

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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: IN RE: : No. 20-5143
: MICHAEL T. FLYNN :
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Friday, June 12, 2020
Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES HENDERSON, WILKINS AND RAO

APPEARANCES:

ON BEHALF OF THE PETITIONER:

SIDNEY POWELL, ESQ.

ON BEHALF OF U.S. DEPARTMENT OF JUSTICE:

JEFFREY B. WALL (DOJ), ESQ.

ON BEHALF OF RESPONDENT, HON. EMMET G. SULLIVAN:

BETH A. WILKINSON, ESQ.

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P R O C E E D I N G S

THE CLERK: Case No. 20-5143, In Re: Michael T. Flynn. Ms. Powell for the petitioner, Michael T. Flynn. Mr. Wall for the U.S. Department of Justice. Ms. Wilkinson for the respondent, the Honorable Emmet G. Sullivan.

JUDGE HENDERSON: Good morning, counsel. We'll hear first from Ms. Powell.

ORAL ARGUMENT OF SIDNEY POWELL, ESQ.

ON BEHALF OF THE PETITIONER

MS. POWELL: Good morning. May it please the Court, this is Sidney Powell for petitioner Michael Flynn. We are here now to stop further impermissible intrusion into the sole power of the Executive Branch under the Take Care Clause to decide to dismiss a case and what circumstances warrant that dismissal. The Government here provided an extensive and thoroughly documented motion to dismiss this prosecution, weighing, as it should, all of the factors that go into that, including the provision of extraordinary exculpatory evidence that came to light through an independent review by Mr. Jensen, who not only had ten years' experience as an FBI agent but ten years as a federal prosecutor before Attorney General Barr tasked him to review this case.

It cannot go on any longer. This is the quintessential case for mandamus because we have both issues

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1 of judicial usurpation of Executive prerogatives and a clear
2 abuse of discretion. The Judge has no authority to do
3 anything further in the case. There is no case or
4 controversy any longer. The parties have decided, the
5 Government has quit, and he also has no authority to go into
6 the reasons behind the Executive's determination to dismiss
7 the case. It's over according --

8 JUDGE WILKINS: Counsel, this is Judge Wilkins.
9 Good morning.

10 MS. POWELL: Good morning.

11 JUDGE WILKINS: I have a question about the role
12 of the district court. You essentially argue that the
13 district court has no role, but in Rinaldi, where the
14 Supreme Court was reviewing the denial of a Rule 48 motion
15 made by the Government, the Court did what it called a,
16 quote, independent evaluation of the unusual circumstances
17 disclosed by the record. So, the Supreme Court believed
18 that it had a role to perform an independent evaluation. So
19 doesn't the district court here have that same role?

20 MS. POWELL: Not in the circumstances of this
21 case. The authorities are that given the fact that the
22 presumption of regularity applies to everything the Attorney
23 General has done, and there is no clear evidence whatsoever
24 to go behind that given the documentation reasoning and
25 briefing that has been provided, there is nothing further

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1 for the Court to do. There is no indication. There is no
2 clear evidence, there is no actual factor or reason to go
3 behind the Government's determination of the factors --

4 JUDGE WILKINS: I don't see how that works because
5 the Court also said in Rinaldi that it would not presume bad
6 faith by the Government. So the Court, you know, gave the
7 Government the benefit of the presumption of regularity, but
8 it yet and still performed an independent evaluation.

9 MS. POWELL: Only to the extent the Court said it
10 was not clearly to the contrary to the manifest public
11 interest. There was no further proceeding of any
12 significance, certainly no amicus appointed, certainly no
13 factual background investigation in Rinaldi. It was simply
14 a review of the Petit (phonetic sp.) policy and its
15 application to the facts of Rinaldi. And in Fokker
16 Services, this Court issued the mandamus, of course, to
17 proceed to make sure the deferred prosecution agreement was
18 entered, and in doing so, it said the leave of court
19 authority gives no power to the district court to deny a
20 prosecutor's Rule 48(a) motion to dismiss charges based on
21 disagreement with the prosecutor's exercise of charging
22 authority. For instance, the Court --

23 JUDGE WILKINS: Well, let's suppose the district
24 court had issued a minute order saying that it intends to do
25 an independent evaluation of the record and will issue an

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1 opinion on the Government's 48(a) motion in due course. Is
2 that error?

3 MS. POWELL: I think that is error. I mean, he
4 can look at it on the face of the documents that have been
5 filed, but I don't think in Rinaldi that they went farther
6 than the Government's statements of what it was doing and
7 why it was doing it. Only the Executive can weigh the
8 willingness of the Government to prosecute, and there would
9 be no remedy. I mean, the Court can't make the Government
10 prosecute this case.

11 JUDGE WILKINS: Well, in Thompson, another Supreme
12 Court case that was cited by at least the Government in
13 their briefing, and I can't remember if you cite it in yours
14 also, the Supreme Court was reviewing the denial of a Rule
15 48(a) motion by the Government, and it said that it
16 performed "an independent examination of the record." And
17 that was despite the Solicitor General's suggestion that the
18 Court just simply dismiss the case. Do you disagree that
19 that's what the Court said that it did in Thompson?

20 MS. POWELL: No, but I think all that means is
21 reviewing the documents that the Government provided and the
22 existing status of the record before it, not investigating
23 new possibilities or assuming the role of the prosecutor to
24 see about adding on perjury or contempt charges. He simply
25 doesn't have the authority to do that. And without a case

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1 in controversy, he's without jurisdiction to do anything
2 further. I mean, if we were here --

3 JUDGE WILKINS: Well, your mandamus petition is
4 you are the rulings under review are the failure of the
5 court, the district court, to grant the motion. So you
6 believe that just him not granting the motion is sufficient
7 grounds, in and of itself, to justify mandamus, right?

8 MS. POWELL: Well, in Fokker, the Court also said
9 that the court's withholding of approval would amount to a
10 substantial and unwarranted intrusion on the Executive
11 Branch's fundamental prerogatives. And the judiciary's lack
12 of competence to review the prosecution's initiation and
13 dismissal of charges, according to weight, equally applies
14 to the DPA decision. So, either way, it can't --

15 JUDGE WILKINS: So you believe that Fokker, a case
16 that was not even a Rule 48(a) case, undermines what the
17 Supreme Court did in Rinaldi and Thompson when the Supreme
18 Court itself performed an independent evaluation of the
19 record when there was no argument there that there was any
20 bad faith by the Government or that the presumption of
21 regularity didn't apply? You think that Fokker --

22 MS. POWELL: No. I'm --

23 JUDGE WILKINS: -- said that --

24 MS. POWELL: No, sir. I'm sorry.

25 JUDGE WILKINS: -- the Supreme Court got it wrong

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1 in Rinaldi and Thompson?

2 MS. POWELL: No. I'm saying that the independent
3 review of the record consists of just that, a review of the
4 record. And the record in this case is extremely well-
5 documented of prosecutorial misconduct and the suppression
6 of Brady evidence that warrants dismissal under any
7 circumstance, aside from the fact we have motions to
8 withdraw pending that were very well documented.

9 I mean, this record contains enormous evidence now
10 of Government misconduct and the suppression of Brady
11 evidence. It's just that the judge can't, he doesn't have
12 the authority to appoint an amicus under the Smith case that
13 Justice Ginsburg just wrote the unanimous decision for. He
14 can't go out and create new issues. Of course he can look
15 at the materials before him, and we welcome him doing that.
16 But to go ahead and grant the motion, because there's no
17 other alternative, not a single case in the country has ever
18 affirmed the denial of a motion to dismiss under 48(a).

19 JUDGE WILKINS: Then it seems like you've got a
20 pretty good argument that you have an alternative avenue of
21 review, then. If he denies the motion, then you can come
22 back here on appeal and we can, you can cite all of those
23 precedents to our court, and we can decide that issue at
24 that time.

25 MS. POWELL: But he doesn't have the authority now

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1 to go beyond the record and do anything except that. We
2 would simply be delaying the inevitable and going through an
3 inordinate process in the process of doing that. I mean, we
4 just got dumped on a 72-page brief that we have to answer by
5 Wednesday with 500 pages of exhibits. Everybody else in
6 this case is being paid by the Government except my client's
7 defense team. The toll it takes on a defendant to go
8 through this is absolutely enormous, and it's not justified
9 by this case.

10 This is the most impressive motion to dismiss I've
11 ever seen in decades of practice, and the most well-
12 documented, and in fact, and Judge Leon, I think it was a
13 two-page motion to dismiss pursuant to which he dismissed
14 three defendants for the Government after guilty pleas just
15 a couple of years ago. And of course, In Re: United States,
16 the Government dismissed, and Judge Posner wrote that
17 decision explaining how the special prosecutor's position
18 had to be vacated and the motion to dismiss had to be
19 granted on mandamus.

20 JUDGE HENDERSON: Ms. Powell, let me ask you, this
21 is Judge Henderson. If Judge Sullivan had just kept this
22 motion waiting and languishing, it would be one thing. He
23 has set a hearing for mid-July. For all we know, by the end
24 of July, he will have granted the motion.

25 MS. POWELL: But he doesn't have the authority to

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1 conduct that hearing, Your Honor. He has appointed this
2 amicus to go far beyond the scope of his authority as a
3 member of the judicial branch into the prerogatives of the
4 Department of Justice.

5 JUDGE HENDERSON: I realize that, but you also
6 know that the courts have said he's not merely a rubber
7 stamp either. So, there's nothing wrong with him holding a
8 hearing as far as I know. I don't know of any authority
9 that says he can't hold a hearing before he takes action.

10 MS. POWELL: Well, the only authority that, in
11 their best case, is In Re: Richards in which the Third
12 Circuit on a motion to dismiss a sexual misconduct claim
13 against someone in the Virgin Islands in a territorial court
14 said we've got to have a little sunlight on the reasons here
15 because the only reason given was in the interests of
16 justice. And certainly that's not sufficient.

17 But even that case, it was actually altered by the
18 Court's decision in, or discussed by the Court's decision in
19 HSBC Bank, the case out of Mr. Gleason's court that reversed
20 his overreaching authority on reviewing a 48(a) dismissal.
21 And that HSBC case describes Richards as requiring a 48(a)
22 dismissal because the district court's authority severely
23 cabined the review to clearly contrary to the public
24 interest, meaning the prosecutor acting in bad faith such as
25 bribery, fecklessness, animus to the victim or his own self-

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1 interest, things like that. And there is none of that here.
2 If Judge Sullivan had denied the motion to dismiss on this
3 record, we would be entitled to mandamus right now. To drag
4 this out another six months, I mean, it won't just be a
5 hearing on July 16th. It will go beyond that.

6 I think it's clear from the amicus position now
7 that they want to take General Flynn to sentencing as soon
8 as possible and impose upon him the maximum possible
9 sentence. And to make us go through that process when the
10 ultimate result has to be the grant of the motion to
11 dismiss, the Government is just wasting resources out the
12 wazoo pursuing this. And the toll it's taking on the
13 defendant is certainly irreparable harm.

