

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN RE: :
MICHAEL T. FLYNN : No. 20-5143
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Tuesday, August 11, 2020
Washington, D.C.

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

BEFORE:

CHIEF JUDGE SRINIVASAN, AND CIRCUIT JUDGES
HENDERSON, ROGERS, TATEL, GARLAND, GRIFFITH,
MILLETT, PILLARD, WILKINS, AND RAO

APPEARANCES:

ON BEHALF OF THE PETITIONER:

SIDNEY POWELL, ESQ.

ON BEHALF OF THE U.S. DEPARTMENT OF JUSTICE:

JEFFREY B. WALL (DOJ), ESQ.

ON BEHALF OF THE HON. EMMET G. SULLIVAN:

BETH A. WILKINSON, ESQ.

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1 MS. POWELL: Thank you, Chief Judge. And may it
2 please the Court. General Flynn is a defendant without a
3 prosecutor in litigation now without any controversy between
4 the actual parties to the case. Instead of promptly
5 granting dismissal as required on these facts as a matter of
6 law, Judge Sullivan denied two defense motions opposing any
7 amicus at all, appointed Mr. Gleason to usurp the job of the
8 prosecutor, raised the sword of perjury and contempt charges
9 over Flynn's head, and impermissibly sallied forth to right
10 the wrongs he perceived.

11 But as Judge Posner noted in In re: United States, the
12 job of the United States Attorney is otherwise occupied. In
13 adding the unconstitutional burdens of process to punish
14 Michael Flynn, Judge Sullivan discarded any semblance of the
15 unbiased, impartial adjudicator this Court extolled in Al-
16 Nashiri, the 2019 chapter of that case saga as the
17 cornerstone of any system of justice worth the label. Four
18 rulings are required to conclude this novel Article III
19 excess. Judge Sullivan's petition for rehearing must be
20 flatly denied with clear Ligon-like (phonetic sp.) language
21 the judge has no injury and no standing to seek relief in
22 this Court of this Court's rulings.

23 Second, because Judge Sullivan has so invested
24 himself in his own prosecution of General Flynn, Al-Nashiri
25 mandates his disqualification for the now-glaring appearance

1 of bias to millions of citizens. Third, Cheney, Sineneng-
2 Smith, and Bond require a mandamus issue to vacate the
3 unconstitutional appointment of Mr. Gleason for intrusion
4 into the sole Article II functions of the Executive Branch.
5 And fourth, mandamus must issue to compel the district court
6 to grant the dismissal as a matter of law. Only the
7 Department of Justice can decide the public interest and
8 myriad factors inherent in pursuing a prosecution.

9 This is not an ordinary motion on which there can
10 be factual development or debate. This is a Rule 48(a) case
11 dispositive motion as to which the Executive Branch has sole
12 discretion and determinative authority. The Government must
13 drop the case, and every 48(a) decision in the country
14 requires this motion be granted.

15 JUDGE SRINIVASAN: Thank you, Ms. Powell. I'll
16 begin the questioning. And can I ask you the following
17 question. And assume with me that I'm focused primarily on
18 the request to require the district court to grant the 48(a)
19 motion, and just put aside for one moment the other forms of
20 relief that you're requesting. I'm focused on the one that
21 the panel decided the case on, which is the requiring the
22 district court to grant the motion for dismissal under Rule
23 48(a). Now you agree that you're entitled to mandamus as to
24 that form of relief only if there's no other adequate means
25 to obtain the relief?

1 MS. POWELL: Yes, Your Honor. And there is no
2 other adequate means to obtain the relief because of the
3 usurpation of power and intrusion in the Article II branch
4 by the process he suggested and the fact that there's no
5 discretion involved in the district court, on the district
6 court's part in addressing a 48(a) motion.

7 JUDGE SRINIVASAN: But are you aware of any other
8 case in which mandamus has been granted to compel a district
9 court to decide a pending motion in a particular way, either
10 by granting or denying it before the district court itself
11 has decided whether it's going to grant or deny the motion?

12 MS. POWELL: Well, now that we have Fokker
13 Services, which of course you know as you wrote it, that the
14 law is clear that this motion has to be granted. Every
15 48(a) motion in the history of the country has ultimately
16 been granted. He could have had a hearing. He has had
17 ample time that he could have had counsel appear in front of
18 him, but there's nothing --

19 JUDGE SRINIVASAN: I'm not even focused -- if I
20 can just stop you for one second. I'm not even focused on
21 48(a) motions as such. And I take your point about Fokker.
22 And, in fact, for purposes of this question, I'll assume,
23 and it's just for purposes of this question, I'll assume
24 that everything you've said about the Fokker decision all
25 along is correct. And I'll assume further that the en banc

1 court agrees with Fokker, even though Fokker was a panel
2 decision. But I'm focused on the prong of mandamus that
3 deals with other adequate means. And whatever you might
4 think about the clarity of Fokker, that's going to be true
5 of all kinds of decisions that are on the books. And I'm
6 not even focused exclusively on 48(a) motions. I'm asking
7 just for any kind of motion, any kind of motion pending
8 before a district court. Are you aware of any situation in
9 which a district court has been compelled under mandamus to
10 grant or deny the motion before the district court itself
11 has decided whether to grant or deny the motion?

12 MS. POWELL: No, sir, because I don't know of any
13 other case where a district court has set about the process
14 that this district court did that went outside the
15 boundaries of Article III from its very inception, from the
16 minute he requested amicus, which is not provided for in the
17 rules of the court at all in a criminal district court case.

18 JUDGE SRINIVASAN: Well, if the district court
19 grants the motion, then that would be adequate alternate
20 means, would it not?

21 MS. POWELL: Well, no, sir, because the process
22 here is the problem. The process is what violates both
23 Article III and Article II. He should have granted or
24 denied the motion months ago, three months ago to be
25 precise. But instead, we've had the unconstitutional burden

1 that Cheney talks about being imposed on us by the process
2 he created, that he has absolutely no authority to create.
3 All he is entitled to do, even if he'd done it timely, would
4 be to review this motion on its face and grant it.

5 JUDGE SRINIVASAN: Okay.

6 MS. POWELL: There is no precedent whatsoever for
7 denying it.

8 JUDGE SRINIVASAN: Thank you, Ms. Powell. I'll
9 let my colleagues answer questions and follow up in the
10 follow-up round with anything more. I appreciate your
11 answers.

12 MS. POWELL: Thank you.

13 JUDGE SRINIVASAN: Judge Henderson.

14 JUDGE HENDERSON: No questions. Thanks.

15 JUDGE SRINIVASAN: Thank you. Judge Rogers.

16 JUDGE ROGERS: I'll follow up briefly. To what
17 extent do you understand Fokker to the extent you could rely
18 on it within the Chief Judge's assumption and the panel
19 opinion. Was Fokker not a case where mandamus was granted
20 after the district court had ruled?

21 MS. POWELL: Yes. Mandamus was granted in Fokker
22 after the district court had ruled on the deferred
23 prosecution agreement. And because we have Fokker now, we
24 know that Judge Sullivan has to grant this motion. And
25 because he went through the guardrails of any bridge of

1 Article III construction whatsoever, he has to be reined
2 back in.

3 And at a very minimum, mandamus must be issued to
4 vacate the appointment of Mr. Gleason as an amicus. And
5 there are no circumstances now under which Judge Sullivan
6 can continue on this case because his bias demands his
7 disqualification. Just the very appearance of bias is
8 enough to demand his disqualification. And here, we have a
9 long history of decisions made on the basis of extrajudicial
10 compact and the blistering op-ed in the Washington Post that
11 led him to choose the amicus he appointed. He even waived
12 the requirement of local counsel for him. He's added
13 additional perjury and contempt charges over General Flynn's
14 head, that perjury is now teed up for additional punishment
15 at the recommendation of the amicus. Judge Sullivan failed
16 to follow this Court's mandamus itself for 15 days and then
17 took the unprecedented step of seeking rehearing by filing
18 his own petition for rehearing in this Court when he has
19 absolutely no standing to do so. Taking on the mantel of an
20 active litigant has to disqualify him from proceeding any
21 further in this case if all the things that happened before
22 were not already sufficient.

23 JUDGE ROGERS: Now, in Will (phonetic sp.), the
24 Supreme Court stated that it had never approved the use of a
25 writ to review an interlocutory procedural order in a

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1 criminal case, which did not have the effect of a dismissal.
2 It acknowledged, though, that it wasn't saying there that it
3 could never be used, but it noted that mandamus had been
4 invoked successfully where the action of the trial court
5 totally deprived the Government of its right to initiate a
6 prosecution or where the Court overreached its judicial
7 power to deny the Government the right (indiscernible) of a
8 valid conviction.

9 Neither of these situations apply here, so why is
10 it appropriate to use mandamus to review the procedural
11 steps the district court took in connection with
12 consideration of the Government's motion?

13 MS. POWELL: Your Honor, the usurpation of power
14 does apply here. That's exactly what Judge Sullivan did
15 when he appointed Mr. Gleason in the stead of the Government
16 as soon as the Government moved to dismiss the prosecution.
17 There's no authority whatsoever for a judge to pile on and
18 add on his own prosecutor against a criminal defendant. The
19 fact that this is a Rule 48(a) motion, as opposed to the
20 Bill of Particulars issue in Will makes all the difference
21 in the world because only the Government can decide when to
22 stop a prosecution. And that's the authority he is
23 intruding on. He's not entitled to ask any questions about
24 that whatsoever when more than a mere conclusory statement
25 has been made. And in this case, we have a 100-page motion

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1 to dismiss supported by stunning exculpatory evidence that
2 was suppressed for three years or more. This is an
3 extraordinary case. The process he's created is beyond the
4 pale, as Judge Ginsberg would say in Sineneng-Smith. And if
5 nothing other than Sineneng-Smith requires that it be ended
6 and mandamus issued.

7 JUDGE SRINIVASAN: Thank you, Ms. Powell. I want
8 to make sure that Judge Rogers has no further questions
9 before proceeding.

10 JUDGE ROGERS: Thank you, Judge.

11 JUDGE SRINIVASAN: Judge Tatel.

12 JUDGE TATEL: Ms. Powell, just a quick question.
13 You argue that Judge Sullivan has no standing to file on
14 that petition. Does that make any difference if we en banc
15 this case sua sponte, that is on our own?

16 MS. POWELL: Well, according to the Court's order,
17 it considered his petition for --

18 JUDGE TATEL: Of course we considered his
19 petition. We consider all petitions. But I don't see
20 anything in the order that says we granted it or denied it.
21 If we --

22 MS. POWELL: Well, to avoid --

23 JUDGE TATEL: My question, though, is. My
24 question, though, is if we in fact en banc the case sua
25 sponte, it doesn't really make any difference whether Judge

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1 Sullivan is a party or has standing.

2 MS. POWELL: It does in terms of the
3 disqualification issue, Your Honor, because it shows --

4 JUDGE TATEL: I was only asking you about our
5 ability to hear the case en banc.

6 MS. POWELL: The Court can always take a case sua
7 sponte.

8 JUDGE TATEL: Thank you. Thank you. I have no
9 further questions.

10 JUDGE SRINIVASAN: Thank you. Judge Garland.

11 JUDGE GARLAND: Yes, thank you. So, imagine the
12 Supreme Court has decided an issue that is in the district
13 court squarely. And the -- without any doubts, completely
14 on fours, on all fours. And the person who moves for
15 summary judgment based on that case says I don't have to
16 wait. You have to decide this before you decide whether or
17 not it applies. And if you don't decide in advance of the
18 motion, I'm going to mandamus you. Why isn't that the same
19 as this case? Well, first of all, I assume you agree that
20 even if the Supreme Court had decided an issue that's not on
21 the district court directly on point, that would not be
22 enough to mandamus the judge before the judge decides. Do
23 you agree?

24 MS. POWELL: No. It would not, Your Honor,
25 because it wouldn't be a 48(a) situation that involved the

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1 core powers of the Executive Branch.

2 JUDGE GARLAND: Well, what if it was a separation
3 of powers case about the core powers of the Executive
4 Branch, and the Supreme Court had decided that the Executive
5 Branch has this power. The plaintiffs were claiming that it
6 doesn't. And the judge has not made up his mind yet. Would
7 you agree that that still the district court has to make the
8 decision before you can appeal or before you can seek
9 mandamus or before you can do anything else?

10 MS. POWELL: Well, he's effectively made a
11 decision here. He denied two motions opposing any amicus at
12 all and denied our request the motion to dismiss be granted
13 before he even appointed Mr. Gleason and then started the
14 whole process and intrudes into the Article II Executive
15 power that he simply cannot do.

16 JUDGE GARLAND: Do you disagree with Judge Rao's
17 statement that the district court currently presiding over
18 the case has yet to decide the Government's motion?

19 MS. POWELL: Yes, I do. I do at this point
20 disagree with that because I went back and looked at the
21 record again and realized we had filed our request for him
22 to grant that and oppose the amicus twice before he even
23 appointed Mr. Gleason.

24 JUDGE GARLAND: That's on the amicus question.
25 What about the dismissal of the case question?

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1 MS. POWELL: In that motion, around Docket 200 I
2 think, we requested again the dismissal be granted.

3 JUDGE GARLAND: I see. So the panel just got that
4 wrong?

5 MS. POWELL: Well, it was my failure to point out
6 to the panel that that motion had previously been granted,
7 but we corrected that in our opposition to his petition for
8 rehearing, something that was so different from the summary
9 judgment context or anything like that is. It's a criminal
10 case in which the defendant, all the constitutional rights
11 are supposed to benefit the defendant.

12 JUDGE GARLAND: We have lots of cases, don't we,
13 where we have reversed a district court for clear or plain
14 error in a criminal case. And yet, there was no ability of
15 that defendant to do anything other than appeal the
16 conviction. They could not mandamus the court. Imagine
17 that the Supreme Court had decided a Fourth Amendment case
18 and clearly applicable to that particular defendant in that
19 defendant's favor, and then the district court ruled the
20 other way. The defendant would still have to appeal even
21 though the defendant's liberty was restricted and a
22 conviction stood. Isn't that right? That's the normal way
23 criminal cases go, isn't it?

24 MS. POWELL: That's the normal way criminal cases
25 go when they're dealing with solely legal issues and the

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1 Government hasn't walked in and said I quit when the
2 Government is the only entity that can pursue a prosecution.

3 JUDGE GARLAND: So it's not just the question of
4 the clarity of the law at the time?

5 MS. POWELL: No, it's not just a question of the
6 clarity of the law at the time. It's a function of the sole
7 authority of the Executive Branch being the one to
8 prosecute. All the discretion is vested in it to weigh all
9 the factors that go into dropping a prosecution. And the
10 Court can't continue a prosecution on its own, which is
11 essentially what Judge Sullivan has tried to do here and has
12 done very effectively for three months.

13 JUDGE GARLAND: So if all that the district court
14 had done was ask Mr. Flynn and the Government to brief and
15 orally argue the scope of Rule 48 and any separation of
16 power arguments and permitted amicus but did not appoint
17 amicus you would not have the argument? Is that right?

18 MS. POWELL: No. I think we still would. I think
19 that's far more procedure and process than is allowed by
20 precedent on any 48(a) motion in the history of the country.

21 JUDGE GARLAND: Okay. Thank you very much.

22 JUDGE SRINIVASAN: Thank you. Judge Griffith.

23 JUDGE GRIFFITH: Thank you, Ms. Powell. As I see
24 it, the question before us is not whether the district court
25 must grant the 48(a) motion. The question is whether the

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1 district court may appoint an amicus and hold a hearing
2 before deciding that motion. Now, in your view, what is it
3 in Rule 48(a) itself or that in our cases that prevents the
4 district court from conducting a hearing before deciding the
5 motion?

6 MS. POWELL: Well, the Supreme Court and this
7 Court has said that the court has no substantial role
8 whatsoever in ruling on a 48(a) motion. The leave of court
9 provision is not a license for him to investigate behind the
10 stated reasons the Government has for dismissing the case.

11 JUDGE GRIFFITH: What is the role of the leave of
12 court language then? From your comments today, you make it
13 sound as if it's ministerial.

14 MS. POWELL: It almost is ministerial. It allows
15 the Court --

16 JUDGE GRIFFITH: But what does almost is
17 ministerial mean? Is it ministerial or not? Yes or no?

18 MS. POWELL: It's pretty ministerial. It's --

19 JUDGE GRIFFITH: Well, that's not, Ms. Powell,
20 that's not helpful. It's not ministerial. You know it's
21 not. The case law doesn't say it's ministerial.

22 MS. POWELL: Well, no. Rinaldi says --

23 JUDGE GRIFFITH: So it's not ministerial. So that
24 means that he judge has to do some thinking about it, right?
25 The judge just is not seeking a rubber stamp. The language

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1 of the rule itself and the history of the rule shows the
2 judge is not a rubber stamp. So aren't you just arguing
3 about what the judge must do to educate himself or herself
4 to be able to rule on the motion? And I take it --

5 MS. POWELL: That --

6 JUDGE GRIFFITH: I take it your point is that the
7 rule itself forbids the conducting of a hearing before the
8 motion. Is that your position?

9 MS. POWELL: No, sir. It's the Constitution and
10 the Supreme Court's decision in Rinaldi and this Court's
11 decision in --

12 JUDGE GRIFFITH: That prevents, that prevents any
13 hearing before the motion?

14 MS. POWELL: It prevents any inquiry behind the
15 Government's stated reasons for the motion.

16 JUDGE GRIFFITH: What is the --

17 MS. POWELL: It prevents any substitution of Judge
18 Sullivan's opinion of --

19 JUDGE GRIFFITH: What type of --

20 MS. POWELL: (Indiscernible).

21 JUDGE GRIFFITH: What type of hearing is
22 permissible, Ms. Powell?

23 MS. POWELL: He could have called the parties in and
24 said does the Government move to dismiss, and the Government
25 says yes, and he could have said well is this Brady

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1 material? Like, they could have said yes or no, or Giglio
2 like he pushed them a bit on the Stevens case. But to have
3 any evidence, any contrary testimony, to ask the, quote,
4 plausible questions he had that he's mentioned in his briefs
5 that he wants to ask, none of that is permissible whatsoever
6 because Rinaldi makes it clear that the leave of court
7 provision is only to protect the defendant from being
8 harassed by the Government. So the only discretion he has
9 is whether to make sure it is with prejudice as Judge
10 Sullivan himself did in his decision in the Pitts (phonetic
11 sp.) case. The Government wanted to dismiss it without
12 prejudice, and he said no, it has to be with prejudice. And
13 that's what he did in the Stevens case too. On just a two-
14 page motion to dismiss filed by the Government.

15 JUDGE GRIFFITH: Ms. Powell, you've stated in your
16 oral argument today that you believe that you have a very
17 strong case before the district court on Rule 48(a), right?
18 (Indiscernible.)

19 MS. POWELL: Yes.

20 JUDGE GRIFFITH: Right. You have a strong case.
21 In that case, why mandamus? Why not simply appeal if Judge
22 Sullivan does not grant the motion to dismiss under Rule 48,
23 why not seek an appeal to us?

24 MS. POWELL: Because the process he has started
25 and intends to pursue violates the Article II powers of the

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1 Executive Branch. And Bond entitles General Flynn to stand
2 on those constitutional principles of separation of powers
3 and allege the harm that also occurs to him by the violation
4 of his constitutional rights. And I think it was In re:
5 Peru or Ex Parte Peru said to a prompt termination of these
6 proceedings instead of a trial upon a trial of the
7 Government's decision to dismiss, which he has no discretion
8 or authority to inquire behind whatsoever. Every case in
9 this country that has ever addressed Rule 48(a) motion has
10 required it be granted. Every one.

11 JUDGE GRIFFITH: And you don't think that's what
12 will happen on this one?

13 MS. POWELL: It's the --

14 JUDGE GRIFFITH: We don't know. We don't know, do
15 we? We haven't checked because we don't know. Judge
16 Sullivan hasn't ruled yet.

17 MS. POWELL: We know the process he has proposed
18 is unconstitutional. We know that the process he's proposed
19 tramples all over the Executive Branch's independent
20 authority to do it, as well as its, what went into its
21 decision-making. Nothing about what he has done since he
22 got the motion to dismiss has been done in any other case we
23 could find. Not one, single step of the procedure. And to
24 add on someone to prosecute the defendant, as Mr. Gleason
25 wants to do when --

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1 JUDGE GRIFFITH: I don't understand your
2 statement. I mean, the appointment of amicus is for a court
3 to argue a view that's not going to be presented by the
4 parties. That's common.

5 MS. POWELL: Not in --

6 JUDGE GRIFFITH: That --

7 MS. POWELL: Not in district court in criminal
8 cases, Your Honor. There's no rule or provision for it. It
9 violates Hollingsworth v. Perry. He can't just go out on
10 its own and do this, and it steps all over the Article II
11 Executive Branch authority.

12 JUDGE GRIFFITH: Okay, thank you very much, Ms.
13 Powell.

14 MS. POWELL: There's nothing there about aligning
15 people against a defendant in a criminal case, as if there
16 weren't enough already.

17 JUDGE SRINIVASAN: Thank you, Ms. Powell. Thank
18 you.

19 JUDGE GRIFFITH: Thank you.

20 JUDGE SRINIVASAN: Judge Millett.

21 JUDGE MILLETT: Yes. Good morning, Ms. Powell.

22 MS. POWELL: Good morning.

23 JUDGE MILLETT: Just a few questions for you.
24 Where in the district court did you raise the separation of
25 power arguments?

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1 MS. POWELL: It was a motion we filed in
2 opposition. Amicus started because of an email sent to
3 chambers by the Robbins Russell firm on behalf of the self-
4 described Watergate prosecutors in which they copied me
5 evidencing their intent to seek the --

6 JUDGE MILLETT: I'm aware of that. And so you say
7 your opposition to that amicus filing, which was before the
8 appointment of Mr. Gleason and before the briefing schedule
9 was issued and this whole process for a hearing was. That
10 was your opposition to orders that the district court issued
11 later.

12 MS. POWELL: Yes. And we requested --

13 JUDGE MILLETT: Okay. Just to be clear. So your
14 answer is that you --

15 MS. POWELL: Yes. I think it's around Docket
16 Number --

17 JUDGE MILLETT: That's before the court even did
18 it. Yes, no, I know. That's the opposition to the
19 Watergate prosecutors. But there was no Gleason, no
20 appointment yet of Mr. Gleason, correct?

21 MS. POWELL: No. He did not enter that order --

22 JUDGE MILLETT: Yes, and there was no briefing --

23 MS. POWELL: -- until after he filed the petition
24 for mandamus that he --

25 JUDGE MILLETT: Right.

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1 MS. POWELL: That he was going to do it.

2 JUDGE MILLETT: Okay. And then after the district
3 court issued that order appointing Mr. Gleason, where is
4 your objection raising the separation of powers concerns or
5 any concerns? Where is your objection?

6 MS. POWELL: Well, the separation of powers
7 objection --

8 JUDGE MILLETT: In the district court?

9 MS. POWELL: -- was already on file with respect
10 to --

11 JUDGE MILLETT: No, no, no. That was with a
12 different amicus. Where is, because the argument here does
13 not mention once the brief about the Watergate prosecutors.
14 It's all about Mr. Gleason's appointment to take over the
15 prosecution, to inquire and scrutinize the Government's, Mr.
16 Gleason, to be clear, is arguing for this, to scrutinize the
17 governmental motives. Where is your opposition to the
18 appointment of Mr. Gleason in the district court?

19 MS. POWELL: Our original opposition, I believe,
20 is at --

21 JUDGE MILLETT: Before he was appointed.

22 MS. POWELL: -- docket numbers 201 and 203.

23 JUDGE MILLETT: Okay, so after his appointment
24 you've never --

25 MS. POWELL: And that opposed the appointment of

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1 any amicus --

2 JUDGE MILLETT: I'm sorry. This works a lot
3 better with one person --

4 MS. POWELL: -- for the same reason --

5 JUDGE MILLETT: This works a lot better if you'll
6 just let me get my questions, because sometimes I just need
7 a quick yes or no. So I'm just clarifying. You didn't do
8 any, you made no opposition, no objection to the appointment
9 of Mr. Gleason. You're just referring back to arguments you
10 made to the Watergate amicus, sua sponte moving for amicus
11 in the case. And in his minute order on May 19th setting
12 out this whole briefing schedule and amicus, the district
13 court said the following schedule should govern the
14 proceedings subject to a motion for reconsideration. Did
15 you ever file a motion for reconsideration?

16 MS. POWELL: No, Your Honor. We had already filed
17 the petition --

18 JUDGE MILLETT: You did not. Okay.

19 MS. POWELL: -- for writ of mandamus --

20 JUDGE MILLETT: Okay.

21 MS. POWELL: -- because that's what exists.
22 That's the remedy for a usurpation of power.

23 JUDGE MILLETT: Okay. I thought the mandamus was
24 filed after that. Our docket shows 5-21, and this order was
25 issued 5-19. Am I wrong on that --

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1 MS. POWELL: We filed the mandamus on --

2 JUDGE MILLETT: -- or is the docket wrong?

3 MS. POWELL: -- on, I think there's a mistake in
4 the order of the docket entry.

5 JUDGE MILLETT: Okay.

6 MS. POWELL: That's when Judge Sullivan was asked
7 to respond to it, but we had filed on the 19th.

8 JUDGE MILLETT: So you never did the motion for
9 reconsideration. Okay.

10 MS. POWELL: No.

11 JUDGE MILLETT: You mentioned --

12 MS. POWELL: That's the purpose of mandamus.

13 JUDGE MILLETT: Yes, okay. Sure. You mentioned
14 that, in a response to one of my colleagues, that the
15 district court could have brought the Government and all the
16 attorneys in, obviously, for a hearing and could have pushed
17 them a bit, I think was your phraseology, as in the Stevens
18 case. Can you elaborate on how much pushing the district
19 court is allowed to do?

