

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**
Alexandria Division

UNITED STATES OF AMERICA,	:	
	:	
v.	:	Criminal Case No. 1:18-CR-457 (AJT)
	:	
BIJAN RAFIEKIAN et al.	:	
	:	
Defendants.	:	

**DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO COMPEL RECORDS**

Defendant Bijan Rafiekian, through counsel, respectfully moves the Court to compel the government to produce: (1) all information within the United States government’s possession, including the State Department and the intelligence agencies, that indicates that Recep Tayyip Erdoğan (“Erdoğan”) has ever been a member of, or otherwise affiliated with or sympathetic to, the Muslim Brotherhood, and (2) all information within the United States government’s possession, including within the State Department, that tends to show that Turkish government officials, including Erdoğan, would disagree with or disapprove of any comparison between Fethullah Gülen (“Gülen”) or his followers and the Muslim Brotherhood.

BACKGROUND

The indictment charges that Mr. Rafiekian knowingly acted as an agent of the government of Turkey.¹ To establish agency, it is not enough to show that Flynn Intel Group, Inc. (“FIG”) took actions that would meet with approval by the Turkish government or that would benefit the Turkish

¹ Count 1 of the Indictment alleges that Mr. Rafiekian (1) conspired to act as an agent of Turkey without prior notification to the Attorney General and (2) willfully made false statements in, and omissions of material fact from, documents filed with the Attorney General under the provisions of the Foreign Agents Registration Act (“FARA”). Indictment at 17–18. Count 2 alleges that Mr. Rafiekian acted as an agent of Turkey without prior notification to the Attorney General in violation of 18 U.S.C. § 951. Indictment at 19.

government. To prove actual agency, as the indictment charges, the government must prove more, that FIG was acting under “the direction or control of a foreign government or official.” 18 U.S.C. §951(d). Evidence that FIG took action that the government of Turkey, or President Erdoğan, would disapprove flatly contradicts the allegation that FIG was acting under Turkey’s direction and control.

It is probably true that this matter would never have come to the attention of the FARA unit in the Department of Justice if Michael Flynn had not published an op-ed in The Hill newspaper on election day in 2016.² DOJ officials jumped to the conclusion that this op-ed must have been written under direction and control of President Erdoğan and Turkish officials loyal to him. The op-ed urged a closer relationship with the government of Turkey, which it claimed was our strongest ally against ISIS in Iraq and Syria. The op-ed also took aim at Fethullah Gülen, a Muslim cleric living in Pennsylvania, whom President Erdoğan believed was the source of the coup attempt against in him July 2016. In their general view about Gülen, Mr. Flynn and Mr. Rafiekian appear to share common ground with Erdoğan. But as is so often true, the devil is in the details. In fact, the op-ed deviates sharply from anything that President Erdoğan or other Turkish officials would have approved.

The Flynn op-ed demonized Gülen by comparing him to the founders and followers of the Muslim Brotherhood:

Gülen portrays himself as a moderate, but he is in fact a radical Islamist. . . . For those of us who have closely studied the careers of Seyed Qutb and Hasan al Bana, the founders and followers of the Muslim Brotherhood, Gülen’s words and activities are very familiar. The late Seyed Qutb in particular was very much in the Gülen mold. The author of 24 books on education and the arts, he assembled an inner circle of intellectuals and influential politicians. But contrary to this well-masked façade, Qutb’s writings provided the inspiration for terrorist groups like

² Lt. Gen. Michael T. Flynn (R), *Our Ally Turkey Is in Crisis and Needs Our Support*, THE HILL, Nov. 8, 2016, <https://thehill.com/blogs/pundits-blog/foreign-policy/305021-our-ally-turkey-is-in-crisis-and-needs-our-support>.

Al-Qaeda. Qutb was hanged in 1966 in Egypt for instigating rebellion. Likewise, Hasan al Bana, an Egyptian who died in 1949, defined the first phase of pre-emptive jihad as a long and quiet process that can take as long as a quarter of a century, to prepare the forces for a decisive strike. Al Bana famously declared that the only acceptable form of law is Sharia. To professionals in the intelligence community, the stamp of terror is all over Mullah Gülen's statements in the tradition of Qutb and al Bana.

