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R E M O T E P R O C E E D I N G S

THE CLERK: Your Honor, this is Criminal Case 17-232, United States of America versus Michael Flynn. Will parties on the video feed please identify yourselves for the record, please?

MR. KOHL: Good morning, Your Honor. This is Ken Kohl and Mr. Hashim Mooppan for the United States.

THE COURT: Good morning, counsel.

MR. MOOPPAN: Good morning, Your Honor.

THE COURT: Good morning.

MS. POWELL: This is Sidney Powell, Jesse Binnall, Molly McCann and Abigail Frye for General Flynn.

THE COURT: Good morning.

MR. GLEESON: Good morning, judge. John Gleeson, amicus curiae.

THE COURT: Good morning, counsel.

All right. I'm going to spend some time essentially capturing the essence of the main arguments. And I want the attorneys when I finish to tell me whether I misstated any argument, whether there are any objections to what I stated and then I have some questions to ask and then I'll give everyone a few minutes to supplement the record with any additional information they may have. I'll do this quickly. I'm going to speak quickly and get to the questions.

1 There are some issues I'm not going to focus on,
2 I'll tell you that right now. I'm not going to focus
3 whether there's a live case of controversy. The circuit's
4 already addressed that and resolved that question. I'm
5 not going to focus on the question of whether or not
6 Mr. Flynn should be held in criminal contempt for perjury.
7 I'm not going to focus on that at this point. The
8 parties' positions and Mr. Gleeson's positions are crystal
9 clear and I don't have any questions at this time.

10 I'm not going to focus on whether the Court has
11 the authority to appoint an amicus in a case like this.
12 The parties' positions are crystal clear again and I don't
13 have any questions.

14 So the scope of the Court's inquiry is going to
15 be significantly limited to the essence of this
16 controversy.

17 Before the Court as everyone knows is the
18 government's motion to -- the unopposed motion to dismiss
19 with prejudice the criminal information against Mr. Flynn
20 pursuant to Federal Rule of Criminal Procedure 48(a),
21 which states and I quote "that the government may with
22 leave of court dismiss an indictment, information or
23 complaint." In moving to dismiss, the government
24 concluded that continued prosecution of Mr. Flynn would
25 not serve the interest of justice after its extensive

1 review of this investigation including newly-discovered
2 and disclosed information attached to the defendant's
3 supplemental pleadings.

4 For the first time in this case, the government
5 claimed that, one, Mr. Flynn's false statements to the FBI
6 agents were not material to any investigation; two, that
7 the government is doubtful they could prove the falsity of
8 Mr. Flynn's statements; and, three, the government has no
9 substantial federal interest in penalizing a defendant for
10 a crime that is not -- that it is not satisfied occurred
11 and that it does not believe it can prove beyond a
12 reasonable doubt.

13 So the issues that the Court will focus on this
14 morning and hear from counsel are as follows: whether the
15 Court has the discretion to review both opposed and
16 unopposed Rule 48(a) motions for prosecutorial abuse and
17 whether this Court should deny the government's -- deny
18 the government leave to dismiss the pending charge against
19 Mr. Flynn.

20 Mr. Flynn pled guilty to one count of making
21 materially false statements to two agents of the Federal
22 Bureau of Investigation in violation of 18 U.S. Code,
23 Section 1001(a) on December 1, 2017 before my colleague,
24 Judge Rudolph Contreras. Judge Contreras, after an
25 appropriate, thorough colloquy with the defendant accepted

1 the guilty plea finding that Mr. Flynn who was represented
2 by experienced counsel, knowingly, voluntarily and
3 intelligently entered into the plea agreement.

4 Six days later on December the 7th, 2017, the
5 case was randomly reassigned to this Court which
6 eventually scheduled a sentencing hearing for December the
7 18th, 2018. And that's significant because sentencing has
8 already commenced in this case. It commenced in this case
9 more than a year and a half ago and only because the Court
10 was concerned that Mr. Flynn receive the full benefit of
11 his cooperation by testifying in a Virginia matter, the
12 Court continued the matter. But sentencing commenced in
13 December 2018.

14 Now during that hearing also the Court conducted
15 an extension of the plea colloquy in view of statements
16 made in Mr. Flynn's sentencing memorandum that raised
17 significant questions in the Court's mind as to whether
18 Mr. Flynn sought to challenge the circumstances of his FBI
19 interview. In response to the Court's questions,
20 Mr. Flynn maintained his plea of guilty upon the advice of
21 counsel. According to the government, Mr. Flynn's
22 substantial assistance to law enforcement authorities led
23 to criminal charges against individuals in the United
24 States District Court for the Eastern District of
25 Virginia. And rather than imposing a sentence on December

1 the 18th, 2018, the Court followed its usual practice that
2 I follow in every case and delayed sentencing until
3 Mr. Flynn completed his cooperation in that jurisdiction.
4 And that's important because any time someone enters into
5 an agreement with the government and agrees to cooperate,
6 the Court wants to ensure that the person has received the
7 entire benefit of his bargain with the government and
8 that's the reason why I postponed sentencing to give him
9 every opportunity to help himself at the final sentencing
10 stage.

11 Mr. Flynn was scheduled to testify in July of
12 2019 as a government witness against his former business
13 partner. He hired new counsel in June. Actually, he was
14 scheduled to testify in early 2019 as a government witness
15 against his former business partner. He hired new counsel
16 in June 2019 and thereafter, he elected not to fully
17 cooperate with the government. As a result, the
18 government did not call Mr. Flynn as a witness at trial in
19 the Eastern District of Virginia.

20 Thereafter, Mr. Flynn filed motions to compel
21 the production of certain materials pursuant to Brady v.
22 Maryland, 373 U.S. 83 and the Court's standing Brady order
23 in August 2019 and October 2019 respectively. It's
24 significant to note that in this case as in every other
25 case before this Court, the Court issues a standing Brady

1 order regardless of the stage of the proceeding that's
2 come before the Court. It was immaterial to this Court
3 that Mr. Flynn had already entered a plea of guilty at the
4 time the Court entered its standing order. The Court was
5 not going to depart from its standard practice and that's
6 the reason, the sole reason why the Court entered its
7 standing Brady order.

8 In those motions, Mr. Flynn asserted his
9 innocence for the first time, alleged prosecutorial
10 misconduct and he sought dismissal. In December 2019, the
11 Court issued a memorandum opinion and separate order
12 denying Mr. Flynn's Brady motions finding that Flynn
13 failed to establish a single Brady violation and also
14 finding that Mr. Flynn's false statements to the FBI were
15 material within the meaning of 18 U.S. Code, Section
16 1001(a) for the purpose of resolving those motions.

17 As the Court and the parties prepared to proceed
18 with the second phase of the sentencing -- and again the
19 sentencing commenced in December 2018 -- Mr. Flynn moved
20 to withdraw his guilty plea in January of 2020. He
21 submitted a sworn declaration stating that he did not lie
22 to the FBI agents, contradicting his prior sworn
23 admissions to the Court -- to this Court and to Judge
24 Contreras. On the same day, Mr. Flynn filed a motion to
25 dismiss for alleged egregious government's conduct and in

1 the interest of justice.

2 In February of 2020, the government opposed
3 Mr. Flynn's motion to dismiss stating that Mr. Flynn
4 "relies on allegations that do not pertain to his case
5 that the Court already rejected and that have no relevance
6 to his false statements to the FBI on January the 24th,
7 2017."

8 The government did not file a response to
9 Mr. Flynn's motion to withdraw his guilty pleas due to its
10 incomplete review of Mr. Flynn's former counsel's
11 productions relevant to Flynn's claims of ineffective
12 assistance of counsel as well as the dispute between
13 Mr. Flynn and the his former attorney.

14 Mr. Flynn filed supplemental submissions in
15 support of his motion to dismiss with materials from the
16 review of the United States Attorney for the Eastern
17 District of Missouri, who was appointed by the Attorney
18 General to review the criminal case against Mr. Flynn.
19 The current Attorney General since there have been more
20 than one in this administration.

21 On May 7, 2020, the government filed a motion to
22 dismiss the criminal information against Flynn with
23 prejudice pursuant to Federal Rule of Criminal Procedure
24 48(a). On the same day with the consent of the
25 government, Mr. Flynn filed a motion to withdraw all of

1 his pending motions without prejudice. The Court has not
2 ruled on those motions at this time.

3 On May 12, 2020, Mr. Flynn filed a notice of
4 consent to the government's Rule 48(a) motion demanding
5 the immediate dismissal of the case.

6 On May 13, 2020, the Court appointed retired
7 Federal Judge John Gleeson as amicus curie to present
8 arguments in opposition to the government's Rule 48 motion
9 and to address whether Mr. Flynn should be held in
10 criminal contempt of perjury.

11 On May 19, 2020, the Court set a briefing
12 schedule and scheduled oral argument for July 16, 2020
13 adding that the order was subject to a motion for
14 reconsideration for good cause shown. And no motion was
15 ever filed.

16 Thereafter, Mr. Gleeson filed his brief.
17 Mr. Flynn filed his response and two supplemental motions
18 and the government filed its response. And recently,
19 Mr. Gleeson filed a reply to all previous pleadings that
20 have been filed by the government and Mr. Flynn.

21 I'm not going to address the appellate
22 proceedings. There are two outstanding opinions and they
23 speak for themselves. So there's no need to spend any
24 time addressing what the circuit court did and what the en
25 banc court did. Suffice it to say, the case was remanded

1 to me by the en banc court early this month.

2 Pursuant to Circuit Rule 41(a)(3), the D.C.
3 Circuit's order denying mandamus relief became effective
4 September the 21st of this year. And in a joint status
5 report to the Court on September the 4th, the parties
6 agreed that they did not need to wait until September the
7 21st to proceed with briefing on the government's motion
8 to dismiss and the Court scheduled oral argument for
9 September the 29th, which is one of the dates suggested by
10 everyone.

11 Now I want to focus on Rule 48(a) at this time.
12 That rule, Federal Rule of Criminal Procedure 48(a)
13 provides and I quote "the Attorney General or the United
14 States Attorney may by leave of Court file a dismissal of
15 an indictment, information or complaint and the
16 prosecution to thereupon terminate. Such a dismissal may
17 not be filed during the trial without the consent of the
18 defendant."

19 Now first, with respect to Mr. Gleeson's
20 arguments, Mr. Gleeson argues that the text and history of
21 Rule 48(a) demonstrate that the Court plays a "limited but
22 vital" role in determining whether to grant the government
23 leave to dismiss the pending criminal charge regardless of
24 whether that motion is opposed or supported by the
25 defendant. And that's his brief ECF Number 225 at 34.

1 First, Mr. Gleeson argues that interpretation of
2 Rule 48(a) begins with its text and a plain text reading
3 of the phrase "leave of court" makes it obvious that the
4 rule vests courts with discretion.

5 As the D.C. Circuit observed in *United States*
6 *versus Ammidown*, 497 Fed. 2nd. 615 at 620 and the court
7 quotes "the requirement of judicial leave gives the court
8 a role in dismissals following indictment." Furthermore,
9 there's no textual limitation on the rule providing that
10 judges only have discretion when the defendant opposes a
11 Rule 48(a) motion; such an interpretation would limit the
12 phrase meaningless in the overwhelming majority of the
13 cases."

14 Second, Mr. Gleeson contends that the plain text
15 interpretation of Rule 48(a) is confirmed by the rule's
16 history. Prior to the rule's passage in 1944, federal
17 prosecutors enjoyed the unreviewable prerogative to enter
18 a *nolle prosequi*. However, the perception that
19 prosecutors were seeking corrupt dismissals against
20 politically well-connected criminal defendants sparked a
21 judicial backlash and the committee appointed by the
22 Supreme Court to draft the Federal Rules of Criminal
23 Procedure took into consideration those concerns.

24 As originally proposed by the Advisory Committee
25 on Criminal Rules, Rule 48(a) allowed a prosecutor to

1 dismiss without leave of court, but required that the
2 prosecutors state reasons for seeking dismissal. However,
3 in promulgating the rule, the Supreme Court deleted this
4 requirement and added the requirement that the prosecutor
5 obtain leave of court. But based on this history,
6 Mr. Gleeson argues that, one, the rule was passed
7 specifically to guard against politically corrupt
8 dismissals; and, two, the rule did not distinguish between
9 opposed and unopposed motions, though it could have; and,
10 three, there's no historical support for the claim that
11 Rule 48(a)'s leave of court requirement exists solely to
12 allow judges to protect criminal defendants from
13 prosecutorial harassment.

14 Third, Mr. Gleeson argues that this
15 interpretation is consistent with the constitutional
16 separation of powers principles. Mr. Gleeson acknowledges
17 that "decisions to dismiss pending criminal charges no
18 less than decisions to initiate charges and to identify
19 which charges to bring lies squarely within the kin of
20 prosecutorial discretion." Quoting *United States versus*
21 *Fokker Services*, 818 Fed 3d. 733. And that judicial
22 authority in this sphere is limited since "few subjects
23 are less adapted to judicial review than the exercise by
24 the executive of his discretion in deciding when and
25 whether to institute criminal proceedings or what precise

1 charge shall be made or whether to dismiss proceedings
2 once brought." However, the executive's primacy in this
3 sphere does not wholly displays the judiciary's
4 substantial constitutional interest in maintaining the
5 integrity of the judiciary and the rule of law.

6 Mr. Gleeson argues that because "these interests are
7 imperiled if the executive branch seeks the dismissal of
8 criminal charges for corrupt, politically-motivated
9 reasons" Rule 48(a) "rests on the premise that judges may
10 constitutionally guard against these forms of abuse in
11 their own courts."

12 In making those arguments, Mr. Gleeson relies
13 heavily on the D.C. Circuit's 1973 decision in *Ammidown*.
14 In *Ammidown*, the D.C. Circuit addressed whether under Rule
15 11, the judge may reject a plea to a lesser charge
16 endorsed by the prosecutor because the judge believed that
17 the defendant should be tried on a higher charge. Finding
18 no precedent, the Court considered Rule 48(a) because an
19 element of a plea bargain is the "dismissal of the charge
20 of the greater offense." The Court noted that when the
21 Supreme Court promulgated the rule in 1944, it rejected
22 the proposal that the prosecutor state the reasons for the
23 dismissal and substitute it without providing a reason for
24 its actions that dismissal may only be obtained by leave
25 of court.

1 The Court stated that the rules "primary concern
2 at least is discerned by subsequent decisions of other
3 federal courts was that of protecting the defendant from
4 harassment." However, the Court also acknowledged that
5 Rule 48(a) "gives the court a role" when "the defendant
6 concurs in the dismissal but the court is concerned
7 whether the actions sufficiently protects the public."

8 with regard to this situation, the Court
9 articulated the following principles: First, the court
10 has a role in dismissals following indictment. Second, in
11 exercising that role, "the court will not be content with
12 a mere conclusory statement by the prosecutor that
13 dismissal is in the public interest, but will require a
14 statement of reasons and underlying factual basis." And
15 third, because the Court's role is to "guard against abuse
16 of prosecutorial discretion" the court "should be
17 satisfied that the reasons advanced for the proposed
18 dismissal are substantial." with regard to the reason for
19 the dismissal, the court recognizes that it is the
20 prosecutor's responsibility to determine whether the
21 evidence is sufficient to warrant prosecution and that a
22 request for dismissal made in good faith should be granted
23 unless the reason given "has no basis in fact."

24 Although the determination of the United States
25 Attorney is to be followed in the overwhelming number of

1 cases, the court concluded that Rule 48(a) did not intend
2 "the trial court to serve merely as a rubber stamp for the
3 prosecutor's decision." And that deserves repeating. The
4 court concluded that Rule 48(a) did not intend "the trial
5 court to serve merely as a rubber stamp for the
6 prosecutor's decision."

7 Accordingly, the D.C. Circuit later clarified in
8 Fokker that faced with clear evidence that prosecutors
9 have failed to perform their official duties in good
10 faith, courts may pierce the presumption of regularity and
11 deny leave of court under Rule 48(a). And that's all set
12 forth in the amicus brief at page 40.

13 And finally, Mr. Gleeson notes that separation
14 of powers concerns are heightened in pre-plea settings
15 "since denial of leave would raise questions about
16 continuance of the prosecution over protest by the
17 executive." But here in a post-plea setting, such
18 concerns are at their nadir because all that is left for
19 the trial court to do is sentence the defendant with a
20 task that is firmly in the district judge's wheelhouse.

21 The government in response concedes that the
22 "leave of court" requirement grants courts some
23 discretion, but that under Fokker, courts are limited to
24 reviewing motions to dismiss only to protect the interest
25 of the defendant. That's the government's response at ECF

1 Number 227 at 17.

2 The government argues that Fokker is controlling
3 here. In Fokker, the issue is whether a district court
4 reject a speedy trial exclusion under 18 U.S. Code,
5 Section 3161(h)(2) in connection with the deferred
6 prosecution agreement. The D.C. Circuit however
7 analogized between DPA, deferred prosecution agreements
8 and Rule 48(a) motions since both concern the dismissal of
9 criminal charges and between relevant provisions of the
10 Speedy Trial Act and Rule 48(a), the former of which
11 requires "approval of the court" similar to the "leave of
12 court" requirement and the latter.

13 Fokker discussed the requirements for Rule 48
14 motions at length and concluded that the same
15 considerations that govern the interpretation of Rule
16 48(a) also govern the interpretation of the Speedy Trial
17 Act provision at issue.

18 First, the government argues that Fokker explain
19 that courts must read Rule 48(a) against the "background
20 of settled constitutional understandings that Article II
21 vest the power to initiate and dismiss crimes in the
22 executive and "the judiciary lacks the power to review the
23 prosecution's initiation and dismissal of charges."
24 Relying upon Fokker.

25 In view of this constitutional understanding,

1 the government argues that the D.C. Circuit in Fokker
2 concluded that judicial intervention is warranted only
3 when the defendant objects to dismissal because "the
4 principal object of the leave of court requirement has
5 been understood to be a narrow one to protect the
6 defendant against prosecutorial harassment.

7 At the same time the D.C. Circuit explained that
8 the "leave of court" authority gives no power to a
9 district court to deny dismissal based on an agreement --
10 based on a disagreement with the prosecution's exercise of
11 charging authority or "to scrutinize and countermand the
12 prosecution's exercise of its traditional authority over
13 charging and enforcement decisions."

14 Quoting Fokker, for instance, a court cannot
15 deny leave of court because of a view that the defendant
16 should stand trial notwithstanding the prosecution's
17 desire to dismiss the charges."

18 The government argues that Ammidown is no longer
19 good law following Fokker because Ammidown involved a plea
20 under Rule 11 and it's Rule 48(a) discussion was dicta.
21 Ammidown's dicta is unambiguous. On the one hand, the
22 government stated that even "when the defendant concurs in
23 the dismissal," a district court will not be content with
24 the mere conclusory statement by the prosecutor that
25 dismissal is in the public interest, but will require a

1 statement of reasons and underlying factual basis.

2 On the other side, the court acknowledged that
3 the prosecutor's decision is to be followed in the
4 "overwhelming number of cases." According to the
5 government, Fokker interpreted the latter statement to
6 mean that courts generally lack authority to second guess
7 the prosecution's constitutionally rooted exercise of
8 charging discretion.

9 Further, Ammidown did not address Article II,
10 but since then the Supreme Court has explained that the
11 executive branch has exclusive authority and absolute
12 discretion to decide whether to prosecute a case and that
13 failure to prosecute is not subject to judicial review.

14 Ammidown suggested that the principal object of
15 Rule 48 is guarding against abuse of prosecutorial
16 discretion and assuring that dismissal is in the public
17 interest. But according to the Supreme Court's subsequent
18 opinion in Rinaldi, the court quotes "the principal object
19 of the leave of court requirement is instead to protect
20 the defendant against prosecutorial harassment.

21 And finally, Ammidown treated dismissal under
22 Rule 48 as similar to the approval of a plea agreement
23 under Rule 11, but the court in Fokker explained that "a
24 dismissal under Rule 48(a) is unlike a plea agreement
25 because the latter leads to the Court's entry of a

1 judgment of conviction and the sentence; whereas the
2 former does not.

3 Next, the government contends that Mr. Gleeson's
4 arguments regarding Rule 48(a)'s history are unsupported.
5 Although Mr. Gleeson argues that the history of Rule 48(a)
6 shows that the original purpose of the rule was to enable
7 courts to guard against favoritism, this understanding
8 contradicts *Fokker* and the Supreme Court's decision in
9 *Rinaldi*, both of which stated that the "principal object"
10 of the leave of court requirement is to protect the
11 defendant against prosecutorial harassment.

12 The government argues that such a reading also
13 does not make practical sense. Even if a court
14 believes that a refusal to prosecute amounts to abuse, it
15 will lack an impractical mechanism for forcing the
16 executive to prosecute a case against its will.

17 And further, the government argues that *Fokker*
18 explained that the meaning of Rule 48(a) "turns on its
19 text, read against the backdrop of long-settled
20 understandings. Not on the intentions or expectations of
21 the rules' drafters.

22 And finally, the government argues that
23 Mr. Gleeson's argument that separation of powers issues
24 have less force in the post-plea setting versus the
25 pre-plea setting is incorrect. Rather the government may

1 file a motion to dismiss even after conviction.

2 Also, Rule 48(a) makes no such distinction and
3 the Supreme Court has explained that when a legal
4 provision raises constitutional concerns with some
5 settings but not others, the lowest common denominator as
6 it were must govern.

7 The government also argues that although
8 Mr. Gleeson suggests that the judiciary has an interest in
9 avoiding complicity in politically motivated decisions,
10 when the executive obtains dismissals under Rule 48(a),
11 the court never exercises its coercive power by entering a
12 judgment of conviction or imposing a sentence.

13 The government's motion here doesn't involve
14 only "the executive's traditional power over charging
15 decisions, not the judiciary's traditional authority over
16 sentencing decisions.

17 In his reply, Mr. Gleeson contends that the
18 government fails to refute his arguments that courts have
19 a role even when the defendant concurs in the dismissal
20 based on, one, the text and the history of Rule 48(a) and,
21 two, decisions from multiple circuit courts and the D.C.
22 Circuit's opinion in *Ammidown*.

23 Mr. Gleeson argues that *Fokker* does not create a
24 categorical rule that courts may deny opposed motions, but
25 not unopposed ones. Rather, *Fokker* simply reiterated a

1 number of well-established constitutional provisions
2 concerning the executive's primacy and charging decisions
3 and its presumption of regularity when seeking dismissals.
4 And while Fokker described protecting defendants as the
5 "principal object" of Rule 48(a), yet not the only object.
6 It also stated that clear evidence may overcome the
7 presumption of regularity enjoyed by prosecutors.

8 Mr. Gleeson also argues that this understanding
9 of Fokker refining Ammidown, not side lining it, aligns
10 with the D.C. Circuit's case in United States versus
11 Schweizer. In Schweizer, qui tam relator objected to a
12 proposed settlement between the government and the
13 defendant citing the provision of the FCA requiring
14 district courts to review proposed settlements for
15 fairness, adequacy and reasonableness.

