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

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| UNITED STATES OF AMERICA<br>v.<br>KEVIN CLINESMITH,<br>Defendant. | Crim. No. 20-cr-165 (JEB) |

**MEMORANDUM OF AMICUS CURIAE NATIONAL LEGAL AND POLICY CENTER IN SUPPORT OF THE GOVERNMENT'S SENTENCING MEMORANDUM**

**Introduction**

On August 19, 2020, defendant Clinesmith pleaded guilty to one count of making a false statement in violation of 18 U.S.C. § 1001(a)(3) by altering a CIA email that he forwarded to an FBI agent preparing an affidavit for a fourth Foreign Intelligence Surveillance Act (FISA) warrant from the Foreign Intelligence Surveillance Court (FISC) against Carter Page. The defendant inserted the words "**and not a 'source'**" in the forwarded email, falsely suggesting that Page was not a source of intelligence to the CIA in his dealings with certain Russians when, in fact, he had been a source for quite some time. Gov't Mem. at 5-7. See also Motion for Relief Under the Crime Victims' Rights Act filed by Carter Page (Dec. 4, 2020) [ECF 23-2].

This criminal conduct, which occurred on June 17, 2017, was later discovered by the Justice Department's Inspector General who issued a scathing report of other numerous irregularities in the FISA application process by other FBI and DOJ personnel in December 2019. When confronted with the alteration during the OIG investigation, "the defendant initially

stated that he was not certain how the alteration occurred, but then subsequently acknowledged that he made the change." Gov't Mem. at 9.[1]

Besides compromising the integrity of the FISA process, the defendant's "conduct also fueled public distrust of the FBI and of the entire FISA program itself." Gov't Mem. at 11. Indeed, internal emails and text messages from the defendant revealed his apparent bias against President Trump that caused him to be disciplined and dismissed from working on the Crossfire Hurricane probe.

> The public record also reflects that political or personal bias may have motivated or contributed to his offense conduct. As noted in the OIG Report and PSR, the defendant was previously investigated, and ultimately suspended, for sending improper political messages to other FBI employees. *See* OIG Report at 256 n.400. For example, on the day after the 2016 presidential election, the defendant wrote "I am so stressed about what I could have done differently." *Id.* When another FBI colleague asked the defendant "[i]s it making you rethink your commitment to the Trump administration[,]" the defendant replied, "Hell no," and then added "Viva le resistance." *Id.* The defendant was referred to the Office of Professional Responsibility for investigation for these and other related messages, and in July 2018 he was suspended, without pay, for 14 days. The defendant's prior disciplinary infraction for expressing his political views in a work setting is a relevant aspect of his background. Indeed, it is plausible that his strong political views and/or personal dislike of the current President made him more willing to engage in the fraudulent and unethical conduct to which he has pled guilty.
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> Gov't Mem. at 13.

Under the applicable Sentencing Guideline range, the defendant can be sentenced to term from zero to six months. The government recommends a minimum sentence of incarceration between "the middle and upper end of the applicable Guidelines range," that is, between three

[1] As an initial matter, amicus is alarmed, and so should the FISC presided over by your Honor, that classified emails from our intelligence agencies can be so easily altered when they are forwarded from the recipient to another person. One would think that, unlike common email systems used by the general public, classified emails would be encrypted or formatted in such a way so as to be locked or made tamper proof in order to prevent anyone from deleting or adding text to a forwarded email, as this defendant did, to make it appear that the altered email was the original.

and six months, which "would reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense, while also affording adequate general deterrence to future criminal conduct." Gov't Mem. at 17-18. The defendant, not surprisingly, argues that probation should be imposed instead, citing his background and family situation, and that community service be imposed as a condition of probation. Clinesmith Sentencing Mem. at 22-38.