Reading the op-ed, one would think that the only force more insidious than Gülen is the Muslim Brotherhood. Yet it has been publicly reported that Erdoğan is an ally of and otherwise sympathetic to the Muslim Brotherhood,³ which if true would flatly contradict the core government hypothesis that FIG and its officers and directors Flynn and Rafiekian were acting under the direction and control of Turkish government officials. Moreover, when defendant Ekim Alptekin was interviewed by the FBI on May 24, 2017, as alleged in Count Three of the indictment, he told the FBI that when he read the op-ed he thought it was a terrible idea to equate the Gülenists to the Muslim Brotherhood, and when he asked Mr. Rafiekian if he could make changes, Mr. Rafiekian refused, saying it would not be appropriate.⁴

Here the government was given a strong clue—more accurately, a flat declaration—that the core theory underlying the prosecution was false. In the two years since Alptekin was interviewed, and certainly before the government decided to indict this case, the government lawyers could have asked whether President Erdoğan and his subordinates would have directed an op-ed to be published that compared Erdoğan's archenemy to the Muslim Brotherhood. Surely, the answer can be found among the Turkish experts at the State Department or the intelligence agencies to

³ See, e.g., Sebnem Arsu, *Turkey Open to Bids for Refuge by Muslim Brotherhood Exiles*, N.Y. TIMES, Sept. 15, 2014, <https://www.nytimes.com/2014/09/16/world/europe/turkey-open-to-bids-for-refuge-by-muslim-brotherhood-exiles.html> (discussing Erdoğan's sympathy towards leaders of the Muslim Brotherhood and offering refuge to them); *Recep Tayyip Erdogan: Turkey's Pugnacious President*, BBC, Apr. 17, 2017, <https://www.bbc.com/news/world-europe-13746679> (noting Erdoğan's solidarity with the Muslim Brotherhood).

⁴ Of note, although the indictment includes four separate counts alleging separate false statements by Alptekin during the May 24, 2017 interview, his statements disapproving the Flynn op-ed were not among the statements alleged to be false.

which the FBI and the Department of Justice have easy access. In a search for truth, nothing would be so illuminating, nor more powerfully exculpatory, as evidence from the government's own experts that the core prosecution theory was false.

Because it seemed self-evident that the government never looked into the question, counsel for Mr. Rafiekian sent a letter to the government requesting discovery on this issue pursuant to Federal Rule of Criminal Procedure 16, *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972) and *Kyles v. Whitley*, 514 U.S. 419 (1995).⁵ In particular, Mr. Rafiekian requested the following categories of documents at issue in this motion:

- 8. All information within the United States government, including the State Department and the intelligence agencies, that indicates that Recep Tayyip Erdoğan has ever been a member of, or otherwise affiliated with, the Muslim Brotherhood.
- 9. All information within the United States government, including within the State Department, that tends to show that Turkish government officials, including Recep Tayyip Erdoğan, would disagree with or disapprove of any comparison between Fethullah Gülen or his followers and the Muslim Brotherhood.

On January 25, 2019, the government responded by email to this request. Although the government gave boilerplate assurances that it would comply with its *Brady*, *Giglio*, *Jencks*, and Rule 16 obligations, it refused to produce any documents in response to the above requests, incorrectly claiming they were “not relevant to this prosecution.”⁶ Accordingly, to date, the government has produced no documents pursuant to either request. Contrary to the government's assertions, the requested documents are unquestionably relevant and material to the defense, and the Court should compel their prompt disclosure.

⁵ See Letter from Mark MacDougall to James P. Gillis (Jan. 18, 2019), at 2, attached hereto as Exhibit 1.

⁶ See Email from James P. Gillis to Mark MacDougall (Jan. 25, 2019), attached hereto as Exhibit 2.

ARGUMENT

I. The Court Should Compel Disclosure of Information Relating to Erdoğan's Sympathies to the Muslim Brotherhood

The government is obligated to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. *See, e.g., Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419 (1995). The burden is on the government to learn of and disclose such evidence before trial. *See Kyles*, 514 U.S. at 437 (“[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case . . .”).

Exculpatory evidence—*i.e.*, information that tends to cast doubt on the defendant’s guilt with respect to any essential element in any charged count—is “favorable” information that must be disclosed. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *see also Brady*, 373 U.S. at 87. Information is material if “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Bagley*, 473 U.S. at 682. At the pretrial stage, where “an accused cannot possibly know, but may only suspect, that particular information exists which meets [the *Brady*] requirements, he is not required . . . to make a particular showing of the exact information sought and how it is material and favorable.” *United States v. King*, 628 F.3d 693, 702, 703 (4th Cir. 2011) (quoting *Love v. Johnson*, 57 F.3d 1305, 1313 (4th Cir. 1995)) (noting that a “defendant cannot demonstrate that suppressed evidence would have changed the trial’s outcome if the Government prevents him from ever seeing that evidence”). Doubtful questions should be resolved in favor of disclosure. *Kyles*, 514 U.S. at 439 (quoting *United States v. Agurs*, 427 U.S. 97, 108 (1976)) (“[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.”).