16 The defendant responded that such review is
17 forbidden by the separation of powers argument. Courts
18 cannot review the executive dismissal or settlement of
19 claims or the take care clause. But the D.C. Circuit
20 disagreed relying on cases interpreting Rule 48(a). And
21 the circuit stated and the court quotes "although
22 decisions not to prosecute may be immune from review, the
23 same cannot be said of decisions to dispose of a pending
24 case. Some limitations on the executive branch's
25 dismissal authority may be valid despite the separation of

1 powers.

2 Furthermore, Mr. Gleeson contends that the
3 government's argument that the judiciary has no interest
4 of its own to protect on a Rule 48(a) because it "never
5 exercises its coercive power, is unsuccessful and
6 unpersuasive because the rule was drafted with an express
7 recognition that abuse of dismissals imperil core
8 interests of the judiciary.

9 And finally, Mr. Gleeson clarifies that he did
10 not argue that the Court's authority to withhold leave
11 under Rule 48(a) is greater after a guilty plea. Rather
12 he argued that the separation of powers concerns vary
13 depending on the circumstances including the stage of the
14 case. Here, there are no concerns that "denial of leave
15 will require a case to be prosecuted against the justice
16 department's expressed position." So the Court need not
17 account for this.

18 I'm going to focus on the scope of the Court's
19 discretion. Mr. Gleeson argues that there are two grounds
20 for denying leave of court. One, where there is "clear
21 evidence" that prosecutors have offered pretextual reasons
22 for dismissal and, two, where there is clear evidence of
23 gross prosecutorial abuse.

24 Regarding denial based on pretextual reasons,
25 Mr. Gleeson cites Ammidown in arguing that it's black

1 letter law. The prosecutors must provide more than a
2 conclusory statement of the reasons and factual basis
3 supporting a motion to dismiss.

4 He goes on to say that in *Ammidown*, the D.C.
5 Circuit explained that and the court quotes "in the
6 exercise of its responsibility, the court will not be
7 content with the mere conclusory statement by the
8 prosecutor that dismissal is in the public interest, but
9 will require a statement of reasons and underlying factual
10 basis.

11 In addition, Rule 48(a) contemplates exposure of
12 the reasons for dismissal. In order to prevent abuse of
13 the uncontrolled power of dismissal previously enjoyed by
14 prosecutors and in pursuance of this purpose to gain the
15 Court's favorable discretion, it should be satisfied that
16 the reasons advanced for the proposed dismissal are
17 substantial.

18 The D.C. Circuit continued that if the reason
19 for dismissal is that "the evidence is not sufficient to
20 warrant prosecution, the court recognizes that the
21 responsibility is on the prosecution and is satisfied if
22 there is a considered judgment in an application made in
23 good faith unless it appears that the assigned reason for
24 the dismissal has no basis in fact.

25 And again the court stated, we do not think Rule

1 48(a) intends the trial court to serve merely as a rubber
2 stamp for the prosecutor's decision. We agree that the
3 judge should be satisfied that the agreement adequately
4 protects the public interest."

5 Mr. Gleeson argues that this requirement serves
6 the purpose of allowing a judge to responsibly exercise
7 his discretion by understanding the basis for the
8 prosecution's decision allowing appellate courts to
9 properly review district court decisions and preventing
10 abuse of the uncontrolled power of dismissal previously
11 enjoyed by prosecutors.

12 Regarding denial based on gross prosecutorial
13 abuse, Mr. Gleeson contends that the "fundamental basis
14 for denial of leave is the same in both opposed and
15 unopposed motions." With opposed Rule 48 motions,
16 prosecutorial harassment is often at issue. In this
17 context, Mr. Gleeson argues that courts review the motions
18 for evidence of prosecutorial abuse and bad faith in
19 seeking to terminate the prosecution that relies upon
20 authorities that the court will not recite at this time.

21 With unopposed Rule 48(a) motions, Mr. Gleeson
22 argues that the same assessment applies when reviewing for
23 gross abuses of prosecutorial power citing as examples
24 "acceptance of a bribe, personal dislike of a victim and
25 dissatisfaction with a jury impaneled."

1 Mr. Gleeson points to the history of 48(a) to
2 contend that corrupt dismissals against the politically
3 well-connected also would constitute prosecutorial abuse.

4 And as Mr. Gleeson argued previously as the
5 court referred to, Fokker did not overrule or disapprove
6 of Ammidown, never addressed whether courts may deny Rule
7 48(a) motions based on clear evidence of bad faith or
8 gross prosecutorial abuse and concerned that "clear
9 evidence may overcome the presumption of regularity that
10 prosecutors enjoy with respect to charging decisions.

11 According to Mr. Gleeson, Fokker refined rather
12 than rejected Ammidown.

13 The government, not surprising, disagrees with
14 Mr. Gleeson's arguments that a court may examine whether
15 the government's reasons are pretextual or involve gross
16 prosecutorial abuse. The government argues that such an
17 interpretation contradicts Fokker. In Fokker, the D.C.
18 Circuit stated that district courts lack power "to
19 scrutinize the prosecution's discretionary charging
20 decisions." That the executive may exercise authority
21 over criminal charging decisions without the involvement
22 of and without oversight power in the judiciary. That
23 Rule 48(a) can "confers no new power in the courts to
24 scrutinize the prosecution's exercise of its traditional
25 authority and that courts lack authority to scrutinize

1 prosecutorial charging choices."

2 The government further contends that Mr.
3 Gleeson's interpretation would violate Article II because
4 the judiciary lacks the authority to invalidate a
5 coordinate branch's exercise of power on grounds of gross
6 abuse absent a constitutional violation. The government
7 also argues that such an interpretation would cause grave
8 harm to the executive branch by forcing it to reveal its
9 internal deliberations in order to satisfy a court that
10 its decision is not pretextual or abusive. The government
11 instead asserts that the proper way to check prosecutorial
12 abuse and favoritism is through "public disapproval,
13 "congressional retaliation" or "impeachment."

14 And, finally, the government argues that even
15 assuming that a district court may deny an unopposed
16 motion to dismiss, the Court's discretion is limited
17 because prosecutors are presumed to have properly
18 discharged their official duties unless "clear evidence"
19 shows otherwise. The government points out that the Third
20 Circuit has referred to the "leave of court" provision as
21 procedural in granting courts no substantive authority to
22 review the prosecutor's reasons for dismissal, while the
23 Second Circuit has found that a court may deny leave only
24 where there is evidence "clearly contrary to manifest
25 public interest" such as evidence of a bribe preference of

1 vacation rather than going to trial or that he is acting
2 alone rather than at the discretion of D.O.J.

3 Even if those standards are applied in this
4 case, the government argues that leave cannot be denied
5 because the motion here represents the authoritative
6 position of the executive" and is based upon the
7 following: One, in the executive's assessment, the
8 interests of justice do not support continuing the
9 prosecution; based on the executive's legal analysis and
10 assessment of the strength of case, proving materiality to
11 a jury beyond a reasonable doubt would be difficult; and,
12 three, based on the executive's legal analysis and
13 assessment the strength proving willful falsity to a jury
14 beyond a reasonable doubt can be difficult. And according
15 to the government, these reasons may be substantially
16 viewed by a court because Fokker explained that the
17 interest of justice standard is unreviewable.

18 I'm going to focus now on the government's
19 motion. The government moved to dismiss the pending
20 criminal charges against Mr. Flynn having concluded that
21 continued prosecution of Mr. Flynn would not serve the
22 interest of justice after its extensive review of this
23 investigation including newly-discovered and disclosed
24 information attached to the defendant's supplemental
25 pleadings.

1 THE CLERK: Excuse me one second, please. would
2 all the folks that's on the lines right now, please mute
3 your phones, please? Please mute your phones or your
4 video feed. will the individual who has the conversation
5 going on, please mute your phone?

6 THE COURT: Thank you very much. We have been
7 getting some feedback. Thank you for muting your phones.
8 This is the new normal. Thank you.

9 The government now asserts that "Mr. Flynn pled
10 guilty to making false statements that were not material
11 to any investigation and that the government does not have
12 a substantial federal interest in penalizing a defendant
13 for a crime that is not satisfied occurred and that it
14 does not believe it can prove beyond a reasonable doubt.

15 The government describes the materiality
16 threshold as requiring more than mere relevance, whether
17 the false statement must have "probative weight" and be
18 reasonably likely to influence the tribunal in making a
19 determination required to be made.

20 The government also claims that based on the
21 following facts, it cannot prove beyond a reasonable doubt
22 how Mr. Flynn's false statements are material to Crossfire
23 Razor, the government's investigation.

24 And I'll quickly go through those points. The
25 evidence shows Mr. Flynn's false statements were not

1 material to any viable counter-intelligence investigation.
2 The communications between Mr. Flynn and the Russian
3 ambassador did not warrant either continuing the existing
4 counter-intelligence investigation or opening a new
5 criminal investigation. The FBI had word-for-word
6 transcripts of the call. So "there was no factual basis
7 for the predication of a new counter-intelligence
8 investigation. The FBI at the time did not open a
9 criminal investigation into whether Mr. Flynn's calls
10 violated the Logan Act because the communications
11 implicated no crime and in bootstrapping the calls with
12 Mr. Kislyak onto the existing authorization without a
13 predicate for further investigative efforts, the FBI
14 sidestepped the predication threshold for investigating
15 American citizens. Vice President Pence and Sean Spicer's
16 conflicting statements on what had been said on the calls
17 did not "provide a separate or distinct basis for an
18 investigation.

19 The regular procedure that preceded Mr. Flynn's
20 interview suggests that the FBI was eager to interview
21 Mr. Flynn irrespective of any underlying investigations.
22 And because the FBI had transcripts of the calls, Flynn's
23 answers would have shed no light on whether and what he
24 communicated with Mr. Kislyak and those issues were
25 immaterial to the no longer justifiably predicated

1 counter-intelligence investigation.

2 In addition, the government in a footnote
3 contends that Mr. Flynn's false statements were not
4 material to Crossfire Hurricane. According to the
5 government, Flynn had never been identified by that
6 investigation and had been deemed no longer a viable
7 candidate for it and, two, his interview had nothing to do
8 with the subject matter and nothing in FBI materials
9 suggest any relationship between the interview and the
10 umbrella investigation.

11 In response to the government's arguments,
12 Mr. Gleeson first argues that the government's statement
13 of reasons is deficient under Rule 48(a). First, he
14 argues that the government's claim that Mr. Flynn's false
15 statements were not material is not credible. According
16 to Mr. Gleeson, a false statement is material under 18
17 U.S. Code, Section 1001 when it has a natural tendency to
18 influence or is capable of influencing either a discreet
19 decision or any other function of the agency to which it
20 was addressed. Relying upon United States versus Moore,
21 which I don't believe the government has attempted to
22 distinguish in this case.

23 The relevant test is objective and asks whether
24 a statement is capable of affecting the general function
25 that a federal agency was performing when the statement

1 was made to it.

2 Mr. Gleeson contends that the materiality
3 standard is met here and I quote "while serving as the
4 national security advisor, Flynn repeatedly lied about the
5 nature and extent of his communications with the senior
6 official of a hostile foreign power that was being
7 sanctioned by the U.S. government for interfering with the
8 U.S. presidential election. He did so to FBI agents
9 carrying out the FBI's general function of conducting
10 investigations into potential threats to national
11 security. Lies about such communications could
12 "adversely affect the ability of the FBI to perform this
13 function. Relying upon Moore.

14 Moreover, Mr. Gleeson points out that the
15 government has already argued in this case and this Court
16 agree that Mr. Flynn's false statements affected the FBI
17 investigation by "impacting the FBI's decision to act and
18 follow leads." In addition, Mr. Gleeson argues that the
19 government's reasons for dismissal are pretextual for the
20 following reasons: whether Crossfire Razor was open or
21 closed is pure mis-direction. The abandoned case closure
22 memorandum is a non-factor even before it was finalized
23 because it reflected no definitive conclusion about
24 Flynn's role. The materiality standard does not turn on
25 predication issues. The fact that Mr. Flynn was not

1 guilty of an underlying crime or wrongdoing is irrelevant
2 to the materiality element. Instead of trying to get
3 Mr. Flynn to make false statements, the FBI agents
4 deliberately refreshed his recollection by repeatedly
5 prompting him with the exact words Flynn used in his
6 conversations with Kislyak when he failed to bring up or
7 claimed to have forgotten aspects of their conversations.
8 And it is never a defense to a false statement charge that
9 the government was not actually deceived and the
10 government regularly rejects this argument in other cases.
11 And in that regard, the court recognizes the circuit
12 opinion in Safavian, 649 F.3rd 691.

13 In response to government's contentions that
14 Mr. Flynn's false statements were not material to
15 Crossfire Hurricane, Mr. Gleeson contends also that the
16 government previously argued that Mr. Flynn's false
17 statements went to the heart of Crossfire Hurricane and
18 Mr. Flynn swore the same in his plea colloquy on at least
19 two occasions.

20 Investigation of Mr. Flynn in Crossfire Razor,
21 it was part and parcel of Crossfire Hurricane. While
22 Mr. Flynn's false statements related to events after the
23 election, the FBI agents asked about all of Flynn's
24 contacts with any Russians throughout the relevant time
25 period. And even arbitrarily limiting the focus of the

1 discussion of post-election calls, truthful information
2 about Flynn's dealings with Russian officials on behalf of
3 the transition team could easily have yielded
4 investigative leads or ruled out investigative dead ends.

5 Second, Mr. Gleeson argues that it's implausible
6 that the government now doubts whether it can prove beyond
7 a reasonable doubt that Mr. Flynn knowingly and willingly
8 made a false statement. He argues that Mr. Flynn has
9 repeatedly admitted to knowingly making a false statement
10 to the FBI including when he pleaded guilty and when he
11 affirmed his guilty plea before this Court. There are
12 also records of what Flynn stated on the call and what he
13 later told the FBI which Mr. Gleeson contends proves the
14 falsity of his statements.

15 According to Mr. Gleeson, Mr. Flynn also did not
16 make equivocal or indirect responses or claimed not to
17 remember, but instead made categorical denials about
18 specific issues in response to specific questions.

19 Finally, Mr. Gleeson argues that the subjective
20 views of the agents including whether they believe the
21 defendant is lying or telling the truth are irrelevant to
22 a false statements case. And while the government points
23 to inconsistent FBI records, the government does not
24 explain to which records or inconsistencies it's
25 referring.

1 with respect to gross prosecutorial abuse,
2 Mr. Gleeson argues that the government's actions
3 constitute indeed gross prosecutorial abuse based upon the
4 demonstrated pretextual reasoning described previously
5 placed in context with the additional circumstances
6 surrounding the case.

7 Flynn was serving as an advisor to President
8 Trump's transition team during the events that gave rise
9 to the conviction. Evidence of coordination between Flynn
10 and other senior transition team members including those
11 located at the President's property at Mar-a-Lago
12 immediately before Flynn engaged in the conversations that
13 he lied about to the FBI.

14 Former FBI Director Comey testified before
15 Congress that President Trump had suggested that the FBI
16 "let this go."

17 President Trump's Twitter feed has "made clear
18 that the President has been closely following these
19 proceedings, is personally invested in showing that
20 Flynn's prosecution ends and has deep animosity toward
21 those who investigated and prosecuted Flynn" and for
22 President Trump's tweets were issued against the
23 background of a severe breakdown in the traditional
24 independence of the justice department for the President."

25 The government's response essentially is that it

1 is entitled to dismissal based on its assessment of the
2 interest of justice. The record material suggests that
3 the FBI was undertaken predominantly to elicit false
4 statements. The FBI had determined that Flynn was not an
5 agent of Russia by January 2017. The FBI agents expressed
6 relief that Crossfire Razor had not been closed and notes
7 of the FBI's assistant director for counter-intelligence
8 questioned the purpose of the interview and whether it was
9 going to be conducted in a manner that would get to the
10 truth or instead would get Flynn to lie so he can
11 prosecute him or get him fired. Because this rationale is
12 a judgment quintessentially in the executive's
13 prerogative, it fully justifies the executive's decision
14 to dismiss standing alone.

15 And second, the government reiterates that it
16 doubts its ability to prove materiality based on
17 substantial evidence that neither the truthful information
18 or the fact of any false statement was influential in that
19 investigation.

20 Now I'm going to ask the government whether it
21 has any objections to anything the Court has just referred
22 to and then I'll ask Mr. Gleeson as well as the attorney
23 for Mr. Flynn.

24 First, government counsel. Any objections or
25 any additional information that you wish to put into the

1 record for this hearing?

2 MR. MOOPPAN: Thank you. So I think that your
3 summary was fairly comprehensive and largely accurate.
4 There are a couple of points that I think we would like to
5 address at some point. I don't know if now or if you want
6 to wait --

7 THE COURT: Why don't you address them now since
8 they are fresh in your mind, counsel, please?

9 MR. MOOPPAN: Okay. So the first is I think we
10 disagree respectfully with Your Honor's assessment that
11 (inaudible) decision resolves the Article III issue.
12 There is a footnote in the en banc opinion. But what the
13 footnote says is that the case is not moot until the Rule
14 48 motion is granted. That is essentially saying that the
15 Court had jurisdiction to determine whether it had
16 jurisdiction. Our point is that Article III informs
17 whether the Rule 48 motion should be granted. Because
18 there is no controversy between the parties, the motion
19 should be granted just as in any other case where the
20 plaintiff decides even after liability has been
21 determined. But a final judgment (inaudible) --

22 THE CLERK: Counsel, can you repeat that for the
23 court reporter? We didn't catch you.

24 MR. MOOPPAN: I'm hearing a little bit of
25 feedback.

1 THE COURT: Yes. You're fading out a little
2 bit. Yes.

3 MR. MOOPPAN: So our point is that
4 (inaudible) --

5 THE COURT: Let's stop for a second, counsel.
6 You're fading out. Let's see what the technical issue is.

7 MR. MOOPPAN: What do you propose we do, Your
8 Honor?

9 THE COURT: This is a new normal here. So we
10 are all learning. Mr. Cramer is here. So we're in expert
11 hands now.

12 Let me just say we are having some technical
13 issues through no one's fault. No one has done anything
14 wrong. If anyone has done anything wrong, I will accept
15 responsibility for that. We are going to recess though.
16 The better part of wisdom is to recess for 30 minutes and
17 then just ask people to reconnect. So I'm just going to
18 ask everyone to reconnect at 12:35. Sorry for that. But
19 it's no one's fault. So please relax. No one needs to
20 get stressed out about this. Thank you. We'll talk again
21 at 12:35. Thank you.

22 MS. POWELL: And I do have a number of
23 objections I would like to put on the record when we
24 return.

25 THE COURT: All right. That's fine. We'll

1 return at 12:35.

2 (Recess.)

3 THE CLERK: This honorable court is now back in
4 session.

5 THE COURT: All right. Let me hear from -- the
6 Court will hear from government counsel again. Good
7 afternoon.

8 MR. MOOPPAN: Good afternoon, Your Honor.
9 Hopefully, this works better this time.

10 THE COURT: Let me just say there are other
11 proceedings in progress in this court. So the system may
12 degrade after a while. We'll do the best we can. But I
13 just want to let you know that's probably one reason for
14 the interruption. So go right ahead, counsel.

15 MR. MOOPPAN: Thank you, Your Honor.

16 So as I said, I think your summary of our
17 arguments was comprehensive and generally accurate. I
18 think there are four points that I would like to briefly
19 address --

20 THE COURT: Sure. Go right ahead.

21 MR. MOOPPAN: -- before I turn it over to Mr.
22 Kohl.

23 So the first is with all respect, I think that
24 the D.C. Circuit en banc opinion doesn't go quite as far
25 as Your Honor suggested. It is true that the D.C. Circuit

1 en banc in a footnote did say that the case is not moot
2 until the Court rules and grants the motion to dismiss.
3 But that doesn't answer the question that we had posed
4 which is whether Article III requires granting the motion
5 to dismiss. Whether because there is no adversity between
6 the parties anymore, therefore, the Court must grant the
7 motion. We don't think that the D.C. Circuit in a
8 footnote in an opinion denying mandamus resolved that
9 fairly significant Article III question especially because
10 in any other case where the plaintiff and the defendant --
11 the plaintiff no longer proceed against the defendant even
12 after a liability finding decides to dismiss, that would
13 be the end of an Article III controversy.

14 So, for example, if there was a false claims
15 suit that the government brought, a district court had
16 entered partial summary judgment on liability, but hadn't
17 reached the damages phase and then the United States
18 decided they wanted to dismiss that civil suit, that would
19 be Article III moot. And there's no difference between
20 that and a criminal case because Article III applies
21 equally with civil or criminal cases.

22 The second point I'd like to address briefly is
23 the question of the Rule 48 standard in a situation where
24 there's -- the defendant agrees. We're not suggesting
25 that this Court should act as a rubber stamp or that the

1 Court has no role to play whatsoever.

2 But I think what's important to note, if you
3 look at the examples that Judge Gleeson has pointed to,
4 all of those examples are situations where you have --
5 there's a concern that the individual prosecutor
6 (inaudible) whether because they have favoritism to some
7 local bigwig or because they have been bribed, the
8 examples were are all of that ilk. And in those
9 situations, we do think the Court has a role to play, but
10 the role is to make sure that the decision to dismiss is
11 the considered view, the authoritative view of the
12 Executive Branch as a whole. It can ensure that Main
13 Justice, the U.S. Attorney and the Attorney General have
14 determined that this is the position.

15 Our third point and relatedly, what the Court
16 cannot do under Rule 48 is second guess the Executive
17 Branch's authoritative position to determine whether as
18 Judge Gleeson puts it either whether there is pretext or
19 whether there is favoritism.

20 I think there are two key quotes that make this
21 clear. The first is the quote, this is from the Supreme
22 Court's Nixon decision on page 693. The executive branch
23 has "the exclusive authority and the (inaudible) whether
24 to prosecute a case. And the second quote is from the
25 Fokker decision at page 742. The leave of court authority

1 gives no power to a district court to deny a prosecutor's
2 Rule 48 motion to dismiss charges based on a disagreement
3 with the prosecution's exercise of charging authority.

4 Both of those quotes by their plain and unambiguous terms
5 pick up Judge Gleeson's argument. They pick up a
6 situation where there's favoritism. They pick up a
7 situation where there is pretext. Those are unambiguous
8 quotes from controlling precedent, both of which postdate
9 Ammidown.

10 The last point I'll make before I turn it over
11 to Mr. Kohl is on the materiality standard. Judge Gleeson
12 has emphasized as Your Honor did as well that the
13 materiality standard is an objective one. It doesn't
14 matter whether an individual government agent was actually
15 misled and we agree with that. If you look at page 17 of
16 the motion to dismiss, we ourselves cited Moore and
17 Safavian, which are this circuit's -- the D.C. Circuit's
18 cases behind those principles.

19 But the critical point here is those are cases
20 about whether the evidence is sufficient to sustain a jury
21 verdict. It is a question about whether a court could
22 convict a defendant. It is not a question about whether
23 the Court should convict a defendant and it is certainly
24 not a question about whether the Department of Justice
25 should bring a case in such circumstances.

