptance of responsibility in this case regarding his lies to the FBI. For that reason, the government asks this Court to inquire of the defendant as to whether he maintains those apparent statements of innocence or whether he disavows them and fully accepts responsibility for his criminal conduct.
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> [snip]
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> Based on statements made in recent defense filings, the defendant has not accepted responsibility for his criminal conduct, and therefore is not entitled to any such credit unless he clearly and credibly disavows those statements in a

> colloquy with the Court.

The government lays out evidence of Flynn's perjury before Emmet Sullivan

But there may be another reason the government invites Sullivan to allocute Flynn again. In an extended passage, the government basically lays out evidence that — given his statements made in the last six months — Flynn perjured himself before Judge Sullivan on December 18, 2018, when the judge had the prescience to put Flynn under oath.

> During the hearing, the Court engaged in a dialogue with the defendant concerning arguments in his sentencing memorandum that appeared to challenge the circumstances of the January 24 interview. See 12/18/2018 Hearing Tr. at 6-7. However, when questioned by the Court, the defendant declined to challenge the circumstances of that interview. Id. at 8. When pressed by the Court about whether he wanted to proceed with his guilty plea "[b]ecause you are guilty of this offense," the defendant unequivocally responded, "Yes, Your Honor." Id. at 16. And when the Court asked whether he was "continuing to accept responsibility for [his] false statements," the defendant replied, "I am, Your Honor." Id. at 10. The defendant's recent conduct and statements dramatically differ from those representations to the Court, which he made under oath.
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> Six months later, in June 2019, the defendant began retracting those admissions and denying responsibility for his criminal conduct. Far from

> accepting the consequences of his unlawful actions, he has sought to blame almost every other person and entity involved in his case, including his former counsel. Most blatantly, the defendant now professes his innocence. See, e.g., Reply in Support of His Motion to Compel Production of Brady Material and to Hold the Prosecutors in Contempt at 2, 6, United States v. Flynn, 17-cr-232 (D.D.C. Oct. 22, 2019) (Doc. 129-2) ("Reply") ("When the Director of the FBI, and a group of his close associates, plot to set up an innocent man and create a crime . . . ;" alleging that text messages provided by the government "go to the core of Mr. Flynn's . . . innocence"). With respect to his false statements to the FBI, he now asserts that he "was honest with the agents [on January 24, 2017] to the best of his recollection at the time." Reply at 23. Such a claim is far from accepting responsibility for his actions. As the defendant admitted in his plea agreement and before this Court, during the January 24 interview the defendant knew he was lying to the FBI, just as he knew he was lying to the Vice President of the United States.
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> The defendant has also chosen to reverse course and challenge the elements and circumstances of his false statements to the FBI. See, e.g., June 6, 2019 Sidney Powell Letter to the Attorney General (Doc. 122-2) ("Powell Letter to AG"). The defendant now claims that his false statements were not material, see Reply at 27-28, and that the FBI conducted an "ambush interview" to trap him into making false statements, see Reply at 1. The Circuit Court recently stated in United States v. Leyva, 916 F.3d 14 (D.C. Cir. 2019), cert. denied, No. 19-5796, 2019 WL 5150737 (U.S. Oct. 15, 2019), that "[i]t is not error for a

> district court to 'require an acceptance of responsibility that extended beyond the narrow elements of the offense' to 'all of the circumstances' surrounding the defendant's offense." Id. at 28 (citing United States v. Taylor, 937 F.2d 676, 680-81 (D.C. Cir. 1991)). A defendant cannot "accept responsibility for his conduct and simultaneously contest the sufficiency of the evidence that he engaged in that conduct." Id. at 29. Any notion of the defendant "clearly" accepted responsibility is further undermined by the defendant's efforts over the last four months to have the Court dismiss the case. See Reply at 32.7

This effectively lays out a catch-22 for Flynn: either he makes a bid, still, for the acceptance of responsibility he has reneged on, or Sidney Powell instead argues that he perjured himself. One way or another (or in both cases) Flynn lied. Repeatedly.

Notably, the government introduces its discussion of why Flynn's past lies — which were false statements, not formally perjury — were so important using a SCOTUS discussion of perjury, something they didn't do in his prior sentencing memo.

> That is precisely why providing false statements to the government is a crime. As the Supreme Court has noted:
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> > In this constitutional process of securing a witness' testimony, perjury simply has no place whatsoever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative. The power of subpoena, broad as it is, and the power of contempt for

> refusing to answer, drastic as that is — and even the solemnity of the oath — cannot insure truthful answers. Hence, Congress has made the giving of false answers a criminal act punishable by severe penalties; in no other way can criminal conduct be flushed into the open where the law can deal with it.

Sidney Powell may be too rash to notice this (as she has missed or not given a shit about other similar warnings in the past). But the government is laying out a case to go after Flynn for perjury if he decides to get cute again.

The government recalls Judge Sullivan's past disgust with Flynn

Having laid out two reasons why the outcome should be significantly different this time around than the outcome the government argued for in December 2018, they then remind Judge Sullivan how pissed off he was at that hearing (where he asked whether treason had been considered for Flynn), where it seemed clear he was *already* ready to send Flynn to prison.

The government reminds Judge Sullivan that he himself decided to let Flynn's "cooperation" play out to see the true nature of it.

