UNITED STATES DISTRICT AND BANKRUPTCY COURTS

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	Case No. CR-17-232
v.	Washington, D.C.
MICHAEL T. FLYNN,	September 29, 2020
Defendant.	11:00 a.m.

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TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: KENNETH KOHL, ESQUIRE
HASHIM MOOPPAN, ESQUIRE

For the Defendant: SIDNEY POWELL, ESQUIRE
JESSE BINNALL, ESQUIRE
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Court Reporter: Lisa K. Bankins RMR FCRR RDR
United States District Court
333 Constitution Avenue, NW
Washington, D.C. 20001

Proceedings recorded by mechanical stenography, transcript produced by notereading.

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the interest of justice.

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

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

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

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

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

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

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

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

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

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

to me by the en banc court early this month.

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

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

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

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

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

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

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

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

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

charge shall be made or whether to dismiss proceedings once brought." However, the executive's primacy in this sphere does not wholly displays the judiciary's substantial constitutional interest in maintaining the integrity of the judiciary and the rule of law. Mr. Gleeson argues that because "these interests are imperiled if the executive branch seeks the dismissal of criminal charges for corrupt, politically-motivated reasons" Rule 48(a) "rests on the premise that judges may constitutionally guard against these forms of abuse in their own courts."

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

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

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

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

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

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

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

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

Number 227 at 17.

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

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

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

In view of this constitutional understanding,

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

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

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

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

statement of reasons and underlying factual basis.

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

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

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

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

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

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

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

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

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

file a motion to dismiss even after conviction.

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

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

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

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

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

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

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

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

powers.

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

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

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

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

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

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

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

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

And again the court stated, we do not think Rule

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

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

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

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

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

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

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

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

prosecutorial charging choices."

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

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

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

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

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

THE CLERK: Excuse me one second, please. Would all the folks that's on the lines right now, please mute your phones, please? Please mute your phones or your video feed. Will the individual who has the conversation going on, please mute your phone?

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

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

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

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

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

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

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

counter-intelligence investigation.

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

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

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

was made to it.

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

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

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

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

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

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

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

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

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

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

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

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

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

The government's response essentially is that it

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

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

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

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

record for this hearing?

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

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

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

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

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

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

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

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

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

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

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

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

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

return at 12:35.

(Recess.)

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

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

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

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

MR. MOOPPAN: Thank you, Your Honor.

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

THE COURT: Sure. Go right ahead.

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

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

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

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

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

Court has no role to play whatsoever.

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

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

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

gives no power to a district court to deny a prosecutor's Rule 48 motion to dismiss charges based on a disagreement with the prosecution's exercise of charging authority. Both of those quotes by their plain and unambiguous terms pick up Judge Gleeson's argument. They pick up a situation where there's favoritism. They pick up a situation where there is pretext. Those are unambiguous quotes from controlling precedent, both of which postdate Ammidown.

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

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

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

THE COURT: All right. Thank you, counsel.

MR. KOHL: Good morning, Your Honor.

THE COURT: Good morning, counsel.

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

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

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

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

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

Now normally, Your Honor, those accusations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. KOHL: Yes, he is, sir.

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

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

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

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

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

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

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

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

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

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

Now I'm not asking you to address on the

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

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

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

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

takes seriously and properly takes seriously.

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

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

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

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

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

MR. MOOPPAN: So, Your Honor --

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

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

Counsel?

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

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

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

MR. MOOPPAN: No.

MR. KOHL: Not from the government, no.

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

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

THE COURT: Sure.

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

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

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

THE COURT: Let me ask you this before you get

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

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

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

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

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

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

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

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

THE COURT: So you're purporting to invoke

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

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

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

MS. POWELL: No, sir.

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

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

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

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

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

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

THE COURT: All right. Prior to that discussion

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

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

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

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

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

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

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

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

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

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

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

MS. POWELL: Oh, heavens, no.

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

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

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

MS. POWELL: Yes.

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

MS. POWELL: I have a number of objections.

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

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

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

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

MS. POWELL: Perfectly.

THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

My understanding is that I wanted to be fair

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Sure.

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

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

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

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

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

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

amicus.

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

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

THE COURT: All right. Thank you, counsel.

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

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

attorneys to file a response to the motion to withdraw.

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

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

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

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

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

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

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

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

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

THE COURT: All right. So --

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

THE COURT: Sure.

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

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

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

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

But is there any circuit authority or district

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

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

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

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

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

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

against 28 defendants.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And what if when Pete Strzok was moving to go

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Sure.

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

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

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

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

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

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

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

MR. KOHL: No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. KOHL: Your Honor?

THE COURT: Yes.

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

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

THE COURT: All right. How should the Court

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

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

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

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

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

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

The language you just referred to, wasn't that

merely dicta in the Fokker opinion?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GLEESON: Yes.

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

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

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

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

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

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

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

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

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

haven't.

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

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

And these tweets are the second bucket. The

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

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

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

defendant admitted guilt was a witch hunt of historic proportion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Gleeson?

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

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

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

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

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

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

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

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

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

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

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

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

What the district judge actually said is that

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

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

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

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

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

and ally of the President of the United States.

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

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

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

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

(Recess.)

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

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

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

Mr. Gleeson?

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

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

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

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

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

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

THE COURT: Sure.

MR. GLEESON: -- for dismissing the case.

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

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

phones and your audio devices when you're not speaking? Thank you very much.

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

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

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

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

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

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

THE COURT: Sure.

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

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

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

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

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

the FBI's investigated activity going forward.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

of court requirement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

He had not had the opportunity then to consult

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

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

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

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

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

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

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

THE COURT: Let me ask you this.

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

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

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

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

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

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

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

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

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

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

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

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

no derogatory information on General Flynn.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Proceedings concluded.)

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