

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**IN RE THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS**

Misc. Action No. _____

Related to:
No. 17-cr-232 (EGS)

Oral Argument Requested

**APPLICATION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE
PRESS FOR THE PUBLIC DOCKETING OF COURT RECORDS IN CRIMINAL
MATTER NO. 17-cr-232 (EGS)**

1. Pursuant to Local Criminal Rule 57.6, the Reporters Committee for Freedom of the Press (the “Reporters Committee” or “Applicant”) respectfully moves the Court for an Order directing the Clerk of the Court to place on the public docket a piece of evidence at the center of current proceedings in the above-captioned criminal matter, and for other appropriate relief. Specifically, the Reporters Committee seeks the public docketing of a Federal Bureau of Investigation (“FBI”) report documenting the May 5, 2020, interview of former FBI official Edward William Priestap (the “Priestap FD-302”), which was created in the review of this prosecution by the U.S. Attorney for the Eastern District of Missouri (the “Jensen Review”) and transmitted to defense counsel on May 18, 2020. *See* ECF No. 210 (attaching as ECF No. 210-1 a cover letter from the United States Attorney for the District of Columbia to defense counsel indicating transmission of the Priestap FD-302).¹

¹ All references in this Application to ECF filing numbers are to the docket in *United States v. Flynn*, No. 17-cr-232 (EGS).

2. In May, *The New York Times* reported that the Justice Department was finalizing the Priestap FD-302 and would be filing it with the Court. See **Exhibit A**, Adam Goldman and Katie Benner, *Ex-F.B.I. Official is Said to Undercut Justice Department Effort to Drop Flynn Case*, N.Y. Times (May 13, 2020), <https://perma.cc/HN5G-AKWK> (“A Justice Department official said that they were in the process of writing up a report on the interview and that it would soon be filed with the court.”) (emphasis added).

INTEREST OF THE APPLICANT

3. The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association of reporters and editors dedicated to safeguarding the First Amendment rights and freedom of information interests of the news media and the public. Reporters Committee attorneys frequently appear before the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit on matters involving public access to judicial proceedings and court records.

4. Applicant—as a representative of the press—has a strong interest in observing and understanding the conduct and disposition of criminal cases prosecuted by the government. That interest is heightened here. This case involves the prosecution of President Donald J. Trump’s first National Security Advisor, General Michael T. Flynn (ret.) (“Defendant”), for allegedly making false statements concerning his conversations with a representative of a foreign power about affairs of state.

5. Further, while Applicant takes no position on the relief sought by the parties, there is intense public interest in the current proceeding. The press and public have an interest in understanding, inter alia, what the amicus curiae this Court appointed described as the “irregular” decision by the government to move to dismiss the case following Defendant’s

repeated acceptance of a plea agreement and admission of guilt, *see* Rep. Br. for Ct.-Appointed Amicus Curiae, ECF No. 243 at 1 (“To describe the Government’s Motion to Dismiss as irregular would be a study in understatement.”), as well as whether political pressure influenced the government’s decision to move to dismiss the case. *See* Adam Goldman and Katie Brenner, *U.S. Drops Michael Flynn Case, In Move Backed By Trump*, N.Y. Times (May 7, 2020), <https://perma.cc/RJE6-W4BQ>; *see also* Jonathan Kravis, *I Left the Justice Department After It Made a Disastrous Mistake. It Just Happened Again*, Wash. Post (May 11, 2020), <https://perma.cc/Z5ZQ-V94V>; Josh Gerstein and Kyle Cheney, *Flynn Lawyer Spoke With Trump, She Reveals in Contentious Hearing*, Politico (Sept. 29, 2020), <https://perma.cc/HK8K-AGZW>.

