No. _____

United States Court of Appeals
For the District of Columbia Circuit

IN RE: MICHAEL T. FLYNN,

Petitioner

On Petition for a Writ of Mandamus to the United States District Court for the District of Columbia Case No. 1:17-cr-232

EMERGENCY PETITION FOR A WRIT OF MANDAMUS

HARVEY & BINNALL, PLLC
Jesse R. Binnall
Lindsay McKasson
Abigail Frye
717 King Street
Suite 200
Alexandria, Virginia 22314
Tel: (703) 888-1943

SIDNEY POWELL, P.C.
Sidney Powell
Counsel of Record
Molly McCann
2911 Turtle Creek Blvd.,
Suite 300
Dallas, Texas 75219
Tel: (214) 707-1775

ATTORNEYS FOR PETITIONER MICHAEL T. FLYNN

May 19, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Petitioner Michael T. Flynn make the following certification:

(A) Parties and Amicus.

Petitioner: Michael T. Flynn.

Respondents: United States District Judge Emmet G. Sullivan.

United States: Timothy O'Shea, United States Attorney, District of Columbia.

Amicus: John Gleeson, Esq.

(B) Ruling Under Review. The district court's appointment of an amicus curiae to consider additional charges against General Flynn, ECF No. 205; its unnumbered minute order of May 18, 2020, granting amicus pro hac vice status in the case; its order indicating it will grant a schedule for amici, App. 3; and, its failure to grant the Government's Motion to Dismiss with Prejudice pursuant to Rule 48(a), ECF No. 198.

(C) Related Cases. This case has not previously been before this Court. There are no pending related cases.

/s/ Sidney Powell
Sidney Powell
SIDNEY POWELL, P.C.

JURISDICTION

This petition seeks an order directing the district court to grant the Justice Department's Motion to Dismiss its criminal case against former National Security Advisor to President Trump, Lieutenant General Michael T. Flynn (Ret.) ("Motion to Dismiss"). ECF No. 198. The Government moved to dismiss the Information charging a violation of 18 U.S.C. §1001 after an internal review by United States Attorney Jeffrey Jensen unearthed stunning evidence of government misconduct and General Flynn's innocence.

This Court has jurisdiction pursuant to the All Writs Act, which authorizes federal courts to issue writs "in the aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. §1651(a). The district court's failure to grant the Government's Motion to Dismiss defies this Court's binding precedent in *United States v. Fokker Servs., B.V.,* 818 F.3d 733, 740 (D.C. Cir. 2016). The district court's sua sponte appointment of an amicus to oppose the Government's motion and its Minute Order to issue a schedule for additional amici are at loggerheads with the unanimous Supreme Court opinion in *United States v. Sineneng-Smith*, No. 19–67 (U.S. May 7, 2020).

RELIEF SOUGHT

Petitioner respectfully requests that this Court order the district court immediately to (1) grant the Justice Department's Motion to Dismiss; (2) vacate its order appointing amicus curiae; and (3) reassign the case to another district judge as to any further proceedings.

ISSUE PRESENTED

Whether the district court exceeded its authority and egregiously abused its discretion by failing to grant the Government's Motion to Dismiss the Criminal Information and, instead, appointing an amicus to oppose the motion and to propose contempt and perjury charges against General Flynn, while inviting additional amici.

FACTS

On January 24, 2017, Michael T. Flynn, the National Security Advisor to the newly-elected President of the United States, was interviewed at the White House by two agents of the Federal Bureau of Investigation—Peter Strzok and Joseph Pientka. As former FBI Director James Comey later bragged on television, he "just sent them"—in violation of known protocols. A fresh review of the Government's file by U.S. Attorney Jeffrey Jensen revealed long-suppressed *Brady* material establishing the FBI had no legitimate reason to interview General Flynn.

The recently disclosed material also shows that members of the FBI had plotted to interview General Flynn without the standard section 1001 warnings to "get him to lie so we can prosecute him or get him fired." ECF No. 198-11. Text messages between the FBI Agents Peter Strzok and Lisa Page (Deputy FBI Director Andrew McCabe's special counsel), revealed that, weeks after the pretextual interview, Strzok was still rewriting the 302 so completely that he struggled to "maintain Joe [Pientka]'s voice." ECF No. 198-8. Page and Strzok massaged the 302 until McCabe approved it, and it was filed as final on February 15, 2017—two days after General Flynn resigned from the White House. *Id.*

General Flynn pled guilty on December 1, 2017.[1] A year later, on what was scheduled to be his sentencing, for which the Government had filed a motion for downward departure and certified his "substantial cooperation," Judge Sullivan publicly berated him. He suggested he may have committed "treason," asserted that he had "sold [his] country out," and expressed

[1] The plea was taken by Judge Rudolph Contreras who, a few days later, recused without explanation, and the case was transferred to Judge Emmet G. Sullivan. It soon became public that Contreras and Strzok are friends. Strzok's now-infamous texts with Page exploded into the news the morning after Special Counsel Mueller coerced Flynn into taking a swift plea with threats to indict his son and give them both the "Manafort treatment" if Flynn did not immediately surrender his claim to innocence.

"disdain" and "disgust" for General Flynn's conduct—flat wrong on crucial facts of the case. Hr'g Tr., *United States v. Flynn*, No. 17-232, (D.D.C Dec. 18, 2018) at 36:1-3, 9-10; 33:13-14, 21-23. App. 1: 34, 37. Before Judge Sullivan returned from recess, explosive headlines of General Flynn's "treason" permeated international news. Judge Sullivan postponed sentencing, after making clear that General Flynn faced prison despite the Government's recommendation of leniency.

In June 2019, General Flynn fired his defense team and current counsel appeared—immediately requesting *Brady* material from the Government. When informal requests were unsuccessful and AUSA Brandon Van Grack (on detail to the Special Counsel's Office) claimed he had produced everything to which the defense was entitled, General Flynn filed a Motion to Compel the Production of *Brady* Material and For an Order to Show Cause. ECF No. 109. After extensive briefing, ECF No. 129, 132, 135, Judge Sullivan issued a 92-page denial on December 16, 2019. ECF No. 144.

Meanwhile, the Inspector General for the Department of Justice filed the long-awaited report, Office of the Inspector General (OIG), *A Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation*, Oversight and Review Division Report 20-012 Revised (December 2019) https://www.justice.gov/storage/120919examination.pdf

("IG Report"). The IG Report disclosed for the first time that Agent Pientka had been surreptitiously slipped into a presidential briefing for nominee Trump on August 17, 2016, because General Flynn would be attending. IG Report at 340. The FBI had decided to have Pientka attend that meeting to "assess" Flynn's mannerisms and collect information in case the FBI needed to interview him later (*i.e.* if Flynn were in the White House after Trump's election). *Id.* This prompted General Flynn's Supplemental Motion to Dismiss for Egregious Government Misconduct and *Brady* Violations. ECF No. 160-2.

General Flynn also filed motions to withdraw his guilty plea because of the Government's breach of the plea agreement, the conflict of interest of his prior counsel, failure of the court to comply with Rule 11, the lack of factual basis for the plea, and ineffective assistance of counsel that rendered his plea unknowing and involuntary. ECF Nos. 151, 160.

In early 2020, the Attorney General asked United States Attorney Jeffrey Jensen of the Eastern District of Missouri to review General Flynn's prosecution. Jensen had served as an FBI agent for ten years and later as an AUSA for another ten years.

Months of contentious litigation culminated on April 24, 2020, when the Government produced four pages of long-withheld *Brady* material. ECF

No. 180. A later tranche of damning evidence showed that the FBI interview was a setup and the 302 was doctored—just as General Flynn had suggested. ECF Nos. 187, 188, 189.

On May 7, 2020, the United States Attorney for the District of Columbia acknowledged the Government's longstanding failure to produce *Brady* evidence and the lack of a legitimate basis for what amounted to a charge fabricated against General Flynn, and the Government moved to dismiss the Information with prejudice in the interest of justice. ECF No. 198. The Government acknowledged that General Flynn's statements to the FBI were not material to a legitimate investigation, and there was no crime. *Id.*

On May 11, 2020, just four days later, a collection of former prosecutors ("The Watergate Group") emailed the court, clerk, and counsel—giving notice of intent to File a Motion for Leave to File an Amicus Brief. App. 2: 64-73.

The defense promptly objected to allowing any amici before the district court acted. *See* ECF No. 204. The court did not address the Motion to Dismiss that had been pending for five days. Instead, it issued a de facto call for amicus briefs by advising that "at the appropriate time, the Court will enter a Scheduling Order governing the submission of any amicus curiae

briefs." App. 3: 75. The following day, the court, sua sponte, entered an order appointing "the Honorable John Gleeson (Ret.) [sic] as amicus curiae to present arguments against the government's Motion to Dismiss." ECF No. 205. The court's order instructed Mr. Gleeson to advise "whether the Court should issue an Order to Show Cause why Mr. Flynn should not be held in criminal contempt for perjury." *Id.* Mr. Gleeson has now appeared and proposes, inter alia, to advise the court as to "any additional factual development [he] may need before finalizing [his] argument in opposition to the government's motion in this case." ECF No. 209.

REASONS WHY THE WRIT SHOULD ISSUE

I. Introduction

The district court has disregarded the constitutional imperative of a "case and controversy" and the "separation of powers" that invests the power to prosecute solely in the executive branch. In the American system, the parties "frame the issues for decision" while the courts take the role of "neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008).

The Supreme Court recently noted: "'[C]ourts are essentially passive instruments of government.' *United States* v. *Samuels*, 808 F. 2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh'g en banc). They 'do

not, or should not, sally forth each day looking for wrongs to right.'" *Sineneng-Smith*, slip op at 4. "Our system is designed around the premise that [parties represented by competent counsel] know what is best for them and are responsible for advancing the facts and argument entitling them to relief." *Id.* at 7 (internal citations omitted).

The principle of party autonomy is particularly salient in criminal cases where the power to prosecute is assigned by the Constitution to the executive branch. As the United States notes in its motion to dismiss:

> Federal Rule of Criminal Procedure 48(a) permits the Government, "with leave of court," to "dismiss an indictment, information or complaint." Fed. R. Crim. P. 48(a). It is also "well established that the Government may move to dismiss even after a complaint has turned into a conviction because of a guilty plea." *United States v. Hector*, 577 F.3d 1099, 1101 (9th Cir.2009) (collecting cases); *see also Rinaldi v. United States*, 434 U.S. 22, 31 (1977) (finding an abuse of discretion to refuse to grant post-conviction Rule 48(a) motion).
>
> When the Government so moves, the role for courts addressing Rule 48(a) motions is "narrow" and circumscribed. *United States v. Fokker Servs., B.V.,* 818 F.3d 733, 742 (D.C. Cir. 2016). The "leave of court" provision serves "primarily to guard against the prospect that dismissal is part of a scheme of 'prosecutorial harassment' of the defendant" through repeated prosecutions—a prospect not implicated by, as here, a motion to dismiss with prejudice. *Id.* at 742 (citing *Rinaldi*, 434 U.S. at 29 n.15); *see also In re United States*, 345 F.3d 450, 453 (7th Cir. 2003) (no such concerns where "[t]he government wants to dismiss the civil rights count with prejudice, and that is what [the defendant] wants as well").

ECF No. 198, at 10-11.

This Court has held that the discretion of the Justice Department under Rule 48(a) is predominant, while the role of the judge is ministerial: "[D]ecisions to dismiss pending criminal charges … lie squarely within the ken of prosecutorial discretion" and "'at the core of the Executive's duty to see to the faithful execution of the laws.'" *Fokker Servs.*, 818 F.3d at 741 (citation omitted); *see also United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.").

A district court cannot deny the Government's motion to dismiss because the judge has "a disagreement with the prosecution's exercise of charging authority," such as "a view that the defendant should stand trial" or "that more serious charges should be brought." *Fokker Servs.*, 818 F.3d at 742-43. Nor should a court second-guess the Government's "conclusion that additional prosecution or punishment would not serve the public interest." *Id.* at 743; *see also In re United States*, 345 F.3d at 453 ("We are unaware … of any appellate decision that actually upholds a denial of a motion to dismiss a charge" on grounds that dismissal would not serve the "public interest.").

The district court has no authority to adopt the role of prosecutor or change the issues in the case by inviting or appointing amici to perform the investigation or prosecution that the court deems appropriate. Less than two

weeks ago, in *Sineneng-Smith,* the Supreme Court unanimously reversed a similar usurpation by the Ninth Circuit in an opinion authored by a venerable alumna of this Court.

II. Standard of Review

While, "[a] mandamus petitioner must demonstrate that its right to the writ is 'clear and indisputable,'" *Fokker Servs.*, 818 F.3d at 749, "numerous decisions of the Supreme Court and this court made clear that courts generally lack authority to second-guess the prosecution's constitutionally rooted exercise of charging discretion. **Mandamus serves as a check on that kind of 'usurpation of judicial power.'**" *Id.* at 750 (citations omitted) (emphasis added). "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

While every mandamus petition must meet the familiar three-factor test, namely that (i) the petitioner has no adequate alternative remedy for obtaining the relief he desires; (ii) his right to relief is clear and indisputable; and (iii) he persuades the court that, in the exercise of its discretion, the writ

is appropriate under the circumstances, *Fokker Servs.*, 818 F.3d at 747, "[w]hen the writ of mandamus is sought from an appellate court to confine a trial court to a lawful exercise of its prescribed authority, the court should issue the writ almost as a matter of course." *In Re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987). If there is "a threshold question concerning … jurisdiction to review the district court's interlocutory order … [this Court] first consider[s] whether the district court legally erred." *Fokker Servs.*, 818 F.3d at 740.

III. The District Court Legally Erred

Binding Supreme Court and Circuit precedent squarely foreclose the district court's determination to continue the prosecution of General Flynn. The district court order appointing an amicus is both unauthorized and bespeaks a disturbing lack of appreciation of the court's limited role when confronted with a motion to dismiss by the Government in a criminal case.

A. The District Court Lacked Authority to Appoint an Amicus to Oppose the Government's Motion to Dismiss or Investigate General Flynn for Contempt or Perjury.

Neither the Federal Rules of Criminal Procedure nor the district court's local rules authorize amicus participation in criminal cases. This is in sharp contrast to the district court rule governing civil cases, which does authorize the filing of amicus briefs. LCvR 7(o). Under the canon of statutory

construction *expressio unius est exclusio alterius,* the express mention of amicus briefs on the civil side must be understood to exclude them on the criminal side. *See Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014) ("the canon's relevance and applicability must be assessed within the context of the *entire* statutory framework") (emphasis added). The Supreme Court has held that this canon applies to the interpretation of district court local rules:

> Notably, the [Local] Rule excepted from its general ban the transmittal of certain proceedings—but it limited that exception to transmissions "within the confines of the courthouse." The negative inference of this exception, of course, is that the Rule would have prohibited the streaming of transmissions, or other broadcasting or televising, beyond "the confines of the courthouse."

Hollingsworth v. Perry, 558 U.S. 183, 192 (2010).

The judges of district court, having acted collectively under the authority of Congress, 28 U.S.C. §2071, made a reasoned decision to allow amicus briefs in civil but not criminal cases. "Those rules have 'the force of law.' *Weil* v. *Neary*, 278 U. S. 160, 169 (1929)." *Hollingsworth*, 558 U.S. at 191.

