

November 20, 2019

VIA EMAIL AND FEDEX

Lily Fu Claffee
Executive Vice President and General Counsel
Fox News
The News Corporation Building
1211 Avenue of the Americas
New York, New York 10036
Email: ldepartment@foxnews.com

Re: Fox News Segment Regarding Lieutenant Colonel Alexander Vindman

Dear Ms. Claffee:

This Firm represents Lieutenant Colonel Alexander Vindman. Our client has devoted his life to protecting the freedoms that Americans enjoy. He is a soldier, not a political activist or a politician. He has selflessly dedicated his entire professional life to serving the United States, including for more than 20 years as an active-duty officer of the United States Army. As an infantry officer, LTC Vindman served multiple tours overseas, including in South Korea and Germany, and deployed to Iraq for combat operations. In Iraq, LTC Vindman was wounded in an IED attack and awarded a Purple Heart. Not once in his twenty-year career has LTC Vindman sought out the public eye. LTC Vindman came into the public eye not because of his actions, but despite them.¹

We are compelled to write because of a deeply flawed and erroneous Fox News segment (the “Segment”) that first aired on October 28, 2019, the gist of which has since been republished countless times, including by the President of the United States to his 66.9 million Twitter followers. Laura Ingraham reported the Segment during her show, “The Ingraham

¹ LTC Vindman has testified on matters concerning his work on the National Security Council as a result of compulsory legal process—a Congressional subpoena. As he has repeatedly made clear before the House Intelligence Committee, he appeared at his deposition on October 29, 2019, and for his testimony on November 19, 2019, “pursuant to a subpoena.” *Deposition of LTC Alexander S. Vindman Before the H. Permanent Select Comm. on Intelligence 14* (Oct. 29, 2019), available at <https://s.wsj.net/public/resources/documents/Vindman-CPRT-116-IG00-D011.pdf>; see *id.* at 232.

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Angle,”² along with John Yoo, who was a panelist invited by Fox News to participate in its coverage of LTC Vindman.

During the Segment, Fox News reported “breaking news” that LTC Vindman committed the crime of “espionage” against the United States on behalf of Ukraine (the “Allegations”). Espionage is a felony under federal law punishable by death. *See* 18 U.S.C. § 794.³ All of the panelists on the show are prominent lawyers, including Mr. Yoo, a former Deputy Assistant U.S. Attorney General and current U.C. Berkeley law professor. When Mr. Yoo accused LTC Vindman of a felony, he spoke with the gravitas and precision of an expert.

Prior to Fox News’ publication of the Segment, LTC Vindman had never in his decorated 20-year career of service to his country been accused of having dual loyalties or committing espionage. Fox News’ report on LTC Vindman sparked a torrent of republications and copycat false charges. Yesterday, the President of the United States built on and amplified Fox News’ falsehoods concerning LTC Vindman in a retweet to his 66.9 million Twitter followers.⁴ The President’s son personally attacked LTC Vindman’s loyalty on your network.⁵

The Segment also created a false factual basis to render sinister otherwise innocuous facts. With the backdrop of Fox News’ false and defamatory reporting that LTC Vindman committed “espionage” for Ukraine, yesterday Ms. Ingraham posted on Twitter: “Why would Ukraine offer the post of defense minister to a U.S. gov’t official working in their region?”

² *The Ingraham Angle*, FOX NEWS, <https://www.foxnews.com/shows/ingraham-angle> (last visited Nov. 14, 2019).

³ 18 U.S.C. § 794(a) (“Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits to any foreign government . . . information relating to the national defense, shall be punished by death . . .”); 10 U.S.C. § 903a, Art. 103a (defining espionage as a violation of the Uniform Military Code of Justice).

⁴ *See* Dan Scavino Jr. (@Scavino45), White House Director of Social Media and Assistant to the President, TWITTER (Nov. 19, 2019, 1:38 PM PST), <https://twitter.com/Scavino45/status/1196860213233684480> (“ICYMI: Lt. Col. Vindman was offered the position of Defense Minister for the Ukrainian Government THREE times! #ImpeachmentSHAM.”); Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 19, 2019), <https://twitter.com/realDonaldTrump> (retweeting Scavino tweet).