6. The Priestap FD-302 is directly relevant to representations to the Court by the United States and defense counsel in support of their motions to dismiss and in opposition to the court-appointed amicus. Both the United States and defense counsel have cited a set of handwritten notes by Mr. Priestap, created on the day of Defendant’s FBI interview at which the alleged offenses in this case occurred, as revelatory of the FBI’s motivations in conducting that interview. The government claims that the notes could be read as indicating the FBI’s desire to entrap Defendant. Gov’t’s Resp. to Ct.-Appointed Amicus Curiae, the Hon. John Gleeson (Ret.), ECF No. 227 at 25; *see also* Catherine Herridge, *Attorney General William Barr on Michael Flynn, Obamacare and Coronavirus Restrictions – Transcript*, CBS News (May 12, 2020), <https://perma.cc/MWE8-U77B> (describing Defendant’s January 24, 2017, interview as “perjury trap”). Defense counsel has stated that the notes demonstrate that officials at the Justice Department and FBI sought to “create an offense they could prosecute or at least get General Flynn fired.” Gen. Flynn’s Br. In Opp. To Amicus, ECF No. 228 at 26. *The New York Times*, however, reported that Mr. Priestap provided additional context on those handwritten notes in his

interview by Jensen Review investigators, which would be memorialized in the Priestap FD-302. Exhibit A, Goldman and Benner, *supra*. Specifically, the *Times* reported that Priestap “knew of no effort to set [Defendant] up” and that “media reports about his notes misconstrued them.” *Id.*

7. The public has a powerful interest in access to as complete a record as possible of the proceedings in this case, and the Priestap FD-302 is central to understanding that record.

BACKGROUND FACTS

8. Defendant is a retired lieutenant general in the United States Army and a former director of the Defense Intelligence Agency, who was named in November 2016 as National Security Advisor for the incoming administration of President-elect Trump. *See* United States’ Supplemental Mem. in Aid of Sentencing, ECF No. 150 at 27; Bryan Bender, *Trump Names Mike Flynn National Security Adviser*, Politico (Nov. 17, 2016), <https://perma.cc/KP4X-4X5P>.

9. On December 29, 2016, outgoing President Barack Obama announced a set of deterrent and punitive measures in response to the Obama administration’s finding of Russian interference in the 2016 election. ECF No. 150 at 6. The Russian government immediately promised to retaliate. Carol E. Lee and Paul Sonne, *U.S. Sanctions Russia Over Election Hacking; Moscow Threatens to Retaliate*, W.S.J. (Dec. 29, 2016), <https://perma.cc/EG59-FTBK>. On the day the measures were announced, Defendant spoke by phone to Russia’s ambassador to the United States, Sergey Kislyak, urging the Russians to only take “reciprocal” measures in response to the Obama administration’s actions and not to escalate the dispute into a “tit for tat.” ECF No. 150 at 7; Br. for Ct.-Appointed *Amicus Curiae*, ECF 223-2 at 8; Mikhaila Fogel, *Director of National Intelligence Declassifies Flynn-Kislyak Transcripts*, Lawfare (May 29, 2020), <https://perma.cc/PP58-X5RE>. On December 31, Ambassador Kislyak called Defendant and informed him that Russia had decided not to retaliate after their earlier conversation had

been “taken into account in Moscow.” ECF No. 223-2 at 10 (“Your proposal that we need to act with cold heads, uh, is exactly what is uh, invested in the decision.”). Those conversations were captured on U.S. wiretaps, the transcripts of which have been made public. *See* Fogel, *supra*.

10. On January 12, 2017, *Washington Post* columnist David Ignatius wrote a column disclosing the Flynn-Kislyak conversations and questioning whether Defendant had said anything regarding the Obama administration’s measures. David Ignatius, *Why Did Obama Dawdle on Russia’s Hacking?*, Wash. Post (Jan. 12, 2017), <https://wapo.st/3cwzB7W>. Defendant told other members of the incoming administration, including Vice President-elect Mike Pence, that he had not discussed the Obama administration measures with Kislyak. ECF No. 150 at 8. Vice President Pence repeated that denial in comments to the news media. *Id.* On January 23, 2017, then-White House Press Secretary Sean Spicer said that he had recently spoken to Defendant, who had again denied speaking to the Russian Ambassador about the Obama administration’s measures. *Id.*

11. The following day, January 24, 2017, FBI special agents assigned to “Crossfire Razor,” a counterintelligence investigation focused on Defendant, interviewed Defendant in his office at the White House, and asked Defendant about his conversations with Ambassador Kislyak. ECF 223-2 at 13. Crossfire Razor was part of “Crossfire Hurricane,” the umbrella counterintelligence investigation into possible ties between individuals associated with the Trump campaign and Russia. *Id.* at 4-5. Defendant made the alleged statements at the interview about his conversations with Ambassador Kislyak that would later form the basis for the charges against him.