20 MS. POWELL: Not very much. He cannot inquire
21 into the deliberation --

22 JUDGE MILLETT: Well what was done in the Stevens
23 case is okay.

24 MS. POWELL: -- or the decision-making that --

25 JUDGE MILLETT: Your pushing in the Stevens case

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1 was okay. Tell me exactly what pushing was okay.

2 MS. POWELL: He asked the Government if the
3 material that had been withheld from Senator Stevens was
4 Brady material. And they kind of, they were a little wishy-
5 washy on that. And then they admitted it was Giglio. And
6 that was the virtual extent of it.

7 JUDGE MILLETT: Okay. And this case, a large
8 portion of the Government's explanation for its motion to
9 dismiss is the discovery of new material that would qualify
10 as Brady material, correct?

11 MS. POWELL: That's correct.

12 JUDGE MILLETT: Okay. Another question is, you've
13 mentioned that courts cannot appoint an amicus to argue
14 against a defendant's interests in a case in which the
15 Government has sided with the defendant. Correct? Okay, so
16 there's just too much, right, once the Government's agreed
17 with it (indiscernible).

18 MS. POWELL: Well -- at the district court level,
19 the rules have no provisions for the appointment of amicus
20 in a criminal case.

21 JUDGE MILLETT: Is there a rule against it?

22 MS. POWELL: No, but by the virtue of the fact --

23 JUDGE MILLETT: Okay.

24 MS. POWELL: -- there is a civil rule --

25 JUDGE MILLETT: Is there --

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1 MS. POWELL: -- in the district court and there's
2 not one in the criminal court.

3 JUDGE MILLETT: Is there a Supreme Court rule that
4 says they can appoint amici in criminal cases to argue
5 against the interests of a criminal defendant when the
6 Government has aligned with him?

7 MS. POWELL: The Supreme Court and appellate
8 courts routinely appoint amici for various purposes.

9 JUDGE MILLETT: Is there a rule in the Supreme
10 Court saying that they can do that, and including, as you're
11 talking about, in a criminal case to align against a
12 criminal defendant? Or is there a rule saying they can or
13 can't?

14 MS. POWELL: I do not know.

15 JUDGE MILLETT: Okay. But they have done it. The
16 Supreme Court's done it.

17 MS. POWELL: The Supreme Court appoints amici
18 whenever it wants to.

19 JUDGE MILLETT: Right, okay. Just trying to
20 clarify. One last quick question for you. You talked about
21 the role of a court and 48(a), and one thing it can do is
22 obviously prevent harassment of a defendant. If this had
23 been a motion to dismiss without prejudice or something, the
24 district court could have insisted that it be with prejudice
25 or at least examine that question with the Government.

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1 Correct?

2 MS. POWELL: Correct. That's Rinaldi and Judge
3 Sullivan's decision --

4 JUDGE MILLETT: I think you agreed with, I think
5 you agree with Judge, I think it was Judge Griffith, that
6 this is not a purely ministerial process. Can courts use
7 48(a) to protect their own processes to ensure that
8 prosecutors are not abusing and manipulating the court
9 process?

10 MS. POWELL: No, Your Honor, it cannot.

11 JUDGE MILLETT: It cannot.

12 MS. POWELL: 48(a) is not for that purpose.

13 JUDGE MILLETT: Okay, all right. Thank you. I'm
14 finished.

15 JUDGE SRINIVASAN: Thank you. Judge Pillard.

16 JUDGE PILLARD: Good morning, Ms. Powell.

17 MS. POWELL: Good morning. One decision that
18 seems, I think it's the only decision I've been able to find
19 that deals with the question of whether mandamus is
20 appropriate before a district judge has even had an
21 opportunity to rule on a Rule 48 motion is the Third
22 Circuit's decision In re: Richards, Judge Becker's opinion.
23 And there, the Third Circuit denied mandamus because the
24 trial court had not even had a hearing on the Rule 48(a)
25 motion. We haven't decided this issue in our circuit, but

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1 Richards suggests that there is no clear and indisputable
2 right against briefing and arguments on a Rule 48(a) motion.
3 (Indiscernible.)

4 MS. POWELL: Well, it's already been briefed. I'm
5 sorry, Your Honor. Go ahead.

6 JUDGE PILLARD: Right. You are opposing the
7 briefing, adversary briefing and argument on the motion.
8 That's why you sought mandamus. Am I right?

9 MS. POWELL: Well, yes. That's because there is
10 no adversary because the parties have consented. General
11 Flynn and the Government have agreed to the motion to
12 dismiss. There's no longer a case or controversy for the
13 district court to adjudicate. And 48(a) and even the In re:
14 Richards case, which is a 20-year-old case out of the Third
15 Circuit from a territorial court in the Virgin Islands in
16 which the Government just made a mere statement of it's in
17 the interest of justice. And the Court said we need a
18 little more sunlight on the reasons for that. That's the
19 only --

20 JUDGE PILLARD: Right. And Richards, you do try
21 to distinguish Richards on the ground that there was only a
22 conclusory interest in Footnote 3 of your panel briefing.
23 But in Richards, the prosecution's joint motion to dismiss
24 had supporting affidavits from potential witnesses saying
25 they wouldn't testify. The court there was entitled to read

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1 the briefs, listen to argument, consider contrary arguments
2 before granting leave. Do you disagree with that? Do you
3 think that they wrongly decided that case?

4 MS. POWELL: Given the particular circumstances of
5 that case and a witness, a key witness who recanted, if I
6 recall, in a sexual misconduct case that was extremely high-
7 profile now 20 years ago, there's been a substantial
8 development in the law, not the least of which --

9 JUDGE PILLARD: Do you disagree with Richards
10 on --

11 MS. POWELL: (Indiscernible) improper service.

12 JUDGE PILLARD: Ms. Powell, do you disagree with
13 Richards on its own terms in that case? Is the only
14 distinction that you're trying to draw appointment of
15 amicus, that there it was premature. The Third Circuit held
16 it was premature. Mandamus was inappropriate because the
17 Court could listen to argument and look at the motion and
18 supporting affidavits and consider whether to grant leave.
19 You don't have any quibble with that, do you?

20 MS. POWELL: As of 20 years ago, no. As of now,
21 yes.

22 JUDGE PILLARD: So under the law as it currently
23 stands, you think that they should have granted mandamus in
24 Richards, and that's why?

25 MS. POWELL: If Richards were now, then yes.

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1 JUDGE PILLARD: Yes. Why?

2 MS. POWELL: If Richards were now, then yes.

3 JUDGE PILLARD: Why?

4 MS. POWELL: I would say because there is a 100-
5 page motion to dismiss here with 80 pages of exculpatory
6 evidence that wasn't produced to the defendant. The fact
7 that Brady evidence was suppressed alone is sufficient to
8 vacate the guilty plea. We also have other motions on file
9 with multiple reasons why the plea is not valid. And --

10 JUDGE PILLARD: I mean your --

11 MS. POWELL: The bottom line is that a 48(a)
12 motion leaves no discretion in the district court even more
13 than an ex parte U.S. The Court said that the discretion to
14 grant or issue a bond or a bench warrant is not the
15 discretion to deny it.

16 JUDGE PILLARD: But we don't know whether this
17 district judge was going to exercise his discretion to grant
18 or deny this motion. We would assume, given the precedent
19 that we've read and that you've read, that he would grant
20 it. That would be the assumption, right?

21 MS. POWELL: We know that the process he has
22 established by --

23 JUDGE PILLARD: So it's the process. It's the
24 process that you're objecting to because we don't have a
25 merits ruling, right?

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1 MS. POWELL: Well, we have a ruling on --

2 JUDGE PILLARD: The process that you're objecting
3 to.

4 MS. POWELL: -- appointing the amicus, it would
5 have to be vacated at a minimum. And then it would have to
6 be remanded to a different district judge because of all of
7 his actions that now amount to the egregious appearance of
8 bias that prohibit him --

9 JUDGE PILLARD: But the reason --

10 MS. POWELL: -- from ruling on this case any
11 further.

12 JUDGE PILLARD: Excuse me, Ms. Powell. So, Judge
13 Sullivan showed bias by appointing an amicus, but Gleason
14 wasn't being chosen as the judge. He was invited to argue
15 one side in an adversary system. An adversary system is so
16 that we get the law right. It's the core of any judge's job
17 to assess cases and deal with the strongest arguments that
18 can be made on both sides. And your position is no, he
19 can't hear both sides on the law. He has to drop the case
20 like a hot potato without an adversary pitching an argument.
21 That's your position.

22 MS. POWELL: There is no provision for amicus in a
23 criminal case in the federal district court, and certainly
24 not to take the position of the Government when it has
25 decided to drop the case. When the Government signs off,

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1 the case is over. The Article III branch cannot make the
2 Article --

3 JUDGE PILLARD: Where --

4 MS. POWELL: -- (indiscernible) branch prosecute a
5 case.

6 JUDGE PILLARD: So I think that your position is,
7 correct me if I'm wrong, that to the extent that Rule 48(a)
8 requires leave of court for anything other than the
9 defendant's interests in a with prejudice dismissal is at
10 stake, that every over application for leave of court
11 requirement is unconstitutional under separation of powers.
12 Is that a fair view of your position?

13 MS. POWELL: Yes.

14 JUDGE PILLARD: Okay. No further questions.

15 MS. POWELL: It is a very limited --

16 JUDGE SRINIVASAN: Thank you. Thank you.

17 MS. POWELL: -- review.

18 JUDGE SRINIVASAN: Judge Wilkins.

19 JUDGE WILKINS: Yes. Good morning, Ms. Powell.

20 MS. POWELL: Good morning.

21 JUDGE WILKINS: I have a hypothetical. So suppose
22 in the future in a different administration you have a 48(a)
23 motion that was filed and that was unopposed and the
24 prosecution said, you know, it's because of this exculpatory
25 evidence that we're moving to dismiss. And a Catholic

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1 University law professor asks the appointed amicus because a
2 group of nuns and bishops happened to witness the prosecutor
3 taking a briefcase full of cash from the defendant in the
4 case, and they made a videotape using their smart phones of
5 the transaction. And they presented that to him along with
6 sworn declarations. And so he wants to file an amicus brief
7 and attach that evidence. Is that improper?

8 MS. POWELL: Well, that would certainly be
9 improper behavior by the prosecutor and worthy of
10 prosecution itself by the Department of Justice.

11 JUDGE WILKINS: Is appointment of amicus, that
12 professor as amicus improper?

13 MS. POWELL: I believe it would be if the
14 Government had already filed a 48(a) motion and had decided
15 through its appropriate channels to drop the case. That's a
16 decision that has to go all the way up to the Attorney
17 General and the Solicitor General, I believe, for a 48(a)
18 motion to be filed. And whatever the considerations that
19 were that go into that are, belong to the Department of
20 Justice, not the Article III judiciary, although it could
21 certainly make a criminal referral, and should.

22 JUDGE WILKINS: Well, so if the district judge
23 said, okay, I'm not going to appoint amicus because the
24 defendant has objected to that, but I want to hold a
25 hearing, and I'm going to ask that those witnesses come to

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1 the hearing and bring their video footage of this alleged
2 bribe. The district judge, because it's an unopposed 48(a)
3 motion, cannot hold that hearing?

4 MS. POWELL: He cannot go behind the prosecutor's
5 decisions to dismiss a case. And he certainly can't on the
6 facts of this case. I mean, one of the reasons I think --

7 JUDGE WILKINS: I'm asking you about my
8 hypothetical, that it would be improper for the district
9 judge to hold a hearing under the facts of my hypothetical.

10 MS. POWELL: I believe under the facts of your
11 hypothetical, what the district judge would have to do is
12 refer the matter to the Department of Justice for
13 prosecution.

14 JUDGE WILKINS: All. I have no further questions.
15 Thank you.

16 JUDGE SRINIVASAN: Thank you. Judge Rao.

17 JUDGE RAO: Thank you. Good morning, Ms. Powell.
18 So, I guess one of the questions that my colleagues seem to
19 be focusing on, and I want to maybe just hear from you again
20 on this is, you know, what is the, what is the most that a
21 district court judge can do then considering leave of court
22 under Rule 48. It seems that you think he can hold a
23 hearing. Is there anything else that he can do?

24 MS. POWELL: Well, according to all the existing
25 authority, it's described his role as extremely limited,

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1 virtually no role. It's not -- there's just not much he can
2 do in the face of the Government's decision not to prosecute
3 a case because the law is clear that it's up to them to
4 weigh all the myriad factors that go into deciding whether
5 something should be prosecuted, including the allocation of
6 existing resources.

7 I mean, it can be something as simple as -- in
8 fact, in one of the cases, just the fact they didn't agree
9 with the sentence was grounds enough to grant a mandamus. I
10 think that was the Hamm (phonetic sp.) case, the en banc
11 Sixth Circuit case. So it's up to the prosecutor to weigh
12 all of the factors that go into deciding whether a case
13 should continue or be prosecuted at all. And once it makes
14 that decision, the Article III branch, it's simply to
15 protect the defendant from being harassed further.

16 JUDGE RAO: And, okay. So to what extent would
17 reassignment, if the Court were not to grant writ of
18 mandamus, to what extent would reassignment to a different
19 judge cure the problems that you've identified?

20 MS. POWELL: Well, that would certainly cure the
21 bias and recusal-slash-disqualification problem. And it
22 would also vacate the appointment of the amicus according to
23 this Court's decision in Al-Nashiri because of the fact that
24 the decision had been made by a judge who was disqualified.
25 And that would have to be dropped, or, it should probably be

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1 made clear, though, that the amicus appointment has to be
2 vacated because that's a severe Article II intrusion and
3 also tramples on the defendant's rights to not have the
4 world piling on against him when the Government's decided to
5 drop the case. That would go a long way toward solving the
6 problem.

7 JUDGE RAO: Okay, thank you. No further
8 questions.

9 JUDGE SRINIVASAN: Thank you. Ms. Powell, I just
10 have one question for you as a follow-up. Suppose again
11 that we're dealing only with the 48(a) question and the
12 issue is whether mandamus should be granted to require the
13 district judge to grant the 48(a) motion. And suppose also
14 just for purposes of argument that I agree with everything
15 you have said about what Fokker means. If the district
16 judge says, if the district judge receives the 48(a) motion
17 filed by the Government requesting dismissal and the
18 district judge says I want to schedule a hearing for two
19 weeks. I just want to make sure I understand the
20 Government's reasons for requesting a dismissal, at that
21 point is it, would you be entitled to mandamus relief
22 because the district judge has scheduled a hearing for the
23 stated purpose of understanding the Government's reasons for
24 requesting a dismissal?

25 MS. POWELL: No, sir.

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1 JUDGE SRINIVASAN: Okay, thank you. Judge
2 Henderson.

3 JUDGE HENDERSON: Yes. I'd like to just ask you a
4 rhetorical question. Are you familiar with, I believe it
5 was Ezra Pound who said some circumstantial evidence is so
6 strong as when you find a fish in the milk. Do you think
7 that applies in this case?

8 MS. POWELL: I think it might, Your Honor.

9 JUDGE HENDERSON: Thank you. That's all I have.

10 JUDGE SRINIVASAN: Judge Rogers.

11 JUDGE ROGERS: No questions.

12 JUDGE SRINIVASAN: Thank you. Judge Tatel.

13 JUDGE TATEL: No questions.

14 JUDGE SRINIVASAN: Thank you. Judge Garland.

15 JUDGE GARLAND: Yes, thank you. Good morning
16 again, Ms. Powell. One thing I want to do is clarify a
17 record point. I had asked you whether the district court
18 had actually decided against General Flynn's motion to
19 dismiss, and you said that the panel had been in error, not
20 the panel's fault but your own, and that you found that the
21 district court did decide against. I have the docket sheet
22 in front of me. I don't see a ruling on it. I assume what
23 motion you're talking about is your docket number 202. But
24 I don't see any denial of that motion. Could you help me
25 with where that is?

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1 MS. POWELL: He did not enter a docket entry for
2 denying that. It was -- let's see. And what's missing as
3 docket entry number 201, we made a sealed filing objecting
4 to the process discussed in the emails that was sent to
5 chambers by the Watergate prosecutors. And then at docket
6 204, we filed a motion to strike and opposition of notice of
7 intent to file motion for leave to file amicus brief on the
8 record with some modifications to alleviate the problem that
9 was in the sealed filing. And then he denied, and it was in
10 that motion that we also requested that the motion to
11 dismiss be granted. Well, he denied both of those, the
12 sealed and the 204 the next morning.

13 JUDGE GARLAND: So you're saying that the 204
14 included a motion to dismiss. His ruling on 204 says he
15 denied the motion to strike and opposition to notice of
16 intent to file motion for leave to file amicus.

17 MS. POWELL: 204 included a request at the end of
18 the motion that he grant the Government's motion to dismiss.

19 JUDGE GARLAND: Well, he denied this motion as
20 moot because he had denied the additional amicus, isn't that
21 right? Are there some words where he said I deny the motion
22 to dismiss? I just don't find that.

23 MS. POWELL: No. No, I'm sorry. No. There's not
24 a separate order in which he denies the motion to dismiss.
25 No, sir.

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1 JUDGE GARLAND: All right. And two other quick --

2 MS. POWELL: I misspoke or was less than clear if
3 I implied that. I apologize.

4 JUDGE GARLAND: I might have misheard, so, in
5 which case I would apologize. On the bias question, so the
6 panel majority found that the district court's conduct did
7 not indicate a clear inability to decide this case fairly.
8 Do you want us to reverse the district court, the panel's
9 finding on bias at that point or does your claim only arise
10 out of the filing of the petition for rehearing en banc, the
11 bias claim?

12 MS. POWELL: Our request now goes back and
13 includes the comments that the district judge made at
14 sentencing or what was supposed to have been the sentencing
15 that would indicate bias, but also carries forward more into
16 the facts that the panel did not consider. That was what
17 they focused on, the statements that were made in the course
18 of the litigation, which as we know are usually excused.
19 But in this case, there's been a lot more since then, and
20 that includes receiving the email from the Watergate
21 prosecutors and agreeing to appoint the amicus at their
22 suggestion is an exorable determination to go forward with
23 these intrusive proceedings, including denying our motions
24 objecting to any amicus and raising the separation of powers
25 issue.

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1 JUDGE GARLAND: Okay.

2 MS. POWELL: So --

3 JUDGE GARLAND: Hold for just one minute. I'm not
4 clear. Are you saying that you didn't argue these points to
5 the panel, and therefore they didn't consider it, or that
6 these events occurred after the panel concluded that there
7 was not the kind of bias that would disqualify a judge?
8 Which is it?

9 MS. POWELL: I think it may be a little bit of
10 both. The panel definitely considered these statements made
11 at sentencing. It's unclear to what extent they considered
12 any other factor because the way the opinion reads is --

13 JUDGE GARLAND: Did you argue the other factors?

14 MS. POWELL: I don't believe we actually even had
15 time to argue the disqualification issue itself in the
16 original panel hearing. But the point now is definitely
17 that Judge Sullivan failed to follow this Court's mandamus
18 for 15 days and then filed his own, unprecedented rehearing
19 petition. That reveals he's so invested in this litigation
20 that there are no circumstances under which he can dispel
21 the appearance of bias from that.

22 JUDGE GARLAND: Okay --

23 MS. POWELL: He inserted himself as if he were a
24 party.

25 JUDGE GARLAND: Thank you. Appreciate the

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1 answers.

2 MS. POWELL: Thank you.

3 JUDGE SRINIVASAN: Thank you. Thank you. Judge
4 Griffith.

5 JUDGE GRIFFITH: Yes. Ms. Powell, I just have a
6 question or two. Throughout the argument this morning,
7 you've been stressing that Rule 48(a) has as its primary
8 purpose the protection of defendants against vexatious
9 prosecutions. And I can understand your emphasis on that.
10 But that's not the sole purpose of 48(a), right? And we
11 know something about the history of it. And the history of
12 48(a) as I understand it, and I'm asking you to correct me
13 if I'm wrong, is that it was also created by the Supreme
14 Court to examine cases of favoritism for politically
15 powerful defendants. And that seems to be of the wheelhouse
16 of what is going on here. Is that not one of the purposes
17 of 48(a)?

18 MS. POWELL: Not according to the Supreme Court.
19 It certainly never addressed that. Rinaldi makes clear that
20 48(a) is to protect the defendant from harassment. And
21 there's no other --

22 JUDGE GRIFFITH: Well, there's no question that's
23 one of the purposes of it, but that's not the sole purpose
24 of it, is it?

25 MS. POWELL: As best I can tell from the law right

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1 now, Your Honor, that's the sole purpose that it's been
2 given any definition whatsoever by any of the cases because
3 they --

4 JUDGE GRIFFITH: We have a record of the history
5 of the creation of 48(a), and I thought that one of the
6 purposes was to allow a district judge to examine favoritism
7 for politically powerful defendants.

8 MS. POWELL: Well, I think courts have --

9 JUDGE GRIFFITH: Do you disagree with that
10 history?

11 MS. POWELL: Well, I mean, the history is whatever
12 the history is. But the courts have not interpreted it that
13 way because, as Judge Posner noted in In re: United States,
14 there's no 48(a) motion that's been denied. Courts --

15 JUDGE GRIFFITH: So just to be clear, have courts
16 rejected that reasoning, or they just haven't addressed it?

17 MS. POWELL: To my knowledge, it has not been
18 addressed.

19 JUDGE GRIFFITH: Well, that's different from
20 rejecting it, right?

21 MS. POWELL: Yes.

22 JUDGE GRIFFITH: Okay. Thank you very much.

23 JUDGE SRINIVASAN: Thank you. Judge Millett.

24 JUDGE MILLETT: Yes, just a couple questions.

25 Just to follow up on Judge Garland's question about your

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1 document 204 filing, the opposition to the Watergate amicus.
2 And you had a proposed order that went with that motion,
3 commonplace. And that proposed order doesn't mention
4 granting the Government's motion to dismiss, does it?

5 MS. POWELL: No, because --

6 JUDGE MILLETT: No, it does not.

7 MS. POWELL: -- there was an order attached to the
8 Government's motion that --

9 JUDGE MILLETT: I'm just asking about your brief.

10 MS. POWELL: Right.

11 JUDGE MILLETT: I'm just asking about arguments
12 you made, so.

13 MS. POWELL: Yes.

14 JUDGE MILLETT: And then, of course there was one
15 attached to the Government's motion to dismiss. You just
16 don't even ask for that in the proposed order, that relief
17 in your proposed order. And the document itself only talks
18 about the Watergate brief and talks, and specifically says
19 they want to file an uninvited amicus brief on page 2. Is
20 that correct?

21 MS. POWELL: I believe that's correct.

22 JUDGE MILLETT: Okay. And then, I also have a
23 question following up on Judge Wilkins's hypothetical about
24 the nuns or I guess the nuns or priests that witnessed the
25 bribery. Could the district court in a case like that where

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1 the Government said its motion to dismiss was based on Brady
2 evidence, and then there's information called to the court's
3 attention that it may have been based on bribery, can the
4 district court when it calls the parties in to discuss the
5 Rule 48(a) motion, does it have the right to press the
6 Government to see if it was lied to?

7 MS. POWELL: I think the recourse for the district
8 court in that instance --

9 JUDGE MILLETT: I don't want to hear about
10 referring someone for prosecution. I'm asking you a yes or
11 no question. Can the district court ask the Government
12 referencing this information that's come to its attention
13 whether it was lied to, whether the Court was lied to in a
14 filing made to the district court?

15 MS. POWELL: Yes, I would think it could do that.

16 JUDGE MILLETT: Can they ask -- yes. All right.
17 That's all my questions. Thank you.

18 JUDGE SRINIVASAN: Thank you. Judge Pillard.

19 JUDGE PILLARD: Ms. Powell, on the question
20 whether Rule 48(a) protects anything other than a
21 defendant's interest against harassment and just probing
22 further on Judge Griffith's question about whether it's
23 actually open what Rule 48(a) protects, including, for
24 example, the abuse of prosecutorial power to favor
25 defendants that the Government wants to protect, the Supreme

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1 Court in Rinaldi, and I think it clarifies as Footnote 15,
2 cites Ammidown and cites Cowan, and really leaves open the
3 question whether Rule 48(a) speaks more broadly and whether
4 a court can deny a consented-to motion to dismiss if it
5 thought the motion was prompted by consideration clearly
6 contrary to the public interest. And there it's crystal
7 clear that the court means other than the defendant's
8 protection against harassment. So you may be right that
9 there's not a case allowing a court to deny a Rule 48(a)
10 motion based on these other public interest concerns, but it
11 isn't a clear and indisputable right against such inquiry,
12 is it, in light of Rinaldi, in light of Ammidown and
13 references to Cowan? There's not a clear and indisputable
14 right against application of Rule 48(a) in the circumstance
15 in which a motion to vacate a plea has been prompted by
16 improper considerations, bribery, whatever.