⁵ The President’s son, Donald Trump Jr., referred to the Segment on Fox News’ “Fox & Friends” show in an interview with Steve Doocy, where he said about LTC Vindman, “now it turns out he’s you know, talking to the Ukraine,” and he characterized LTC Vindman as a political activist. John Bowden, *Trump Jr. attacks Vindman: ‘Total absolutism if you are a leftist veteran’*, THE HILL (Oct. 30, 2019, 1:36 PM), <https://thehill.com/homenews/administration/468144-trump-jr-attacks-vindman-total-absolutism-if-you-are-a-leftist>. The day after the Segment first aired, the President’s personal attorney, Rudy Giuliani, tweeted, “A US gov. employee who has reportedly been advising two gov’s? No wonder he is confused and feels pressure.” Rudy Giuliani (@RudyGiuliani), TWITTER (Oct. 29, 2019, 2:49 PM PST), <https://twitter.com/RudyGiuliani/status/1189253035366780928>.



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What does that reveal, if anything, about how Ukraine perceived him?”⁶ And last night, Fox News host Tucker Carlson said on air, “Now we learn that the Ukrainian government repeatedly asked Vindman to take formal control of the entire Ukrainian military, which, for the record, is a very strange thing to ask of an active duty American military officer.”⁷

As a result, LTC Vindman and his family have been forced to examine options, including potentially moving onto a military base, in order to ensure their physical security in the face of threats rooted in the falsehood that Fox News originated.

Fox News boasts that it is the “most trusted” American TV news brand.⁸ It is undoubtedly aware of the enormous influence its words have on the minds—and actions—of millions of Americans. When Fox News reports, and fails to retract or correct, that a Lieutenant Colonel in the U.S. Army, a Director on the National Security Council, has committed espionage, those words cause enormous and foreseeable harm—harm that has, as the above examples show, already occurred.

While our client does not intend by this letter to discourage reporting concerning him or critical of him, the Allegations published in the Segment are false and defamatory. Fox News knew they were false when it published them. The Allegations have injured LTC Vindman and Fox News is responsible for any third-party republication of them.

We respectfully request that Fox News make any and all corrections to the Segment based on this letter and take steps to ensure that it does not publish further defamatory falsehoods concerning LTC Vindman. Fox News has a responsibility to help put out the fire it lit when it falsely accused a decorated soldier of disloyalty to his country. LTC Vindman, who has dedicated his life to defending America out of the public eye, deserves better than to be falsely attacked when compelled by law and duty to speak the truth.

I. The Allegations in the Segment Were False and Defamatory

On October 28, 2019, the evening before LTC Vindman was scheduled to testify, Fox News reported that “a White House national security official, his name is LTC Alexander Vindman, he’s going to tell impeachment investigators tomorrow, in a statement that’s been

⁶ See Laura Ingraham (@IngrahamAngle), TWITTER (Nov. 19, 2019, 8:36 PM PST), <https://twitter.com/IngrahamAngle/status/1196829547808927744>.

⁷ Ryan Saavedra (@RealSaavedra), TWITTER (Nov. 20, 2019, 12:42 AM PST), <https://twitter.com/RealSaavedra/status/1197027332478758912>.

⁸ Brian Flood, *New survey shows Fox News more trusted than MSNBC, CNN*, FOX NEWS (Aug. 1, 2018), <https://www.foxnews.com/entertainment/new-survey-shows-fox-news-more-trusted-than-msnbc-cnn>.

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distributed to some media outlets, that he twice reported objections over Trump's call with Ukraine."

In her 10 p.m. Eastern segment, Fox News host Laura Ingraham summarized a *New York Times* article⁹ on LTC Vindman: "[B]ecause Col. Vindman emigrated from Ukraine along with his family when he was a child and is fluent in Ukrainian and Russian, Ukrainian officials sought advice from him about how to deal with Mr. Giuliani, though they typically communicated in English."

Rolling her eyes, Ingraham then remarked in a knowing, exasperated tone, "*Now, wait a second, John [Yoo]. Here we have a U.S. national security official who is advising Ukraine, while working inside the White House, apparently against the President's interest, and usually, they spoke in English. Isn't that kind of an interesting angle on this story?*"¹⁰

Mr. Yoo responded and made explicit the plain meaning of Ingraham's words: "*I find that astounding, and in—you know, some people might call that espionage.*" Ingraham did not disagree with or correct Mr. Yoo at any time during the remainder of the Segment. Nor did fellow panelist Alan Dershowitz—until later—dispute the Allegations.

At no point during the Segment did Fox News publish any facts that could reasonably provide a basis for accusing LTC Vindman of criminal—treasonous—misconduct. The viewer was left to understand that Ms. Ingraham, an attorney and former Supreme Court clerk, and her law professor guest *must have had a factual basis* for concluding that LTC Vindman had engaged in espionage against the country he has sworn to protect.¹¹ They did not.

