UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
v.	)	No. 17-cr-00232 (EGS)
MICHAEL T. FLYNN,	)	
Defendant.	)	

BRIEF OF FORMER FEDERAL PROSECUTORS AND HIGH-RANKING DEPARTMENT OF JUSTICE OFFICIALS AS *AMICI CURIAE*

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a bipartisan group of former federal prosecutors and former high-ranking supervisory officials in the Department of Justice ("DOJ" or the "Department"). Many served in a nonpartisan career capacity in administrations of both parties. Some were political appointees—appointed by both Republican and Democratic presidents. All *amici* took an oath to uphold the United States Constitution and to carry out the Department's core mission of pursuing equal justice under the law. They proudly adhered to the longstanding principle, expressed in the Department's *Justice Manual*, that "[i]t is imperative that the Department's investigatory and prosecutorial powers be exercised free from partisan consideration."[2]

Amici submit this brief out of concern that President Trump and Attorney General Barr have flouted these principles by seeking to dismiss the prosecution of Michael Flynn for what appear to be partisan political reasons. *Amici* have an enduring respect and admiration for the Department and its career prosecutors. They also share an abiding belief that our democracy is safe only when the enormous power of federal law enforcement is applied equally to all citizens based on facts and the law, rather than the political whims of a particular president or administration. As then-Attorney General and later Supreme Court Justice Robert Jackson said: "While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst."[3]

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[1] For ease of reading, emphases have been added and internal punctuation, alterations, citations, and footnotes have been omitted from quotations throughout this brief, without individual notations.

[2] U.S. Dep't. of Justice, *Justice Manual* § 1-8.100 (2018), https://perma.cc/7M84-JZ5P.

[3] Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Jud. Soc'y 18 (1940), 21 J. Crim. L. 3 (1940), *available at* https://perma.cc/SLB4-WN4Y (address at Conference of U.S. Attorneys, Washington, DC, Apr. 1, 1940).

Driven by their respect for the Department and the rule of law, and drawing on their more than 11,500 cumulative years of experience enforcing the federal criminal laws, *amici* seek to aid the Court in its resolution of the pending motion to dismiss. Because the government and the defendant agree that the case should be dismissed, the Court lacks the benefit of opposing interests as it considers the questions now before it. *Amici* hope to assist in filling that gap. They urge the Court to exercise its authority to undertake a searching review of the government's request, and in so doing to protect the public interest in the even-handed enforcement of our laws.

INTRODUCTION

In November 2017, the government charged former national security advisor Michael Flynn with one count of violating 18 U.S.C. § 1001. Flynn twice pled guilty before Article III judges. Two-and-a-half years later, with Flynn now awaiting sentencing before this Court, the government seeks to dismiss the case.

But the law is clear: It cannot do so without "leave of court." Fed. R. Crim. P. 48(a). To be sure, a district court's discretion to deny such leave is narrow. Prosecutors' motions to dismiss pending criminal charges can and often do serve laudable ends, including the protection of criminal defendants from charges that may be too weak or from punishments that may be unjust or too severe. In recognition of that fact and of longstanding separation of powers principles, courts have held that the government's prosecutorial discretion to dismiss a case is broad and should be disturbed only in rare circumstances.

The history of Rule 48 and its applicable precedent make clear, however, that a district court has the authority—and even the duty—to deny leave under Rule 48 in two situations. The first is not relevant here, as it occurs when the government is engaged in prosecutorial harassment of the defendant. But the second is very much at issue. It arises when the court determines that

dismissal would be contrary to the "public interest." *Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977) (citing *United States v. Ammidown*, 497 F.2d 615, 620 (D.C. Cir. 1973)). In assessing that question, "the trial court" does not "serve merely as a rubber stamp for the prosecutor's decision." *Ammidown*, 497 F.2d at 622. Rather, it is the Court's "*duty* to . . . protect[] . . . the public interest," *United States v. Cowan*, 524 F.2d 504, 511 (5th Cir. 1975), which it must do by ensuring that the government's actions are not "tainted with impropriety." *Rinaldi*, 434 U.S. at 30.

The government's request in this case does not appear to advance the interests of justice or of the public, nor does it appear to be free of impermissible and unlawful taint. The government's motion instead bears the hallmarks of a brazen attempt to protect an ally of the President. The dismissal, in other words, appears to serve President Trump's *personal* political interests, rather than the interests of the public whom the President and Attorney General Barr serve. The dismissal thus also appears to violate the Attorney General's oath (and that of his political subordinates) to faithfully execute the laws and to abide by the longstanding policies of the Department of Justice.

There is nothing remarkable or unjust about the case against Flynn. He lied to FBI agents—and admitted to that lie under oath. More significantly, he lied while serving as the President's national security advisor about his communications with a high-ranking representative of a hostile foreign power, in the midst of the FBI's investigation into ties between that hostile power and President Trump's 2016 election campaign. That investigation was within the FBI's jurisdiction to protect the United States against national-security threats. Moreover, Flynn's conduct raised concerns at the highest levels of the FBI and DOJ that he might be subject to blackmail, which would disqualify him for his role as national security advisor (or any other senior government job).

What *is* remarkable is the government's newly minted claim that Flynn's lies were not "material" within the meaning of 18 U.S.C. § 1001 because the FBI did not, on the day it

interviewed Flynn, have a "legitimate" open investigation that it expected to result in criminal charges against him. The government's portrayal of the facts is an egregious distortion. The government *did* have an open investigation into Flynn, and not only was that investigation legitimate, the FBI was investigating Flynn for possible criminal conduct that went far beyond any connection he may have had to Russian interference in the 2016 election. The FBI also had ample reason to investigate the many foreign business relationships Flynn forged while working for President-elect Trump (and prior to that time) under its broad mandate to ensure that government employees do not pose national security threats. But even if the government's recitation of the facts were accurate, its narrow reading of materiality is not—and has never been—the law. And notably, no career prosecutor signed the government's brief.