12. On February 13, 2017, President Trump asked Defendant to resign as national security advisor. ECF No. 150 at 9. In his resignation letter, Defendant stated that he had

“inadvertently briefed the vice president-elect and others with incomplete information regarding my phone calls with the Russian ambassador.” Michael Flynn’s Resignation Letter, N.Y. Times (Feb. 13, 2017), <https://perma.cc/7X28-CK3M>.

13. On May 9, 2017, President Trump fired FBI Director James Comey and, on May 18, 2017, then-Deputy Attorney General Rod Rosenstein appointed former FBI Director Robert Mueller as special counsel overseeing the investigation into Russian interference in the 2016 election, including Crossfire Razor. See Miles Parks et al., *The James Comey Saga, In Timeline Form*, Nat’l Pub. Radio (last visited Sept. 26, 2020), <https://n.pr/3cBeykC>. Based on alleged false statements about the Flynn-Kislyak conversations during Defendant’s January 24, 2017, FBI interview, the Office of the Special Counsel (“OSC”) agreed to charge Defendant with a single charge under 18 U.S.C. § 1001(a) in exchange for Defendant’s cooperation. ECF No. 223-2 at 17-19. On December 1, 2017, Defendant pled guilty to that charge before the Honorable Rudolph Contreras. *Id.* at 19. Shortly thereafter, the case was randomly reassigned to this Court, which held an extension of the plea colloquy on December 18, 2018. *Id.* at 21-22. At that hearing, the Court and the parties agreed to postpone sentencing. *Id.* at 22.

14. In June 2019, Defendant terminated his existing counsel and retained new representation. *Id.* On January 14, 2020, Defendant filed a motion to withdraw his plea. ECF No. 151. On January 29, 2020, Defendant filed a “Motion to Dismiss Case for Egregious Government Misconduct and in the Interest of Justice.” ECF No. 162.

15. On April 24, 2020, the Justice Department disclosed by letter to defense counsel, which was filed with the Court, that the Jensen Review had been ongoing since January 2020, as ordered by Attorney General William Barr. ECF No. 180. In that letter, the Justice Department transmitted to defense counsel handwritten notes by Mr. Priestap, which defense counsel then

referenced in a filing that day as evidence that the Justice Department and FBI had “conspired to destroy Mr. Flynn” during the period from August 2016 leading up to the January 24, 2017, interview. ECF No. 181 at 2 (“These documents show in their own handwriting and emails that [“partisan FBI and DOJ leaders”] intended either to create an offense they could prosecute or at least get him fired.”).

16. The handwritten Priestap notes, created on January 24, 2017, were unsealed and docketed with redactions on April 29, 2020. ECF No. 190 at 4. When he wrote them, Mr. Priestap was the assistant director of the FBI Counterintelligence Division, the top counterintelligence official at the FBI, and was supervising the Crossfire Razor investigation. *See* H. Jud. Comm., Interview of Edward William Priestap, 9 (June 5, 2018), <https://perma.cc/4FR5-YRJM>. The notes include the passage: “What is our goal? Truth/Admission or to get him to lie, so we can prosecute him or get him fired?” ECF No. 190 at 4. The notes continue, “If we’re seen as playing games, WH will be furious.” *Id.*

17. The disclosure of the Priestap handwritten notes generated a significant amount of media and public attention. *See, e.g.*, Emily Jacobs, *FBI Agents Reportedly Tried to Get Michael Flynn to Lie to Get Him Fired*, N.Y. Post (Apr. 30, 2020), <https://perma.cc/67AC-2JYE>; Gregg Re, *FBI Discussed Interviewing Michael Flynn ‘To Get Him to Lie’ and ‘Get Him Fired,’ Handwritten Notes Show*, Fox News (Apr. 30, 2020), <https://perma.cc/BS93-6LEV>; Devlin Barrett and Matt Zapposky, *FBI Notes on Michael Flynn Unlikely to Convince Judge He Was Entrapped, Legal Experts Say*, Wash. Post (Apr. 30, 2020), <https://perma.cc/D3PX-K7BJ>.