1 It would be fairly remarkable if the Department
2 of Justice was convinced, convinced that the FBI has went
3 out and asked about the questions that they knew the
4 answers to and didn't care what the answers to just to set
5 up a defendant that they would nevertheless be compelled
6 to bring a prosecution and that a jury would convict.
7 That is simply not a proper interpretation of Rule 48 and
8 with that, I will turn it over to Mr. Kohl.

9 THE COURT: All right. Thank you, counsel.

10 MR. KOHL: Good morning, Your Honor.

11 THE COURT: Good morning, counsel.

12 MR. KOHL: As you know, I've been around the
13 courthouse for three decades. I'm the senior-most --
14 senior ranking career person in our office right now and I
15 wanted to appear today because the allegations against our
16 office that we would somehow operate or act with a corrupt
17 political motive just are not true. I've never seen it in
18 my entire career in our office and it didn't happen here.

19 I'm here to say that the U.S. Attorney's Office
20 decision to dismiss this case was the right call for the
21 right reasons.

22 You know, we're completely unafraid here to
23 address, to get into and address the specifics as to why
24 we thought we needed to dismiss this case. In my
25 judgment, Your Honor, there isn't a case and we'd be happy

1 to go through the evidence. But I just want to emphasize
2 one thing. As the Court knows, once the government finds
3 some evidence of wrongdoing, it's our responsibility to do
4 a proper investigation and, you know, that the Attorney
5 General had asked the U.S. Attorney Jeff Benton to do a
6 review from beginning to end in terms of the origin of
7 this investigation. There was also the FBI has asked its
8 inspection division to look at some of the work that was
9 done on this case as well. It is a continuing review.

10 And some of the things that have been found
11 including the case agent -- the statement that was made
12 just recently by the case agent on this case, Bill
13 Barnett, who told us that he was working on the Flynn case
14 when it was discovered that Flynn had talked to Ambassador
15 Kislyak. That call did not change his assessment that
16 Flynn was in any way compromised by the country of Russia.
17 He later -- he followed this case. He briefed the Special
18 Counsel's Office that -- of his assessment that there was
19 no crime and his belief that -- and he observed that as he
20 interacted with the Special Counsel's Office and observed
21 them interview witnesses on this case, it was his
22 impression that the Flynn case was being used to get Trump
23 and that it affected how they handled witnesses in the
24 case.

25 Now normally, Your Honor, those accusations

1 alone would be game over for the prosecution. There
2 certainly would be a need to do a further review. But
3 it's more than that. Notes that had been discovered over
4 at DOJ and among the Special Counsel file showed that the
5 Special Counsel prosecutors themselves met with DOJ
6 officials and observed that -- they gave an update on how
7 the Flynn investigation was going and they observed that
8 Flynn had a bad memory. That's consistent, of course,
9 with his claims of innocence in this case.

10 Plus we have newly discovered the HPSCI
11 transcript that had been classified and that we didn't
12 have access to by the U.S. House of Representatives of
13 James Comey's testimony. When he was asked directly do
14 you think Flynn lied, he said I don't know, I think there
15 is an argument he lied, it's a close one.

16 Now when the most authoritative voice of the
17 FBI, the director is saying he doesn't know, he thinks
18 there is an argument he lied, that's a problem for the
19 government. It's not simply a matter of would that
20 statement be admissible against us. We don't prosecute
21 people -- we don't just throw the evidence on the wall to
22 see what sticks. We prosecute people when we are certain
23 they committed a crime. As Your Honor knows, the agents
24 left the interview of Mr. Flynn and they said they could
25 not tell from his demeanor whether he actually knew he was

1 lying and they had doubts as to whether he did lie.

2 The last thing I would point out, we ultimately
3 had to prove this case with witnesses. I mean in the end,
4 there is no recording of what Mr. Flynn said. It's going
5 to be the testimony of the case agents who were there.
6 Most of the agents who were there have since this case was
7 charged --

8 THE COURT: I'm sorry. I just need to ask you a
9 question. Are you saying there is no recording of what
10 Mr. Flynn said?

11 MR. KOHL: There is no audio recording. There
12 is a 302, Your Honor. Yes. There is a write-up of the
13 FBI interview. Oh, I'm sorry. Yes. Let me clarify. I'm
14 referring now to the January 24, 2017 interview of
15 Mr. Flynn. That's the basis of this charge. Right?
16 There's no audio recording of exactly what he said or
17 didn't say during that interview. It is just the FBI's
18 recollection based on their notes and their 302.

19 There were two agents that were present. One
20 agent -- I mean who are we going to call as witnesses in
21 this case? Are we going to call Pete Strzok, the lead
22 agent that had drove this investigation who the Office of
23 Inspector General had said that he -- his test -- I'm
24 quoting -- "implied a willingness to take official action
25 to impact the presidential candidate's electoral process."

1 That was this same administration. We spoke about how he
2 felt himself that he was a insurance policy. The work
3 that he was doing would be an insurance policy to blunt
4 Trump if he's elected. The very next day after he sent
5 that message, he opened this investigation.

6 Do we call the second interview in April? A
7 whole separate Office of Inspector General report that
8 found that he misled the Foreign Intelligence
9 Surveillance Court about material facts concerning another
10 Trump advisor, Carter Page. Or do we call the deputy
11 director who ordered the interview, Andy McCabe, who was
12 fired by DOJ after they determined he lied under oath
13 including to FBI agents?

14 If we move forward in this case, we would be put
15 in a position of presenting the testimony of Andy McCabe,
16 a person who our office charged and did not prosecute for
17 the same offense that he's being -- that we would be
18 proceeding to trial against with respect to Mr. Flynn.

19 So all of our evidence, all of our witnesses in
20 this case as to what Mr. Flynn did or didn't do have
21 been -- have had specific findings by the Office of
22 Inspector General. Lying under oath, misleading the
23 Court, acting with political motivation. Never in my
24 career, Your Honor, have I had a case with witnesses, all
25 of whom have had specific credibility findings and then

1 been pressed to go forward with the prosecution. We're
2 never expected to do so.

3 Based on all of those concerns, not the least of
4 which again I mentioned, you have the case agent on this
5 case, Bill Barnett, saying he never saw a problem with
6 Flynn's conversation with Ambassador Kislyak. He did not
7 change his opinion as to whether he was an agent of
8 Russia. He was left out of the interview of Mr. Flynn and
9 ultimately briefed. The same charge in this case. And
10 with his assessment that no crime had occurred. When,
11 when, Your Honor, has our office ever been pressed to go
12 forward with a prosecution under those circumstances?

13 THE COURT: All right. Thank you, counsel. I
14 was going to -- I don't have in front of me right now a
15 document that I wanted to ask you a question about. I'll
16 have that document in front of me in about -- in a few
17 minutes or so, counsel.

18 But let me ask you since you raised the question
19 of the reason or the purpose for government action. There
20 was a letter sent by Mr. Flynn's current attorney to the
21 current Attorney General in June I think of 2019. Are you
22 familiar with that letter?

23 MR. KOHL: Your Honor, not specifically. But
24 please go ahead.

25 THE COURT: No, no. Let me -- I've just asked

1 someone on my staff to get it. I had it. There are so
2 many binders. I had it in one of the many binders and I
3 can't put my hand on it. So just relax for a second.
4 I'll have it within the next -- let me just read this
5 letter to you.

6 It's a letter dated June 6, 2019. It's
7 addressed -- it's from Mr. Flynn's current attorney to the
8 Attorney General, the current Attorney General and also
9 Jeffrey Rosen, the Deputy Attorney General. Is he still
10 the Deputy Attorney General?

11 MR. KOHL: Yes, he is, sir.

12 THE COURT: All right. And I'll just read it
13 since you don't have a copy in front of you.

14 "Dear Attorney General Barr and Deputy Attorney
15 General Rosen, I write on behalf of Lieutenant General
16 Michael Flynn and as former Assistant United States
17 Attorney of ten years' service under nine United States
18 Attorneys from both political parties as a lawyer
19 dedicated to the rule of law and a firm believer in the
20 mandate of Gerker versus United States. That the role of
21 the United States is to seek justice, not convictions.

22 It is my fervent hope that you and the
23 Department of Justice will use this case to restore
24 integrity and trust in the department and reinstate clear
25 application of the rule of law.

1 It's important that to note" -- I'm just -- this
2 is just my postscript here. It's important to note that
3 at the time she wrote this letter, she had not entered an
4 appearance in this case. In fact the next paragraph
5 addresses her status, the attorney's status.

6 "Covington and Burling has moved to withdraw,"
7 which means that Covington and Burling are still
8 representing Mr. Flynn "and I will soon appear on the
9 record on behalf of General Flynn. They -- meaning
10 Covington and Burling -- are not aware of this
11 communication which I will treat with the utmost
12 confidentiality. My goal is to encourage and allow the
13 department to address these issues internally for the
14 benefit of all concerned especially the department itself.
15 Despite what he and his family have been through, General
16 Flynn firmly believes in our justice system and hopes to
17 be a positive and forceful spokesperson for it in the
18 future.

19 This letter is a preliminary outreach primarily
20 to provide you with an outline and notice of likely
21 exculpatory information. We ask you to watch for as you
22 and your appointed investigators independent of the
23 Special Counsel Office are re-examining the possible
24 corruption of our beloved government institutions for what
25 appears to be political purposes and to suggest that just

1 resolution of the evidence shows what we believe to be
2 true."

3 And I'm not going to read the letter. It's a
4 ten-page letter. It's dated June 1st. It was filed on
5 the docket in this case in October of '19. It was filed
6 as an attachment to a government pleading.

7 And she makes a number of requests and one she
8 says she "requests the appointment of new government
9 counsel with no connection to the Special Counsel team of
10 attorneys or agents to conduct review of the entire Flynn
11 case or Brady material that has not been produced in
12 prosecutorial misconduct." And then she goes on and makes
13 a number of other requests.

14 But what I want to ask you to address is the
15 propriety of this letter. I mean this letter has been
16 somewhat under the radar screen. There's not been a lot
17 of public discussion about this letter. But one must
18 wonder just what the public's reaction would have been had
19 the public known that here's a person, she doesn't
20 represent someone, reaching out to the Attorney General of
21 the United States, which in my opinion would probably be
22 highly unusual, to request that new attorneys be appointed
23 by the Attorney General to prosecute a case that she
24 intends to enter her appearance in.

25 Now I'm not asking you to address on the

1 propriety or the ethics, the legal ethics of what she's
2 done. She can address that herself and it may well be
3 that the Bar will have to address that at some point. But
4 I'd like your reaction to this letter because it raises
5 questions about the motive for things that have happened
6 in this case starting with the removal of a team of
7 attorneys who were prosecuting Mr. Flynn. Mr. Kohl?

8 MR. MOOPPAN: So, Your Honor, if I can answer
9 that? So, Your Honor, the Attorney General made his
10 decision here to investigate this case in significant part
11 because of the withdrawal of the plea that ultimately
12 occurred and the emerging evidence of the FBI misconduct.
13 It wasn't based on this letter requested by --

14 THE COURT: Do you know that for a fact that
15 this -- that there was no action by the Attorney General
16 pursuant to this letter or are you just speculating?

17 MR. MOOPPAN: So I do not know one way or the
18 other. I've not spoken to the Attorney General about this
19 precise letter. I have spoken to the Attorney General
20 about the decisions that were made in this case. But I
21 would say that if not -- setting aside whatever sort of
22 Bar issues you would raise, it's not apparent to me why it
23 would be a problem for a lawyer or a citizen to raise
24 concern about misconduct in a criminal prosecution, Your
25 Honor. That is something that the Department of Justice

1 takes seriously and properly takes seriously.

2 THE COURT: Do you know whether or not there was
3 a response to this letter by the Attorney General? And if
4 so, I'd like to get a copy of that response.

5 MR. MOOPAN: Not to my knowledge, Your Honor.
6 I'll look into it and if there was, we will get back to
7 you about that.

8 THE COURT: Because when she concludes her
9 letter, she says "we appreciate your attention to and
10 consideration of these important issues." And again this
11 is from a person -- a lawyer who intends to enter her
12 appearance on behalf of someone who is being prosecuted by
13 the government, in fact someone who has already
14 participated in the preliminary sentencing hearing and she
15 says I look forward to your reply. And then she gives her
16 cell number. It's blacked out. I'm not going to repeat
17 it even if I knew it. And I would like to schedule a
18 meeting to discuss this further at your convenience and
19 provide you additional information.

20 So I'd like to know what the Attorney General
21 wrote in response. I want to get a copy of that, his
22 reply to this letter, the reply by the Deputy Attorney
23 General to this letter. I'd like to know what further
24 meetings were scheduled, what was discussed at those
25 meetings, the minutes of those meetings and any further

1 communication between the Attorney General, Rosen and the
2 attorney for Mr. Flynn. I would like to get that as soon
3 as possible, counsel.

4 MR. MOOPPAN: So, Your Honor --

5 MS. POWELL: Excuse me. I can probably address
6 that question --

7 THE COURT: No. I didn't ask you. I didn't ask
8 you to address it. I'll give you a chance at some point.
9 Counsel?

10 MR. MOOPPAN: So, Your Honor, I don't know
11 whether there was any sort of reply or meeting. I will
12 look into it. As to whether we will provide that, of
13 course, as Your Honor is aware, those sort of
14 communications, whether we will produce that is something
15 that I would have to talk with the leadership department
16 who will -- I will look into the factual premise and we
17 will respond to you --

18 THE COURT: All right. I appreciate that. I
19 mean there may be legitimate reasons for not disclosing
20 that. I certainly don't sit here and say that there
21 aren't. So I appreciate that. I would just like a
22 response to my questions, counsel.

23 All right. Anything further with respect to
24 that letter dated June the 6th, 2019?

25 MR. MOOPPAN: No.

1 MR. KOHL: Not from the government, no.

2 THE COURT: All right. Okay. Ms. Powell, you
3 wanted to say something?

4 MS. POWELL: Yes, sir. I have a number of
5 things to say. I'll address the letter issue first if I
6 might.

7 THE COURT: Sure.

8 MS. POWELL: The only response that was received
9 from the Department of Justice was from Mr. Van Grack
10 denying that he had any Brady material whatsoever. There
11 was no response from the Attorney General. There was no
12 meeting with me at all.

13 I did the same thing writing a letter to
14 Attorney General Eric Holder in the Brown case that's
15 detailed in my book, License to Lie, Exposing Corruption
16 in the Department of Justice. In that case, I was
17 afforded a meeting with the principal Deputy Assistant
18 Attorney General Rita Glavin and with Gary Grindler, Chief
19 of Staff for Eric Holder, at which I spent a significant
20 amount of effort trying to get the Department of Justice
21 to do the right thing in that case before it was
22 ultimately reversed and dismissed.

23 I have a number of other objections that I would
24 like to make on the record. We object vehemently --

25 THE COURT: Let me ask you this before you get

1 to your other objections since we're talking about --
2 since I raised the issue about communications and
3 correspondence with the Department of Justice. Have you
4 had discussions with the President about this case?

5 MS. POWELL: I have not, Your Honor, while the
6 case was pending pre-motion to dismiss or otherwise other
7 than an update as to what happened in it.

8 THE COURT: I'm sorry. I'm not sure I
9 understand your answer. The question is whether you've
10 had any discussions at all with the President of the
11 United States about Mr. Flynn and about this case. Yes or
12 no.

13 MS. POWELL: I'm sorry, Your Honor. I can't
14 discuss that.

15 THE COURT: What's the reason why you can't
16 discuss that?

17 MS. POWELL: I would think any conversations
18 that I had with the President would be protected by
19 executive privilege.

20 THE COURT: Well, you don't work for the
21 government.

22 MS. POWELL: I don't think the executive
23 privilege is limited to people who work for the
24 government.

25 THE COURT: So you're purporting to invoke

1 executive privilege not to answer the Court's question
2 about whether you discussed Mr. Flynn's case with the
3 President of the United States. Is that correct?

4 MS. POWELL: Yes. Other than the fact that
5 after the government moved to dismiss or at some point in
6 the last month or so, I provided the White House an update
7 on the overall status of the litigation.

8 THE COURT: How did you provide that update?
9 Was it in writing?

10 MS. POWELL: No, sir.

11 THE COURT: How did you provide that update?
12 Who did you speak with?

13 MS. POWELL: I provided it in person to counsel
14 for the President.

15 THE COURT: I mean the White House counsel or a
16 deputy or who did you speak to?

17 MS. POWELL: Your Honor, I spoke with Jenna
18 Alice and I spoke with the President himself to provide a
19 brief update of the status of the litigation within the
20 last couple of weeks.

21 THE COURT: And did you make any request of the
22 President?

23 MS. POWELL: No, sir. Other than he not issue a
24 pardon.

25 THE COURT: All right. Prior to that discussion

1 with the President -- how many discussions with the
2 President have you had about this case?

3 MS. POWELL: That's the only one I recall.

4 THE COURT: So you're not ruling out other --
5 well, certainly, you would recall a discussion with the
6 President of the United States, wouldn't you?

7 MS. POWELL: well, I've had a number of
8 discussions with the President of the United States. I
9 think the New York Times reported I've had five. So it
10 seems like they probably have a number better than I know.

11 THE COURT: Are the New York Times'
12 representations erroneous?

13 MS. POWELL: I couldn't tell you the number of
14 times I've actually spoken with the President, Your Honor.

15 THE COURT: All right. About this case. But
16 there's been more than one though.

17 MS. POWELL: No, sir. I can tell you I spoke
18 with one time to the President about this case to inform
19 him of the general status of the litigation.

20 THE COURT: And was that within the last two
21 weeks?

22 MS. POWELL: Time has a way of getting by for
23 me, but it's certainly well after the government moved to
24 dismiss and probably if I recall correctly after the writ
25 of mandamus was entered.

1 THE COURT: All right. Did you ever ask the
2 President of the United States to request his Attorney
3 General to appoint more attorneys in this case?

4 MS. POWELL: Oh, heavens, no.

5 THE COURT: All right. So very succinctly just
6 so I have a clear understanding, what precisely -- during
7 the first time you spoke with the President of the United
8 States, what precisely did you ask him to do in connection
9 with this case? What did you ask him to do in connection
10 with this case?

11 MS. POWELL: I never discussed this case with
12 the President until recently when I asked him not to issue
13 a pardon and gave him the general update of the status of
14 the litigation.

15 THE COURT: All right. All right. You had a
16 number of other objections --

17 MS. POWELL: Yes.

18 THE COURT: -- that you wanted to put on the
19 record.

20 MS. POWELL: I have a number of objections.

21 THE COURT: Go right ahead. Oh, I'm sorry.
22 Before we move on to that, your letter dated June the 6th,
23 2019, at the time you wrote that letter, Mr. Flynn was
24 represented by Covington and Burling. Was that ethically
25 appropriate for you to write a letter on behalf of someone

1 you didn't represent to request some action on behalf of
2 that person knowing that that person was being represented
3 by other counsel?

4 MS. POWELL: Mr. Flynn had already terminated
5 Covington and Burling at that point. I did in fact
6 represent him. I had simply not entered an appearance yet
7 before the Court for other reasons that constitute work
8 product.

9 THE COURT: All right. So your answer is in
10 your opinion, it was ethically appropriate for you to
11 write that letter then. Correct?

12 MS. POWELL: Perfectly.

13 THE COURT: All right.

14 MS. POWELL: As I said, I did the same thing to
15 Attorney General Eric Holder in the Brown case except that
16 letter was much more substantial and longer and had more
17 exhibits with it.

18 THE COURT: All right. So what else would you
19 like to put on the record, counsel?

20 MS. POWELL: I want to make clear that we object
21 to all the Court's orders appointing Mr. Gleeson or
22 instructing him to do anything. That we object to any and
23 all amicus appearing in a criminal case against a
24 defendant and request to strike all of that briefing. We
25 request to strike all of Gleeson's briefing and exhibits.

1 There is no -- he's not a party. He has no legitimate
2 role in this case under the rules or in the Supreme Court
3 decision in Hollingsworth versus Perry. It's wholly
4 inappropriate. It's also inappropriate for all the
5 separation of powers issues that have raised this. No
6 court has ever appointed someone as a special prosecutor
7 like this effectively to proceed against a criminal
8 defendant when the government has requested to drop the
9 prosecution.

10 THE COURT: All right. I think your position
11 is -- your position is crystal clear I believe in the
12 record. If you believe that it's not, you can file an
13 appropriate motion, counsel. But I believe the record
14 supports your total disagreement with the appointment of
15 the amicus in this case. I didn't --

16 MS. POWELL: There is one more -- I have one
17 more motion, Your Honor.

18 THE COURT: I didn't spend any time earlier
19 talking about the reasons for or against the appointment
20 of the amicus because I am firmly under the impression
21 that everyone's position is crystal clear. But if you
22 believe that there's a need to supplement the record
23 before this Court, then certainly you should file whatever
24 you believe is consistent with your client's best
25 interest, counsel.

1 MS. POWELL: Yes. And I will do that. I
2 believe that I also need to move to disqualify the Court
3 and urge that it recuse itself immediately. It's
4 absolutely unprecedented for proceedings against a
5 defendant to be conducted by a person who actively
6 litigated against him.

7 And further evidence of bias. This Court did
8 not act forthwith to schedule this hearing or decide the
9 motion. The Court just allowed a filing against the
10 defendant by attorney for Peter Strzok, one of the
11 dirtiest FBI agents in the case. When the government and
12 Flynn even expedited their efforts to have this Court hear
13 the case, the Court picked the very last date the parties
14 had possibly agreed to after setting September 21 as a
15 scheduling deadline which was multiple weeks after the
16 Court of Appeals --

17 THE COURT: Let me just say one thing about
18 that. We took very seriously the remand by the Court of
19 Appeals en banc. And I have not practiced law in many
20 years. I was once the judge on the D.C. Court of Appeals,
21 but I've forgotten all the appellate law I've ever known
22 about when a case is remanded. After mandamus relief is
23 denied, when can a court properly proceed with any further
24 matters. So there were a number of questions.

25 My understanding is that I wanted to be fair

1 about this. I didn't know whether Mr. Flynn was going to
2 file a petition for certiorari and that's, you know, of
3 course, an option available to him. So we wanted to be
4 mindful of what the timeframe was for him to exercise that
5 discretion.

6 We also wanted to be certain about when the
7 "mandate" was returned to this Court. I didn't want it to
8 appear that the Court was doing anything prior to its
9 first opportunity to consider a case after remand and
10 that's the reason why the Court issued a scheduling order
11 blocking off a significant amount of time that we believe
12 should elapse before this Court had jurisdiction vested
13 with it again. So that's the reason for the Court's
14 scheduling order to say by no later than a certain date,
15 tell us how you wish to proceed.

16 You're objecting to a date that you and everyone
17 else suggested. It was the date that was convenient --
18 most convenient for the Court, today's date, the 29th. It
19 wasn't as if the Court selected any date to disadvantage
20 Mr. Flynn or anyone else. So if I understand your
21 objection, you are objecting because it's the last date
22 the Court selected. Well, that's one of the dates that
23 you selected and suggested to the Court.