The government's seemingly disingenuous representation of the facts and governing law comes in the context of a long history of actions undertaken by Attorney General Barr in furtherance of President Trump's personal political interests. From issuing a statement mischaracterizing the report of the Special Counsel on the Russia investigation,[4] to repeatedly commenting—in violation of DOJ policy—on ongoing investigations in a manner that impugns the character and integrity of people the President dislikes,[5] to seeking a lighter sentence for President Trump's friend Roger Stone against the recommendation of career prosecutors,[6] Attorney General Barr has behaved in a manner that has already caused a judge of this Court to

[4] *See* Mark Mazzetti & Michael S. Schmidt, *Mueller Objected to Barr's Description of Russia Investigation's Findings on Trump*, N.Y. Times (Apr. 30, 2019), https://nyti.ms/3bpSTtA.

[5] *See, e.g.*, Aaron Blake, *"One of the Greatest Travesties in American History": Barr Drops All Pretense About Ongoing Probe of Russia Investigation*, Wash. Post (Apr. 9, 2020), https://wapo.st/2YTpgy9; *cf.* U.S. Dep't of Justice, *Justice Manual*, *supra* note 2, § 1-7.000 *et seq.*

[6] *See* Katie Benner et al., *Prosecutors Quit Roger Stone Case After Justice Department Intervenes on Sentencing*, N.Y. Times (Feb. 11, 2020), https://nyti.ms//3fHTLwQ.

remark on his "lack of candor" and to question whether he has misled the courts and the public at the President's behest.[7] Barr has likewise initiated criminal investigations and prosecutions that the President has publicly called for at the expense of the due process rights of the subjects, including a failed attempt to prosecute former FBI Deputy Director Andrew McCabe, an effort that the same judge of this Court likened to prosecutorial behavior in a "banana republic."[8]

Partisan interference in law enforcement of the kind exhibited by the Department under Attorney General Barr is anathema to its mission of pursuing equal justice under the law. The Department's *Principles of Federal Prosecution* are founded on the premise that its prosecutorial power should be exercised in service of the "fair, evenhanded administration of the federal criminal laws."[9] Those principles likewise designate "political association, activities, or beliefs"[10] as impermissible considerations in initiating *or declining* criminal charges. When the Department abandons that neutrality, it erodes public respect for the rule of law and does grave damage to the institutions that undergird our democracy. It also forfeits any deference that this Court owes to the Department's exercise of its otherwise vast prosecutorial discretion.

As explained fully below, this Court has robust authority to scrutinize the government's motion to dismiss and to take appropriate action if it determines that dismissal would not serve the public interest. The Court should exercise that authority here to protect the public interest in the integrity of the Department of Justice and the fair administration of the criminal law.

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[7] *Elec. Privacy Inf. Ctr. v. U.S. Dep't of Justice*, __ F. Supp. 3d __, No. 19-cv-810(RBW), 2020 WL 1060633, at *8 (D.D.C. Mar. 5, 2020) ("Attorney General Barr distorted the findings in the Mueller Report," apparently "to create a one-sided narrative . . . at odds with the . . . Report [itself]").

[8] *See* Spencer S. Hsu & Devlin Barrett, *Judge Cites Barr's "Misleading" Statements in Ordering Review of Mueller Report Redactions*, Wash. Post (Mar. 5, 2020), https://wapo.st/2AnY9B1.

[9] U.S. Dep't of Justice, *Justice Manual*, *supra* note 2, § 9-27.001.

[10] *Id.* at § 9-27.260.

ARGUMENT

I. THE COURT HAS A DUTY TO SCRUTINIZE THE GOVERNMENT'S MOTION AND, IF DISMISSAL IS NOT IN THE PUBLIC INTEREST, TO DENY IT.

While a court should ordinarily grant a motion for leave under Rule 48, the text, history, and judicial interpretation of the Rule confirm that a court must reject a prosecutor's request to dismiss a case if it determines that dismissal would be contrary to the public interest. Unique features of this case underscore the need for such judicial review, given the special risk that the government's motion would not faithfully execute, but rather would frustrate, the fair administration of the criminal law.

A. Federal Rule of Criminal Procedure 48(a) denies the government authority to dismiss a criminal case without the Court's approval, which the Court must withhold if dismissal would be contrary to "the public interest."

Federal prosecutors, like their predecessors at common law, once had unfettered discretion to terminate any criminal case, at any time and for any reason.[11] That changed in 1944, when the Supreme Court promulgated Federal Rule of Criminal Procedure 48(a), the text of which—then and now—is clear: "The government may, *with leave of court,* dismiss an indictment, information, or complaint." Fed. R. Crim. P. 48(a).

That crucial highlighted phrase—*with leave of court*—does not appear in the Rule by happenstance. On the contrary, when Rule 48 was first submitted to the Supreme Court for approval by the Advisory Committee on the Rules of Procedure, it "adopted the common law rule that the power of the prosecutor to enter a *nolle prosequi* in a criminal case [i]s unrestricted." *Ammidown*, 497 F.2d at 620. But the Supreme Court sent that proposed draft back to the Committee, with a citation to the Court's own recent opinion in *Young v. United States*, 315 U.S.

[11] *See, e.g.*, *The Confiscation Cases*, 74 U.S. (7 Wall) 454, 457–58 (1868).

257 (1942).[12] In *Young*, the Court had held that the mere fact that a prosecutor confesses error in a case "does not relieve th[e] Court of the performance of the judicial function." *Id.* at 258. Rather, the Court declared:

> The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to *our* consideration and protection as well as that of the enforcing officers. . . . [T]he proper administration of the criminal law cannot be left merely to the stipulation of parties.