Prior to issuance of its extraordinary May 12, 2020, order, the district judge adhered scrupulously to the district court's rules, denying some two dozen attempts by third parties to intervene or file amicus briefs in this very

case. A December 20, 2017, Minute Order denies such a motion with a detailed explanation:

> MINUTE ORDER. This Court has received several motions to intervene/file an amicus brief along with letters in support from a private individual who is neither a party to this case nor counsel of record for any party. The Federal Rules of Criminal Procedure do not provide for intervention by third parties in criminal cases. The Court recognizes that the movant sincerely believes that he has information to share that bears on this case, and that, understandably, he wishes to be heard. Options exist for a private citizen to express his views about matters of public interest, but the Court's docket is not an available option. **The docket is the record of official proceedings related to criminal charges brought by the United States against an individual who has pled guilty to a criminal offense. For the benefit of the parties in this case and the public, the docket must be maintained in an orderly fashion and in accordance with court rules.** The movant states that he disagrees with the similar Minute Order issued by Judge Berman Jackson in Criminal Case Number 17-201, but the contrary legal authority on which he relies is neither persuasive nor applicable. Therefore, the Clerk is directed not to docket additional filings submitted by the would-be intervenor. If the individual seeks relief from this Court's rulings, he must appeal the rulings to the United States Court of Appeals for the District of Columbia Circuit. Signed by Judge Emmet G. Sullivan on 12/20/2017. (lcegs3) (Entered: 12/20/2017). [Emphasis added.]

As the Supreme Court held in *Hollingsworth*, rules of court, no less than other regulations, are binding, not just on the parties, but the court itself. "If courts are to require that others follow regular procedures, courts must do so as well." 558 U.S. at 199. Any change to the rules may not be implemented by a single judge in a particular case but must be initiated by

the full court pursuant to its rule-making processes and subject to the requirement of public notice-and-comment. *Id.* at 193. "The Court's interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes." *Id.* at 196. In *Hollingsworth*, this interest was sufficiently important for the Court to stay a high-visibility *civil* case—the morning trial was set to begin—to prevent broadcast of the trial to remote federal courthouses.

As this Court is aware, the prosecution of General Flynn has garnered at least as much publicity as the trial at issue in *Hollingsworth*. The district court's disregard of rules that "have 'the force of law'" in a *criminal* case, where concerns for "the integrity of the judicial process" are at their zenith, has been widely reported and drawn massive attention and criticism of the federal judiciary and this judge in particular. In the words of fabled Harvard Law Professor Alan Dershowitz, this undermines the notion that "*Judges are Umpires, Not Ringmasters*." WALL ST. J. (May 13, 2020, 12:29 PM) https://www.wsj.com/articles/judges-are-umpires-not-ringmasters-11589387368.

This adverse effect will be exacerbated by the fact that the person the district court appointed to "present arguments in opposition to the

government's Motion to Dismiss" and to "address whether the Court should issue an Order to Show Cause why General Flynn should not be held in criminal contempt for perjury" had just published an opinion piece excoriating the Department of Justice's Motion to Dismiss as "smack[ing] of impropriety," of attempting to make the court "a party to corruption," and of "reek[ing] of improper political influence." John Gleeson, David O'Neil, and Marshall Miller, *The Case Isn't Over Until the Judge Says it's Over*, WASH. POST (May 11, 2011, 6:52 PM), https://www.washingtonpost.com/opinions/2020/05/11/flynn-case-isnt-over-until-judge-says-its-over/. Mr. Gleeson advocated that the court "assess the credibility of the department's stated reasons for abruptly reversing course," "compel the department to reveal" classified information, and "appoint an independent attorney to act as a 'friend of the court' . . . ."[2] It did not take the district court long to follow these suggestions by appointing Mr. Gleeson as amicus.

[2] Similarly, the Watergate Group expressed its intent to seek leave to file a brief of amici to address "procedures that the Court can and should follow, such as conducting a hearing or potentially appointing counsel to assist the Court; whether a dismissal, if any, should be with or without prejudice; and whether the Court should instead deny the Motion and proceed to sentencing." Because this document was e-mailed and not docketed, it is App. 2.

The district court's order appointing Mr. Gleeson as amicus cites the court's "inherent authority" and two cases (discussed below) to support the appointment. An order issued a day earlier is also revealing. That order noted, without mentioning the undocketed correspondence from the Watergate Group, that "the Court anticipates that individuals and organizations will seek leave of the Court to file amicus curiae briefs pursuant to Local Civil Rule 7(o). There is no analogous rule in the Local Criminal Rules, but '[the Local Civil] Rules govern all proceedings in the United States District Court for the District of Columbia.' LCvR 1.1." *United States v. Flynn,* Crim. No. 17-232 (D.D.C. Minute Order May 12, 2020). App. 3: 75.

However, the local civil rules cannot be read as authorizing procedures that the criminal rules exclude. By the district court's logic, all the civil rules—some 130 pages—are incorporated into the criminal rules, whenever the criminal rules are silent. This includes Duty to Confer, LCvR 16.3, Pretrial Statements, LCvR 16.5, Class Actions, LCvR 23.1, Discovery, LCvR 26.2, Motions for Summary Judgment, LCvR 7(h), Temporary Restraining Orders, LCvR 65.1, and a multitude of other procedures that no reasonable person would interpret as applying to criminal cases. Nor does the court have "inherent authority" to circumvent the rules, any more than did the district court in *Hollingsworth*.

The district court cites two cases that do not support its orders: *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008), and this Court's opinion in *Fokker Servs.* But those courts *were* authorized to entertain amicus briefs—in *Jin* by LCvR 7(o), because it was a civil case, and in *Fokker Servs.* by Fed. R. App. P. 29, which authorizes this Court, unlike the district court, to entertain amicus briefs in criminal cases.

The May 12, 2020, Minute Order establishes the court's intent to allow multiple additional amicus briefs: "Accordingly, at the appropriate time, the Court will enter a Scheduling Order governing the submission of any amicus curiae briefs." App. 3: 75. As with its appointment of Mr. Gleeson as amicus, nothing of the sort is authorized by the district court rules or any other authority. It undermines the prerogative to decline prosecutions which, as this Court held in *Fokker Servs.,* is the Government's alone.

B. The District Court May Not Deny the Motion to Dismiss and Lacks Authority to Conduct the Searching Inquiry Proposed by its Chosen Amicus.

In its seminal *Fokker Servs.* opinion, this Court granted mandamus where the district court denied a joint motion to suspend the running of the Speedy Trial Act clock in accordance with a plea bargain that included a Deferred Prosecution Agreement (DPA). 818 F.3d at 738. The court had denied the motion because "in the court's view, the prosecution had been too

lenient .... [T]he court disagreed with prosecutors' decision to forgo bringing any criminal charges against individual company officers." *Id.* at 738-39.

Ordering the district court to grant the motion, this Court offered a textbook discourse on the allocation of authority between the district court and the Government in criminal cases, with proper emphasis on the separation of powers that necessarily constrains the court's authority:

> The Constitution allocates primacy in criminal charging decisions to the Executive Branch. The Executive's charging authority embraces decisions about whether to initiate charges, whom to prosecute, which charges to bring, and whether to dismiss charges once brought. It has long been settled that **the Judiciary generally lacks authority to second-guess those Executive determinations, much less to impose its own charging preferences.** The courts instead take the prosecution's charging decisions largely as a given, and assume a more active role in administering adjudication of a defendant's guilt and determining the appropriate sentence.

Fokker Servs., 818 F.3d at 737 (emphasis added).

Later in its opinion, the Court observed: "In vacating the district court order, we have no occasion to disagree (or agree) with that court's concerns about the government's charging decisions in this case. Rather, the fundamental point is that those determinations are for the Executive—not the courts—to make." *Id.* at 738.

These were not ex-cathedra ruminations of the unanimous panel. Rather, they were supported by long-standing tradition as to the

constitutionally-mandated allocation of authority between the district court and the Government in criminal cases:

> The Executive's primacy in criminal charging decisions is long settled. That authority stems from the Constitution's delegation of "take Care" duties, U.S. Const. art. II, § 3, and the pardon power, *id.* § 2, to the Executive Branch. *See United States v. Armstrong,* 517 U.S. 456, 464 (1996); *In re Aiken Cnty.,* 725 F.3d 255, 262- 63 (D.C. Cir. 2013). Decisions to initiate charges, or to dismiss charges once brought, "lie[] at the core of the Executive's duty to see to the faithful execution of the laws." *Cmty. for Creative Non–Violence v. Pierce,* 786 F.2d 1199, 1201 (D.C.Cir.1986). The Supreme Court thus has repeatedly emphasized that "[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *United States v. Batchelder,* 442 U.S. 114, 124 (1979); *see Bordenkircher v. Hayes,* 434 U.S. 357, 364 (1978).
>
> Correspondingly, "judicial authority is ... at its most limited" when reviewing the Executive's exercise of discretion over charging determinations. *Pierce,* 786 F.2d at 1201 *see ICC v. Bhd. of Locomotive Eng'rs,* 482 U.S. 270, 283 (1987). The decision whether to prosecute turns on factors such as "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan." *Wayte v. United States,* 470 U.S. 598, 607 (1985). The Executive routinely undertakes those assessments and is well equipped to do so. By contrast, the Judiciary, as the Supreme Court has explained, generally is not "competent to undertake" that sort of inquiry. *Id.* Indeed, "[f]ew 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 a proceeding once brought." *Newman v. United States,* 382 F.2d 479, 480 (D.C.Cir.1967). "Judicial supervision in this area" would also "entail[] systemic costs." *Wayte,* 470 U.S. at 608. It could "chill law enforcement," cause delay, and "impair the performance of a core

> executive constitutional function." *Armstrong,* 517 U.S. at 465 (quotation omitted). As a result, "the presumption of regularity" applies to "prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *Id.* at 464 (internal quotation marks, quotation, and alterations omitted).

Fokker Servs., 818 F.3d at 741-42.

The Court then rejected any notion that the "leave of court" language in Fed. R. Crim. P 48(a) upended this constitutional balance:

> That language could conceivably be read to allow for considerable judicial involvement in the determination to dismiss criminal charges. But decisions to dismiss pending criminal charges—no less than decisions to initiate charges and to identify which charges to bring—lie squarely within the ken of prosecutorial discretion. *See e.g., Newman,* 382 F.2d at 480. To that end, the Supreme Court has declined to construe Rule 48(a)'s "leave of court" requirement to confer any substantial role for courts in the determination whether to dismiss charges. Rather, the "principal object of the 'leave of court' requirement" has been understood to be a narrow one—"to protect a defendant against prosecutorial harassment ... when the [g]overnment moves to dismiss an indictment over the defendant's objection." *Rinaldi v. United States,* 434 U.S. 22, 29 n. 15 (1977). A court thus reviews the prosecution's motion under Rule 48(a) primarily to guard against the prospect that dismissal is part of a scheme of "prosecutorial harassment" of the defendant through repeated efforts to bring—and then dismiss—charges. *Id.*
>
> So understood, the "leave of court" authority gives no power to a district court to deny a prosecutor's Rule 48(a) motion to dismiss charges based on a disagreement with the prosecution's exercise of charging authority. 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, or a view that any remaining charges fail adequately to redress the gravity of the defendant's alleged**

> **conduct.** *See In re United States,* 345 F.3d 450, 453 (7th Cir.2003). **The authority to make such determinations remains with the Executive.**

Fokker Servs., 818 F.3d at 742 (emphasis added).

Fokker Servs. did acknowledge there may be a limited role for the court where it appears that the parties were attempting to "evade" statutory constraints. *Id.* at 746. However, it does not apply here. Moreover, the district court must be mindful that "the presumption of regularity" applies to 'prosecutorial decisions and, **in the absence of clear evidence to the contrary**, courts presume that [prosecutors] have properly discharged their official duties.'" *Id.* at 741 (quoting *United States v. Armstrong,* 517 U.S. 456, 464 (1996) (emphasis added; alteration in original)). The Government's lengthy motion and exhibits make clear it acted properly here.

Assuming any such authority exists, *but see In re United States*, 345 F.3d at 453 (dubitante), there is nothing in this record—much less clear evidence—to undermine the presumption of regularity that attaches to the Government's Motion to Dismiss. The Government's motion explains in plain terms the reasons for the Government's change in position: "After a considered review of all the facts and circumstances of this case, including newly discovered and disclosed information appended to the defendant's supplemental pleadings, the Government has concluded that the interview

of Mr. Flynn was untethered to, and unjustified by, the FBI's counterintelligence investigation into Mr. Flynn—a no longer justifiably predicated investigation that the FBI had, in the Bureau's own words, prepared to close because it had yielded an '*absence* of *any* derogatory information.'" ECF No. 198 at 4 (citations omitted) (emphasis added).

"Having repeatedly found 'no derogatory information' on Mr. Flynn, [Ex. 1] at 2, the FBI's draft 'Closing Communication' made clear that the FBI had found no basis to 'predicate further investigative efforts' into whether Mr. Flynn was being directed and controlled by a foreign power (Russia) in a manner that threatened U.S. national security or violated FARA or its related statutes, *id.* at 3." *Id.* at 13. The FBI nevertheless decided to interview General Flynn, not to serve a legitimate investigative purpose, but to frame him with a bogus violation of 18 U.S.C. §1001—and altered the 302 to achieve that goal.

To that end, FBI officials at the highest level circumvented standard Justice Department procedures by failing to notify the White House Counsel's Office of the interview, advising the Acting Attorney General only after "agents were already on their way to the White House to interview Mr. Flynn," ECF No. 198 at 7, and failing to give him the standard "warnings that making false statements would be a crime." *Id.* at 9. The decision to bypass

these procedures were made by then-FBI Director Comey, who later preened that this was "something we, I probably wouldn't have done or gotten away with in a [] more organized administration." *Id.* at 7 (quoting December 2018 interview with MSNBC and NBC News analyst Nicolle Wallace).

There is much more information in the Government's motion (and in the multiple defense motions that preceded it) that the Special Counsel failed to disclose to General Flynn or his lawyers, despite the district court's standing *Brady* order and repeated denials that such evidence even existed. All this information bears directly on the "materiality" element of a section 1001 prosecution. U.S. Attorney Jensen's discovery of this *Brady* material led the Government to conclude that it "does not have a substantial federal interest in penalizing a defendant for a crime that it is not satisfied occurred and that it does not believe it can prove beyond a reasonable doubt …." ECF No. 198 at 12.

As the Government also points out, the "materiality" element of a section 1001 prosecution is an important protection of personal liberty which "prevents law enforcement from fishing for falsehoods merely to manufacture jurisdiction over any statement—true or false—uttered by a private citizen or public official." *Id.* at 13. General Flynn rotely "stipulated to the essential element of materiality without cause to dispute it insofar as

it concerned not his course of conduct but rather that of the agency investigating him." *Id.* at 19. General Flynn could swear truthfully that he committed the *acts* constituting the crime with which he was charged—after all he had no duty to tell FBI line agents about missions he undertook in his capacity as Security Advisor to the President Elect—but he had to accept on faith that the questions were "material" to a legitimate criminal investigation, even though that was not made clear to him at the time.[3] In truth, they were not.

Because the Government failed to disclose this information to the defense, General Flynn had no way of knowing that it was false. Now additional facts have established he was not interviewed for a legitimate purpose, and therefore any statements he made were not "material" under 18 U.S.C. §1001, the Government justly believes that he is not guilty of any crime. "[T]he balance of proof, the equities, and the federal interest served

[3] Nor, as the Government explains, was there anything unlawful or improper about General Flynn's conversations with Ambassador Kislyak: "Mr. Flynn, as the incumbent National Security Advisor and senior member of the transition team, was reaching out to the Russian ambassador in that capacity. In the words of one senior DOJ official: 'It seemed logical … that there may be some communications between an incoming administration and their foreign partners.' App. 3 at 3. Such calls are not uncommon when incumbent public officials preparing for their oncoming duties seek to begin and build relationships with soon-to-be counterparts." ECF No. 198 at 14.

by continued prosecution of false statements that were not 'material' to any bona fide investigation," all favor dismissing the prosecution. ECF No. 198 at 19-20.