18. On May 5, 2020, investigators with the Jensen Review interviewed Priestap. ECF No. 210. The Justice Department then transmitted the Priestap FD-302 to defense counsel on May 18, 2020. ECF. No. 210-1.

19. On May 7, 2020, two days after the Priestap interview, the United States moved to dismiss the charges against Defendant, citing the Priestap handwritten notes in passages discussing the January 24, 2017, Flynn interview. *See* ECF. No. 198 at 8 n.2, 17 n.5.

20. On May 13, 2020, the Court appointed the Honorable John Gleeson as amicus to present arguments in opposition to the government's motion to dismiss. ECF No. 205. Judge Gleeson filed his amicus brief on June 10, 2020. ECF. No. 225. In it, Judge Gleeson describes in detail the circumstances of the January 24, 2017, interview. *See id.* at 13-15.

21. In its response to Judge Gleeson's brief, the United States again cited the Priestap handwritten notes in a discussion of (1) the FBI's decision not to show Flynn the text of the Kislyak calls, ECF No. 227 at 4 (quoting the notes as saying that the FBI "regularly show[s] subjects evidence with the goal of getting them to admit their wrongdoing"); (2) in a discussion of whether the record evidence could be read to suggest that the interview was undertaken "to elicit false statements and thereby criminalize Mr. Flynn," *id.* at 25 (quoting Gov't's Mot. to Dismiss, ECF No. 198 at 16-17); and (3) in support of the government's contention that the record evidence could be read to show "confusion and disagreement about the purpose and legitimacy of the interview and its investigative basis," *id.* at 27, which would be relevant to the materiality of the alleged false statements during the January 24, 2017, interview.

22. The response by defense counsel to the amicus submission likewise references the Priestap handwritten notes. For instance, defense counsel states that the Priestap notes indicate Priestap's "concern that some in the FBI sought to interview Flynn so as to 'get him to lie, so we can prosecute him or get him fired.'" ECF No. 228 at 20 (quoting ECF No. 198-11). Defense counsel also cites the Priestap notes as supporting the proposition that "FBI and DOJ leaders intended either to create an offense they could prosecute or at least get General Flynn fired."

ECF No. 228 at 26. The response by defense counsel further characterizes the Priestap notes as particularly important exculpatory evidence. *Id.* at 20 (describing notes as some of the “most damning evidence”).

23. On May 19, 2020, Defendant filed a petition for a writ of mandamus with the U.S. Court of Appeals for the District of Columbia Circuit seeking an order directing the Court to grant the government’s motion to dismiss and challenging the appointment of an amicus curiae. Emergency Pet. for Writ of Mandamus, *In re: Michael T. Flynn*, No. 20-5143 (D.C. Cir. filed May 19, 2020). The petition cites the Priestap handwritten notes. *Id.* at 3. During oral argument before the panel, defense counsel again cited to the Priestap notes, characterizing them as reflecting a discussion between Priestap and then-FBI Deputy Director Andrew McCabe “about trying to get the defendant to lie.” ECF No. 241-4 at 16:7-22.

24. On June 24, 2020, the three-judge panel, with Judge Wilkins dissenting, granted the petition in part. The panel directed the Court to grant the government’s Rule 48(a) motion to dismiss and dismissed the challenge to the amicus appointment as moot. *In re: Michael T. Flynn*, No. 20-5143, slip op. (D.C. Cir. June 24, 2020). On July 30, 2020, the full Court of Appeals agreed to rehear the petition for a writ of mandamus en banc and vacated the panel decision. *In re: Michael T. Flynn*, No. 20-5143 (D.C. Cir. July 30, 2020) (Order). On August 31, 2020, the D.C. Circuit issued a per curiam opinion, with Judges Henderson and Rao dissenting, reversing the panel and denying the petition for a writ of mandamus. *In re: Michael T. Flynn*, No. 20-5143, slip op. (D.C. Cir. Aug. 31, 2020).