Here, unlike many *Brady* issues that courts must consider, the defense has identified the specific information it seeks and the likely—and obvious—places where the prosecutors should look. Almost two years ago, and before formal charges were ever filed, the FBI Agents (and DOJ attorneys) were told by the person they allege to speak for the government of Turkey that equating the Gülenists to the Muslim Brotherhood was a terrible idea. Under the circumstances, the search for the requested exculpatory evidence is long overdue.

CONCLUSION

For the foregoing reasons, Mr. Rafiekian respectfully requests that the Court grant his Motion to Compel Records.

Date: April 26, 2019

Respectfully submitted,

/s/

Mark J. MacDougall (*Pro Hac Vice*)
Stacey H. Mitchell (*Pro Hac Vice*)
John C. Murphy (*Pro Hac Vice*)
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/s/

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CERTIFICATE OF SERVICE

I hereby certify that, on the 26th day of April 2019, true and genuine copies of Defendant Rafiekian's Memorandum of Law in Support of Motion to Preclude Use of "Kickback" and Synonymous Terms was sent via electronic mail by the Court's CM/ECF system to the following:

James P. Gillis
John T. Gibbs
Evan N. Turgeon
U.S. Attorney's Office (Alexandria-NA)
2100 Jamieson Avenue
Alexandria, VA 22314
Telephone: (703) 299-3700
Email: james.p.gillis@usdoj.gov
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/s/
Robert P. Trout (VA Bar # 13642)

EXHIBIT 1

Akin Gump

STRAUSS HAUER & FELD LLP

MARK J. MACDOUGALL

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mmacdougall@akingump.com

January 18, 2019

By Email

James P. Gillis
John T. Gibbs
Evan N. Turgeon
United States Attorney's Office
2100 Jamieson Avenue
Alexandria, Virginia 22314

Re: *United States v. Bijan Rafiekian and Kamil Ekim Alptekin*, No. 1:18-cr-457 (E.D. Va.)

Dear Counsel:

This letter contains discovery requests on behalf of Mr. Rafiekian in the above-referenced case under Fed. R. Crim. 16, *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *Kyles v. Whitley*, 514 U.S. 419 (1995), their respective progeny, and other authority. We recognize, of course, that the government has produced discovery under a letter from Mr. Gillis dated January 2, 2019, and is in the process of producing additional discovery.

Our discovery requests (and the government's discovery obligations in this case under Fed. R. Crim. P. 16, *Brady*, and otherwise) should be understood to apply not only to documents, materials, and information in the possession, custody, or control of the National Security Division and Criminal Division of the Department of Justice (including, without limitation, the FARA Registration Unit of the Counterintelligence and Export Control Section) the Office of Special Counsel, the U.S. Attorney's Office for the Eastern District of Virginia, the FBI, the NSA, and CIA, but also to documents, materials, and information in the possession, custody, or control of all other federal and state agencies that have been involved in any respect in the government's investigation of conduct relating to the subject matter of the indictment, including in particular Flynn Intel Group, Inc.'s (FIG) Foreign Agents Registration Act (FARA) filing. Please let us know the government's position in that regard so that if there is any disagreement regarding scope we can attempt to resolve it.

1. Pursuant to Fed. R. Crim. P. 16(a)(1)(B), please produce all notes and other documents reflecting all statements of Bijan Rafiekian (including but not limited to agent notes of encounters with Kamil Ekim Alptekin and Inovo). Under Rule 16, defendants are entitled to receive all documents containing statements—not simply interview memoranda created by agents after an



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encounter. Recorded statements of defendant (in whatever form) are not themselves subject to claims of privilege or work product protection. If the government claims that agent (or other) notes contain both recorded statements of defendants and work product or material that is subject to a claim of privilege, please produce all notes with the statements unredacted, and identify the basis for any redaction that you make.

2. All records or other information of instances wherein Bijan Rafiekian, while in the employ of the United States, took action that might reasonably be construed as furthering the interests of the United States.

3. All records of commendations or awards for Bijan Rafiekian based on his work while in the employ of the United States.