Id. at 259. Accordingly, when the Court issued the final version of Rule 48, it "inserted the phrase 'by leave of court.'" *Cowan*, 524 F.2d at 510. And in so doing, the Court made "it manifestly clear that [it] intended to clothe the federal courts with a discretion broad enough to protect the public interest in the fair administration of criminal justice." *Id.* at 512.[13]

That discretion can and must take account of the Executive's central role in seeing the criminal law "faithfully executed." U.S. Const. art. II, § 3; *see United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 30 (D.D.C. 2015) (Sullivan, J.) (describing criminal prosecution as "a traditional Executive Branch function" that may not be "seize[d] . . . by the Judicial Branch"); *see also Cowan,* 524 F.2d at 513. Precedent interpreting Rule 48 thus takes special care to "balance the constitutional duty of government prosecutors, as members of the Executive Branch . . . with the constitutional powers of the federal courts," including "most particularly the sentencing power of trial judges." *United States v. Hamm*, 659 F.2d 624, 629 (5th Cir. 1981). "The resulting balance of power is precisely what the Framers intended" when they established an independent judiciary,

[12] *See Cowan*, 524 F.2d at 509–10 (describing Rule 48's drafting history); Thomas Ward Frampton, Why Does Rule 48(a) Require "Leave of Court"? (May 13, 2020) (unpublished manuscript), https://bit.ly/3brIn4X (recounting drafting history in detail).

[13] *See also Rinaldi*, 434 U.S. at 29 n.15 ("The words 'leave of court' . . . obviously vest some discretion in the court . . . ."); *id.* at 34 (Rehnquist, J., dissenting) ("This proviso was . . . clearly directed toward an independent judicial assessment of the public interest in dismissing the indictment.").

which exists in part to serve as "a check on the abuse of Executive prerogatives" in those rare instances where such abuses occur. *Cowan*, 524 F.2d at 513. Thus, while Rule 48 "was not promulgated to shift absolute power from the Executive to the Judicial Branch," "it *was* intended as a power to check power." *Id.*

In this Circuit, that "power to check power" is cabined, structured, and channeled by the Court of Appeals' seminal decision in *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir 1973). *Cf. Rinaldi*, 434 U.S. at 29 n.15 (citing *Ammidown* with approval); *United States v. Pitts*, 331 F.R.D. 199, 203–06 (D.D.C. 2019) (Sullivan, J.) (treating *Ammidown* as this Circuit's central Rule 48 precedent). As the Court of Appeals explained, a District Court's Rule 48 authority to deny a prosecutor's motion to dismiss is confined to two specific circumstances. The first arises when the government attempts to harass a defendant by "charging, dismissing, and recharging" a case to gain a tactical advantage. *Rinaldi*, 434 U.S. at 29 n.15; *see Ammidown*, 497 F.2d at 620. In that posture, "the Government moves to dismiss [the] indictment *over the defendant's objection*," *Rinaldi*, 434 U.S. at 29 n.15, and the court steps in to protect the defendant from harassment, typically by insisting that the dismissal be with prejudice.[14]

But prosecutorial harassment is not the only evil that Rule 48 addresses. As the Court of Appeals recognized in *Ammidown* and the Supreme Court recognized in *Rinaldi*, "the Rule has also been held to permit the court to deny a Government dismissal motion *to which the defendant has consented* if the motion is prompted by considerations clearly contrary to the public interest."

[14] *See, e.g.*, *Pitts*, 331 F.R.D. 199. In *Ammidown*, the Court of Appeals suggested that "prosecutorial harassment" cases are Rule 48's "primary concern." 497 F.2d at 620; *see also Rinaldi*, 434 U.S. at 29 n.15. But in a thorough scholarly excavation of Rule 48's history, Professor Thomas Frampton demonstrates that the Rule's principal object was not to protect "individual defendants, but rather to guard against dubious dismissals of criminal cases that would benefit powerful and well-connected defendants." Frampton, *supra* note 12. "In other words," Rule 48 "was drafted and enacted precisely to deal with the situation that has arisen in *United States v. Flynn*." *Id.*

Rinaldi, 434 U.S. at 29 n.15 (citing *Ammidown*, 497 F.2d at 620). In this "distinctly different situation," the Court's task is not to protect the defendant—who is now aligned with his former adversary. *Ammidown*, 497 F.2d at 620. Rather, the Court's task is to determine whether the prosecutor's proposed dismissal "sufficiently protects *the public*." *Id.*

As the Supreme Court has explained, in conducting this public-interest inquiry the "salient issue" is whether the government's "efforts to terminate the prosecution [are] tainted with impropriety." *Rinaldi*, 434 U.S. at 30. Such impropriety will be manifest where a dismissal "does not serve due and legitimate prosecutorial interests," *Ammidown*, 497 F.2d at 622; where it represents a marked "departure from sound prosecutorial principle," *id.*; where "the motion was a sham or a deception," *Cowan*, 524 F.2d at 514; where "the decision to terminate the prosecution was tainted by bad faith," *United States v. Smith*, 55 F.3d 157, 159 (4th Cir. 1995); or where the decision is driven by base *personal* interests, rather than public ones, *see Hamm*, 659 F.2d at 629–30 (holding that "the court should withhold leave" to dismiss if it appears that the prosecuting official is acting "because he personally dislikes the victim of the crime"); *cf. Saena Tech Corp.*, 140 F. Supp. 3d at 34 (noting in the related context of deferred prosecution agreements that a personal desire to benefit "an intimate acquaintance" would be improper) (quoting *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161, at *6 (E.D.N.Y. July 1, 2013)). In conducting this review, the Court must recognize that "it has traditionally been the prosecutor who determines which case will be pressed to conclusion." *Ammidown*, 497 F.2d at 621. But the Court's job is not "to serve merely as a rubber stamp for the prosecutor's decision." *Id.* at 622. Rather, it is the Court's "*duty* to [ensure] the protection of the public interest." *Cowan*, 524 F.2d at 511.

B. The circumstances of this case underscore the need for independent judicial review.

The Court's duty to protect the public interest must be fulfilled in every case. But in the unique circumstances of this case, multiple considerations underscore the essential need for this Court's independent review of the government's motion. These special considerations include the unusual posture of the case, its proximity to the President, its implications for the integrity of the judicial system, and its salience to the public.