Amicus submits that these are not necessarily mutually exclusive choices because the Court can impose discretionary conditions on the defendant either after completing a term of imprisonment to include community service *or* as a condition of probation. Amicus urges this Court that in either case, it should impose an additional discretionary condition that would include the defendant making a video about his criminal conduct, as more fully described herein.

**Some Period of Incarceration Is Warranted**

Amicus agrees with the government that a sentence of incarceration is warranted in order to:

> send a message that people like the defendant—an attorney in a position of trust who others relied upon—will face serious consequences if they commit crimes that result in material misstatements or omissions to a court. This Court's sentence can have a powerful deterrent effect because, unlike the majority of cases, this case has received and will continue to receive substantial publicity and coverage by the news media. This Court's sentence should be designed, in part, to send a powerful message to the community that this type of conduct—falsifying information to hide facts from a court—will not be tolerated. Gov't Mem at 12.

And it is precisely because the defendant is a former government attorney that amicus believes that any condition of supervised release after being released from prison, or any condition of probation, should include a video of the defendant to be used periodically by the Department of Justice and D.C. Bar authorities in their ethics training, and also available to law schools to be used in their ethics courses. In the video, the defendant should express remorse for his conduct, describe the personal and professional consequences he has suffered, and warn other

attorneys not to engage in such conduct. Community service projects, as proposed by the defendant, have nothing to do with his criminal conduct.[2]

The defendant implores the Court to impose probation because of his background, and personal and family circumstances, particularly because his wife is pregnant with their first child. Def. Mem. at 18-37. But as the government points out:

> Section 5H1.6 of the Sentencing Guidelines states that family ties and responsibilities are ordinarily not relevant in determining whether a sentence should be outside the applicable guideline range. Thus, it is only in the extraordinary case that a defendant's family circumstances will warrant consideration. This Court routinely sentences defendants who have children, significant others, and family, to periods of incarceration, and the defendant's situation is not unique or extraordinary.
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> Gov't Mem. at 16.

Indeed, that same reason—the pregnancy of an attorney/defendant's wife—was proffered by the first defendant to be sentenced in the Mueller Russia probe to justify a sentence of probation. But countervailing reasons warranted a prison sentence. Skadden Arps lawyer Alex van der Zwaan was sentenced to 30 days in prison and fined $20,000 after pleading guilty to one count of lying to the FBI in violation of 18 U.S.C. 1001 during the Mueller Russia probe, even though he asked for probation because his wife was also pregnant with their first child and lived in London.

Judge Amy Berman Jackson nevertheless believed that some minimum prison time was necessary for both punishment and deterrent purposes, precisely because he was a lawyer. "It's a message that needs to be sent, especially given the fact that you're an attorney. But I don't think

[2] Defendant proposes to lends his services to either or both Street Sense Media, a newspaper for homeless people, and the American Foundation for Suicide Prevention ("AFSP"), to help with marketing and development. Def't Mem. at 32. While these community organizations serve a public purpose, neither of them relates to the criminal conduct committed by defendant nor do they require the defendant to be out in the community, such as working in a soup kitchen; instead, such community service can be done remotely from home.

it takes a significant period of time to have a significant impact." *United States v. van der Zwaan*, Crim. No. 18-cr-31 ABJ, Sentencing Transcript at 42 (Apr. 3, 2018) [ECF No. 28].[3] In the instant case, the defendant is a government attorney who held a position of trust; *a fortiori*, amicus submits some prison time is warranted.

**The Court Can Require the Defendant to Produce a Video as a Discretionary Condition of Any Sentence**

Sentencing judges have broad discretion in imposing conditions of supervised release. See *United States v. Salazar*, 743 F.3d 445, 451 (5th Cir. 2014) (internal citations omitted) ("District courts have wide discretion in imposing special conditions of supervised release. First, such conditions must be reasonably related *to one* of the following statutory factors: (i) the nature and circumstances of the offense and the history and characteristics of the defendant; (ii) the need to afford adequate deterrence to criminal conduct; (iii) the need to protect the public from further crimes of the defendant; and (iv) the need to provide the defendant with needed training, medical care, or other correctional treatment in the most effective manner. A condition satisfies the requirements if it is reasonably related *to any* of the four factors") (emphasis added).