The Government has amply supported its assertions with documents appended to its motion. Nothing in the record casts doubt on the Government's reasons for moving to dismiss. Nor is there anything outside the record—and certainly nothing cited by the district court—that justifies the outrageous suggestions of "impropriety," "corruption," or "improper political influence" flung by the district court's chosen amicus in the *Washington Post*.

To rebut "the presumption of regularity" that attaches to prosecutorial decisions, this Court and the Supreme Court require "clear evidence to the contrary." *Fokker Servs.*, 818 F.3d at 741 (quoting *Armstrong*, 517 U.S. at 464). Here, there is *no* evidence to the contrary, so the district court lacks authority to do anything but grant the Motion to Dismiss, as it has done routinely in other cases—including after guilty pleas.[4] It is unheard of to

[4] For example, in 2009, the FBI arrested twenty-two people for Foreign Corrupt Practices Act violations. *See United States v. Amaro Goncalves,* No. 09-CR-335-RJL, https://tinyurl.com/yabn8anb. On the Government's perfunctory Rule 48(a) motion, Judge Leon promptly dismissed the prosecution of three of the defendants long after their guilty

conduct the type of intrusive inquiry—including forcing the Government to divulge classified information—that Mr. Gleeson and the Watergate Group, *supra* n.2—urge the district court to undertake. It would make a collision between the branches of government inevitable. The district court's repeated efforts to hijack the prosecution of General Flynn defy the clear mandates of *Sineneng-Smith* and *Fokker Servs.*

C. This is the Rare Case Where Mandamus is Warranted.

The Government, which has sole authority to dismiss this prosecution, has presented a well-documented motion explaining its reasons. The Government misconduct and *Brady* violations provide a more-than-sufficient basis for dismissal. An innocent man has been the target of a vendetta by politically motivated officials at the highest level of the FBI. The egregious Government misconduct, and the three-year abuse of General Flynn and his family, cry out for ending this ordeal immediately and permanently.

The district judge's orders reveal his plan to continue the case indefinitely, rubbing salt in General Flynn's open wound from the Government's misconduct and threatening him with criminal contempt.

---

pleas. Similarly, Judge Sullivan granted a short motion to dismiss the prosecution of Senator Stevens. App. 4: 79-90.

Petitioner has no alternative avenue of relief, his right to relief is "clear and indisputable" and, in these extraordinary circumstances, issuance of the writ is not just appropriate, it follows "as a matter of course." *In Re Reyes*, 814 F.2d at 168.

D. Petitioner's Right to Relief is "Clear and Indisputable," and He Has no Alternative Avenue of Relief.

Petitioner has already suffered an unimaginable ordeal at the hands of unscrupulous high-ranking Government officials and a three-year prosecution. He has suffered the opprobrium of much of the country—which he reveres and for which he has risked his life—financial ruin, and the mental anguish caused by the prospect of prison and the unscrupulous threat to prosecute his son. All for no legitimate reason.

To its credit, the Department of Justice has finally produced the evidence that General Flynn committed no crimes. The wrongful and wasteful prosecution must end. Since the district judge refuses, Petitioner must ask this Court to order the district court to comply with the controlling precedent of the Supreme Court and this Court.

The Government, too, is entitled to have its motion granted. Continuation of these proceedings undermines the Government's prosecutorial authority and subjects the Department of Justice to specious

charges of misconduct such as Mr. Gleeson's publication in the *Washington Post*, among countless others.

As Judge Posner noted in a much less contentious case, "No statute authorizes the Government to appeal from a denial of the dismissal of a count or case, but we do not think that there can be much doubt that such relief is available by way of mandamus." *In re United States*, 345 F.3 450, 452 (7th Cir. 2003). There is even less doubt here, where continuation of the proceedings for the indefinite future will subject the Department of Justice to sustained assaults on its integrity and cast doubt on its authority to terminate criminal proceedings it has determined do not serve the interests of the United States.

As Judge Posner wryly noted in the above-cited case, "The judge . . . is playing U.S. Attorney. It is no doubt a position that he could fill with distinction, but it is occupied by another person." *Id.* at 453. Here, that person is the signatory of the Government's Motion to Dismiss, the United States Attorney for the District of Columbia. Like the district judge in *In Re United States*, the district judge below has taken over the role of prosecutor. "Mandamus serves as a check on that kind of 'usurpation of judicial power.'" *Fokker Servs.*, 818 F.3d at 750.

E. Issuance of the Writ is Appropriate.

In granting Mandamus, this Court noted in *Fokker Servs.,* "numerous decisions of the Supreme Court and this court made clear that courts generally lack authority to second-guess the prosecution's constitutionally rooted exercise of charging discretion." *Fokker Servs.*, 818 F.3d at 750. Impairment of the Government's authority to make prosecutorial decisions suffices to make this an appropriate case for mandamus, but there is much more.

First, Petitioner, through no fault of his own, has been drawn into a Kafkaesque nightmare that is a cross between *The Trial* and *In the Penal Colony*. He has been subjected to deception, abuse, penury, obloquy, and humiliation. Having risked his life in service to his country, he has found himself the target of a political vendetta designed to strip him of his honor and savings, and to deprive the President of his advice. He has been dragged through the mud and forced, through coercion and the artful withholding of information crucial to his defense, to confess to a crime he did not commit—indeed, to a crime that could not exist. Having at last, through the relentless determination of his current counsel, brought the truth to light, he now learns that the judge who is charged with adjudicating his case impartially has, in Judge Posner's words, decided to "play[] ... U.S. Attorney." The

equities demand an end to this nightmare and restoration of General Flynn's freedom and peace of mind.

Second, the reputation of the judiciary is in jeopardy. As the Chief Justice memorably stated at his confirmation hearings, the function of a judge in our system of government is to "call balls and strikes, and not to pitch or bat." The district judge in this case has abandoned any pretense of being an objective umpire—going too far as to suggest that a criminal defendant who succumbs to a coerced and unfair plea bargain should be prosecuted for contempt.

In the midst of a national election season, with unprecedented acrimony on all sides of the civic debate, the district judge has dragged the court into the political hurricane—cementing the notion that judges are politicians in robes who use their authority to thwart what they consider the "corruption," "impropriety," and "improper political influence" of another one of the political branches.

Confidence in the rule of law, and the willingness of federal judges to administer it impartially, will continue to erode, if this Court fails to put a swift end to this spectacle.

IV. The Court Should Order this Case Re-Assigned to Another District Judge

The district judge's manifest confusion about the facts of this case, accusing General Flynn of treason and having "sold out his country," and his punitive intentions are well documented. Following Petitioner's first sentencing hearing on December 18, 2018, headlines such as these appeared: Stephanie Kirchgaessner, *'I can't hide my disgust, my disdain': judge lambasts Michael Flynn*, THE GUARDIAN (Dec. 18, 2018, 5:26 PM) https://tinyurl.com/ycbt6ayr; Shannon LaFraniere and Adam Goldman, '*Not Hiding My Disgust': Judge Rebukes Flynn, Then Delays Sentencing*, N.Y. TIMES (Dec. 28, 2018) https://tinyurl.com/ybh2czv6; Victoria Albert, *Judge asks prosecutors whether Mike Flynn could have been charged with treason*, THE DAILY BEAST (Dec. 18, 2018, 4:06 PM) https://tinyurl.com/ycx45gvt; Griffin Connolly, *Judge Lights Into Michael Flynn: 'You Sold Your Country Out,'* ROLL CALL (Dec. 18, 2018, 1:03 PM) http://tiny.cc/p1h9oz; Demetri Sevastopulo, *'You sold your country out,' judge tells Michael Flynn as sentence delayed*, THE IRISH TIMES (Dec. 18, 2018, 6:54 PM) https://tinyurl.com/y7e5lxvz.

These world-wide headlines are only one wave of the tsunami of invective that crashed into General Flynn as a result of the district judge's

intemperate comments. A defendant facing sentencing is entitled to a judge who does not express "disgust" and "disdain" in a courtroom filled with reporters. Inflaming public passions against a party, particularly a criminal defendant, and encouraging prosecutors to vastly increase the charges against him, is the very antithesis of calling balls and strikes.

Nor was this the end of the matter. The district judge's latest actions—failing to grant the Government's Motion to Dismiss, appointing a biased and highly-political amicus who has expressed hostility and disdain towards the Justice Department's decision to dismiss the prosecution, and the promise to set a briefing schedule for widespread amicus participation in further proceedings—bespeaks a judge who is not only biased against Petitioner, but also revels in the notoriety he has created by failing to take the simple step of granting a motion he has no authority to deny. This is an umpire who has decided to steal public attention from the players and focus it on himself. He wants to pitch, bat, run bases, and play shortstop. In truth, he is way out in left field.

This Court in *Fokker Servs.* declined the petitioners' request to reassign the case because "[r]eassignment is warranted only in the 'exceedingly rare circumstance,' [*In re Kellogg Brown & Root*, 756 F.3d 754, 763 (D.C. Cir. 2014)], in which the district judge's conduct is 'so extreme as

to display clear inability to render fair judgment,' *Liteky v. United States,* 510 U.S. 540, 551 (1994)." 818 F.3d at 750-51. The Court concluded that Fokker "does not approach that high bar. Although the district court volunteered opinions about Fokker's conduct on the basis of facts presented during the proceedings, those sorts of 'candid reflections' concerning the judge's assessment of a defendant's conduct 'simply do not establish bias or prejudice.' *In re Barry,* 946 F.2d 913, 914 (D.C.Cir.1991); *see SEC v. First City Fin. Corp.,* 890 F.2d 1215, 1222 (D.C.Cir.1989). Nor do the district court's observations suggest 'deep-seated ... antagonism that would make fair judgment impossible.' *Liteky,* 510 U.S. at 555." *Id.*

Unlike in *Fokker*, the district judge's outrage at General Flynn does reveal a deep-seated antagonism. In open court, knowing full well that his words would be broadcast all over the world within minutes, the district judge accused General Flynn of treason—a charge hurtful to any American, but a stake through the heart of one who has risked his life protecting the United States from its foreign enemies. The judge also expressed his personal "disgust" (pointing out he was not hiding it) and accused him of arguably having "sold out" his country. App. 1: 34. Even uttered in a private conversation, such words would be cause for recusal, but to say them to the

world does, indeed, evince "deep-seated ... antagonism that would make fair judgment impossible." *Liteky,* 510 U.S. at 555.

If the Court grants the principal relief Petitioner seeks, there may not be much by way of further proceedings in the case, but there could be. Petitioner, the Government, and the appearance of justice will best be served by having another judge—one who has not implied that Petitioner is a traitor—conduct any further proceedings in the case.

CONCLUSION

For these reasons, Petitioner respectfully requests a Writ of Mandamus ordering the district court to (1) grant the Government's Motion to Dismiss with prejudice, (2) vacate its order appointing an amicus curiae, and (3) assign the case to another judge for any additional proceedings.

Respectfully submitted,

/s/ Jesse R. Binnall

Jesse R. Binnall
Lindsay McKasson
Abigail Frye
HARVEY & BINNALL, PLLC
717 King Street
Suite 200
Alexandria, Virginia 22314
Tel: (703) 888-1943

/s/ Sidney Powell

Sidney Powell
Molly McCann
SIDNEY POWELL, P.C.
Counsel of Record
2911 Turtle Creek Blvd.,
Suite 300
Dallas, Texas 75219
Tel: (214) 707-1775

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. I further certify that I have served the following by first-class United States Mail for delivery to each of the following on May 19, 2020.

Timothy Shea, Esquire
United States Attorney for the District of Columbia
555 4th Street, N.W.
Washington, D.C. 20530

The Hon. Emmet G. Sullivan
United States District Court for the District Columbia
333 Constitution Avenue, N.W.
Washington, D.C. 20001

John Gleeson, Esquire
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
Tel: 212-909-6000
Fax: 212-909-6836

May 19, 2020

/s/ Sidney Powell

Sidney Powell
SIDNEY POWELL, P.C.
Counsel of Record
2911 Turtle Creek Blvd.,
Suite 300
Dallas, Texas 75219
Tel: (214) 707-1775

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMIT

(1) This document complies with the word limit of the Federal Rule of Appellate Procedure 21(d)(1) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and D.C Circuit Rule 32(e)(1) this document contains 7,765 words.

(2) This document complies with the typeface requirement of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Georgia**.**

May 19, 2020

/s/ Sidney Powell

Sidney Powell
SIDNEY POWELL, P.C.
Counsel of Record
2911 Turtle Creek Blvd.,
Suite 300
Dallas, Texas 75219
Tel: (214) 707-1775

No. _____

United States Court of Appeals
For the District of Columbia Circuit

IN RE: MICHAEL T. FLYNN,

Petitioner

On Petition for a Writ of Mandamus to the United States District Court for the District of Columbia Case No. 1:17-cr-232

APPENDIX

HARVEY & BINNALL, PLLC
Jesse R. Binnall
Lindsay McKasson
Abigail Frye
717 King Street
Suite 200
Alexandria, Virginia 22314
Tel: (703) 888-1943

SIDNEY POWELL, P.C.
Sidney Powell
Counsel of Record
Molly McCann
2911 Turtle Creek Blvd.,
Suite 300
Dallas, Texas 75219
Tel: (214) 707-1775

ATTORNEYS FOR PETITIONER MICHAEL T. FLYNN

May 19, 2020

TABLE OF CONTENTS

APPENDIX 1
TRANSCRIPT OF DEC. 18, 2018 HEARING

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
Plaintiff,	:	Criminal Action
	:	No. 17-232
v.	:	
	:	
MICHAEL FLYNN,	:	December 18, 2018
	:	11:00 a.m.
	:	
	:	
Defendant.	:	Washington, D.C.
	:	
.....	:	

TRANSCRIPT OF SENTENCING PROCEEDINGS
BEFORE THE HONORABLE EMMET G. SULLIVAN,
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the United States:

Brandon Lang Van Grack, Assistant U.S. Attorney
U.S. DEPARTMENT OF JUSTICE
Special Counsel's Office
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 616-0800
Email: Bvg@usdoj.gov

Zainab Naeem Ahmad, Assistant U.S. Attorney
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue NW
Room B-103
Washington, DC 20530
(202) 616-0800
Email: Zna@usdoj.gov

APPEARANCES: Cont.

For the Defendant:

Robert K. Kelner, Esq.
COVINGTON & BURLING LLP
850 Tenth Street, NW
One City Center
Washington, DC 20001
(202) 662-5503
Fax: (202) 778-5503
Email: Rkelner@cov.com

Stephen Pierce Anthony, Esq.
COVINGTON & BURLING LLP
850 Tenth Street, NW
One City Center
Washington, DC 20001
(202) 662-5105
Fax: (202) 778-5105
Email: Santhony@cov.com

For the U.S. Probation Department:

Kelly Kraemer-Soares, Probation Officer

Renee Moses-Gregory, Probation Officer

Court Reporter:

Scott L. Wallace, RDR, CRR
Official Court Reporter
Room 6503, U.S. Courthouse
Washington, D.C. 20001
202.354.3196
scottlyn01@aol.com

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

MORNING SESSION, DECEMBER 18, 2018

(11:16 a.m.)

THE COURT: Good morning.

THE COURTROOM CLERK: Good morning, Your Honor.

THE COURT: Good morning.

THE COURTROOM CLERK: Your Honor, this is criminal case 17-232, *United States of America versus Michael Flynn*.

Will all parties please come forward to this lectern and identify yourselves for the record.

MR. VAN GRACK: Good morning, Your Honor. Brandon Van Grack on behalf of the United States, and with me at counsel's table is Zainab Ahmed and William McCausland from the FBI.

THE COURT: Good morning, Counsel.