14 JUDGE WILKINS: I'd like to ask you --

15 JUDGE RAO: Ms. Powell --

16 JUDGE WILKINS: Go ahead.

17 JUDGE HENDERSON: Let me ask one last question,
18 and that's why couldn't we hold this abeyance and let's see
19 what happens on July 16th?

20 MS. POWELL: Because the damage continues to
21 accrue by the day because he has no case or controversy
22 before him, and no jurisdiction because he doesn't have the
23 authority to go do what he's trying to do or has done. He
24 didn't even have the authority to appoint the amicus under
25 Justice Ginsberg's decision.

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1 JUDGE WILKINS: I don't understand that argument.
2 I mean, suppose, in a run-of-the-mill criminal case, well,
3 it's not run-of-the-mill because the Government has evidence
4 from a drone camera that was positioned to look through
5 upstairs bedroom windows into the defendant's home. And the
6 defendant moves to suppress, and amici, including, you know,
7 the Cato Institute and other organizations, seek to
8 participate as friends of the Court in support of that
9 motion to dismiss. You're saying that a district court
10 wouldn't have authority to grant those motions?

11 MS. POWELL: No. I'm saying that he doesn't have
12 authority to appoint an amicus to do the job that the
13 Government would have done if the Government chose to
14 continue the prosecution. Having somebody weigh in --

15 JUDGE WILKINS: So the Court can appoint amicus on
16 a motion, but a court can't do it on its on motion?

17 MS. POWELL: No. I'm saying that the Court cannot
18 substitute its role for that of the Government. It can't
19 take the place of the Attorney General or appoint someone to
20 take the place of the Attorney General. That's precisely
21 what Judge Posner rejected in In Re: United States. He
22 can't go outside his lane to appoint somebody to do the job
23 that the --

24 JUDGE WILKINS: The order appointing amicus,
25 appointed him to present arguments in opposition to the

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1 Government's motion to dismiss. That's all that it says in
2 that paragraph. So, how is that violating Article 2 to
3 appoint someone to present arguments in opposition?

4 MS. POWELL: Because the Government had already
5 made the decision to stop, and the Government is the only
6 entity that can make that decision. The Department of
7 Justice is the only entity that can decide whether to pursue
8 this prosecution. The judge has no way of doing that on his
9 own through amicus or a special prosecutor or anything else.
10 The Government has quit, and it's time to leave the field.

11 JUDGE WILKINS: So --

12 JUDGE RAO: Ms. Powell, what is -- oh, sorry.

13 JUDGE WILKINS: Go ahead.

14 JUDGE RAO: What about, and this is Judge Rao,
15 what about appointing amicus for the contempt charges?
16 Where I mean, the Supreme Court in the Young case said that
17 the Court can't appoint a private party to prosecute
18 contempt charges. I mean, do your arguments with respect to
19 the appointment of the amicus, apply also to the contempt
20 charges?

21 MS. POWELL: Yes. As our amici pointed out, and
22 we did also in our brief, contempt doesn't lie for perjury
23 in these circumstances. There are 500 people in the
24 National Database Registry of exonerations who would
25 otherwise be susceptible to perjury prosecutions because

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1 they entered guilty pleas, but they were actually innocent.

2 JUDGE RAO: But Ms. Powell, that goes to the
3 merits about whether contempt would actually, could actually
4 be found. But what about the appointment of the amicus to
5 look into contempt charges?

6 MS. POWELL: There's no basis to do that either.
7 He doesn't have the authority to prosecute anyone for
8 contempt. That's not the judge's place to add on charges.
9 That is solely within the prerogative of the Department of
10 Justice.

11 JUDGE WILKINS: So Young --

12 JUDGE RAO: But isn't that inconsistent with the
13 Supreme Court's decision in Young?

14 MS. POWELL: I don't see that inconsistency.

15 JUDGE RAO: Well, in Young, the Court said that
16 the district court can appoint a private party to prosecute
17 contempt charges.

18 MS. POWELL: Well, in the circumstances of this
19 case, contempt cannot lie by virtue of them having moved to
20 withdraw his guilty plea.

21 JUDGE RAO: Well what --

22 MS. POWELL: It simply --

23 JUDGE RAO: Yes. Let me ask you one other
24 question about the contempt charges. I mean, if we decide
25 that reassignment here is not appropriate, would we have any

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1 grounds for reaching the contempt question? I don't believe
2 Mr. Flynn's petition for a writ of mandamus asked for
3 mandamus on the contempt question itself. Is there any
4 grounds we would have for being able to reach that question?

5 MS. POWELL: Well, simply the fact that the judge
6 doesn't have the authority to do it, and there's no
7 continuing case or controversy.

8 JUDGE WILKINS: Can I ask a question about the
9 continuing case or controversy point? In Thompson, the 1980
10 Supreme Court case that I referred to earlier that was cited
11 in the briefs, the Supreme Court, the Solicitor General
12 suggested to the Supreme Court that the case be dismissed
13 under Rule 48(a). And the Supreme Court did not itself
14 dismiss the case, and the Supreme Court did not declare that
15 there was no longer a case or controversy. Instead, the
16 Supreme Court remanded the case to the Court of Appeals for
17 reconsideration in light of the Government's present
18 position.

19 So in that case, the Supreme Court did not treat
20 the fact that the Government had filed a Rule 48(a) motion
21 as ending the case so that there was no longer a case or
22 controversy. Don't you agree?

23 MS. POWELL: Well, as I recall that case
24 correctly, it was a mandamus for a mandamus. And what the
25 Court, what the Supreme Court decided was that the appellate

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1 court needed to address an additional issue. That is not
2 our situation. With the fact that not a single court in the
3 country has ever refused to affirm a 48(a) motion, there's
4 no basis to proceed with this case. The Government is the
5 only entity, the Department of Justice is the only entity
6 under Article 2, Section 3 that can prosecute a case.

7 And they have decided not to do this for a number
8 of reasons, not the least of which is the appalling
9 suppression of exculpatory evidence that's gone on for as
10 long as three years, the fact that the FBI agents literally
11 made up statements to put in a 302, the fact that Mr.
12 Priestap had a discussion with Andrew McCabe about trying to
13 get the defendant to lie, and, you know, what is our goal
14 here, and came back the next day reconsidering the fact that
15 they had decided not to show him the evidence that they had,
16 like they do with everybody else, the fact they decided not
17 to even give him a 1001 mention, not the least of, not even
18 a warning, of course. No warning, but not even to mention
19 1001. They sent agents over there, according to Mr. Comey's
20 testimony, just told him a couple agents were going to drop
21 by, was that okay? And he said of course, sure, he works
22 with them all the time.

23 I mean, this is an appalling injustice. It's a
24 travesty of justice that this man has been dragged through
25 this for three years on a case that was absolutely concocted

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1 by FBI agents with some help from Department of Justice, and
2 evidence falsified, and everything else. The Government has
3 provided extraordinary documentation, and the only thing
4 left to do is for the judge to order the dismissal of this
5 case. The delay --

6 JUDGE WILKINS: The judge can't do an independent
7 evaluation of the record before, before answering that
8 dismissal.

9 MS. POWELL: No, he could look at the record. He
10 can look at the record and, but the only thing to do as a
11 result of that is to order this dismissal because of the
12 presumption of regularity that attaches and the fact there's
13 no clear evidence of anything else. He can't make up these
14 things he calls reasonable, plausible questions that don't
15 even relate to the motion to dismiss and proceed to drag
16 this out forever. It's just not, I mean, it's contradictory
17 to Fokker Services. It's contradictory to Rinaldi. It's
18 contradictory to the In Re: United States and the Fourth
19 Circuit in Smith and the Fifth Circuit in Hamm.

20 JUDGE WILKINS: Where in the orders under review
21 did the district court say anything about reasonable,
22 plausible questions?

23 MS. POWELL: It's in their brief.

24 JUDGE WILKINS: That's not the order under review,
25 though. The order under review is, from your perspective,

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1 is him not granting the motion, that not granting the motion
2 itself is grounds for a mandamus.

3 MS. POWELL: And appointing the amicus to do
4 anything.

5 JUDGE WILKINS: So --

6 MS. POWELL: But yes --

7 JUDGE WILKINS: So, we have to find both of those
8 things to be improper to justify amicus? Is that your
9 position, or is one of them, any one of them by itself
10 grounds for mandamus?

11 MS. POWELL: I think either one by itself is
12 grounds for mandamus. They're independent grounds for
13 mandamus.

14 JUDGE HENDERSON: Ms. Powell, let me ask you
15 something about this appointment of amicus. In Fokker
16 Services, we ourselves appointed amicus. Now, if Judge
17 Sullivan had not appointed amicus, would you be telling us
18 that we couldn't appoint amicus?

19 MS. POWELL: No, ma'am. You can appoint amicus to
20 weigh in on any issue the Court of Appeals wants an amicus
21 to weigh in on, as long as it's an issue within the case,
22 and the Court of Appeals didn't create it. What Judge
23 Sullivan has done here is created his own issues that he
24 wants to investigate that aren't related to the motion to
25 dismiss or even the case before him in any way. He wants to

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1 add on charges that he can't --

2 JUDGE HENDERSON: But in Fokker Services, we
3 appointed someone to defend Judge Leon's order. And this is
4 what Judge Sullivan had --

5 MS. POWELL: And that's -- well, that's what Ms.
6 Wilkinson is doing here before this Court. She's the
7 analogous piece of that proposition, not Mr. Gleason.

8 JUDGE HENDERSON: That's true. And you have no
9 problem with her, obviously.

10 MS. POWELL: No. Obviously, she's entitled to be
11 here on behalf of the judge. Appellate courts often allow
12 amicus participation. But the district court doesn't in
13 criminal cases. There's not even a provision in the rule
14 for that. In fact, if you go try to file a brief as an
15 amicus in the district court, you can't do it properly. All
16 of the docket entries had to be corrected.

17 JUDGE WILKINS: So --

18 MS. POWELL: There's no provisions for amicus in
19 criminal cases in the district court.

20 JUDGE WILKINS: So I asked you earlier if an
21 amicus could file a motion in support, a brief in support of
22 a motion to suppress. What's your answer? Is there
23 authority for that? Yes or no?

24 MS. POWELL: I would think there is authority for
25 that.

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1 JUDGE WILKINS: Based on what?

2 MS. POWELL: In support of a motion that another
3 party has filed. If the judge wants to allow it, it would
4 require a leave of court, I would think.

5 JUDGE WILKINS: Based on what rule?

6 MS. POWELL: I don't think there's a rule for it,
7 but I do believe that, for instance, there have been amici
8 in other cases in the district court level, but it's been in
9 support of a position of one of the parties, not in support
10 of a judge trying to gin up additional charges himself.

11 JUDGE WILKINS: Well, just with respect to the
12 Rule 48(a) motion, it's your contention that if for some
13 reason Mr. Flynn opposed the Government's motion, it would
14 be okay for an amicus to enter an appearance to file briefs
15 in support of Mr. Flynn, right?