24 But that's the reason for the Court's delay
25 because I didn't want it to appear that the Court was

1 doing anything during a period of time wherein
2 jurisdiction had not been returned to this Court. And
3 that's the reason for the Court's scheduling order to say
4 by no later than I think it was the 21st of September -- I
5 don't have it in front of me, whatever you say is
6 correct -- let us know because the time would have expired
7 and the "mandate" would have been returned to this Court.
8 So I was proceeding very cautiously and also mindful that,
9 well, maybe the attorneys will file a petition for
10 certiorari. So it wasn't any effort to unduly delay this
11 proceeding. What's your next point?

12 MS. POWELL: A petition for certiorari does not
13 delay the mandate or the issuance of a mandate --

14 THE COURT: All right. I understand that. It's
15 academic right now. You are here now. You have your day
16 in court. What's your next point?

17 MS. POWELL: The next point is that your
18 comments this morning, the Court's comments this morning
19 cement the abject bias of the Court that mandate its
20 disqualification. It firmly appears that the Court
21 appointed Mr. Gleeson to support its own personal views
22 that Flynn must be sent to prison regardless of the facts
23 or the law.

24 Mr. Gleeson is not a party. He has no lawful
25 standing in this case. He's completely ignored the

1 massive disclosures of evidence of egregious government
2 misconduct the government has provided in the last 60 days
3 or so.

4 The Court's comments about a new Attorney
5 General ignores also that massive production and seems to
6 indicate its own political bias. As the Court knows from
7 the D.C. Circuit's decision in United States versus Al
8 Nashiri, unbiased and partial adjudicators are the
9 cornerstone of any system of justice worth the label and
10 because deference to the judgments and rulings of the
11 Court depends upon public confidence and the integrity of
12 independence of judges, jurors most support even the
13 appearance with partiality. Justice must satisfy the
14 appearance of justice --

15 THE COURT: All right. Let me ask you this.
16 The record in this case is voluminous. I'm not sure
17 whether you ever filed a motion to recuse in this case
18 before me. I don't know. Did you? I may be mistaken. I
19 don't believe you have. If you have --

20 MS. POWELL: I'm making that motion right now,
21 Your Honor.

22 THE COURT: Put it in writing. I don't want to
23 cut you off, but if you want to file a motion to recuse,
24 you probably should have filed it, but you didn't and I'll
25 certainly afford you an opportunity to prepare and file an

1 appropriate motion to recuse. I'm not going to address
2 that on oral representations of counsel. I'm not going to
3 waste your time or everyone else's time. You could have
4 filed a motion in writing. You could have filed it in
5 June. You could have filed it earlier. But even though
6 you didn't, I'll certainly afford you an opportunity to do
7 that and I'll give you a week from today to file your
8 motion to recuse. Next point?

9 MS. POWELL: We will file that motion to recuse,
10 Your Honor, because we believe even if it didn't occur
11 when the Court actively --

12 THE COURT: Counsel, what's your next point?
13 what's your next point? I don't need to hear anything
14 more about that. I'm going to give you an opportunity to
15 file your motion to recuse. I'll give you a week from
16 today. what's your next point you would like to put on
17 the record?

18 MS. POWELL: The Court mentioned that General
19 Flynn had -- excuse me just a minute.

20 THE COURT: Sure.

21 MS. POWELL: That Mr. Flynn was scheduled to
22 testify and chose not to cooperate. That statement is
23 completely false. Mr. Flynn was fully prepared to
24 cooperate in the Eastern District of Virginia in the
25 Rafiekian case until the government's prosecutor, Brandon

1 Van Grack insisted that Mr. Flynn lie about his knowledge
2 of false FARA filing and the false FARA filing that the
3 government alleged was false and the false statements were
4 actually created by the government itself or by Covington
5 and Burling. We established that with filings that we've
6 provided the Court already. And we also briefed fully for
7 the Court how Mr. Van Grack had threatened General Flynn
8 and proceeded to try to compel him to testify to facts
9 Mr. Van Grack knew was false because Mr. Van Grack himself
10 had deleted those remarks or that portion that he there
11 and then knew from the statement of offense himself and
12 all the documents that support that are in the record
13 before the Court.

14 THE COURT: All right. Thank you. Next point?

15 MS. POWELL: That's it for the objections. I
16 have other arguments to make --

17 THE COURT: All right. I'll get to those after
18 I afford Mr. Gleeson an opportunity to comment on what the
19 Court had intended to do which was to summarize the
20 principal arguments that the parties had made in this
21 case. Mr. Gleeson?

22 MR. GLEESON: Yes. I think you did a good job
23 of that, judge. I have no objections to your summary of
24 the essential arguments. I, too, would like to be heard
25 at the appropriate time, but your summary is fine with the

1 amicus.

2 THE COURT: All right. Thank you. And for the
3 record, I've read or have read somewhere either in a
4 pleading or in print that I appointed you after discussing
5 this matter with you and for the record, I would just like
6 to state and ask you whether or not you and I have ever
7 discussed this case whatsoever.

8 MR. GLEESON: No. This is the first time I've
9 had the pleasure of addressing the Court.

10 THE COURT: All right. Thank you, counsel.

11 I have a few questions for government counsel.
12 If the Court were to deny the motion, what would the next
13 steps be? Should the next step be to allow Mr. Flynn to
14 attempt to withdraw his plea alleging ineffective
15 assistance of counsel?

16 I recall very vividly that the parties,
17 Mr. Flynn and the government, had been working very
18 diligently to see if they could agree on what could be
19 said and what could not be said with respect to the motion
20 to dismiss -- the motion to withdraw the plea based upon
21 ineffective assistance of counsel and I really appreciated
22 their hard work. I know they were being very diligent in
23 an effort to reach an agreement. But what happened was
24 the government with newly-appointed counsel filed a motion
25 to dismiss and the Court never directed the previous

1 attorneys to file a response to the motion to withdraw.

2 So what should the Court do? I mean who should
3 I address these questions to? Mr. Kohl or your colleague?

4 MR. KOHL: Sure, Your Honor. Yeah. You are
5 correct. The motion to withdraw the plea has not been
6 resolved. Our position is, you know, we're just well
7 aware as you are, Your Honor, that under D.C. Circuit case
8 law that motions to withdraw a guilty plea prior to
9 sentencing are to be liberally granted.

10 You yourself, Your Honor, emphasized when you
11 met with Mr. Flynn the first time back in December of 2018
12 that you can't recall any incident in which the Court
13 has -- and I'm quoting your remarks -- "has ever accepted
14 a B plea of guilty from someone who maintained that he was
15 not guilty and I don't intend to start today." It would
16 be -- I'm sure that's still true today. I definitely
17 understand the Court's point that sentencing had started
18 to commence, but, of course, Your Honor did give Mr. Flynn
19 the opportunity to cooperate and there's been a lot of
20 litigation since then that have been separate and apart
21 from the sentencing process.

22 In this case, I just don't even know of a
23 situation where a court has taken a defendant to
24 sentencing with claiming he's innocent where he hasn't
25 been afforded a trial.

1 In this case I'd also like to highlight for Your
2 Honor we did do that review of the Covington records. I
3 know that Mr. Flynn is claiming that his plea was under
4 duress and it was imperfected by threats to prosecute his
5 son. I did just want to highlight for the Court, I know
6 that defense counsel has placed on the record as Document
7 181, there was some indication, there was a discussion and
8 an unofficial "understanding" between the lawyers that
9 they are unlikely to charge the son in light of the
10 cooperation that Mr. Flynn had given and there was
11 specific discussion in that filing by the defense,
12 Document 181-2.

13 And I'm quoting from an email from Mr. Flynn's
14 attorney at the time that basically says the only
15 exception is the reference to Michael, Jr. That's the
16 defendant's son. The government took pains to not give a
17 promise to Michael T. Flynn regarding Michael, Jr. so as
18 to limit how much of a benefit it would have to disclose
19 as part of Giglio disclosures to any defendant against
20 whom Michael T. Flynn may one day testify. That's
21 concerning if there are unofficial agreements between
22 lawyers that were not -- that the Court hasn't had the
23 opportunity to review with the defendant.

24 There was also a concern raised I know by the
25 defense that there was a conflict of interest between he

1 and his prior counsel. That wasn't actually covered by
2 Your Honor in the prior plea.

3 So these are -- I'm really not making
4 accusations on either of these things. I'm just as an
5 officer of the court making the Court aware of them. That
6 they are something you'd have to go over if you really are
7 not going to allow the defendant to withdraw his plea in
8 this case.

9 THE COURT: All right. So --

10 MR. MOOPPAN: And, Your Honor, if I can make one
11 last legal point related to that factual point?

12 THE COURT: Sure.

13 MR. MOOPPAN: Which is the fact that motions to
14 withdraw guilty pleas are freely granted underscores why
15 it doesn't make sense to construe Rule 48 to apply very
16 differently. If General Flynn has valid grounds to
17 withdraw his plea and the government does not wish to
18 prosecute this case, I think even Judge Gleeson
19 acknowledged there is at least as a practical matter no
20 real way to proceed. There would be no prosecutor.

21 Judge Gleeson in a footnote in his reply brief
22 cited Rule 42, but Rule 42 only authorizes the appointment
23 of a prosecutor in a context of contempt. I'm not aware
24 and I don't believe Judge Gleeson will be able to cite a
25 single instance in the history of this country where a

1 federal appellate court has allowed a private prosecutor
2 to prosecute a defendant in federal court. And so I think
3 that just underscores why Rule 48 should not be construed
4 to draw this magical line between pre and post-plea
5 especially because the right to withdraw the plea should
6 be freely granted and this Court should be making
7 decisions about whether it will allow him to withdraw his
8 plea based on the concern that otherwise the case will end
9 because we don't intend to prosecute it.

10 THE COURT: Thank you, counsel. Let me ask you.
11 You are looking at my list of questions here because the
12 next question would have been can the government point to
13 any case in the history of our system of justice that is
14 identical in all fours to this case where an individual
15 has on more than one occasion pled guilty under oath under
16 penalty of perjury, admitted his guilt and actually and
17 indeed proceeded to sentencing because I'm not going to
18 overlook the fact that in December of 2018, the Court
19 presided over the first sentencing hearing. But in an
20 effort to be fair to this man, Mr. Flynn, as I am to
21 everyone, I continued sentencing to allow him to cooperate
22 to the fullest extent so he can get the complete
23 bargain -- so he could get the complete benefit of his
24 bargain with the government.

25 But is there any circuit authority or district

1 court authority or any other authority anywhere that is
2 identical on all fours, closely analogous to the
3 proceeding before this Court? I'm not aware that the
4 government has relied upon any authority in its pleadings.

5 MR. KOHL: Your Honor, the case that I would
6 cite is closest analogous is the Matthew Lowry. Remember
7 just four years ago we had those series of cases, they
8 were narcotics cases where it was discovered that an FBI
9 agent identified by the name of Matthew Lowry --

10 THE COURT: How could I forget those cases?
11 Yes. I had some of those cases. Right. Thank you.

12 MR. KOHL: Yes. And when it was discovered that
13 there was this wrongdoing and they found out --

14 THE COURT: For the record, the alleged
15 wrongdoing was taking evidence from an evidence room that
16 consisted of controlled substances if I recall correctly
17 and for that, he was prosecuted and convicted before my
18 colleague, Judge Hogan I believe and incarcerated. I
19 recall that case.

20 MR. KOHL: Right. And what was interesting
21 about that case, Your Honor, is he was tampering with
22 evidence in some cases. We reviewed all of the cases that
23 he had involvement in and Your Honor was actually very
24 engaged in that in making sure that we did a proper review
25 of every other case in order to dismiss the indictments

1 against 28 defendants.

2 Now many of those defendants had pled -- 25 of
3 them had pled guilty under oath. They admitted their
4 responsibility and yet and some were serving sentence.
5 But we moved to dismiss all of those cases because there
6 was a higher principle at stake in that when the
7 government seeks to deprive a person of their liberty
8 (inaudible) insists that law enforcement do their jobs the
9 right way and that really has been the theme here. That
10 law enforcement, you know, it really raises eyebrows and
11 serious concerns in terms of how this case was put
12 together and eventually charged. So it is similar to
13 Lowry in that respect.

14 MR. MOOPPAN: And if I could address one last
15 point on your question about precedent, Your Honor? To
16 the best of my awareness and to the best of Judge
17 Gleeson's briefing, I do not believe that there is a
18 single appellate case in the history of this country where
19 an appellate court has upheld the denial of a Rule 48
20 motion over the opposition where the defendant agrees.
21 Not a single one on any sort of facts. These facts or any
22 others. It has never happened.

23 THE COURT: All right. I don't believe there
24 were any written opinions in Lowry. I know I had -- I
25 presided over a few matters, a couple of matters. I

1 didn't author any opinions and I'm not sure if any of my
2 colleagues did as well.

3 And just to be clear, I don't believe that the
4 government relied upon the Lowry case in its written
5 submission. I mean I will go back and read anything you
6 want me to read, but I don't believe there were any
7 written opinions, were there, in Lowry?

8 MR. KOHL: I don't think there was written
9 opinions, Your Honor.

10 THE COURT: Right. Right. If I recall
11 correctly, we actually engaged the United States Attorney
12 from the Eastern District of Pennsylvania I believe to
13 prosecute some matters because things became very
14 complicated. But I don't recall that anyone wrote any
15 opinions. But I do recall the factual bases for the
16 number of dismissals of indictments and informations and
17 pleas of guilty.

18 On what authority could the Court deny the
19 motion without prejudice?

20 MR. MOOPAN: So, Your Honor, we do think that
21 Article III and Article II and the Rule 48 standard all
22 require that the motion be granted and that the case be
23 dismissed. It is true that whether it has to be dismissed
24 with or without prejudice, we don't think that there's a
25 constitutional requirement for that. But we do think that

1 in the circumstances of this case, given everything that
2 the government has discovered, we do think it would be an
3 abuse of discretion to dismiss it without prejudice. But
4 the most important point is that whether it be dismissed
5 with or without prejudice, that it be dismissed.

6 THE COURT: All right. So you're not -- so just
7 to be clear, the government is not advocating for either
8 or, with or without prejudice. Correct? You are
9 advocating for a dismissal that's loud and clear. I got
10 you there. But you're not drawing a line for either with
11 or without prejudice.

12 MR. MOOPAN: No. Our motion is for it to be
13 dismissed with prejudice. If you look at the motion, that
14 is an express request and we stand by that because as I
15 said, we do think it would be an abuse of discretion in
16 the circumstances of this case to deny it without
17 prejudice -- to dismiss it without prejudice. I was just
18 saying that as a constitutional matter, we're not saying
19 that that part, the with or without prejudice, we don't
20 think the Constitution compels that. We do think that the
21 Constitution compels that the case be dismissed.

22 THE COURT: All right. Let me ask you this,
23 counsel. During the plea colloquy before Judge Contreras,
24 Mr. Flynn also admitted his complicity in certain
25 uncharged criminal conduct. And as part of the plea

1 agreement -- and he did that under oath. And as part of
2 the plea agreement, the government agreed not to prosecute
3 him further for the uncharged criminal conduct.

4 Recognizing that the uncharged criminal conduct
5 that he admitted he had been engaged in is related to the
6 conviction before this Court, wouldn't it be appropriate
7 to enable any future Attorney General or administration an
8 opportunity to consider whether he should be prosecuted
9 for the uncharged criminal conduct and indeed this case
10 and that counsel is in favor of any denial without
11 prejudice?

12 And let me just say one thing so the record is
13 clear. I ask a lot of questions and if I ask a question,
14 I don't know the answer to it. But no one should read too
15 much into any question that I ask because I'm just trying
16 to reach the right decision for the right reasons. So
17 we're talking about dismissal with or without prejudice
18 now and I'm talking about any prejudice to any future
19 administration or future Attorney General under this
20 administration for that matter who may want to prosecute
21 for the related uncharged criminal conduct and indeed the
22 1001(a) offense.

23 MR. MOOPAN: So, Your Honor, my understanding
24 though I would like the confirmation from Mr. Kohl is that
25 because the FARA claim is not charged conduct, if one

1 count that is charged is with or without prejudice, the
2 prejudice is only with respect to the charged offense. So
3 that will not affect the separate FARA account which is
4 not affected by the dismissal one way or the other.

5 MR. KOHL: Your Honor, the only thing I can add
6 to that is and I totally agree with my colleague on that.
7 I know you were presented a statement of offense in this
8 case in December of 2018. And when you look at it, it
9 looks like there are FARA violations.

10 But one of the things that we learned in the
11 review of the Covington documents when we're looking into
12 the conflict of interest issue and again none of this was
13 ultimately resolved, but there was specific back and forth
14 negotiating the exact language in that statement of
15 offense. And apparently, the defendant insisted on
16 removing language from the statement of offense that you
17 had where it fully admitted that there were false filings,
18 took out the operative language that he knew at the time
19 that the filings were false and of course, they were
20 prepared by his attorneys and that's something I think the
21 gravamen of the claim that there was conflict of interest
22 for those same attorneys who handled the filings
23 (inaudible) on the case.

24 But the one thing I'll add because he never
25 admitted that intent part of it, it led to real problems

1 in the prosecution in the Eastern District of Virginia and
2 they couldn't use him as a witness because he actually
3 never admitted under oath that he knowingly filed a false
4 FARA filings even though they got a conviction on the
5 other business partner. Judge Trenga seized on that same
6 problem with respect to the other business partner,
7 Mr. Rafiekian. So some of this that you were presented
8 isn't quite what it appears. But you're right. The
9 dismissal of this case won't affect some future
10 prosecutor's ability to go forward on FARA if the evidence
11 actually is there.

12 THE COURT: All right. Thank you, counsel. The
13 Court addressed materiality in its December 2019 opinion.
14 What's the factual and legal predicate to persuade the
15 Court to engage in that exercise again and I hasten to add
16 that the defendant never asked me to reconsider that
17 opinion whatsoever.

18 MR. MOOPAN: Let me address the legal part of
19 that and Mr. Kohl will address the factual part. I think
20 a critical part of this is again this is a Rule 48 motion.
21 So we are moving to dismiss and when we move to dismiss,
22 the question in our mind is not what is the legal standard
23 of materiality for whether the evidence here will be
24 sufficient to sustain a conviction on appeal. The
25 question is whether we, the Department of Justice, think

1 this evidence is material and more to the point whether
2 we, the Department of Justice, think we should bring a
3 case.

4 And so the inquiry that was at issue in the
5 Brady analysis is just not the same issue as whether we
6 should move to dismiss. That's compounded by the fact
7 that there are factual differences between the record at
8 the time and the record now which I'll allow Mr. Kohl to
9 elaborate on.

10 MR. KOHL: Yes, Your Honor. And it's such a
11 good question because, you know, going back again to the
12 December 2018 plea hearing, you'll remember you read the
13 statement of offense. And the statement of offense is
14 pretty clear as to what the materiality is, at least
15 what's alleged. It is that Flynn's false statements
16 impeded and otherwise had a material impact on the FBI's
17 ongoing investigation into the existence of any links or
18 coordination between individuals associated with the Trump
19 campaign unless those efforts, they interfere with the
20 election. That's the investigation called Crossfire
21 Hurricane.

22 So you read that and Mr. Flynn pled guilty at
23 the time for sure. This is what was represented by the
24 Special Counsel's Office to you. And then you asked twice
25 during that hearing questions of the defense attorneys.

1 You asked questions, Your Honor, really that ultimately is
2 what's led to the unraveling of this case because at that
3 hearing, Your Honor asked both counsel, "I need to know
4 answers about how he impeded the investigation and what
5 the material impact on the investigation was." These are
6 questions, you went on to say, that you would be prepared
7 to answer anyway and as you know, how the government's
8 investigation was impeded, what was the material impact of
9 the criminality.

10 Now Mr. Gleeson would say none of those things
11 matter in a technical way in terms of meeting the elements
12 of the offense. But you're asking those questions because
13 you wanted to gauge the seriousness of his conduct.
14 Totally appropriate. And you might have been imagining in
15 your mind that Flynn's false statements in January of 2017
16 set back the Russian investigation, which of course was a
17 hugely important investigation. It set back for six
18 months or something. But what if Your Honor were to know
19 that not only did it not set back the investigation, but
20 the agents who did the interview at the time didn't view
21 it as (inaudible) Crossfire Hurricane?

22 So it's not just a matter of technically what
23 clever attorneys can argue to come up with the rationale
24 for the interview that was done of Mr. Flynn in January of
25 2017. It's a matter of what's actually true, what's

1 actually true. And in the end, on materiality, you know
2 we were there. We made the argument that supported your
3 Brady ruling in December of 2019 because that's what the
4 statement of offense said.

5 But once the defendant withdrew his plea, moved
6 to withdraw his plea, it causes us to look at it another
7 way. Could we actually prove this? Could we prove what
8 was presented to Your Honor in the statement of offense
9 back in 2018? And what we found as we looked into it is
10 that there was a series of documents that had been
11 discovered by the Jensen review and through some other
12 searches of former special counsel files that it really
13 cast doubt that the agents even at the time thought it was
14 related to Crossfire Hurricane.

15 I put to the fact that, yes, Your Honor knew
16 about a closing E.C. where they were making attempts to
17 close the Flynn investigation, the Flynn separate
18 investigation called Crossfire Razor. But when we looked
19 at the language in the closing E.C., it actually showed
20 that the agents themselves said he's no longer a viable
21 candidate as part of the larger Crossfire Hurricane case.
22 That's significantly at odds with what the statement of
23 offense said was the reason for the interview.

24 And what if we turned up documents, Your Honor,
25 that showed that even the Deputy Assistant Director of the

1 FBI which is Peter Strzok who viewed himself as a bit of
2 an insurance policy against the Trump administration, he
3 didn't even view Crossfire Hurricane as a justification
4 for the interview. He was scrambling. Have you heard
5 about the Ambassador Kislyak -- the call with Ambassador
6 Kislyak? He was scrambling to justify, you know,
7 continued investigation of the defendant under the Logan
8 Act, not Crossfire Hurricane and he was citing that -- he
9 was acknowledging in his own communications that there
10 were constitutional problems with that statute and it
11 certainly had never been according to the legislative
12 history in his own mind -- I'm quoting his language --
13 never contemplated against incoming administration
14 officials.

15 But what if there was even more? What if the
16 case agent on the case who had been investigating Flynn
17 for months and had recommended closure? When he learned
18 about the Kislyak interview -- this is the Bill Barnett
19 interview that we supplemented the record on just a couple
20 of weeks ago said what if the underlying conduct -- he
21 concluded -- he listened to the actual calls with Kislyak
22 and already reviewed the transcripts and it did not change
23 his view that Flynn was comprised by the Russians. He
24 didn't see a significant issue with the call.