⁹ Danny Hakim, *Army Officer Who Heard Trump's Ukraine Call Reported Concerns*, N.Y. TIMES (Oct. 28, 2019), <https://www.nytimes.com/2019/10/28/us/politics/Alexander-Vindman-trump-impeachment.html>.

¹⁰ Ms. Ingraham's tone left no doubt as to her meaning. See *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1339 (D.C. Cir. 2015) ("[A] question's wording or tone or context sometimes may be read as implying the writer's answer to that question.").

¹¹ Fellow panelist Alan Dershowitz, a legal scholar steeped in the politics of our times, understood Yoo and Ingraham to have an undisclosed factual basis for their "espionage" allegations. In an article on October 30, 2019, Dershowitz explained his initial silence in the face of the accusations against LTC Vindman by writing, "At the time, I had never heard of Vindman and didn't really understand what the other panelist was saying." Dershowitz had to undertake his own factual research to learn that the facts conveyed on the Segment were false: "The next day, I looked up Vindman and found out that he was a great patriot, an American military hero and an immigrant from the Ukraine. I immediately tweeted the following: 'I don't believe that Vindman is guilty of espionage or other crimes.'" Alan Dershowitz, *Vindman is a patriot. Republicans must stop their smears.*, N.Y. DAILY NEWS (Oct. 30, 2019, 1:33 PM), <https://www.nydailynews.com/opinion/ny-oped-vindman-is-a-patriot-20191030-orjv4isfsfb3fiopvnyztalxly-story.html>.

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Reactions to the Segment quickly confirmed that it was universally understood to accuse LTC Vindman of espionage against the United States. The *New York Times* wrote the following day, “One pundit on Fox News went as far as to suggest that Colonel Vindman had engaged in ‘espionage’ against the United States, prompting an unusual rebuke from a Republican member of Congress.”¹² That rebuke came from House Republican Conference Chairwoman Liz Cheney, who called it “shameful” that some were “questioning the patriotism, questioning the dedication to country of people like Mr. Vindman, Lt. Col. Vindman.”¹³ While the Congresswoman did not identify Fox News by name, her statement was recognized across the political spectrum as referring to the Segment and its false allegation that LTC Vindman had committed “espionage.”¹⁴

A participant in the Segment, moreover, confirmed that the Segment accused LTC Vindman of espionage. On October 30, 2019, Mr. Dershowitz published an op-ed in the *New York Daily News* titled, “Vindman is a patriot. Republicans must stop their smears.”¹⁵ Mr. Dershowitz wrote, “I don’t believe that Vindman is guilty of espionage or other crimes.” He decried “partisan efforts to weaponize the criminal justice system against political opponents” and continued, “I asked Fox to have me on again to express my positive views of [LTC Vindman]. I will continue to do so at every opportunity.” To our knowledge, Fox News has not granted Mr. Dershowitz’s request.

Since the Segment first aired on October 28, 2019, Fox News’ false reporting that LTC Vindman engaged in “espionage” has had foreseeably damaging consequences. During LTC Vindman’s public testimony before Congress on November 19, 2019, members of Congress asked LTC Vindman questions, following the path set by Fox News, that attempted to demonstrate that LTC Vindman’s loyalties were divided between the United States and Ukraine. Certain members of Congress suggested that LTC Vindman’s loyalty lay with Ukraine by asking about his ability to speak foreign languages and offers that he become the Ukrainian Minister of Defense—offers which (as LTC Vindman testified) he “immediately

¹² Michael M. Grynbaum & Davey Alba, *After Vindman’s Testimony Went Public, Right-Wing Conspiracies Fired Up*, N.Y. TIMES (Oct. 29, 2019), <https://www.nytimes.com/2019/10/29/business/media/fox-news-alexander-vindman.html>.

¹³ Juliegrace Brufke, *Liz Cheney condemns attacks on Vindman’s patriotism*, THE HILL (Oct. 29, 2019, 11:33 AM), <https://thehill.com/homenews/house/467897-liz-cheney-condemns-attacks-on-vindmans-patriotism>.

¹⁴ E.g., Zachary Evans, *GOP Rep. Liz Cheney: ‘It is Shameful to Question’ the Patriotism of Vindman, Other Impeachment Witnesses*, NAT’L REVIEW (Oct. 29, 2019, 3:12 PM), <https://www.nationalreview.com/news/gop-rep-liz-cheney-it-is-shameful-to-question-the-patriotism-of-vindman-other-impeachment-witnesses>; Burgess Everett & Melanie Zanona, *‘He’s a patriot’: Republicans defend key impeachment witness from attacks*, POLITICO (Oct. 29, 2019, 12:03 PM), <https://www.politico.com/news/2019/10/29/republicans-defend-impeachment-witness-vindman-061057>.