Posture of the Case. Consider first the case's posture. As noted above, Rule 48 analyses typically arise when a prosecutor seeks dismissal prior to trial. *See Ammidown*, 497 F.2d at 620. In that setting, separation of powers concerns cut in favor of granting a motion to dismiss. As the Supreme Court has observed, before trial, "the prosecutor's assessment of the proper extent of prosecution may not have crystallized." *United States v. Goodwin*, 457 U.S. 368, 381 (1982). Likewise, prior to trial, the government may still be assessing nuanced considerations such as "the prosecution's general deterrence value [or] the government's enforcement priorities." *Wayte v. United States*, 470 U.S. 598, 607 (1985). More basically, it would be "unwise and impractical" to deny a motion to dismiss before trial, *United States v. Shanahan*, 168 F. Supp. 225, 229 (S.D. Ind. 1958), because the court "is constitutionally powerless to compel the government to proceed" to opening statements or to the presentation of evidence. *Cowan*, 524 F.2d at 511.

Here, however, the Court need not "compel the government to proceed" any further with this case, *id.*, because the government has already reached the end of the road: It has already secured the defendant's guilty plea—twice.[15] It has already prepared a sentencing memorandum—

[15] *See* Minute Entry (Dec. 1, 2017) (Contreras, J.); Minute Entry (Dec. 18, 2018) (Sullivan, J.).

twice.[16] Indeed, it has already *gone to sentencing*.[17] In this unusual posture, it is not the Executive's power to charge or conduct a prosecution that is threatened, but rather it is "the sentencing authority reserved to the judge." *Ammidown*, 497 F.2d at 622. After all, "[i]t is axiomatic that, within the limits imposed by the legislature, imposition of sentence is a matter for discretion of the trial judge." *Id.* at 621. Accordingly, the "dropping of an offense" at this late stage of the proceedings threatens "an intrusion on the judicial function." *Id.* at 623; *see also United States v. Fokker Servs. B.V.*, 818 F.3d 733, 745–46 (D.C. Cir. 2016) (observing that a judge's authority is "markedly different" when the government seeks dismissal after "the court reviews the defendant's admitted conduct" and finds him at fault, given the "immediate sentencing implications" of such a finding); *id.* (noting "the Judiciary's traditional power over criminal sentencing").[18]

Proximity to the President. But this case does not just present an unusual posture. It presents highly unusual, if not unprecedented, facts that have clearly captured the close attention of the President himself. The President's interest in this case is significant for multiple reasons. *See infra* Part II.B. For present purposes, though, it bears noting that this case's proximity to the President and his close attention to these proceedings undermines any argument that this Court might somehow encroach on the Executive's authority by reviewing or rejecting the government's motion. After all, "a judge could not possibly win a confrontation with the executive branch over

[16] *See* Gov't Sentencing Mem., ECF No. 46; Gov't Supp. Sentencing Mem., ECF No. 150.

[17] *See* Tr. of Proceedings, ECF No. 103.

[18] In *United States v. Fokker Servs.*, the Court of Appeals reviewed a judge's refusal to toll the Speedy Trial clock in connection with a deferred prosecution agreement. *See* 818 F.3d at 737. In extensive dicta, the Court analogized that refusal to a refusal to dismiss a case under Rule 48(a). *See id.* at 742. In so doing, it repeatedly cited *United States v. Ammidown* with approval, *see id.* at 745–46, and nowhere suggested any intention to depart from that opinion's seminal conclusion—embraced by the Supreme Court in *Rinaldi*—that trial courts must determine for themselves whether a proposed dismissal "sufficiently protects the public." *Ammidown*, 497 F.2d at 620.

its refusal to prosecute, since the President has plenary power to pardon a federal offender." *In re United States*, 345 F.3d 450, 454 (7th Cir. 2003). In run-of-the-mill cases, the idea that the President might issue such a pardon simply to defend the Executive's prerogative against a District Court conducting a Rule 48 inquiry seems unlikely. But here, the prospect of a presidential pardon is anything but remote.[19]

Judicial Integrity. Indeed, the only practical difference between a presidential pardon and the dismissal that the Executive now seeks through its motion is that the pardon would be executed by the President alone, whereas the government's motion asks this Court to bless the Executive's proposed absolution of the defendant. The very fact that the Executive is seeking the Judiciary's blessing, however, raises a third consideration: "the need to preserve the integrity of the courts." *United States v. Carrigan*, 778 F.2d 1454, 1463 (10th Cir. 1985) (holding that "Rule 48(a) . . . permits courts faced with dismissal motions to consider" judicial integrity).

As this Court has observed in a related context, considerations of judicial integrity are "[o]f utmost importance." *Saena Tech Corp.*, 140 F. Supp. 3d at 32. And here, the risk to that integrity is high. "The Court is being asked to place its formal imprimatur," *id.* at 33, on the Executive's decision to abandon a prosecution of a close associate of the President himself—indeed, the former national security advisor. Moreover, the defendant is being prosecuted for—and pled guilty to—lying to the FBI as it was investigating potentially unlawful behavior in the highest echelons of our government. *Id.*

In a far less serious case, cited with favor by the Court of Appeals in *Ammidown*, a federal District Court judge described the crime of lying to federal investigators as "an offense [that]

[19] *See, e.g.*, Eric Tucker & Jill Colvin, *Trump Praise of "Tormented" Flynn Raises Pardon Speculation,* Associated Press (Apr. 30, 2020), https://perma.cc/W63U-PESQ.

strikes at the very trunk nerve of our system of administering justice. It is not a minor offense, but one possessed with grave consequences." *Shanahan*, 168 F. Supp. at 226, *cited in Ammidown*, 497 F.2d at 621. For that reason, the court held, "A motion for leave to dismiss . . . such an offense cannot be taken lightly by the Court." *Id.* And as this Court has already observed, the same can be said here. *See* Tr. of Proceedings 24, ECF No. 103 ("This is a very serious offense. A high-ranking senior official of the government [made] false statements to the Federal Bureau of Investigation while on the physical premises of the White House.").