25 And what if when Pete Strzok was moving to go

1 forward with this interview, within 24 hours of the MLAT
2 Logan Act as the justification, not Crossfire Hurricane,
3 but it gets briefed to the director of the FBI and the FBI
4 within 24 hours briefed the President of the United States
5 and notes from that meeting indicate that there is a
6 discussion of the Logan Act with Director Comey and
7 Director Comey says he references the Flynn/Kislyak case
8 and the calls and he says, yeah, there were these calls,
9 but they appear legit. They appear legit.

10 what if on the morning of the interview, before
11 the interview of the defendant on January 24th, there's a
12 meeting with the Assistant Director of the FBI for
13 counter-intelligence and he's writing notes for himself
14 and he is ruminating about this interview, he is thinking
15 about this interview with Mr. Flynn and he writes to
16 himself, well, what's our goal? well, that's a red flag
17 right there if the leadership of the FBI is wondering what
18 their goal in the interview is. And he writes true
19 admission or to get him (inaudible) so we can prosecute
20 him or get him fired.

21 Now if it's true that the Kislyak calls seemed
22 legit both to the case agent and all the way up to the
23 director of the FBI and if it didn't change their
24 impression -- that their view that Flynn was compromised
25 in some way by the Russians, then why is the FBI talking

1 about doing an interview in hopes of getting someone
2 fired? That's actually not the FBI's job.

3 And one last thing I'd say about this. When
4 they do do the interview -- I know Mr. Gleeson is very
5 capable of arguing the rationale. Oh, of course, it fits
6 the Crossfire Hurricane. It says in the statement of
7 offense. And they would want to naturally -- if he had
8 only been honest, they could have asked questions about
9 finding out who else Flynn met about the request he made
10 of Kislyak and what are the conversations that occurred
11 around that discussion with Ambassador Kislyak.

12 But if that was the purpose of the interview,
13 Your Honor, why didn't the agents actually follow up? Why
14 didn't they actually ask those questions that Mr. Gleeson
15 has proffered for the Court? Flynn in that interview
16 according to the FBI 302 volunteered info on other closed
17 door meetings with the Russians. He talked about other
18 communications with the Russians. So why not explore --
19 if Crossfire Hurricane is what it's all about and who else
20 talked to you about sanctions, why not explore those
21 issues?

22 And then let me add the agents come and they
23 meet with senior leadership at the FBI the next day and
24 there's discussion about why don't you go back and do a
25 re-interview. And according to Acting Attorney General

1 Sally Yates, the FBI all the way up to Deputy Director
2 McCabe was "pretty emphatic" that a re-interview was
3 unnecessary. How could the interview be unnecessary if
4 the agents never asked any of the questions that
5 Mr. Gleeson is saying are so obviously in support of doing
6 the interview?

7 So, you know, in the face of all these shifting,
8 you know, rationales that we see in the paperwork in the
9 FBI, I think it's fair for us to ask the same questions
10 you would at the original plea hearing in December of
11 2018. Did these statements really impede a genuine
12 investigation and since the agents' justification for the
13 interview are so all over the map, it's certainly fair for
14 us to say and use -- exercise our discretion that this
15 isn't a case that should be prosecuted.

16 Prosecutors in the end, in the end, we have to
17 really look at people -- we've got to make sure that the
18 evidence is there against a politically-connected
19 defendant that we go forward and charge them. But if the
20 evidence isn't, we don't even if they're politically well
21 connected and even if there is going to be political blow
22 back. We just tried to make the right call here.

23 THE COURT: All right. So just to take this a
24 step further, there is some who may arguably say that this
25 appears to be Monday morning quarterbacking. In other

1 words, the game is over, this is what we could have done
2 better and articulate some steps. But those same people
3 would say but this is a new team of attorneys appointed by
4 a new Attorney General without any participation
5 whatsoever by the previous attorneys, the Mueller team,
6 Office of Special Counsel attorneys. And what inferences
7 should the Court draw from that, if any?

8 And I guess the second part of that question is
9 wouldn't it have been more appropriate to file a motion
10 for reconsideration since the Court spent I mean almost a
11 hundred pages talking about there's no Brady material
12 here, there's no Giglio material the Court found,
13 everything that the defendant complains of that he hadn't
14 received, he did receive and addressing materiality and
15 falsity and there was no motion. Wouldn't it have been
16 more appropriate to file a motion for reconsideration
17 saying, judge, you know what, we have a new team of
18 attorneys take a look at this and we have a new theory
19 here? And why should I -- why should the Court allow that
20 new theory to persuade the Court that it's appropriate
21 with the fair administration of justice that this plea
22 agreement should be allowed to be dismissed with prejudice
23 for all those reasons?

24 MR. KOHL: Your Honor, I know it seems like such
25 a reversal in our position because it's from December

1 where we were supporting the Court's Brady order, right,
2 until dismissal in May. But that is as we say partly
3 because the defense had moved to withdraw and that caused
4 us to take a second look at what's -- you know, do we have
5 the evidence to prove this case? And we were operating
6 under the assumption that the Court would follow its
7 normal course and say I've never gone forward on a case
8 where a defendant claiming his innocence and I didn't go
9 forward with a plea under those circumstances.

10 But with that said, once we didn't -- and of
11 course, independently the Attorney General had ordered an
12 investigation after the three Office of Inspector General
13 findings had knocked out all of our witnesses in this
14 case. If we went forward and that was problematic, it
15 really wouldn't be appropriate for us to move to seek
16 reconsideration because we're not disputing we have a
17 Brady obligation to turn over this information.

18 So as the information became known, actually we
19 became so convinced and troubled by the inability -- the
20 evidence just wasn't matching up with what was said in the
21 statement of offense. And once we discovered that and we
22 decided this case is done and we decided to move to
23 dismiss.

24 The last thing I'd say that's just so alarming
25 that I just hope -- I mean I really want to persuade the

1 Court because I don't want the Court to think we acted
2 with political motive.

3 As we continued to do this review, even since we
4 filed the motion to dismiss, what we found was analysts as
5 they are talking -- this is in the Crossfire Hurricane
6 case. As they're talking about the process that they're
7 issuing on this very defendant, right, they're talking
8 about how there's a lack of predicate and they are
9 expressing concern that this is a nightmare. We're asking
10 for Flynn's records under national security for which
11 there is no -- it's not a logical investigative step.
12 There's notes -- there's messages among the analysts that
13 people who are scrambling for info to support certain
14 things and it's a mad house.

15 At one point they are expressing relief that
16 they are finally shutting down the Michael Flynn case, the
17 Razor investigation and they are so glad they're closing
18 Razor and yet, they continue to move forward making these
19 requests for information that has no logical basis.

20 And in the end, of course, what's most troubling
21 is -- Court's indulgence.

22 THE COURT: Sure.

23 MR. KOHL: Court's indulgence. Is the fact that
24 the case agent who's there the whole time, Bill Barnett,
25 is coming forward and saying that he did not see any

1 predicate for this interview under Crossfire Hurricane.
2 In the end, he didn't see -- he didn't raise any alarm
3 bells and he told the Special Counsel's Office that there
4 was nothing there with respect to Flynn.

5 So I do need to emphasize when you say a whole
6 team of new lawyers, we're not Monday morning
7 quarterbacking. We're just dealing with the evidence that
8 we are saddled with right now and the reality is all of
9 this stuff has become known in the last several months
10 including the views of the case agent in terms of the
11 motivations and how the investigation was conducted by the
12 SCO. We're not really taking sides. We are just saying
13 we never -- Your Honor would never expect us to go forward
14 on evidence like this to prosecute a guy who's claiming
15 he's innocent.

16 And I do want you to remember Jocelyn Ballantine
17 has been on his case, you know, since last summer. She
18 has been on each of the pleadings defending this motion to
19 dismiss. She was on the pleadings in the Court of
20 Appeals. So there's not -- you know, she defended as
21 well. These are career people that are defending this
22 decision, Your Honor. In the end even if there were
23 conversations, I can't speak to anything about other
24 communications. I'm telling you as a career lawyer this
25 case should be dismissed.

1 THE COURT: All right. I wasn't casting any
2 aspersions on any individual attorneys, counsel. I have a
3 high regard for all the attorneys and you know that. And
4 I forgot to welcome you to the three-decade club. Since
5 we're talking about the three-decade club, you'll recall
6 that the Ted Stevens case, the Court dismissed that matter
7 with prejudice on the government's motion to dismiss. I
8 don't recall whether Eric moved to dismiss with prejudice
9 or not. I just don't recall. I think he did.

10 But the most compelling reason then was because
11 there was a ton of Brady -- as you know, there was a ton
12 of Brady material that was not turned over that was
13 intentionally withheld and this was after trial, after the
14 man had maintained his innocence and he testified. But
15 the defendant was deprived of an opportunity to use that
16 evidence during cross-examination or examination of
17 witnesses.

18 That's not what we have here. We don't have a
19 Ted Stevens re-do here.

20 MR. KOHL: No.

21 THE COURT: Right? That's not what we're
22 talking about here. In terms of --

23 MR. KOHL: I mean I don't view it like that
24 because, you know, we inherited this case 16 months after
25 the negotiated plea had occurred. Right? And that's when

1 our U.S. Attorney's Office in D.C. got involved. So and
2 we inherited -- the guy had already pled guilty twice and
3 the defendant was still standing by his plea. You had
4 checked with him as to whether he still wanted to stand by
5 his plea.

6 So in that context, the demands for discovery
7 and even Brady is limited solely to matters of sentencing
8 at that point. I think in the end, it was really our own
9 review that was triggered by the motion to withdraw and
10 the concerns that were raised by the OIG with respect to
11 our -- all of our witnesses in the case and to take a hard
12 look at the evidence. I think we've done -- we've tried
13 to do the right thing and disclosed things as soon as we
14 got them.

15 THE COURT: All right. And that's all I'm
16 trying to do. The Court is trying to do the right thing
17 for the right reasons and that's why I'm asking all these
18 questions.

19 Either you or your colleague mentioned Peter
20 Strzok. You know what, there was a flurry of filings
21 yesterday. I read the letter from -- that was posted from
22 Strzok's attorney. I haven't read everything else, but I
23 will. But in light of the letter from the attorney for
24 Peter Strzok, can the government counsel certify that all
25 emails and interlineations have been shown to all

1 declarants for the purposes of authenticating what's been
2 represented to me as true and accurate? Because I tell
3 you, quite frankly, I was floored when I saw the letter
4 from the attorney that there were alleged alterations in
5 an email.

6 MR. KOHL: Not that we are aware of, Your Honor.
7 I certainly want to respond specifically, but I'd have to
8 see that specific pleading. I'm sorry that I didn't see
9 that.

10 THE COURT: All right. And I'll give you a
11 chance to respond. I think, you know, any responses I
12 think a week is going to be a good time. But the question
13 is whether or not someone, some government attorney can
14 certify that all emails and interlineations that have been
15 attached and appended to motions to dismiss, et cetera,
16 have been shown to the declarants to authenticate because
17 it was very unsettling to see the letter from the attorney
18 for Mr. Strzok telling me that, you know, there appeared
19 to be alterations by other people other than Mr. Strzok.
20 So I'll just leave it at that. But I need a certification
21 from someone at some point.

22 Counsel, Mr. Kohl, you made reference to
23 politics not being the motivating factor here. Should the
24 Court take into consideration the numerous statements by
25 the President on Twitter feed and for the record I

1 wouldn't know how to put anything on Twitter if my life
2 depended on it. But there are a number of statements
3 attributed to the President criticizing the prosecution of
4 Mr. Flynn. So that's the question. Should the Court take
5 those into consideration and if so, for the weight or for
6 whatever reason?

7 MR. MOOPAN: So, Judge Sullivan, as you know,
8 the communication between the Attorney General and the
9 President are privileged and deliberative. But I have
10 consulted with the Attorney General about this and I am
11 authorized to represent to you that the Attorney General's
12 decisions in these cases were not based on communications
13 with the President or the White House and they weren't
14 based on any of the tweets or the sort of things that
15 you're referencing.

16 But I would further note as I think Your Honor
17 actually just averted to, most of those tweets, they say
18 things like they think that General Flynn is being
19 railroaded. It's not even clear what he said is false.
20 None of those things even meet Judge Gleeson's own
21 standard. That's not favoritism. That's a view about
22 whether this is a just prosecution or an unjust
23 prosecution. So even if you were to consider them, which
24 we don't think you should, they don't even meet Judge
25 Gleeson's own standard.

1 THE COURT: Well, putting aside Judge Gleeson's,
2 you know, who will certainly speak for himself, but
3 putting aside Judge Gleeson's view, I mean these
4 statements are in the public domain.

5 So the question is what weight, if any, should
6 the Court give these statements by the President of the
7 United States, the chief executive officer?

8 MR. MOOPPAN: So I'll say two things. The
9 decision here is a decision made by the Department of
10 Justice. The Attorney General's decision wasn't based on
11 the President's statement. So I don't think you should
12 give it weight because it's not actually the basis of the
13 decision. But if you were to consider it, I think it
14 would just only underscore the propriety of this dismissal
15 because you have as you said the chief executive of the
16 United States agrees obviously with the decision and is
17 agreeing for reasons that are not impermissible. They are
18 based on views of whether this is a just prosecution.

19 THE COURT: All right. I haven't researched
20 that issue recently about Twitter feeds. I'm sure that
21 there are courts across the country writing on the
22 propriety of what weight, if any, to give to tweets. So
23 within that same week, if you have some authority you'd
24 like to bring to the Court's attention, please do so
25 because there are a number of tweets associated with

1 comments allegedly made by the President and I would like
2 to know what weight, if any, should the Court give to
3 those or should the Court just merely disregard them. So
4 I welcome any additional input you may have in that
5 regard, counsel.

6 MR. KOHL: Your Honor?

7 THE COURT: Yes.

8 MR. KOHL: Just one more point. I think the
9 Attorney General himself said that all of the tweets make
10 his job harder. It makes our job harder, too, because it
11 seems that he looks at the tweets and draw correlations
12 that just aren't really true and that's why I think the
13 further we get away from the facts, the further we get
14 away from what we've learned in this case, you know, the
15 easier it is to speculate to all kinds of things.

16 I'm telling you both of us that have looked at
17 the evidence, I was there with Jocelyn Ballantine as we I
18 think in the last several months, we've actually looked at
19 the files, the former files in the Special Counsel's
20 Office, notes from people from DOJ and found many of these
21 documents. That's what drove this decision ultimately was
22 a decision that in the end, what was told to the Court in
23 the statement of offense, we just couldn't prove in terms
24 of actual evidence.

25 THE COURT: All right. How should the Court

1 factor into its decision making the undisputed fact that
2 not one attorney from the Special Counsel's Office signed
3 onto the motion to dismiss? I recognize Ms. Ballantine as
4 you said has -- she's with the U.S. Attorney's Office if I
5 understand correctly. What inferences if any are to be
6 draw from that, the fact that no SCO attorney signed on to
7 the motion to dismiss and Mr. Van Grack withdrew shortly
8 before it was filed? I have no understanding why --
9 rather than guess, I'll just ask the question if it can be
10 answered.

11 MR. MOOPAN: So that, Your Honor, I don't think
12 is a matter that you should give any weight. There's no
13 question here that the motion reflects the considered
14 decision of the Executive Branch. It is signed by the
15 U.S. Attorney. It's been defended by the Inspector
16 General. It is approved by the Attorney General. Even if
17 you had concerns about whether it reflects improper
18 authorization, the career lawyers in the U.S. Attorney's
19 Office, the most senior lawyer in that office as well as
20 the career lawyer who has been on the case virtually the
21 entire time are all on it. Why any individual lawyer is
22 or is not on it is a matter of internal (inaudible). That
23 is the sort of separation powers term that the Seventh
24 Circuit in the 2005 case that we've cited in our briefs
25 said that how the United States Attorney's Office

1 structures its affairs is the matter for the Attorney
2 General and the President. It is not a matter of the
3 courts and in that case the Court actually granted
4 mandamus when motions about (inaudible) were raised.

5 THE COURT: All right. Thank you, counsel. Why
6 should the Court consider Fokker binding? Fokker was the
7 deferred prosecution agreement case. Why should the Court
8 consider Fokker binding in this case, but not Ammidown?

9 MR. MOOPAN: Well, Your Honor, I guess I'd say
10 two things about that. First, Fokker did expressly
11 discuss Rule 48 as part of its analysis and it had the
12 sentence that I talked to you about earlier and I'll read
13 it again, which is that the leave of court authority from
14 Rule 48 it gives no power to a district court to deny a
15 prosecutor's Rule 48 motion to dismiss charges based on a
16 disagreement with the prosecution's exercise of
17 (inaudible). That was an essential element of the
18 reasoning of Fokker which remember, Fokker reversed the
19 district court for second guessing the prosecutor.
20 Ammidown did the opposite. Ammidown also --

21 THE COURT: Well, wait a minute. Before we
22 leave Fokker, Fokker was a deferred prosecution agreement
23 case when my colleague refused to accept the deferred
24 prosecution agreement.

25 The language you just referred to, wasn't that

1 merely dicta in the Fokker opinion?

2 MR. MOOPPAN: No, Your Honor. It was an
3 essential aspect of the reasoning. The Supreme Court has
4 made clear in cases like Seminole Tribe that the holding
5 of the cases, not just based on the facts, but it's based
6 on the essential legal reasoning. Seminole Tribe is one
7 of the leading cases for that proposition, Your Honor.
8 And the legal reasoning of Fokker relied heavily on Rule
9 48. This isn't some stray sentence in Fokker. There's a
10 whole section of the opinion that talks about Rule 48 and
11 how the limits on Rule 48 are what I just read to you and
12 why those likewise apply under the deferred prosecution
13 agreement context.

14 Ammidown though is the exact opposite. In
15 Ammidown, there, too, the Court of Appeals, actually much
16 like in Fokker reversed the district court and said the
17 district court had gone too far. The language that Judge
18 Gleeson has relied on, that really is dicta because that
19 was talking about situations where maybe you could deny a
20 motion. But that wasn't presented in the case and the
21 court didn't actually affirm a district court verdict
22 denying a motion. In fact as I discussed earlier, no
23 appellate court ever in the history of this country has
24 affirmed a substantive denial of an unopposed Rule 48
25 motion and of course, Ammidown was decided in 1973. The

1 very next year, 1974, the Supreme Court in the Nixon
2 decision said the Executive Branch has the exclusive
3 authority and absolute discretion whether to prosecute a
4 case. Absolute discretion. That is simply irreconcilable
5 with any standard that says you can deny the motion
6 because of favoritism or pretext or anything else.

7 THE COURT: All right. I recognize the
8 government disagrees with Mr. Gleeson's recitation of the
9 history of Rule 48(a). The question though is don't the
10 two opinions, Fokker and Rinaldi, leave open the
11 possibility that courts may review Rule 48(a) motions for
12 reasons other than prosecutorial abuse?

13 MR. MOOPAN: Your Honor, so I don't actually
14 disagree with Judge Gleeson's description of the history
15 of Rule 48. I disagree with the inference he draws from
16 that history. It is true that there are evidence that the
17 drafters of Rule 48 were worried about a specific type of
18 prosecutorial abuse. Namely, rogue individual prosecutors
19 doing things that were on a frolicking detour. Whether
20 it's a U.S. Attorney out in Montana who gives a break to,
21 you know, a prominent person out there or an individual
22 prosecutor who is bribed or an individual prosecutor who
23 just wants to take a vacation.

24 None of that, none of that, there is no history
25 that suggests when the Executive Branch as a whole makes

1 an authoritative decision when the Attorney General of the
2 United States has decided that a case should end
3 (inaudible) that a court can disregard that and
4 (inaudible) the case continue. There's no history of
5 that. There's no case that's ever done it.

6 THE COURT: All right. All right. Thank you.
7 I want to shift gears, counsel. I'm going to focus on
8 Mr. Gleeson. He's been very patient. I see he's walking
9 around now at his desk. I don't want him to be impatient.
10 So I'm going to give him some time.

11 Mr. Gleeson, good afternoon, sir. On what
12 authority could the Court deny the motion without
13 prejudice?

14 MR. GLEESON: Your Honor, you have discretion to
15 do that. It's certainly an oddity in one of the many
16 distinctive, unusual, really unprecedented, although you
17 know the Ted Stevens case certainly better than I do. But
18 when the government makes a motion under Rule 48(a) to
19 dismiss a case, the default relief is always dismissal
20 without prejudice. I think you can canvass government
21 motions to dismiss and you will -- you're not going to
22 find one with the possible exception of the Ted Stevens
23 case you mentioned earlier where they seek to have a
24 dismissal with prejudice. So it's one of the many. And,
25 judge, I'm going to answer your questions. But I have a

1 lot to say and if I don't say so myself, it really needs
2 to be said and I hope you give me an opportunity later.

3 But on this point, the off the rack, the full
4 rule is a Rule 48 motion is when it's granted, it's
5 granted without prejudice. Here the government has asked
6 for more. It's in keeping with the fact that the
7 government has kind of erected an entire different set of
8 legal rules and factual concerns solely for the case
9 against Michael Flynn. But from my perspective as amicus,
10 I think, you know, the academic question as to whether the
11 without prejudice off the rack default relief ought to be
12 granted here is entirely that. It's without prejudice.

13 I will say this. You know, there is (inaudible)
14 who pointed out there's the FARA case. There's also
15 multiple false statements. You know, the conversations
16 with Kizlyak, there were two separate sets of
17 conversation. The 22nd and 23rd of December involving the
18 Russia's position on the Israeli settlements and the U.N.
19 resolution there and then the conversations on the 29th
20 and the 31st regarding the President Obama's sanctions and
21 the requested Russian response to those. Those are
22 separate units of prosecution. So it's not as though
23 there's not plenty at stake. There is plenty at stake.
24 If the government's motion were to be granted pursuant to
25 the typical rule and as this Court knows, I have asked --

1 I have suggested to this Court in connection with the
2 potential perjury prosecution, you should treat this case
3 like you treat any other. There's a lot of heat, not much
4 light. A lot of -- a blizzard of things that I'd like to
5 address a little bit later. But it's a federal criminal
6 case in a federal courtroom. It should be treated like
7 any other.

8 So in that regard, if you grant the motion, the
9 motion should be granted without prejudice, but I don't
10 really feel like I as amicus have a dog in that race.

11 THE COURT: All right. Let me ask you this.
12 You've not recommended that the Court preside over an
13 evidentiary hearing. Am I correct in saying then that --
14 actually, I don't want to speak for you. You have not
15 made that request. And what's the principal reason for
16 that? Is the record sufficient to enable the Court to
17 rule as a matter of law?

18 MR. GLEESON: Yes. You don't need one because
19 part of your job under Ammidown which was not overruled
20 sub silencio by Fokker. I'll get to that later if the
21 Court will allow me to. But part of your job is to ask
22 for the reasons and the factual basis for the reasons.
23 And they have to be the real reasons. And these reasons
24 are so patently pretextual that the government feels the
25 need to keep coming up with more of them. Sometimes in

1 another setting, it might be the need to have a factual
2 hearing to determine pretext, but here it jumps off the
3 record in the case.