4. All records of training Bijan Rafiekian received while in the employ of the United States.

5. All internal communications that mention, reference, or allude to Bijan Rafiekian, including all communications with, between or among the CIA, the NSA, Department of Defense or any other agencies or departments of the United States government.

6. Please confirm that no oral statements were made by defendant Rafiekian that have not been recorded and already produced to defendant. *See* Fed. R. Crim. P. 16(a)(1)(A).

7. All information relating to any United States government contacts, directly or through any third party, with the Government of Turkey regarding Fethullah Gülen's extradition.

8. All information within the United States government, including the State Department and the intelligence agencies, that indicates that Recep Tayyip Erdoğan has ever been a member of, or otherwise affiliated with, the Muslim Brotherhood.

9. All information within the United States government, including within the State Department, that tends to show that Turkish government officials, including Recep Tayyip Erdoğan, would disagree with or disapprove of any comparison between Fethullah Gülen or his followers and the Muslim Brotherhood.

10. All FBI 302 reports, or similar reports from other United States government agencies, related to this case or Bijan Rafiekian.

11. Any documents or information tending to demonstrate that Bijan Rafiekian had no intent to harm the United States.

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12. Any documents or information tending to demonstrate that from the time of the engagement of FIG with Inovo BV, through March 7, 2017, Bijan Rafiekian and/or General Michael Flynn were willing to have FIG register under FARA, or otherwise were not opposed to registering under FARA.

13. Documents or information tending to demonstrate that the government of Turkey was not the source of the funds paid to FIG per the agreement between Inovo and FIG, including any records tending to show that Inovo BV (Inovo) or Alptekin or an entity affiliated with Alptekin was the source funds paid to FIG.

14. A list of all instances where the United States has learned of potential violations of FARA and declined to prosecute, and the reasons the United States declined prosecution, and all documentation related to the investigation of these cases.

15. In your email of January 2, 2019, you described three hard drives totaling ten TB that the government was providing as part of Rule 16 discovery, plus a thumb drive containing about 67,500 pages of additional documents. Some, as you noted, may be duplicative. While you expressed your belief that this production represented “nearly all of the documents in the government’s possession relating to the investigation of Rafiekian and Alptekin,” you also said there would be additional, but limited productions. Since receiving the hard drives and thumb drive on January 3, 2019, we have received only one additional production of almost 1,000 pages, on January 9. Given the challenges of identifying relevant documents, from electronic media holding as much as ten TB of data, you have earlier told us that you intend to provide us with copies of the core documents on which the government intends to rely in making its case, but you are unable to do so until the government shutdown ends and your office has the resources to complete the task. It is therefore our understanding that, without regard to the additional materials that we are seeking in this letter, there is additional discovery that the government intends to provide, and as soon as the government shutdown ends, the government is committed to separately providing to the defense copies of all the documents on which the government intends to rely in proving its case. Please let us know if anything in this paragraph is not correct.

16. Without limiting the scope of the government’s discovery obligations and undertakings in this case, please produce pursuant to Rule 16(a)(1)(E) all documents and tangible objects that are material to the preparation of the defense, or that the government intends to use in its case in chief at trial, or that were obtained from or belong to defendant. *See, e.g., United States v. Stein*, 488 F.Supp.2d 350, 356-357 (S.D.N.Y. 2007) (“The materiality standard normally is not a heavy burden; rather, evidence is material as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal. Evidence that the government does not intend to use in its case in

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chief is material if it could be used to counter the government’s case or to bolster a defense.”). We reserve the right to follow up, of course, with additional discovery requests as this case proceeds.

17. Please produce all material to which the defense is entitled under *Brady* and its progeny, including *Giglio* and *Kyles*, and if the material is already contained in the discovery that the government has produced and is in the process of producing, please specify the document identifiers for the material we seek and all locations where the material is contained. The scope of *Brady* is, of course, very broad. See Justice Manual (JM) § 9-5.001. For instance, a “prosecutor must disclose information that is inconsistent with any element of any crime charged” and “must disclose information that either casts a substantial doubt upon the accuracy of any evidence—including but not limited to witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal of the defendant for a charged crime.” *Id.* What is more, the disclosure requirement “applies to information regardless of whether the information subject to disclosure would itself constit

18. ute admissible evidence.” *Id.* Under *Brady*, a prosecutor must assess evidence collectively. *Kyles v. Whitley*, 514 U.S. 419, 436–37 (1995); see also JM § 9-5.001 (“While items of information viewed in isolation may not reasonably be seen as meeting the standards outlined in paragraphs 1 and 2 above, several items together can have such an effect. If this is the case, all such items must be disclosed.”).