Public Salience. Much like this Court, the public may be hard pressed to "hid[e] [its] disgust, [its] disdain, for this criminal offense." *Id.* at 33. Nor will the public likely ignore the highly unusual circumstances under which the government's motion was filed—and the serious questions those circumstances raise about the government's motives and its conduct. *See infra* Part II; *cf. Saena Tech Corp.*, 140 F. Supp. 3d at 34 ("The power to protect the integrity of the judiciary keeps courts from becoming accomplices in illegal or untoward actions . . . .").

Against the backdrop of these special circumstances, Rule 48 exists "to preserve the essential judicial function of protecting the public interest in the evenhanded administration of criminal justice." *Cowan,* 524 F.2d at 512. As this Court has observed, "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings. . . . If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted." *Saena Tech Corp.*, 140 F. Supp. 3d at 32 (quoting *Mesarosh v. United States*, 352 U.S. 1, 14 (1956)). In fulfillment of that duty, the Court must "not be content with a mere conclusory statement by the prosecutor that dismissal is in the public interest." *Ammidown*, 497 F.2d at 620. Rather, it must engage in a thorough "examination of the record," *Rinaldi*, 434 U.S. at 30, so as "to obtain and evaluate the prosecutor's [true] reasons" for dropping this case. *Ammidown*, 497 F.2d at 622. And with those

true reasons in hand, it must determine—for itself—whether a dismissal would "assure protection of the public interest." *Id.*

C. Interference in a law enforcement matter to advance the president's political agenda violates Article II of the Constitution and is *per se* inconsistent with the public interest.

The "balance of power" animating Rule 48 requires courts to defer to prosecutorial discretion but also to serve as "a check on the abuse of Executive prerogatives." *Cowan*, 524 F.2d at 513. A paradigmatic example of such abuse occurs where prosecutorial decisions are made not to serve the public interest but rather to serve the president's own personal political incentives. Accordingly, a court may deny a Rule 48 motion if it finds the motion to be the product of improper political interference in the exercise of the government's law enforcement power.

The Constitution places the president at the head of the executive branch, but it does not cloak him with unlimited authority to intervene in how the law is enforced. Rather, the president's task is to "take Care that the Laws be *faithfully* executed." U.S. Const. art. II, § 3. The very word "faithfully" suggests constraints, "imposing a duty of good faith"[20] that prohibits "dishonesty, disloyalty, and lack of fair dealing."[21] Indeed, the word "faithfully" appears only one other time in the Constitution, in the president's oath of office: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, § 1, cl. 8. Through that oath, the Constitution makes the president a fiduciary of the public trust.[22]

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[20] *See, e.g.*, David E. Pozen, *Constitutional Bad Faith*, 129 Harv. L. Rev. 856, 907 (2016); *see also* Noah Webster, *An American Dictionary of the English Language* (1828), https://perma.cc/PR2X-UQXE (defining "faithfully" as meaning "with good faith").

[21] *See* Pozen, *supra* note 21, at 888.

[22] *See* Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111, 2119 (2019) ("[T]he Faithful Execution Clauses are substantial textual and historical commitments to what we would today call fiduciary obligations of the President").

When the president intervenes in an individual prosecution to influence it for corrupt or self-protective purposes, he violates not only that trust but also his oath of office and the Take Care Clause itself. He is not preserving, protecting, and defending the Constitution to the best of his ability—he is undermining it. Accordingly, however broad the president's powers may be, one thing he absolutely cannot do is exempt or shield himself or his allies from applicable laws. This would, by definition, *not* be taking care to faithfully execute the laws; it would be frustrating the execution of the law.

Like the president, the Attorney General's power to prosecute crimes is also grounded in Article II of the Constitution. *See United States v. Nixon*, 418 U.S. 683, 694 (1974). Accordingly, as the Department's own *Justice Manual* confirms, "the prosecutor's status as a member of the Executive Branch" means that he too has a "responsibility under the Constitution to ensure that the laws of the United States be 'faithfully executed.'" U.S. Dep't of Justice, *Justice Manual*, *supra* note 2, § 9-27.110. That responsibility includes the duty to protect criminal prosecutions "from partisan consideration" or influence—including from the president himself.[23] *Id.* at § 1-8.100.

For these reasons, it is clear that a failure to *faithfully* execute the laws—on the part of the President, the Attorney General, the Department of Justice, or all three acting in concert—threatens "the public interest in the evenhanded administration of criminal justice." *Cowan*, 524 F.2d at 512. When that failure takes the form of a politically tainted request to dismiss a case, "the role of

[23] *See* Andrew McCanse Wright, *The Take Care Clause, Justice Department Independence, and White House Control*, 121 W. Va. L. Rev. 353, 395–96 (2018) (discussing Attorney General's Take Care Clause obligation to avoid presidential interference in prosecutions); *cf.* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 Yale L.J. 1836, 1875–76 (2015) ("[T]he Framers did not expect that the President would be personally implementing the laws").

guarding against abuse of prosecutorial discretion" falls to the Court, and warrants denial of the government's motion under Rule 48. *Ammidown*, 497 F.2d at 620.

II. THERE APPEAR TO BE AMPLE REASONS TO DENY THE GOVERNMENT'S MOTION.

Based on the record currently before the Court, there are serious grounds to doubt that a dismissal of this case would serve the public interest, for at least two separate but interrelated reasons. First, the government's arguments in support of dismissal fail even the most deferential scrutiny as to both matters of fact and law. Second, the context surrounding the filing of the government's motion—including the abrupt departure of the only career prosecutor on the case—indicates that the motion is the result of political interference by the Attorney General and his politically-appointed subordinates, seemingly at the President's behest. Either of these defects, standing alone, would warrant denial of the motion. But here they appear intertwined, as the government's meritless legal arguments seem to be a pretext for political interference.