¹⁵ Dershowitz, *supra* note 11.

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dismissed” and reported up his chain of command.¹⁶ That same day, an Assistant to the President of the United States tweeted from his official White House account, “ICYMI: Lt. Col. Vindman was offered the position of Defense Minister for the Ukrainian Government THREE times! #ImpeachmentSHAM.”¹⁷ The President himself promptly retweeted Mr. Scavino’s tweet to his 66.9 million followers.¹⁸

The law requires that any publication alleged to be false and defamatory must be scrutinized in the context in which it was published, and by taking into consideration all the words used, and not merely a particular phrase or sentence. *Armstrong v. Simon & Schuster, Inc.*, 649 N.E.2d 825, 829 (N.Y. 1995) (“[T]he court must give the disputed language a fair reading in the context of the publication as a whole”); *Zimmerman v. Al Jazeera Am., LLC*, 246 F. Supp. 3d 257, 276 (D.D.C. 2017) (“Context is critical because it is in part the *settings* of the speech in question that makes their . . . nature apparent, and which helps determine the way in which the intended audience will receive them.”). Similarly, as the Supreme Court has opined, a publication is false when the “gist” or “sting” of the challenged allegations has a different “effect on the mind of the reader” than “the pleaded truth.” *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991).

Judged by those principles, the Allegations are false and defamatory. The “gist” or sting” of the Allegations is that LTC Vindman “engaged in ‘espionage’ against the United States.”¹⁹ Espionage is a felony under federal law punishable by death. *See* 18 U.S.C. § 794. Until Fox News published the Segment, Vindman had never been accused of disloyalty, dual loyalties, or espionage against the United States. There was no factual basis for Fox News’ accusation.

II. Fox News Published the False Allegations Knowing or in Reckless Disregard of Their Falsity

There appears to be no dispute that Fox News lacked any factual basis for publishing the false and defamatory Allegations concerning LTC Vindman.

¹⁶ Jon Ward, *Army officer on Trump phone call said it was his ‘duty’ to report president*, YAHOO NEWS (Nov. 19, 2019), <https://www.yahoo.com/news/army-officer-on-trump-phone-call-said-it-was-his-duty-to-report-president-161636306.html> (“Republicans used that new piece of information [that LTC Vindman had been offered the position of Minister of Defense] to imply that Vindman’s loyalties were divided between the U.S. and Ukraine, a talking point that first originated on Fox News in recent weeks.”).

¹⁷ Dan Scavino Jr. (@Scavino45), TWITTER (Nov. 19, 2019, 1:38 PM) PST, <https://twitter.com/Scavino45/status/1196860213233684480>.

¹⁸ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 19, 2019), <https://twitter.com/realDonaldTrump> (retweeting Scavino tweet).

¹⁹ Grynbaum & Alba, *supra* note 12.

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On November 1, 2019, Mr. Yoo published an op-ed in *USA Today* regarding his appearance on Fox News several days earlier (the “Yoo Op-ed”).²⁰ In the Yoo Op-ed, Mr. Yoo stated, contrary to fact, that “I didn’t call Alexander Vindman a spy.” But of course, he did—Mr. Yoo’s statement on Fox News expressly accused LTC Vindman of “espionage” and was universally understood to have done so.²¹ It is why Mr. Yoo wrote an op-ed seeking to rewrite recorded fact; it is why he begins his op-ed, “I really stepped in it this week.” What Mr. Yoo “stepped in” was a lie.

Mr. Yoo acknowledges in the Op-ed, “I have no reason to question Vindman’s patriotism or loyalty to the United States,” despite plainly having done so in the Segment. Mr. Yoo wrote, “I have tremendous respect for a decorated officer of the U.S. Army and a veteran of the Iraq War,” which demonstrates that Mr. Yoo had a “high degree of awareness of [the] probable falsity” of his statements concerning LTC Vindman. *Harte-Hanks Comms., Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (citation omitted). There is thus no dispute that Yoo harbored “serious doubts” as to the truth of the Allegations when the Segment was published. *Id.*; *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (“Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.”).

