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August 22, 2019

Mr. Daniel Noble
Permanent Select Committee on Intelligence
U.S. House of Representatives
Daniel.Noble@mail.house.gov

Re: ***HPSCI Subpoenas to LTG. Michael Flynn (Ret.)***

Dear Mr. Noble:

We write to reply to your latest email of August 16, 2019, further setting out what you represent is the Committee's position on additional document production and testimony by Mr. Flynn. Because your position is so unreasonable and unethical, we are copying Chairman Schiff and Ranking Member Nunes. Perhaps the Committee will decide to exercise better judgment.

With respect to further document production, you know at least as well as we do that Mr. Flynn has already provided large caches of documents to several congressional committees, *including* the House Permanent Select Committee on Intelligence that you serve. Over the last two years he has responded to multiple subpoenas and produced thousands of pages of documents on behalf of himself and his former business the Flynn Intel Group (FIG).

This has been extraordinarily time consuming and financially exhausting. FIG is no longer in business. It ended in late 2016. Mr. Flynn cooperated fully with the Special Counsel investigation, spending countless hours and hundreds of thousands of dollars over two years to assist the government. He does not have the resources to comply with yet more open-ended congressional fishing expeditions.

Moreover, the Department of Justice took possession of all his electronics and files. You are free to contact the Department for whatever materials it is willing to produce. Otherwise, we suggest that you perform your own searches in the massive document sets that have already been sent to the various Committees, including the HPSCI.

As far as testimony is concerned, we have already informed you that *at our insistence*, Mr. Flynn will assert his Fifth Amendment privilege and will not answer any questions. He remains, after all, a defendant in a criminal prosecution that has not been concluded. We attach the docket entry from Judge Sullivan dated yesterday.

Your demand that he appear at a hearing merely to assert the privilege against self-incrimination is transparently pure harassment, because it cannot achieve any legitimate congressional purpose.

The tactic of calling a witness for the sole purpose of requiring him to "take the Fifth" has been widely condemned as unethical and unprofessional in every forum in which the specter has arisen.

For example, it is improper for a prosecutor to put a witness before a grand jury to take the Fifth Amendment. Section 3-4.6(h) of the 2018 American Bar Association Standards Relating to the Administration of Criminal Justice states that a prosecutor presenting a case to a grand jury should not seek to compel the appearance of a witness whose activities are the subject of the grand jury's inquiry, if the witness states in advance that if called the witness will claim the constitutional privilege not to testify and provides a reasonable basis for such claim.

The same is true in a trial. If a matter proceeds to trial, Section 3-6.7(c) cautions that the prosecutor:

> should not call a witness to testify in the presence of the jury, or require the defense to do so, when the prosecutor knows the witness will claim a valid privilege not to testify.

These principles apply to state and federal prosecutors alike, but the U.S. Department of Justice has developed them further in the United States Attorneys' Manual. Section 9-11.154, dealing with grand jury testimony, states that ordinarily a target of the investigation should be excused from appearing after stating in writing an intention to invoke the privilege.

Courts agree that witnesses cannot be called to the stand to "take the Fifth." *U.S. v. Reed,* 173 Fed. Appx. 184 (3rd Cir. 2006) (unpublished) (citing cases from several circuits). *See also U.S. v. Ritz*, 548 F.2d 510 (5th Cir. 1977) (reversing conviction when witness was placed on stand and invoked the Fifth); *Fletcher v. United States*, 332 F.2d 724 (D.C. Cir. 1964) (finding prejudicial error). Not even a criminal defendant has a right to put a witness on the stand who will assert the Fifth Amendment. *U.S. v. Bolts*, 558 F.2d 316 (5th Cir. 1977).

It would be disturbing if Congress refused to exercise the same restraint—in this specific and limited scenario—as the Department of Justice has and as the ethical rules and legal decisions demand. In Mr. Flynn's case, you have our assurance that he *will* refuse to answer *any* questions other than confirming his name. And his invocation of his Fifth Amendment right is obviously well-founded and not merely an avoidance device: *he is a criminal defendant in an ongoing criminal case*.

We encourage you to recognize the wisdom of both points in this letter. There is no legitimate reason to continue seeking documentary material that has already been

produced to your committees, was combed endlessly by FBI Agents and a team of lawyers from the Special Counsel's Office, and remains in the government's possession.

It is, at best, unseemly and unethical to compel any citizen—let alone one who has served our country with such distinction for so long—to go through a meaningless exercise only to cause expense and embarrassment, with exactly zero legitimate gain for the Committee.

Sincerely,

/s/*Sidney Powell*
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cc: Adam B. Schiff, Chairman
Devin Nunes, Ranking Member