A. The government's motion is unpersuasive because Flynn's false statements were material as a matter of law.

For more than two and a half years, as the pendency of this case spanned two different District Court judges, two different prosecuting offices, and hundreds of pages of written pleadings, the government maintained a straightforward position: Michael Flynn committed a federal crime when, sitting in his White House office, he lied to the FBI about his contacts with a hostile foreign power. It was not a hard position for the government to maintain. After all, in his very first appearance in this courthouse, on December 1, 2017, Mr. Flynn raised his hand and confessed to that very crime. Over a year later, he swore a second oath and confessed to the crime yet again, standing before this Honorable Court. *See* Tr. of Proceedings 7–10, ECF No. 103.

Now, the government seeks to reverse course, insisting that, actually, there never was any crime here to begin with. Its sole reason for that assertion is its claim that it has unearthed "new" evidence demonstrating that Flynn's statements were not "material" within the meaning of 18 U.S.C. § 1001. This is purportedly so because the FBI did not have a "legitimate" investigation *of Flynn* pending at the time its agents interviewed him. The government rests its claim on communications between FBI agents and other government personnel disclosing that the FBI had decided to close a counterintelligence investigation of Flynn before learning of his conversations with the Russian ambassador. To that the government adds the assertion that, going into their meeting with Flynn, the FBI agents already knew that what Flynn had said in his conversation with the Russian ambassador likely did not give rise to a crime. And it concludes by noting that some government personnel disagreed on how to handle or interpret Flynn's conversation.

The government is wrong on both the law and the facts. Indeed, it so clearly and unequivocally wrong that one wonders why it is straining to make such unfounded arguments, if not to mask some alternative explanation for its request to drop Flynn's case.

The Law. As this Court knows—and has already held in this case—section 1001 applies broadly to "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States," and criminalizes false material statements made in connection with any such matter. *See United States v. Flynn*, 411 F. Supp. 3d 15, 41–42 (D.D.C. 2019). The Supreme Court has accordingly described the statute's application as "sweeping." *United States v. Rodgers*, 466 U.S. 475, 479 (1984). The statute's expansive scope dovetails with the FBI's own broad and dual-purpose jurisdiction to investigate not just potential violations of federal criminal law but also threats to national security that may or may not be criminal in nature.[24]

[24] *See* FBI, Domestic Investigative and Operations Guide, Preamble (published Oct. 16, 2013).

Notwithstanding this statute's clear and well-established scope, the government now advances the wholly novel position that concededly false statements like the one Flynn made to the FBI do not constitute a crime if, at the time the statement was made, the FBI did not already have an ongoing criminal investigation of the defendant. If accepted, the government's argument would give rise to an unprecedented reading of the materiality element of 18 U.S.C. § 1001 that could well call into question myriad past and future prosecutions.

One expects, however, that the Department will not long adhere to the position it has invented in this case—because the position is legally baseless. Simply put, there is no requirement that the FBI have an open investigation of anyone for a lie to be material: "A lie influencing the possibility that an investigation might commence stands in no better posture under § 1001 than a lie distorting an investigation already in progress." *United States v. Hansen*, 772 F.2d 940, 949 (D.C. Cir. 1985). To prove materiality, the government is required only to make "a reasonable showing" of the "*potential* effects of the statement," *Hansen,* 772 F.2d at 949, and is not limited to the "immediate circumstances" in which the statement was made in doing so. *United States v. McBane*, 433 F.3d 344, 351 (3d Cir. 2005); *see also United States v. Moore*, 612 F.3d 698, 701 (D.C. Cir. 2010) ("[A] statement is material if it has a natural tendency to influence, *or is capable of influencing*, either a discrete decision or any other function of the agency to which it was addressed."). As these precedents make clear, the government "has a fundamental misunderstanding of the law of materiality under 18 U.S.C. § 1001." *Flynn*, 411 F. Supp. at 41 (rejecting similar materiality arguments advanced by the defendant in this case).

The Facts. This Court has already analyzed the materiality of Flynn's false statements to the FBI in considerable detail, and has held that they were material in ways both narrow and broad. *See id.* at 40–43. As the government concedes, at the time of Flynn's interview, the FBI had an

open counterintelligence investigation focused specifically on Flynn's direct role, as a member of President Trump's campaign, in Russian interference in the 2016 election, as well as on Flynn's other dealings with foreign nationals. A conversation between Flynn and the Russian ambassador that occurred before Trump took office—possibly at Trump's direction—concerning sanctions imposed on Russia was certainly relevant to that inquiry, as was the possibility that Flynn had lied to his superiors about the conversation. Whether the FBI was poised to close that investigation when it learned of Flynn's conversation makes no difference. New information—including Flynn's account of the call or his explanation for why he had previously lied about its contents to others—could have led the FBI to extend the investigation or to open a new one. "It is axiomatic that the FBI is not precluded from following leads and, if warranted, opening a new investigation based on those leads when they uncover information in the course of a different investigation." *Kelley v. FBI*, 67 F. Supp. 3d 240, 287 n.35 (D.D.C. 2014) (quoted in *Flynn*, 411 F. Supp. 3d at 42).

Flynn's statements were likewise material to matters within the FBI's jurisdiction even if the FBI was not investigating Flynn himself. The FBI had an open counterintelligence investigation into whether President Trump's 2016 campaign was part of Russian election interference. To quote the government's own briefing in this case, circa five months ago:

> Mr. Flynn's false statements were "absolutely material" because his false statements "went to the heart" of the FBI's "counterintelligence investigation into whether individuals associated with the campaign of then-candidate Donald J. Trump were coordinating with the Russian government in its activities to interfere with the 2016 presidential election."

Flynn, 411 F. Supp. 3d at 40–41 (quoting Gov't's Surreply 10, ECF No. 132).