17 MS. POWELL: Well, there's a clear and
18 indisputable right to the 48(a) when the Government decides
19 to drop the prosecution because that's the only outcome that
20 can rise from that. Now whether --

21 JUDGE PILLARD: And that's really a constitutional
22 separation of powers argument rather than an interpretation
23 of the intention of Rule 48(a)?

24 MS. POWELL: It is. It has to be read together.

25 JUDGE PILLARD: Rule 48(a) itself in its history

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1 may -- right. Rule 48(a) in its history, under your view,
2 may indeed invite that kind of superintendence by a district
3 court. But it's your view that if it does,
4 unconstitutional.

5 MS. POWELL: Exactly.

6 JUDGE PILLARD: Is that right?

7 MS. POWELL: Yes.

8 JUDGE PILLARD: Thank you. No further questions.

9 JUDGE SRINIVASAN: Thank you. Judge Wilkins.

10 JUDGE WILKINS: Yes. Just following up on my
11 earlier hypothetical just so that we're clear. If in that
12 situation the district judge said I want to have a hearing
13 on the 48(a) motion, which is unopposed, and I want to have
14 the nuns and priests testify and view their videotape
15 showing these alleged handing over of cash from the
16 defendant to the prosecutor, you would say that the judge
17 has no authority under Rule 48(a) to hold a hearing and
18 proceed in that fashion?

19 MS. POWELL: I would say he does not have that
20 authority under Rule 48(a), that he would need to refer it
21 for prosecution by the Department of Justice.

22 JUDGE WILKINS: And you base that on Fokker?

23 MS. POWELL: Fokker, separation of powers,
24 Rinaldi, every 48(a) case that's ever been decided.

25 JUDGE WILKINS: Okay, thank you.

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1 JUDGE SRINIVASAN: Thank you. Judge Rao.

2 JUDGE RAO: No further questions.

3 JUDGE SRINIVASAN: Thank you. Thank you for your
4 argument, Ms. Powell. We'll give you a bit of time for
5 rebuttal. We'll now hear from the acting Solicitor General
6 on behalf of the United States, Mr. Wall.

7 ORAL ARGUMENT OF JEFFREY B. WALL, ESQ.

8 ON BEHALF OF THE U.S. DEPARTMENT OF JUSTICE

9 MR. WALL: Good morning, Your Honor, and may it
10 please the Court. In our constitutional system, a defendant
11 may not be convicted of an ordinary crime without the
12 concurrence of all three branches. When the Executive
13 Branch no longer wishes to prosecute and the defendant
14 agrees, the criminal case should be at an end. That is why
15 Fokker says at least seven times that the decision whether
16 to dismiss charges is a core Executive duty that is not
17 suited to judicial review. Under Articles II and III and
18 Fokker, the Government's unopposed Rule 48 motion must be
19 granted.

20 If we're clearly right about that, then there's no
21 adequate alternative to mandamus. The district judge's
22 rehearing brief makes clear what will happen next.
23 Ammidown's public interest standard remains good law, he
24 says, and assessing whether the motion serves, quote,
25 legitimate prosecutorial interests, end quote, requires a,

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1 quote, developed factual record, end quote, based on
2 investigations in the, quote, the facts and circumstances,
3 unquote of the dismissal. The district court thus plans to
4 conduct an intrusive inquiry into the Executive's dismissal
5 decision which will result in every one of the harms
6 detailed in Fokker, regardless of whether the court
7 eventually grants the motion.

8 The district judge says this Court should ignore
9 those harms. But the Government is a party that filed a
10 brief at the Court's invitation urging mandamus. Under
11 Cobell (phonetic sp.) and Exxon Mobile, it's the fact and
12 substance of that filing that matters, not its caption.
13 Even apart from the Government under cases like Bond,
14 General Flynn can invoke the separation of powers harms in
15 defense of his own, individual liberty. And of course,
16 courts routinely consider third party interests in assessing
17 equitable relief, so it would be patently strange if this
18 Court could not consider the harms to the Government, a
19 party that expressly supported mandamus.

20 In the end, the criminal charge against petitioner
21 must be dismissed. The only question is how much further a
22 harmful and unnecessary process will be allowed to play out.
23 The answer in our constitutional scheme should be no
24 further. Thank you.

25 JUDGE SRINIVASAN: Thank you. Mr. Wall, can I ask

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1 you the following question. So in your opening, you focused
2 on the brief that was filed by Judge Sullivan at the
3 mandamus stage before our Court. If you take out of the
4 field of vision that brief, then would you still say that
5 based on what we know, mandamus needs to be granted and
6 there's no adequate alternative means for relief with
7 respect to the dismissal of the 48(a) motion?

8 MR. WALL: I would, Chief Judge Srinivasan,
9 because in some sense I think the panel briefs were more
10 concerning than the rehearing petition because in the panel
11 briefs, Judge Sullivan is explicit that he wanted, quote,
12 affidavits and declarations on both Rule 48 and contempt.
13 And so it was --

14 JUDGE SRINIVASAN: In the panel brief, sorry. No,
15 but that's still a post-mandamus petition. I meant to
16 include that, so I may not have been clear. I'm saying if
17 you take out of the field of vision what Judge Sullivan's
18 briefing has said before this Court, either at the panel
19 stage or at the en banc stage, would you still say that we
20 know enough such that mandamus should be granted on the
21 theory that there's still no other adequate alternative
22 means?

23 MR. WALL: I would, Your Honor. I want to both
24 answer the question and I don't want to affect the premise
25 too much, but I do think the very purpose of ordering the

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1 court to respond to the mandamus petition was to understand
2 the basis for the court's actions. So I'm not sure how this
3 Court can discount the district court's explanation for what
4 it wants to do. But even if you looked only at what had
5 gone on in front of the district court, I do think we'd be
6 here saying the same thing because we'd be implicating the
7 separation of powers in the same way. The district court
8 has set up a process to probe into the Government's motives
9 for exercising its prosecutorial discretion. We think it's
10 clear both under Fokker and the constitutional backdrop on
11 which Fokker relied that that's precisely what a district
12 court may not do in adjudicating a Rule 48(a) motion.

13 JUDGE SRINIVASAN: And in Fokker itself, the
14 district judge held a bunch of proceedings before the denial
15 of the deferred prosecution agreement. And would you say
16 that in Fokker itself, those types of proceedings should
17 have never happened, and if a mandamus petition had been
18 filed, a mandamus should have been entered because the
19 district judge had telegraphed the kinds of questions he was
20 concerned with?

21 MR. WALL: So I want to separate and talk about
22 the proceedings that went on before the court granted
23 mandamus and the proceedings that went on after. Maybe I
24 misunderstand Fokker. I did not think that there were very
25 substantial remand proceedings that went on in Fokker after

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1 the grant of mandamus. If they --

2 JUDGE SRINIVASAN: I mean before the grant of
3 mandamus. I'm saying that before the petition for mandamus
4 was even filed --

5 MR. WALL: Right.

6 JUDGE SRINIVASAN: -- which was before the
7 deferred prosecution agreement was rejected, the district
8 judge scheduled a number of proceedings to ask about the
9 proposed deferred prosecution agreement. Is it your view
10 that in Fokker, if a mandamus petition had been filed when
11 those proceedings were announced, before the district judge
12 entered a ruling on whether he was going to accept the
13 deferred prosecution agreement, that mandamus should have
14 been granted because the district judge had telegraphed
15 where he was going?

16 MR. WALL: Yes. And I think it would be harder
17 case. It would be a little, it would be more like Richards
18 because you wouldn't have binding circuit precedent. But
19 all of the reasoning in Fokker, Chief Judge Srinivasan,
20 suggests that it would have been impermissible, that the
21 decision to dismiss pending criminal charges is within the
22 can of prosecutorial discretion, and the district court
23 can't probe that, whether or not it's made a final decision.

24 This case is easier because now that we have
25 Fokker on the books, if a district court tomorrow said, well

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1 look, maybe I am required to approve the DPA under Fokker,
2 but I still want to have a hearing to cast light on what I
3 think may have been improper conduct by a United States
4 Attorney, I would be very surprised if that were not
5 mandamus-able in this circuit now in light of Fokker. So
6 I'll grant (indiscernible).

7 JUDGE SRINIVASAN: Last question along these
8 lines. Thank you. Last question along these lines, which
9 is if the Government has filed the exact same 48(a) motion
10 that is filed, and the district judge had said thanks for
11 the submission. I want to make sure I understand the
12 Government's reasons further. I'll schedule a hearing in X
13 number of weeks, would there be grants for mandamus on the
14 theory that there's nothing for the district judge to do
15 other than grant the dismissal?

16 MR. WALL: Well, I'm not certain about that, Your
17 Honor. If the district court said I just want to understand
18 the reasons in your motion. There's ambiguity. I'm not, I
19 don't understand why it is you want to dismiss, I'm not
20 saying that mandamus would rely for that. But that isn't
21 what the district court is doing here, obviously. This is
22 meant to probe the Executive's reasons, and that's exactly
23 what Fokker takes off the table.

24 JUDGE SRINIVASAN: Thank you, Mr. Wall. Judge
25 Henderson.

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1 JUDGE HENDERSON: Yes. Let me put a correction on
2 the record so I don't get any aftermath on it. My clerks
3 have informed me that it was Henry David Thoreau who made
4 the remark about circumstantial evidence. Mr. Wall, we
5 asked you to be prepared to address the effect, if any, of
6 455(a) and 455(b)(5)(i). Are you waiting to do that in
7 response to questions? Have you waived it? What's your
8 position?

9 MR. WALL: No, I'm happy to address it now, Judge
10 Henderson. The Government's view, as you know, that Judge
11 Sullivan is not a party, under the rules, entitled to file a
12 petition. We would say the same thing under 455. I don't
13 see a reason to differentiate the rules from statute, so I
14 don't think there is a (b)(5)(i) problem. Though for those
15 who think that Judge Sullivan is entitled to file under the
16 rules, I don't understand why it isn't also a statutory
17 problem because, of course, Rule 55(d) said that if you're a
18 party at any state of the proceedings, then that I think
19 would include the mandamus proceeding. But we aren't urging
20 that, though I'm not sure what Judge Sullivan's counsel will
21 say about that.

22 I do think it's a harder question on 455(a). As
23 you know, we did not agree with General Flynn before the
24 panel that disqualification was warranted even though what
25 had happened in the district court to that point was unfair

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1 and irregular. I do think we're in a bit of a different
2 posture now because the district court has filed a petition
3 that is not permitted under the rules, which suggests, as
4 Ms. Powell said, a level of investment in the proceedings
5 that is problematic and has gone further than the district
6 court did in the panel briefing to decide the legal standard
7 and has now definitively said that, and this is pages 14 to
8 16 of the petition, that Fokker has nothing to say about the
9 separation of powers considerations on these facts. That's
10 page 14. And that Ammidown remains good law. That's page
11 16. And that the district court can undertake its own,
12 independent examination of the public interest. That's
13 Footnote 3.

14 And, I'm sorry, I think now the district court has
15 prejudged part of what I understood the proceedings below to
16 be designed to accomplish. So I do think that we've
17 reluctantly come to the view that there is now at least a
18 question about appearances of impartiality.

19 JUDGE HENDERSON: Thank you.

20 JUDGE SRINIVASAN: Thank you. Judge Rogers.

21 JUDGE ROGERS: Well, I suppose, Mr. Wall, is your
22 position that the filing by the district court in urging
23 that mandamus was in effect impermissible at this stage,
24 that that is the bias that would require reassignment?

25 MR. WALL: No, Judge Rogers. I'm not saying that

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1 it actually suggests that the district court is biased. I
2 want to be clear about that. We're not saying we think
3 there's an actual partiality problem, but I do think that --

4 JUDGE ROGERS: (Indiscernible.)

5 MR. WALL: Oh, but no, we do think that there is
6 an appearance problem from having filed a petition that, as
7 we read the rules, is not permitted, and the substance of
8 that petition, as I said, which goes, I think, an awfully
9 long way, if it doesn't cross the finish line, towards
10 saying what Rule 48, what the legal standard is. I think
11 that brief essentially says that the district court does not
12 think Fokker sheds light on this. It says nothing about the
13 separation of powers consideration on these facts and that
14 Ammidown is good law and it's going to conduct a public
15 interest examination. And so I think the district court has
16 decided what the legal standard would be, and if the Court
17 is going to deny mandamus, I would hope that it would
18 provide some guidance to the district court on what we see
19 as its limited role under the Constitution and Fokker.

20 JUDGE ROGERS: Now, I understand the argument
21 about the amendments to (indiscernible) but particularly the
22 Supreme Court (indiscernible) indicated the situation that
23 the district court may find itself in. I didn't see any
24 suggestion that that would create an appearance of
25 partiality problem.

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1 MR. WALL: No, Judge Rogers. I don't think that
2 somebody can create a recusal problem for a judge by filing
3 a mandamus petition. And Rule 21, as you say, solves that
4 problem by allowing the Court of Appeals to invite the
5 district court to respond almost by way of an amicus. It
6 specifically doesn't list the district court as a party. I
7 think the problem here is that because the district court
8 has reached out despite those rules and filed a petition
9 without being invited to do so by the Court, it at least
10 raises a question about whether the district court is
11 invested in what should be its official authority to a point
12 where we have an appearance problem. After all, I mean,
13 we've only been able to identify one en banc petition filed
14 by a district judge ever, and that was a situation where the
15 district court's personal reputation was really at issue
16 because of comments that the district judge had made
17 (indiscernible). This is very different. This is just
18 about the scope of the district judge's official authority.
19 It isn't the sort of thing that you would normally think
20 would trigger an en banc petition.

21 JUDGE ROGERS: Well, I'm just trying to understand
22 the scope of your position here because the Supreme Court
23 cases (indiscernible) do not appear to have (indiscernible)
24 that. And by saying the questions he wants to ask, as the
25 Chief Judge framed it, in order to understand the

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1 Government's motion, that that alone is sufficient? In
2 other words, originally, all I was going to ask you about
3 was, you know, why should the Court consider harm to the
4 Government, to the Executive Branch when it never filed for
5 mandamus and it never filed any sort of interlocutory
6 appeal. It just, as in Cobell, it has simply waited until
7 it was invited to comment. And then I thought, well even
8 assuming the Court should consider the injuries to the
9 Executive. At this point, why aren't the injuries just
10 speculative, or are you adopting Mr. Flynn's argument about
11 the process itself that signals the extraordinary actions by
12 the appellate court reassigning a case to another district
13 court judge is appropriate here.

14 MR. WALL: Three quick points, Judge Rogers.
15 Again, I'm just responding to a question that the Court has
16 put to me about 455(a). We do think that we're in uncharted
17 waters. We think it raises a question. But if the Court
18 disagrees with us on that, we think it is important if the
19 case goes back that this Court provides some guidance to the
20 district court on its role under Rule 48(a) and that it take
21 off the table some of this factual inquiry that the district
22 court seems to want to engage in.

23 My second point is, I just want to be clear in my
24 answer related to the Chief Judge. There's a difference
25 between trying to understand the motion and the kinds of

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1 questions that the district court raised in its panel briefs
2 why we didn't charge with respect to the Turkey statements,
3 why we have handled related prosecutions the way that we
4 have, why certain attorneys signed the briefs and others,
5 not the probing behind the motion. It's not an attempt to
6 understand the motion. And so my third point, Judge Rogers,
7 is there's nothing speculative about the injury to the
8 separation of powers from that. No matter how we ultimately
9 answer those questions in the district court, and no matter
10 how it ultimately disposes of the motion, probing the
11 Executive Branch in that way is what Wayte and Fokker
12 quoting Wayte, says is constitutionally impermissible.
13 Those aren't speculative injuries. Those are certain
14 injuries from the process itself.

15 JUDGE ROGERS: I have a dozen questions, but Chief
16 Judge, I'll let my colleagues speak.

17 JUDGE SRINIVASAN: Thank you. Judge Tatel.

18 JUDGE TATEL: Yes, good morning. I have two
19 questions. The first is, I'd like to ask you the same
20 question that Judge Srinivasan asked Ms. Powell, which is
21 are you aware of any case at all in which a Court of Appeals
22 has issued a writ of mandamus to prevent a district court
23 from conducting a hearing of any kind?

24 MR. WALL: I believe that there may have been some
25 of the writ of prohibition cases like that, Judge Tatel.

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1 I'd have to go back and look and we'd have to supplementary
2 brief it. I think the closest case I could give you is
3 Cheney where the district court ordered a discovery plan.
4 It was just a process for setting up discovery, and no
5 documents had changed hands. And obviously this Court in a
6 divided panel said there were adequate alternatives to
7 mandamus because the Executive could assert its Executive
8 privilege. And the Supreme Court disagreed. And so the
9 harm was to requiring the Executive to engage in that
10 process in the first instance. And I think the same is true
11 here. Now granted, that's discovery rather than a hearing
12 on a motion, but I think the reasoning is, is parallel, that
13 it is where the, where, it's the hearing itself that
14 implicates the separation of powers, just like there it
15 would be assertion of privilege. I don't think we have to
16 wait for the process to play itself out. The process is,
17 itself, part of the constitutional harm.

18 JUDGE TATEL: Right, but from a mandamus point of
19 view where the relief has to be clear and indisputable,
20 there is no case where a, at least I don't know what those
21 prohibition cases are you're mentioning, but setting those
22 aside, there isn't one where mandamus was granted before the
23 district court actually held the hearing that you know of,
24 right?

25 MR. WALL: No, Judge Tatel. But I would say what

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1 I said earlier about that which is if a district court
2 tomorrow said it wanted to have a hearing like that on the
3 DPA, I would think that would be mandamus-able in this
4 Circuit under Fokker.

5 JUDGE TATEL: Yes, okay. My second question has
6 to do with, which is related. In your brief, you argue that
7 it, and I'm quoting here, is a usurpation of judicial power
8 to double, to second-guess the Government's justification.
9 And you also argue, quote, the Executive is entitled to
10 confidentiality in its decision-making process. But don't
11 courts regularly scrutinize the Executive's stated
12 justifications? Like, take for example, a Batson hearing
13 where the Court will review the Government's proffered
14 justification, or in Department of Commerce v. New York, the
15 census case where the question was whether they could have,
16 the district court could have a hearing to consider external
17 evidence of pretext. Isn't that this case? The Court said
18 in Department of Commerce, a court is ordinarily limited to
19 evaluating the agency's contemporaneous explanation in light
20 of the existing record. It says we have recognized a narrow
21 exception to that general rule on a strong showing of bad
22 faith. And isn't that what this case is about? Isn't the
23 district judge here simply looking into whether there's been
24 such a strong showing?

25 MR. WALL: So two points, Judge Tatel. The first

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1 is, that's not just our view. That's quoting Fokker, which
2 says courts may not, quote, second-guess the Executive's
3 exercise of discretion over the dismissal of criminal
4 charges, end quote. And the second thing is, no, of course
5 you are right that there are plenty of circumstances, as
6 this Court well knows, where courts can scrutinize whether
7 the Executive has complied with some statutory or regulatory
8 duty. What makes this different, as Fokker explains, is
9 that the Constitution vests this kind of discretion, the
10 discretion over bringing and maintaining and dismissing
11 criminal charges in the Executive. And so as a separation
12 of powers matter, these kinds of decisions are taken off the
13 table for judicial review that Fokker says not adapted to
14 judicial review under our constitutional structure. But of
15 course that's not true of any number of other legal
16 questions that aren't the exercise of such a core Executive
17 duty.

18 JUDGE TATEL: I have no further questions. Thank
19 you.

20 JUDGE SRINIVASAN: Thank you. Judge Garland.

21 JUDGE GARLAND: Yes. Good morning, Mr. Wall.

22 MR. WALL: Good morning.

23 JUDGE GARLAND: I want to just follow up on a
24 question that Judge Tatel asked General Flynn's attorney
25 earlier on. So in your brief, you argue that there's an

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1 Article III standing problem, a party standing problem, a
2 lack of Solicitor General authorization for this en banc.
3 If it were true, and I ask you to assume that I'm correct
4 about this, that the Court granted sua sponte, do you think
5 that the Court does not have the authority on its own to
6 rehear a panel's decision?

7 MR. WALL: No, Judge Garland. Those problems
8 wouldn't be posed. The question would be, then, only
9 whether it was an appropriate use of the Court's sua sponte
10 authority under cases like Sineneng-Smith to go en banc in a
11 circumstance like this after the filing of a petition that
12 was defective, including constitutionally defective. But we
13 have not argued, we did not argue in our brief, as you saw,
14 that the Court would lack the power to do that.

15 JUDGE GARLAND: That case is nothing, is not about
16 en banc, is it? You're talking about the Supreme Court's
17 recent decision?

18 MR. WALL: Yes. It's not about en banc, but it is
19 in part about a court's use of its authority sua sponte to
20 redirect a case in particular ways.

21 JUDGE GARLAND: So if an en banc panel, if a court
22 as a whole is wondering whether the three-judge panel
23 correctly decided that there's any circumstance in which it
24 can't on its own decide to rehear that matter, or are we
25 stuck in every mandamus case with whatever three-judge panel

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1 happens to decide a case?

2 MR. WALL: No, Judge Garland. Sorry if I wasn't
3 clear. You have the power to go en banc. The defects with
4 the petition don't affect that power. The only question
5 would be whether that's an appropriate use of the Court's
6 authority, and obviously that would be left to the Court.
7 We haven't (indiscernible).

8 JUDGE GARLAND: I'm sorry to interrupt, but the
9 Chief has been very parsimonious about the amount of time
10 he's given us. You, meaning the Government has already
11 given its reasons for dismissing this case, correct? That
12 is, as the panel says, the motion explains, the Government
13 explains that in light of newly-discovered evidence of
14 misconduct, the prosecution can no longer prove beyond a
15 reasonable doubt any false statements or material. Right?
16 That's the Government's reasons, correct?

17 MR. WALL: That was one of the three reasons,
18 Judge Garland.

19 JUDGE GARLAND: I'll take all three of the
20 reasons. So, you've stated three reasons, and I assume you
21 believe that those are true, correct?

22 MR. WALL: Yes.

23 JUDGE GARLAND: What more is there for you to say
24 if -- well, let me put it another way. Let me begin.
25 Wasn't that optional? Did you not even have to say that

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1 much in your motion to dismiss?

2 MR. WALL: I don't think that we did, and we often
3 don't. But under the circumstances here, we went further
4 than we thought we were obligated to. And by the way, Judge
5 Garland, just to drive that point home, the Attorney
6 General, of course, sees this in a context of non-public
7 information from other investigations like --

8 JUDGE GARLAND: I'm not in any way questioning
9 anything underlying. I'm just asking, this was the reason
10 given, and you gave this reason.

11 MR. WALL: Yes. I just wanted to make clear that
12 it may be possible that the Attorney General had before him
13 information that he was not able to share with the court.
14 And so what we put in front of the court were the reasons
15 that we could, but it may not be the whole picture available
16 to the Executive Branch.

17 JUDGE GARLAND: Well, if the judge asks you what
18 your reason is, and you state this as the reason during the
19 hearing, are you saying that's not the end of, there would
20 be no problem with you saying that, would there?

21 MR. WALL: No, not at all. It's just we gave
22 three reasons. One of them was that the interests of
23 justice were no longer served in the Attorney General's
24 judgment by the prosecution. The Attorney General made that
25 decision or that judgment on the basis of lots of

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1 information, some of it is public and fleshed out in the
2 motion, some of it is not.

3 JUDGE GARLAND: All right. So if you stood by
4 this reason when Judge Sullivan conducts the oral hearing,
5 there would be no problem in him doing that, would there,
6 from your point of view? No separation of powers problem at
7 this point given what you've already stated to say that,
8 right?

9 MR. WALL: If all we had to do was show up and
10 stand on our motion, no. We've already said that to the
11 district court.

12 JUDGE GARLAND: Yes. And if the district court
13 goes further, at that point you could seek mandamus again.
14 But at this point, the district court has not actually gone
15 further. I mean, there's a brief in en banc about what
16 might happen, but the district court has not ordered you to
17 do anything other than show up and brief the matter, right?

18 MR. WALL: With all respect, Judge Garland, I
19 think I don't agree with that. But after Judge Gleason
20 wrote his op-ed calling for a factual inquiry, he was
21 immediately appointed as amicus as part of a process that
22 the district court has now explained to this Court was meant
23 to probe our motives. And so to say that this is just an
24 anodyne proceeding on the meaning of Rule 48, and all we
25 will have to do is stand on our motion --

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1 JUDGE GARLAND: I understand that, but you can
2 refuse to answer any further. And if you're pressed
3 further, at that point, you can again move for mandamus.
4 But there's the possibility that after all this briefing the
5 district judge will see the light in your view, and that
6 will be the end of the matter. I mean, unless there's
7 extraneous outside information that someone other than the
8 Government presents so that there's no probing of the
9 Government's subjective motives.