4 THE COURT: If the Court were to deny,
5 Mr. Gleeson, the government's motion, would the next
6 logical step be to address the motion to withdraw --

7 MR. GLEESON: Yes.

8 THE COURT: -- the guilty plea? All right.

9 MR. GLEESON: And that motion is -- sorry to
10 interrupt, judge. Go ahead.

11 THE COURT: No, no, no. You go right ahead.
12 No.

13 MR. GLEESON: I'd like to address that because I
14 just heard -- I can't believe some of the things I'm
15 hearing and I'll tell you, judge, you don't know me. I'm
16 not prone to hyperbole. I can't believe some of the
17 things I'm hearing. Of course, it's the case that this
18 Court would never accept a guilty plea from someone who
19 claims that he's innocent. Of course, that's the case.
20 That's not what's happened here.

21 what's happened here is this defendant knowingly
22 and voluntarily and in the face of evidence that proves
23 his guilt every which way pled guilty not once, but twice.
24 And people who don't hang around federal courtrooms don't
25 really get just how important it is to enter a plea of

1 guilty. They don't get the formalities required by Rule
2 11. They don't get the solemnity of a guilty plea
3 proceeding in federal court. And those things are -- all
4 of that happens for a reason.

5 People can't plead guilty and then show up for
6 sentencing as this defendant did on December 18, 2018 and
7 see how the wind is blowing, hear the Court say -- not for
8 nothing -- I'm from Brooklyn -- not for nothing, but this
9 crime was committed in the West Wing. And get a feel for
10 how the wind is blowing and then say whoa, I have a change
11 of heart and seek to withdraw a guilty plea that was
12 entered and accepted twice. You didn't appoint me to
13 argue against the motion to withdraw the plea. But that
14 motion has no merit.

15 THE COURT: All right. What about the tweets?
16 You've devoted a lot of time and effort to bring it to the
17 Court's attention these tweets attributed -- allegedly
18 attributed to the President. What weight, if any, should
19 the Court give to that material?

20 MR. GLEESON: You should give a lot of weight to
21 that material. And if I could address that briefly? You
22 know, your job, judge, on the second prong of our motion,
23 you know, we've told you that we've advocated that you
24 deny this motion to dismiss the case and one reason is you
25 have to get the right reasons, the real reasons and you

1 haven't.

2 But a second and completely independent
3 (inaudible) for our motion -- for our opposition to the
4 motion rather is that the -- it's a gross abuse of
5 prosecutorial discretion. And in that regard, there's a
6 couple of buckets of clear evidence in the record which is
7 why you don't need a hearing. One happens to be all the
8 pretexts that keep coming over the transom. Honest to
9 goodness, I feel like taking a break and looking at the
10 docket sheet to see if another supplemental submission has
11 been made with yet another reason because when we point
12 out the hollowness of materiality or an inability to prove
13 falsity when a defendant has pled guilty as many times as
14 this defendant. You know, we've proved the pretextual
15 nature of the ostensible reasons advanced and you just get
16 some additional reasons and I want to come back to that
17 later if I can.

18 But the second ground -- the first bucket of
19 evidence is exactly that. Judge, you're familiar with
20 criminal cases and the notion of consciousness of guilt.
21 You know, the fact that you get so much pretext is a basis
22 for you to draw the inference that there's a real reason
23 that's not legitimate that they don't want to share with
24 you.

25 And these tweets are the second bucket. The

1 actions of the President and the statements of the
2 Attorney General himself constitute more direct evidence
3 that, man, that's a friend in high places, the highest
4 possible place who wants DOJ to scuttle this case. And if
5 I can just touch briefly on some of this evidence. Flynn
6 is an early advisor. I'm going to get to the tweets in a
7 second, although I promise you there are more than a
8 hundred tweets and re-tweets by the President of the
9 United States about this case. I promise you I'm not
10 going to go through all of them.

11 Flynn is an early advisor, a crucial, political
12 ally to the President during the last presidential
13 election campaign. From the outset of the case in tweets
14 and in the media, the President has engaged in a running
15 public commentary about it through media and on Twitter.
16 We've learned here today he's consulting with defense
17 counsel. He's closely following the proceedings. He's
18 personally vested in ensuring that this prosecution ends
19 and he has a deep animosity toward those who investigated
20 and prosecuted Flynn before the about-face happened in the
21 Justice Department.

22 As I say, there's literally hundreds of tweets
23 and re-tweets, but let me just highlight a couple. On
24 March 31, 2017, the President tweeted that the
25 investigation that gave rise to a charge to which this

1 defendant admitted guilt was a witch hunt of historic
2 proportion.

3 In a June (inaudible) 2018 interview, the
4 President weighted into the facts. Maybe he didn't lie,
5 the President said. Even though by then, Flynn had
6 admitted his guilt in writing under penalty of perjury and
7 under oath in open court before one of your colleagues.

8 The next month the President wrote it's a shame
9 that the FBI didn't think he was lying. A false and also
10 a legally irrelevant trope that later appeared in the
11 government's own papers.

12 When Flynn came into your courtroom for
13 sentencing on December 18, 2018, the President tweeted
14 good luck. And in March of this year, he tweeted that he
15 was strongly considering a full pardon for Flynn.

16 Then in late April about a week before the
17 government filed this instant motion to dismiss this case,
18 the President's remarks got uglier. He called the case a
19 scam. Said Flynn had been tormented and persecuted by
20 dirty, filthy cops at the top of the FBI as well as
21 certain news outlets.

22 He also advanced another false narrative that
23 the government's adopted in its motion to dismiss that the
24 agents were trying to force Flynn into a position where
25 they could get him to lie. They went to Flynn's office

1 with the express intention of nudging him into tell -- of
2 reminding him of the very words he used in his
3 conversations with Kislyak. At one point, Flynn said to
4 them, hey, good reminder. So this notion that they're --
5 putting aside the fact that there's no other case in
6 America where DOJ suggested some kind of defense to a
7 false statements case, let alone a reason to dismiss one,
8 that the person is put in a position where the FBI knows
9 he will lie and they want him to lie, that's not even what
10 happened here.

11 And, judge, you know, these case-specific
12 communications by President Trump were made against a
13 backdrop of an open disdain on his part for the
14 independence from the Justice Department. Every
15 president's case since Watergate has respected the need
16 for DOJ independence, FBI independence from the president.
17 But not this President. In an interview with the New York
18 Times in December of 2017, he said -- he has "the absolute
19 right to do what I want to do with the Justice
20 Department."

21 The Attorney General himself said publicly just
22 seven months ago that the President's public statements
23 and tweets about pending cases "make it impossible to do
24 his job," meaning the Attorney General's job. And "to
25 assure the courts and the prosecutors in the department

1 that we're doing our work with integrity." As this Court
2 showed about an hour ago.

3 Some things are so important they bear
4 repetition and this is one. This is the Attorney General
5 of the United States who said in an interview with ABC
6 News, an exclusive interview with ABC News, February 13,
7 2020. That the President's public statements and tweets
8 have made it impossible for the department to assure
9 courts like you that they're doing their job with
10 integrity.

11 We pointed this out. The government doesn't
12 disagree with any of this. It can't. He didn't even
13 mention the President's personal lobbying for Flynn or his
14 usual ad hominem attacks on those that were previously
15 involved in the prosecution. Quoting the Attorney
16 General's own admission that the President's interference
17 with the work of the Justice Department has made it
18 impossible to assure courts that DOJ is doing its work
19 with integrity.

20 So based entirely on evidence that's already in
21 the public view, really the only coherent explanation for
22 the government's exceedingly irregular motion creating
23 standards of materiality that they fight in every other
24 case, but they apply to the President's friend, the only
25 inference you can draw is that the Justice Department has

1 done exactly what the Attorney General said was the danger
2 of these tweets, which is a yield to the President's
3 pressure.

4 THE COURT: All right. I have a number of other
5 questions, Mr. Gleeson, government counsel and Ms. Powell.
6 I know everyone wants to supplement the record. I know
7 that you've been preparing for the argument. So let me
8 just afford each attorney an opportunity to place on the
9 record any argument that he or she had prepared to make.

10 The government -- I asked a lot of questions of
11 the government that focused on Ammidown, Fokker, that
12 touched on Rinaldi. So I'll ask Mr. Gleeson to address
13 the -- how the Court should be persuaded by Ammidown,
14 Fokker and Rinaldi and also to address whether or not
15 Fokker is binding here and any other principal argument
16 that he would like to place on the record.

17 Then I'm going to give Ms. Powell an
18 opportunity. I think I have three or four questions to
19 ask her and I'll give her an opportunity to supplement her
20 part of the record with any argument she wants to make as
21 well and then I'll give the government a chance to -- the
22 government is the moving party in this case. I'll give
23 the government a chance to close with whatever additional
24 argument the government attorneys wish to make.

25 Mr. Gleeson?

1 MR. GLEESON: Yes. Thank you, judge. You know,
2 and I've been thinking in light of your recitation of the
3 parties' arguments and the questions you've already posed
4 to counsel and I've been working and truncating my
5 arguments to the Court appropriately. And I think what
6 I'll do is begin and obviously, the Court has shown its
7 ability to ask questions. To ask them. So obviously, I'm
8 willing to answer any of your questions. But I think it's
9 useful as a level setting matter to begin to focus on
10 Ammidown and Fokker with the government's argument about
11 separation of powers and there was a telling piece of one
12 of the comments made by government counsel earlier.

13 Now their argument about your authority to deny
14 this motion, an authority that appears in the text of Rule
15 48(a). Offending the separation of power doesn't work at
16 all and it doesn't work because it's blind to the context
17 in which this Court is acting. It's absolutely true,
18 Judge Sullivan, that the executive has a power that is
19 unreviewable at least in a court of law not to bring
20 charges, criminal charges at all. And it's also true that
21 the President has a power that's reviewable only in the
22 court of public opinion to pardon or grant sentencing.
23 But neither of those situations creates any risk of
24 targeting the integrity of your branch, of the third
25 branch of government.

1 This case is different because the government
2 chose to lodge a criminal case in your Article III court.
3 Now let me hasten to add that doesn't mean that the
4 executive's primacy when it comes to charging decisions go
5 away because it brought the charges. It doesn't mean
6 that. That primacy doesn't go away. Decisions to dismiss
7 pending criminal charges also lies squarely in the
8 prosecutor's discretion.

9 And I concede this and I think it's an essential
10 part of our tripartite in our system of government. The
11 government is entitled to a strong presumption of
12 regularity when it makes a motion to dismiss. But both
13 Ammidown and Fokker, separation of powers principles are
14 not offended when a court is faced with clear evidence
15 that prosecutors have failed to perform their duties in
16 good faith. There is deference to be accorded to the
17 executive. But it's (inaudible) deference. It's a
18 presumption of regularity. But it's not a presumption
19 that can't be rebutted. And the evidence that prosecutors
20 are acting in bad faith, that they are abusing their power
21 pierces the presumption of regularity and this Court is
22 free to deny (inaudible) under Rule 48 to vindicate
23 fundamental judicial interests and related public
24 interest.

25 I embrace Fokker. I don't have to run from

1 Fokker. There's no sense in which Fokker recites Ammidown
2 approvingly overruled. Fokker is -- you understand it
3 correctly, of course, Your Honor. Fokker is -- it is
4 dicta. The case involves as, you know, a deferred
5 prosecution agreement and the exclusion of time under the
6 Speedy Trial Act. And there's language in there including
7 the language read by my adversary. That relates to the
8 executive's primacy. But the case cites Ammidown
9 approvingly. It makes clear that if there's clear
10 evidence that the prosecutor is acting inappropriately,
11 the presumption of regularity disappears. This court said
12 in Ammidown, the requirement of judicial approval entitles
13 the court to obtain and evaluate the prosecutor's
14 decisions. And Fokker left that untouched. It's dicta.
15 Leaves it untouched. There's other parts of the opinion
16 that have been read to you. I suggest respectfully you
17 read Fokker as a whole. The one thing it adds and again I
18 embrace it is an emphasis on the executive's primacy in
19 determining not only whether to charge, but in determining
20 whether to dismiss a charge once brought.

21 The one fundamental difference that Fokker does
22 not to do anything to eviscerate is (inaudible) to
23 unqualified power and choose not to charge.

24 And, you know, I think it is important to
25 address the history of Rule 48. It's (inaudible) to my

1 mind unfairly denigrated by my adversary a minute ago.
2 It's an important part of my argument, judge, and I think
3 the important part is your understanding of what the legal
4 core language means to see where it came from. We know
5 where it came from.

6 Back in the 1920's there was a federal tax
7 collector out in Missoula, Montana. His name was Franklin
8 Woody. He's indicted on an embezzlement charge. But he
9 wasn't an ordinary defendant just like this case.

10 His grandfather was Missoula's first mayor and
11 later a judge. His dad was a friend of the governor. The
12 first tell in that case was a warrant issued, but the
13 marshal claimed that he couldn't find Woody. Then the
14 government moved to dismiss the case and because at that
15 time, its power to do so was unreviewable, it said out
16 loud that one of its reasons was the defendant was from a
17 prominent family and it added that the government didn't
18 want to spoil his future career as a lawyer.

19 This made the district judge extremely uneasy.
20 He said what the government was doing -- by the way, the
21 district judge said nothing about a rogue prosecutor or
22 this is not the official position of the Department of
23 Justice. I encourage you to read that opinion. It's at 2
24 F.2nd. 262 (District of Montana) 1924.

25 what the district judge actually said is that

1 what the government was doing fueled the common criticism
2 that "the criminal law is for none but poor, friendless
3 and influential." Few things are more pernicious, that
4 judge went on to say, than the disparate treatment of
5 defendants who have friends in high places. And he
6 mentioned specifically how it harmed the court side. No
7 leave of court was necessary. So he couldn't prevent it.
8 He went on to complain about the fact that the law didn't
9 even require the prosecutor to give a reason for the
10 dismissal. But because he had to, he reluctantly granted
11 the motion, but good for him. He wrote that opinion. He
12 followed the law, but wrote the opinion complaining about
13 it and that's one of the way the law changes, Judge
14 Sullivan. Others made similar complaints.

15 And then in 1941, the Supreme Court appointed an
16 advisory committee to create Rules of Criminal Procedure.
17 The committee's initial proposed rule dealt only with one
18 of the problems that that judge mentioned. It required
19 that prosecutors only offer a statement of reasons for the
20 dismissal. The Supreme Court sent it back with a
21 suggestion. Cited a case that said that the court reviews
22 errors of law even when the government contests it's
23 error. So it sent it back with a suggestion to give a
24 rule to the judges in policing the dismissal of criminal
25 charges. But the advisory committee didn't get the hint.

1 It sent back a final rule that still only required a
2 statement of reasons. So the Supreme Court itself rewrote
3 the rule. Put the leave of court requirement in it. That
4 language that is at the heart of today's dispute.

5 So the government's claim that the language
6 exists just to allow judges to protect criminal defendants
7 from prosecutorial harassment is not just counter-textual.
8 You can't find that text in the rule, of course. And it's
9 not only lacking in historical support, but the history of
10 this rule, this leave of court language flatly refutes it.
11 The reason this language was put into the rule was
12 precisely to empower courts in the rare case, admittedly
13 in the rare case like the one presented before you today
14 in which prosecutors have abused their discretion to have
15 abused their really enormous power to dismiss a case, it's
16 a, you know, not for nothing, but this hasn't happened in
17 the -- well, no more than half a century since Rule 48(a)
18 was promulgated.

19 But so the executive has that unreviewable power
20 before they come into your courtroom. They have the
21 unreviewable power on the back end. You know, if the
22 executive wants to take Michael Flynn off the hook, he can
23 pardon him. But if he does that, it doesn't inextricably
24 bind up this Court, this judge in the unseemly desire to
25 scuttle a case simply because the defendant is a friend

1 and ally of the President of the United States.

2 Sorry, judge. To the extent I'm fumbling with
3 my papers, the good news is I'm streamlining the argument
4 in light of what's already come before us.

5 THE COURT: No, no. That's fine. Take your
6 time, counsel.

7 MR. GLEESON: Thank you. The requirement that
8 the government explain its reason which is the direction
9 that Ammidown gives to this Court is critical. If it were
10 allowed to hide behind an opaque claim that dismissal is
11 in the public interest --

12 THE COURT: Mr. Gleeson, I'm sorry. If I
13 overlook the court reporter, she'll leave the courtroom.
14 So we are going to have to take a 15-minute recess. I
15 have to keep peace with everyone in the courtroom. I'm
16 sorry if I overlooked the court reporter. She is the most
17 important person in the courtroom, I can tell you that.
18 We'll take a 15-minute recess.

19 (Recess.)

20 THE COURT: All right, Mr. Gleeson. Let me just
21 say something to everyone. We started early, but we've
22 had a couple of recesses. Everyone's pleadings have been
23 excellent and this is a motion that the defendant doesn't
24 oppose. So I'm going to give Mr. Gleeson a few more
25 minutes. Maybe you can talk about discretion. Where does

1 it start? where does it end? I mean I have some
2 discretion. I think the government concedes I have some
3 discretion. But I'll let Mr. Kohl and his colleague
4 address that.

5 But it's late in the day. A lot of my questions
6 have been answered. And the pleadings address the other
7 questions I have. But let me just give Mr. Gleeson a few
8 more minutes and then I'll hear from Ms. Powell. I just
9 have four questions to ask her and I'll give her a chance
10 to without being repetitive make any additional brief
11 arguments she wishes to make.

12 Mr. Gleeson?

13 MR. GLEESON: Yes, judge. You know, I was going
14 to say if I take another 15 minutes, I think I've
15 shortened my remarks by more than 15 minutes.

16 THE COURT: Great. That's fine. And, you know,
17 originally when we started because there were so many
18 issues in this case and because everyone had done an
19 absolutely excellent job of wrestling with those issues, I
20 thought I might save a lot of time by focusing on the
21 Court's understanding because if I'm wrong about
22 something, then I want someone to tell me that I'm wrong.
23 So I don't regret having done that.

24 I think I've got a really good grasp of the
25 issues in the case and I understand everyone's position

1 and I know that counsel have prepared for your moot court
2 proceedings to make presentations and I don't want to
3 deprive you of that opportunity. So go right ahead,
4 Mr. Gleeson.

5 MR. GLEESON: Okay. I hear you, judge.

6 When we broke I was about to emphasize how
7 critical it is that the government explained its reasons.
8 And I don't mean to not answer directly the question that
9 you posed for me. I do want to come back to some
10 discussion of the government's ostensible reasons --

11 THE COURT: Sure.

12 MR. GLEESON: -- for dismissing the case.

13 But when it comes to your discretion, one of the
14 ways I found to track and to characterize your authority
15 under Rule 48 is what was said by the Fifth Circuit in the
16 Cowan case that's cited in our briefs which says that what
17 Rule 48 did was give district judges the power to check
18 (inaudible) and that's really what this is. You know, you
19 have authority because (inaudible) judicial branch not to
20 be -- not to become an instrument, not to feel the same
21 queasiness that judge felt 93 years ago in Montana where
22 you become an instrument of unseemly bad faith and
23 misconduct by the government --

24 THE CLERK: Excuse me, Mr. Gleeson. This is
25 Mark Coates. Parties, can you do me a favor and mute your

1 phones and your audio devices when you're not speaking?

2 Thank you very much.

3 MR. GLEESON: Okay. You know, and so the heart
4 of the reason you have the discretion is notwithstanding
5 the primacy of the Executive Branch when it comes to the
6 determination to dismiss the case. It's a qualified right
7 and it's qualified because when it does so in
8 circumstances like the one presented before you, Judge
9 Sullivan, it erodes people's confidence in the judicial
10 branch to see you become an instrument of this kind of
11 behavior.

12 The reason for the requirement that the
13 government not only state reasons, but provide factual
14 basis for their reasons is because if they were able to
15 hide behind an opaque claim that dismissal is in the
16 public interest, it would defeat the purpose of the leave
17 of court requirement. I mean the incantation alone would
18 send you right back to the rubber stamp days that the
19 Supreme Court decided judges would no longer have to live
20 in and it would deprive you of the opportunity, the
21 obligation that Ammidown gives to you and Fokker doesn't
22 touch to defer to the government's stated reasons, but not
23 defer blindly and examine them.

24 So, you know, when the power was unchecked as
25 the Cowan court says this is a power, checked power, when

1 it was unchecked, the prosecutor if she chose to or he
2 chose to could say to the judge squirm all you want about
3 being the instrument of our unseemly conduct, but just
4 grant the motion because you have to because the defendant
5 has a friend in a high place.

6 But Rule 48 changed that. And now so the --
7 obviously, the incentive to act on pretext in unseemly
8 circumstances like that was created by Rule 48 itself.

9 Now what I want to do is turn to exactly what's
10 happening here and, judge, I'd like you to give me -- it's
11 not that long.

12 THE COURT: Sure.

13 MR. GLEESON: I would like to walk through the
14 stated basis for this motion as made and then I'm just
15 going to talk briefly about the stones to which the
16 government has jumped mid-stream I think because the
17 stated bases hold no water at all and then I'll sum up
18 very briefly.

19 Let me start with materiality. The
20 government -- to back up, Flynn was interviewed by the FBI
21 and it was conducting an investigation, judge, into
22 possible coordination between Trump campaign officials and
23 the Russian government. Flynn was a campaign advisor. He
24 had traveled to and business ties with Russia and just a
25 month earlier, a month prior to this interview in which he

1 made his false statements, he had inappropriate back
2 channel requests that he made of the Russian ambassador.

3 When the FBI repeatedly asked him about those
4 communications, he lied. That is -- I'm a former
5 prosecutor. You've been around the courtroom a long time.
6 That's about as straightforward a case of materiality as
7 this court will ever see.

8 Under the actual law, not the standards the
9 government has put forward just for Michael Flynn, the
10 test is objective. The false statements are material if
11 it has a natural tendency to influence or is capable of
12 influencing either a discreet decision or other function
13 of the agency to -- you look -- and I've curtailed this
14 quite a bit, Your Honor, since your summary. You look at
15 the qualities of a false statement and ask whether they
16 are capable of affecting the general function of the
17 agency -- that the agency is performing. Flynn's lies not
18 only potentially affected, it actually affected according
19 to the government itself in prior iterations in this case
20 in the course of the FBI's investigation. Earlier
21 submissions by the government stated they were "absolutely
22 material" because they prevented the FBI from learning why
23 his communications with Kislyak occurred. They raised
24 questions about why the defendant would lie to the FBI
25 about those communications and fundamentally influenced

1 the FBI's investigated activity going forward.

2 The government itself said that and the Court
3 agreed with it in your ruling back last December. And how
4 could you not? To put this very succinctly and very
5 bluntly, pursuant to an active investigation into whether
6 Trump campaign officials coordinated activities with the
7 government of Russia, one of those officials lied to the
8 FBI about coordinating activities with the government of
9 Russia.