Nor is it relevant whether Flynn's statement to the Russian ambassador in and of itself constituted a federal crime. The FBI has wide-ranging jurisdiction to determine whether a government employee is beholden to a foreign government and is thus a threat to national security. Here, the FBI knew that the National Security Advisor had lied *to the Vice President-elect of the*

United States about a phone call with a hostile power. And it further knew that the Russian government was aware that Flynn had lied, because the Vice President repeated the lie on national television. As the then-Acting Attorney General later explained to the White House Counsel, the fact that "Flynn had misled senior administration officials about the nature of his communications with the Russian ambassador to the United States" meant "that the national security adviser was potentially vulnerable to Russian blackmail."[25] If a lie told to the FBI against this backdrop is not "material" to the FBI's jurisdiction to investigate "threats to the national security of the United States,"[26] then the word "material" has lost all meaning.

Finally, conversations between FBI and DOJ officials describing their discussions about the investigation of Flynn and whether to notify the incoming administration about his apparent lies to the vice president-elect have no bearing on the materiality of Flynn's lies to the FBI.[27] The government has not argued that Flynn, a longtime high-ranking military intelligence official who was intimately familiar with the FBI and the intelligence community, made his false statements unknowingly or involuntarily. Nor does it dispute that he was acting voluntarily when, represented by a well-known law firm, he twice admitted under oath in this Court that his statements were

[25] Adam Enotus et al., *Justice Department Warned White House that Flynn Could Be Vulnerable to Russian Blackmail, Officials Say*, Wash. Post (Feb. 13, 2017), https://wapo.st/2YZr8Fq.

[26] FBI, Domestic Investigative and Operations Guide, Preamble (published Oct. 16, 2013).

[27] The government repeatedly cites an FBI interview with Mary McCord, the then-acting head of DOJ's National Security Division, for the proposition that the FBI's interview of Flynn never should have taken place. From that premise, it argues that his false statements during that interview were not material. But as Ms. McCord recently explained, "[M]y interview in 2017 doesn't help the department support this conclusion, and it is disingenuous for the department to twist my words to suggest that it does." Mary B. McCord, *Barr Twisted My Words in Dropping the Flynn Case. Here's the Truth*, N.Y. Times (May 10, 2020), https://nyti.ms/3ctZ0hI. The government may also have misrepresented the notes of Bill Priestap, the former head of FBI counterintelligence. *See* Adam Goldman & Katie Benner, *Ex-FBI Official is said to Undercut Justice Department Effort to Drop Flynn Case*, N.Y. Times (May 13, 2020), https://nyti.ms/2Z0NS88.

indeed materially false. And the government has not gone so far as to argue that it was misconduct for law enforcement personnel to plan a strategy for interviewing a witness in advance of actually talking to him. Internal disagreements between prosecutors and agents over whether, when, and how to conduct investigations have no bearing on the legal question of the government's jurisdiction to conduct an interview.

In sum, considering both the governing law and the conceded facts, the government's extraordinary argument that it is lawful for a witness (a government employee, no less) to lie to the FBI about contacts with a high-ranking representative of a hostile foreign power simply cannot hold water. Indeed, the argument is so transparently untenable that it would seemingly make sense only as pretext for some other, unstated rationale for seeking dismissal of this case—a conclusion reinforced, as discussed below, by the events surrounding the filing of the government's motion.

B. The government's attempt to dismiss the Flynn prosecution appears intended to further the President's personal political interests and contravenes the consensus views of career officials, indicating it is not in the public interest.

President Trump has denounced the FBI's investigation of Flynn from its inception. Flynn, of course, was a senior adviser to the President's 2016 campaign, and the Flynn investigation was part of an inquiry into wrongdoing by that campaign. In President Trump's first days in office, he attempted to induce then-FBI Director James Comey to terminate the investigation, saying "I hope you can see your way clear to letting this go."[28] This act, among others (including firing Comey to, in the President's words, end "this Russia thing"), led the Special Counsel to caution that

[28] Michael S. Schmidt, *Comey Memo Says Trump Asked Him to End Flynn Investigation*, N.Y. Times (May 16, 2017), https://nyti.ms/2Wug6GO.

Trump's actions are "capable of exerting undue influence over law enforcement investigations, including the Russian-interference and obstruction investigations."[29]

The President has not shied away from exerting such influence in this case. Just last month alone, he repeatedly suggested that he was preparing to pardon Flynn,[30] before going on to lambaste what he called the "dirty, filthy cops at the top of the FBI" and the government prosecutors who "tormented" and "destroyed" Flynn.[31] These comments were simply the latest in a long string of criticisms the President has leveled against the Department and the FBI more generally, and against the prosecution of Flynn in particular. Indeed, "Flynn's case has become something of a cause for Trump supporters," who have keyed in on the President's tweets and statements.[32] And in fact, as soon as the government's motion to dismiss was filed in this case, the President's reelection campaign issued a press release touting the move.[33]

In the meantime, as the President's multi-year pressure campaign unfolded, the career officials who worked on the investigation, the Special Counsel who was appointed under rules aimed at ensuring the exercise of independent prosecutorial judgment, and President Trump's Senate-confirmed United States Attorney for the District of Columbia, Jessie Liu, all found the case's underpinnings to be fully consistent with both the law and the Department's *Principles of*

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[29] Special Counsel Robert S. Mueller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election* at 38, 157 (Mar. 2019), https://www.justice.gov/storage/report.pdf.

[30] *See, e.g.*, Annie Karni & Adam Goldman, *Trump Says He's "Strongly Considering" Pardoning Flynn*, N.Y. Times (Mar. 12, 2020), https://nyti.ms/3bs8ngr.

[31] Quint Forgey, *'Dirty, Filthy Cops': Trump Blasts Michael Flynn Investigation After New FBI Documents Released,* Politico (Apr. 30, 2020), https://politi.co/3dFFVsX.

[32] Michael Balsamo, *Trump Doesn't Heed Barr's Request to Cool Tweeting on DOJ,* Associated Press (Feb. 15, 2020), https://bit.ly/2zuIiQO.

[33] *See* Trump Pence 2020, *Trump Campaign Statement On Case Against Gen. Flynn Being Dropped* (May 7, 2020), https://perma.cc/T8J4-XFKC.