MS. AHMAD: Good morning, Your Honor.

MR. KELNER: Good morning, Your Honor. Robert Kelner with Covington & Burling for the defendant, Michael Flynn, and with me at counsel table is Stephen Anthony.

THE COURT: All right. Good morning, Counsel. Mr. Flynn, good morning. How are you?

THE DEFENDANT: Good.

THE COURT: From the Probation Department?

MS. KRAEMER-SOARES: Good morning, Your Honor. Kelly Kraemer-Soares and Renee Moses-Gregory on behalf of U.S. Probation.

THE COURT: All right. Good morning to you both. The

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

case is in a very unique posture. As everyone knows, I was not the judge who took the plea of guilty from Mr. Flynn, so before I focus on sentencing issues, I need to focus on some other issues. I want to say a couple of things before I get to those issues. I read every filing very carefully in this case. There's a great deal of nonpublic information in this case, and I'll just leave it at that.

If any of my questions require a party to disclose nonpublic information, or if I begin to discuss something nonpublic, don't be shy in telling me. My clerks over the years have learned to do this (indicating) if I get off of script or if I get into areas where -- I won't get offended if you do it. I may not see you, so stand up and raise your hands or say something, please. I don't want to unintentionally say something that should not be revealed on the public docket.

There's a new document that was filed at 10:19 this morning. The government filed a sealed motion alerting the Court that it inadvertently omitted one document from the government's in-camera production.

The Court understands that the defendant received this document from the government on November the 8th of this year. The Court received and read the document before I came on the bench. Does the defendant have any concerns about this inadvertent omission before this hearing proceeds or otherwise any objections?

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

MR. KELNER: No, Your Honor.

THE COURT: All right. I want to focus on the plea first because I think I need to. And there are some questions that I'm going to ask Mr. Flynn, and because this is an extension, in my opinion, of the plea colloquy, I'm going to ask the courtroom deputy at that time to administer the oath, because normally when we have plea colloquies, we always require a defendant to be under oath, and that's what I'm going to do this morning, unless there are objections.

MR. KELNER: No objection, Your Honor.

THE COURT: All right. And in Mr. Flynn's Memorandum in Aid of Sentencing he states he, quote, does not take issue with the description of the nature and circumstances of the offense contained in the government's sentencing memorandum and the presentence investigation report, end quote. He also states that he has, quote, frankly acknowledged, end quote, that, quote, his actions were wrong and he accepted full responsibility for them, end quote.

At the same time, however, Mr. Flynn focuses much of his memorandum on certain, quote, additional facts, end quote, regarding the circumstances surrounding the January 24, 2017 FBI interview at which Mr. Flynn admittedly lied about several topics to the FBI agents.

Mr. Flynn contends that such additional facts, quote, warrant the Court's consideration as it evaluates the seriousness

of the offense relative to the circumstances of witness interviews and typical cases charged under 18 U.S. Code Section 1001, end quote.

Mr. Flynn highlights the fact that former Deputy FBI Director Andrew McCabe explained that the, quote, quickest, end quote, way, to conduct the interview would be without involving the White House counsel's office.

Mr. Flynn then agreed to meet the agents without any additional participants.

Mr. Flynn also highlights that the FBI agents intentionally decided not to warn him that lying to the FBI was a crime to ensure that Mr. Flynn would be relaxed.

At the interview, Mr. Flynn was relaxed and unguarded. He implies that he was unguarded because he did not receive a warning and was not represented by counsel.

In his sentencing memorandum, Mr. Flynn cited a January 24, 2017 FBI memorandum and an August commonly referred to as a 302, and an August 22nd -- strike that. I misspoke. It's the memorandum -- and an August 22nd, 2017 FD-302 without providing copies to the Court.

Mr. Flynn did not cite or quote the FD-302 prepared immediately after his interview. These documents were not otherwise in the record. The Court then ordered the defendant to produce the cited material and ordered the government to produce any other memoranda or FD-302 relevant to Mr. Flynn's FBI

interview.

After reviewing the produced material, the Court concluded that the FD-302 prepared immediately after Mr. Flynn's interview was relevant to sentencing and thus ordered the government to file a redacted version on the public docket.

The Court takes its responsibility here today, as always, very seriously.

Mr. Flynn's briefing concerned the Court, as he raised issues that may affect or call into question his guilty plea, and, at the very least, maybe his acceptance of responsibility.

As such, the Court concludes that it must now first ask Mr. Flynn certain questions to ensure that he entered his guilty plea knowingly, voluntarily, intelligently, and with fulsome and satisfactory advice of counsel.

I cannot recall any incident in which the Court has ever accepted a plea of guilty from someone who maintained that he was not guilty, and I don't intend to start today. So I'm going to invite Mr. Flynn and his attorney or attorneys to come to the podium, and I'm going to ask the courtroom deputy to administer the oath to Mr. Flynn.

(MICHAEL FLYNN, DEFENDANT IN THE CASE, SWORN)

THE COURT: All right. And I will inform you, sir, that any false answers will get you in more trouble. Do you understand that?

THE DEFENDANT: Yes.

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

THE COURT: You have to keep your voice up. If you don't understand my question, please tell me and I'll rephrase it.

Most importantly, you may consult with your attorney privately before answering my questions or at any point in time. Should you want the opportunity to attempt to withdraw your plea, I will afford you that opportunity. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you wish to challenge the circumstances on which you were interviewed by the FBI?

THE DEFENDANT: No, Your Honor.

THE COURT: Do you understand that by maintaining your guilty plea and continuing with sentencing, you will give up your right forever to challenge the circumstances under which you were interviewed?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any concerns that you entered your guilty plea before you or your attorneys were able to review information that could have been helpful to your defense?

THE DEFENDANT: No, Your Honor.

THE COURT: At the time of your January 24th, 2017 interview with the FBI, were you not aware that lying to FBI investigators was a federal crime?

THE DEFENDANT: I was not -- I was aware.

THE COURT: You were aware?

THE DEFENDANT: Yeah.

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

THE COURT: Your sentencing memorandum also states that you pled guilty before certain, quote, revelations that certain FBI officials involved in the January the 24th interview were themselves being investigated for misconduct, end quote. Do you seek an opportunity to withdraw your plea in light of those revelations?

THE DEFENDANT: I do not, Your Honor.

THE COURT: All right. Now, again, at any time -- I should have said this before I started asking questions, but knowing what I was going to do, to have this colloquy with you, I've made arrangements for a private room for you and your attorneys to talk about any of these questions and your answers. So, even though I've taken a number of answers from you, if you want -- if you want that opportunity to speak privately with your attorneys, then I'll certainly afford you that opportunity as well. Would you like to do that?

THE DEFENDANT: No, Your Honor.

THE COURT: All right. Are you satisfied with the services provided by your attorneys?

THE DEFENDANT: I am.

THE COURT: In certain special circumstances, I have over the years appointed an independent attorney to speak with a defendant, review the defendant's file, and conduct necessary research to render a second opinion for a defendant. Do you want the Court to consider appointing an independent attorney for you

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

in this case to give you a second opinion?

THE DEFENDANT: I do not, Your Honor.

THE COURT: Do you feel that you were competent and capable of entering into a guilty plea when you pled guilty on December 1st, 2017?

THE DEFENDANT: I do, Your Honor.

THE COURT: Do you understand the nature of the charges against you and the consequences of pleading guilty?

THE DEFENDANT: I do understand, Your Honor.

THE COURT: And that was covered extensively by Judge Contreras. I've read the transcript.

Are you continuing to accept responsibility for your false statements?

THE DEFENDANT: I am, Your Honor.

THE COURT: Do you still want to plead guilty, or do you want me to postpone this matter, give you a chance to speak with your attorneys further, either in the courtroom or privately at their office or elsewhere, and pick another day for a status conference? And I'm happy to do that.

THE DEFENDANT: I appreciate that, but no, Your Honor.

THE COURT: All right. For your attorneys: Do you have any concerns that potential *Brady* material or other relevant material was not provided to you?

MR. KELNER: No, Your Honor.

THE COURT: All right. Do you contend that Mr. Flynn is

entitled to any additional information that has not been provided to you?

MR. KELNER: No, Your Honor.

THE COURT: Do you wish to seek any additional information before moving forward to sentencing?

MR. KELNER: No, Your Honor.

THE COURT: Do you believe the FBI had a legal obligation to warn Mr. Flynn that lying to the FBI was a federal crime?

MR. KELNER: No, Your Honor.

THE COURT: Is it your contention that Mr. Flynn was entrapped by the FBI?

MR. KELNER: No, Your Honor.

THE COURT: Do you believe Mr. Flynn's rights were violated by the fact that he did not have a lawyer present for the interview?

THE DEFENDANT: No, Your Honor.

THE COURT: Do you believe his rights were violated by the fact that he may have been dissuaded from having a lawyer present for the interview?

MR. KELNER: No, Your Honor.

THE COURT: The sentencing memorandum also states that Mr. Flynn pled guilty before certain, quote, revelations that certain FBI officials involved in the January 24th interview were, themselves, being investigated for misconduct, end quote. Is it your contention that any misconduct by a member of the FBI

raises any degree of doubt that Mr. Flynn intentionally lied to the FBI?

MR. KELNER: No, Your Honor.

THE COURT: The references that I've mentioned that appear in your sentencing memorandum raise some concerns on the part of the Court. And my question is, how is raising those contentions about the circumstances under which Mr. Flynn lied consistent with acceptance of responsibility?

MR. KELNER: Your Honor, the principle reason we raised those points in the brief was to attempt to distinguish the two cases in which the Special Counsel's investigation has resulted in incarceration, the Papadopoulos and Van der Zwaan cases in which the Special Counsel had pointed out as aggravating factors the fact that those defendants had been warned and the fact that those defendants did have counsel and lied anyway, and we felt it was important to identify for the Court that those aggravating circumstances do not exist in this case relevant to sentencing.

But General Flynn has been, I think, clear from the beginning and will be clear again to you today that he fully accepts responsibility, stands by his guilty plea, which was made based on knowing and willful conduct.

We did think there was information produced in the *Brady* process that Your Honor might want to see, and that was relevant strictly to the question of the history and circumstances of the case for sentencing purposes.

Those are the reasons that was included.

THE COURT: All right. But you can understand why the Court has some concern after --

MR. KELNER: -- I can --

THE COURT: -- reading those passages in the sentencing memo.

MR. KELNER: We absolutely understand your concerns, Your Honor, yes.

THE COURT: And you're not asking for a postponement to give more time to whether you wish to file a motion to attempt to withdraw Mr. Flynn's plea of guilty?

MR. KELNER: We have no intention and the defendant has no intention to withdraw the guilty plea, and we're certainly not asking Your Honor to consider that. We're ready to proceed to sentencing.

THE COURT: All right. And you don't need any further time to think about it?

MR. KELNER: We do not, Your Honor.

THE COURT: And nothing that's been filed within the last week on the docket raises any concerns on your part about any aspect of Mr. Flynn's guilty plea?

MR. KELNER: That's correct, Your Honor.

THE COURT: The other puzzling question I have is this: Can you explain for the record why Mr. Flynn was interviewed by the FBI on January the 24th but the 302 cited in his sentencing

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

memorandum is dated August the 22nd, 2017? There's no reference, and the January 24th is not highlighted at all.

MR. KELNER: Yes, Your Honor. Thank you for the opportunity to address that. I think there's been some public confusion about that. The original draft of our brief cited specifically to the FD-302 for the interview of Special Agent Strozk and cited it specifically to the McCabe memorandum, and actually originally we intended to include those documents with the filing.

Prior to the filing, we shared a draft copy of our brief with the Special Counsel's Office really for two purposes: One was to make sure that we weren't including anything covered by the protective order, which they objected to our including, which would, perhaps, have to be redacted or filed under seal; and the other reason, frankly, was generally to understand what their reaction might be to particular points in the filing.

After that, the Special Counsel's Office discussed it with us and asked that we consider removing the Strozk 302, and the McCabe memorandum from the brief and to simply cite to them. Given our position as cooperating in the investigation, we acceded to that.

We then sent them a draft of the footnotes that we would use to cite to the relevant documents, and originally those footnotes, as drafted by us, named the McCabe memorandum specifically and named the Strozk 302 specifically so that it

Scott L. Wallace, RDR, CRR, Official Court Reporter
(202)354-3196 * scottlyn01@aol.com

would be clear to the reader which documents we were talking about.

The Special Counsel's Office requested that we change those citations to simply reference the memorandum and date and the FD-302 and date without the names. We acceded to that request, and I would add would not have acceded to it if in any way we felt it was misleading, but we respected the preferences of the Special Counsel's Office.

THE COURT: All right. Any objection to what counsel said? Anything that you wish to add to that?

MR. VAN GRACK: Judge, just one point of clarification.

THE COURT: Sure.

MR. VAN GRACK: Which is what we've represented to defense counsel in terms of what to and not to include, what we indicated was anything in the Strozk 302 and the McCabe memorandum that they thought was relevant can and should be included in their submissions. What we asked was that they not attach the documents because, as the Court is aware, there are other considerations in the material there that we wanted to be sensitive to.

THE COURT: All right. Thank you, Counsel. Thank you both.

Mr. Flynn, anything else you want to discuss with me about your plea of guilty? This is not a trick. I'm not trying to trick you. If you want some time to withdraw your plea or try to

withdraw your plea, I'll give you that time. If you want to proceed because you are guilty of this offense, I will finally accept your plea.

THE DEFENDANT: I would like to proceed, Your Honor.

THE COURT: All right. Because you are guilty of this offense?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. I am satisfied that Mr. Flynn entered his guilty plea while competent and capable. He understood at that time the nature of the charges against him and the consequences of pleading guilty. Having carefully read all the materials provided to the Court in this case, including those materials reviewed under seal and in-camera, I conclude that there was and remains to be a factual basis for Mr. Flynn's plea of guilty. As such, there's no reason to reject his guilty plea and I'll, therefore, move on to the sentencing phase.

What I would normally do at this point, Mr. Flynn, is to ask you a few questions about the pretrial -- strike that -- the presentence report. Have you had an opportunity to read the presentence report?

THE DEFENDANT: I have.

THE COURT: Did you read it?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any questions that you want to ask me about it?

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

THE DEFENDANT: I don't believe so.

THE COURT: All right. At some point, if you would like to say something, I'll give you an opportunity. I would not hold it against you if you decided you didn't want to say anything.

To your attorneys, I'm going to inquire whether or not there are any objections to the mathematical calculations. This is a total offense level of 4, criminal history category of 1. Mr. Flynn has no prior criminal history, and the advisory, and I emphasize that word, the advisory guideline range is zero months to six months. This is a five-year statutory felony. Are there any objections to the mathematical calculations, Counsel?

MR. KELNER: No, Your Honor.

THE COURT: All right. And the advisory range for supervised release is one year to three years.

I'm going to request that you gentlemen have a seat because I want to, for the record -- and again, because I wasn't the original judge who accepted the plea in the first instance, I want to talk about the plea agreement and the facts that are relevant for the Court's consideration, and you gentlemen don't have to stand there in front of me while I do that, all right. You can have a seat.

MR. KELNER: Thank you, Your Honor.

THE COURT: Sure. Mr. Flynn agreed to plead guilty to Count 1 of the information, making false statements, in violation of 18 U.S. Code Section 1001. He stated that he understood the

maximum sentence is five years imprisonment, three years supervised release, and a $250,000 fine.

The parties also agreed that his Guideline calculation range was zero to six months.

His base offense level is 4 after a two-point reduction for acceptance of responsibility, and he's in a criminal history category of 1, and I believe he has no prior criminal history.