10 The conclusions the government has engaged in to
11 contradict its own filings are not pretty. When was the
12 last time, Judge Sullivan, you had a case where the DOJ
13 took the position that a lack of predication for an
14 investigation mattered even in the slightest in a false
15 statements case, let alone warranted dismissal of the
16 case? For one thing, the premise is simply false.
17 Predication is never a prerequisite for the FBI to conduct
18 the kind of voluntary interview that happened in this
19 case. But even if it were, I bet you've heard -- I did
20 when I was in your position. I bet you've heard what I'm
21 about to say hundreds of times from the mouths of
22 prosecutors. A violation of the internal guidelines never
23 gives rise to any rights on the part of the defendant. We
24 pointed that out in writing and the government's silence
25 in that respect is deafening. It's jettisoned any

1 reliance. And what it previously characterized to you as
2 a critical predication threshold formed the backbone of
3 the original motion. A red flag for pretext.

4 The government also relies on a draft memo that
5 would have closed Crossfire Razor, the Flynn specific
6 investigation under the Crossfire Hurricane umbrella.
7 Because of Flynn's subsequent crimes, the Crossfire Razor
8 was not closed. But honestly, judge, whoever heard of
9 such a memo mattering even to a defendant, let alone to
10 the government, let alone becoming a basis for dismissing
11 a case after the defendant has twice pled guilty?

12 And since when does it matter that the -- sorry.
13 Since when does it matter that (inaudible) point in the
14 investigation the FBI classified the investigation as
15 criminal or counter-intelligence? All of these
16 administrative things, meaningless administrative things.
17 If it weren't such a blow to the rule of law, the
18 government's odd disclosure of them, these administrative
19 tidbits and acting like they were some kind of smoking gun
20 would be laughable. They never come up in any other case.
21 Materiality is not complicated.

22 The Supreme Court says in the Gordon case what
23 statement was made, what decision was the agency trying to
24 make and how in general could the former affect the
25 latter. The answer to each of these questions is so clear

1 and entirely unaffected by the irrelevant arguments made
2 by the government.

3 One last thing about materiality and it's the
4 most troubling is they've been adopted just to help this
5 one defendant. Suppose you had another defendant in
6 another false statement case stand in your courtroom and
7 demand disclosure of whether the agency at one point
8 thought about closing the investigation or demanded
9 production of the facts in which the investigation was
10 predicated or demanded to know what the investigating
11 agents subjectively believed at different points in time
12 about whether the defendant was telling the truth. Even
13 if a defendant hadn't twice already pled guilty, judge,
14 the government would laugh at those demands. And I
15 respectfully submit that this Court which has
16 distinguished itself in a positive way is perhaps the most
17 demanding judge in the country when it comes to
18 disclosures by the government would deny those requests.

19 The government has also manufactured a
20 materiality standard just for Michael Flynn. He says in
21 his motion that a statement is material if it's reasonably
22 likely to influence the tribunal in making a determination
23 required to be made. And it italicizes those last four
24 words. Citing a 74-year-old case that's no longer good
25 law. And the response to our brief, it says the

1 prosecution was brought on the theory that Flynn's oral
2 statements had a material impact on the FBI's ongoing
3 investigation. Those are not standards for materiality
4 anywhere else. And I guarantee you in every other
5 courtroom in America where a defendant asks for that
6 standard to be given to the jury, the government will
7 fight tooth and nail to keep it from happening. But
8 that's the standard that they drag out from Michael
9 Flynn's case.

10 And, judge, I don't mean to suggest for a minute
11 that these false statements don't -- all of the
12 statements. Even the government's. That's not my point.
13 My point is not that the defendant-friendly standards
14 would actually make a difference in this case. But rather
15 that the government's willingness to try to sell them here
16 when you know and I know that they'll oppose them
17 elsewhere says so much about what this motion is really
18 about.

19 The government says that the interviewers went
20 to the white House -- I covered this before -- they went
21 to the white House with the intention to help Michael
22 Flynn because he didn't remember his false statements.
23 They were going to nudge him and they did nudge him.

24 The government previously told this Court that
25 Flynn's false statements went to the heart of Crossfire

1 Hurricane, which was alone sufficient to establish
2 materiality and then when he pled guilty, he admitted his
3 lies materially impacted the FBI's investigation.

4 There's no rational view of the law of
5 materiality pursuant to which Flynn's false statements can
6 be reasonably described as immaterial. When he turns to
7 falsity briefly as a fall back, the government says it
8 can't even prove that Flynn lied and, judge, this is not
9 an argument that can be taken seriously. First of all, it
10 doesn't have to prove Flynn lied. He's pled guilty and,
11 you know, one of the questions I'm going to suggest that
12 this Court asks the government when it speaks again is
13 just what it really means that every time someone pleads
14 guilty and then they come into court for sentencing and it
15 looks like things might not go well, then they ask for
16 their plea back, the government is going to agree to it.
17 I don't think so. That's not how the government works.
18 That is not how the law works.

19 But worse than that is the government has
20 painted itself into an impossible corner on this. Flynn
21 repeatedly admitted he lied. He did it in his
22 debriefings. He did it under oath before you. He did it
23 under oath before Judge Contreras. He did it subject to
24 penalty of perjury the night before he pled guilty before
25 Judge Contreras when he adopted the statement of reasons.

1 And now he says wait, those admissions weren't true. They
2 were coerced by a threat to prosecute my son. But the
3 government's position is he's lying about that. It denies
4 that happened. So why can't it use his own admission?

5 There's no answer in the government's papers.
6 This is what happens. We point out they scratch the
7 surface a tiny bit. We point out how completely and
8 utterly hollow the government's ostensible reasons are and
9 they abandon them and find some others. There's no
10 answer. And so there's no answer to the question of
11 whether under the terms of his cooperation agreement, they
12 can use his own admissions. They say they can't prove his
13 guilt if he goes to trial. But they can use his
14 admissions and we know that because we can read.

15 Paragraph 11 of the cooperation agreement allows
16 the government to use those guilty pleas, those statements
17 that he made during his debriefing whenever he wants
18 because Flynn breached the agreement by committing perjury
19 which even the government itself admits.

20 In any case, forget the admissions, judge.
21 Flynn's case is plain. There's a reason he pled guilty
22 and cooperated with the government and it's because his
23 guilt could hardly be easier to prove. We know what he
24 said to Kislyak and we know what he said to the FBI. He
25 lied when he denied or denied recalling requests he

1 personally made of the Russian ambassador. The government
2 says it's going to be hard to prove because he lied --
3 it's going to be hard to prove he lied because he quote --
4 this is government speaking -- "he offered either
5 equivocal or indirect responses or claimed not to remember
6 the matter in question." That's false. Flynn also told
7 outright lies.

8 But let me just spend a moment because it places
9 in such stark (inaudible) the pretext that this assertion
10 actually is. Let me spend a moment on Flynn's claimed
11 failures of recollection during the interview. He was
12 asked if he encouraged Kislyak not to escalate the
13 situation in the wake of President Obama's sanctions and
14 to keep the Russian response reciprocal. Flynn responded
15 "I don't remember." The government says it would be hard
16 to prove that was false.

17 And, judge, here's the problem with this flurry,
18 this blizzard of things the government and Ms. Powell
19 says. Just think about that one dot for a second, that
20 one data point it would be hard to prove that he actually
21 remembered. He was the national security advisor. He
22 forgot within less than a month having personally asked
23 for a favor from the Russian ambassador during the
24 transition period, a favor that is sought to undermine the
25 policy of the sitting President and he forgot doing that

1 even though he had lied to the Vice President-elect about
2 that exact request less than two weeks earlier and the
3 incoming chief of staff and the incoming press secretary,
4 all of whom themselves misled the American public and
5 repeated lies publicly. Does the government really think
6 it couldn't win that case? Of course, it doesn't.

7 And, judge, I want to say this. You know, this
8 isn't easy for any of us. Not easy for me. It's our
9 Department of Justice, too. But the sad fact is you have
10 to conclude that a worry about proving Michael Flynn's
11 guilt had literally nothing to do with why this motion was
12 made. There's no other inference you can draw from these
13 facts. So the government half-heartedly throws in some
14 other lame arguments. It says they are inconsistent FBI
15 records concerning the interview meaning -- you know
16 this -- the agent's notes and the 302's and there's
17 nothing remotely unusual about there being things in the
18 notes that are not in the 302 and vice versus. There's
19 nothing unusual as you well know about statements being
20 testified to at trial that are not in either the notes or
21 the 302's.

22 The government says that the FBI agents were not
23 actually deceived by Flynn's false statements even while
24 conceding this was legally irrelevant. Nothing about the
25 falsity of Flynn's statements is difficult to prove.

1 Nothing has changed since the government itself said that
2 to the Court. Said that the evidence was consistent and
3 clear that the defendant made false multiple statements to
4 the agents. The reasons stated in the original motion
5 were obviously pretextual. And the government and Flynn
6 have been scrambling ever since we filed our brief to find
7 better ones.

8 Judge, I have to bring up the issue of agent
9 bias not because it's new necessarily, although there's a
10 new addition to it in the most recent filing to come over
11 the transom in the courthouse. It's been lurking around
12 the case for years since a couple of FBI agents were
13 dismissed. It was disclosed years ago when Flynn
14 reaffirmed his guilty plea, but it keeps coming up. And
15 the government says unconvincingly in part of the briefing
16 that agent bias would impair its ability to prove Flynn's
17 guilt and it surfaces again in this brand new submission
18 that just arrived where the interview of another agent,
19 this William Barrett says that people in the Special
20 Counsel's Office had to get Trump.

21 It's not clear to me -- and maybe the government
22 will illuminate this when it speaks -- what role the
23 government wants this to play in the Court's mind, this
24 agent bias to play in this motion? But I think the Court
25 ought to put it up on the table and poke it around a

1 little bit with the government. And let me be clear,
2 judge, I have no objection to criminal defendants
3 obtaining relief when they are subjected to bias by law
4 enforcement. Make no mistake about it if that's what the
5 government is suggesting here, it's an astonished
6 about-face. In every other case involving allegations,
7 but demonstrated irrefutable bias, federal prosecutors not
8 only don't seek to dismiss the case, they give the
9 defendant's arguments the back of the hand. That review
10 of the agents means nothing they'll say. Focus on the
11 evidence whether it objectively establishes guilt. Maybe
12 if we put the agent on the stand, you can cross him or
13 her. Although they always fight that, too, and often win.
14 But as long as the offending agents don't testify, bias on
15 part of the investigators is irrelevant.

16 Judge, there's not an experienced defense lawyer
17 in America that hasn't run across bias on the part of the
18 law enforcement agents, not because there's any greater
19 incidence of it in law enforcement. That's not my point.
20 Police officers and agents are people just like the rest
21 of us and they are immune from the explicit and implicit
22 fallacies that are baked into our society. But I ask you
23 to ask the government on rebuttal whether if it wants you
24 to grant this motion based in part on the political bias
25 of agents and prosecutors, what about other cases in which

1 defendants can demonstrate such bias or even worse,
2 invidious unconstitutional bias? Those based on race or
3 religion or ethnicity. Will you dismiss those cases as
4 well even if the defendant doesn't have friends in high
5 places?

6 Among the newest reasons that the government has
7 served up -- it's intriguing, too, it's been referred to
8 already today -- is this impressive sounding claim that
9 dismissal would be in the interest of justice. It talks
10 about enforcement priority and policy assessments.
11 Without telling us what the policies are and what the
12 assessments are, it says these policy assessments are
13 quintessentially unreviewable. But again it doesn't say
14 what they are. And it turns out when you -- to the extent
15 there is any light to shed on what the underlying facts
16 are, they rely on the circumstances surrounding Flynn's
17 interview which are exactly the same legally irrelevant
18 facts it relies on for materiality and falsity.

19 And, judge, if you accept the government's
20 argument that from the highest ranks of the Justice
21 Department, we assure you we've done this in the interest
22 of justice so therefore, you must grant this motion, you
23 have become the rubber stamp the Supreme Court decided to
24 eliminate when it rewrote the proposed Rule 48 that was
25 submitted by the advisory committee and inserted the leave

1 of court requirement.

2 This hasn't ended. The government keeps
3 advancing reasons why it should dismiss. You heard some
4 new ones today. You have this new interview of Agent
5 Barrett. Judge, that interview happened last week, months
6 after the government made its motion to dismiss. And
7 Agent Barrett believes that Flynn lied. And opposing this
8 motion which I'm proud to do at the Court's request has
9 become a game of whack-A-Mole. And the most bizarre
10 process I witnessed the government continues to honor
11 utterly inconsequential administrative and investigative
12 tidbits. It launders them through this weird
13 investigation being conducted out of the Eastern District
14 of Missouri and then up they pop onto your docket as the
15 supplemental reason why you should dismiss this case.
16 It's sad. It's ridiculous and it's sad because it's our
17 Justice Department, too.

18 Let me -- and subject to the Court's questions,
19 let me just say a couple of things and then I'll sit down.
20 We agree that whenever the government moves to dismiss a
21 pending criminal case, whether it's opposed or unopposed,
22 it's entitled to substantial deference. We, too, take
23 seriously the take care clause in our Article II, Section
24 3 of the Constitution and the substantial power invested
25 in the executive. The power not to prosecute at all as

1 I've mentioned is absolute. But once a prosecution has
2 commenced, once a government brings a criminal charge by
3 indictment or information into your courtroom, the power
4 to dismiss it is qualified. You are not only entitled,
5 but you're obligated to demand the reasons and evaluate
6 the reasons and though you must presume them to be the
7 real reasons, you are not required to act like you were
8 born yesterday.

9 The Supreme Court in 1941 put an end to those
10 days where judges had to hold their noses and grant these
11 motions and become inextricably bound up in conduct. That
12 smacks of impropriety like the conduct that's happening in
13 this case. There's a completely legit role to what the
14 Executive Branch wants to accomplish here. One that won't
15 erode the public's confidence in your branch, the third
16 branch. They should take that role. We will do it this
17 way. Don't attack your own filings in this case because
18 the President wants Flynn off the hook and doesn't want to
19 use the pardon power to do it. There's no overstating how
20 damaging it is to the court, to the judiciary of which
21 this Court is a part and to the department itself. For
22 the department to create a brand new set of rules for
23 Michael Flynn, ones that will never apply to anyone else
24 and then to tell a federal judge to apply those rules and
25 dismiss the case and that just happened in a nation

1 committed to the rule of law. And, Judge Sullivan, you
2 should not allow that to happen here. Unless the court
3 has any questions, I'll sit down.

4 THE COURT: Mr. Gleeson, thank you very much.
5 And I appreciate your services in this case. Thank you.

6 I'm going to give -- I'm going to afford Ms.
7 Powell an opportunity. She's been very patient for the
8 last couple of hours to speak. She's not a moving party
9 in this case on behalf of Mr. Flynn. I'm going to accept
10 as true that she joins in the government's motion for all
11 the reasons articulated by the government. I have a few
12 questions to ask her and then I'll give her an opportunity
13 to briefly put anything on the record she wants to. But I
14 do not want her to be repetitious of what the government
15 has already said.

16 I can't see you, Ms. Powell. I assume you're
17 still here there. Are you?

18 MS. POWELL: Yes, I am here, Your Honor.

19 THE COURT: Okay. All right. That's great.
20 I'm sorry you had to wait so long. Let me ask you this.
21 Why did Mr. Flynn plead guilty twice under oath?

22 MS. POWELL: Well, first of all, Your Honor, he
23 had counsel that was hopelessly conflicted. They had an
24 unconsentable conflict of interest and could not engage in
25 effective assistance of counsel under that conflict. He

1 was not advised of all the evidence accurately that even
2 the government what little bit it had disclosed before the
3 plea.

4 And the first plea was invalid as a matter of
5 law before Judge Contreras because he was -- he should
6 have been recused then. The government knew. It held
7 text messages evidencing his relationship with Peter
8 Strzok, the lead FBI agent on the case that required his
9 recusal within a few days later and once a judge is
10 recused under the D.C. Circuit's decision in Al Nashiri,
11 nothing he did thereafter can be given any credit or use.
12 So everything that Judge Contreras did under Al Nashiri
13 has to be stricken and/or is void. So there was never a
14 valid guilty plea in the first place.

15 When this Court proceeded to sentencing on or to
16 schedule a sentencing hearing on December 12th, which
17 reminds me there had never been a sentencing. It did not
18 commence. The Court shifted instead to do a plea
19 colloquy, an extended plea colloquy of which General Flynn
20 was not informed before the proceeding and his counsel
21 which the docket showed that we have filed coached him
22 only to if the Court offered him an opportunity to
23 withdraw his plea to say no to that. It would only be
24 giving him rope to hang himself.

25 He had not had the opportunity then to consult

1 with independent counsel. It was some months later before
2 that happened. As soon as he did --

3 THE COURT: well, let me just stop you there.
4 During the course of that hearing before me, I bent over
5 backwards as I always do to be fair to everyone who comes
6 before me.

7 And when the question came up about his
8 attorneys back pedaling from acceptance of responsibility
9 or what appeared to be back pedaling and that provoked the
10 discussion about, look, you know, no one is forcing you to
11 go through with this, if you want another attorney to
12 discuss this, I'll appoint an attorney for you at no
13 expense to you.

14 And I also had -- knowing that I was going to
15 ask those questions, I also had available a conference
16 room for him to speak with his then current attorneys
17 about that and I took a recess.

18 So there was an offer made by the Court to
19 appoint an outstanding lawyer to speak with him about
20 going forward and then I think his response to that after
21 talking with his attorneys and after thinking about it was
22 that he appreciated it, but he denied the opportunity to
23 have independent counsel. So it wasn't as if he wasn't
24 afforded an opportunity to speak with someone else.
25 Anyway, go ahead.

1 MS. POWELL: well, there was no independent
2 counsel for him there at that time and he was completely
3 blind-sided by the entire proceedings as were his own
4 counsel who had told him only to say no if the Court
5 offered him any opportunity to withdraw his plea. They
6 were still laboring under a non-consentable conflict of
7 interest because they themselves had done the FARA filing
8 and documents we have filed from their own files show that
9 they knew there were problems with the FARA filing that
10 were created by the government itself in its allegations
11 and by their own files. That the statements came from an
12 Eric Fox, the Eric Fox firm and from the accounting
13 records, not attributable to Mr. Flynn at all.

14 But they had the issue of being conflicted by
15 their underlying work on the FARA filing. It was a choice
16 of either, you know, we admit that we screwed up here or
17 point out that this is wrong or Flynn goes ahead with the
18 plea and they pushed him through with the plea. There's
19 no dispute about that. It really cannot be contested.

20 THE COURT: Let me ask you this.

21 MS. POWELL: That was not a valid Rule 11
22 proceeding either because this Court did not do a full
23 Rule 11 colloquy. It didn't ask about coercion. It
24 didn't elicit anything that would have shown that the
25 government knew about the conflict of interest and had

1 discussed it with defense counsel. So the Court wasn't
2 informed by the conflict and the court wasn't informed
3 about the coercion of General Flynn by threats to indict
4 his son and how the following day giving him the Manafort
5 treatment that was so notorious at the time. And the fact
6 that the government was hiding that from the Court because
7 Mr. Van Grack wanted to avoid any Giglio obligation in the
8 future.

9 I mean this Court six years ago when the Stevens
10 case came about was outraged over government misconduct
11 and hiding Brady. The government here didn't even give us
12 the right names of the agents who had written the notes
13 for 18 months. Yet, the Court voiced no concern about
14 that while it's concerned about a couple of days on
15 Strzok's handwritten notes.

16 There are Brady violations all over this case
17 and rampant evidence of government misconduct in the words
18 of the own agents who talk about partisan axes to grind by
19 people in the white House the day of or before the
20 President Obama himself and Biden met with Sally Yates and
21 James Comey when Comey told them the phone calls were
22 legitimate that Flynn had made with Ambassador Kislyak
23 because they had the transcripts of them and knew there
24 was no problem with them whatsoever. Yet, President Obama
25 in a politically corrupt investigation and prosecution

1 sent Comey out to make sure he put the right people on it
2 and continued the investigation despite the fact every
3 lead showed that General Flynn was an extraordinary
4 person. There was no derogatory information on him
5 whatsoever from any source. They had investigated him for
6 six months by then, put out national security letters on
7 him and everything else.

8 And by the way, that investigation didn't even
9 ramp up until after the election despite the fact the
10 insurance text they discussed in McCabe's office on
11 August 15th led to the opening of the file against General
12 Flynn the very next day and then sending Agent Pientka,
13 the other agent who interviewed him into a trusted
14 presidential daily briefing to spy on General Flynn and
15 President-elect Trump or nominee Trump at the time to
16 collect information on him and assess his mannerisms in
17 the event they needed to interview him later. And that
18 information was not disclosed to us until Inspector
19 General's report of December 2018 after this Court had
20 already issued its ruling on denying the Brady evidence.

21 So extraordinary Brady evidence has come to
22 light since this Court's original Brady order that shows
23 this --

24 THE COURT: Let me stop you for a second. I
25 want you to be very precise. Since the Court's ruling,

1 what is the very precise Brady material that has been
2 produced since the Court's ruling?

3 MS. POWELL: well, there's the report of the
4 Inspector General that shows that Mr. Pientka was sent
5 into a presidential daily briefing to spy on nominee Trump
6 and General Flynn to collect information on Flynn's net
7 briefing. That Christopher Wray himself found so
8 egregious the FBI has completely stopped that policy and
9 the Office of National Intelligence has said that they're
10 not even going to allow the FBI to participate in any more
11 briefings like that. It was such an egregious abuse of
12 trust. We didn't know that.

13 We have more evidence now that Agent Pientka and
14 Agent Strzok knew General Flynn was telling the truth when
15 he talked with them. That he was forthcoming. He told
16 them about a meeting with the Russians that they did not
17 even know he had.

18 We know that Agent Barnett has said there was
19 nothing but exculpatory information with respect to
20 General Flynn. There was no derogatory information at
21 all. We have the new national security letters list that
22 shows how many MSL's were sent out on General Flynn even
23 while he was in the White House, none of which produced
24 any derogatory information. They ran every kind of trap,
25 wire, lead, anything you want to talk about and there was

1 no derogatory information on General Flynn.

2 Yet, because the meeting with Obama and Biden
3 and Sally Yates and James Comey in the White House on
4 January 5th, Comey went back out despite saying the calls
5 were legitimate and instituted a politically corrupt
6 procedure as evidenced by the agents' own words and notes
7 now. They all knew it to get General Flynn and thereby,
8 get President Trump. And the mantle that Mr. Gleeson and
9 this Court have picked up since then is the mantle to
10 continue a political prosecution of General Flynn that has
11 no justification whatsoever in fact or law. It is a
12 hideous abuse of power that continues to this very minute
13 and only in other countries have any of us ever seen this
14 happen.

15 THE COURT: Have you or any other attorney on
16 behalf of Mr. Flynn filed a -- first of all, let me just
17 say I was unaware of any reasons why Judge Contreras
18 recused. I've never had a conversation with him about
19 recusal. I have no idea why he recused and I never wanted
20 to discuss with him why he recused. Has anyone filed a
21 motion to vacate the plea of guilty before him for the
22 reasons you've articulated today?