Federal Prosecution. These officials vigorously prosecuted the case, securing a plea, preparing sentencing memoranda, and—most notably—arguing forcefully against Flynn's eventual efforts to withdraw his guilty plea based on alleged government misconduct. With respect to the latter, the government's attorneys prevailed when this Court recently rejected Flynn's claims that he had been the victim of government misconduct, including entrapment and *Brady* violations by the prosecution. *See Flynn*, 411 F. Supp. 3d 15.

But after years of steadfast support for the prosecution by nonpartisan Department personnel, Attorney General Barr personally stepped in to alter its course. Earlier this year, Barr and Trump removed Ms. Liu from her position[34] and replaced her with Timothy Shea, who was previously one of Barr's top aides. Barr appointed Shea as an "interim" United States Attorney, a status that avoids Senate confirmation.[35] One of Shea's first official acts was to contravene the recommendation of career prosecutors in the sentencing of Roger Stone, President Trump's friend and former campaign associate.[36] Three career prosecutors withdrew from that case as a result. A fourth resigned from the Department altogether and recently wrote that the government's intervention to seek favorable treatment for Stone "abdicat[ed] [the Department's] responsibility to dispense impartial justice."[37] Now, the government has moved to dismiss the Flynn prosecution

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[34] *See* Carol Lee et al., *Barr Takes Control of Legal Matters of Interest to Trump, including Stone Sentencing*, NBC (Feb. 11, 2020), https://nbcnews.to/3cwSIOt.

[35] *See* Keith L. Alexander, Spencer S. Hsu & Matt Zapotosky, *Attorney General William Barr Names Timothy P. Shea, One of His Counselors, as the District's Interim U.S. Attorney*, Wash. Post (Jan. 30, 2020), https://wapo.st/2yGFrEl.

[36] *See* Natasha Bertrand & Daniel Lippman, *"Really Shocking": Trump's Meddling in Stone Case Stuns Washington*, Politico (Feb. 12, 2020), https://politi.co/2T02gcZ.

[37] Jonathan Kravitz, *I left the Justice Department After it Made a Disastrous Mistake. It Just Happened Again*, Wash. Post (May 11, 2020), https://wapo.st/2Wqc16g.

in a pleading signed only by Shea and no career official, as the government's lead career prosecutor on the case moved to withdraw his appearance shortly before the government's motion was filed.

In this context, the government's efforts to excuse Flynn's material and criminal lies serve the President's desire to spare a political loyalist and to exonerate his own campaign. They also represent an assault on the Department's mission to pursue equal justice under the law without regard to partisan interests. The government's actions send an unmistakable message that there is one standard of justice for President Trump, his campaign, and his friends and another for everyone else. That message corrodes the rule of law and cannot meet any definition of the "public interest."

III. AIDED BY ITS APPOINTED *AMICUS,* THE COURT SHOULD CONDUCT AN EVIDENTIARY HEARING TO ASSESS THE GOVERNMENT'S DECISION.

Clearly, the Court already appreciates the serious nature of its obligation to scrutinize the government's motion with care, as is evidenced by its recent appointment of the Hon. John Gleeson (ret.) as *amicus curiae* to argue in opposition to the government's request. As the Court is aware, Judge Gleeson's participation in these proceedings stems from the Court's own "inherent authority." *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008). Accordingly, "[i]t is solely within the court's discretion to determine 'the fact, extent, and manner' of the [*amcius*'s] participation." *Id.* (quoting *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003)).

In this case, given the highly irregular nature of the Department's recent conduct, the facially insupportable nature of its legal arguments, and the fundamental public interests at stake, the Court—assisted by its *amicus*—can and should conduct a thorough "examination of the record." *Rinaldi*, 434 U.S. at 30. Such an examination will likely require an evidentiary hearing, given unresolved questions surrounding the Department's curious turnabout. Only after developing a full and complete record will the Court be able to determine whether that reversal entails any "bad faith on the part of the Government." *Id.* And as numerous courts have observed,

the Court's broad authority to appoint an *amicus curiae* includes the authority to "allow *amici* to call their own witnesses and cross examine the witnesses of other parties" at any such hearing. *Russell v. Bd. of Plumbing Examiners of Cnty. of Westchester*, 74 F. Supp. 2d 349, 351 (S.D.N.Y. 1999); *see also Wharton v. Vaughn*, No. CV 01-6049, 2020 WL 733107, at *5 (E.D. Pa. Feb. 12, 2020) ("*[A]micus curiae* at the hearing . . . will be permitted to call and cross-examine witnesses."); *id.* at *5 n.4 (citing cases in support of such authority).

Finally, if after considering the government's arguments and gathering evidence, the Court concludes that the motion to dismiss is motivated by improper political considerations or otherwise contravenes the public interest, the Court should deny the motion and proceed in due course to sentencing. The defendant has already pled guilty and the government has already submitted multiple sentencing memoranda for the Court's consideration. In this posture, all that remains is the "imposition of sentence," a matter for the "discretion of the trial judge" alone. *Ammidown*, 497 F.2d at 621.

CONCLUSION

A democracy governed by the rule of law requires a Justice Department that acts evenhandedly when exercising its vast powers. There is ample evidence that under its current political leadership the Department has been weaponized to do the opposite: to punish the President's opponents and reward his friends. The government's motion to dismiss the prosecution of a presidential ally who has twice confessed to serious crimes is yet another step down this dangerous path. The career officials who carry out the Department's work and whom the President routinely maligns cannot speak in their own defense. But this Court has both the authority and the obligation to ensure that federal law-enforcement power is exercised in the interest of the people—the public interest—as the Constitution requires. We respectfully ask the Court to do so.

May 14, 2020

Respectfully submitted,

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* Signed pursuant to Local Rule of Criminal Procedure 44.1(c).

** Application for admission to the District of Columbia Bar pending. Admitted in Missouri and Illinois; practice consistent with D.C. Court of Appeals Rule 49(c). Signed pursuant to Local Rule of Criminal Procedure 44.1(c).

APPENDIX

LIST OF AMICI CURIAE