25. Following the per curiam reversal on August 31, 2020, this Court scheduled oral argument for September 29, 2020. During the course of oral argument, the United States referenced the Priestap notes at least twice, and again characterized them as an actual record of

Mr. Priestap’s belief on January 24, 2017—that the interview was an effort to get Defendant to lie. See Anna Salvatore and Benjamin Wittes, *Oral Argument Summary: U.S. v. Flynn* (Sept. 29, 2020), <https://perma.cc/DJS7-XQED> (“[Acting Assistant Attorney General Kenneth] Kohl adds that one member of the FBI leadership ruminated in his notes ‘what our goal’ is in prosecuting Flynn—was it to get him fired.”). Deputy Assistant Attorney General Hashim Mooppan cited the notes in connection with his comment to the Court, “What if it’s true that it’s a witch hunt?,” and criticized amicus for not addressing these “contemporaneous notes” of the “FBI counterintelligence chief himself . . . raising questions about whether the” point of the interview was to get Defendant to lie. See Tierney Sneed and Josh Kevensky, *Sorry Mike Flynn, Judge Not Ready to Dismiss Your Case*, Talking Points Memo (Sept. 29, 2020), <https://perma.cc/SF5Y-DWTR>; Oral Arg., Sept. 29, 2020.

26. The prominence of the Priestap handwritten notes as claimed exculpatory evidence in support of the United States’ and the defendant’s motions to dismiss has generated significant public interest and debate about their meaning. See ¶ 17, *supra*. Compare John Malcom et al., *Michael Flynn Finally Seems to be Getting the Justice he Deserves*, Heritage Found. (May 11, 2020), <https://perma.cc/SP2P-6NUR> (“[P]riestap’s notes show that he questioned whether [the FBI’s] true objective was to get the truth or to get Flynn to lie in order to prosecute him or get him fired.”) (quotation marks omitted), and Eli Lake, *The Railroad of Michael Flynn*, Commentary (June 2020), <https://perma.cc/H2D4-CDRV> (“According to handwritten notes disclosed through a review of the Flynn prosecution by U.S. attorney Jensen, Priestap found it difficult to make sense of the investigative purpose of the interview.”), with Barbara McQuade, *Eli Lake’s Omissions and Misleading Facts in Defense of Michael Flynn*, Just Security (May 27, 2020), <https://perma.cc/VC5S-7XAW> (“A goal of ‘get him to lie’ does

not suggest that this was a perjury trap either, defined as an interview conducted for the sole purpose of catching someone in a lie with no legitimate investigative purpose.”), and Quinta Jurecic and Benjamin Wittes, *Flynn Redux: What Those FBI Documents Really Show*, Lawfare (May 1, 2020), <https://perma.cc/WVJ6-LCZ2> (“[I]t’s wrong for the bureau to set up an interview in the absence of a viable case in order to induce a witness to lie for purposes of prosecution, but there’s no evidence that is what happened—merely evidence that the possibility was on a list of possible strategic goals for the interview.”).

27. Accordingly, Mr. Priestap’s statements regarding the meaning of the passages in his handwritten notes are now directly material to the resolution of several questions before the Court, including whether the FBI agents who interviewed Defendant on January 24, 2017, intended to create a “perjury trap,” as the Attorney General has alleged. As noted, *The New York Times* reported that Priestap told Jensen Review investigators he “knew of no effort to set [Defendant] up” and that “media reports about his notes misconstrued them.” Exhibit A, Goldman and Benner, *supra*.

28. As such, and as explained more fully in the accompanying Memorandum of Points and Authorities, the public has a common law right of access to the Priestap FD-302, and the strong presumption in favor of access cannot be overcome.

REQUEST FOR RELIEF

29. Applicant seeks an order directing the Clerk of the Court to file the Priestap FD-302 on the public docket.

30. Applicant seeks any further relief that the Court deems just and proper.

ORAL ARGUMENT REQUESTED

31. Applicant respectfully requests oral argument.

Dated: October 1, 2020

Respectfully submitted,

/s/ Gabriel Rottman

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPLICATION FOR THE PUBLIC DOCKETING OF COURT RECORDS IN CRIMINAL MATTER NO. 17-cr-232 (EGS)** was filed with the Clerk of the Court by email, and served on the following via email and U.S. Mail:

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This the 1st day of October, 2020.

/s Gabriel Rottman

Gabriel Rottman