Mr. Yoo’s argument that he did not intend to accuse LTC Vindman of “espionage”—that he was accusing the nation of Ukraine instead—is as legally irrelevant as it is factually incredible. Under the law, what matters is whether a reasonable viewer would have understood Mr. Yoo’s statements to refer to LTC Vindman. *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 399 (2d Cir. 2006); *Croixland Props. Ltd. P’ship v. Corcoran*, 174 F.3d 213, 216 (D.C. Cir. 1999). As the examples above show, reasonable viewers, including Republican Congressional leadership,²² understood Mr. Yoo to accuse LTC Vindman of espionage. The very fact Mr. Yoo wrote an article entitled, “No, I didn’t call Alexander Vindman a spy” shows that he knew his statement was understood by reasonable viewers to have done just that.

²⁰ John Yoo, *No, I didn’t call Alexander Vindman a spy. But Ukraine did engage in espionage*, *USA Today* (Nov. 1, 2019, 6:00 AM), <https://www.usatoday.com/story/opinion/2019/11/01/john-yoo-alexander-vindman-ukraine-espionage-testimony-column/4111757002>.

²¹ E.g., David Brennan, *Fox News Guest John Yoo Accuses Vindman of ‘Espionage’ Ahead of Testimony to Trump-Ukraine Impeachment Investigators*, *NEWSWEEK* (Oct. 29, 2019, 7:18 AM), <https://www.newsweek.com/fox-news-john-yoo-alexander-vindman-testimony-trump-ukraine-impeachment-1468355>; *supra* note 14.

²² Everett & Zanona, *supra* note 14.

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III. Fox News Should Retract and Correct the Falsehoods It Has Spread Against LTC Vindman

At no time since the Segment aired at 10 p.m. Eastern on October 28, 2019, has Fox News retracted or corrected the Allegations despite knowing that they are false. Instead, Fox News has watched as the false narrative it originated about allegations of dual loyalties—an accusation that had never before been made against LTC Vindman, a decorated patriot and veteran—were republished by some of the most powerful people in the world. As such, it is all the more incumbent on Fox News to correct that record.²³ But it is not too late for Fox News to retract and correct the Allegations and help mitigate some of the harm the Allegations have caused.

LTC Vindman has no interest in silencing the news. He wants, as any responsible news organization would want, to see the *truth* published. And Fox News is in a unique position to correct its falsehoods with truth.

“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring). Justice Brandeis’ words nearly a century ago ring as true today as they did when he wrote them. But as you know, LTC Vindman’s ability to counter Fox News’ false speech with “more speech” is limited because of the oaths he has taken and the duties he has to this country.²⁴ Surely Fox News, whose “Patriot Awards” aired recently to honor “the patriotic values we hold dear,” is better than to exploit the honor and sacrifices of a war hero for an opportunity to advance a false, politicized, and dangerous narrative.²⁵

²³ See Ward, *supra* note 16 (“Republicans used that new piece of information [that LTC Vindman had been offered the position of Minister of Defense] to imply that Vindman’s loyalties were divided between the U.S. and Ukraine, a talking point that first originated on Fox News in recent weeks.”).

²⁴ LTC Vindman is limited in his ability to defend himself publicly due to U.S. Army and Department of Defense restrictions on active military personnel’s ability to speak to the press.

²⁵ Fox News has long claimed to honor members of America’s armed services and criticized other networks’ “lack of sensitivity when it comes to the brave men and women who serve in the military.” Brian Flood, *NBC infuriates veterans twice in one week as critics point to Peacock Network culture*, FOX NEWS (Nov. 5, 2018), <https://www.foxnews.com/entertainment/nbc-infuariates-veterans-twice-in-one-week-as-critics-point-to-peacock-network-culture>.

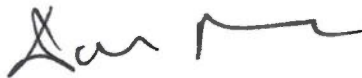
BSF

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As lawyers, it can be tempting to ask ourselves what the law says we must do. And the law here is clear: Fox News is liable, including for punitive damages, for the false and defamatory Allegations it published about LTC Vindman, knowing they were false. But putting aside legal arguments you may advance about whether Fox News can evade liability for its misconduct, we ask you to consider what Fox News *should* do. As the self-described “most watched, most trusted” news network,²⁶ Fox News has a grave responsibility to the truth. The Segment was not true. It has now been repeated by some of the most powerful people in the world. It is causing great pain. We ask you to retract the coverage, correct the record, and publish the truth.

I look forward to hearing from you. We reserve all rights.

Sincerely,



David Pressman
BOIES SCHILLER FLEXNER LLP

²⁶ *Fox News Channel: Most Watched, Most Trusted*, FOX NEWS INSIDER, <https://insider.foxnews.com/fox-news-channel-most-watched-most-trusted> (last visited Nov. 14, 2019).