16 MS. POWELL: Well, at least there would still be a
17 case in controversy before the Court, and it would be up to
18 the district court whether to allow leave to do that. I
19 don't see a provision in the rules for it, but generally
20 speaking, district courts I've known kind of do what they
21 want to do within the bounds of reason.

22 JUDGE WILKINS: So there's authority for it so
23 long as there's a case or controversy? Is that -- I'm just
24 trying to understand your legal reasoning here.

25 MS. POWELL: The legal reasoning is that he

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1 essentially appointed Mr. Gleason as a special prosecutor,
2 that he doesn't have the authority to do. If he'd asked Mr.
3 Gleason, for example, to weigh in on a side that existed in
4 the case, that might be permissible. I would probably still
5 argue against it, but I wouldn't have sought a writ of
6 mandamus on it, I don't think. But to bring in --

7 JUDGE RAO: Isn't your argument also that it's
8 impermissible to have amicus briefs in criminal cases under
9 the rules of the Court?

10 MS. POWELL: Yes, that is one of our arguments
11 here because there is no rule. There is no rule providing
12 for it. But like I said, I've certainly seen it done in
13 other district courts, as long as it's on the side of one of
14 the parties that seeks to continue the litigation, just not
15 on behalf of the judge as an independent prosecutor himself.

16 JUDGE HENDERSON: All right. Are there any more
17 questions? Okay, Ms. Powell, we'll give you a couple
18 minutes in reply. Next is Mr. Wall.

19 ORAL ARGUMENT OF JEFFREY B. WALL, ESQ.

20 ON BEHALF OF U.S. DEPARTMENT OF JUSTICE

21 MR. WALL: Thank you, Your Honor. And may it
22 please the Court, Jeff Wall for the United States. I hope
23 I'll have the opportunity to address a number of the
24 questions that the Court has asked petitioner's counsel, but
25 I want to start with two points, one on the merits to you,

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1 Judge Wilkins, and one on harms to you, Judge Henderson.
2 And I think, by the way, that's the right order to take
3 them.

4 In recent mandamus cases like Fokker and like
5 Blumenthal, the Emoluments Clause case, the Court looked at
6 the merits, asked whether there was a clear and indisputable
7 right on the merits, and then turned to the mandamus factors
8 and the harms. I think that makes particular sense here
9 because if we are clearly right about Fokker, that it
10 doesn't leave an oversight power in the courts or a
11 substantial role with respect to unopposed Rule 48 motions,
12 then I think it's easier to see, Judge Henderson, why it's
13 so harmful to continue to allow this process to play itself
14 out in the district court.

15 Taking the merits first, Judge Wilkins, Rinaldi
16 was a case in which the Court assumed, I think it's clear,
17 as in footnote 15, it assumed the broader standard, and then
18 said even that standard can't be satisfied, so the trial
19 court has abused its discretion in denying a motion, a
20 motion, by the way, that came after judgment in that case,
21 not just after a plea or a trial, but after a judgment. And
22 Thompson, of course, was just a case in which we wanted to
23 pull the prosecution in the Supreme Court, and we asked the
24 Court to GDR (phonetic sp.). And even there, after an
25 affirmance in the Court of Appeals, it sent it back to the

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1 district court to allow us to do that.

2 But I completely agree, Judge Wilkins, neither one
3 of those cases resolves the substantive standard for Rule
4 48. They resolved that Rule 48 applies contra respondent's
5 assertion, all the way on direct review. There's no magical
6 line at the plea. But they don't resolve the substantive
7 standard. The case that does that, and the case that we
8 rely on for mandamus here, is this Court's decision in
9 Fokker. That's the decision that resolves the substantive
10 standard for the denial of a Rule 48 motion.

11 JUDGE WILKINS: How does it resolve that when the
12 case was not an appeal of a Rule 48(a) motion?

13 MR. WALL: Because what Chief Judge Srinivasan did
14 in discussing the DPA was he explained how DPAs and Rule 48
15 motions are analogous. And he separated off approval of a
16 plea agreement under Rule 11. And that analogy was central
17 to the Court's reasoning. Right? In order for the Court to
18 say the district court erred in a way that justified
19 mandamus, he said the error is so clear because look at what
20 has to be the rule under Rule 48, and then that has to be
21 the rule for DPAs as well.

22 So I understand parts 2-A and 2-B of the opinion
23 in Fokker to be central to the judgment and to what it goes
24 on to do when it applies that standard later in the opinion.
25 And I think the language of Fokker when it goes through that

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1 discussion leaves no doubt. It says dismissing charges, not
2 just commencing but dismissing is squarely within the can of
3 prosecutorial discretion. It says there's no oversight
4 power in the courts, no involvement by the judiciary, and it
5 says no substantial role for courts.

6 And if we are right about what Fokker says with
7 respect to Rule 48, then to turn to my point to you, Judge
8 Henderson, then it's really a question of what is the point
9 of further proceedings if the district court is required by
10 circuit case law to grant the Rule 48 motion. And I --

11 JUDGE WILKINS: You believe that Fokker stands for
12 the proposition that the district court can't perform an
13 independent evaluation of the record?

14 MR. WALL: I think it does in the following
15 sense, Judge Wilkins. I understand Fokker to mean that if
16 tomorrow, faced with the kind of tolling agreement that was
17 at issue in Fokker, a district court (indiscernible) I'm
18 going to set up a process for deciding whether to grant this
19 agreement, I'll hear from both sides, there are a number of
20 factual questions I'm going to have to resolve
21 and the district court did all of that, I understand that to
22 be, yes, a straightforward violation of Fokker.

23 And again, it's not just the sort of idea that
24 there will be some briefs and a hearing, Judge Henderson.
25 The harm is that as the respondent claims both in the

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1 opening brief and page 2 of the reply, the point of this is
2 to investigate, they say, the prosecutorial decisions and
3 prosecutorial motives. Those are respondent's words. And
4 that --

5 JUDGE WILKINS: The order itself says the, that
6 which is under review says that amicus is appointed to
7 present arguments in opposition to the Government's motion
8 to dismiss. That's the order under review.

9 MR. WALL: So with all --

10 JUDGE WILKINS: It doesn't say anything about, you
11 know, fact development or anything else.

12 MR. WALL: So with all respect, Judge Wilkins, two
13 points. First, we're not here on appeal from an order. We
14 are here, as you know, on mandamus. And mandamus is an
15 extraordinary writ that directs the district court to do
16 something. It's not necessarily review of an order. And
17 here, we're asking that the district court be directed to
18 grant the Rule 48 motion.

19 But second, beyond the order, the reason for
20 entering the order, as respondent's briefs in this Court
21 have explained, so we now know what's going to go on below,
22 respondent wants to inquire into what they say are
23 prosecutorial decisions and prosecutorial motives because
24 the district court is concerned that there was improper
25 influence here, and indeed both the district court and the

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1 court-appointed amicus have on the one hand suggested, and
2 with respect to the amicus flat-out alleged that there was
3 misconduct on the part of the Attorney General and even the
4 President of the United States.

5 That's going to mean that we are, in the district
6 court's view, going to have to come in and answer those
7 questions and defend against them. And that's all of the
8 systemic costs that this Court laid out in Part 2-A of
9 Fokker. So in order to have the sort of anodyne proceeding
10 that some of these questions are assuming, this Court would
11 have to issue mandamus. You'd have to take off the table
12 evidentiary proceedings and the like. You'd have to take
13 off the table contempt. You'd have to say just the Rule 48
14 motion, you address that with dispatch, and then you could
15 come back to this Court. But at that point, that's the
16 proceeding. There's no reason not to --

17 JUDGE WILKINS: The court doesn't even, the
18 district court doesn't even have the authority to appoint
19 amicus to advise it on whether it should issue an order to
20 show cause for contempt?

21 MR. WALL: Judge Wilkins, we, unlike the
22 petitioner, we have not argued that district courts
23 generally lack the power to appoint amici, I think either
24 under the Rules or more likely under their inherent
25 authority. But what we have said is that the particular

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1 amicus here is improper for all the same reasons that
2 appointing amici and going through an elaborate process
3 would be improper in the DPA context under Fokker. And if
4 that's true, then a fortiori has got to be true for the Rule
5 48 context, which was the basis for Fokker's reasoning with
6 respect to DPAs.

7 So, we're not saying that, you know, the district
8 courts don't have the power to do this generally. What
9 we're saying is that here, there are problems with this
10 particular appointment of the amicus, and just to get back
11 to your question, Judge Henderson, I think once we know that
12 those are the harms, there's no reason not to take that
13 final step because we know the harms that are going to play
14 out. This has already become, and I think is only becoming
15 more or a public spectacle, particularly in light of the
16 amicus filing in the district court two days ago. And I
17 really, it threatens to harm not just the integrity of the
18 Executive and its prosecutorial discretion and its
19 deliberative processes, but I think, frankly, it threatens
20 to do harm to the judiciary as well.

21 JUDGE RAO: Mr. Wall, if I could just ask you, I
22 mean, the Court has, you know, our Court has repeatedly
23 declined to grant mandamus when the Government addresses
24 abstract separation of powers violations, such as in
25 (indiscernible). So I'm just wondering if you can be more

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1 specific and more particular about what the concrete
2 separation of powers violation is here. I mean, Rule 48
3 does allow leave of court, right? So is the problem, like,
4 what precisely is the problem here? What precisely is the
5 infringement on the Article 2 power?

6 MR. WALL: I think, Judge Rao, that the separation
7 of powers harms here, you're right, they can be very subtle
8 and very abstract in a lot of cases. I think they are as
9 stark and as concrete here as they come because here, we
10 know from what's transpired below and from the briefs in
11 this Court that what the district court is contemplating is
12 a sort of intrusive, fact-intensive inquiry into what they
13 say are a host of factual questions. Why did particular
14 prosecutors not sign the brief? Why did the Attorney
15 General make this decision? Was he right on these various
16 grounds? What about the uncharged conduct with respect to
17 the turnkey (phonetic sp.) statements?

18 We're going to have to brief and apparently put on
19 evidence in defense of all of that so that the district
20 court can then reach a decision when Circuit law compels him
21 to grant the motion. And I think that it is an intrusive
22 process, and it is going to harm the Executive, and we can't
23 ignore that it is playing out in a politicized environment
24 that I think is made worse by the kind of, by honestly this
25 sort of 70-page, almost polemic that the court-appointed

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1 amicus filed, which alleges that the President and the
2 Attorney General have engaged in grave misconduct.

3 So when you're looking at those kinds of
4 allegations, you're forcing us to dissent against them all
5 in a context where this Court's case law says that's exactly
6 what courts shouldn't be doing. It says, quote, no
7 substantial role, end quote. It's hard for me to see --

8 JUDGE WILKINS: But all of the 48(a) opinions from
9 every court has said that the Court has some role in that
10 the role involves making sure that there is not something
11 that's being done clearly contrary to the public interest.
12 So, then, there must be some case where, or some set of
13 circumstances where as unfortunate as the clash of the two
14 branches of government might be, where Rule 48(a) does some
15 work. Isn't that right?