10 MR. WALL: Judge Garland, again, I go back to
11 Cheney and Fokker with all respect, I just think that under
12 values, the harms to a critical branch from compelling us to
13 respond to improper questions and accusations by the court-
14 appointed amicus about the reasons --

15 JUDGE GARLAND: (Indiscernible.)

16 MR. WALL: (Indiscernible) prosecutorial
17 discretion.

18 JUDGE GARLAND: In Cheney, there actually was an
19 order of discovery, and there is no order yet here. Isn't
20 that right? In fact, it was the most wide-ranging discovery
21 that the Supreme Court had ever seen it said. Something
22 along those lines. There hasn't been a discovery order yet.
23 Is that correct?

24 MR. WALL: No, there hasn't been a discovery
25 order, per se, but there has been an order setting up a

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1 process to make us defend the exercise of a core Executive
2 duty. And I think, to be fair, I think it doesn't take
3 seriously the harms to a co-equal branch from a situation
4 like that where we are called in to have, you know,
5 questions and accusations thrown our way that we've got to
6 respond to. That's exactly what Fokker says --

7 JUDGE GARLAND: In the day when I was an Assistant
8 U.S. Attorney, accusations were thrown my way by the defense
9 counsel. This is part of the job of being a prosecutor. I
10 don't understand how merely being a subject of accusations
11 from the other side or even from the judge who often
12 questioned what the Government was doing, if each of those
13 was a separation of powers case, we would have a large
14 number of mandamus cases in the circuit.

15 MR. WALL: Judge Garland, in the vast majority of
16 those circumstances, there's no separation of powers
17 question at play. In the DPA context, I think it would be
18 fairly remarkable if a district court said tomorrow that
19 even if it had to approve a DPA, it was going to have a
20 hearing so it could air out a bunch of allegations about
21 whether the prosecutors had cut a sweetheart deal with the
22 corporate defendants as part of a DPA. That seems to me
23 exactly the harm that Fokker is discussing in Part 2-A. And
24 again, I just think it doesn't take the harm to a co-equal
25 branch seriously to say, well, that's not really harm until

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1 the motion is granted or denied because those are not the
2 only harms that the separation of powers is meant to guard
3 against. It's meant to guard against oversight and scrutiny
4 of this core Executive discretion.

5 JUDGE GARLAND: All right. I have the argument,
6 and I've overstayed my welcome. Thank you.

7 JUDGE SRINIVASAN: Thank you. Judge Griffith.

8 JUDGE GRIFFITH: Yes. Good morning, Mr. Wall.
9 And thank you. I'm struggling with the meaning of the
10 phrase that Rule 48(a) leave of court and what that means.
11 Ms. Powell for General Flynn has a very narrow view of what
12 it means. She said I think it's almost ministerial, and
13 maybe I'm misquoting. Ms. Powell, I don't mean to do that.
14 What is the Government's view of what that phrase leave of
15 court means?

16 And let me put it to you this way. Is it
17 appropriate, in the Government's view, for a district court
18 judge to have a hearing before ruling on Rule 48(a)?

19 MR. WALL: I think it depends on, as I was trying
20 to say earlier to Judge Srinivasan, what the hearing is
21 designed to do.

22 JUDGE GRIFFITH: Okay. So, but there's not a
23 categorical prohibition on having a hearing, right?

24 MR. WALL: No. I'm not saying that once one of
25 these things is filed the district court just has to stamp

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1 it and send it out the door. The district court --

2 JUDGE GRIFFITH: And that's (indiscernible).

3 MR. WALL: (Indiscernible.)

4 JUDGE GRIFFITH: The question then becomes what's
5 going to happen at the hearing, isn't that right?

6 MR. WALL: I think. But can I, if I could just go
7 back to your first question. I think Rule 48(a) has a role
8 to play with respect to opposed motions. We know that.
9 With unopposed motions, we know the focus is the harassment
10 to the defendant. I would say that also the district court
11 can make sure that it's got the authoritative position of
12 the Executive Branch, which it might not if you have a
13 prosecutor that's been bribed or gone rogue. It can make
14 sure the defendant's been counseled and is, you know, not
15 agreeing to a harassing motion to dismiss against the
16 defendant's interests. But I think that beyond that, which
17 I'll grant is a fairly narrow conception of the rule.
18 That's what Fokker says. I don't think that there's a
19 substantive role for the Court to play. That's what the
20 Seventh Circuit said in In re: United States. It's even
21 what the Third Circuit said in Richards. It said no
22 substantive authority. You can ask for the reasons --

23 JUDGE GRIFFITH: Well, what if the Court is
24 concerned about favoritism being displayed to a politically
25 powerful defendant? Is that a proper reason to have a

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1 hearing?

2 MR. WALL: No. That is a concern that is not the
3 domain of Rule 48. That has political --

4 JUDGE GRIFFITH: What's your authority for that?

5 MR. WALL: So that's, I'd say, In re: United
6 States. I'd say Richards. I'd say Fokker. It doesn't
7 matter what the, the district court may believe that the
8 Government has a bad motive. And that bad motive could be
9 all sorts of things, favoritism or something else. But
10 everybody agrees that the United States can't be made to
11 bring a prosecution even if it should, even if it's motive
12 for not commencing one is irregular or impermissible. And
13 the same is exactly true of dismissing or maintaining
14 prosecution. There are checks on that, plenty of checks on
15 that in our political --

16 JUDGE GRIFFITH: Okay, what would be an
17 appropriate hearing for Judge Sullivan to call on these
18 facts in this case? What are the outer limits of what he
19 could do that the Government would think is appropriate?

20 MR. WALL: Well, I don't think that there is one
21 on the facts of this case. You have a well-counseled
22 defendant. You have --

23 JUDGE GRIFFITH: No hearing at all? I'm sorry.
24 So you're saying on the facts of this case no hearing at all
25 would be appropriate?

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1 MR. WALL: Well, if he needs to understand the
2 motion, but as a substantive matter to try to get behind the
3 motion for some motive or another, no.

4 JUDGE GRIFFITH: What do you mean if he needs to
5 understand -- I'm trying to get at what you think would be
6 an appropriate hearing for Judge Sullivan to call in this
7 case? What would that hearing look like?

8 MR. WALL: On these facts, I don't think there is
9 an appropriate hearing that could be had, Judge Griffith. I
10 think in other cases, you can imagine where a district court
11 was just trying to understand the law. But here, Judge
12 Sullivan's briefs make clear that he understands the law.
13 He thinks it's a different standard from what I read Fokker
14 to have. But he wants a hearing to probe our motives. No
15 sort of hearing like that is going to be permissible.

16 JUDGE GRIFFITH: Okay. Thank you very much.

17 JUDGE SRINIVASAN: Thank you. Judge Millett.

18 JUDGE MILLETT: Yes. Good morning, Mr. Wall.

19 MR. WALL: Good morning.

20 JUDGE MILLETT: So, a quick question. First of
21 all, I thought Ms. Powell had said, and I'd just like you to
22 clarify, does the filing of the 48(a) motion by the
23 Government have to get approved by the Solicitor General
24 and/or Attorney General?

25 MR. WALL: I don't know about the, so I think it

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1 is rare that they go all the way up to the Attorney General.
2 The Solicitor General is typically not involved. The
3 Attorney General was involved here.

4 JUDGE MILLETT: Sure. No, I got that. Okay. So
5 that's not something that routinely happens. And I want to
6 make sure, I'm trying to figure out what the, like Judge
7 Griffith here, what that leave of court is meant to cover to
8 help understand what it doesn't allow, it helps to
9 understand what it does allow, for me at least. And so, I
10 think you may have said this would be okay, but I just want
11 to confirm. I had asked Ms. Powell, referring to Judge
12 Wilkins's hypothetical about information coming in from,
13 about the nuns who had seen money pass hands, a suitcase of
14 money passed from a defendant to an AUSA. And so would it,
15 do you agree that it would be appropriate for the district
16 court under Rule 48(a) to have a hearing and ask the
17 Government what was the real reason for your decision? You
18 said in your motion, I think his hypothetical was Brady
19 violations, evidence has come to my attention, maybe it's
20 wrong, of a bribery, but here's the video. Can the district
21 court push and ask that question? What's the real motive
22 here? Was it a bribe or was it Brady?

23 MR. WALL: I don't think in a sort of evidentiary
24 hearing way, no. The Court can --

25 JUDGE MILLETT: That's not what I said. What I

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1 said is have the attorneys come in for a hearing, and it's
2 evidentiary only in the sense that here's the video. I've
3 shared it with you, counsel, both counsel. You know what
4 video I'm talking about. Maybe he even plays it again in
5 court. And says what is your real reason?

6 MR. WALL: Judge Millett, I don't think that's
7 appropriate. Here's how I think that should be handled
8 under Rule 48(a). I think the judge can call in a U.S.
9 Attorney and say do you --

10 JUDGE MILLETT: No, no, no, yes, okay. But I want
11 to, so the district court cannot ask whether it was lied to
12 by the Government in a filing?

13 MR. WALL: Not under Rule 48(a). It can certainly
14 ask for purposes of sanctioning an attorney before --

15 JUDGE MILLETT: Well --

16 MR. WALL: -- on other authorities.

17 JUDGE MILLETT: Can it do that after it dismisses
18 the case, or does it need to do it while the case is still
19 pending?

20 MR. WALL: No. I think it could do it before or
21 after as a matter of sanctioning an attorney under --

22 JUDGE MILLETT: No, but before, and just tell me.
23 I have no idea. Can you issue sanctions or hold a
24 Government attorney in contempt after the case is dismissed?

25 MR. WALL: I would --

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1 JUDGE MILLETT: Or do you need to do that before
2 it's dismissed?

3 MR. WALL: I don't know the answer, Judge Millett.
4 I would think that the answer is --

5 JUDGE MILLETT: Yes, I don't know that either.

6 MR. WALL: -- the court could continue to
7 supervise officers of the court --

8 JUDGE MILLETT: Well --

9 MR. WALL: -- even after granting a Rule 48(a)
10 motion.

11 JUDGE MILLETT: Okay. So it's clearly not settled
12 whether the district court can --

13 MR. WALL: Oh, it may be. I just, I haven't --

14 JUDGE MILLETT: -- granting -- right, okay. Well,
15 I couldn't figure it out either, but that -- you'll have
16 more experience than me. That's probably --

17 MR. WALL: But again, I just want to say the basis
18 of that is not Rule 48(a). The basis for that would be --

19 JUDGE MILLETT: No. The question is, you have a
20 motion to dismiss, and at least Ms. Powell's argument is
21 grant it and go home. And a district court looks at that
22 motion and says I fear I'm lied to in that motion. Your
23 position is the district court nonetheless has to grant that
24 motion in which it feels it was lied to and maybe it's a
25 violation of court rules, that very document. It

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1 nevertheless has to grant it and can't inquire about whether
2 it was lied to. That's the Government's position before --

3 MR. WALL: Yes.

4 JUDGE MILLETT: -- granting the motion sua sponte.

5 MR. WALL: (Indiscernible) exercise of
6 prosecutorial discretion is not substantively reviewable in
7 that way.

8 JUDGE MILLETT: Well, Rule 48(a), when it says
9 leave of court, and did you know the Supreme Court has left
10 open the question of whether there's any other public
11 interest besides harassment of a defendant and to which a
12 court can look to, and your position is protecting the
13 integrity of the court and the very process in front of it
14 is not, I'm not talking about any general public interest.
15 I'm talking about this very narrow interest of protecting
16 the integrity of the court and the court process. That's
17 not allowed.

18 MR. WALL: I'm saying that's the domain of
19 sanctions and contempt. It's not relevant in a 48(a) --

20 JUDGE MILLETT: It's not -- okay. And is it your
21 position that there is no such interest inquiry?

22 MR. WALL: Of the kind you're outlining, yes. No
23 such inquiry is appropriate in Rule 48(a).

24 JUDGE MILLETT: So it's just limited to defendant
25 harassment?

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1 MR. WALL: It is defendant harassment and ensuring
2 that the parties have reached counseled, authoritative
3 positions. But when they no longer want to proceed, and
4 that's a counseled, considered choice by both parties, yes,
5 the court cannot keep the criminal prosecution alive.
6 Article II and Article III do not permit that.

7 JUDGE MILLETT: And then, did the United States
8 raise an objection to the appointment of Mr. Gleason as the
9 court-appointed amicus in the district court?

10 MR. WALL: No. May I explain why?

11 JUDGE MILLETT: I'm going to give you a couple
12 questions because maybe it will explain them together
13 because I'm getting benched by the Chief Judge here. And
14 did you object to the briefing order, the schedule the
15 district court laid out, which is subject to motion for
16 reconsideration? You didn't do that either?

17 MR. WALL: No, not other than the arguments we
18 made in our motion to dismiss.

19 JUDGE MILLETT: Right. Got that. Okay. And
20 then, and, but go ahead and answer that. And I'm sorry,
21 Chief Judge Srinivasan, but I have one more quick procedural
22 question. But I don't want to cut you off on your full
23 answer. Those two are I think --

24 MR. WALL: I'll be very brief. That the court
25 didn't provide notice that it was going to appoint an

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1 amicus. I mean, it did it immediately after the publication
2 of Judge Gleason's op-ed. It seemed to us a considered
3 decision, and it did not seem worth moving for
4 reconsideration. And we were not aware of any requirement
5 to ask for reconsideration of a sua sponte decision,
6 especially a considered one. So, no, we did not go and tell
7 the district court that it should not have done that.

8 JUDGE MILLETT: Okay. And then one last thing.
9 There's been some talk about recusal and the judge's bias or
10 interest, self-interest in the case. Is it in the
11 Government's view, just generically, is mandamus appropriate
12 to raise recusal issues if the district court judge has, if
13 the parties haven't first asked the district court judge to
14 recuse?

15 MR. WALL: I think that would be an odd
16 requirement where part of what gives rise to the potential
17 appearance of impartiality is the conduct in the mandamus
18 proceeding itself.

19 JUDGE MILLETT: Well, I think the mandamus
20 petition itself, even before there was any filing by Judge
21 Flynn already asked for disqualification of the judge. So
22 I'm asking are you aware of any case that has granted, on
23 mandamus has granted recusal without someone first asking
24 the district court to recuse?

25 MR. WALL: No, I'm not aware that a court has ever

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1 been faced with a situation like this one. I mean this is
2 an unprecedented en banc petition.

3 JUDGE MILLETT: All right, thank you.

4 JUDGE SRINIVASAN: Thank you. Judge Pillard.

5 JUDGE PILLARD: Good morning, Solicitor General
6 Wall.

7 MR. WALL: Good morning.

8 JUDGE PILLARD: I think we all agree we owe huge
9 deference to the United States Government, and there's not a
10 judge in the city that questions that. And I think it's
11 clear that courts owe virtually complete deference to the
12 Government under Rule 48(a). And I appreciate that it was
13 General Flynn and not the United States that initiated the
14 mandamus petition, and that General Flynn alone sought
15 recusal of the district judge, at least at the, at the panel
16 stage. But, you know, the integrity and independence of the
17 Court is also (indiscernible) here, and the separation of
18 powers is protecting Article II courts also. And in this
19 case, the district judge was also skeptical in, as you know,
20 in the plea colloquy, accepting the plea in the first place.
21 And in fact, Flynn would have been sentenced long ago but
22 for Judge Sullivan's skepticism in saying if you don't want
23 to do this right now, take more time, talk to your counsel.
24 I have a room for you.

25 But then the district judge at your urging, at the

1 Government's urging, expected the plea as factually
2 supported by the Government's evidence, the Government
3 urged, he didn't dream up this order. He didn't dream up
4 the plea of guilty. And the Government demonstrably has
5 said we can meet our burden of proof beyond a reasonable
6 doubt. He looked at that. He scrutinized that. And now
7 you're insisting that the district court contradict an order
8 that she previously granted. She previously got on board,
9 and you're saying, actually, never mind. Rule 48 requires
10 leave of court. She has to participate. The rule calls on
11 him to play a role.

12 And I just, what self-respecting Article III
13 district judge would simply jump and enter an order without
14 doing what he could do to understand both sides, to
15 understand both sides. He wasn't appointing Gleason to be
16 the judge. He was appointing Gleason to make the strongest
17 arguments. And he understood and trusted that the
18 Government was making its strongest arguments, and he was
19 therefore in the adversarial system have the strongest
20 understanding of what was before him.

21 And I appreciate, listening to counsel, I
22 appreciate that your arguments today have focused almost
23 entirely on the prospect of a factual inquiry that I think
24 you said the district judge seems to want to engage in. But
25 all of the schedule was briefing and argument on the law,

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1 right? It was briefing and argument. He never, he never
2 said factual development is necessary. Yes, Gleason asked
3 for it, but there's no order of discovery here.

4 So if it's just lawyers' arguments about the
5 existing record, just lawyers' arguments about the existing
6 record, what is the intrusion on General Flynn's clear and
7 indisputable rights?

8 MR. WALL: Two points, Judge Pillard, and they're
9 really critical. The first is that you are certainly right
10 that the Government no longer wants to prosecute, and that's
11 true for any case in which we have got Rule 48 and, you
12 know, for a small subset of them you actually have a plea.
13 But we're not asking the district court to contradict
14 anything that it's done earlier. As Fokker says, the Rule
15 48 motion, like approving a DPA, says it involves no formal
16 judicial action and the Court never exercised its coercive
17 power. So accepting a plea is different from simply
18 allowing the Executive to let a case go as a constitutional
19 matter.

20 And to take the second part of your question,
21 you're right that the district court below never entered an
22 order per se and said there'll be fact development. He just
23 appointed an amicus that it called for and has now filed
24 briefs asking for it. But he has said that to this Court,
25 both in his briefs to the panel and even more explicitly at

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1 various points in his rehearing petition. Now, at argument
2 below, I think the district court's counsel backed away from
3 that and said he just wants to have a hearing and ask some
4 questions, and the dissent accordingly believed that
5 discovery and evidence and this kind of factual probing
6 wasn't at issue.

7 If the Court really thinks that's not at issue,
8 then I think that should be among the limits that it should
9 place on the district court when the case goes back. If all
10 we're doing is arguing about Rule 48, it's hard for me to
11 see, then, what we're going to do below because the district
12 court has explained what its legal view is, there's no basis
13 for looking behind what we've done on the face of the motion
14 itself. So then I'd say it's even clearer that we ought to
15 get mandamus because there's no reason to have any
16 unnecessary proceeding if it's not meant to probe behind
17 what we've said. And if what we've said satisfies, as you
18 agree, is a very deferential standard, it's hard for me to
19 see what the point of these further proceedings is at all.
20 Then I think the panel is clearly correct to enter mandamus.

21 JUDGE PILLARD: But doesn't it cut exactly the
22 other way, that, that you haven't even asked the district
23 court to rule yet. The district court hasn't ruled. I
24 think that's just the basic differential between this case
25 and every other case except for Richardson. And just one

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1 follow-up. You said you're not asking the district court to
2 contradict himself. But you are asking him to accept, and
3 if you weren't asking him to do anything, you wouldn't be
4 here to mandamus him, right? You needed the judge to sign
5 off on the Rule 48(a). And, right? I mean, right now
6 there's a plea in play. He could call a sentencing hearing
7 tomorrow, presumably.

8 MR. WALL: That's right, Judge Pillard. So two
9 points. One, in a motion to dismiss, quoting Fokker and a
10 number of the Supreme Court cases, we laid out the fact that
11 we felt we were entitled to have the motion to dismiss
12 granted. Rather than accepting that argument, the district
13 court has convened to this entire proceeding, invited the
14 public to participate, and raised the specter of contempt.
15 But in moving forward with it, we're not asking the district
16 court to contradict itself. It found before that there was
17 a factual basis for the plea. We're not asking the district
18 court to say anything different.

19 We are only asking the district court to say the
20 Attorney General has now made a policy judgment that it is
21 no longer in the interests of the United States to
22 prosecute, whether or not the Government could move forward
23 and there's an adequate factual basis. And I am bound to
24 that decision because that decision was vested in him under
25 the Constitution. There's no inconsistency between those

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1 two things, and that's why the Court says in Fokker that
2 signing off on the DPA or allowing a court to dismiss a
3 prosecution is not like accepting a plea under Rule 11. It
4 doesn't invoke the court's coercive power. It doesn't
5 involve formal judicial action adopting or imposing
6 anything. It just agrees to let a case go --

7 JUDGE PILLARD: Exactly. Exactly. It's just
8 really striking and remarkable. What is the Government
9 worried about if none of the inquiry that you're
10 highlighting has even been scheduled. He wanted an
11 argument. Anyway, I'm --

12 MR. WALL: With all respect --

13 JUDGE PILLARD: -- making sure I understand. The
14 only last question I had for you. Do you agree with Ms.
15 Powell that it's not the reading of Rule 48(a) that imposes
16 the severe limitation on the court being able to deliberate
17 about the separation of powers overlay? The history of the
18 rule seems to be that there actually was quite a robust
19 contemplation that judges would scrutinize whether there
20 was, for example, political favoritism. And is it also your
21 view that that doesn't matter if that's the right way to
22 read the rule because separation of powers would render that
23 unconstitutional?

24 MR. WALL: I think that overstates the history.
25 There are some members of the drafting committee that

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1 mention favoritism as a concern, but they didn't put any
2 mechanism in the rule for allowing the Court to superintend
3 prosecutions in that way, so I'm not sure the history is as
4 clear on this as --

5 JUDGE PILLARD: But just leave of court, yes --

6 MR. WALL: Yes, it is --

7 JUDGE PILLARD: (Indiscernible) leave of court.

8 MR. WALL: It is, just as Fokker said, it's
9 reading that language in light of constitutional principles
10 and avoidance. And just to go to your other question very
11 quickly, when you say, look, what are the real harms, I
12 think that's Cheney all over again. It's what are the
13 harms? You can assert Executive privilege. What are the
14 harms? If you want to show up and you want to have these
15 questions, you don't have to answer them. You can stand on
16 your motion. Or if the district court is frustrated, he can
17 hold you in contempt, he can grant it, he can deny the
18 motion. What's the big deal? And I think just as in
19 Cheney, that understates the harm to separation of powers.
20 I would say the same is true here. It's hard for me to read
21 Fokker and think that's not among the harms that Fokker is
22 talking about to the Executive Branch.

23 JUDGE PILLARD: Okay, Mr. Wall, just a very last.
24 Shouldn't the district court be able to hear and consider in
25 light of the strongest argument. We're not talking about

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1 facts. Whatever's in the record now, period, assume that
2 that is all that there is. Shouldn't the district court be
3 able to hear and consider in light of the strongest
4 arguments on both sides why the Government believes the
5 evidence is now, doesn't support going forward? It's your
6 view that he should not be able, that Rule 48(a) does not
7 authorize him to have a lawyers talking kind of hearing and
8 guide him in exercising the leave of court authority?

9 MR. WALL: We haven't said that a district court
10 doesn't have the power to appoint amici in criminal cases
11 generally. The problem with the appointment here is that
12 like everything else the Court is doing, it is designed to
13 entrench on Executive power. So if a court tomorrow said,
14 look, I'm not sure whether I'm going to approve this DPA. I
15 think maybe it's too lenient on the corporate defendants. I
16 want the best arguments from both sides about whether I
17 should approve this or whether it's too lenient, and so I'm
18 going to appoint an amicus. I think Fokker squarely
19 forecloses that. It says there's no substantial rule for
20 the courts. And whatever the district court --

21 JUDGE PILLARD: He didn't say that, though. He
22 says that I want to understand. I'm sorry I'm interrupting.
23 It's my feeling of urgency because I know the Chief wants me
24 to move on. But if he just wants to understand what the
25 Government's position is, and he thinks the adversary system

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1 is the way to get there, and he's going to appoint the
2 devil's advocate on one side and have the Government argue
3 strongly on the other, that, you don't have any objection to
4 that?

5 MR. WALL: Judge Pillard, just to be clear, that's
6 not what this is. The district court needs --

7 JUDGE PILLARD: I understand that that's, we have
8 a difference of opinion on that. But what we've been asked
9 to mandamus is where to draw the line.

10 MR. WALL: That's right. But the district court
11 told you in its briefs, if you look at the rehearing
12 petition on pages 14 to 16 in 703, it says it wants to see
13 whether the public interest is served. And what it says is,
14 quote, legitimate prosecutorial interests. This is not a
15 lack of understanding on the part of the district court.
16 The briefs from the district court are very good. The
17 district court fully understands the United States'
18 position. What it wants to inquire into is whether that
19 position is in its view, quote, legitimate. And that is
20 exactly what Articles II and III do not allow.

21 JUDGE PILLARD: Thank you.

22 JUDGE SRINIVASAN: Thank you. Judge Wilkins.

23 JUDGE WILKINS: Yes. Good morning, General Wall.

24 MR. WALL: Good morning.

25 JUDGE WILKINS: So, in your view, Fokker

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1 forecloses may factual development at a Rule 48(a) hearing,
2 yes or no?

3 MR. WALL: Beyond ensuring that you have the
4 authoritative positions of the parties, yes. You can make
5 sure the defendant is counseled. You can make sure that the
6 prosecutor hasn't gone rogue or been bribed. But outside of
7 that, yes.