23 MS. POWELL: It's one of the reasons we filed
24 the motion to withdraw the plea. We've argued this
25 repeatedly. That Contreras had to have been recused

1 because of the Strzok text messages that talk about
2 meeting him at a cocktail party and discussing the case
3 and him being on the FISA court and all of that. We've
4 provided those to the Court as part of our request to
5 withdraw the guilty plea and I believe we even briefed it
6 in our mandamus petition as one of the reasons the guilty
7 plea is void. Both guilty pleas. Neither one of them is
8 valid. The first because Judge Contreras had to have been
9 recused and the second because this Court did not do a
10 full plea colloquy and General Flynn still was not
11 represented by counsel who had -- could be dedicated to
12 his --

13 THE COURT: When he was before me, he was under
14 oath and he swore under oath that he was guilty because he
15 was guilty and asked for forgiveness. In what situations
16 are you arguing that the Court may review a Rule 48(a)
17 motion if at all?

18 MS. POWELL: A consented to Rule 48(a) motion,
19 Your Honor, and the Court is required to grant. The
20 government has given more than substantial reasons to
21 withdraw it. Nixon says it's within their sole discretion
22 to decide who, what and when to prosecute. This Court,
23 for example, in its own decision in Pitts recognized that
24 a dismissal has to be with prejudice. Otherwise, there is
25 a potential for harassment against the defendant. And the

1 fact that this Court and Mr. Gleeson wouldn't even
2 consider waiting for a new Attorney General or a new
3 administration simply highlights the political nature of
4 this continued prosecution.

5 THE COURT: I'm not going to get into any
6 discussion about Pitts. I authored that opinion, but it
7 speaks for itself. The facts were significantly different
8 than the facts in this case and they cried out for a
9 dismissal with prejudice and the government chose not to
10 appeal.

11 MS. POWELL: To fail to dismiss this case with
12 prejudice would trigger the same concerns of Rinaldi and
13 Pitts. That the defendant be subjected to continued
14 harassment except this time it would be by the Court and
15 Mr. Gleeson, his special prosecutor, as opposed to the
16 government who has absolutely clearly and unequivocally
17 said it --

18 THE COURT: well, I've not appointed Mr. Gleeson
19 as special prosecutor and don't intend to appoint him or
20 anyone else as special prosecutor. He's appointed as
21 amicus. And again and if you want to argue that, there's
22 no basis. You can file something within a week or so.

23 You argue also that the Court may not look in
24 your words "behind the motives or into the reasoning of
25 the executive." How then is the Court to determine any

1 motives? What's the extent of what the Court can look at?

2 MS. POWELL: It can look at the face of the
3 pleadings by the government, the at least 80 or more pages
4 of documents. I think we're up to about 150 pages of new
5 evidence now that shows that the investigation itself was
6 the corruption. That it was part of the essential coup to
7 take out President Trump and the goal was to get Flynn
8 first and then get Trump. That's evident from
9 Mr. Barnett's 302 as well as the text messages and link
10 messages of many of the agents.

11 THE COURT: All right. Is there anything else
12 you want to put on the record? I don't have any other
13 questions to ask you. Any other points you wish to make
14 that are not repetitive of what the government has already
15 made?

16 MS. POWELL: We have provided the new
17 information to the Court as it was given to us by the
18 government. This Court's own decision in Pitts requires
19 it to be dismissed with prejudice.

20 In closing, I would just say that Mr. Gleeson
21 continues to be lost down the rabbit hole on the other
22 side of the looking glass where nothing would be what it
23 is because everything would be what it isn't and
24 contrary-wise what is, it wouldn't be and what it wouldn't
25 be, it would. It's all backwards. It's upside down.

1 In a different scenario, he himself wrote "the
2 prosecutor can do justice by the simple act of going back
3 into court and agreeing that justice should be done. The
4 importance of the Department of Justice being able to
5 self-correct, to maintain its own reputation and to
6 restore faith of the public in the Department of Justice
7 itself is hugely important." As Mr. Gleeson wrote then,
8 "doing justice can be much harder, it takes time and
9 involves work including careful consideration for the
10 circumstances of particular crimes, defendants and victims
11 and often the relevant events that occurred in the distant
12 past. It requires a willingness to make hard decisions
13 including some that will be criticized."

14 That is exactly what Attorney General Barr has
15 done here. The President's tweets are a red herring as is
16 the letter from Peter Strzok's lawyer, all of which are
17 extrajudicial and should not be considered by this Court
18 at all.

19 In the case in which Mr. Gleeson discussed, he
20 said as Assistant U.S. Attorney had to retrieve and
21 examine an old case file. He requested an adjournment so
22 his office could do this extremely important work of
23 reviewing it. The effort that went into deciding whether
24 to agree to vacate two counts against the defendant could
25 have been devoted to other cases. This is a significant

1 case and not just for the defendant. It demonstrates the
2 difference between a department of prosecutions and a
3 Department of Justice. It shows how the Department of
4 Justice as the government's representatives in every
5 federal case has the power to walk into courtrooms and ask
6 judges to remedy injustices.

7 This is the most egregious injustice I have seen
8 in my 30-plus years of practice and the government is
9 (inaudible) that if we rectify it and that this Court
10 dismiss this case with prejudice is the standard here.

11 THE COURT: All right. Thank you. I want to
12 extend the courtesy to Mr. Kohl and his partner, law
13 partner. Mr. Kohl, any additional comments you wish to
14 make in the record?

15 MR. MOOPPAN: Thank you, Your Honor. This is
16 Mr. Mooppan.

17 THE COURT: Yes.

18 MR. MOOPPAN: I'll start. So Judge Gleeson said
19 a lot during his argument, but I don't think he really
20 addressed the key points we made and what little he did
21 say about those key points proves our point. I'm going to
22 try to make three brief points.

23 THE COURT: Okay. And when doing so, please
24 address the points he raised about political bias and the
25 interest of justice as well.

1 MR. MOOPAN: I will definitely do that, Your
2 Honor. So the first point is (inaudible) point during his
3 argument that he addressed the quotes from the Nixon
4 decision and the Fokker decision that I read to you during
5 our opening. I'll read them again because they are so
6 important.

7 The quote from Nixon is that the Executive
8 Branch has "the exclusive authority and the absolute
9 discretion whether to prosecute a case." It doesn't say
10 almost absolute discretion unless fill in the blank of
11 Judge Gleeson's standard. It doesn't say absolute
12 discretion of whether they initiate charges or once you've
13 initiated the charges, you lose your discretion. It says
14 the absolute discretion whether to prosecute a case. If
15 there was any ambiguity about that, there's the quote from
16 Fokker which I also read to you which Judge Gleeson also
17 didn't address. Again, that quote says "the leave of
18 court authority, Rule 48 gives no power to a district
19 court to deny based on the disagreement." Not even a
20 disagreement for all of the reasons that Nixon said.

21 Now Judge Gleeson to be fair, on this quote he
22 did suggest in passing without any explanation that that
23 language was dicta. But he gave no explanation for why
24 it's dicta when it is the necessary reasoning of the D.C.
25 Circuit's opinion in Fokker and he certainly didn't

1 explain how that language could be dicta, but the language
2 in Ammidown is not dicta because after all, in Fokker this
3 reasoning supported what the court did, which was reverse
4 the decision below. In Ammidown, the language he cites is
5 irrelevant to what the court did which was again to
6 reverse the district court below. So we think --

7 THE COURT: So let me ask you this. Essentially
8 what the government is saying is that leave of court is
9 required. The court -- and I assume you would concede the
10 Court can do what it's doing now, have a hearing, asking
11 questions. But even asking a few questions or three hours
12 worth of questions, the Court nevertheless has to dismiss.
13 That's the answer. Right?

14 MR. MOOPPAN: No, Your Honor. So of course, in
15 a case where the defendant opposes, the Court would have a
16 role to play to make a decision --

17 THE COURT: No. I'm talking about a case like
18 this one where the defendant agrees with the government.

19 MR. MOOPPAN: Right. And so in a case where the
20 defendant agrees with the government, we do think there is
21 a role to play, but it is a very narrow role to play.

22 THE COURT: Where does it start and end? I need
23 to know that. Where does it start and end?

24 MR. MOOPPAN: Where it starts and where it ends
25 is to ensure that it is the authoritative position of the

1 Executive Branch. So it is not like the examples Judge
2 Gleeson historically identified where you've got an AUSA
3 out in Montana doing something that the main Justice
4 Department would not have authorized. You're not where
5 you have some AUSA who is taking a bribe on the side that
6 if the Attorney General found out about it, he would put
7 an end to it. But that is the sum and substance of the
8 role.

9 The only way they reconcile the language of Rule
10 48 with the quotes that I just read to you from Nixon and
11 Fokker is to say that as long as it is the authoritative
12 position of the Executive Branch. If the Attorney General
13 has made an authoritative determination, then that is the
14 end of the matter and that is the circumstance in which
15 you find yourself here.

16 THE COURT: So essentially, the Court is
17 relegated to have a hearing and ask those two questions
18 and rule.

19 MR. MOOPAN: In a case such as this where we do
20 think that that is correct, Your Honor. We think that is
21 what both Nixon and Fokker show.

22 But let me turn to my second point. If you
23 don't agree with that, Your Honor, and so Judge Gleeson's
24 one of his two grounds at which he articulated is you can
25 set them aside if it's based on favoritism. And to show

1 that it was based on favoritism, he went through a laundry
2 list of comments by the President. Set aside the points I
3 made earlier that, you know, having consulted with the
4 Attorney General, I've been authorized to represent to you
5 that none of that had any effect on the Attorney General's
6 decision. Just focus on what Judge Gleeson actually read
7 to you in that laundry list. I urge you to go back in the
8 transcript and read the quotes he read. Not once did he
9 read something from the President that said you should
10 dismiss this suit because Michael Flynn is my friend, I
11 want this suit dismissed.

12 Instead what he said, again and again and Judge
13 Gleeson may disagree with it, but what the President said
14 again and again is he thought that this was a witch hunt
15 and he thought that maybe that General Flynn didn't even
16 say anything false. Now that is not favoritism.

17 What if it was true? I know Judge Gleeson
18 doesn't think it's true. But let's say the President was
19 right, that it is a witch hunt and General Flynn didn't
20 think it was false. Is Judge Gleeson really suggesting
21 that the Department of Justice should plow ahead anyway
22 and prosecute General Flynn even if it were a witch hunt
23 and even if it were false? That cannot possibly be
24 correct. So the evidence that he has identified to try to
25 show that there is favoritism just doesn't prove.

1 what it does show and this gets to his next
2 standard, he thinks it's wrong. He thinks the President
3 is just wrong about this, that there is no witch hunt and
4 that it was clearly false. And I'll say two points about
5 that, Your Honor.

6 The first is that is exactly the type of
7 scrutinizing and second guessing that Fokker clearly takes
8 off the table. What the historical facts are here is
9 whether the Executive Branch has properly determined that
10 there is serious problems with this prosecution is exactly
11 what Fokker says you cannot do.

12 But we're happy to talk about the facts. So let
13 me just give you two facts on the two exact things that
14 Judge Gleeson himself emphasized. On the question about
15 whether this is a witch hunt, here is one of the new
16 pieces of evidence that was not before Your Honor at the
17 time of the Brady ruling and it's a point of evidence that
18 Judge Gleeson conspicuously failed to address at any point
19 during his remarks. It is the notes from the FBI Chief of
20 Counter-intelligence. The FBI Chief of
21 Counter-intelligence wrote down in contemporaneous notes
22 what is the goal of this interview. Is the goal to get
23 truth or admissions or is it to get him to lie so we can
24 prosecute him or get him fired? It is astonishing to me
25 that Judge Gleeson would suggest that in the face of

1 evidence like that, the Department of Justice is required
2 to plow ahead and prosecute an individual when the FBI
3 counter-intelligence chief himself is raising questions
4 about whether the only point of this interview is to get
5 the incoming national security advisor fired.

6 The second point that the President made that
7 Judge Gleeson scoffed at is whether General Flynn
8 knowingly lied. Well, here are the quotes from the FBI
9 agents right when they left the interview. This is when
10 they were debriefing the Department of Justice and the FBI
11 after the interview. Their contemporaneous impression was
12 that Flynn was not lying and or did not think he was
13 lying. Let that sink in. Judge Gleeson thinks it's so
14 obvious he's lying. Of course, he's lying. The FBI
15 agents who interviewed him at the time didn't think that
16 he thought he was lying. And that shouldn't be surprising
17 to anyone because, of course, as we pointed out in the
18 motion to dismiss, General Flynn before the interview told
19 McCabe that he assumed that the FBI knew every word of his
20 communications. It would be astonishing for General Flynn
21 assuming that the FBI knew every word of the
22 communications to then walk into that FBI interview room
23 or have them walk into his office and lie to them
24 knowingly. Despite knowing that he knew every word they
25 had. It makes far more sense that he just didn't remember

1 the precise details that he was asked about and that is
2 confirmed by yet more new evidence that has come in. As
3 Mr. Kohl referenced earlier, the SCO agents when they had
4 been briefing Main Justice, they themselves recognized
5 that General Flynn has a "bad memory."

6 So you can have Judge Gleeson's theory which is
7 that General Flynn, the FBI knew every word he had said,
8 nevertheless decided for some inexplicable reason to lie
9 to them and did it so well that when the FBI agents walked
10 out, they didn't think that he was lying or thought he was
11 lying or you can think that maybe he just didn't remember
12 and maybe he pled guilty for many reasons that lots of
13 people plead guilty even though they didn't actually
14 knowingly lie.

15 But at a minimum, these sort of facts and all
16 the other facts we've talked about this morning show that
17 there's not clear evidence of these acts. This is a
18 exactly the sort of case where this Court should defer to
19 the Executive Branch's judgment that this is a case that
20 does not warrant prosecution. And I believe Mr. Kohl has
21 a couple of additional points along those lines.

22 THE COURT: All right. Thank you, counsel. Mr.
23 Kohl?

24 MR. KOHL: Yes, Your Honor. Thank you.
25 Mr. Gleeson suggests that we're just giving the Court a

1 bunch of opaque reasons and trying to invoke interest of
2 justice. In reality, as my colleague, Mr. Mooppan just
3 cited, we are giving very specific reasons that any
4 prosecutor would find extremely troubling and be unwilling
5 to proceed.

6 In addition, I'd point out as I said if three
7 different Office of Inspector General investigations had
8 found that your only witnesses in this case were either
9 lying under oath, misleading a court or acting with
10 political motivation or they actually suggested they acted
11 with political motivation, how can you expect us to go
12 forward? That's a reason.

13 And then, of course, the director's own comment
14 that when asked under oath himself whether he thought that
15 Flynn was lying, he said it's a close question, you can
16 make the argument. We don't prosecute people simply
17 because you can make an argument they're guilty. We as
18 prosecutors are entitled to know and believe with
19 confidence that they are actually guilty.

20 The last thing I'd just point out, Your Honor,
21 is I mean with these sorts of facts where the agents
22 themselves aren't even absolutely convinced that he's
23 guilty, career prosecutors just wouldn't bring charges. I
24 can tell you career prosecutors looking at these facts
25 would never have filed the charges in this case.

1 And it's interesting because when the agents got
2 done interviewing Mr. Flynn, they came over to the
3 Department of Justice for meetings and there were
4 discussions about what Flynn said, didn't say. And, of
5 course, as I mentioned before, there was a discussion --
6 and we're learning this all from executive political notes
7 that we've since reviewed, but there was discussion about
8 whether to do a re-interview. But one note -- a couple of
9 notations were pretty telling.

10 On January 25th, the Deputy Assistant Attorney
11 General at Main Justice asked the agents if his
12 recollection accurate since we didn't confirm or correct
13 it. That's how career people were looking at this. You
14 never actually followed up questions. You didn't clarify.
15 He gave wrong and false information, but was it willful?
16 And the FBI declined to go back and do an interview.
17 Subsequent notes show that as they continued to drill down
18 on Mr. Flynn, the FBI told DOJ they did not believe he was
19 acting as an agent of Russia and did not find any evidence
20 of collusion with respect to General Flynn.

21 So when I say that career prosecutors would not
22 have filed this charge in the first instance, we know
23 that's true because they didn't file charges in this case.
24 Not in January, not in February, not in March. Not until
25 the Special Counsel's Office picked this case up. So when

1 you couple that with investigator or Agent Barnett's
2 expressed concerns about what may have been motivating at
3 least some of the personnel at the Special Counsel's
4 office, I think it is something that we are entitled --
5 you know, we are not asking you to dismiss for that
6 reason. We're saying we want to dismiss for that reason.
7 We move to dismiss and we obviously believe that we're
8 entitled to leave of court for that.

9 I mean among other things if the accusations by
10 Agent Barnett that this -- that the charges filed in this
11 case were in some way politically motivated are a proper
12 basis for us to be concerned, it's hard to have concerns
13 about those things.

14 Moving to dismiss. Now if we're concerned about
15 politics at the front end, moving to dismiss now is not
16 political. It's a court action. We're just trying to get
17 the criminal system back to where it should have been all
18 along. We do ask Your Honor to grant this motion today
19 and to do so with dispatch as recommended by the Court of
20 Appeals here. Thank you, Your Honor.

21 THE COURT: All right. Thank you. I want to
22 revisit one point about the Lowry convictions. I think
23 earlier I think this afternoon I asked government counsel
24 whether or not there was any reported decisions either by
25 circuit court or district court, anywhere that are

1 directly on point with this case, in other words,
2 analogous and my recollection is Mr. Kohl referred to
3 Lowry.

4 Lowry though -- and I thought about this over
5 the last recess -- the Lowry case was problematic for a
6 whole host of reasons, principally, because Lowry was the
7 principal investigating FBI agent I believe if my memory
8 serves me correctly and there were all sorts of problems
9 with the FBI crime lab. There were no security -- there
10 was no security there. There were instances in which
11 Lowry had checked out contraband, drugs seized from
12 defendants were being prosecuted in our courts. There was
13 a host of reasons why it was compelling for those cases to
14 be dismissed with prejudice. But I just don't see where
15 those cases rise to the level or this case rises to the
16 level of what happened in Lowry though.

17 So I just have to ask the question again. Are
18 you aware of any other opinions other than Lowry? Maybe I
19 missed something in your argument. But I don't see where
20 Lowry should in and of itself dictate the decision that
21 this Court reaches.

22 MR. MOOPAN: No, Your Honor. I'm not aware of
23 any other case where the FBI counter-intelligence chief
24 said the point of this interview is to get him to lie so
25 we can get him fired. Those cases just don't get brought

1 in the first instance. But I feel quite confident if that
2 had come up in another case, we would have a decision to
3 submit to the Court. This is the Department of Justice,
4 not the department of prosecutions.

5 THE COURT: All right. And, Mr. Gleeson, in
6 fairness, you know, government counsel professionally and
7 appropriately responded to your arguments. Do you have
8 anything in a few minutes to respond to counsel?

9 MR. GLEESON: Sure. Just very briefly, judge.
10 I'll do the lawyering here. As for the Nixon case, we
11 agree, by the way, that the decision whether to prosecute
12 is absolute. A decision to withdraw a prosecution once
13 it's been brought is qualified. Of course, it was dicta
14 in Fokker. The case involved the Speedy Trial Act and
15 whether it was error not to do a speedy trial extension in
16 the end. It was not about Rule 48(a) and in fact Ammidown
17 was. Ammidown was about whether an agreement to dismiss a
18 top count in a murder case should be approved under Rule
19 48(a). So the government lawyers just have their law
20 wrong.

21 I want to focus, judge, on just a couple of
22 things before I sit down. One is that I hate to sound --
23 I'm being as kind as possible. They sound like bad
24 defense lawyers. This notion that the FBI agent talked
25 about whether they could get Flynn to commit perjury.

1 First of all, they decided not to do it because they
2 reminded him of his own words to Kislyak. This notion
3 that they're shocked, shocked I tell you that an FBI agent
4 would think about inducing someone to perjury. You know,
5 where have they been? You know, you look under the hood.
6 That's what they do.

7 But what I really want to focus on, I want to
8 focus on the rules that they've articulated for Michael
9 Flynn that doesn't apply anywhere else. I didn't hear an
10 answer to the question whether next time there is
11 political bias in a case, they are going to dismiss it.
12 Or racial bias or religious bias. I got a litigation
13 right now. Overt. Religious animus and the prosecutor
14 says, well, that's completely irrelevant unless we put
15 that person on the stand. That principle applies only to
16 Michael Flynn. I want to know, judge, the next time it's
17 a false statements case and the defendant says I would
18 like to know whether any of the agents in the case at any
19 point had some doubt about whether I'm guilty because then
20 they are going to dismiss the case against me. No, that's
21 not going to happen. That's never a relevant factor in a
22 false statement case. But it is for Michael Flynn.

23 One other point before I mention this, I respond
24 to this witch hunt thing. If you deny this motion, you
25 deny the motion to withdraw the plea and proceed to

1 sentence, but there's an unspoken premise that I'm not
2 sure is correct that came up earlier in today's
3 proceedings. The government hasn't said that if you deny
4 this motion to dismiss, it will not continue to prosecute
5 the case and where would it get off doing that? That's
6 asked this Court for relief and then if you say no,
7 they're packing up and going home? They haven't said that
8 yet. And I would be astonished if that's the case. It
9 would be an act of enormous disrespect for this Court --
10 to this Court.

11 And lastly, you know, the whole witch hunt think
12 proves my case. The reason this motion to dismiss has
13 been brought has nothing to do with materiality. Every
14 single thing these prosecutors said was flatly
15 contradicted by the prosecutors in this very case. And to
16 the extent they are not here to respond to it now, I have.
17 The dismissal -- the attempt to dismiss this case has
18 nothing to do with materiality. It has nothing to do with
19 being able to prove falsity. A first-year prosecutor one
20 day out of law school can do this case. It has everything
21 to do with the President's belief that this is some kind
22 of witch hunt and the fact that he's brought pressure on
23 the Justice Department and an Attorney General who has
24 said publicly that the pressure that's brought on the
25 Justice Department by the President and his tweets and his

1 communications make it very difficult for the Justice
2 Department to get the trust of the courts and that's
3 exactly what's happening here and it's why you should deny
4 this motion.

5 THE COURT: All right. Thank you, all. All
6 right. It's been a very interesting and very informative
7 long day. I'm mindful of the instructions given by the en
8 banc court when the case was remanded. I'll take the case
9 under advisement. The record is voluminous and I will
10 proceed with dispatch. Thank you. Have a nice day.
11 Thank you.

12 I've talked about additional submissions within
13 a week. I'll spell that out in a minute order. We've
14 spent a lot of time today. I'm not going to keep you any
15 longer. Let me just turn my attention to my attorneys
16 just for a second. All right. The second is up. This
17 hearing is concluded. Thank you, all.

18 (Proceedings concluded.)
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CERTIFICATE OF REPORTER

I, Lisa K. Bankins, an Official Court Reporter for the United States District Court for the District of Columbia, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the motions hearing in the case of the United States of America versus Michael T. Flynn, Criminal Action Number CR-17-232, in said court on the 29th day of September, 2020.

I further certify that the foregoing 163 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, together with the backup tape of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 1st day of October, 2020.

Lisa K. Bankins
Official Court Reporter

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