His Guideline fine range is 500 to $9,000. Mr. Flynn also attested that he understood and agreed that the Guidelines were not binding on the Court and that the Court was not obligated to grant a downward departure, quote, even if the government files a motion pursuant to Section 5K1.1 of the Sentencing Guidelines, end quote. And even if the parties agree that there should not be -- there should be a certain sentence, the Court's not obligated to accept that recommendation.

Mr. Flynn also agreed to cooperate with the Special Counsel's Office and agreed that any refusal to cooperate will constitute a breach of the plea agreement. He further agreed that a breach of the plea agreement does not constitute a basis for him to withdraw his plea.

Special Counsel's Office agreed to file a departure motion pursuant to Section 5K1.1 of the U.S. Sentencing Guidelines if it determined that Mr. Flynn, quote, provided substantial assistance in the investigation, end quote.

Relevant here, Mr. Flynn also agreed that, quote,

sentencing in this case may be delayed until his efforts to cooperate have been completed as determined by the government so that the Court will have the benefit of all relevant information before a sentence is imposed, end quote.

With respect to the Statement of Facts, when he pleaded guilty Mr. Flynn agreed to the follow facts: He served as an advisor and surrogate for the Trump Campaign and the transition team. He later served as the National Security Advisor for President Trump starting on January 20th, 2017. Mr. Flynn made materially false statements and omissions during a January 24th, 2017 interview with the FBI.

At that time, the FBI had an open investigation into Russia's efforts to interfere with the 2016 presidential election. As part of that investigation, the FBI investigated, quote, the nature of any links, end quote, between the Trump campaign and Russia, and, quote, whether there was any coordination, end quote, between the two.

Mr. Flynn admitted that his false statements or omissions impeded and had a material impact on the investigation, and when I ask questions of the government, I need to know answers about how he impeded the investigation and what the material impact on the investigation was.

The Statement of Facts further describes Mr. Flynn's false statements. One, Mr. Flynn falsely stated that he did not ask the Russian Ambassador Sergey Kislyak to refrain from, quote,

Scott L. Wallace, RDR, CRR, Official Court Reporter
(202)354-3196 * scottlyn01@aol.com

escalating the situation, end quote, in response to sanctions the Obama Administration had imposed upon Russia.

On December the 28th, 2016, then-President Obama signed Executive Order 13757 which was to take effect on December the 29th, 2016. The executive order announced sanctions against Russia as a response to Russia's interference in the 2016 presidential election.

On December the 28th, 2016, the ambassador contacted Mr. Flynn. The next day Mr. Flynn called a senior transition official who was with other senior officials at the Mar-a-Lago Resort. They discussed the sanctions and their shared desire that Russia not escalate the situation.

Immediately after this phone call, Mr. Flynn called the ambassador, quote, and requested that Russia not escalate the situation and only respond in a reciprocal manner, end quote.

Shortly after this conversation, Mr. Flynn spoke again with the senior official to report on the call.

Mr. Flynn also falsely stated that he did not remember a, quote, follow-up conversation, end quote, in which the ambassador stated that Russia had, quote, moderated its response to those sanctions as a result of Mr. Flynn's request, end quote.

On December 30th, 2016, President Putin announced that he would not take retaliatory measures in response to the sanctions imposed by then-President Obama.

On December 31, 2016, the ambassador called Mr. Flynn to

inform him that Russia had chosen not to retaliate. After this call, Mr. Flynn spoke with senior members of the transition team about the conversation and Russia's decision not to escalate the situation.

Three: Mr. Flynn also made statements, quote, about calls he made to Russia and several other countries regarding a resolution submitted by Egypt to the United Nations Security Council on September 21, 2016, end quote.

Mr. Flynn told the FBI that he had only, quote, asked the country's positions on the vote and that he did not request that any of the countries take any particular action on the resolution, end quote.

On December 21, 2016, Egypt submitted a resolution to the United Nations Security Council on the issue of Israeli settlements. The resolution was aimed at preventing Israeli settlements and Palestinian territories. The U.N. Security Council was scheduled to vote on the resolution the next day.

On December the 22nd, 2016, a, quote, very senior, end quote, member of the transition team directed Mr. Flynn to contact officials from foreign governments, including Russia to, quote, learn where each government stood on the resolution, end quote, and to, quote, influence those governments to delay the vote or defeat the resolution, end quote.

That same day, Mr. Flynn contacted the ambassador about the vote and informed him that the incoming administration was

opposed to the resolution. He requested that Russia vote against or delay the resolution.

On December 23rd, 2016, Mr. Flynn again spoke to the ambassador who informed him that Russia would not vote against the resolution if it came to a vote.

Four: Finally, Mr. Flynn made false statements or omissions regarding his contacts with foreign governments, specifically, the Republic of Turkey, when filing documents with the Department of Justice pursuant to the Foreign Agents Registration Act, commonly referred to as FARA.

On March 7th, 2017, Mr. Flynn filed multiple documents pursuant to the Foreign Agents Registration Act. In the filings, he made false statements or omissions by stating that his company, the Flynn Intel Group, Incorporated did not know whether or the extent to which Turkey was involved in a project he and his company performed, quote, for the principle benefit of Turkey, end quote, when, in fact, Turkish officials had supervised, approved, and directed the work his company performed.

Mr. Flynn also made false statements by stating that his company's Turkey project was, quote, focused on improving U.S. business organizations' confidence regarding doing business with Turkey, end quote, when that was not the primary purpose.

Finally, Mr. Flynn made a false statement that an op-ed he published in the Hill on November 8th, 2016 was written at his

Scott L. Wallace, RDR, CRR, Official Court Reporter
(202)354-3196 * scottlyn01@aol.com

own initiative, when it was actually written for Turkey's benefit at its direction and under its supervision.

At the time the Turkish officials were directing and supervising this work, Mr. Flynn was also serving as a senior national security official on the Trump Campaign.

With respect to the sentencing questions that the Court needs to focus on and resolve today, the Court, pursuant to Title 18, U.S. Code section 3553(a), the Court must impose a sentence that it fines sufficient but not greater than necessary to reflect the seriousness of the crime, afford adequate deterrence, and protect the public, among other things.

In determining the particular sentence to be imposed, the Court must consider several factors as set forth in Title 18 U.S. Code 3553(a). Those factors include, one, the nature and circumstances of the offense and the history and characteristics of the defendant; two, the need for the sentence to reflect the seriousness of the offense, to promote respect for the law and provide just punishment; three, the need for the sentence to afford adequate deterrence; four, the need, if any, for the sentence to protect the public from further crimes of the defendant; five, the need, if any, to provide the defendant with correctional treatment; six, the sentences available, the sentencing range, and any applicable policy statements set forth in United States Sentencing Guidelines; seven, the need to avoid unwarranted sentence disparities among similarly situated

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

defendants; and eight, the need, if any, to provide restitution to victims.

The process is highly individualized. As such, some of these factors are not relevant in Mr. Flynn's case and some factors, including the seriousness of the crime, which the Court emphasizes, and the history and characteristics of the defendant, weigh very heavily.

This is a very serious offense. A high-ranking senior official of the government making false statements to the Federal Bureau of Investigation while on the physical premises of the White House.

The Court will also consider the defendant's acceptance of responsibility and his substantial assistance in several investigations. In Mr. Flynn's case, the government has filed a motion for a downward departure pursuant to Section 5K1.1 of the Sentencing Guidelines. The memorandum states that Mr. Flynn provided substantial assistance to certain investigations.

When the government files such a memorandum, the Court may depart -- the Court's not obligated to do so -- and sentence the defendant to a lower sentence than contemplated by the Guidelines. In determining whether a reduction is warranted, the Court may consider the significance and usefulness of the defendant's assistance, the truthfulness, completeness, and reliability of the defendant's assistance, the nature and extent of the defendant's assistance, any gains or injury the defendant

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

may have endured as a result of his assistance; and the timeliness of the defendant's assistance, among other considerations.

Mr. Flynn's total offense level is 4. And having no other criminal history, his criminal history category is 1. Therefore, the applicable Guideline range is zero to six months of incarceration with one to three years of supervised release.

All that being said, the Guidelines, again, are advisory, as I've said four, five, six times. The Court could sentence the defendant to a sentence above or below the Guidelines, notwithstanding any Section 5K1.1 motion.

Now, I'd like to hear from the government first, all right. Would you come forward, Counsel, to the microphone. And your colleagues can join you if they wish to, whatever.

And again, I'm not intentionally trying to intrude on matters that should not be on the public record, so I will respect your resistance to answer a question, all right.

Is Mr. Flynn still cooperating with and providing assistance to the government?

MR. VAN GRACK: Your Honor, it remains a possibility that General Flynn is continuing to cooperate with the government at this time.

THE COURT: All right. It's a possibility?

MR. VAN GRACK: Yes, Your Honor.

THE COURT: All right. And the reason I ask that is

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

because, as you know and most people don't know, most of these cooperation agreements are conducted in sealed courtrooms, and the public doesn't really know a lot about cooperation efforts by individuals. And it's for that reason -- not for that reason, but the courts are reluctant to proceed to sentencing unless and until cooperation has been completed, more often than not, for cogent reasons. Because the Court wants to be in a position to fully evaluate someone's efforts to assist the government.

Had I taken the plea, I would have had a discussion with Mr. Flynn probably along these lines: I probably would have said something like, as I say in every case in which someone is cooperating, "the more you assist the government, the more you, arguably, help yourself at the time of sentencing."

Now, I make no promises about that. I mean, conceivably the Court could thank someone at the end of their cooperation after months or years and say "thank you" and sentence someone to the maximum. I don't recall ever doing that, but that's a possibility, and I tell people that. But I want people to have the best opportunity to help themselves at the time of sentencing. That's why, more often than not, the Court will wait until the government says, "this person is finished; this person has testified in the Grand Jury" or "there have been pleas of guilty entered, there's nothing else he can do to help us."

But there's still a likelihood that he could help, though, correct?

MR. VAN GRACK: And, Your Honor, let me clarify that point.

THE COURT: Sure.

MR. VAN GRACK: Which is the determination on the path of the government to proceed is for a number of reasons, which is, one, based on the totality of the assistance that the defendant had provided at that point. We believe that it did merit substantial assistance in the filing of a motion for a downward departure, and we made a submission summarizing that.

Related to that is, based on the government's view of not only the assistance he provided, but the nature of the investigations that he provided, that the defendant had provided the vast majority of cooperation that could be considered. And so in order to fully inform the Court, the Court was in a position to consider the vast majority of not just the cooperation, but the potential benefit of that cooperation. And we'd like to bring to the Court's attention that we just had an indictment unsealed in the Eastern District of Virginia charging Bijan Rafiekian and Ekim Alptekin with various violations, and the defendant provided substantial assistance to the attorneys in the Eastern District of Virginia in obtaining that charging document.

THE COURT: All right. Could the defendant have been indicted in that indictment? Could he have been charged in that indictment?

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

MR. VAN GRACK: And, Your Honor, the answer is yes, and the reason for that is that in the Statement of Offense in this case, the defendant refers to false statements in that FARA filing that are part of the indictment filed in the Eastern District of Virginia.

THE COURT: All right. And I can assume that the person identified as "A" is the defendant, correct, or would you rather not mention that?

MR. VAN GRACK: Your Honor, having not conferred with attorneys from the Eastern District of Virginia -- I just want to be sensitive about --

THE COURT: I think that's fair. I think that's fair. Your answer is he could have been charged in that indictment.

MR. VAN GRACK: Yes, Your Honor.

THE COURT: And that would have been -- what's the exposure in that indictment if someone is found guilty?

MR. VAN GRACK: Your Honor, I believe, if you'll give me a moment, I believe it was a conspiracy, 18 U.S.C. 371, which I believe is a five-year offense. It was a violation of 18 U.S.C. 951, which is either a five- or ten-year offense, and false statements -- under those false statements, now that I think about it, Your Honor, pertain to Ekim Alptekin, and I don't believe the defendant had exposure to the false statements of that individual.

THE COURT: Could the sentences have been run consecutive

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

to one another?

MR. VAN GRACK: I believe so.

THE COURT: So the exposure would have been grave, then, would have been -- it would have been -- exposure to Mr. Flynn would have been significant had he been indicted?

MR. VAN GRACK: Yes. And, Your Honor, if I may just clarify. That's similar to the exposure for pleading guilty to 18 U.S.C. 1001.

THE COURT: Right. Exactly. I'm not minimizing that at all. It's a five-year felony.

MR. VAN GRACK: Yes, Your Honor.

THE COURT: Excuse me one second.

(Brief pause in proceedings.)

THE COURT: Yes, Counsel.

MR. VAN GRACK: Your Honor, I'd clarify that the maximum penalty for 18 U.S.C. 951 is a ten-year felony and five years --

THE COURT: Ten-years. All right. Thank you.

I want to thank you at this point. I'm going to invite Mr. Flynn back at this point and his attorneys. Thank you, Counsel.

So, at this point you've paid attention to what the attorney said, Mr. Flynn, correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I want to ensure that you want to move forward today with sentencing. The government's publicly filed Addendum

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

in Aid of Sentencing, quote, seeks to provide a comprehensive description of the benefit the government has thus far obtained from your substantial assistance, end quote, but cautions that some of that benefit may not be fully realized at this time, end quote, and that's not different from what counsel just said. There could be a need for further cooperation from you. Did you understand that?

THE DEFENDANT: I believe I understand that, yes, Your Honor.

THE COURT: All right. And I don't know what that could be, but I accept the government's representations, and it could involve that case in Virginia, it could involve other matters for which you've spoken with the government, because you've had 19 interviews with the government, correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right.

You've asked to proceed to sentencing at this time and for the Court to assess your cooperation and substantial assistance and what impact that will have on the Court's sentencing, and that's your desire, to proceed with sentencing today, correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. You've heard me say that sentencing a cooperating defendant before cooperation has ended is relevant, is rare. Normally, these discussions we're having now are held in sealed courtrooms with people, and more often

than not, I may weigh in and say, "let's wait because more is expected of this defendant," and, arguably, "he or she should have a chance to argue for the full benefit of that assistance."

And it's only fair because the Court's not bound by the recommendations. The Court has to be in a position to say, "I can consider everything now, the full extent of a defendant's cooperation."

I can't do that in your case because, arguably, you could be required to provide more cooperation to the government. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: So, if you proceed to sentencing today, which is your prerogative and only yours, the Court will have to impose a sentence without fully understanding the true extent and nature of your assistance. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: If you want to postpone this and come back at some later point -- and I don't know what that later point will be -- that's fine with me. Because at that time I can say the book is closed, the government is satisfied, there's nothing else that Mr. Flynn can do, and I can evaluate everything that you've done or not done.

I have to caution you, Mr. Flynn, that the sentence the Court imposes today, if sentencing proceeds, may not be the sentence that you would receive after your cooperation ends. I

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

don't know that to be a fact. I don't know. I mean, who knows? I don't have the proverbial crystal ball, but I always approach sentencing with an open mind, and I'm fully prepared to listen to the attorneys and the defendant and consider the full extent of someone's cooperation.

In other words, the Court likes to be in a position to say there's nothing else this defendant can do to help the United States of America. He's done everything that he can do. And then the Court focuses on what impact that has under the advisory Guidelines.

I'm going to be frank with you. This crime is very serious. As I stated, it involves false statements to the Federal Bureau of Investigation agents on the premises of the White House, in the White House in the West Wing by a high-ranking security officer with, up to that point, had an unblemished career of service to his country. That's a very serious offense.

You know, I'm going to take into consideration the 33 years of military service and sacrifice, and I'm going to take into consideration the substantial assistance of several ongoing -- several ongoing investigations, but I'm going to also take into consideration the aggravating circumstances, and the aggravating circumstances are serious. Not only did you lie to the FBI, but you lied to senior officials in the Trump Transition Team and Administration. Those lies caused the then-Vice

Scott L. Wallace, RDR, CRR, Official Court Reporter
(202)354-3196 * scottlyn01@aol.com

President-Elect, incoming Chief of Staff, and then-Press Secretary to lie to the American people. Moreover, you lied to the FBI about three different topics, and you made those false statements while you were serving as the National Security Advisor, the President of the United States' most senior national security aid. I can't minimize that.