8 JUDGE WILKINS: So if in my hypothetical there is
9 a videotape of the U.S. Attorney taking a suitcase full of
10 cash and the judge wants to have a hearing on that because
11 that same U.S. Attorney signed the motion, you would say
12 that that hearing is appropriate or not appropriate on the
13 Rule 48(a)?

14 MR. WALL: I would say the hearing to make sure
15 that the Executive Branch actually wants to dismiss is not a
16 problem. But if a U.S. Attorney shows up and says I want to
17 dismiss; we'll deal separately with whether the AUSA
18 committed bribery, no, the Court cannot --

19 JUDGE WILKINS: No. My hypothetical is that --

20 MR. WALL: (Indiscernible.)

21 JUDGE WILKINS: Excuse me, sir. My hypothetical
22 is that the U.S. Attorney is the one in the videotape taking
23 a bribe, and the judge makes that factual finding that the
24 person standing in front of him, the U.S. Attorney, is the
25 person in the videotape.

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1 MR. WALL: Again, that's the toughest case at the
2 margin, I'll give you, but my answer's still the same. The
3 Court can ask the AG or the Deputy Attorney General whether
4 they really want to dismiss. If the answer from the
5 Executive Branch is yes, then whether some individual in the
6 Executive Branch has committed a crime is not the domain of
7 Rule 48(a). The Executive Branch could prosecute, and the
8 Court could sanction or have contempt under separate
9 authorities, but it would not be a basis for denying the
10 Rule 48(a) motion. It would be a separate criminal
11 proceeding involving the corrupt United States Attorney.

12 JUDGE WILKINS: And that is based on Fokker?

13 MR. WALL: And the constitutional backdrop on
14 which Fokker relied. If the Attorney General said in your
15 hypothetical yes I want to dismiss. I have lots of good
16 reasons. I will separately look into whether the United
17 States Attorney took a bribe. I think the Court would be
18 required to grant the motion and dismiss the prosecution.
19 It couldn't keep it alive.

20 JUDGE WILKINS: So suppose there's a hypothetical,
21 again, hypothetical situation 10 years from now, different
22 administration where the Attorney General is in the
23 videotape by the nuns taking the bribes. No authority under
24 48(a) to dismiss that case?

25 MR. WALL: No. My answer's still the same, and

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1 the political and public remedies for that are I think sort
2 of so obvious that it wouldn't need to be the domain of Rule
3 48(a). And I don't think anybody has contemplated that Rule
4 48(a) is meant to aim at that sort of public corruption.

5 JUDGE WILKINS: Well, so the case would still get
6 dismissed as to that defendant who bribed the Attorney
7 General.

8 MR. WALL: Yes, and --

9 JUDGE WILKINS: The Attorney General might be able
10 to be prosecuted or impeached, but the defendant would still
11 get off scot-free as a result of committing a bribe.

12 MR. WALL: Maybe if I --

13 JUDGE WILKINS: That's the way 48(a) works?

14 MR. WALL: Maybe if I could come at it a different
15 way, Judge Wilkins. In the vast majority of cases where
16 what we're talking about is not commencing charges, I take
17 it everyone, even the district court agrees that there's no
18 rule for courts to play under Rule 48(a) even if they think
19 that the Executive has failed to prosecute for some improper
20 reason like bribery, like favoritism, like corruption.
21 Everyone agrees that the Executive can't be made to
22 prosecute the case no matter how impermissible its motives
23 for declining to do so.

24 And all we're saying is that as a rule-based
25 matter, the same rule applies to Rule 48(a) if we have

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1 brought the charge. Fokker says dismissing is the same as
2 bringing as a constitutional matter. It's bad conduct to be
3 sure. It should be punished to be sure. There are other
4 remedies for it. But they don't concern Rule 48(a).

5 JUDGE WILKINS: Well, a 48(a) motion can be made
6 after sentencing. So you're saying that the Attorney
7 General is bribed by the defendant after the sentence
8 because the defendant didn't like the sentence that he got,
9 the Court would still have to vacate the conviction based on
10 48(a) even with the videotape evidence of a bribe to the
11 Attorney General?

12 MR. WALL: As Fokker says, there is no substantial
13 role for courts to perform that sort of judicial scrutiny
14 and oversight. The Executive Branch's conduct of
15 prosecutions is governed, but it is governed by the
16 Legislative Branch and the public through means like
17 legislative oversight, impeachment, and arrest. It is not
18 governed by courts under Rule 48(a), that's right.

19 JUDGE WILKINS: Okay, thank you. That's all I
20 have.

21 JUDGE SRINIVASAN: Thank you. Judge Rao.

22 JUDGE RAO: Thank you. So, Mr. Wall, I guess my
23 first question to you is in light of the dissent
24 accompanying the panel opinion which rested in significant
25 measure on the failure of the Government to file a separate

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1 mandamus petition, and then the subsequent grant of
2 rehearing en banc, why has the Government not filed a
3 separate mandamus petition at this point?

4 MR. WALL: So I think, Judge Rao, I understand the
5 arguments about sort of the timing on the harms. I don't
6 really understand the argument that the Court can't look at
7 the harms or that we needed to file a separate petition.
8 We're a party. We filed a brief for the United States. We
9 articulated at length our harms, and in conclusion, we urged
10 mandamus. I take the line between cases like Cobell and
11 ExxonMobil to be whether we have filed and sought the
12 relevant relief, not how we captioned the brief. Nothing
13 here would have been different if we had filed exactly the
14 same brief but we had said it's a brief for the United
15 States and a mandamus petition. And we haven't been able to
16 find any case from any court where an appellee supported an
17 appellant or respondent supported a petitioner and the court
18 didn't look at the arguments that that party was making in
19 support of the relief. So I think --

20 JUDGE RAO: I may agree with you as to that
21 argument, but at this point it seems that at least some
22 members of the Court do not.

23 MR. WALL: I understand that there may be
24 disagreement over that, but I just think that it would, to
25 have come in now and to have filed a late-breaking

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1 mandatory, a mandamus petition that would have been word-
2 for-word what we had already put in front of the Court is
3 exactly what I understand Cobell and ExxonMobil to say isn't
4 necessary. And I think it would have been distracting. It
5 arguably would have been dilatory in the same eyes of the
6 members who think that we should have filed earlier.

7 And again, even if you thought that there was some
8 problem with our raising those harms as a party, as a
9 respondent-supporting petitioner, which we do routinely in
10 the courts of appeals. Indeed, there's a Supreme Court rule
11 expressly designed to allow this. I still think General
12 Flynn can raise the harms under cases like Bond because
13 after all it's not an abstract separation of powers we're
14 talking about. It's meant to protect individual liberty.
15 He has his own Article III in jury, hence he can raise the
16 separation of powers violation.

17 And even more generally, with respect to equitable
18 relief, courts look at the time at the interests of third
19 parties in deciding whether to grant or deny equitable
20 relief. So it's hard for me to understand how the Court, if
21 it can do that, can't in granting mandamus look at the harms
22 to a party that actually filed and requested mandamus. I
23 think it would come down, then, to saying we didn't caption
24 our brief a particular way. And I don't understand anything
25 in the rules or common sense to recommend that approach.

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1 JUDGE RAO: Okay. So, no one here seems to be
2 suggesting that the district court can deny the Rule 48
3 motion on the facts here. And we accept your argument, you
4 know, that probing the reasons behind the Executive's
5 decision about whether to prosecute infringes on Article II
6 and that harm is pretty clearly established by Fokker and
7 other cases. It seems that in our cases, you talk about
8 Cheney. When the Court has found a harm to the Executive
9 Branch or found a separation of powers violation, that an
10 appeal is not considered an adequate means of protecting the
11 Executive power. And I think that is also what the 1998
12 sealed case stands for involving the independent counsel and
13 Cobell. And I'm just wondering if you are aware of any
14 cases in which we've found a separation of powers violation
15 or a harm to the Executive power, and has not granted
16 mandamus because we've waited for the Executive Branch to
17 appeal?

18 MR. WALL: I am not aware of any case, Judge Rao,
19 where the resolution of a motion was compelled by clear law
20 and the conduct of hearing the motion would violate Articles
21 II and III or any other constitutional principle but
22 mandamus was denied. The closest example, of course, is the
23 Seventh Circuit where the Seventh Circuit granted mandamus.
24 So, no, I'm not aware of anything like that.

25 I understand that there is some skepticism on the

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1 Court about doing it at this stage. We do think that Cheney
2 and other cases make clear, Fokker among them, that an
3 appeal is not going to be an adequate remedy for the
4 Government because of the harms it faces from the process.
5 But if the Court disagrees with that, I think at least
6 whether we need to do or to place on it the limits that the
7 panel dissent thought were implicit in the proceeding and
8 that the Court (indiscernible) have indicated. I think it
9 would need to indicate to the district court that it needs
10 to take a harder look at Rule 48 and Fokker because it's
11 role is a limited one. I think it needs to take off the
12 table the sort of fact development that the district court
13 is trying to hold open, notwithstanding the panel dissent.
14 And I think the district court would need to make a quick
15 decision so that we could come back to the mandamus panel in
16 a timely way.

17 JUDGE RAO: Thank you.

18 JUDGE SRINIVASAN: Thank you. Mr. Wall, just one
19 quick question. The Seventh Circuit case, that's the In re:
20 United States case?

21 MR. WALL: Yes, sir.

22 JUDGE SRINIVASAN: And that one the Rule 48
23 motion, Rule 48(a) motion, excuse me, was denied by the time
24 mandamus was granted. Is that right?

25 MR. WALL: Yes, that's right.

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1 JUDGE SRINIVASAN: Okay, thank you. Judge
2 Henderson.

3 JUDGE HENDERSON: Yes. I just have a quick
4 question, Mr. Wall. When the trial judge appointed amicus,
5 he also asked that amicus to opine on whether Flynn had
6 committed perjury or contempt. And you referred to it as
7 the specter of contempt. But aren't there two ways to look
8 at it? In other words, it protects the Article III
9 interests because if a trial judge thinks he's been
10 hoodwinked or dealt with dishonestly, he can hold whoever's
11 responsible for it in contempt. On the other hand, it could
12 also indicate that Judge Flynn is thinking -- I'm sorry,
13 Judge Sullivan is thinking well I may have to dismiss the
14 charges, but I'm not through with him yet. Do you have a
15 position on that?

16 MR. WALL: Judge Henderson, I will say, although
17 it's not our goose being cooked on the contempt piece of it,
18 I do, I find that maybe the most troubling part of the case,
19 because as the National Association of Criminal Defense
20 Lawyers explained in their brief in the district court, it
21 is not an uncommon occurrence for a defendant to plead
22 guilty because he thinks that's the best deal he can get,
23 and then to later decide that he wants to withdraw his plea
24 and maintain his innocence. That is a fairly common
25 proceeding in the district court.

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1 As far as the folks in the Criminal Division are
2 aware at the Department of Justice, no district judge has
3 ever raised the specter of contempt for that. It's happened
4 in front of this district court before. I'm not aware he's
5 ever raised the specter of contempt for any other defendant.
6 And the reason is that the Supreme Court's cases are clear
7 that that may be perjury, but it's not contempt. And even
8 the court-appointed amicus hasn't tried to make an argument
9 that it is under cases like Hudgings and Michael.

10 And so it's, I think that raising that creates a
11 real question about why now and why this defendant. Again,
12 it's not a harm to the separation of powers, so it's not
13 something we focused on in our brief. But my own, I do,
14 Judge Henderson, think it's fairly troubling. And in terms
15 of your dichotomy more the latter than the former. It seems
16 more a sword over the defendant's head than the sort of
17 thing that this district court is legally entitled to do.
18 I'm not even sure how it's arguable under cases like
19 Hudgings and Michael. No one has tried to make the case.
20 The district court has never even addressed that in its
21 briefs to this Court.

22 JUDGE HENDERSON: Thank you.

23 JUDGE SRINIVASAN: Thank you. Judge Rogers.

24 JUDGE ROGERS: I'll pass.

25 JUDGE SRINIVASAN: Thank you. Judge Tatel.

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1 JUDGE TATEL: Mr. Wall, I just have a quick more
2 or less summary type of question. Could you just tell us,
3 what's your very, very best argument, your very best
4 argument, given there are so few Rule 48(a) cases, what is
5 your very best argument that it's clear and indisputable
6 that the district court has no substantial Rule 48(a) role
7 under the circumstances of a case like this where, one, the
8 Government seeks to drop a prosecution after the district
9 court accepted a plea of guilty, and number two, the
10 district court has not acted on your motion to dismiss?
11 What's your best argument that it's clear and indisputable
12 under those two circumstances together?

13 MR. WALL: So I fear this is not going to persuade
14 you, Judge Tatel, but I'm reading it from Fokker --

15 JUDGE TATEL: I ask the question because I'm
16 always open to persuasion.

17 MR. WALL: Decisions to dismiss pending criminal
18 charges lie squarely within the can of prosecutorial
19 discretion. To that end, the Supreme Court has declined to
20 construe Rule 48(a)'s leave of court requirement to confer
21 any substantial role for courts in the determination whether
22 to dismiss charges --

23 JUDGE TATEL: Right.

24 MR. WALL: And the court in Fokker went on, by the
25 way, Judge Tatel, to distinguish Rule 48 from something like

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1 Rule 11. So it's, I think it specifically objects to --

2 JUDGE TATEL: Right. But that case involved
3 neither of the two circumstances present here.

4 MR. WALL: Well, two things. One, I think I
5 granted earlier, or I meant to, that it would have been a
6 harder case, but I think it should have come out the same
7 way if there had been no hearing there. Once it's on the
8 books, I don't understand what difference the hearing can
9 make because that's part of the process that's foreclosed,
10 as we know, by the constitutional backdrop. And so that
11 just leaves the distinction between the pre-plea and the
12 post-plea situation. But I understand Fokker to reject
13 that. Rule 48 does not, like Rule 11, set up different
14 standards for stages of the proceeding. And of course, the
15 constitutional principles that led Fokker to interpret the
16 rule in the way that it did are the same because you need
17 the adversity and you have to respect the prosecutorial
18 discretion throughout the case. There's nothing magical
19 about the plea. It doesn't enter a judgment of conviction
20 even, and there's still many things that go on in front of
21 the district court. There would be many things that went on
22 here if this Rule 48 motion were denied before we got to a
23 final judgment. So, the text of the rule doesn't
24 distinguish, the cases don't distinguish, the constitutional
25 principles are the same. So once we know that Rule 48 is

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1 not meant to do this for the pre-plea situation, I don't see
2 how the Court could say that as a rule-based matter it's
3 meant to do it for the post-plea situation.

4 JUDGE TATEL: I have no further questions. Thank
5 you. Thank you.

6 JUDGE SRINIVASAN: Thank you. Judge Garland.

7 JUDGE GARLAND: Yes, thank you. Hello again,
8 General Wall. So you were asked about how often we grant a
9 mandamus in separation of powers cases. And you sort of
10 amended the question by saying what really matters here was
11 the process. And in answering Judge Tatel's question, you
12 said the real problem here is just the hearing itself. So
13 I'm trying to figure out how we draw a line between this
14 kind of separation of powers claim leading to mandamus and
15 the many other ones that we have in the district court not
16 leading to mandamus, unless we're going to have a flood.

17 So there are a lot of separation of powers cases
18 that challenge actions of various administrations under the
19 separation of powers. And in fact, the argument in the
20 appropriations clause case that we just heard en banc, our
21 last en banc, was that the allegedly unauthorized spending
22 by the Executive, if permitted to go forward, would
23 constitute a violation of separation of powers.

24 So here's my hypothetical. Assuming there's
25 standing, and assuming that that claim is indisputable,

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1 would it be appropriate for a plaintiff to petition this
2 Court to mandamus a district court to rule in its favor and
3 not wait for the district court to ever rule?

4 MR. WALL: In a case between private parties,
5 Judge Garland, I'm not sure that it would. I would limit in
6 three ways that I think cabin your concern. First --

7 JUDGE GARLAND: A party, the House of
8 Representatives or the Congress as a whole. In other words,
9 the Congress claims, in my hypothetical, the Congress claims
10 that the Executive Branch in disregard of the Appropriations
11 Clause is spending money. In fact, imagine that the
12 Executive Branch just says we don't care about the
13 Appropriations Clause. We're going to spend it anyway. Why
14 is that kind of separation of powers claim remedial while
15 the having to go to a hearing claim that you have here is
16 non-remedial? I'm only looking at that adequate
17 alternatives ground.

18 MR. WALL: Right. And so if we've assumed away
19 all the threshold questions like standing and all the rest.

20 JUDGE GARLAND: Yes, yes. Understand I'm not
21 trying to decide the other case today.

22 MR. WALL: Right, right. I guess I'd say a few
23 things. One, the constitutional principles have got to be
24 crystal clear. And here they are under Fokker. You've got
25 to have a clear and indisputable right, not just be correct

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1 on the merits, as you know.

2 JUDGE GARLAND: (Indiscernible) I'm giving you the
3 hypothetical the Constitution says appropriations are made
4 by the Congress, and the Executive says I don't care, I'm
5 going to spend the money anyway.

6 MR. WALL: Right. And --

7 JUDGE GARLAND: It's indisputable that there's
8 a -- I'm not saying that's the circumstance we're in. I'm
9 just asking you, if it's -- or imagine now the Supreme Court
10 has also held in another case that the Executive can't,
11 which hardly seems necessary, the Executive can't spend
12 money without appropriations from the Congress. Does that
13 not even have to be heard by the district court?

14 MR. WALL: No. So I'd say two other things, Judge
15 Garland. First, there, it's not the district court imposing
16 the injury. It's an interbranch dispute. But the writ of
17 mandamus is about confining a district court within the
18 bounds of its lawful authority. So this is much more
19 squarely within (indiscernible).

20 JUDGE GARLAND: (Indiscernible.)

21 MR. WALL: And of course here you have the
22 Executive Branch in the case raising the harms from what the
23 district court is doing. In your hypothetical, you can pay
24 back money, of course. But here, you can't undo the
25 scrutiny from the district court's process that it has set

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1 up which usurps our exercise of prosecutorial discretion.

2 There's no way to undo that harm.

3 JUDGE GARLAND: In looking at the alternative
4 remedies, paying back money where it's been spent on various
5 laborers to do things is not a realistic answer to that
6 question. The claim in the hypothetical I'm raising is that
7 the money is being spent, and that is, or is about to be
8 spent, and that will constitute an irreparable injury to the
9 congressional branch, and the money can't be obtained in any
10 practical way because it's being spent on goods and services
11 that can't be given back by anyone. So, why is your going
12 to a hearing, you meaning the Executive Branch, more
13 important or more remedial than Congress's authority to
14 determine spending?

15 MR. WALL: Well, I assume that's a situation there
16 where a party is coming in and asking for an injunction
17 against the spending of the money. But mandamus, as you
18 know, is a writ directed to the district court because the
19 district court is opposing. There, it's an Executive
20 injury. So, yes, you'd have to run the equitable factors on
21 likelihood of success on the merits and equitable interest
22 in all the rest, but I don't think it's a problem for the
23 Court in terms of if it were to grant mandamus here, why not
24 mandamus in every other case? Because here, what you have
25 is you've got clear Circuit law, and you've got a district

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1 court that's put in place a process which, where the harms
2 really can't be remedied later.

3 JUDGE GARLAND: Let me adjust the hypothetical one
4 more time. What I'm asking is whether the judge can be
5 mandamus to make a ruling. So imagine the district court
6 says, somebody applies for a preliminary injunction, and the
7 court says all right, well, I'll hear it. We're going to
8 have a big hearing. I don't care what the Supreme Court
9 said about this. I want to have a big hearing and, you
10 know, I want a bunch of facts. And the Congress's argument
11 is every day separation of powers is being violated. So the
12 mandamus would be directed against the district court to
13 make a decision it has not yet made, which is what you're
14 asking the district court to do here -- asking us to do
15 here, order the district court to make a decision it has not
16 yet made.

17 MR. WALL: I don't think so, Judge Garland. I
18 think the difference between a case like that one and a case
19 like this one or Cheney is that the separation of powers
20 doesn't itself require federal courts to stop injuries
21 imposed by the Executive. You've got to satisfy whatever
22 the legal requirements for an injunction and all the rest.
23 It does, as Cheney says, prohibit federal courts from
24 injuring the Executive in particular ways. That is the
25 traditional function of a writ of mandamus, or at least one

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1 of them. So I think that's the difference between your
2 hypothetical and this case. Cheney and this case could be
3 on one side of the line without sweeping in all of the kinds
4 of cases that you're concerned about.

5 JUDGE GARLAND: Okay. Thanks very much.
6 Appreciate the answer.

7 JUDGE SRINIVASAN: Thank you. Judge Griffith.

8 JUDGE GRIFFITH: Yes. General Wall, I just have
9 one quick question, I think. You're right to point us to
10 the separation of powers concerns here. I mean, that's
11 critical. But help me understand, how is it a breach of the
12 separation of powers for the Government to be asked
13 questions? Why can't it be the case that at this hearing if
14 an inappropriate line of inquiry is followed the Government
15 objects, and in posing the objection it doesn't answer. And
16 then that gets appealed, and then we follow the normal
17 course? Isn't that how we normally deal with claims that
18 separation of powers are being violated by asking questions
19 that are inappropriate?

20 MR. WALL: So, Judge Griffith, that was exactly
21 the Court's reasoning, this Court's reasoning in Cheney.
22 Look, all the Executive needs to do is assert the privilege,
23 and then we can deal with the harms from if the district
24 court requires you to turn over something that you say is
25 privileged, but what's the harm, this Court said, in simply

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1 requiring the assertion of the privilege. And the Supreme
2 Court said that was insufficiently respectful of the harms
3 to the Executive Branch, and I'd say the same thing here,
4 and Fokker supports this. There is a harm that I think this
5 Court should not undervalue to making the Executive come in
6 and respond to the kinds of accusations that this court-
7 appointed amicus has put in a 70-page brief that by now the
8 Court has read. And simply, I think it diminishes the
9 interests of a co-equal branch to say, well, what's the harm
10 in being called to account like that? What's the harm in
11 having to answer all of those? If you don't want to put on
12 evidence, you can decline. If he wants to hold you in
13 contempt, he can. That entire proceeding, which I think
14 threatens to be a spectacle in front of the district court,
15 frankly, is what Articles II and III are meant to place off
16 limits. Once the Executive wants to dismiss and the
17 defendant agrees, there's no controversy left between the
18 parties, and the Court's injecting itself in a way that, as
19 I say, creates real harms to the Executive.

20 JUDGE GRIFFITH: Okay, thank you.

21 JUDGE SRINIVASAN: Thank you. Judge Millett.

22 JUDGE MILLETT: Yes, following up on that question
23 from Judge Griffith. In other criminal cases, and Cheney
24 wasn't a criminal case. In other criminal cases when
25 there's been a question to dismiss or not, and courts have,

1 I'm thinking of United States v. Armstrong, crack cocaine
2 and whether there was racial bias in the prosecution. And
3 when the district court insists that over the Government's
4 objection on discovery that the Government didn't want to
5 do. It just said no, we cannot comply. Go ahead and enter
6 a judgment against us, and we'll appeal.

7 And when I'm trying to understand your harms here,
8 sometimes in the briefs it sounds like you want mandamus
9 against Mr. Gleason and his arguments. But at these points,
10 at this point, we don't know what the district court would
11 ask. We don't know what the district court would insist
12 upon. Even if the district court asks something and you say
13 we're not going to answer because of privilege or separation
14 of powers, you can just do that. There's nothing that
15 compels you, as in Cheney, to start turning over documents.

16 Really, you can just say we refuse to comply as
17 the Government does, I won't say commonly but not
18 uncommonly. It says fine; rule against us and we'll take
19 our appeal. Why isn't that? There's nothing here that
20 requires you to disclose. You don't have to respond to
21 every argument made by Mr. Gleason. The Government doesn't
22 respond to every argument in opposing amicus or a party
23 makes. So do you say what you said already, we stand on our
24 filing; we will say no more? And if the Court thinks that's
25 a basis to rule against us, rule against us. We'll take our

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1 appeal. Does that not, would that process not protect you
2 against any separation of powers injury?

3 MR. WALL: I don't --

4 JUDGE MILLETT: (Indiscernible) Armstrong?

5 MR. WALL: I don't think it would, Judge Millett.
6 Two points. One, as you know, Armstrong is an exception
7 among the rules justified by the Equal Protection Clause.
8 And even that exception is a very tightly cabined one. It
9 sets up a very high hurdle. And only where you got clear
10 evidence of an unconstitutional motive, we don't have
11 anything like that here, so --

12 JUDGE MILLETT: But you're talking about the
13 process for the Government to avoid injury. We're not
14 talking about the constitutional issue there versus here.
15 I'm talking about the process for the Government to avoid
16 injury. If you get a question, you ignore arguments you
17 feel like you don't have to answer. You just say we refuse
18 to answer. They're not relevant. They're not legally
19 relevant. We will not address them.

20 MR. WALL: Right. So that was going to be my
21 second --

22 JUDGE MILLETT: (Indiscernible) information.
23 Right. And you just say that to the district court.

24 MR. WALL: Well, my first point was just that
25 probing the Executive in the way that Armstrong allows is a

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1 very narrow exception required by the --

2 JUDGE MILLETT: That was the ultimate Supreme
3 Court holding. Again, I'm talking about the process by
4 which the Government responded.