16 MR. WALL: Judge Wilkins, I think it is right in
17 the following sense. 48(a) does work in cases where it's an
18 opposed motion. And even where it's an unopposed motion, we
19 don't dispute that the Court can ascertain that it's got the
20 considered decisions of the parties. You don't have a
21 prosecutor who's been bribed or a defendant who hasn't been
22 counseled about the dismissal. But we do say that for
23 unopposed motions to dismiss, a relatively small set of
24 applications under 48(a) that where the parties agree, and
25 they are both making considered decisions, yes, the Court is

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1 required to grant, in light of the constitutional concerns
2 that this Court discussed on Fokker.

3 And the second thing I'd say, Judge Wilkins, just
4 to drive this home, is I understand respondent to accept
5 that everything I just said is right in the pre-plea
6 situation. They agree that if the defendant hadn't pleaded
7 and this was just an ongoing prosecution, we could pull this
8 back. There would be nothing the Court could do about it,
9 couldn't force us to go to trial. And a court, even if it
10 were upset about our motives, couldn't perform any
11 oversight. It would need to grant the motion.

12 And so the move that they make, and it's the key
13 to the merits, at page 19 of the reply, is to say, okay, but
14 Fokker is just for the pre-plea situation. It doesn't apply
15 once the court has accepted the plea. And I think that's
16 got to be wrong for no fewer than four reasons.

17 First, once we know that it's not the concern of
18 the rule in most of the cases, which are the pre-plea cases,
19 then we know it's not really what the rule cares about.
20 Second, the constitutional concerns are exactly the same
21 after the plea. We no longer want to proceed as the
22 Executive, and there's no longer a controversy between the
23 parties. Third, we know, as you said, from Rinaldi the U.S.
24 can dismiss even after judgment, even after trial, let alone
25 after a plea. So there's no magical plea line.

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1 And fourth, Fokker rejected exactly this
2 distinction. It said accepting the plea agreement, to be
3 sure, is a judicial act. That calls on the Court's
4 authority. But just dismissing, that, it said, doesn't.
5 That's just letting a case go in deference to the
6 Executive's exercise of prosecutorial discretion. And once
7 you know that that plea line, there's nothing magical about
8 that in terms of Rule 48 or the Constitution, then I think
9 their case on the merits collapses, and then we're just back
10 to Judge Henderson's question about the harms and why grant
11 mandamus, why grant mandamus now.

12 JUDGE WILKINS: Fokker made clear that there are
13 different considerations at different stages of a criminal
14 case to the extent that you, even if we credit that Fokker
15 is binding on Rule 48(a). And here, we have two different
16 district judges that as a part of their obligations under
17 Rule 11 made factual findings as to materiality and a basis
18 for a plea, et cetera. And so the Government's motion
19 doesn't just implicate the Government's position. It
20 implicates those rulings that two district court judges have
21 made. So, the case isn't in the same posture as it would be
22 prior to a plea agreement in that respect.

23 MR. WALL: Well, I absolutely agree with part of
24 that, Judge Wilkins. It is certainly true that there are
25 different concerns at different stages, and Fokker says

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1 accepting the plea agreement does call on the Court's
2 authority because it has to ascertain whether there's a
3 factual basis for the plea. But it contrasts that with
4 dismissal.

5 And so the part I disagree with is that once
6 you've crossed that plea line and a defendant has pleaded,
7 that suddenly everything that follows invokes the Court's
8 authority in some way that changes the calculus because
9 Fokker says that's not true. And the best example, I think,
10 is in In Re: United States in the Seventh Circuit. The
11 district court, it wasn't just a plea. It was a sentence.
12 And in light of the sentence, the Government wanted to
13 dismiss some of the charges because it no longer wanted to
14 proceed with them. And the district court was upset about
15 that. It wouldn't allow the Government to dismiss.

16 And the Seventh Circuit said, look, it doesn't
17 matter. Even if the Government is trying to get around the
18 district court's sentencing authority, it's the master of
19 its own case. It gets to decide when to bring or when to
20 dismiss charges. So I agree that a Rule 11 acceptance of a
21 plea agreement, if that's what were before the Court, that's
22 different. But this, and Fokker's language is crystal clear
23 about this. It says, accepting DPAs and dismissing on a
24 Rule 48, it says, quote, are not formal judicial action
25 imposing or adopting, end quote, terms on defendants or

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1 parties. They're not the court formally signing off on
2 anything.

3 When Judge Sullivan grants this Rule 48 motion, as
4 he's required to, he's not taking back anything he's done
5 before. He's not expressing any opinion on the Government's
6 case. He's not saying he agrees or disagrees. He's just
7 acknowledging a co-equal branch's exercise of its core
8 Executive power.

9 JUDGE WILKINS: I have a question about --

10 JUDGE RAO: Mr. Wall -- sorry.

11 JUDGE WILKINS: I have a question about your
12 position, the United States' position about its
13 representations in support of a Rule 48(a) motion. Is it
14 your position that the Government does not have to state all
15 of its reasons in support of dismissing the case, only those
16 that it chooses to share with the Court?

17 MR. WALL: It is, Judge Wilkins, but I don't think
18 anything turns on that here and that you need to agree with
19 me on that. I think we could have come in and just moved to
20 dismiss without providing an explanation to the district
21 court. We do that at times, and district courts routinely
22 grant them. No appellate courts ever reversed in a
23 situation like that. But here, we did. We went beyond what
24 we thought we were obligated to do under the circumstances.
25 We provided a robust explanation to the district court, and

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1 we think whatever Rule 48 might require as a procedural
2 matter, we've more than cleared that hurdle, as Ms. Powell
3 said. I mean, I think this is one of the most robust Rule
4 48 motions you will find.

5 JUDGE WILKINS: So I guess to understand my
6 concern, suppose you have a case where a federal law
7 enforcement officer has pleaded guilty to a criminal civil
8 rights violation for using excessive force, and then the
9 Government says that they've uncovered some Brady evidence
10 and are moving to dismiss under 48(a) after the guilty plea.
11 But part of the reasoning of the authorities was that as to
12 why they didn't believe they'd be able to prove this case
13 beyond a reasonable doubt was that the defendant is black --
14 I'm sorry, the victim is black. The defendant law
15 enforcement officer is white. And they didn't believe that
16 a jury would believe the black victim over the white officer
17 without corroborating evidence, and that's unfortunate, but
18 that's the reality.

19 And so that was one of their reasons for
20 dismissing. But they thought that that wouldn't play well,
21 so they didn't say that in the motion. They just said that
22 the exculpatory evidence was the reason they're dismissing.
23 Is that proper?

24 MR. WALL: So two points, Judge Wilkins. One is
25 legal and one is practical. The legal one is that there's

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1 an easy way to deal with that here given the mandamus
2 posture. I think Fokker is clear that the Government, as
3 long as it provides no reason or any reason at all, and it's
4 not an unconstitutional reason, can dismiss. So yes, I
5 think that that motion there should be granted. But the
6 easy way to deal with that in the mandamus posture is to
7 say, look, even if you think that there's room for some kind
8 of a Richards-like rule or we think there's a, it's -- it's
9 not clear and indisputable.

10 JUDGE WILKINS: I'm sorry. I couldn't hear about
11 ten seconds of that. Can you repeat whatever you said?

12 JUDGE HENDERSON: Neither did I.

13 MR. WALL: Sure.

14 JUDGE HENDERSON: Yes.

15 MR. WALL: Sure. I'm sorry, Judge Wilkins. If
16 you thought that it wasn't clear under Fokker whether the
17 court could allow that type of explanation, you could try to
18 leave that open and just say, look, whatever that might be
19 on the merits, it's clear and indisputable that wherever the
20 bar is, the Government met it here through its very fulsome
21 explanation. And the practical thing I'd say is, I
22 certainly hope that the Government has never filed a motion
23 like that, and I'm not aware of it.

24 But even then, yes, I think the Court should have
25 to grant it because the Government, whatever its motive, no

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1 longer wants to proceed. But what you would see is you'd
2 see other defendants walking in, attaching that motion, and
3 bringing Armstrong claims saying the Government is making
4 racially-based decisions in its prosecutions. And based on
5 your hypo, it sounds like they'd have pretty good grounds
6 for that.

7 So I think there are remedies for this other than
8 needing to contort Rule 48 to get into what the Executive's
9 motives are, if you didn't have --

10 JUDGE WILKINS: So if there's remedies for it,
11 there can't be a remedy for it unless you know that it's
12 happening. And if the Government doesn't have to disclose
13 all of its reasons, then you never know that it's happening,
14 right?

15 MR. WALL: But that's always true.

16 JUDGE WILKINS: And if the district court isn't
17 allowed to ask whether there were any other reasons, you'd
18 never know that it's happening, right?

19 MR. WALL: But that would be equally true in a
20 case like Fokker, Judge Wilkins. The district court could
21 always say, look, I think that the U.S. Attorney has cut a
22 sweetheart deal with the corporate defendants here, and so I
23 want to get some briefing, and I want some argument in
24 hearing on whether there was improper influence brought to
25 bear on this. And the point of Fokker is that it isn't to

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1 the courts to police whether the Executive has pure or
2 impure motives. The remedies for those occur in political
3 and public arenas, retaliation from the other branches,
4 dismissal of corrupt Executive officials, even, you know,
5 impeachment if it comes to it. But Rule 48, Fokker says, is
6 not the mechanism for policing the kind of harms that you're
7 worried about.

8 And if a court could do the sort of thing you're
9 talking about, then I think Fokker has to be a dead letter.
10 Because either with respect to Rule 48 or a DPA, a court
11 concerned about the Executive's motives could always
12 inquire. And I understand that inquiry to be exactly what
13 Fokker shuts off.

14 JUDGE RAO: So, Mr. Wall, are you suggesting, I
15 mean, normally the standard is that there is a presumption
16 of regularity. What about the case in which a district
17 court feels that that presumption is overcome on the face of
18 the materials presented by the Government?

19 MR. WALL: So two points, Judge Rao. First, I
20 don't think that presumption is relevant here. And put it
21 to you this way. If the court, if a district court thought
22 that the Government had a bad faith motive for declining to
23 bring a prosecution, I take it everyone agrees that the
24 Court couldn't force the U.S. to bring the case. And the
25 same is true for maintaining a prosecution. As Fokker says,

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1 there's no oversight rule for the courts. And when it
2 refers, this is the key thing, Judge Rao, when it refers to
3 the presumption of regularity, it's not saying there's some
4 exception to the rule it's laying down in that situation.

5 If you look at that passage of the opinion, all
6 it's doing is listing that as another reason for adopting
7 its rule. So that even with respect to constitutional
8 claims, courts are very loathe to second guess in the
9 absence of clear evidence of an unconstitutional motive.
10 And so it gives that as a reason for reading Rule 48 its
11 way. It's not adopting some exception to its reading of the
12 rule, but even if it were, we'd still be entitled to
13 mandamus because Armstrong is completely clear, Judge Rao,
14 that you have to have clear evidence of an unconstitutional
15 motive to rebut the presumption. And they can argue back
16 and forth about whether they think the Attorney General is
17 right about this or about that.