Two months later you again made false statements in multiple documents filed pursuant to the Foreign Agents Registration Act. So, all along you were an unregistered agent of a foreign country, while serving as the National Security Advisor to the President of the United States.

I mean, arguably, that undermines everything this flag over here stands for (indicating). Arguably, you sold your country out. The Court's going to consider all of that. I cannot assure you that if you proceed today you will not receive a sentence of incarceration. But I have to also tell you that at some point, if and when the government says you've concluded with your cooperation, you could be incarcerated.

It could be that any sentence of incarceration imposed after your further cooperation is completed would be for less time than a sentence may be today. I can't make any guarantees, but I'm not hiding my disgust, my disdain for this criminal offense.

THE DEFENDANT: Yes, Your Honor.

THE COURT: But it's your call, Mr. Flynn. I'm just being

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

up front with you, as I would with anyone else, and everyone who knows me knows that. If you want to proceed to sentencing today, I can't promise anything other than I'll give full consideration to anything you wish to say, if you want to say anything at all. You may say, "Judge, my lawyers have said everything possible. I don't want to say anything." I would not hold that against you, sir. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: But if you want some more time and to come back later after it's clear that you've done everything you possibly can for the United States of America, I'm going to grant that request.

Now, if you would like to take a recess now and talk to your attorneys, I'm happy to accommodate you in that regard as well. Would you like to do that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Fair enough. Why don't you have a seat. Let me ask the government a few more questions that I want you to consider as well.

Counsel. And these are questions -- answers to which the Court's going to consider in attempting to determine an appropriate sentence. The conversation with the Russian ambassador in December, is that a violation of law?

MR. VAN GRACK: Your Honor --

THE COURT: I hate to be so blunt. Could he have been

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

charged with a criminal offense?

MR. VAN GRACK: Let me answer two ways.

THE COURT: Okay.

MR. VAN GRACK: Which is the facts could potentially, potentially support a violation of the Logan Act, which I think is, perhaps, what the Court is referring to.

THE COURT: Is that the Act that no one has ever been prosecuted under?

MR. VAN GRACK: That's right, which is why I want to be clear in terms of the government's consideration of potential charges against General Flynn. That is not one of the charges that the government was considering in its interfacing with --

THE COURT: Fair enough. Good. That's the answer I wanted. Were there other charges that could have been brought against Mr. Flynn, Other than FARA violations, false statements? I'm not minimizing either one of those.

MR. VAN GRACK: The government's Statement of Offense represents a representation of the unlawful activity that the government was -- believes that the defendant committed in terms of beyond a reasonable doubt. And in terms of other offenses, they were not sort of in consideration in our interfacing with the defendant.

THE COURT: All right. I really don't know the answer to this question, but given the fact that the then-President of the United States imposed sanctions against Russia for interfering

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

with federal elections in this country, is there an opinion about the conduct of the defendant the following days that rises to the level of treasonous activity on his part?

MR. VAN GRACK: The government did not consider -- I shouldn't say -- I shouldn't say did not consider, but in terms of the evidence that the government had at the time, that was not something that we were considering in terms of charging the defendant.

THE COURT: All right. Hypothetically, could he have been charged with treason?

MR. VAN GRACK: Your Honor, I want to be careful what I represent.

THE COURT: Sure.

MR. VAN GRACK: And not having that information in front of me and because it's such a serious question, I'm hesitant to answer it, especially because I think it's different than asking if he could be charged under FARA or if there were other 1001 violations, for example.

THE COURT: The government filed a sentencing memorandum in which it recommended sentencing at the low end of the Guidelines, including probation. Subsequent thereto, the government filed its reply, which did not include the language "including probation." Now, I'm going to assume that was intentional.

MR. VAN GRACK: Your Honor, thank you for the opportunity

Scott L. Wallace, RDR, CRR, Official Court Reporter
(202)354-3196 * scottlyn01@aol.com

to clarify. The government's recommendation is that a sentence at the low end of the Guideline range is appropriate and warranted period. And, in fact, the conclusion of the government's sentencing memo states that very point. The clarification in that opening paragraph of "including a term of no incarceration" was to represent that when we say "low end of the Guideline range," that, in fact, could include a term of no incarceration. And in particular, it was to distinguish some other representations that the Special Counsel's Office had made in other cases in which there was a specific recommendation for a term of incarceration. So it was meant to clarify the position from the beginning, including in its reply, was intended to be consistent.

THE COURT: All right. So, there was an intention to be consistent, then?

MR. VAN GRACK: Yes, yes. The government's representation that a sentence at the low end of the Guideline range is warranted.

THE COURT: All right. The points raised by Mr. Flynn in his sentencing memorandum concerned the Court. Do you have an opinion as to whether he's forfeited the adjustment points for acceptance of responsibility by raising questions about the circumstances surrounding his interview with the FBI agents on January the 24th?

MR. VAN GRACK: Your Honor, we believe that he has

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

accepted responsibility, not just from his statements to the Court today, but throughout the proceedings, including the statements he made under oath in front of Judge Contreras that he has accepted responsibility and acknowledges that his false statements were knowing and willful.

THE COURT: All right. Because in your memo you say "assuming he continues to accept responsibility." So, was there some doubt in your mind that he was wavering on acceptance?

MR. VAN GRACK: Your Honor, though the government interpreted the defendant's submission in the way that it was presented to the Court, which is to identify distinguishing characteristics to two other matters that the Special Counsel's Office had prosecuted, it was also aware of the potential implications that the memorandum had made and wanted to clarify under no uncertain terms its position that those were not mitigating circumstances in any way, and is satisfied both in terms of the representations the defense counsel has made and his statements today that we do not doubt that he has accepted responsibility.

THE COURT: All right. Excuse me one second, Counsel.

(Brief pause in proceedings.)

THE COURT: Yes, Counsel.

MR. VAN GRACK: No, Your Honor.

THE COURT: Nothing further? All right. I'm going to -- at Mr. Flynn's request, I'm going to give them a -- we're going

Scott L. Wallace, RDR, CRR, Official Court Reporter
(202)354-3196 * scottlyn01@aol.com

to take a recess. I can never see that clock because there's a glare on that clock there. It's 12:04. Until 12:30. Will that be enough time?

MR. KELNER: Yes, Your Honor.

THE COURT: Do you have any other questions that you want to ask me before we take a recess?

MR. KELNER: Not at this time, Your Honor.

THE COURT: All right. Any questions, Counsel?

MR. VAN GRACK: No, Your Honor.

THE COURT: All right. The Court will stand in recess until 12:30. There's no need to stand.

THE COURT: Marshal Ruffin. There's a room available for you to speak privately with your client, Counsel, and Marshal Ruffin will accommodate you. Thank you.

(Thereupon, a recess in the proceedings occurred from 12:09 p.m. until 12:45 p.m.)

THE COURT: All right. Thank you.

THE COURTROOM CLERK: Your Honor, resuming Criminal Case 17-232, *United States of America versus Michael Flynn*.

THE COURT: All right. I just want to ask a couple of questions. This is directed to either government counsel or defense counsel. I made a statement about Mr. Flynn acting as a foreign agent while serving in the White House. I may have misspoken. Does that need to be corrected?

MR. VAN GRACK: Yes, Your Honor, that would be correct,

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

which is that the conduct ended, I believe, in mid-November 2016.

THE COURT: All right. That's what I thought, and I felt terrible about that. I just want the record clear on that. You agree with that, Counsel?

MR. KELNER: Yes, Your Honor.

THE COURT: All right. I also asked about -- and this is very important -- I also asked about the Special Counsel's Office. I also asked questions about the Special Counsel and the -- and other potential offenses for the purpose of understanding the benefit, if any, that Mr. Flynn has received in the plea deal. I wasn't suggesting he's committed treason. I wasn't suggesting he committed violations. I was just curious as to whether or not he could have been charged, and I gave a few examples. And, you know, there are a lot of conspiracy theorists out there. I'm not taking the elements of any of the uncharged offenses into consideration at the time of sentencing. I was just trying to determine the benefit of and the generosity of the government in bestowing a benefit on Mr. Flynn. That was the reason why.

MR. VAN GRACK: Yes, Your Honor.

THE COURT: And I said early on, Don't read too much into the questions I ask. But I'm not suggesting he committed treason. I just asked a legitimate question.

MR. VAN GRACK: Yes, Your Honor. And that affords us an opportunity to clarify something on our end which is, with

respect to treason, I said I wanted to make sure I had the statute in front of me. The government has no reason to believe that the defendant committed treason; not just at the time, but having proffered with the defendant and spoken with him through 19 interviews, no concerns with respect to the issue of treason.

THE COURT: Right, right, and I've never presided over a treasonous offense and couldn't tell you what the elements are anyway. I just asked the question. All right. Thank you very much. How would you like to proceed, Counsel.

MR. KELNER: Your Honor, with your indulgence, if I could make a few points.

THE COURT: Sure.

MR. KELNER: First of all, let me make very clear, Your Honor, that the decisions regarding how to frame General Flynn's sentencing memorandum made by counsel, made by me, made by Mr. Anthony, are entirely ours and really should not and do not diminish in any way General Flynn's acceptance of responsibility in this case. And I want to make that --

THE COURT: That point is well taken, but you understand why I had to make the inquiry?

MR. KELNER: I do.

THE COURT: Because I'm thinking, this sounds like a backpedaling on the acceptance of responsibility. It was a legitimate area to inquire about. And I don't want to be too harsh when I say this, but I know you'll understand. I would

Scott L. Wallace, RDR, CRR, Official Court Reporter
(202)354-3196 * scottlyn01@aol.com

never penalize any client for what his or her attorney has said. I'm not saying that you misspoke at all, but you understand absolutely why I had to make the inquiry.

MR. KELNER: I absolutely understand. We understand the Court's --

THE COURT: And I wouldn't take it out on him or anyone else, for that matter, what the attorneys say, no.

MR. KELNER: Right. We understand the Court's reason for concern. I just wanted to make very clear the very specific reasons that those sections in the brief were included, to distinguish the Papadopoulos and Van der Zwaan cases, which did result in incarceration, we think are meaningfully distinguishable in many respects.

THE COURT: Let me stop you on that point, because I'm glad you raised that, and I was going to raise this point at some point. We might as well raise it now since you brought up Papadopoulos and Van der Zwaan. The Court's of the opinion that those two cases aren't really analogous to this case. I mean, neither one of those individuals was a high-ranking government official who committed a crime while on the premises of and in the West Wing of the White House. And I note that there are other cases that have been cited in the memorandum with respect to other individuals sentenced in 2017, I believe, for 1001 offenses, and the point being made -- and I think it's an absolutely good point -- the point being made that no one

received a jail sentence.

My guess is that not one of those defendants was a high-ranking government official who, while employed by the President of the United States, made false statements to the FBI officers while on the premises of and in the West Wing of the White House. That's my guess. Now, if I'm wrong, then you can point me to any one or more of those cases.

This case is in a category by itself right now, but I understand why you cited them. I appreciate that.

MR. KELNER: Your Honor, we don't disagree. We recognize that General Flynn served in a high-ranking position, and that is unique and relevant. But I --

THE COURT: Absolutely.

MR. KELNER: But I would submit to you a couple of points in response for the Court's consideration.

Number one, because of his high rank and because of his former high office, when it came time to deal with this investigation and to deal with the Special Counsel's Office, that, too, set a higher standard for him, and he did understand that as a three-star general and a former National Security Advisor, what he did was going to be very consequential for the Special Counsel's investigation, and very consequential for the nation, so he made decisions early on to remain low profile, not to make regular public statements, as some other people did. That was acknowledged by the Special Counsel's Office when we did

first hear from them, the value of that silence.

And then he made the decision publicly and clearly and completely and utterly to cooperate with this investigation, knowing that, because of his high rank, that was going to send a signal to every other potential cooperator and witness in this investigation, and that was consequential, and we appreciate the fact that the Special Counsel memorialized that in his brief. That did make a decision, and that was another kind of high standard that was set for him and that he rose to and met decisively. In addition, there have been other cases --

THE COURT: Can I just stop you right now? Is -- How do you wish to proceed? Do you wish to proceed with sentencing today or do you want to defer it?

MR. KELNER: Thank you, Your Honor.

THE COURT: Or are you leading up to that point?

MR. KELNER: I'm leading up to that.

THE COURT: No, that's fine.

MR. KELNER: Just a bit of indulgence, if I may.

THE COURT: No, no. Go ahead. That's fine.

MR. KELNER: And let me just finish that last point.

THE COURT: No, no, no. I'm not trying to curtail you. I just wanted to make sure I didn't miss anything.

MR. KELNER: I'm building up to it. I'm building up to it, Your Honor.

THE COURT: All right.

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

MR. KELNER: In addition, I would note there have been other high profile cases, one involving a four-star general, General Petraeus.

THE COURT: I don't agree with that plea agreement, but don't --

MR. KELNER: It's a classic --

THE COURT: He pled to a misdemeanor?

MR. KELNER: He was allowed after lying to the FBI --

THE COURT: -- right --

MR. KELNER: -- to plead to a misdemeanor and was sentenced to probation.

THE COURT: All right. Well, I'm not going to criticize -- I don't know any of the facts about that case, other than what I've read in -- what I've read, so....

MR. KELNER: I'll just briefly highlight those examples. The Sandy Berger case, also involving a former National Security Advisor, also included lies to government officials. He was also allowed to plead to a misdemeanor and also sentenced to probation. So there is precedence. But I want to be clear. We absolutely take your point. General Flynn recognizes the obligations that came with high office and that this is a serious offense. We don't in any way dispute that.

But at the same time, knowing that high standard, he made use of it in sending a signal as part of the larger Special Counsel's investigation.

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

Your Honor, I would like to also emphasize that our understanding, and I think it's been reiterated today, is that it remains the position of the Special Counsel's Office that a sentence at the low end of the Guidelines range, quote, including a sentence that does not impose a term of incarceration, is appropriate and warranted in the government's view, and we've just reconfirmed that with them.

I'd like to highlight that General Flynn has held nothing back, nothing in his extensive cooperation with the Special Counsel's Office. He's answered every question that's been asked. I believe they feel that he's answered them truthfully, and he has. He's complied with every request that's been made, as has his counsel.

Nothing has been held back. That said, it is true that this EDVA case that was indicted yesterday is still pending, and it's likely, I would think, that General Flynn may be asked to testify in that case. We haven't been told that, but I think it's likely, and he's prepared to testify. And while we believe that the Special Counsel's Office views his cooperation as having been very largely complete, completed at this point, it is true that there's this additional modicum of cooperation that he expects to provide in the EDVA case, and for that reason, we are prepared to take Your Honor up on the suggestion of delaying sentencing so that he can eke out the last modicum of cooperation in the EDVA case to be in the best position to argue to the

Court the great value of his cooperation.

THE COURT: Let me tell you something. It didn't occur to me to do that. I just raised the thought. I'm prepared to go forward today, but I think it's only fair to say exactly what I did say.

MR. KELNER: Yes.

THE COURT: So, you know, call it a suggestion or a thought. It was a thought. I didn't, you know, say, you know, wink-wink, nod-nod, you need to do this. So if you want to proceed today, I'm prepared to do so.

MR. KELNER: We do not take it as a wink-wink, nod-nod.

THE COURT: And I'm not promising anything either.

MR. KELNER: And we understand that.

THE COURT: All right.