5 MR. WALL: Right.

6 JUDGE MILLETT: Right. That was the Government's
7 position in the lower court in Armstrong. And the process
8 we used there, and it could be used here and avoid any harm.
9 No one makes you, right? I guess the worst that could
10 happen, I suppose, is throw an attorney in contempt, and you
11 get immediate appeal of that too. But wasn't even, no one's
12 even mentioned that. So that would completely protect you
13 against disclosing anything that you don't think you should
14 have to disclose.

15 MR. WALL: But I guess what I've been trying to
16 say, Judge Millett, is that I think the process itself is
17 harmful. And if a district court said tomorrow I want you
18 to justify this DPA, and if you don't want to explain to me
19 why you've entered into it or why you've taken a sweetheart
20 deal then, you know, you can stand there as the amicus says
21 various things and I create a record on your silence, and I
22 take that to be the sort of harm that Fokker says is not
23 permissible because you're extending the criminal process.
24 You're exposing or asking the Executive to expose its
25 deliberative process. You're threatening to reveal

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1 sensitive information because --

2 JUDGE MILLETT: Wait, wait, wait. No one's
3 threatening to reveal. You've got complete control over
4 that. And so asking the Government to reveal something that
5 the Government considers to be privileged, and maybe the
6 district court's wrong as rain, but the district court
7 thinks is an open question, that's mandamus-able every time
8 a question like that is asked in a district court across
9 this country? That's mandamus-able?

10 MR. WALL: No, Judge Millett. When a district
11 court in this Circuit begins to probe in that way with
12 respect to a DPA or a Rule 48 motion, it is mandamus-able
13 under Fokker. And the reason, and I may not persuade you,
14 but the reason is that the harm from usurping a
15 constitutionally vested power in another branch is not
16 undone --

17 JUDGE MILLETT: Yes, okay. Well, just to be
18 clear, I'm just asking questions (indiscernible). Just to
19 be clear, your position is no one's forcing you to answer.
20 You have control over your answer or non-answer. So asking
21 the question is the constitutional violation. Just to be
22 clear, just so I understand your position.

23 MR. WALL: Yes. That's not a price or cost that's
24 imposed by Rule 48(a).

25 JUDGE MILLETT: Okay. And then I want to ask you

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1 again because just to be clear. I was a little surprised
2 about your response about lying to the Court. So let me
3 make things absolutely crystal clear. You have a, and this
4 is a hypothetical case, capital H, criminal case. District
5 court has said, and it's the standard order on Brady
6 disclosures. The Government says we've complied, we've
7 turned over. District court again before trial goes I want
8 to make sure you've done everything under Brady. You've
9 given them everything you have. You've asked everyone who
10 would know or have information. You've checked every file.
11 The Government says yes, yes, yes. There's nothing else.
12 We've done an open file process in this case. We've given
13 the defendant everything.

14 Third time, the district court confirms right
15 before trial, you have done everything Brady requires,
16 everything has been disclosed? Absolutely, Your Honor.
17 It's now the first day of trial. In the presence of the
18 Court, the defendant hands to the defendant's attorney who
19 then hands to the prosecutor a briefcase filled to
20 overflowing with \$20 bills, falling out at the seams. It's
21 handed to the prosecutor, who is the U.S. Attorney, and the
22 Attorney General is sitting right there next to her. And
23 the Government upon receipt of that briefcase submits to the
24 district court a Rule 48 motion to dismiss. And it's 10
25 pages long, and it has affidavits, and it says there was a

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1 Brady violation in this case.

2 So in the presence of the district court, money
3 has exchanged hands. Previous representations about Brady
4 are now being undermined. And your position, as I
5 understood it from your prior answer to me, is that the
6 district court has no choice but to grant that motion to
7 dismiss. And that would be true even if it is unclear
8 whether the district court could prosecute criminal
9 contempt, contempt in the court's presence after a case is
10 dismissed.

11 MR. WALL: Yes, but if I may explain my answer.
12 The Court can impose sanctions and pursue the Brady
13 violation. It may be even be able to pursue the bribery --

14 JUDGE MILLETT: I understand you --

15 MR. WALL: -- or the (indiscernible).

16 JUDGE MILLETT: No, I understand you said that.
17 No, no. But look, you're saying the district court --

18 MR. WALL: But yes, it is --

19 JUDGE MILLETT: -- has to play a part in this, has
20 to finish the bribe and make it effective, has sullied the
21 court's reputation by closing the deal between the two
22 parties. What is your clear authority for that? Because
23 Fokker says on page 743, to be sure, a district court judge
24 is not obliged to accept a proposed decree that on its face
25 and even after Government explanation appears to make a

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1 mockery of judicial power. So you can't point to Fokker.
2 So what's your clear and undisputable authority that Rule
3 43(a) compels dismissal even if it's unclear, even if it
4 was, there's a risk that it will strip the Court of its
5 criminal contempt and sanctions power once the case is
6 dismissed?

7 MR. WALL: So three things, Judge Millett. The
8 first is I take everyone to agree that that is the situation
9 in the pre-plea situation. I take it even Judge Sullivan
10 agrees with that. So the only question is whether the plea
11 somehow triggers a different regime. And under Rule 48, we
12 don't think it does. It's all bad conduct, to be sure. But
13 if it --

14 JUDGE MILLETT: Just to be clear, I don't agree
15 that that would be true pre-plea if a bribe was executed in
16 the presence of the Court. But go ahead.

17 MR. WALL: All right. Well, I didn't understand
18 anyone to dispute that. But second, I do actually rely on
19 Fokker. First, when the Court's talking about the mockery
20 of justice, it's talking about the consent decree context
21 where you are invoking judicial power in an ongoing judicial
22 role. Obviously you couldn't involve the Court in that kind
23 of a mockery. But in any event, here, it has to be a filing
24 (indiscernible).

25 JUDGE MILLETT: Okay. So Rule 43 does allow

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1 involving the Court in a mockery?

2 MR. WALL: Well, it has to be a filing that on its
3 face makes a mockery. Here, one of the Attorney General's
4 reasons is a policy judgment.

5 JUDGE MILLETT: I'm asking only for an answer to a
6 hypothetical question. That did not on its face make a
7 mockery of justice, my hypothetical? I am not, it is a
8 hypothetical. I am not for a minute suggesting that's
9 what's going on in this case, to be absolutely clear.

10 MR. WALL: No. The motion, and I didn't
11 understand the motion in your hypothetical on its face to be
12 a mockery. The question was what the Government's actual
13 motive was that might underlie what it was saying was a
14 Brady violation. The motion on its face seemed fine. It
15 seemed like the kind of thing that could be granted in lots
16 of other cases where there was no evidence of a bribe
17 without any question at all, routinely granted. I took it
18 just to be that the judge has a question about what the real
19 motives are of the prosecutor who has otherwise filed a
20 motion that's false on its face.

21 JUDGE MILLETT: No. I will restate the
22 hypothetical. The district court does not wish to be privy
23 and party to closing the deal, which is what granting the
24 motion will do.

25 MR. WALL: I thought the -- yes, if the motion

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1 just comes in and says, look, we think there's a Brady
2 violation, we want to dismiss, but the Court thinks maybe
3 that's not the motive, there was bribery, or --

4 JUDGE MILLETT: You got the hypothetical. It's
5 clear as rain what's going on. Three representations about
6 Brady. I'm just trying to be, I'm trying to make sure, and
7 maybe it's just your position, sometimes the Government has
8 to take hard positions. But there's nothing ambiguous.
9 It's in the presence of the Court. And the Court wants to
10 protect the integrity of the Court and not grant the motion.
11 And the Government's position, as I take it, I mean, you can
12 just confirm yes, is that Rule 43 does not allow the
13 district court to not participate in that activity to
14 preserve the integrity of the judicial process.

15 MR. WALL: No. I think if you're asking about the
16 consent decree context, it may be different --

17 JUDGE MILLETT: No. I am asking about the
18 hypothetical I gave you, which is a criminal prosecution.

19 MR. WALL: I'm sorry. When you said Rule 43 --
20 no. Rule 48 does not --

21 JUDGE MILLETT: I'm sorry, 48. I'm so sorry.
22 Rule 48. I do apologize. Yes, Rule 48(a).

23 MR. WALL: No, I don't think it leaves that role
24 to the Court. And again, if I could just make one point.
25 Everyone agrees that is true if that exact same bad conduct

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1 went on at any other earlier stage of the criminal
2 proceeding. And maybe the Court doesn't agree, but I think
3 that's been fairly well accepted throughout the litigation
4 that you can't force the Executive to bring a prosecution or
5 to keep one alive pre-plea. And all we're saying is nothing
6 changes in the plea circumstance. There are lots of outlets
7 for it, and there is, it's not that the Court is powerless,
8 but it still has to, it still has to let the prosecution go
9 if that's the considered authoritative position of the
10 Executive Branch, yes.

11 JUDGE MILLETT: Okay, thank you.

12 JUDGE SRINIVASAN: Thank you. Judge Pillard.

13 JUDGE PILLARD: Hi, Mr. Wall. On the lines of the
14 same line of inquiry, what the Government is asking of the
15 Court and how the Court is implicated. If there were no
16 rule 48(a) at all, which is sort of, I gather, how you're
17 reading the rule to apply here, and there were a plea
18 entered before a district judge and the Government decided
19 that it didn't want to pursue that prosecution, what do you
20 envision would happen?

21 MR. WALL: So it's not, Judge Pillard, that we
22 think there's no role under Rule 48 or that I'm reading it
23 out. It has more to do for opposed motions and even for
24 unopposed motions to protect the defendant in cases of
25 harassment and of course to make sure you've got --

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1 JUDGE PILLARD: So in a case like this, if there's
2 no Rule 48(a), the Government wants to walk away, is there a
3 conviction? Is there not a conviction? Is there a private
4 settlement between the Government and the defendant? What
5 if then the district judge scheduled a sentencing? I mean,
6 because I'm trying to, I think I'm trying to probe my
7 impulse that the Judicial integrity is at stake here
8 together with your impulse that Executive integrity is at
9 stake and the extent to which you'll recognize that there is
10 any judicial integrity at stake here. I'm just, I'm
11 literally, I don't know. And so I'm trying to understand
12 what role you think if any the court plays.

13 MR. WALL: I think in the absence of Rule 48(a),
14 the plaintiff could dismiss its case, here that's the
15 prosecution, as in any other context. Rule 48(a) does set
16 up a hurdle to that. It does require leave of the court.
17 It's just a hurdle that has to be understood is a relatively
18 low one in light of the constitutional backdrop. And I
19 don't want to say that it doesn't involve judicial integrity
20 in any sense, but not in the relevant sense. Because we're
21 not asking Judge Sullivan in granting this motion, there's
22 nothing, he could file a simultaneous opinion saying he
23 doesn't agree. He thinks there's a factual basis. He, you
24 know, he's not signaling at all. And indeed, a district
25 court might strongly agree that the prosecution should be

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1 let go. So there's nothing about deferring to the
2 Executive's judgment that means the courts independently
3 agree with that judgment.

4 JUDGE PILLARD: Exactly. But you didn't even wait
5 to see whether he would defer. But anyway, that was
6 helpful. So if there were no Rule 48, the Government could
7 just stop pursuing the case and send a letter to the court
8 and that would be done. In your view, that would be
9 effective in ending, even though there was a plea that was
10 accepted?

11 MR. WALL: I think so because there'd no longer be
12 any Article III controversy between the parties, and there
13 wouldn't be any authority beyond Rule 48 for the district
14 court to keep it alive. And that seems to me at least as
15 important, maybe more important, on the criminal side where
16 you're not just talking about an adversarial contest between
17 private parties. You're talking about an adversarial
18 contest between a private citizen and a branch of
19 government. And what the district court has never explained
20 is how it could keep alive a controversy over the
21 Executive's objection, which means that if the Rule 48(a)
22 motion has to be granted at the end of the day, then the
23 real question is what is the purpose of allowing unnecessary
24 proceedings to play themselves out if the Court thinks that
25 there are no harms to the Executive.

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1 JUDGE PILLARD: Yes. And I think it's, this has
2 been clarifying for me because I think, you know, our Court
3 has seen there to be a role under Ammidown, for example, on
4 page 620 where we refer to Rule 28(a)'s requirement of
5 judicial leave, which gives the Court a role in dismissals.
6 And there it's just following indictment, you know, in
7 exercising its responsibility, the Court will not be content
8 with a mere conclusory statement by the prosecutor. It will
9 require a statement of reason, the role of guarding against
10 abuse of prosecutorial discretion. So there's a discussion
11 of the role of the Court.

12 And as I took Judge Tatel's questions of you to
13 also focus on, it feels like the Court's role is
14 particularly robust where there is a plea that has been
15 accepted. And Ammidown specifically talks about the
16 imposition of a sentence which is a matter for discretion
17 for a trial judge. And so to the extent that there is a
18 balance between Executive authority and Judicial authority,
19 the Judicial authority becomes more prominent when there is
20 a conviction still, you know, none of which is to speak
21 ultimately to the merits of this 48(a), but just to, as I
22 said, to probe your position that there is --

23 MR. WALL: Right.

24 JUDGE PILLARD: -- no role on these facts.

25 MR. WALL: But even --

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1 JUDGE PILLARD: (Indiscernible) that the Court --

2 MR. WALL: Sorry.

3 JUDGE PILLARD: Go ahead.

4 MR. WALL: But even Ammidown at 622 says, well,
5 sure, the Executive has got to supply a reason. But Judge
6 Leventhal says but the Court can't deny the Rule 48 motion
7 because its conception of the public interest differs from
8 that of the prosecutor. I don't know how to square that up
9 with Footnote 3 of the rehearing petition which makes clear
10 that the district court is going to conduct an independent
11 inquiry into whether in its view we've satisfied the public
12 interest.

13 So even if the Court disagrees with what the panel
14 did, I still think in sending it back to the district court,
15 as I said earlier, it would be helpful to provide the
16 district court some guidance on what I take to be the fairly
17 limited role for the district court in this context because
18 of course the Court was aware in Ammidown, in Fokker, it
19 relied on the statements in Ammidown that rejected judicial
20 oversight, and it cited all of the intervening separation of
21 powers cases from the Supreme Court. I mean, it's not a
22 blank slate. You have Armstrong, BLE, Wayte, Heckler v.
23 Cheney. So I understand that --

24 JUDGE PILLARD: None of which involved mandamus
25 before a ruling, so --

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1 JUDGE SRINIVASAN: Thank you, Mr. Wall. I just
2 want to make sure we have a chance --

3 JUDGE PILLARD: Yes.

4 JUDGE SRINIVASAN: -- to get through the follow-
5 up, and --

6 JUDGE PILLARD: Yes, yes, yes.

7 JUDGE SRINIVASAN: -- get to Ms. Wilkinson.

8 JUDGE PILLARD: Right. And on page 622, just to
9 circle back, of Ammidown, the requirement of judicial
10 approval requires the judge to obtain and evaluate the
11 prosecutor's reasons, close quote. Thank you.

12 JUDGE SRINIVASAN: Thank you. Judge Wilkins.

13 JUDGE WILKINS: Yes, one question. Why isn't it a
14 proper interpretation of Rule 48(a) and Rule 48(b) in Judge
15 Millett's hypothetical, if the district judge observes what
16 he finds to be a bribe occur in her courtroom, and decides
17 that she does not want to be a party to it, why can't the
18 judge deny the 48(a) motion. And yes, the judge can't force
19 the Government to continue with the prosecution. But then
20 the defendant just moves to dismiss because of impermissible
21 delay under 48(b), and the judge grants that motion. Why
22 isn't that an appropriate way for that to play out?

23 MR. WALL: So three quick points, Judge Wilkins.
24 The first is that there's no mechanism in Rule 48, as your
25 question recognizes, to force the Executive to proceed,

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1 which I think is strong evidence that that's not the purpose
2 of the rule. Second, there are other ways to expose and
3 respond to the Executive misconduct that you were talking
4 about, legislative oversight, impeachment, elections, all
5 the rest. And the third is, I just think, you don't have
6 to, you may disagree with me on this hypothetical. I think
7 it goes to whether you have the considered position of the
8 parties. But even if you think that it's not the sort of
9 the thing that, or it is the sort of thing Rule 48(a) ought
10 to cover, it does highlight, I think, how far we are from
11 that in this case. Even if you thought that maybe a crime
12 committed in front of the district court by the prosecutor
13 would be the sort of thing that would allow the court to
14 probe the Government's motives, all that underscores is how
15 far we are away from a case like that. There's no Armstrong
16 allegations here of unconstitutionality. There's no
17 allegation of unlawful conduct of the kind that you are
18 talking about. There's a question about whether there's
19 been improper political influence, as the court-appointed
20 amicus has said. But that's not the sort of thing that the
21 hypo gets at. That seems like clearly the sort of thing
22 that should be taken care of through political channels.

23 JUDGE WILKINS: Nothing further.

24 JUDGE SRINIVASAN: Thank you. Judge Rao.

25 JUDGE RAO: No further questions. Thank you.

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1 JUDGE SRINIVASAN: Thank you. Thank you, General
2 Wall. We'll give you a bit of time for rebuttal as well.
3 We'll now hear from Ms. Wilkinson.

4 ORAL ARGUMENT OF BETH A. WILKINSON, ESQ.

5 ON BEHALF OF THE HON. EMMET G. SULLIVAN

6 MS. WILKINSON: Thank you, Chief Judge Srinivasan,
7 and may it please the Court. The extraordinary remedy of
8 mandamus is unwarranted when a district judge has yet to
9 decide a pending motion. By appointing amicus, scheduling a
10 hearing, and receiving legal briefing from the parties, the
11 district court is doing what district courts do, preparing
12 to rule on a motion. The judge has not asked any questions
13 of the Government or anyone else. No fact-finding has been
14 requested, and briefing by the parties is not finished.

15 Once that process is complete and the judge
16 studies the papers, there may be little left to discuss at
17 the hearing. The parties' speculation and fears about what
18 the district court might do are not a proper basis for
19 mandamus. Indeed, all agree that this Court has never
20 granted mandamus before giving a district court an
21 opportunity to rule. The petition for mandamus should be
22 denied for the simple reason that petitioner has adequate
23 alternative means of relief.

24 Three reasons support this commonsense conclusion.
25 First, the district court could very well grant the motion

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1 to dismiss, which is the outcome petitioner desires.
2 Second, as the panel appeared to recognize, there's no
3 irreparable harm to petitioner from permitting the district
4 court to receive briefing and argument on a pending motion
5 nor can the Government, which did not petition for mandamus,
6 show irreparable harm. The Government's entire argument
7 comes down to speculation about what might happen, but
8 speculation cannot be the rationale for such an intrusive
9 mandate from a reviewing court.

10 Finally, for purposes of recusal, Judge Sullivan
11 is not a party. Deciding whether to hear a case en banc is
12 solely within the power of this Court. What we did as
13 counsel was to suggest something this Court can do on its
14 own, and did. Our suggestion is consistent with the Supreme
15 Court's definitive statement in *Western Pacific* giving
16 litigants and counsel the ability to request en banc review,
17 but the power remains with this Court. Thank you, Your
18 Honor, and I'm happy to answer questions.

19 JUDGE SRINIVASAN: Thank you. Ms. Wilkinson, I
20 have a couple questions. First, in your view, is there
21 anything that a district judge could do in advance of ruling
22 on a motion in terms of setting out the grounds on which the
23 district judge wants to hear further that would result in an
24 entitlement to mandamus?

25 MS. WILKINSON: I think it would be very

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1 difficult, Your Honor, in a vacuum to say he could do
2 anything because, as in this case, the judge has just
3 ordered briefing and is determining what the issues are.
4 But I could see the Government objecting, for example, and
5 there's no reason to believe this would ever happen, but if
6 you're asking me a hypothetical, for example, if the
7 Attorney General was ordered to appear, I would think that
8 would be something the Government would object to, would
9 move to quash, and the district court might easily say
10 you're right, I'm not going to do that. And that's the
11 problem with all of the arguments you've heard from the
12 Government. It's not only that they can say no when asked
13 these questions that they fear are going to be asked. But
14 the judge could accept their no, could accept their answer
15 that this is privileged, this is part of the deliberative
16 process, and move on. It's not clear that when they explain
17 that the court would continue.

18 JUDGE SRINIVASAN: If we take out of play the harm
19 that ensues from asking a particular official to appear, and
20 we just stay within the cannon of cases that involved the
21 normal give-and-take between counsel for the Government and
22 the court, even in the scope of the hearing itself, you
23 think there's nothing that the court could ask of counsel
24 that would entitle the Government to mandamus at that time?
25 Your view is that even in the scope of the hearing itself,

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1 the Government always has a remedy because they can decline
2 to answer, and then if that occasions a ruling against the
3 Government, then that can be appealed?

4 MS. WILKINSON: Yes.

5 JUDGE SRINIVASAN: And then what do you do with
6 the acting Solicitor General's explanation of Cheney, the
7 proposition that, well, that was effectively what was at
8 issue in Cheney, and the Supreme Court set down a different
9 type of understanding in indicating that, no, it's not
10 always enough that somebody can show up and decline to
11 answer a particular question. Sometimes mandamus is
12 warranted even to keep a district court from going down that
13 road.

14 MS. WILKINSON: Cheney was different for two
15 reasons. One, there was an actual order from the court
16 ordering broad discovery and ordering the Government to turn
17 over the documents. And there, the Government did assert
18 Executive privilege before the case and gave the district
19 court judge the chance to reconsider his ruling. So none of
20 that has happened here. If there's any questions that the
21 Government thinks are improper, again, they can --

22 JUDGE SRINIVASAN: (Indiscernible) in Cheney in
23 some sense was that the regime that the Supreme Court was
24 reviewing was one in which the ostensible fail-safe was that
25 the Government could show up and decline to answer specific

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1 questions.

2 MS. WILKINSON: The reason that's not relevant
3 here, Your Honor, is the Government has answered many
4 questions already. The Government hasn't taken that clear,
5 specific, and full assertion of Executive privilege. I
6 think the Government misspoke when they said that they
7 shouldn't have to answer, or they are not going to answer
8 the 70-page brief by the amicus during the pendency of these
9 proceedings. They have filed a response in the lower court
10 to the amicus brief, and they haven't asserted in that
11 response any Executive privilege, any deliberative process
12 privilege, or that they can't turn over certain kinds of
13 information. So they haven't, the facts of this case are
14 not similar to Cheney. The Government's had that
15 opportunity. It has responded, and it has not claimed any
16 privilege or any irreparable harm when they've actually
17 answered the questions or responded to the motion or the
18 pleadings.

19 JUDGE SRINIVASAN: Okay. Thank you, Ms.
20 Wilkinson. Judge Henderson.

21 JUDGE HENDERSON: No questions.

22 JUDGE SRINIVASAN: Thank you. Judge Rogers.

23 JUDGE ROGERS: So your reading of Cheney is that
24 absent the elements you just decided with the Chief Judge,
25 that the Supreme Court would not have ruled as it did? In

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1 other words, I thought some of the language in Cheney was
2 very broad.

3 MS. WILKINSON: I believe you're right, Judge
4 Rogers, that the language was broad. But as it was applied,
5 and it was because the Government asserted the privilege
6 generally, and the Court said it should not have to go
7 through each response or each discovery request and make
8 those assertions because that itself on the specifics would
9 reveal some Executive privilege, and they shouldn't have to
10 do that. And that was a very different case than here where
11 the Government has chosen to respond and started with a
12 motion to dismiss that contained an application of and an
13 explanation of the facts and the law.

14 But you've heard the arguments today, as well as
15 in the pleadings for the en banc court in terms of the
16 process and more or less the burdens and the signaling, as
17 it were, that the district court has given in terms of what
18 it intends to pursue. And it's not framed in terms of
19 trying to understand the Government's decision, although it
20 could be framed that way if we apply the normal presumption
21 that the district court will act in accordance with the law.

22 So, where you answered the Chief Judge by saying
23 you couldn't see a situation with a process itself before
24 the district court has ruled would give rise to an
25 appropriate issuance of mandamus. Do you think that the

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1 Supreme Court's application of Cheney is sufficiently
2 limited?

3 MS. WILKINSON: With regard to this case, I do,
4 Your Honor. And perhaps I didn't make it clear that of
5 course the Court would follow the law, which starts with a
6 very narrow scope of any argument or hearing on a Rule 48(a)
7 motion in these circumstances. So the Government has, I
8 believe, misread or over interpreted the pleadings in this
9 case where the legal issues are being raised. Nowhere has
10 the trial judge said that he's going to collect evidence or
11 require affidavits. He pointed out where some of these
12 issues are, but there's nothing that suggests he's going to
13 do other, anything other than have a hearing where the
14 lawyers argue the motion. There can be follow-up questions
15 by him on the motion, and he'll decide the motion. That
16 process, which occurs all the time in a district court,
17 would not invade the separation of powers, would not usurp
18 the power of the Executive Branch, and there's no signaling
19 to them that there are going to be these onerous or invasive
20 questions.