**Discretionary Conditions of Supervision:** Under 18 U.S.C. §§ 3563(b) and 3583(d), the court may order additional conditions of probation **or** supervised release. These conditions may be imposed to the extent that they:

a. are reasonably related to the relevant sentencing factors listed at 18 U.S.C. § 3553(a);
b. involve only such deprivations of liberty or property as are reasonably necessary for the relevant sentencing purposes listed at 18 U.S.C. § 3553(a); and
c. are consistent with any pertinent policy statements issued by the Sentencing Commission.

[3] See also Gerstein, *Dutch attorney gets 30 days in first sentence for Mueller probe,* Politico (Apr. 3, 2018). https://www.politico.com/story/2018/04/03/dutch-attorney-sentenced-to-30-days-for-lying-in-mueller-probe-498266

See Administrative Office of the United States Courts, Probation and Pretrial Services Office, *Overview of Probation and Supervised Release Conditions* 3 (Nov. 2016) (footnotes omitted) (emphasis added).[4]

The Court can be creative in imposing conditions for probation or supervised release. As the website of defendant's counsel notes:

- Supervised release, also called probation, is a period of time during which the defendant must comply with certain court-mandated terms and conditions. The terms of supervised release can be varied and cover almost any topic. Community service is a common condition. One federal judge even sentenced a defendant to write a book! Failure to comply with the terms may result in imprisonment.[5]

The federal judge referred to was District Court Judge Ricardo M. Urbina of this Court who ordered a white-collar defendant to write a book about his crime.

> But this is not the first time Judge Urbina has demanded written penance. In 1998, he sentenced a prominent Washington lobbyist to write and distribute a monograph to 2,000 lobbyists at the defendant's own expense.
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> The lobbyist, James H. Lake, pleaded guilty to making illegal corporate campaign contributions. Judge Urbina ordered him to pay a $150,000 fine and to write a monograph describing the criminal provisions of federal laws governing corporate campaign contributions.
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> In the sentencing hearing on Monday, Judge Urbina said he would like to see Dr. Bodnar write a book about the Plavix case as a cautionary tale to other executives.[6]

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[4] https://www.uscourts.gov/services-forms/authority-probation-supervised-release-conditions

[5] https://www.mololamken.com/knowledge-How-Does-a-Judge-Decide-What-Sentence-To-Impose-on-a-Defendant. Amicus notes that the law firm's description that "Supervised release [is] also called probation" is not accurate since supervised release is imposed *after* a period of incarceration, whereas probation is a punishment imposed *in lieu of* incarceration.

[6] Singer, *Judge Orders Former Bristol-Myers Executive to Write Book*, New York Times (June 8, 2009). https://www.nytimes.com/2009/06/09/business/09bristol.html

So too here. Amicus recommends that this Court impose a discretionary condition of supervised release following incarceration, or an *additional* condition of probation if this Court were to impose probation with community service, that would require the defendant to make a video of appropriate length, in which he describes his illegal conduct, expresses his remorse, and relates the toll it had on him professionally and personally. Such a video would likewise serve "as a cautionary tale to other" lawyers, particularly those in the Department of Justice, including the FBI, as they periodically receive ethics training. Any other sentence would fade from public memory in a year or so, and thus, would not serve the principle of general deterrence as would the video proposed by amicus.

## CONCLUSION

For the foregoing reasons, amicus urges this Court to impose a period of incarceration in the three-to-six-month range and a discretionary condition of supervised release (or probation if that is imposed) that would include the defendant making a video expressing his remorse to be used by the Department of Justice and others in their ethics training programs.

Date: January 26, 2021

Respectfully submitted,

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