18 But there's nothing here that remotely approaches
19 clear evidence of an unconstitutional motive. That's what
20 you'd need to rebut the presumption, even if it were
21 relevant.

22 JUDGE RAO: So irregularity, in your view, would
23 only be an impermissible motive? There are not other types
24 of irregularities?

25 MR. WALL: That's right, because it's only an

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1 unconstitutional motive that would allow the Court to step
2 in, that you need an independent constitutional limit, like
3 a racially-based prosecution. So yes, if a district court
4 thought that a U.S. Attorney was favoring his friends that
5 would be terrible conduct. There are political remedies for
6 that, but there aren't judicial remedies under Rule 48. If
7 the considered decision of the Executive Branch, whatever
8 its motive, is that it no longer wishes to proceed, it
9 doesn't have to bring the case. And by the way, whatever
10 its motives, there's no longer an Article 3 case or
11 controversy. There's no longer --

12 JUDGE WILKINS: So even if the prosecutor was
13 dismissing the case because it did not believe that a white
14 police officer should have to answer for using excessive
15 force on a black defendant, and they say that in their
16 pleading under Rule 48(a), the district court still has to
17 grant the motion?

18 MR. WALL: Judge Wilkins, I don't think that the
19 Court can force the Executive to keep that case alive in the
20 absence of a case or controversy. As I tried to say
21 earlier, it may well be a basis for dismissing other
22 prosecutions, but even if you disagree with me on that, the
23 reasons your hypothetical has force is because it's an
24 unconstitutional motive. It's the kind of thing that could
25 qualify for Armstrong. And you can bracket that question

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1 off if you think that Fokker isn't as categorical as I do
2 because there's nothing like that here. And I don't think
3 you can leverage that, Judge Wilkins, to say, well, if we
4 can inquire --

5 JUDGE WILKINS: Then what does leave of court mean
6 then?

7 MR. WALL: So --

8 JUDGE WILKINS: What work at all does leave of
9 court do then?

10 MR. WALL: Well, it does work, of course, with
11 respect to opposed motions to dismiss. And the work that it
12 does for the far smaller set of unopposed motions in a
13 situation like this is it allows the Court to make sure that
14 it's the considered decision of the Executive. You don't
15 have a prosecutor who has been bribed, and it's the
16 considered position of the defendant, the defendant hasn't
17 been poorly counseled.

18 Imagine a situation where a defendant agrees to a
19 dismissal without prejudice even when the Government has
20 repeatedly been bringing charges and then dismissing them on
21 eve of trial. I think certainly a district court is
22 warranted in asking the defendant are you sure about this,
23 because it sure seems like the Government keeps yanking your
24 chain.

25 JUDGE WILKINS: So why isn't it the case that if

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1 the Government makes a considered but racist decision that
2 it just does not want to have a white officer stand trial
3 for excessive force on a black victim that the district
4 court can deny the motion, and then the political chips can
5 fall where they may, and perhaps under pressure from the
6 public or Congress or whatever, the district court may not
7 be able itself to force the Government to prosecute the
8 case, but maybe through the operation of the Legislative
9 Branch or other pressures from the public and the media, a
10 new prosecutor is appointed and the case proceeds? Why
11 isn't that exactly what leave of court should operate to do?

12 MR. WALL: Judge Wilkins, your question, I think,
13 recognizes the answer, which is, as you say, there's no
14 power to make the Executive move forward to trial, which I
15 think goes to show why this isn't the concern of Rule 48. A
16 district court can't deny --

17 JUDGE WILKINS: But if the Government can't make
18 the case go away, and the case is in limbo, then while it's
19 in limbo, pressure could be brought to bear on the
20 Government to reconsider its decision, right?

21 MR. WALL: So let me say two more things, Judge
22 Wilkins. First, I think as Judge Kavanaugh explained in
23 Aiken, the remedy for that kind of an equal protection
24 violation is to dismiss other cases. It's not to compel the
25 Government to move forward with this prosecution. And

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1 second, even if you disagree with the reasoning of Aiken, if
2 you had that kind of a case where the prosecutor put forward
3 on its face in the motion evidence, clear evidence under
4 Armstrong of an unconstitutional motive, I think you could
5 bracket off that case, and as a constitutional matter.

6 We don't have anything like that here. And just
7 to square the circle, you can't leverage that back, I think,
8 to say that even if you could inquire in some Armstrong type
9 case because the face of the motion disclosed a possible
10 constitutional violation that then you can inquire in every
11 case. That, then, would just eat the rule.

12 So I think Aiken is right that there are other
13 remedies for the equal protection violation. It's not meant
14 to be taken care of under Rule 48, but you don't have to
15 agree with me on that because here, no one, I think, is
16 arguing, not even respondent, that on the face of the motion
17 to dismiss that the Government filed, there's any
18 unconstitutionality, there's any evidence that we violated
19 the equal protection clause or anything like that.

20 JUDGE WILKINS: Thank you.

21 JUDGE HENDERSON: Mr. Wall, let me ask you, you
22 threw out a question probably 30 minutes ago. What would be
23 the harm in going ahead and mandating the granting of the
24 motion to dismiss? The harm is, to me anyway, regular
25 order. And mandamus is a drastic remedy. You know that.

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1 We all know that. Nobody has been able to find a case in
2 which mandamus has issued where the district court has not
3 acted in the sense of a ruling, an order, something that we
4 can review.

5 Now, this district judge has taken two actions.
6 He's appointed an amicus, and he's set a hearing. Now,
7 unless you agree with Ms. Powell that the setting of a
8 hearing is something that's ultra vires, that leaves the
9 appointment of the amicus, and granted, he may have chosen
10 an intemperate amicus, but that doesn't mean that he is
11 going to deny this motion. And considering the drastic
12 remedies that mandamus is, considering there's no precedent
13 that allows us to move without an order, I don't see -- and
14 considering that there's a hearing then set for July 16th, I
15 don't see why we don't observe regular order and allow him
16 to rule. For all we know, he will say this amicus brief is
17 over the top, the dismissal motion is granted.

18 MR. WALL: So, Judge Henderson, a few points.
19 Yes, it's an extraordinary writ. We would say this is an
20 extraordinary case. I think we're well past a regular
21 order.

22 JUDGE HENDERSON: I agree with that. I agree.
23 It's an extraordinary case.

24 MR. WALL: And I think if, I would say at a
25 minimum, at a minimum, in order to have the sort of regular

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1 order you were talking about, the Court should still issue a
2 more limited form of mandamus. That takes off the table
3 these evidentiary questions they want, probe the Executive's
4 motives, and we'll have to defend against that. You know,
5 they say in their brief, quote, affidavits and declarations,
6 end quote. And it seems to me that they want some
7 evidentiary or discovery process. I think that clearly
8 should be off the table, and contempt should be off the
9 table.

10 If all we're talking about is the meaning of
11 Fokker and Rule 48, and the Court is going to decide that at
12 the hearing with dispatch. We can come right back to the
13 Circuit. I think at a minimum you need that in order to get
14 the sort of regular order you're talking about. But then I
15 would say, Judge Henderson, and the reason I think you
16 should go a step further is it's just not true that even if,
17 as limited, he just denies the, or he grants the Rule 48
18 motion, it's still not the case that the parties haven't
19 suffered harms. The harms to General Flynn are obvious from
20 the continued prosecution and the threat of contempt unless
21 this Court takes it away, but the harms to the Government
22 are really what I'm focused on.

23 You have, as you say, a potentially intemperate
24 amicus. You have all of these allegations being lobbied at
25 the Executive Branch. We're going to have to answer them in

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1 a public forum, in a politicized environment. That's
2 exactly the sort of thing that Fokker, when it walks through
3 the harms in Part 2-A says you shouldn't be doing. It
4 invades our deliberative process. It chills law
5 enforcement. It sets up a conflict between the branches,
6 and so I agree with you --

7 JUDGE HENDERSON: But we don't know that's going
8 to happen. We have Judge Sullivan, who is an old hand.
9 He's an excellent trial judge. And he may say to himself,
10 at least, you know, I asked for advice, and I'm ignoring it,
11 and I'm granting the motion to dismiss. Shouldn't he be
12 allowed to do that?

13 MR. WALL: I think, Judge Henderson, and the
14 Government respects Judge Sullivan, as you say, an
15 experienced judge on the district court. I think because we
16 are past regular order, we have crossed into the mandamus
17 threshold. If we had gone about this a different way, I
18 might agree with you that order ought to be maintained. But
19 because we've reached a point where you have the district
20 court in its brief raising questions about prosecutorial
21 motives, you have the court-appointed amicus driving that
22 home in its brief.

23 The court is apparently contemplating that we'll
24 defend ourselves and lay out exactly why we've done what
25 we've done, all of this playing out against the backdrop of

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1 these incredibly harmful allegations. And I just, I think
2 if it isn't already, it is threatening to become and will
3 become the sort of public spectacle that I think mandamus is
4 warranted to foreclose at this point.

5 And I agree with you, Judge Henderson. I wish we
6 weren't here, but we are. Fokker is clear about granting
7 the Rule 48 motion. And so there isn't, it's why would we
8 have these unnecessary proceedings when they are really
9 going to do damage to the Executive Branch at this point
10 given the way they've set up and the environment they're
11 playing out in.

12 JUDGE WILKINS: But the Government didn't file
13 petition for writ of mandamus. Mr. Flynn did.

14 MR. WALL: That's very fair, Judge Wilkins. I
15 don't want to get too much in the Government's deliberative
16 process because, of course, our whole point is that's not
17 permissible under Rule 48. But what I can say is there was
18 uncertainty in the district court about what the district
19 court was going to do. And on the same day the district
20 court set the briefing schedule, before we'd made any final
21 decision, General Flynn filed his mandamus petition. And at
22 that point, we had to decide whether to support it or
23 whether to file a duplicative petition that risked slowing
24 this down.

25 And we obviously decided to support the mandamus

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1 petition. And I think, honestly, it would be artificial to
2 cabin off the separation of powers harms here just because
3 we didn't file our own petition when, you know, they're
4 presented in stark relief. And certainly, if that were
5 important to the Court, it should at least give us the
6 opportunity to file some short, mandamus petition that could
7 be consolidated with General Flynn's because we are here
8 saying there are serious, I mean, indeed grave. I think to
9 Judge Rao's point, stark separation of powers concerns
10 playing themselves out. These are not the sort of subtle,
11 abstract things that sometimes present themselves in these
12 Article 2 and Article 3 cases. You have a court that is
13 considering whether to keep alive a prosecution --

14 JUDGE WILKINS: But you're talking about regular
15 order, and then you're saying that, well, we didn't file a
16 mandamus petition, but if that's important, then give us
17 leave here after argument to file one. I mean, that's far
18 from regular order here. And you're arguing that, you know,
19 if you're not inclined to grant the principle relief by the
20 people who filed the motion, then grant some form of limited
21 mandamus relief. And you're making that argument even
22 though you don't have a mandamus petition before us. I
23 mean, none of that is regular order, counsel.