21 JUDGE ROGERS: Thank you.

22 JUDGE SRINIVASAN: Thank you. Judge Tatel.

23 JUDGE TATEL: Ms. Wilkinson, your argument, your
24 argument is that mandamus is premature because the judge has
25 simply scheduled a hearing and hasn't yet acted on the

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1 motion to dismiss. That's your argument.

2 MS. WILKINSON: Yes, Your Honor.

3 JUDGE TATEL: My question is this. Let's assume
4 you're right that under Rule 48(a), there is some
5 substantive role for the district court. Does the judge
6 actually have discretion to deny a Rule 48(a) motion? Is
7 that included in his, can he deny it? In other words, even
8 if he has a substantial role, does that role include the
9 discretion to deny the Rule 48(a) motion? Because if it
10 doesn't, then I don't understand what the purpose of the
11 hearing is going to be.

12 MS. WILKINSON: I think there's very limited
13 discretion to turn, or to deny that motion, but there is, in
14 the case law, examples like the one, I believe, that, I
15 don't remember who first started, but Judge Millett or Judge
16 Pillard used about bribery of the prosecutor. And in Fokker
17 itself, the Court recognized there's a presumption of
18 regularity, but that could be overcome, and that could be a
19 basis to deny the motion.

20 JUDGE TATEL: Well, play that out for me, then.
21 Let's assume you're right, that there is some discretion to
22 deny the motion. Then what happens?

23 MS. WILKINSON: In this case, it is different from
24 when a prosecution is initiated. If it were denied, there's
25 no role for the Executive Branch any further because

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1 sentencing is the only thing that's left. Now the
2 Government and Mr. Flynn could take the position that
3 they're going to mandamus after that. That's obviously what
4 I believe they think would be their next step. But if that
5 didn't happen, the defendant would go on to sentencing, and
6 then there would be an appeal, I assume, by either one or
7 both of the parties.

8 JUDGE TATEL: And how would that appeal come out?
9 What would be the result of that?

10 MS. WILKINSON: Well, if I'm reading the tea
11 leaves properly, Your Honor, depending on who the panel is,
12 this Court appears to, and the Fokker decision suggests that
13 there's very limited discretion for a judge to turn down or
14 deny that motion to dismiss --

15 JUDGE TATEL: (Indiscernible).

16 MS. WILKINSON: -- but there could be --

17 JUDGE TATEL: I asked you a question, and I did,
18 which is if in the end, either because the district court
19 reads Rule 48 as giving him no discretion, or if because
20 this Court later views Rule 48 as leaving the district court
21 no discretion, what's the purpose of going through all of
22 this?

23 MS. WILKINSON: Well, two, Your Honor. First of
24 all, that doesn't mean it's clear and indisputable now and
25 that mandamus is appropriate now because you're talking

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1 about what would this Court do. But the process itself of
2 the judge participating with leave of court, which is
3 receiving the briefing so he understands the scope of the
4 Government's motion and the law and allowing lawyers to
5 argue it and make a decision is not, even if the answer is
6 predictable, is not an error and is certainly not the basis
7 for a mandamus for this reviewing court to come in and
8 direct him to what you're suggesting. And the hypothetical
9 is inevitable.

10 JUDGE TATEL: Thank you. I have no further
11 questions.

12 JUDGE SRINIVASAN: Thank you. Judge Garland.

13 JUDGE GARLAND: Yes. So as I read what happened
14 in the district court, all that the judge did was order
15 responsive briefs and an oral argument to be held. But the
16 panel decision focuses, and your opposing counsel focused on
17 what was done in the briefs in this Court. And the panel
18 says, before this Court, the district court explains that he
19 plans to question the bona fides of the Government's motion,
20 inquire about the Government's motions and representations,
21 illuminate the full circumstances surrounding the proposed
22 dismissal, and probe whether the presumption of regularity
23 for prosecutorial decisions is overcome in the unusual facts
24 of this case.

25 Is this different than what happened in the

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1 district court? Are you forecasting what the district court
2 plans to be doing? What is your answer to these statements
3 in the panel's decision?

4 MS. WILKINSON: We are not forecasting anything,
5 Your Honor, and that starts with what we said in the
6 conclusion of our brief on page 18. All the district court
7 has done is ensure adversarial briefing and an opportunity
8 to ask questions about a pending motion. That's all the
9 Court has planned to do. That's all the Court plans to do.
10 And the briefing, when this whole process started, the
11 briefing wasn't completed. It's still not completed. The
12 Government is going to have a chance, as well as Mr. Flynn,
13 to file surreplies and lay out all of these issues, if
14 appropriate.

15 So there's no basis in the pleadings for en banc
16 to suggest that the Court has specific questions it's going
17 to answer. Counsel referred to Footnote 3, which is really
18 talking about what the law says. It doesn't say, of course,
19 that these are the questions that Judge Sullivan plans to
20 answer. And in our initial briefing, we pointed out that
21 when the Government signed the motion to dismiss, it was
22 only the acting U.S. Attorney. There were no declarations.
23 There were no affidavits. We did not say that therefore
24 there needs to be some and there's going to be any
25 requirement. Again, the parties are speculating, and I

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1 think even said this might turn in, they suspect it will
2 become a circus. There's absolutely no basis for that.
3 There's nothing in anything that the court has done below or
4 has done in its pleading to suggest it will do anything than
5 follow the law and listen to the arguments of the parties,
6 ask any follow-up questions, and rule on the motion to
7 dismiss.

8 JUDGE GARLAND: Is there? I mean, opposing
9 counsel suggests, both opposing counsels suggest there's a
10 contemplation that you intend to get underlying documents
11 about other charging decisions, why the Government did or
12 did not make other charging decisions. Maybe you'll call in
13 the Attorney General and ask what's the real reason that you
14 did this. Are these things contemplated or not?

15 MS. WILKINSON: They are not contemplated, Your
16 Honor. I believe that the reason the parties are suggesting
17 that is because Judge Gleason, excuse me, Mr. Gleason in his
18 pleadings suggested there might be a basis for that. But
19 when he filed his pleading, he said he's not requesting any
20 fact-finding. So Judge Sullivan surely has not entertained
21 any of those issues, and even Mr. Gleason in his pleading
22 has said that won't be required. So there's nowhere, again,
23 anywhere in the record that suggests that that would be
24 anything that Judge Sullivan intends to do at a hearing.

25 JUDGE GARLAND: Thank you.

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1 JUDGE SRINIVASAN: Thank you. Judge Griffith.

2 JUDGE GRIFFITH: Yes. Thank you, Ms. Wilkinson.

3 Are you then telling us that such questions won't be asked
4 at the hearing? You said you don't want to forecast the
5 hearing. Maybe you should forecast the hearing a little
6 bit. And are you telling us that those lines of inquiry
7 will not be pursued?

8 MS. WILKINSON: Judge Griffith, I can't tell you
9 exactly what won't be pursued, again, because the briefing
10 is not completed, and Judge Sullivan hasn't decided all of
11 the questions. He may or may not ask. And even during the
12 oral argument, that could address a question that he has,
13 and there may be no questions. I'll give you one example.
14 When the issue was raised about the acting U.S. Attorney
15 signing the pleading by itself. The Government answered in
16 one of its pleadings saying well that was signed off by the
17 entire Department of Justice. That answers that question.
18 The Court may disagree. Other people may disagree. But
19 there's no need to pursue that because the Government's
20 answered that, explained that and answered that question.
21 So I see no basis, if all of these pleadings are available
22 to the Court, the other filings are made, there's no reason
23 to believe the Court won't ask anything but what's narrowly
24 prescribed in this hearing, which is listening to the
25 arguments and asking any follow-up questions to those

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1 arguments.

2 JUDGE GRIFFITH: Do you have a view on the scope
3 of Rule 48(a), what is meant by leave of court? We've had
4 some discussion today about whether it's limited to
5 protecting defendants from vexatious prosecution and other
6 views that it is designed to allow, one of its purposes is
7 to allow a district court judge to probe dismissal that he
8 or she suspects might involve some favoritism. Do you have
9 a view on that matter?

10 MS. WILKINSON: Well, I start like you did with
11 the history of the rule, which is quite clear there was much
12 debate about this and most of it was focused not on
13 protecting the defendant from harassment. I think that was
14 already accepted. But it was on protecting the public
15 interest when there might be favoritism rewarding or
16 dismissing a prosecution. And as the courts have gone along
17 and developed a law here, there's been very little. But
18 where they have, everyone has said the primary reason or the
19 substantial, major reason for the rule is because of
20 protecting the defendant.

21 But no one has said, what I think we heard today,
22 that that's the only purpose of a Rule 48(a) motion when the
23 two parties agree. So I think the courts have left that
24 open. Ammidown commented on that and suggested that.

25 JUDGE GRIFFITH: What would happen if, we were at

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1 a late stage of this prosecution, obviously, but what would
2 happen if this had taken place in an earlier stage of the
3 prosecution, before sentencing and so forth? And Rule 48(a)
4 motion is made --

5 UNIDENTIFIED FEMALE: I'm sorry. There's been an
6 internal error. You will be disconnected now. Goodbye.

7 (Off the record at 3:00:32.)

8 (On the record at 3:02:37.)

9 THE CLERK: Judge, Ms. Wilkinson is back on the
10 line.

11 JUDGE GRIFFITH: Okay.

12 MS. WILKINSON: Judge Griffith, I'm so sorry. I
13 don't know how I got disconnected. I apologize.

14 JUDGE GRIFFITH: No. I'm not certain it's your
15 fault at all. My question was, if we were earlier in a
16 proceeding and a judge denied a motion to dismiss, what
17 would happen then?

18 MS. WILKINSON: Are we assuming, Your Honor, that
19 it's the same basis, that they thought they were going to
20 pursue charges and decided they couldn't because, or
21 shouldn't?

22 JUDGE GRIFFITH: Yes. Yes. I'm just wondering
23 how, would it be inappropriate for the Judicial Branch to
24 compel the Executive Branch to proceed with prosecution.

25 MS. WILKINSON: Yes. It would be much more

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1 difficult, obviously. You can't compel them to bring the
2 prosecution. I think you could inquire about the reasons
3 because you still may have a public interest in the
4 integrity of the court, but it isn't -- the standard for
5 48(a) is the same, but the totality of the circumstances one
6 would consider are different because you now in the post-
7 plea phase have involved the court. And as other judges
8 have referred to, you're bringing the power of the court,
9 the integrity of the court and the --

10 JUDGE GRIFFITH: Okay. Could you respond to the
11 criticism of Judge Sullivan for appointing Judge Gleason in
12 light of the fact that right before the appointment he had
13 staked out a public position on the matter? How do you
14 respond to that criticism?

15 MS. WILKINSON: In appointing any amicus, the
16 Court is looking for the opposite viewpoint from what the
17 two parties agree on and looking for full adversarial
18 briefing. So the fact that Mr. Gleason announced that he
19 had a position that was adverse to the Government and to the
20 defendant makes sense that he would be one of the candidates
21 because he is being appointed, not to be neutral but to
22 flesh out those legal arguments on the other side of the
23 case. So one wouldn't, you know, the best analogy I know is
24 professor Paul Cassell, who's quite famous and has, you
25 know, pursued Miranda issues for almost his entire career,

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1 asked the Supreme Court to be the amicus and argued against
2 the Government, and the Court listened and ruled against Mr.
3 Cassell's position. And no one thought it was inappropriate
4 for him, even though it was publicly known that his
5 positions were adverse to the Government.

6 JUDGE GRIFFITH: Okay, thank you.

7 JUDGE SRINIVASAN: Thank you. It appears we may
8 have lost Judge Millett momentarily. Judge Pillard.

9 JUDGE PILLARD: Hi, can you hear me?

10 MS. WILKINSON: Yes, Judge Pillard.

11 JUDGE PILLARD: Thank you. So on the mandamus
12 standard, we could decide that if we were to rule against
13 the petition, we could decide that there were alternative
14 remedies or that there was no clear and indisputable right.
15 And I wonder if you have a view on which is the narrower
16 ground. Is there an alternative remedy? If so, what is it?
17 Or do you think the narrower ground is to say that there's
18 no clear and indisputable right at this point to
19 (indiscernible) the proceeding?

20 MS. WILKINSON: It's a real contest, but I believe
21 the narrower ground is the alternative relief below because
22 the judge has not yet ruled. So the easiest remedy would be
23 for the judge to grant the motion to dismiss, and there
24 would be nothing even for a reviewing court to do. So that
25 seems to me to be the narrowest and the most commonsensical

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1 basis to deny the petition because the court has not made
2 its decision yet.

3 JUDGE PILLARD: And so there, the alternative
4 remedy, just to be clear, is if the judge grants the Rule
5 48(a) motion, is the district judge gave the Government what
6 it wanted and General Flynn what he wanted. What if the
7 judge were to deny the motion or postpone the motion? Is
8 there an alternative remedy?

9 MS. WILKINSON: I'm not sure postponing changes
10 that, but once the decision is made, if somehow he denied
11 the motion, then the parties could appeal.

12 JUDGE PILLARD: Right away. Now, I thought we
13 said in Fokker anyway, there was no interlocutory appeal
14 from a denial of a deferred prosecution agreement. Would
15 there be an interlocutory appeal, or would you say there was
16 mandamus then, or would you have to wait for after
17 sentencing? And I realize these are hypothetical issues
18 because they're not before us. But I'm just trying to get a
19 sense of what you're envisioning in terms of alternatives.
20 And let me just lay it out. It seems to me that really the
21 flip side of or wedded to the point about whether there's an
22 alternative remedy is what is the right that's being
23 remedied. And so in order to think that once the 48(a) is
24 denied or at least postponed that there would be some
25 appeal, then one has to think that there's a right against

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1 that postponement. You see what I'm saying? I'm not sure
2 that, unless we envision an outright denial, which seems
3 almost (indiscernible) very likely course, what the
4 alternative remedy would be and whether one can decide that
5 without deciding it, and how to right it.

6 MS. WILKINSON: I'm sure you'll let me know if I'm
7 not addressing your question. But if the first point is the
8 postponement, I believe this Court in In Re: Aiken at least
9 gave, the participants there was an agency, multiple chances
10 to act. And when they ordered mandamus, or ordered the
11 writ, the agency had said specifically they were refusing to
12 act, and therefore that was considered by the Court an
13 action.

14 Here, I don't know that a, you know, delay of some
15 sort would be warranted, a mandamus would be warranted for
16 that. I mean, this matter could have been over on July
17 16th, ironically, if the judge had been able to have his
18 hearing. But assume you go forward with the hearing, they
19 could appeal. There could be sentencing that could all
20 happen very quickly, and there could be a direct appeal. If
21 the parties think that a mandamus is appropriate, at least
22 there is an order from the Court. So they would then be
23 able to remedy that because the remedy would be, they would
24 be asking for would be to reverse his decision, which is
25 when you look at the law of mandamus in this Circuit, that's

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1 99 percent of the cases are, there's a decision by the court
2 that the parties disagree with, and then this Court comes in
3 and says either that decision was appropriate or it should
4 be reversed.

5 JUDGE PILLARD: Right. And if the judge were to
6 deny the Rule 48(a) or postpone it in some -- or let's say
7 just to make it complicated given today's argument, if the
8 judge were to say I want an in-depth, factual hearing, not
9 just an argument by lawyers, but in-depth hearing with new
10 fact-finding, that would be a different, that would be an
11 open question whether there's a clear and indisputable right
12 against that that could be remedied somehow, although
13 that -- I'm sorry. I'm garbling. That would present a
14 separate mandamus question.

15 MS. WILKINSON: Yes, because you have the two
16 prongs, not just the alternative relief but the clear and
17 indisputable.

18 JUDGE PILLARD: Right, right.

19 MS. WILKINSON: And both would have to be met.

20 JUDGE PILLARD: So here, the reason that you say
21 the alternative remedies is the narrowest is because the
22 clear and indisputable right that is missing is the right to
23 the relief before the judge rules.

24 MS. WILKINSON: Yes.

25 JUDGE PILLARD: And we just don't have to go

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1 further than that. We don't have to inquire whether there's
2 fact-finding, how broad the judge's authority is to deny a
3 Rule 48(a) motion or anything else. You just have to say
4 that the judge gets to rule and as long as it's a simple
5 argument. And --

6 MS. WILKINSON: Yes. Premised upon the
7 understanding the judge will follow the law. And there's no
8 reason to believe that this --

9 JUDGE PILLARD: Right.

10 MS. WILKINSON: -- judge who has over 25 years of
11 experience on the district court would do anything but
12 follow the law.

13 JUDGE PILLARD: Right. Thank you. That's helpful.

14 JUDGE SRINIVASAN: Thank you.

15 JUDGE PILLARD: No further questions.

16 JUDGE SRINIVASAN: Thank you. We'll go back to
17 Judge Pillard -- I'm sorry, we'll go back to Judge Millett.

18 JUDGE MILLETT: Yes. Sorry. Good afternoon. I
19 apologize. I've been off for about five minutes. So if I
20 ask you something that someone else has already asked, you
21 have the liberty just to say we already discussed that, and
22 I will read the transcript. So I think Judge Pillard was
23 talking about this, but again, I missed the beginning. If
24 this district order had said, if the district court's order
25 said and on July 16th there will be an evidentiary hearing

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1 to address the grounds for the Government's position, the
2 Government's filing, is your position that that could not be
3 mandamus?

4 MS. WILKINSON: I don't think it would be
5 mandamus because I don't think it's clear and indisputable
6 that that's inappropriate and that's forbidden by the law.
7 If you look at Fokker or you look at Seyna (phonetic sp.),
8 which is Judge Sullivan's own case where -- I'm sorry.

9 JUDGE MILLETT: No, go ahead.

10 MS. WILKINSON: Where looking at and asking
11 questions of the Government was never held by the Court to
12 be in appropriate. It was the actual decision --

13 JUDGE MILLETT: Well, this would be beyond asking
14 questions of the Government. This is, it will be an
15 evidentiary hearing to examine the real grounds for the
16 Government's decision. I think a fair inference from that
17 is that somebody from the Government's going to be having to
18 put in evidence on the basis for their decision-making. Do
19 you think a district court can do that, and the Government
20 still has to go through the whole hearing and wait for the
21 district court to rule before it can file mandamus?

22 MS. WILKINSON: It depends on what we mean by an
23 evidentiary hearing. When you're still talking about the
24 Government prosecutors --

25 JUDGE MILLETT: I'm telling you that's all we know

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1 from the order that an evidentiary hearing to examine the
2 genuine grounds for the Government's decision.

3 MS. WILKINSON: I think the Government should
4 attend the hearing, and if there's anything inappropriate,
5 if that's all we know, if there's anything inappropriate
6 about the hearing, they shouldn't, they should refuse to
7 present witnesses, if that's what they're being asked for.
8 If they're supposed to put evidence that they think somehow
9 impinges upon their Article II power --

10 JUDGE MILLETT: Well, they say that's what Cheney
11 said they don't have to do.

12 MS. WILKINSON: Well, I don't think that is what
13 Cheney told them they don't have to do. Cheney said if you
14 think it is surely part of the executive privilege and you
15 object and shouldn't have to even make those distinctions,
16 then you should claim that privilege, and that's it, and the
17 court then should stop. And the court did not stop. The
18 court still ordered discovery.

19 Here, the Government never took that position.
20 The Government never said we absolutely don't have to answer
21 any questions. We don't have to make any explanation. In
22 fact, they chose to make a 17-page explanation. They chose
23 to respond to the amicus brief. And they haven't made any
24 of those arguments below. That's why technically I'm not
25 sure I understand why it may not matter to some people

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1 technically that they didn't file a petition for mandamus,
2 but it is indicative of what their position was at the time,
3 whether this was such protected Article II power that was
4 being usurped by the court. They didn't say that to the
5 court at the time.

6 JUDGE MILLETT: I'm sorry, just in the interest of
7 time here. In this case, all that's going to be held, all
8 that we know on July 16 is a hearing. And who knows how
9 long after that it would take a district court to rule.
10 Let's imagine it's a different case where at the same
11 procedural stage, after a plea, pre-sentencing, the
12 Government comes up and says, with a filing that says, uh-
13 oh, we have to dismiss because DNA evidence just came in and
14 it completely exonerates the defendant. This needs to be
15 dismissed. And this defendant is incarcerated at the time,
16 pre-trial. Or, I'm sorry, pending sentencing. Post-plea,
17 pending sentencing. The defendant is incarcerated, DNA,
18 complete exoneration according to the Government. Can the
19 district court take six, seven weeks to have a hearing and
20 then a month to issue a decision, keeping a defendant under
21 the custody of the United States when the United States says
22 we're done; we don't want to have this person in custody; we
23 don't want to prosecute them?

24 MS. WILKINSON: Yes, Your Honor. That happens all
25 the time in the district court. I mean, that happens. When

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1 the Government comes in --

2 JUDGE MILLETT: When the Government states that we
3 don't want to prosecute them? We'll let them, you know, let
4 them go. We're done. We're not prosecuting. And the
5 Government has said in my hypothetical the person's
6 innocent.

7 MS. WILKINSON: Your Honor, with DNA evidence like
8 that, there are examples where the district court has a
9 hearing. Now, the exact weeks, obviously most courts would
10 like to schedule that as soon as possible. They may ask for
11 briefing. But that, the court doesn't release the --

12 JUDGE MILLETT: But doesn't it seem like, if you
13 have someone, and I understand that Mr. Flynn is not
14 incarcerated, but he's still under custodial restrictions.
15 And if the Government says someone should be at liberty, we
16 should not be prosecuting them, don't you think the district
17 court should go as fast as possible if it's going to have
18 even just briefing and an argument in this circumstance as a
19 matter of the liberty interest of defendants? I can't
20 imagine keeping someone incarcerated for a few more months
21 when the Government says they're totally exonerated. We
22 don't want to prosecute them.

23 MS. WILKINSON: Well of course everyone --

24 JUDGE MILLETT: (Indiscernible) shouldn't they?

25 MS. WILKINSON: The court should go as fast as

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1 possible. And here, there's no suggestion that there was
2 any delay.

3 JUDGE MILLETT: This is as fast as possible, seven
4 weeks just for the hearing, not even the decision?

5 MS. WILKINSON: Yes. The order, the briefing --

6 JUDGE MILLETT: I think district courts go much,
7 much faster even with amicus briefing. We see it all the
8 time. Why shouldn't --

9 MS. WILKINSON: And courts go much, much longer,
10 Your Honor, in district court. They can --

11 JUDGE MILLETT: Well, I understand, But that's
12 all I'm saying. That's why I'm asking. They may do it. It
13 may not be right. I'm asking whether it's right.

14 MS. WILKINSON: Well, I don't think the custodial
15 restrictions here are any, in any way comparative to
16 incarceration. The examples are --

17 JUDGE MILLETT: He's not at liberty --

18 MS. WILKINSON: -- Mr. Flynn had some --

19 JUDGE MILLETT: Under our Constitution, he's not
20 under liberty. I understand he's on, you know, has been
21 released on his recognizance and the district court has been
22 very understanding of him. But he's still not at liberty.
23 And the principle here of the district court's right to hold
24 hearings and take, you know, take its time and examining
25 things, getting around to decide it is going to apply in

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1 every case.

2 MS. WILKINSON: But that's never been a basis for
3 irreparable harm, Your Honor. There's no case that says
4 that when a 48(a) motion is pending a defendant is under ROR
5 and has been allowed to travel overseas even by the court --

6 JUDGE MILLETT: I know, but --

7 MS. WILKINSON: -- that somehow that's an
8 irreparable harm.

9 JUDGE MILLETT: -- my hypothetical is someone
10 who's incarcerated. So my hypothetical is someone who's
11 incarcerated, completely exonerated --

12 MS. WILKINSON: This Court has had that --

13 JUDGE MILLETT: (Indiscernible.)

14 MS. WILKINSON: This Court has had that in Al-
15 Nashiri, and the defendants were detained. They were
16 incarcerated, and there were separation of powers issues
17 raised. And this Court still said --

18 JUDGE MILLETT: Did the Government say there they
19 are completely, they're innocent. The evidence exonerates
20 them. We no longer wish to prosecute them? That's my
21 concern.

22 MS. WILKINSON: No, no, no.

23 JUDGE MILLETT: Yes. There's all kinds of other
24 times --

25 MS. WILKINSON: No.

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1 JUDGE MILLETT: Yes, other issues that come up in
2 criminal prosecutions. I'm talking about this circumstance.

3 MS. WILKINSON: Well, there's no clear and
4 indisputable rule that the court has to rule within a week
5 or within 10 days. And it may depend upon the particular
6 facts. But here, Mr. Flynn has as much freedom as any
7 defendant. And the United States says when they've pled
8 guilty to a crime, and the Government now comes and says
9 they no longer want to prosecute, there's briefing and a
10 hearing. That's it.

11 JUDGE MILLETT: All right. My time is up.

12 JUDGE SRINIVASAN: Thank you. Judge Wilkins.

13 JUDGE WILKINS: Yes. Good morning, Ms. Wilkinson.

14 MS. WILKINSON: Good morning, Your Honor.

15 JUDGE WILKINS: What is your position as to the
16 range of public interest factors that a district judge can
17 properly consider in whether to grant or deny a motion under
18 Rule 48(a)?