MR. KELNER: But from the beginning of this process, literally from the beginning, General Flynn has cooperated with Director Mueller and the Special Counsel's investigation in every way imaginable, and he's prepared to continue that cooperation with respect to the EDVA case, which I think is the only area which there is anything left to give, probably just consisting of his testimony at trial in that case.

But we would like to request a continuance of sentencing to allow him to complete that cooperation, and I might suggest, perhaps, a status conference in 90 days, if it -- if it makes sense to the Court.

Scott L. Wallace, RDR, CRR, Official Court Reporter
*(202)354-3196 * scottlyn01@aol.com*

THE COURT: That's fine with the Court.

Mr. Flynn, why don't you join your attorney at the microphone. Mr. Flynn.

All right, sir. You've heard your attorney indicate that you would like to postpone this. Again, the Court's not making any promises. The Court was just being up front with you, like I've been up front with people for more than 30 years, and that's all I was doing. If you want to proceed today, I would proceed today, but I'm not making any promise as to what the sentence will be in the event you cooperate with that matter, about this or other matters. Do you understand that?

THE DEFENDANT: Yes, I understand Your Honor.

THE COURT: All right. Okay. Does the government have an objection to doing this?

MR. VAN GRACK: No, Your Honor.

THE COURT: All right. Let me just say this. I probably shouldn't. Having said that, I probably shouldn't. I don't agree with the Petraeus sentence. I'm sorry. I don't see how a four-star general gives classified information to someone not authorized to receive it and then is allowed to plead to a misdemeanor, but I don't know anything about it. Maybe there were extenuating circumstances. I don't know. It's none of my business, but it's just my opinion.

And that has no impact -- I would not take that into consideration in whatever sentence I impose here. Just based

Scott L. Wallace, RDR, CRR, Official Court Reporter
(202)354-3196 * scottlyn01@aol.com

upon what I know about that case, I just disagreed with it. That's all.

MR. KELNER: Understood.

THE COURT: Counsel, what day would you want? I mean, I can probably accommodate -- the 12th is not a good date. March 12th is not a good date, but otherwise, if you want to suggest a date that's convenient for everyone, that's fine with me.

MR. ANTHONY: May I confer?

THE COURT: Sure.

(Discussion had off the record.)

MR. KELNER: Your Honor, after consulting with the government, we suggest a status report rather than a status conference.

THE COURT: Sure.

MR. KELNER: And for a date, I believe March 13th would work.

THE COURT: Any date you want now, that's fine, to file a status report. That's fine.

MR. KELNER: We propose March 13th for the status report.

THE COURT: Sure, that's fine. Let's just say by noon on the 13th of March.

MR. KELNER: Thank you, Your Honor.

THE COURT: All right. Anything further?

MR. KELNER: Nothing further from us.

THE COURT: From government counsel?

MR. VAN GRACK: No, Your Honor.

THE COURT: Mr. Flynn, do you have any questions you want to ask me or your attorneys? Do you have any questions you want to ask me?

THE DEFENDANT: I have none, Your Honor.

THE COURT: All right. Excuse me one second.

(Brief pause in proceedings.)

THE COURT: Let me just throw this out. Let me just share this with you.

What I could do, and maybe it's not appropriate to do it now, and maybe it's not appropriate to do it in March. At some point -- it probably won't surprise you that I had many, many, many more questions, and at some point what I may do is share those questions with counsel so you can give some thought, maybe do some additional research to be prepared for an eventual sentencing. I'm not sure if I want to do that. I was not going to spend another hour and share those questions with you in open court today, had you decided to postpone sentencing, but I may do that. I'm not sure. These are questions that you would be prepared to answer anyway, such as, you know, how the government's investigation was impeded? What was the material impact of the criminality? Things like that.

MR. KELNER: Your Honor, I think we would find it very helpful, actually, and would welcome the opportunity.

THE COURT: I thought you might say that. I'll give it

Scott L. Wallace, RDR, CRR, Official Court Reporter
(202)354-3196 * scottlyn01@aol.com

some thought, because my purpose is not to sandbag anyone. I want your best thoughts, your best answers about questions that are -- that I believe are very relevant and important, but it's not time to do that now, and it won't be time to do it before March 13th, but I may do that.

MR. KELNER: Thank you, Your Honor.

THE COURT: All right. Sure. Would the government find that of any benefit? You probably know the questions I'm going to ask anyway, impeding the investigation, materiality impact.

MR. VAN GRACK: We would not object to any clarification from the Court.

THE COURT: Okay. All right. Thank you, all. And happy holidays, everyone. Thank you.

MR. KELNER: Thank you, Your Honor.

(Proceedings adjourned at 1:01 p.m.)

C E R T I F I C A T E

I, Scott L. Wallace, RDR-CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Scott L. Wallace 12/18/18

Scott L. Wallace, RDR, CRR
Official Court Reporter

Date

D

Q

R

S

Y

Z

APPENDIX 2
WATERGATE PROSECUTORS
EMAIL AND FILING

From: Smith, Hunter <hsmith@robbinsrussell.com>
Sent: Monday, May 11, 2020 4:58:26 PM
To: dcd_cmecf_cr@dcd.uscourts.gov <dcd_cmecf_cr@dcd.uscourts.gov>
Cc: sullivan_chambers@dcd.uscourts.gov <sullivan_chambers@dcd.uscourts.gov>; Emmet_G_Sullivan@dcd.uscourts.gov <Emmet_G_Sullivan@dcd.uscourts.gov>; sidney@federalappeals.com <sidney@federalappeals.com>; jocelyn.ballantine2@usdoj.gov <jocelyn.ballantine2@usdoj.gov>; Robbins, Larry <lrobbins@robbinsrussell.com>; Taylor, William W. <wtaylor@zuckerman.com>; Marcus, Ezra <EMarcus@zuckerman.com>; Friedman, Lee <LFriedman@robbinsrussell.com>
Subject: United States v. Flynn, Crim. No. 17-232

To the Clerk of Court:

Please see the attached filing on behalf of proposed *amici* in the above-captioned case.

Sincerely,

HUNTER SMITH

2000 K Street NW, 4th Floor, Washington, DC 20006

P 202.775.4523 F 202.775.4510

hsmith@robbinsrussell.com
www.robbinsrussell.com

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	
v.	**Crim. No. 17-232 (EGS)**
MICHAEL T. FLYNN,	
Defendant.	

NOTICE OF INTENT OF WATERGATE PROSECUTORS TO FILE MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* OR APPLICATION UNDER LOCAL RULE 57.6

On May 7, 2020, the Government filed a Motion to Dismiss the Criminal Information Against the Defendant Michael T. Flynn (DE # 198) ("Motion"). A group of 16 former members of the Watergate Special Prosecution Force of the Department of Justice,[1] through the undersigned counsel, hereby provides notice of its intent to file a motion for leave to file a brief as *amicus curiae*, other appropriate application (*see* Local Rule Crim. P. 57.6), or both. The Watergate Prosecutors intend to address, without limitation, the scope of this Court's authority to decide the Motion; the procedures that the Court can and should follow, such as conducting a hearing or potentially appointing counsel to assist the Court; whether a dismissal, if any, should be with or

[1] The Watergate Prosecutors are: Nick Akerman, Richard Ben-Veniste, Richard J. Davis, Carl B. Feldbaum, George T. Frampton, Jr., Kenneth S. Geller, Gerald Goldman, Stephen E. Haberfeld, Henry L. Hecht, Paul R. Hoeber, Philip Allen Lacovara, Paul R. Michel, Robert L. Palmer, Frank Tuerkheimer, Jill Wine-Banks, and Roger Witten. Their qualifications and interest in this matter are summarized in an attachment to this notice.

without prejudice; and whether the Court should instead deny the Motion and proceed to sentencing.

The Motion raises serious questions concerning this Court's authority under Federal Rule of Criminal Procedure 48(a) and Article III of the United States Constitution, and the Court will not receive a full, fair, and adverse presentation of these issues from the parties in light of the Government's change in position. The Government's position is that, even at this late stage, after a pair of guilty pleas accepted by court order, and the Court's fulfillment of its responsibilities under Federal Rule of Criminal Procedure 11, it may freely dismiss this prosecution so long as the Defendant consents. Motion at 11. The government admonishes the Court not to "second-guess" its determination that dismissal is in the public interest. *Id.*

But the D.C. Circuit has explained, in a decision that the Government fails to cite, that "considerations[] other than protection of [the] defendant . . . have been taken into account by courts" when evaluating consented-to dismissal motions under Rule 48(a). *United States v. Ammidown*, 497 F.2d 615, 620 (D.C. Cir. 1973). Courts have exercised their authority under Rule 48(a) where "it appears that the assigned reason for the dismissal has no basis in fact." *Id.* at 620–21. Even when the Government represents that the evidence is not sufficient to warrant prosecution, courts have sought to "satisf[y]" themselves that there has been "a considered judgment" and "an application [for dismissal] made in good faith." *Id.* at 620.

Other Circuits have similarly held that a court may investigate, including through hearings if necessary, whether "the prosecutor is motivated by considerations clearly contrary to the manifest public interest." *United States v. Hamm*, 659 F.2d 624, 628 (5th Cir. 1981); *see In re Richards,* 213 F.3d 773, 789 (3d Cir. 2000) (holding that district court could hold hearing to "appropriately inquire into whether there were any improprieties attending the Government's

petition to dismiss the Richards's prosecution."); *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975) ("[I]t seems altogether proper to say that the phrase 'by leave of court' in Rule 48(a) was intended to modify and condition the absolute power of the Executive, consistently with the Framers' concept of Separation of Powers, by erecting a check on the abuse of Executive prerogatives."). The Supreme Court has recognized uncertainty as to the scope of a district court's discretion in ruling on a consented-to motion under Rule 48(a) and has declined to resolve the issue. *Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977). There are at least substantial questions as to whether factual representations in the Motion are accurate and whether the Motion is made in good faith and consistent with the public interest. *See, e.g.*, Mary B. McCord, Bill Barr Twisted My Words in Dropping the Flynn Case. Here's the Truth, N.Y. Times, May 10, 2020, https://nyti.ms/3cj25kB; DOJ Alumni Statement on Flynn Case, May 11, 2020, https://bit.ly/2YR2kzu.

The Government's Motion also does not adequately address questions of this Court's heightened Article III role in light of the posture of this case, with the Defendant having pled guilty and awaiting sentencing. A guilty plea represents a turning point between "the Executive's traditional power over charging decisions and the Judiciary's traditional authority over sentencing decisions." *United States v. Fokker Servs. B.V.,* 818 F.3d 733, 746 (D.C. Cir. 2016). When a court accepts a plea agreement, it "enters a judgment of *conviction*, which in turn carries immediate sentencing implications." *Id.*; *see also United States v. Hector*, 577 F.3d 1099, 1100 n.1 (9th Cir. 2009) ("[O]nce a guilty plea has been accepted, the defendant stands convicted."); *United States v. Brayboy*, 806 F. Supp. 1576, 1580 (S.D. Fla. 1992) (holding that government's post-verdict Rule 48(a) motion was an attempt to "remove this Court's sentencing authority" and "is exactly th[e]

type of absolute control by one branch over a power properly vested with another branch that the constitutional scheme of separation of powers prohibits").

No party before the Court will address the question whether the Government's proffered reasons for dismissal have a "basis in fact," *Ammidown*, 497 F.2d at 621, or other reasons that may lead the Court to conclude that it should not grant the Motion. The Watergate Prosecutors, for reasons set forth in the accompanying Statement of Interest, are uniquely suited to help ensure a fair presentation of the issues raised by the Government's Motion, which include, without limitation, the accuracy of the facts and law presented in the Motion, the significance of the Defendant's prior admissions of guilt and this Court's orders to date, the Trump administration's opposition to the prosecution of the Defendant, and whether the Government's change of position reflects improper political influence undermining determinations made by the Special Counsel's Office.

This Court is fully empowered to obtain guidance from *amici* or otherwise. *See United States v. Microsoft Corp.*, 2002 WL 319366, at *1 (D.D.C. Feb. 28, 2002). "Amicus participation is normally appropriate . . . 'when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.'" *Hard Drive Prods., Inc. v. Does 1-1,495*, 892 F. Supp. 2d 334, 337 (D.D.C. 2012) (quoting *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008)); *see also United States v. Arpaio*, 887 F.3d 979, 981-82 (9th Cir. 2018) (recognizing in context of contempt proceedings the "inherent authority" of courts to appoint *amici* to provide full briefing and argument in defense of position abandoned by the United States).

The Watergate Prosecutors propose to file their motion for leave to file an *amicus curiae* brief or application under Local Rule 57.6, along with a proposed brief, by no later than May 21,

2020, the date on which a response to the Government's Motion would ordinarily be due. *See* Local Rule Crim. P. 47(b).

Dated: May 11, 2020

Respectfully submitted,

/s/ Lawrence S. Robbins
Lawrence S. Robbins (D.C. Bar No. 420260)
Lee Turner Friedman (D.C. Bar No. 1028444)
D. Hunter Smith (D.C. Bar No. 1035055)
ROBBINS, RUSSELL, ENGLERT,
ORSECK, UNTEREINER & SAUBER LLP
2000 K Street, NW
Washington, DC 20006
Tel: (202) 775-4500
lrobbins@robbinsrussell.com

/s/ William W. Taylor, III
William W. Taylor, III (D.C. Bar No. 84194)
Ezra B. Marcus (D.C. Bar No. 252685)
ZUCKERMAN SPAEDER LLP
1800 M Street N.W. Suite 1000
Washington, D.C. 20036
Tel: (202) 778-1800
Fax: (202) 822-8106
wtaylor@zuckerman.com

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	
v.	**Crim. No. 17-232 (EGS)**
MICHAEL T. FLYNN,	
Defendant.	

STATEMENT OF INTEREST

Proposed *Amici Curiae* ("*Amici*") served on the Watergate Special Prosecution Force, which investigated the Watergate scandal between 1973 and 1977. *Amici* are: Nick Akerman, Richard Ben-Veniste, Richard J. Davis, Carl B. Feldbaum, George T. Frampton, Jr., Kenneth S. Geller, Gerald Goldman, Stephen E. Haberfeld, Henry L. Hecht, Paul R. Hoeber, Philip Allen Lacovara, Paul R. Michel, Robert L. Palmer, Frank Tuerkheimer, Jill Wine-Banks, and Roger Witten. *Amici* have also held positions in government, in academia, and in private practice.

In their roles as Watergate prosecutors, *Amici* investigated serious abuses of power by President Richard M. Nixon and prosecuted many of President Nixon's aides for their complicity in his offenses. More than any other episode in modern American history, the Watergate scandal exemplified how unchecked political influence in the Justice Department can corrode the public trust. As Special Prosecutor Archibald Cox explained, his office was established to "restore confidence, honor, and integrity in government."[1]

[1] George Lardner, Jr., *Cox Is Chosen as Special Prosecutor*, THE WASHINGTON POST (May 19, 1973), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/051973-1.htm.

The investigations by the Watergate Prosecutors led to the filing of criminal charges against two former Attorneys General for corruptly abusing their official powers in order to interfere with the objective, professional investigation and prosecution of federal crimes. Moreover, during their work in pursuing investigation of obstruction of justice by a number of senior federal officials, including White House officials, *Amici* experienced the "Saturday Night Massacre," during which an honorable Attorney General and an honorable Deputy Attorney General resigned or were dismissed rather than obey the instructions of a self-interested President to frustrate the work of an independent Special Prosecutor. The parallels and the contrasts between the Watergate affair and the present situation now before this Court make manifest that *Amici* have a direct and substantial interest in the proper disposition of the pending Motion directed by the incumbent Attorney General to protect a close ally of the President.