24 MR. WALL: Judge Wilkins, I'll grant that very
25 little about this case is regular order at this point. I

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1 don't think that our not filing a mandamus petition can be
2 taken as legally relevant in any way. We are a respondent
3 supporting petitioner. That regularly occurs in courts,
4 including the Supreme Court. We make the full range of
5 arguments, and our legal argument and our harms are
6 considered by those courts, as I think they should be here.
7 And my only point to Judge Henderson was, to get us back to
8 regular order, you need at least mandamus that would take
9 off the table the evidentiary proceedings and questions and
10 contempt.

11 But even if you just narrowed it to the legal
12 question of the meaning of Rule 48, which would mean that
13 most, I mean the vast bulk of the court-appointed amicus
14 brief is no longer relevant to the hearing, even then, you
15 still ought to take the additional step of granting
16 mandamus. And the cases, Judge Henderson, I would point you
17 to are Fokker and In Re: United States themselves. Those
18 were questions of first impression, but both this Court and
19 the Seventh Circuit said the constitutional principles are
20 so clear, we're going to give mandamus. And here, we have
21 not just the constitutional concerns under Article 2 and
22 Article 3, but you have the decision in Fokker itself. So I
23 think the key is going to be --

24 JUDGE HENDERSON: You know, but Fokker, I keep
25 coming back to in Fokker we knew what the district court

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1 did. We don't here.

2 MR. WALL: Oh, I agree. And I think it's
3 possible, then, that if you'd come up at an earlier stage in
4 Fokker, this Court wouldn't have granted mandamus. But once
5 it grants mandamus in Fokker and explains why it's doing it,
6 and it explains how it reads Rule 48, and it says a dozen
7 different times that there's prosecutorial discretion,
8 courts can't scrutinize. There's no oversight. It's not
9 just imputing the decision of the district court there, it's
10 impeding everything the district court was doing that lead
11 up to it because courts, it says, don't have any substantial
12 role. They have, quote, no oversight power, end quote.

13 And so once you know that from Fokker, then I take
14 the point that, you know, if -- look, this is not briefs and
15 a hearing. That's not what this is right now. That is not
16 how this is shaping up in the district court. But even if
17 we were somehow to limit it to a more normal type of
18 proceeding without all of the stuff that respondent in its
19 brief says it wants to get into, that's all now squarely
20 foreclosed by Fokker. So I understand pre-Fokker why it
21 might not have been enough, but it seems to be now it
22 indisputably is.

23 JUDGE RAO: Mr. Wall, I'm concerned about your
24 fallback position that we could grant some kind of partial
25 relief. I mean, wouldn't that require the Court to

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1 articulate, actually, far more legal standards about what
2 precisely is on and off the table? That seems to be a lot
3 of law to be making in the mandamus posture. And seems much
4 less clean than just, you know, issuing a writ of mandamus
5 in full. I'm just wondering whether what -- I mean if you
6 really think that this partial mandamus would actually be
7 more minimalist than a clean writ of mandamus?

8 MR. WALL: No, Judge Rao. Let me be very clear
9 about this. The writ of mandamus is warranted here. It is
10 clear and indisputable that the Rule 48 motion has to be
11 granted under Rule 48. And if we're right about that, there
12 is no reason to let these harmful proceedings play
13 themselves out in the district court.

14 So we completely agree that the cleanest way to
15 resolve the case under Fokker is to grant the writ. I was
16 just explaining to Judge Henderson that if the Court sort of
17 has these concerns about granting the writ, it seems a
18 little but unfair to the petitioner and the Government to
19 say you should observe regular order because nothing about
20 these proceedings threatens to be regular. To put them back
21 on a regular track, you have to grant at least some kind of
22 mandamus.

23 But I completely agree with you that that does
24 require you to say, look, Fokker is clear that it doesn't
25 have evidence, and it does require you to address the

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1 contempt piece. The cleaner way to do it is just to say
2 Fokker is clear that the Court has to grant the Rule 48
3 motion. And so given the harms to the defendant and the
4 Government, the writ should issue. And I will fully grant,
5 Judge Henderson, that it's an extraordinary writ. And we do
6 not ask for it in ordinary cases and in an ordinary dispute
7 between private parties, it wouldn't be appropriate here.

8 But this is a separation of powers case. I mean,
9 if you take a case like Cheney, where you just think about
10 discovery bringing the branches into possible conflict, and
11 the Supreme Court grants mandamus, this case, it seems to
12 me, is two steps beyond that. You have actual conflict
13 between the branches where the court wants to inquire into
14 why we did this in the face of allegations that there was
15 some impropriety. And I understand that to be exactly what
16 Chief Judge Srinivasan said in Fokker courts may not do.
17 And I really don't think it's hard to see what the harms are
18 going to be to the Government over the next couple of months
19 if we and the defendant are put through that process, which
20 is all for naught if at the end of the day the district
21 court is required by law to grant our motion.

22 JUDGE HENDERSON: Well, let's drop the phrase
23 regular order, and let's talk about one of the requirements
24 I don't think I've heard anybody mention, and that is the
25 adequate remedy at law. That's what I'm talking about as

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1 far as regular order. You granted, assuming you have an
2 indisputable right, and that, to me, seems pretty clear.
3 You still have to say why there is no adequate remedy at
4 law, and I'm not going to repeat myself, but why is there
5 none if on July 16th Judge Sullivan grants the motion to
6 dismiss?

7 MR. WALL: So I'll take one more stab, Judge
8 Henderson, and I think it's this. Even if, you know, a
9 month or two from now the Court grants our Rule 48 motion,
10 in the meantime you have a proceeding that's forcing us to
11 explain ourselves to do it apparently through affidavits,
12 declarations, some kind of an evidentiary process in the
13 district court. I don't know whether, I mean the district
14 court is very careful in its briefs not to say exactly what
15 it envisions, but, you know, the district court has left
16 itself room for not just documents of that kind but
17 witnesses and all the rest. And that is going to intrude,
18 it's going to -- all the harms in Part 2-A of Fokker. It's
19 going to intrude on our deliberative process.

20 And I think the Court has to take account of the
21 fact that both respondent's briefs and the court-appointed
22 amicus, they're impugning the motives of the Attorney
23 General of the United States, and it's going to pull the
24 judiciary into a fight that should play out in a public,
25 political, arena. And I think those are real harms to the

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1 Executive Branch, even if, at the end of having been put
2 through that whole process, and what I think threatens to be
3 a spectacle in the district court, the district court
4 ultimately grants the Rule 48 motion.

5 And if we're right, as you've started, that Fokker
6 says that district courts shouldn't be doing these things,
7 it's hard to imagine a case where a district court would do
8 something foreclosed by Fokker that would be more harmful
9 than what we're facing on the circumstances here. If ever
10 the court were going to say a district court needs to grant
11 the Rule 48 motion, that's what Fokker clearly and
12 indisputably requires, it seems like this would be the
13 classic case.

14 JUDGE HENDERSON: All right. Are there any more
15 questions?

16 JUDGE WILKINS: No.

17 JUDGE HENDERSON: If not, then we'll hear from Ms.
18 Wilkins. Thank you, Mr. Wall.

19 ORAL ARGUMENT OF BETH A. WILKINSON, ESQ.

20 ON BEHALF OF RESPONDENT HON. EMMET G. SULLIVAN

21 MS. WILKINSON: Thank you, Judge Henderson, and
22 may it please the Court. The petition asks this Court to
23 grant really an extraordinary remedy for mandamus to prevent
24 this district court from even considering or questioning a
25 pending a motion. This Court should deny that petition for

1 three reasons.

2 First, the Government's motion, as this Court has
3 already pointed out, is still pending, and it may very well
4 be granted. Alternative relief is available below. Second,
5 the law does not clearly and indisputably foreclose the
6 district court's consideration of the Government's motion.
7 And third, it would be inappropriate to grant mandamus in a
8 case involving open questions where the Government is
9 raising novel constitutional arguments that were not raised
10 below. As this Court has said, it is essential for those
11 questions to be raised below to maintain the regular order.

12 No one disputes that a federal district court
13 cannot second guess a legitimate exercise of prosecutorial
14 discretion simply because it disagrees with it. But that is
15 not the issue before the Court. The issue here is whether a
16 federal district court judge can set an expedited briefing
17 schedule and appoint an amicus to provide adversarial
18 briefing before ruling on a motion that requires leave of
19 court. The answer is it must be yes.

20 JUDGE RAO: Ms. Wilkinson?

21 MS. WILKINSON: Yes, Judge Rao.

22 JUDGE RAO: Ms. Wilkinson, yes, so, in a case such
23 as this where both the Government and the defendant agree
24 with the motion to dismiss, I mean, isn't the appointment of
25 an amicus creating an Article 3 case or controversy where

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1 there isn't one?

2 MS. WILKINSON: No, Your Honor. There is a case
3 in controversy here for several reasons. One, as you know,
4 the Government and the defendant are asking for the motion
5 to be dismissed with prejudice. By definition, there cannot
6 be a ruling to dismiss those charges with prejudice if the
7 Court doesn't have jurisdiction. And the parties want that,
8 of course, because they don't want another prosecutor to
9 come back and then look at these charges, and bring those
10 charges against Mr. Flynn. So everyone in this case agrees
11 that this motion, if it should be granted, should be granted
12 with prejudice so the charges are ended.

13 JUDGE RAO: Well, what happens, though, in a
14 case -- maybe another way of asking this, if the district
15 court were to determine that the motion to dismiss should be
16 denied, then what happens? Then we go on to sentencing Mr.
17 Flynn even though the executive is no longer pressing its
18 prosecution?

19 MS. WILKINSON: There's no reason at this point to
20 fear that the district court is going to deny the
21 Government's motion to dismiss. But if, for some reason,
22 the facts or the answers to the questions at the hearing
23 gave some basis for that, I'm sure the parties, including
24 the Government this time, and Mr. Flynn, would file another
25 motion or another writ for mandamus, and that happened in In

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1 Re: Aiken, as you know. And there, the Court said, and
2 denied the first motion for the writ because they said the
3 Government hadn't had the chance to act. And in fact, they
4 gave years to the Government agency, the NRC, to make that
5 decision. And only when that agency announced that it would
6 not rule did this Court issue a writ of mandamus.

7 So here, we're not in any situation similar to
8 that. As Judge Henderson has said, the court only set a
9 briefing schedule and has a hearing for July 16th. The order
10 to the amicus is circumscribed as only presenting arguments
11 in opposition, and there's no suggestion that the Court is
12 going to call witnesses or do anything of the parade of
13 horrors the Government and petitioner was laying out for
14 you. All this court is doing is getting advice on --

15 JUDGE RAO: And what standard is an Article 3
16 judge supposed to apply in this context?

17 MS. WILKINSON: Well, I think if you --

18 JUDGE RAO: In order to assess the motion to
19 dismiss, Rule 48 just says there must be leave of court.
20 Well, what's the standard that the district court judge must
21 apply?