19 MS. WILKINSON: I'll answer your question, Your
20 Honor, but it's easier to say what they're not. Of course,
21 the court cannot second-guess the prosecutorial decision
22 made by the Government. So the public interest factors have
23 not been fully explored by courts, but they have given
24 examples of misconduct by the prosecutor like bribery or
25 even failure to appear at the hearing. And other courts

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1 have talked about the integrity of the Judicial Branch and
2 the public interest in the integrity of the system. So it
3 would be fact-specific, but it certain doesn't include
4 second-guessing the prosecutorial decisions.

5 JUDGE WILKINS: All right, thank you. I don't
6 have any further questions.

7 JUDGE SRINIVASAN: Thank you. Judge Rao.

8 JUDGE RAO: Thank you. Ms. Wilkinson, I'm
9 wondering if you can help me to understand what precisely
10 the district judge's interest is in pursuing rehearing at
11 this stage. I mean, so we have a situation where the
12 Executive Branch wishes to drop the prosecution because it
13 has confessed a number of errors in the process. And so we
14 have the interest of the Executive Branch in controlling
15 prosecutions, which I think you admit is a well-established
16 part of the Article II power. And then, you know, so the
17 separation of powers between the Executive and the courts in
18 this case relates also not just in some abstract way to
19 individual liberty but really directly to the liberty
20 interests of an individual criminal defendant, namely
21 General Flynn. So where we have here an unopposed motion to
22 dismiss, what interest does the district judge have in
23 continuing to scrutinize the dismissal of a prosecution?
24 What is the district judge seeking to vindicate on rehearing
25 and with the inquiries that, you know, have been represented

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1 will be made below?

2 MS. WILKINSON: The rehearing, Your Honor, is
3 meant to protect the process and the mandamus standard
4 because under the panel's decision, although written to be
5 fact-specific, could open the floodgates to other people who
6 are unhappy with a district court not ruling on a motion
7 thinking that they know what the answer should be, that the
8 answer is clear from the case law or the precedent, and
9 moving to mandamus a district court whenever they think
10 they're in that position. So it's broader than just this
11 particular Rule 48(a) issue.

12 JUDGE RAO: But does a district judge have a right
13 to litigate on behalf of legal standards generally? Does
14 that make him a party to the case? Does it make him a free-
15 wheeling amicus? I mean, what precisely is the judge's
16 interest in this any more than there would be in any case
17 where the panel issues an opinion where a district judge may
18 disagree with the a court of appeals' legal analysis?

19 MS. WILKINSON: He doesn't have a right to
20 litigate or is not a party, Your Honor. This Court made him
21 a respondent. What that means for purpose of mandamus I
22 don't think is totally clear, but the Court ordered him to
23 respond and participate in the process. He didn't volunteer
24 to participate.

25 JUDGE RAO: Right. And that process played out at

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1 the panel level. So what is the interest in seeking
2 rehearing by a district judge? I mean, he's not deciding, I
3 mean judges have an Article III power to decide cases and
4 controversies.

5 MS. WILKINSON: Well there's --

6 JUDGE RAO: What exactly is the district judge
7 doing in this context? I mean, I think it's not surprising
8 that it's so unusual that there are virtually no cases in
9 which a district judge has appeared in this posture. I
10 think the Government found only one case and rehearing was
11 denied. So what exactly is being vindicated here? I mean,
12 maybe you can help me understand that.

13 MS. WILKINSON: Well, first, there are cases, Your
14 Honor, where district courts have moved for cert at the
15 Supreme Court and review there and either been granted or
16 denied. And parties, I mean the judge has not been seen as
17 a participant nor, you know, reassigned when the case went
18 back to the district court. But there's not a vindication
19 of any right. The panel made its decision with three able
20 judges, and now the respondent is asking for all 10 judges
21 in this Court to reconsider and to review and make its
22 decision again on what the law should be in this Circuit.
23 It's the same posture he was in with in front of three
24 judges. Most respectfully, we're just now arguing in front
25 of 10 judges. And you all will make that decision. But he

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1 doesn't have an interest. We made a suggestion, like I
2 said, consistent with Western Pacific, which has been clear
3 for 70 years that that doesn't mean that the judge or anyone
4 else is a litigant or a party. It's that if you can make a
5 suggestion to the Court for something they can do
6 themselves, which you can do yourselves and in essence did
7 by voting to accept this petition. Then all he's interested
8 in is that the 10 of you decide whether mandamus is
9 appropriate or not.

10 JUDGE RAO: So can district judges in other cases,
11 not mandamus cases, simply file briefs suggesting that we
12 reconsider cases en banc where we disagree with the district
13 court's ruling below?

14 MS. WILKINSON: In cases where the Circuit has not
15 made them a respondent, I doubt that would be appropriate,
16 but this is a very unique situation where the Court was
17 ordered to defend its judgment below, which was a process
18 not a decision. It was ordered to say, explain why it was
19 doing what it was doing.

20 JUDGE RAO: Okay. One of the things we haven't
21 talked about that much is the presumption of regularity
22 here. And so the Government here has submitted a fairly
23 significant amount of information about the irregular
24 behavior and its reasons for wanting to dismiss this
25 prosecution. So I guess I'm wondering, you know, how does

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1 the Government motion here not meet the standards for
2 regularity? Because it seems that there have to be some
3 overcoming of the presumption of regularity for the district
4 judge to continue on the path that has been contemplated.

5 MS. WILKINSON: I don't think that's correct, Your
6 Honor. The path contemplated is just a hearing with
7 argument from lawyers. And the presumption of regularity
8 applies. And in the absence of clear evidence to the
9 contrary, the courts presume that the prosecutors have
10 properly discharged their official duties. That's from
11 Fokker. That doesn't say that it can't be tested whether
12 there was a presumption of regularity because, if so, then
13 there would be a rule of regularity, not a presumption of
14 regularity. It may be that, again, when the briefing is
15 completed, there's no real question about that, and the
16 court doesn't even ask about that. The hearing is
17 completed, and the decision is issued. So there's not a
18 path that's suggesting that the court is somehow saying it
19 can and will overcome the presumption of regularity.

20 JUDGE RAO: I think what you're now classifying as
21 just a hearing, and that's what you've repeatedly said here
22 at oral argument, it doesn't really match up with what was
23 filed in the briefs before this Court both at the panel
24 level and on the hearing. And it seems like there is some
25 much greater scrutiny that is contemplated that goes well

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1 beyond, you know, just a hearing to evaluate the motion to
2 dismiss.

3 MS. WILKINSON: Well, Your Honor, if we suggested
4 in our pleadings specifically what the questions would be,
5 then that's my error. There is no basis to believe that
6 there is any specific even questions that are contemplated
7 yet. And I think in your panel decision, you said the
8 questions would likely reveal internal deliberative process
9 and other Executive Branch discussions. It's not clear that
10 that's true, but again if that happens or if it had happened
11 based on the briefing, the Government can make that point to
12 the Court, and the Court could say, okay, I'm not going to
13 pursue those questions any further.

14 And you also said that the questioning could
15 threaten to chill law enforcement by subjecting the
16 prosecutors' motives and decision-making to outside inquiry.
17 And I understand that. So far, the Government hasn't taken
18 that position when actually confronted with the issues, when
19 they responded to Mr. Gleason's brief. But again, if the
20 Government believes that questions by the Court somehow
21 invade or usurp their power, that's all they need to say.
22 And it shouldn't be presumed that the court will overrule
23 that or make a record and say I'm going to rule against you.
24 The court may be persuaded that the Government has every
25 right to give that answer and move on.

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1 JUDGE RAO: Let me just ask you one final
2 question. Yes, I'm over my time, but. So if we were to not
3 provide the relief here, would we be setting out a rule that
4 this Court can never issue a writ of mandamus absent a
5 district court's ruling on a dispositive motion? Is that
6 the rule that would have to come out of it?

7 MS. WILKINSON: No.

8 JUDGE RAO: I mean, is that the rule that you're
9 advocating? Because that rule seems to me inconsistent with
10 Cheney and Cobell and the sealed case.

11 MS. WILKINSON: No. I don't think that's the
12 rule, and I don't think, I think In re Aiken makes that
13 clear. There can be lack of action that's tantamount to an
14 action. So I don't think, however this Court fashioned its
15 decision, it would have to say that in no circumstances can
16 there be mandamus when there's a hearing scheduled.

17 JUDGE RAO: Well, it says that there was an
18 adequate means because, you know, the Government could
19 always appeal, isn't that suggesting that that's, you know,
20 a categorical rule?

21 MS. WILKINSON: Well, again, there's a presumption
22 that the district court will do its job and follow the law.
23 So yes, I think generally there would be little or no basis
24 for mandamus for a district court judge who's scheduling a
25 hearing. But as Judge Srinivasan asked me could there be

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1 something that happened even in the order for that hearing
2 that suggested totally improper conduct outside the clear,
3 you know, law of this Circuit, there could be. And of
4 course that could be a basis for mandamus. But the
5 presumption here, in front of this Court, is that district
6 courts do their job and follow the law.

7 JUDGE RAO: Thank you.

8 JUDGE SRINIVASAN: Thank you. Judge Henderson,
9 any follow-up questions?

10 JUDGE HENDERSON: I do have one question, and that
11 is, the trial judge was ordered not to defend any action by
12 the three-judge panel. He was directed to file a response
13 addressing the motion to dismiss. And that was at our
14 invitation. Rule 21 makes clear there is a very limited
15 role for the trial judge in a mandamus proceeding. I'd like
16 to know why Rule 35 suddenly allows him without any
17 invitation from us, to petition for rehearing en banc.

18 MS. WILKINSON: I don't think it is Rule 35, Your
19 Honor. My understanding in reading Western Pacific is
20 that --

21 JUDGE HENDERSON: Well you --

22 MS. WILKINSON: -- an en banc --

23 JUDGE HENDERSON: Excuse me. That was the
24 procedure your petition followed, was Rule 35. You invoked
25 Rule 35.

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1 MS. WILKINSON: Yes, Your Honor. But I think it
2 depends on how you interpret the word party. I don't think
3 he's a party for having a vested interest in the outcome, as
4 you said. The way you required him to respond was I don't
5 think trying to make him a party. But in terms of
6 interpreting that term and that process in light of Western
7 Pacific, the whole purpose of the rule was to allow anyone
8 who's involved to make that request. It's this Court's
9 decision, and you have your own authority to do so. It's a
10 power of the court. It's not a power of the litigant or the
11 participant. And I think you may be asking me, you know,
12 does that make him look like he has a vested interest or an
13 inappropriate interest in the outcome. And I do not think
14 that's true because it's -- we're making the --

15 JUDGE HENDERSON: I agree with you, Ms. Wilkinson.
16 He is not a party. I agree with you. But you're the one
17 who invoked a rule limited to a party. So that's all I want
18 to know. And now you've answered my question so I'm done.

19 JUDGE SRINIVASAN: Thank you. Judge Rogers.

20 JUDGE ROGERS: I wonder if you want briefly to
21 address the reassignment issue and the invocation of Section
22 455.

23 MS. WILKINSON: Thank you, Judge Rogers. As the
24 panel found, there was no basis to reassign this case from
25 Judge Sullivan, and therefore the only change since that

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1 panel decision was the filing of the request for en banc and
2 the pleadings themselves, which talk about the law. So,
3 explaining your views on the law of the district court again
4 in the same proceeding, the same mandamus proceeding that
5 you were in before does not seem to show any basis of bias
6 or appearance of impropriety. It's the same process. It's
7 the same proceeding. It's not the same as the underlying
8 criminal proceeding, but it's the same mandamus proceeding
9 with the judge making the same arguments he did to the
10 original panel of three, and so there's no reason to
11 reassign the case to another judge. He will follow whatever
12 this panel says, or whatever this full court says he should
13 do.

14 JUDGE ROGERS: Well, you heard the acting
15 Solicitor General argue that even where the en banc Court to
16 deny the petition, it should include in its opinion
17 instructions to the district court. I gather from your
18 argument that you take it that, A, some aspects of the
19 record have not been fully appreciated, and secondly, that
20 the concerns expressed are largely hypothetical or
21 speculative. Other than the delay that's involved as a
22 result of the seeking of mandamus, the process was
23 proceeding. Whether as fast as possible, I'm not going to
24 get into.

25 But I'm trying to understand, the acting Solicitor

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1 General's position is very strong in terms of his emphasis
2 on not only the Cheney concerns but on the process
3 contemplated by the district court. If you care to respond
4 to that, some of your earlier answers I realize have said
5 that there appears to be some over-reading of what's
6 contemplated were this to go forward before the district
7 court. Is it your view, then, that even if the Court does
8 not need to instruct the district court to follow the law as
9 we see it, that no further instruction is required?

10 In other words, there's been a question from the
11 beginning about what does leave of court mean. And is it
12 simply a courtesy? The prosecutor's decided it has no case
13 or it does not want to proceed with the case, and that's the
14 end of the matter. And we're just here to let you know,
15 judge, that's where we are. Then there are the other
16 hypotheticals that have been posed this morning which goes
17 beyond anything I'm aware of in the record here.

18 So, that's a lot of issues in one statement, but
19 I'm just curious about what instructions you think would be
20 appropriate, if any, and why the concerns expressed by the
21 acting Solicitor General and General Flynn's attorney should
22 not be of concern to the Court or that the Court need not
23 address them were it to deny the petition for mandamus.

24 MS. WILKINSON: Judge Rogers, I'll answer. I
25 think those are two questions, and I'll start with the first

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1 one of whether any instructions are necessary for the
2 district court. They are not. But I think in part that's
3 because there's been expansive briefing in this case
4 underlying, which has not finished, as you point out, in the
5 district court. But quite a bit here that has been
6 instructive about the scope of Rule 48(a) and leave of
7 court. So I don't see any need for instructions from this
8 Court on what that means.

9 And I certainly don't see any reason to think that
10 there's going to be this invasive questioning. There is
11 nothing in the record, as I stated earlier, to suggest any
12 question that Judge Sullivan intends to ask. But certainly
13 there's been no request for evidence. There's been no
14 request for declarations or affidavits or witnesses or any
15 of the things that were kind of weaved into some of the
16 parties' pleadings to suggest that the judge was somehow
17 going to go beyond the narrow scope of a legal hearing on a
18 motion to dismiss.

19 So, speculating about hypothetical questions that
20 could be asked certainly isn't a basis for mandamus. But
21 there's also a cure below if for some reason that occurred
22 where the Government doesn't have to answer those questions
23 and can explain to the court why it's inappropriate. So for
24 all those reasons, I don't think any instructions are
25 necessary.

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1 JUDGE ROGERS: Thank you.

2 JUDGE SRINIVASAN: Thank you. Judge Tatel.

3 JUDGE TATEL: I have no questions.

4 JUDGE SRINIVASAN: Thank you. Judge Garland.

5 JUDGE GARLAND: No further questions. Thank you.

6 JUDGE SRINIVASAN: Thank you. Judge Griffith.

7 JUDGE GRIFFITH: Yes, just to follow upon that,
8 Ms. Wilkinson. What would be permissible questioning under
9 Rule 48(a) and Article II?

10 MS. WILKINSON: Generally, Your Honor, especially
11 with regard to this case, I think it would be following up
12 on the briefing that the parties have submitted him.
13 Because there's still surreplies to come and there's
14 argument, I can't say that there might be a lot of
15 questioning. It depends on how the Government and the
16 parties address those issues. If you just start with where
17 we were a couple weeks ago before Mr. Gleason filed his
18 brief, there was speculation, oh, there's going to be a
19 request for evidence and fact-finding. And then when we
20 waited or, you know, we came to the point where Mr. Gleason
21 filed his brief, he said he's not requesting any fact-
22 finding. So I think it's, I think the general scope would
23 be narrow, but it may be even, an even thinner reed or a
24 smaller list of questions when all of the briefing is
25 finished. And that's just hard to predict --

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1 JUDGE GRIFFITH: But you agree, are you saying
2 fact-finding would be categorically inappropriate?

3 MS. WILKINSON: No, but I don't, without some
4 basis for it, yes. I can't predict that there won't be any
5 basis. It's certainly, we haven't seen that thus far. But,
6 you know, again, I can't tell you what's going to happen,
7 what the Government is going to say or Mr. Flynn's going to
8 say in his surreply. But it doesn't seem like there's any
9 basis for that right now.

10 JUDGE GRIFFITH: Okay. Thank you very much.

11 JUDGE SRINIVASAN: Thank you. Judge Millett.

12 JUDGE MILLETT: Yes, thank you. Two questions. I
13 think you said in your brief that these separation of powers
14 concerns on behalf of the Government shouldn't be considered
15 because they didn't file a mandamus petition. But I don't
16 understand why they can't be raised by a criminal defendant
17 in a case because to the extent, you know, a district court
18 is charged with or the concern is the district court is
19 violating the separation of powers by intruding on the
20 prosecutorial judgments, it's the criminal defendant
21 (indiscernible).

22 You know, in my hypothetical, it would be the guy
23 has been exonerated by DNA, continuing to sit in a prison
24 cell for weeks if not months. And separation of powers
25 protects the liberty of individuals. So I don't understand

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1 why it matters whether the Government did or did not file a
2 mandamus petition in this case for purposes of the
3 separation of powers arguments.

4 MS. WILKINSON: I think that raises two points,
5 Your Honor. First, the incarcerated defendant in your
6 hypothetical could claim he is suffering irreparable harm
7 himself and not have to rely on the Government's irreparable
8 harm or basis for irreparable harm. But I think Bond does
9 give an argument to say that another party can raise the
10 Government's, you know, irreparable harms. The difference
11 here is whether that's true or not.

12 JUDGE MILLETT: They're not raising the
13 Government's. Right? They're saying, look, the
14 Constitution divides power to protect individual liberty
15 including mine. And if a district court is in a
16 hypothetical case blowing past those lines and it has
17 consequences on that defendant in that case, then the
18 defendant gets to argue about it. It's not that they're
19 making the Government's argument. It's that they're making
20 a liberty argument about separation of powers.

21 MS. WILKINSON: I don't understand, I didn't
22 understand, and maybe I'm incorrect, that that was Mr.
23 Flynn's position that his liberty was a separation of powers
24 or constitutional argument. He was saying it was
25 irreparable harm under Rule 48(a) and under mandamus. But I

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1 don't, I didn't understand that.

2 JUDGE MILLETT: Well if he's in custody, his
3 status as a criminal defendant has been prolonged. He's not
4 as free as you and I are to come and go.

5 MS. WILKINSON: Well, he's pretty darn close.
6 He's been able to do everything he wants to do with
7 permission of his --

8 JUDGE MILLETT: We can all say that, but what, if
9 I have governmental constraints on my liberty for one day
10 that makes me different.

11 MS. WILKINSON: That's true. And in terms of the
12 length of this process, Mr. Flynn could have gone down and
13 asked for reconsideration, could have asked for expediting
14 the briefing, expediting the hearing, parties do that all
15 the time at the district court. No one did that here. No
16 one made the argument you're making that this is not
17 happening quickly enough and I would like the process to go
18 more quickly. Mr. Flynn now says through counsel that it's
19 been dragging on forever. But he had a basis to go back to
20 the court and say I want this decided more quickly. And
21 that would have been the easiest way to speed up the time
22 frame if he thought it was inappropriate, but he didn't do
23 that. He didn't choose to do that despite the court's
24 specific request or willingness to accept a motion to
25 reconsider everything that he had done when he issued his

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1 order around May 20th.

2 JUDGE MILLETT: Okay, thank you. I'm afraid my
3 time is up, so thank you.

4 JUDGE SRINIVASAN: Thank you. Judge Pillard.

5 JUDGE PILLARD: I have no questions.

6 JUDGE SRINIVASAN: Thank you. Judge Wilkins.

7 JUDGE WILKINS: No questions.

8 JUDGE SRINIVASAN: Thank you. Judge Rao.

9 JUDGE RAO: No further questions.

10 JUDGE SRINIVASAN: Thank you. Thank you, Ms.
11 Wilkinson.

12 MS. WILKINSON: Thank you, Your Honor.

13 JUDGE SRINIVASAN: We will now hear rebuttal from
14 Ms. Powell and General Wall. In light of the lateness of
15 the hour, let's hear two minutes of rebuttal, but that time
16 will be uninterrupted. Ms. Powell.

17 MS. POWELL: Thank you, Your Honor.

18 JUDGE SRINIVASAN: Welcome back.

19 FURTHER ORAL ARGUMENT OF SIDNEY POWELL, ESQ.

20 ON BEHALF OF THE PETITIONER

21 MS. POWELL: Thank you. This is a criminal case
22 in which a man's liberty and entire life has been consumed
23 by four years of litigation that the Executive has now
24 determined within its sole discretion should never have been
25 brought against him. He has been under the scourge of this

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1 criminal process now for almost four years. Mr. Gleason has
2 no valid role here whatsoever. It's the process itself
3 since May 7th that has been part of the abuse that General
4 Flynn has suffered.

5 These are completely unprecedented proceedings,
6 and the reason they are is because they should never have
7 happened. Mandamus doesn't need to have an order to seek
8 review of. Its very purpose and existence is to correct a
9 usurpation of power or the district judge exceeding his
10 authority, which he did the very minute he appointed Mr.
11 Gleason to step into this case in the role of a prosecutor
12 essentially when the Executive Branch in its sole discretion
13 decided this case should never have been brought to begin
14 with.

15 So he's been through this for almost four years
16 now, cost him millions of dollars, had to sell his house
17 because of it, been called a traitor and treasonous for
18 absolutely no reason. And not any of this should have
19 happened. So it is imperative that this Court restore the
20 rule of law and issue the writ of mandamus to compel the
21 judge to grant the motion to dismiss and disqualify Judge
22 Sullivan. Because the very thought, the very fact that he
23 thinks he has an interest that he can petition for rehearing
24 to this Court on is sufficient evidence of the appearance of
25 bias that mandates his disqualification under this Court's

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1 decision in Al-Nashiri.

2 The appointment of the amicus has to be vacated,
3 and the order must be dismissed immediately as a matter of
4 law on the face of the motion itself. To borrow from the
5 Second Circuit decision in HSEC, put simply, the court's
6 role is not as a super prosecutor to second-guess a core
7 function of the Executive Branch but as a mutual arbiter of
8 law. He's lost that neutrality. If not sooner, then at
9 least by the time he filed a petition for rehearing in which
10 he has no standing and which has required an additional
11 thousand hours of defense work to deal with. So we ask --

12 JUDGE SRINIVASAN: Thank you, Ms. Powell. Please
13 finish.

14 MS. POWELL: I was just going to say we ask that
15 the petition for rehearing be flatly denied with clear
16 Ligon-like language and the order of dismissal entered and
17 stamped by this Court itself as it has the authority to do.

18 JUDGE SRINIVASAN: Thank you, Ms. Powell. General
19 Wall.

20 FURTHER ORAL ARGUMENT OF JEFFREY B. WALL, ESQ.

21 ON BEHALF OF THE U.S. DEPARTMENT OF JUSTICE

22 MR. WALL: Thank you, Your Honor. To be honest, I
23 feel a bit rope-a-doped. The district court appointed an
24 amicus who had urged an intensely factual inquiry. In its
25 panel briefs, the district judge raised a host of specific

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1 factual questions and noted the Government had not put in
2 affidavits and declarations. Even the rehearing petition
3 calls for a developed factual record. Before the panel,
4 counsel backed away from factual development. Today,
5 counsel steps back even further and suggests there's not
6 much the court can ask, and we can decline to answer.

7 Counsel seems to be defending the process on the
8 ground that it might be meaningless. I think that tepid
9 defense gives away the game. Either the process is exactly
10 what we have all understandably feared, in which case
11 mandamus is warranted, or the process could not possibly
12 call into question the reasons on the face of the motion to
13 dismiss, in which case mandamus is warranted.

14 In the event this Court disagrees, yes, we think
15 it should provide clear guidance for further proceedings in
16 three ways. First, it should reiterate that the
17 Constitution and Fokker leave a very limited role for the
18 district court, which does not mean an independent, non-
19 deferential public interest analysis. Second, we think the
20 Court should, as the panel dissent did, make clear that the
21 parties are not required to engage in discovery or put on
22 evidence. Third and finally, the Court should require a
23 quick decision so that the defendant and Government may, if
24 necessary, return to this Court for relief.

25 But to be clear, none of this should be necessary.

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1 When Fokker says that dismissing charges is an Executive
2 decision and that there is no substantial role for courts,
3 it's impossible to square that with an invitation to the
4 public to participate, the appointment of a hostile amicus
5 to oppose the Government's motion, a full four-brief
6 schedule and hearing, all backed by the threat of contempt
7 and all in the face of a judgment by the Attorney General of
8 the United States that a prosecution here is no longer in
9 the interests of justice. Yes, this is an extraordinary
10 (indiscernible), but the district court has teed up an
11 extraordinary conflict with the separation of powers. The
12 United States respectfully submits that the writ should
13 issue. Thank you.

14 JUDGE SRINIVASAN: Thank you, General Wall. And
15 thank you to all counsel for your arguments this morning and
16 this afternoon. We will take the case under submission.

17 (Whereupon, at 1:19 p.m., the proceedings were
18 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

August 17, 2020

Date

DEPOSITION SERVICES, INC.