Here, where the Motion seeks to reverse a prosecutorial judgment previously entrusted to and made by Special Counsel, Robert Mueller, the value the Watergate Prosecutors' unique perspective on the need for independent scrutiny and oversight to ensure that crucial decisions about prosecutions of high-ranking government officials are made in the public interest, are viewed as legitimate, and are not subsequently reversed by political intervention. The integrity of prosecutorial decision making is a cornerstone of the rule of law. *Amici* have a special interest in restoring the public trust in prosecutorial decision making and in public confidence in the viability of future independent investigations and prosecutions if the results of such work are likely to be subjected to reversal by transparent political influence.

Dated: May 11, 2020

Respectfully submitted,

/s/ Lawrence S. Robbins
Lawrence S. Robbins
Lee Turner Friedman
D. Hunter Smith
ROBBINS, RUSSELL, ENGLERT,
ORSECK, UNTEREINER & SAUBER LLP
2000 K Street, NW
Washington, DC 20006
(202) 775-4500
lrobbins@robbinsrussell.com

/s/ William W. Taylor, III
William W. Taylor, III (D.C. Bar No. 84194)
Ezra B. Marcus (D.C. Bar No. 252685)
ZUCKERMAN SPAEDER LLP
1800 M Street N.W. Suite 1000
Washington, D.C. 20036
Tel: (202) 778-1800
Fax: (202) 822-8106
wtaylor@zuckerman.com

APPENDIX 3
MAY 12, 2020 MINUTE ORDER

05/12/2020		MINUTE ORDER as to MICHAEL T. FLYNN. Given the current posture of this case, the Court anticipates that individuals and organizations will seek leave of the Court to file amicus curiae briefs pursuant to Local Civil Rule 7(o). There is no analogous rule in the Local Criminal Rules, but "[the Local Civil] Rules govern all proceedings in the United States District Court for the District of Columbia." LCvR 1.1. "An amicus curiae, defined as friend of the court,... does not represent the parties but participates only for the benefit of the Court." *United States v. Microsoft Corp.*, No. 98-cv-1232(CKK), 2002 WL 319366, at *2 (D.D.C. Feb. 28, 2002) (internal quotation marks omitted). Thus, "[i]t is solely within the court's discretion to determine the fact, extent, and manner of the participation." *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008) (citation and internal quotation marks omitted). "'An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. Otherwise, leave to file an amicus curiae brief should be denied.'" *Id.* at 137 (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th Cir. 1997)); *see also* LCvR 7(o). Although there is no corollary in the Local Criminal Rules to Local Civil Rule 7(o), a person or entity may seek leave of the Court to file an amicus curiae brief in a criminal case. *See* Min. Order, *United States v. Simmons*, No. 18-cr-344 (EGS) (D.D.C. May 5, 2020); *cf. United States v. Fokker Servs. B.V.*, 818 F.3d 733, 740 (D.C. Cir. 2016) (appointing amicus curiae in a criminal case). As Judge Amy Berman Jackson has observed, "while there may be individuals with an interest in this matter, a criminal proceeding is not a free for all." Min. Order, *United States v. Stone*, No. 19-cr-18 (ABJ) (D.D.C. Feb. 28, 2019). Accordingly, at the appropriate time, the Court will enter a Scheduling Order governing the submission of any amicus curiae briefs. Signed by Judge Emmet G. Sullivan on 5/12/2020. (lcegs3) (Entered: 05/12/2020)

APPENDIX 4
MAY 13, 2020 ORDER APPOINTING GLEESON

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. MICHAEL T. FLYNN, Defendant.	Crim. Action No. 17-232 (EGS)

ORDER APPOINTING *AMICUS CURIAE*

Upon consideration of the entire record in this case, it is hereby

ORDERED that the Court exercises its inherent authority to appoint The Honorable John Gleeson (Ret.) as *amicus curiae* to present arguments in opposition to the government's Motion to Dismiss, ECF No. 198, *see, e.g.*, *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 740 (D.C. Cir. 2016); *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008); it is further

ORDERED that *amicus curiae* shall address whether the Court should issue an Order to Show Cause why Mr. Flynn should not be held in criminal contempt for perjury pursuant to 18 U.S.C. § 401, Federal Rule of Criminal Procedure 42, the Court's inherent authority, and any other applicable statutes, rules, or controlling law.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
May 13, 2020

APPENDIX 5 SIMILAR MOTIONS TO DISMISS AND ORDERS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	No. 08-231 (EGS)
THEODORE F. STEVENS,	)	
	)	
Defendant.	)	
	)	

MOTION OF THE UNITED STATES TO SET ASIDE THE VERDICT AND DISMISS THE INDICTMENT WITH PREJUDICE

In February 2009, the Acting Assistant Attorney General for the Criminal Division appointed undersigned counsel to conduct the post-trial litigation in this matter. In preparing to respond to defendant Theodore Stevens' various motions and in preparation for a possible evidentiary hearing, undersigned counsel began collecting and reviewing documents and interviewing potential witnesses. As the Court is aware, the Government has voluntarily provided to the defense documents and summaries of witness interviews.

The Government recently discovered that a witness interview of Bill Allen took place on April 15, 2008. While no memorandum of interview or agent notes exist for this interview, notes taken by two prosecutors who participated in the April 15 interview reflect that Bill Allen was asked about a note dated October 6, 2002, that was sent from the defendant to Bill Allen. The note was introduced at trial as Government Exhibit 495 and was referred to as the "Torricelli note." The notes of the April 15 interview indicate that Bill Allen said, among other things, in substance and in part, that he (Bill Allen) did not recall talking to Bob Persons regarding giving a bill to the defendant. This statement by Allen during the April 15 interview was inconsistent with Allen's recollection at trial, where he described a conversation with Persons about the

Torricelli note. In addition, the April 15 interview notes indicate that Allen estimated that if his workers had performed efficiently, the fair market value of the work his corporation performed on defendant's Girdwood chalet would have been $80,000. Upon the discovery of the interview notes last week, the Government immediately provided a copy to defense counsel.

Defendant Stevens was not informed prior to or during trial of the statements by Bill Allen on April 15, 2008. This information could have been used by the defendant to cross-examine Bill Allen and in arguments to the jury. The Government also acknowledges that the Government's Opposition to Defendant's Motion for a New Trial provided an account of the Government's interviews of Bill Allen that is inaccurate. *See* Opposition at 42-43 (Dkt. No. 269).

Given the facts of this particular case, the Government believes that granting a new trial is in the interest of justice. *See* Fed. R. Crim. P. 33(a). The Government has further determined that, based on the totality of circumstances and in the interest of justice, it will not seek a new trial. Accordingly, pursuant to Fed. R. Crim. P. 48(a), the Government moves to set aside the verdict and dismiss the indictment with prejudice.

Further, as the Court is aware, certain matters in this case previously have been referred to the Office of Professional Responsibility of the Department of Justice. The Government has supplemented the referral to include the facts concerning the April 15th Bill Allen interview. Once the inquiry into this matter is completed by the Office of Professional Responsibility, the Government will share the findings of that inquiry with the Court.

Respectfully submitted,

PAUL M. O'BRIEN
Chief, Narcotic and Dangerous Drug Section
Criminal Division
U.S. Department of Justice
1400 New York Ave. NW
Washington, D.C. 20530
Tel: 202-514-0169
Fax: 202-514-6112

DAVID L. JAFFE
Deputy Chief, Domestic Security Section

WILLIAM J. STUCKWISCH (Bar No. 457278)
Senior Trial Attorney, Fraud Section

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2009, I caused a copy of the foregoing "MOTION OF THE UNITED STATES TO SET ASIDE THE VERDICT AND DISMISS THE INDICTMENT WITH PREJUDICE" to be delivered electronically to the following:

Brendan V. Sullivan, Jr., Esq.
Robert M. Cary, Esq.
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005

Paul M. O'Brien

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v.

THEODORE F. STEVENS,

Defendant.

No. 08-cr-231 (EGS)

ORDER

At the direction of the Attorney General, on April 1, 2009, a newly-appointed team of prosecutors filed a Motion to Set Aside the Verdict and Dismiss the Indictment, citing the failure to produce notes taken by prosecutors in an April 15, 2008 interview of Bill Allen. At a hearing on April 7, 2009, the government conceded that these notes contained information that the government was constitutionally required to provide to the defense for use at trial. Despite repeated defense requests and the Court's repeated admonitions to provide exculpatory information, the notes were not produced to the defense until March 25-26, 2009, nearly five months after trial. The Court will grant the Motion.

There was never a judgment of conviction in this case. The jury's verdict is being set aside and has no legal effect.

The government's Motion is GRANTED. The verdict is hereby set aside and the indictment is hereby dismissed with prejudice. See Fed. R. Crim. P. 48(a).

IT IS SO ORDERED.

April 7, 2009

Emmet G. Sullivan
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 09-335 (RJL)
	:	
v.	:	
	:	
AMARO GONCALVES, *et al.*,	:	
	:	
Defendants.	:	
	:	

GOVERNMENT'S UNOPPOSED MOTION TO
DISMISS PURSUANT TO FED. R. CRIM. P. 48(a)

The United States of America, by and through its undersigned attorneys, hereby moves to dismiss in the above-captioned case (1) the Superseding Indictment against defendants Jonathan M. Spiller, Haim Geri, and Daniel Alvirez, and Count 1 of the Superseding Information against defendant Daniel Alvirez, with prejudice, and (2) Count 2 of the Superseding Information against defendant Daniel Alvirez without prejudice.

1. On April 16, 2010, Spiller, Geri, Alvirez, and other defendants were charged in a Superseding Indictment with conspiracy to violate the Foreign Corrupt Practices Act ("FCPA"), 18 U.S.C. § 371, violations of the FCPA, 15 U.S.C. §§ 78dd-1 *et seq.*, and conspiracy to commit money laundering, 18 U.S.C. § 1956(h). On March 1, 2011, defendant Alvirez was charged in a two-count Superseding Information. Count 1 charged the same conspiracy to violate the FCPA that was charged in Count 1 of the Superseding Indictment ("the Gabon conspiracy count"). Count 2 charged a separate conspiracy to violate the FCPA relating to the sale of military and law enforcement equipment to the Republic of Georgia ("the Georgia conspiracy count").

2. On March 1, 2011, defendant Alvirez pleaded guilty to both counts of the Superseding Information – the Gabon conspiracy count and the Georgia conspiracy count. On March 29, 2011, defendant Spiller pleaded guilty to the Gabon conspiracy count. On April 28,

2011, defendant Geri pleaded guilty to the Gabon conspiracy count.

3. On December 22, 2011, at the close of the government's case in the second trial conducted in this matter, the Court granted the trial defendants' motions for judgment of acquittal, pursuant to Fed. R. Crim. P. 29, as to the Gabon conspiracy count, ruling that there were structural deficiencies in the conspiracy as it was charged and that the government's proof at trial did not establish that conspiracy.

4. On February 21, 2012, the government moved to dismiss with prejudice the Superseding Indictment against the defendants who were pending trial, including seven defendants for whom the Court had granted mistrials following hung juries and nine defendants who had yet to be tried. The government submitted that the continued prosecution of the case was not warranted under the circumstances, given the outcomes of the first two trials, the implications of certain evidentiary and other legal rulings in those trials for future trials, and the substantial resources that would be necessary to proceed with another four or more trials. In an Order dated February 23, 2012, the Court granted the government's motion, and dismissed with prejudice the Superseding Indictment, and all underlying indictments, against the defendants who were pending trial.

5. Based on a review of the record, the government has concluded that the Court's ruling in the second trial as to the Gabon conspiracy count would apply equally to defendants Spiller, Geri, and Alvirez. Although, as the Court knows, the government argued extensively in opposition to the defendants' Rule 29 motions and does not agree with the Court's ruling, the government accepts the Court's decision. As a result of the Court's ruling on the Gabon conspiracy count, and in light of the reasons set forth in its prior motion to dismiss, the

government has concluded that further prosecution of the Gabon-related charges against defendants Spiller, Geri, and Alvirez is unlikely to be successful.

6. The government has also concluded that it is in the interests of justice not to prosecute defendant Alvirez on the Georgia conspiracy count at this time, but rather to continue the investigation of that and related conduct. Following such investigation, the government will determine whether to bring criminal charges relating to that conduct.

7. The government has contacted counsel for defendants Spiller, Geri, and Alvirez and they do not oppose this motion to dismiss.

Accordingly, the government moves pursuant to Fed. R. Crim. P. 48(a) to dismiss in the above-captioned case (1) the Superseding Indictment against defendants Jonathan M. Spiller, Haim Geri, and Daniel Alvirez, and Count 1 of the Superseding Information against defendant Daniel Alvirez, with prejudice, and (2) Count 2 of the Superseding Information against defendant Daniel Alvirez without prejudice.

Respectfully submitted,

DENIS J. McINERNEY
Chief, Fraud Section

RONALD C. MACHEN JR.
United States Attorney
In and For the District of Columbia

By: /s/
LAURA N. PERKINS
D.C. Bar # 479048
JOEY LIPTON
IL Bar # 6225473
Trial Attorneys
Criminal Division, Fraud Section
U.S. Department of Justice
1400 New York Avenue, N.W.
Washington, D.C. 20530
(202) 514-7023

/s/
MATTHEW C. SOLOMON
NY Bar # 3055209
Assistant United States Attorney
Fraud & Public Corruption Section
United States Attorney's Office
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-7566

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 09-335 (RJL)
v.	:	
DANIEL ALVIREZ,	:	
Defendant.	:	

ORDER

On the government's unopposed motion to dismiss pursuant to Fed. R. Crim. P. 48(a) in the above-captioned case, it is hereby ORDERED:

1. The Superseding Indictment against defendant Daniel Alvirez (the "defendant"), and Count 1 of the Superseding Information against the defendant, are dismissed with prejudice.

2. Count 2 of the Superseding Information against the defendant is dismissed without prejudice.

3. As a result of the dismissal of the charges, the guilty plea entered by the defendant is vacated.

DATED: 3/30/12

THE HONORABLE RICHARD J. LEON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 09-335 (RJL)
v.	:	
JONATHAN M. SPILLER,	:	
Defendant.	:	

ORDER

On the government's unopposed motion to dismiss pursuant to Fed. R. Crim. P. 48(a) in the above-captioned case, it is hereby ORDERED:

1. The Superseding Indictment against defendant Jonathan M. Spiller is dismissed with prejudice.

2. As a result of the dismissal of the charges, the guilty plea entered by the defendant is vacated.

DATED: 3/30/12

THE HONORABLE RICHARD J. LEON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 09-335 (RJL)
v.	:	
HAIM GERI,	:	
Defendant.	:	

FILED
MAR 30 2012
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

ORDER

On the government's unopposed motion to dismiss pursuant to Fed. R. Crim. P. 48(a) in the above-captioned case, it is hereby ORDERED:

1. The Superseding Indictment against defendant Haim Geri is dismissed with prejudice.

2. As a result of the dismissal of the charges, the guilty plea entered by the defendant is vacated.

DATED: 3/30/12

THE HONORABLE RICHARD J. LEON
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. I further certify that I have served the following by first-class United States Mail for delivery to each of the following on May 19, 2020.

Timothy Shea, Esquire
United States Attorney for the District of Columbia
555 4th Street, N.W.
Washington, D.C. 20530

The Hon. Emmet G. Sullivan
United States District Court for the District Columbia
333 Constitution Avenue, N.W.
Washington, D.C. 20001

John Gleeson, Esquire
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
Tel: 212-909-6000
Fax: 212-909-6836

May 19, 2020

/s/ Sidney Powell

Sidney Powell
SIDNEY POWELL, P.C.
Counsel of Record
2911 Turtle Creek Blvd.,
Suite 300
Dallas, Texas 75219
Tel: 214-707-1775