22 MS. WILKINSON: Well, the governing law here is in
23 Ammidown, which is still good law, was cited by Fokker. And
24 there, as Fokker reiterated, I think, we have to look at
25 whether that presumption of regularity or there was a clear

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1 violation of the public interest for the Court to seriously
2 consider whether it can deny the motion to dismiss. So
3 there is a presumption, as you mentioned earlier. And the
4 question is, is there any basis to overcome that
5 presumption, and that would guide the Court's inquiry after
6 receiving the briefing and asking questions of the
7 Government and the parties.

8 JUDGE RAO: But, I mean, isn't, I mean the public
9 interest is not a standard that's mention in the rule. And,
10 I mean, in our constitutional system of government, isn't
11 the public interest with respect to whether a prosecution
12 goes forward, isn't that public interest one that is
13 committed firmly under Article 2 to the Executive Branch,
14 and two the politically accountable Executive Branch, not to
15 an Article 3 court?

16 MS. WILKINSON: Generally yes, Your Honor. The
17 prosecutorial prerogatives protect and consider the public
18 interest. But in Rinaldi, the Supreme Court specifically
19 held out that standard, I think you know, in Footnote 15
20 where they said they aren't ruling. They are allowing the
21 motion to dismiss be reviewed as the abuse of discretion,
22 and they found that it did abuse discretion. But they said
23 we have not decided whether you could consider a Rule 48 in
24 light of the public interest. And, in fact, the dissent,
25 led by Justice Rehnquist, said he thought it was clearly an

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1 independent basis to review a Rule 48 motion.

2 But in any event, that law is not clear here.
3 There's no clear and indisputable standard for this Court to
4 issue a writ of mandamus based on the fact that the standard
5 is unclear as to how you determine leave of court and any
6 kind of abuse of discretion or discretion. What we do know
7 is in this Court, in this Circuit Court, in Fokker and
8 Ammidown, both provided for a review by the court of the
9 Government's motion and allowed for questioning.

10 When you decided the case in Fokker, Judge Leon
11 questioned the parties, including the Government, in open
12 court on several occasions, and he had conferences. When
13 Fokker was decided, no one stated in that opinion you cannot
14 ask questions, you cannot have a hearing. And in fact, the
15 Government never took Judge Leon up on a mandamus. There's
16 no situation in Ammidown --

17 JUDGE WILKINS: The Government argues that Fokker
18 necessarily rebuked that approach by the district court.
19 What's your response to that?

20 MS. WILKINSON: That's not what Fokker says. What
21 Fokker says is that the district court judge abused his
22 discretion when he denied the motion, which was the speedy
23 trial motion, necessary for the deferred prosecution
24 agreement when he stated that he disagreed with the
25 Government's prosecutorial decisions. That, indeed, is an

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1 improper basis to deny a motion to dismiss. And that was
2 the circumscribed ruling of Fokker. Fokker does not deal
3 with Rule 48, as you've talked about, but it certainly
4 doesn't say that you can't have consideration or scrutiny.
5 In fact, it says just the opposite.

6 Throughout the opinion, they talk about the
7 scrutiny, and they talk about it being circumscribed, but
8 they certainly don't say the court has no right to ask
9 questions. And here, all the judge is doing is receiving
10 briefing and having a hearing. And the parties, the
11 petitioner and the Government didn't object to that below.
12 They had no --

13 JUDGE RAO: Well, but --

14 MS. WILKINSON: Yes, Your Honor.

15 JUDGE RAO: I mean, how does the presumption of
16 regularity, then, apply in a situation like this? I mean,
17 before asking questions, you know, appointing amicus,
18 doesn't the district court have to determine that the
19 presumption is overcome?

20 MS. WILKINSON: No, Your Honor. The court could
21 not determine whether the presumption had been overcome
22 without at least questioning the Government about its
23 motion. I think Judge Wilkins was pointing that out when he
24 was saying if you had a pleading and the Government didn't
25 include all the facts because they only wanted to present

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1 certain facts, the court, by definition, would have to
2 inquire to determine whether that presumption was overcome.
3 The court was clear that there is a presumption. So it is a
4 long hill to climb to overcome that presumption, but there's
5 nothing in Fokker that says you may not question the
6 Government.

7 And in fact, the Government answers these kinds of
8 questions all the time. If you look at Rinaldi, then-Chief
9 Judge King of the Southern District of Florida's court
10 called the prosecutors in and asked questions. The Supreme
11 Court in Rinaldi didn't say that kind of questioning was
12 improper. That happens every day in district courts when a
13 party files a motion and the judge asks questions. That's
14 all that's happening here.

15 JUDGE RAO: Well what about --

16 MS. WILKINSON: There's nothing more, nothing
17 less.

18 JUDGE RAO: I mean, there is more here. There is
19 an appointment of an amicus to oppose the motion to dismiss.
20 I mean, that is, that, I don't believe, is an everyday
21 occurrence.

22 MS. WILKINSON: You're absolutely right, Your
23 Honor, because normally parties are opposed, but here,
24 there's unusual circumstance where both parties agree. All
25 the district court did was appoint an amicus to present

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1 arguments in opposition to the Government's motion to
2 dismiss. And we know, because at least some time has
3 passed, that the amicus filed that brief and did not ask for
4 any witnesses, did not request any fact-finding. So to go
5 to Judge Henderson's point about the regular order, if this
6 Court doesn't step into the fray and allows the district
7 court to do its job, it may well be that the court reads
8 both sides, both briefings, asks the Government questions,
9 and grants the motion to dismiss.

10 JUDGE RAO: But who is the amicus representing
11 here? I mean, you know, where the Government decided to
12 drop a prosecution, and the defendant agrees, what is the
13 standard that they're arguing? I mean, who are they arguing
14 on behalf of?

15 MS. WILKINSON: They're arguing on behalf of the
16 adversarial position just like this Court does often or the
17 Supreme Court does. I mean, one of the most famous cases is
18 Dickerson where the Government was not going to challenge
19 the Miranda standard, and the Court appointed an amicus
20 there to argue because the Government chose not to take that
21 position.

22 JUDGE RAO: Right, but so what is the, so you're
23 saying that there is some kind of judicial right or judicial
24 powers here that the amicus is representing?

25 MS. WILKINSON: No. I think, I mean, I think as

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1 Mr. Wall stated, there is an inherent power, and it occurs
2 at the district court level, not frequently, for the Court
3 to appoint an amicus when it needs advice or legal briefing
4 on an issue. But here, it's even more important because you
5 need adversarial briefing. The Government and Mr. Flynn are
6 aligned.

7 JUDGE RAO: I know, but so, but that's, in a
8 criminal case, that is the adversarial process. It's the
9 Government against a criminal defendant. What does it even
10 mean to have an adversary where the Government and the
11 defendant agree? Like, I mean, is it representing some kind
12 of an inherent authority of the court?

13 MS. WILKINSON: It's representing the authority of
14 the court to understand the opposing arguments. Just like
15 here, Your Honor. You have the Government and the
16 petitioner aligned. And the district court was brought in
17 to argue the other side. It doesn't mean that the district
18 court thinks this motion under Rule 48 should be denied.
19 All we're doing coming forward is arguing the other side.

20 And all the district court was doing is appointing
21 an amicus to say what is the scope of the authority? Can a
22 motion, an unopposed motion under Rule 48 be denied? And if
23 so, what is the standard, as you've just asked me? The
24 standard is not clear.

25 So what are the outlines? What are the cases, and

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1 what do they say about the court's authority to ask
2 questions and to make that decision?

3 JUDGE RAO: So then the amicus isn't an adversary.
4 You're not, then, you're saying the amicus is to just
5 provide understanding about the law to the district court?

6 MS. WILKINSON: I think it's, the amicus is an
7 adversary in the sense that he was directed to take
8 positions opposing the Government's motion to dismiss, so I
9 believe the Government and the petitioner would surely see
10 the amicus as an adversary. And that's important because
11 the Court doesn't have to listen to the amicus, as Judge
12 Henderson said, the Court is an experienced judge. He can
13 ignore the amicus. He can take some of the points under
14 consideration. And then he can ask his questions and make
15 his ruling. But he wanted to hear --

16 JUDGE RAO: But I --

17 MS. WILKINSON: Yes, Judge.

18 JUDGE RAO: I'm sorry. I guess I think here, as
19 you've also recognized, right, I mean there is a core
20 Article 2 power over prosecution. Even the weakest
21 understandings of Article 2 admit that the Executive power
22 includes control over prosecutions. But it's hard --

23 MS. WILKINSON: Absolutely.

24 JUDGE RAO: I think you have to articulate here
25 what is the countervailing Article 3 issue at stake? So for

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1 instance, in the Nixon case, right, there was a conflict
2 between Article 2 and Article 3, and the Article 3 power
3 there that the Court articulated was the district court's
4 essential function in protecting individual liberty in a
5 criminal trial. But here, I think, I guess I'm wondering if
6 you can articulate what is the countervailing Article 3
7 power at stake in a case where the Government and the
8 defendant agree on the motion to dismiss?

9 MS. WILKINSON: Fokker laid that out by saying the
10 Court is allowed to question the presumption of regularity
11 of the prosecutorial decision even when the defendant and
12 the Government agree. Ammidown says the same thing. And
13 even in Nixon, Your Honor, the Court, citing the Framers,
14 made clear that even though you're dividing and allocating
15 the sovereign powers among three, co-equal branches, the
16 Framers of the Constitution sought to provide a
17 comprehensive system, but the separate powers were not
18 intended to operate with absolute independence.

19 And here, you had the Government exercising its
20 Article 2 powers coming in and asking the Court to make an
21 independent finding for a plea. It had the Court make a
22 legal finding and a factual finding, and by, as Fokker says,
23 the Court has exercised its coercive power and convicted the
24 defendant. There's a public conviction in lieu of a trial,
25 so the Government didn't have to go through that. And

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1 that's very important for Article 3 power that you're
2 stepping into the shoes of the jury and saying, based on
3 this finding, we can adjudicate this defendant guilty.

4 And now, the Government is coming back and saying
5 we want you to dismiss those charges, and, apparently,
6 vacate your findings of guilt. It's not clear what they
7 want to do about the actual plea because that's not the
8 subject of this mandamus. The plea agreement that is
9 between the Government and the defendant, and what the
10 effect of that is if the charges are dismissed. But they're
11 asking the Court, the Executive Branch, to come in and
12 reverse or vacate its findings. And so the Court has the
13 right, the duty, and the language under leave of court to
14 ask the Government questions. The Rule 48 language that's
15 been in the statute for over 80 years that the Supreme Court
16 suggested and Congress approved, there's not a case since
17 that language went in that says leave of court is
18 meaningless when the parties agree.

19 And that's the Government and the petitioner's
20 position. To be clear, they are saying those words mean
21 nothing when the defendant and the Government agree. And
22 that makes no sense under all of the cases, starting with
23 Rinaldi. It makes no sense in light of all the cases around
24 the country where every panel has at least considered
25 whether the Court below abused its discretion when they

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1 denied a motion to dismiss.

2 JUDGE RAO: Right. Well, perhaps, I mean, leave
3 of court may not be a kind of rubber stamp, but leave of
4 court is, those words on its own are also, it's hard, I
5 think, to fit into leave of court the ability for a court to
6 keep sentencing a person where the Executive Branch wants to
7 drop the prosecution. I mean, leave of court may not mean
8 that much, even if it means something more than a rubber
9 stamp.