> At the initial sentencing hearing in December 2018, the Court raised concerns about proceeding to sentencing without "fully understanding the true extent and nature" of the defendant's assistance.
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> [snip]
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> Although the government noted that "some of th[e] benefit" of the defendant's assistance "may not be fully realized at

> th[at] time," it proceeded to sentencing because it believed the defendant's anticipated testimony in the Rafiekian case had been secured through his grand jury testimony and the Statement of Offense.8 The Court, however, expressed that "courts are reluctant to proceed to sentencing unless and until cooperation has been completed . . . [b]ecause the Court wants to be in a position to fully evaluate someone's efforts to assist the government." 12/18/2018 Hearing Tr. at 26. The Court's concern that the parties had prematurely proceeded to sentencing was prescient.

It then reminds Judge Sullivan that he asked — and the government affirmed — that Flynn could have been charged in a conspiracy to act as an Agent of Turkey, one of the things that Sullivan found so disgusting in the last sentencing hearing.

> The Court inquired whether the defendant could have been charged as a co-defendant in the Rafiekian case, and the government affirmed that the defendant could have been charged with various offenses in connection with his false statements in his FARA filings, consistent with his Statement of Offense.

The government next reminds Sullivan that Flynn's actions were an abuse of public trust, another of the things that really pissed him off in the last sentencing hearing.

> Public office is a public trust. The defendant made multiple, material and false statements and omissions, to several DOJ entities, while serving as the President's National Security Advisor and a senior member of the Presidential Transition Team. As the government represented to the Court at

> the initial sentencing hearing, the defendant's offense was serious. See Gov't Sent'g Mem. at 2; 12/18/2018 Hearing Tr. at 32 (the Court explaining that "[t]his crime is very serious").

The government returns to those themes to argue — factually but aggressively — that Flynn compromised national security.

> The defendant's conduct was more than just a series of lies; it was an abuse of trust. During the defendant's pattern of criminal conduct, he was the National Security Advisor to the President of the United States, the former Director of the Defense Intelligence Agency, and a retired U.S. Army Lieutenant General. He held a security clearance with access to the government's most sensitive information. The only reason the Russian Ambassador contacted the defendant about the sanctions is because the defendant was the incoming National Security Advisor, and thus would soon wield influence and control over the United States' foreign policy. That is the same reason the defendant's fledgling company was paid over $500,000 to work on issues for Turkey. *The defendant monetized his power and influence over our government, and lied to mask it. When the FBI and DOJ needed information that only the defendant could provide, because of that power and influence, he denied them that information. And so an official tasked with protecting our national security, instead compromised it*. [my emphasis]

Having laid out the reasons why Sullivan was ready to send Flynn to prison before he started all the Sidney Powell shenanigans, the government then repeats his past judgment that this is a unique case, and Flynn's case is worse than all the directly relevant precedents, Papadopoulos, van der Zwaan, and, since the last

sentencing hearing, Wolfe and Gates, who were sentenced to a range between two weeks and two months.

> It goes without saying that this case is unique. See 12/18/2018 Hearing Tr. at 43 (Court noting that "[t]his case is in a category by itself"). Few courts have sentenced a high-ranking government official and former military general for making false statements. And the government is not aware of any case where such a high-ranking official failed to accept responsibility for his conduct, continued to lie to the government, and took steps to impair a criminal prosecution. Accordingly, while Section 3553(a)(6) requires the court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," there are no similarly situated defendants.
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> Although other persons investigated by the SCO pleaded guilty to lying to the FBI and were sentenced to varying terms of incarceration, those individuals and their conduct are easily distinguishable. See id. at 42-43 ("The Court's of the opinion that those two cases aren't really analogous to this case. I mean, neither one of those individuals was a high-ranking government official who committed a crime while on the premises of and in the West Wing of the White House."). Alex van der Zwaan lied to the SCO, pled guilty to violating 18 U.S.C. § 1001, and was sentenced to 30 days incarceration and a fine of $20,000. See United States v. van der Zwaan, No. 18-cr-31 (ABJ). George Papadopoulos likewise lied to the SCO, pled guilty to violating 18 U.S.C. § 1001, and was sentenced to serve 14 days incarceration, to perform 200 hours of

> community service, and pay a fine of $9,500. See United States v. Papadopoulos, No. 17-cr-182 (RDM). Neither defendant was a high-ranking government official, held a position of trust vis-à-vis the United States, held a security clearance, had a special understanding of the impact of providing misleading information to investigators, or denied responsibility for his unlawful conduct.
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> [snip]
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> The Court granted the government's motion for a significant downward departure pursuant to Section 5K1.1 for providing substantial assistance, gave Gates credit for accepting responsibility, and still sentenced him to 45 days of confinement.

Effectively, then, the government uses Sullivan's own past judgments, giving him all the reasons he would need to sentence Flynn, at least, near the top of guidelines range six months.

Subtly, the government twice invokes "aggravating factors" (once citing the Wolfe case, which I predicted would happen).

> The defendant's offense is serious, his characteristics and history present aggravating circumstances, and a sentence reflecting those factors is necessary to deter future criminal conduct.
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> [snip]
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> The court concluded that Wolfe's position—which was far less significant than the defendant's position as National Security Advisor—was an aggravating factor to consider at sentencing, and one that distinguished his case from those of Papadopoulos and

> van der Zwaan. Moreover, in that case, the defendant received credit for accepting responsibility.

The government doesn’t ask Sullivan to go beyond a guidelines sentence of six months (though even six months would be almost unheard of), though the comparison to Wolfe makes it clear they think Flynn should serve more than two months in prison. But they give him all the ammunition he’d need if he wanted to go there on his own.

Ultimately, as the government notes, the guidelines range is the same. But the facts of the case are now very different.