Under *Kyles* and its progeny, please ensure that your office reviews and produces all material documents, objects, and other information not only in your immediate possession, custody, and control, but also in the possession, custody, or control of the FBI, the NSA and CIA, as well as the files of all other agencies involved in the government’s investigation. Although we will be following up with more specific *Brady* requests, we note at this point our position that all documents, recordings, and other records of unsuccessful efforts by any government cooperator to develop evidence against any person, including but not limited to defendants, constitutes *Brady* material.

For each request, we ask that the government inform us whether: (1) the material exists and will be produced; (2) the material does not exist; or (3) the material exists, but the government does not believe that it is subject to disclosure.

Please do not hesitate to contact me if you have any questions or wish to discuss anything.



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Sincerely,

s/ Mark J. MacDougall

Mark J. MacDougall

Attachment

cc: Stacey Mitchell
Robert Trout

EXHIBIT 2

From: [Gillis, James P. \(USAVAE\)](#)
To: [MacDougall, Mark](#); [Trout, Robert \(External\)](#)
Cc: [Gibbs, John \(USAVAE\)](#); [Turgeon, Evan \(NSD\) \(JMD\)](#)
Subject: United States v. Rafiekian
Date: Friday, January 25, 2019 9:49:21 AM

****EXTERNAL Email****

Dear Bob and Mark,

I have your letter of January 18, 2019. Our responses correspond to the numbered paragraphs in your letter.

1. We will comply with all of our Rule 16 obligations.
2. This request is for information not relevant to this prosecution and is, in any event, overbroad. We will of course comply with all of our Brady, Giglio, Jencks, and Rule 16 obligations.
3. This request is for information not relevant to this prosecution. We will of course comply with all of our Brady, Giglio, Jencks, and Rule 16 obligations.
4. This request is for information not relevant to this prosecution and is, in any event, overbroad. We will of course comply with all of our Brady, Giglio, Jencks, and Rule 16 obligations.
5. This request is for information not relevant to this prosecution and is, in any event, overbroad. We will of course comply with all of our Brady, Giglio, Jencks, and Rule 16 obligations.
6. We will comply with all of our Rule 16 obligations.
7. This request is overbroad. It can hardly be contested that the Turkish government sought the extradition of Gulen or that the United States did not extradite him. I will request that our Office of international Affairs assemble the requests themselves and the U.S. government's responses to the Turkish government. I will also ask OIA to search its files for mention of Gen. Flynn, Rafiekian, Alptekin, or Inovo in connection with the extradition requests.
8. This request is for information not relevant to this prosecution.
9. This request is for information not relevant to this prosecution.
10. This request is beyond the scope of our discovery obligations. Nonetheless, we have made a number of the 302s related to this investigation available for your review and, as we've discussed, are prepared to make all of them available upon certain conditions. We will of course comply with all of our Brady, Giglio, Jencks, and Rule 16 obligations.
11. We will of course comply with all of our Brady, Giglio, Jencks, and Rule 16 obligations.
12. This request is for information not relevant to this prosecution since the indictment does not charge nor mention a failure to file under FARA. Nonetheless, I believe that this information

has been and will be included in our discovery productions. We will of course comply with all of our Brady, Giglio, Jencks, and Rule 16 obligations.

13. This information has been and will be included in our discovery productions.
14. This request is for information not relevant to this prosecution.
15. I do intend to produce what I consider to be the core documents. This, of course, represents my own work product and that of others on the prosecution team, and we are producing them despite any obligation to do so. The government shutdown has continued to hamper our efforts to compile clean copies of these, but I hope to be able to produce them today or Monday. There will also be approximately eight DVDs that we will produce containing the productions received from FIG, Alptekin, and others. Although these may have been produced in the original batch, I believe that these will be easier for you to review. This project, too, has been affected by the furlough of our support staff. Still, we are making every effort to produce these documents, and we are not waiting for the shutdown to end before doing so.
16. We will of course comply with all of our Brady, Giglio, Jencks, and Rule 16 obligations.
17. (and 18) We will of course comply with all of our Brady, Giglio, Jencks, and Rule 16 obligations.

In complying with our discovery obligations, we are aware of our obligation to make reasonable inquiry with those who may be considered part of the prosecution team.

Best regards,

Jim

James P. Gillis
Assistant United States Attorney
Office: (703) [REDACTED]
Mobile: [REDACTED]