10 MS. WILKINSON: True, Your Honor. And I think
11 every case has said that it's a circumscribed review, a
12 limited inquiry that a court can do under that standard, but
13 it doesn't say no review. It doesn't say no questions. And
14 the Government's position is somehow, by the Court asking
15 the Government questions about the motion that it filed,
16 that somehow that's some irreparable harm. If it is, that
17 goes on in a district court every day of the week. It went
18 on in Fokker. It went on in Ammidown. It went on in
19 Rinaldi.

20 The district court in each of those cases asked
21 the prosecutors questions, and they didn't stand up and say
22 we don't have to answer them; Leave of court means nothing.
23 They answered the questions. They gave the court the
24 information, and the Government certainly knows how to
25 refuse to answer or refuse to provide information if it

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1 thinks it's appropriate. And this is the reason why this
2 case, all of these issues should have been brought up with
3 the district court below. If the Government did not like
4 the process of the amicus or the briefing, or the petitioner
5 didn't, they should have raised it with Judge Sullivan. And
6 instead --

7 JUDGE WILKINS: Counsel --

8 MS. WILKINSON: -- they've end-run the district
9 court and come to you.

10 JUDGE WILKINS: Counsel, the Government says that
11 with respect to kind of the case or controversy and the
12 Article 2 prerogatives, and how Rule 48(a) is supposed to
13 work, that even if the Government in a motion says, you
14 know, we're moving to dismiss because we don't want to
15 prosecute this white defendant for beating and using
16 excessive force against a black victim, that the Court would
17 still be compelled under Rule 48(a) to grant the motion to
18 dismiss, and that the remedy, if any, for that sort of
19 unconstitutional bias would be, you know, defendants in
20 other cases filing some sort of Armstrong motion, or I guess
21 some, I guess action by other branches, you know, after the
22 dismissal to reprimand the Executive, what's your response
23 to that point of view of Rule 48(a)?

24 MS. WILKINSON: It won't surprise the Court that I
25 strongly disagree with that. The case law that's already

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1 well-known by this Court, starting with Rinaldi, and the
2 cases around the country give examples of where a court can
3 move, can deny a motion, which include bribery. That's not
4 even a constitutional violation. You just heard Mr. Wall
5 mention it a few minutes ago. And all of those cases
6 provide, that could be an example where a prosecutor was
7 bribed, and likely, if that were true, he's not going to put
8 that in the pleading, in the motion to dismiss, and that
9 could cause a court concern and could be the basis for a
10 motion to dismiss.

11 So if the Government was acting in a racist way
12 and either gave those bases to the court or the court was
13 able to uncover them through questioning, yes, that would be
14 a basis to dismiss. The next question is, then what could
15 the court do? It would depend on the posture of the case.
16 If it was an early decision in the case and the defendant
17 actually hadn't pled guilty, then there's more limited
18 options.

19 But as you've said, there's still public pressure
20 that can come as a result of the court's issuing that
21 motion. But if the defendant has pled guilty, the more
22 difficult question, or the more interesting question is, the
23 Article 3 court now has supervisory power over that
24 defendant. As Fokker says, once you have a guilty plea, the
25 court has jurisdiction over sentencing. So the question is,

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1 if that police officer has pled guilty and the Government
2 disagrees with moving to the dismissal, and the court denies
3 it, could the court sentence that defendant? I don't know
4 the answer to that question, but there's certainly a basis
5 for the judge to deny the motion to dismiss on those
6 grounds.

7 JUDGE WILKINS: Thank you.

8 MS. WILKINSON: The district court is not asking
9 as a prosecutor, Your Honor. Nor has he made up his mind
10 about the pending issues. He is considering the
11 Government's motion and receiving briefing from all the
12 parties. After hearing the arguments, Judge Sullivan will
13 do what he is called on to do on a daily basis. He'll
14 decide the motion. With such a combined inquiry, there is
15 no clear and indisputable justification for this Court to
16 enter the fray now and stop a federal district court judge
17 from carrying out his Article 3 responsibilities. Thank
18 you.

19 JUDGE HENDERSON: All right. Any more questions?
20 All right. Madam Clerk, neither counsel has any time left,
21 right?

22 THE CLERK: Correct. Correct.

23 JUDGE HENDERSON: All right. Ms. Powell, why
24 don't you take two minutes.

25 ORAL REBUTTAL OF SIDNEY POWELL, ESQ.

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1 ON BEHALF OF THE PETITIONER

2 MS. POWELL: Your Honor, first, there were no
3 valid Rule 11 proceedings in this case to take the guilty
4 plea. But mainly, the first judge who took it should have
5 recused already. He mysteriously recused a few days later,
6 but for the same reasons that would have existed when he
7 recused seven days later, he should have recused
8 immediately. And the Government knew that information, but
9 General Flynn didn't. The second guilty plea colloquy that
10 Judge Sullivan did was not a full colloquy at all. In fact,
11 he ended it by asking repeated questions and saying he had
12 many, many, many questions, including about how this was
13 material and how it impeded the Government's investigation.

14 All of that is now refuted completely by the
15 extraordinary exculpatory evidence that Mr. Jensen disclosed
16 that has been hidden from the defendant for three years.
17 That's what makes this case different from every other case.
18 When that happened in Stevens, Judge Sullivan had no problem
19 dismissing the case at all. He didn't inquire behind the
20 Government's two-page motion to dismiss. They simply
21 produced the evidence and dismissed the case.

22 Why we're making a special exception here for
23 General Flynn is beyond my capacity to understand the law
24 when every case in the country has affirmed a grant of a
25 motion to dismiss and not denied one in any way, shape, or

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1 form. I mean, every appellate case in the country has
2 affirmed the grant of a motion to dismiss or has said the
3 case has to be dismissed. They don't have any ability to go
4 question behind the Government's perspective on why it made
5 the decision absent an Armstrong problem which clearly
6 doesn't exist here or clear evidence, not plausible
7 questions, not musings, not imaginings, but clear evidence
8 of some serious wrongdoing that indicates bad faith on the
9 part of the Government. And Rinaldi makes clear that the
10 leave of Court provision was included to protect the
11 defendant from prosecutorial harassment.

12 There is neither a case nor controversy here any
13 longer. The Government and the defendant have agreed that
14 the case must be dismissed. The Government is not going to
15 carry on the prosecution. It cannot be forced to by an
16 Article 3 court. That's outside its bounds. And the motion
17 for writ of mandamus should be granted on all counts.

18 JUDGE HENDERSON: All right. Thank you, Ms.
19 Powell. Mr. Wall, why don't you take two minutes?

20 MR. WALL: Judge Henderson, can you hear me?

21 JUDGE HENDERSON: Yes.

22 ORAL REBUTTAL OF JEFFREY B. WALL, ESQ.

23 ON BEHALF OF U.S. DEPARTMENT OF JUSTICE

24 MR. WALL: Thank you. So, just a couple of very
25 brief points. I didn't hear respondent address what I think

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1 is the central point on the merits, which is that once they
2 have conceded that Fokker does not allow the court to go any
3 further with respect to the pre-plea situation, because
4 there's no way to make the Executive proceed with the
5 prosecution. Once we know that it's a Rule 48 and a
6 constitutional matter, there's no way to force the
7 Government in that situation. They don't have any argument
8 either as a matter of reading the rule in interpretive
9 principles or constitutional concerns that would distinguish
10 the post-plea situation. That's just not what Rule 48 is
11 meant for, and I think Fokker is clear about that.

12 So then really they've hung their hat on just the
13 notion that it's too early in time. And as I tried to say
14 earlier, I think, Judge Henderson, there are a real harms
15 that are going to come from the kinds of questions they want
16 to ask. I mean, in the brief they say they want to ask
17 about the uncharged conduct. So not just why do we no
18 longer want to maintain this prosecution but why we haven't
19 brought separate charges against this defendant. Everybody,
20 I thought even respondent conceded, commencement of the
21 prosecution is off the table, but they want to ask about
22 uncharged conduct.

23 They want to ask about related prosecutions. They
24 want to ask about why certain prosecutors signed particular
25 briefs, whether they agreed with our position, whether they

1 didn't. They want to ask questions on the reasons that the
2 Attorney General gave, like his policy judgment that the
3 federal interest is no longer warranted. And if the Court
4 thinks about the manner in which we are going to have to
5 answer those questions in the district court, what we are
6 going to have to say whether as a factual or as a legal
7 matter in terms of disclosing our own, deliberative
8 processes and the like, I think it's fairly clear why Fokker
9 said courts were not supposed to go down this road.

10 And I take the point that the train isn't at the
11 end of the line, that it's only partially left the station.
12 But I think that's why Fokker said the train is never
13 supposed to leave in the first place. In order to respect
14 the division of constitutional authority being the Executive
15 and the Judiciary in light of these Article 2 and Article 3
16 concerns like the ones Judge Rao was raising. There are
17 real harms here, and if we know what has to happen at the
18 end of the day, with all respect, the district court should
19 be directed to do it now rather than have some unnecessary
20 and very harmful further proceedings.

21 JUDGE HENDERSON: Mr. Wall, let me ask you
22 something that is I think in your brief but I don't think
23 you mentioned it this morning. And that is the harm to
24 Article 2, perhaps not harm, but the benefit of self-
25 correction. On this record before us, if there was bad

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1 faith, it occurred in the original prosecution. And
2 shouldn't we allow Article 2 to self-correct?

3 MR. WALL: Absolutely, Judge Henderson. And I
4 think, and this goes to the question Judge Wilkins was
5 asking earlier. Even if we could legally come in and not
6 give any reasons for the motion, we did give fairly fulsome
7 reasons, and the Attorney General had two, independent
8 rationales. And, or sorry, three independent rationales.
9 And although they have challenged two of them on sort of
10 legal bases, no one, not the court-appointed amicus and not
11 the respondent, has said a word about the portion of the
12 motion where the Attorney General says that looking at the
13 circumstances surrounding the FBI's interview of General
14 Flynn and the fact, the way it went on, and the way it
15 wasn't communicated to others at the White House and all the
16 rest, that he concluded that it was no longer in the
17 interest of justice to proceed with the prosecution.

18 Now, the reason they don't say a word about it is
19 because I think no one disputes that that is the kind of
20 judgment that is at the core of Article 2 power. It's
21 difficult to imagine, at least outside the military context,
22 a more core Article 2 judgment. And yes, Judge Henderson,
23 when we put that forward in the motion, whether we were
24 required to or not, absolutely, I think that at that point,
25 the district court is required to grant the Rule 48 motion.

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1 JUDGE HENDERSON: All right, thank you. Do my
2 colleagues have any questions?

3 JUDGE WILKINS: No.

4 JUDGE RAO: No further questions.

5 JUDGE HENDERSON: All right. Counsel, your case
6 is submitted, and Madam Clerk, if you'll adjourn court.

7 (Whereupon, the proceedings were concluded.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Mary Rettig

June 16, 2020

Date

DEPOSITION SERVICES, INC.