UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Washington, D.C.

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

BEFORE:

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

APPEARANCES:

ON BEHALF OF THE PETITIONER:

SIDNEY POWELL, ESQ.

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

JEFFREY B. WALL (DOJ), ESQ.

ON BEHALF OF THE HON. EMMET G. SULLIVAN:

BETH A. WILKINSON, ESQ.

C O N T E N T S

P R O C E E D I N G S

THE CLERK: Case number 20-5143, In Re: Michael T. Flynn. Ms. Powell for the Petitioner, Michael T. Flynn. Mr. Wall for the U.S. Department of Justice. Ms. Wilkinson for the Honorable Emmet G. Sullivan.

JUDGE SRINIVASAN: Thank you. This is Chief Judge Srinivasan. Before we begin with argument this morning, I note on behalf of the Court that our colleague, Stephen Williams, passed away last Friday in his 34th year of service on our court. Please join the Court in observing a moment of silence in honor and remembrance of Judge Williams.

Thank you. We'll now proceed with argument in today's case to be conducted as follows. Each counsel will give an opening statement to be followed by questioning by the judges in order of seniority, and then a second round of questioning for any judge who has a follow-up question. We'll follow the same process for each of the three counsel presenting argument today, and we'll then end with a brief rebuttal and closing time for Mr. Flynn's counsel and counsel for the United States.

Ms. Powell, we're ready to hear from you. Please proceed.

ORAL ARGUMENT OF SIDNEY POWELL, ESQ.

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUDGE SRINIVASAN: Okay.

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

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

MS. POWELL: Thank you.

JUDGE SRINIVASAN: Judge Henderson.

JUDGE HENDERSON: No questions. Thanks.

JUDGE SRINIVASAN: Thank you. Judge Rogers.

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

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

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

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

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

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

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

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

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

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

JUDGE ROGERS: Thank you, Judge.

JUDGE SRINIVASAN: Judge Tatel.

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

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

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

MS. POWELL: Well, to avoid --

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

Sullivan is a party or has standing.

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

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

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

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

JUDGE SRINIVASAN: Thank you. Judge Garland.

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

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

core powers of the Executive Branch.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUDGE GARLAND: Okay. Thank you very much.

JUDGE SRINIVASAN: Thank you. Judge Griffith.

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

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

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

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

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

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

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

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

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

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

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

MS. POWELL: That --

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

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

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

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

JUDGE GRIFFITH: What is the --

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

JUDGE GRIFFITH: What type of --

MS. POWELL: (Indiscernible).

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

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

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

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

MS. POWELL: Yes.

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

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

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

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

MS. POWELL: It's the --

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

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

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

MS. POWELL: Not in --

JUDGE GRIFFITH: That --

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

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

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

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

JUDGE GRIFFITH: Thank you.

JUDGE SRINIVASAN: Judge Millett.

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

MS. POWELL: Good morning.

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

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

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

MS. POWELL: Yes. And we requested --

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

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

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

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

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

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

JUDGE MILLETT: Right.

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

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

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

JUDGE MILLETT: In the district court?

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

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

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

JUDGE MILLETT: Before he was appointed.

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

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

MS. POWELL: And that opposed the appointment of

any amicus --

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

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

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

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

JUDGE MILLETT: You did not. Okay.

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

JUDGE MILLETT: Okay.

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

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

MS. POWELL: We filed the mandamus on --

JUDGE MILLETT: -- or is the docket wrong?

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

JUDGE MILLETT: Okay.

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

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

MS. POWELL: No.

JUDGE MILLETT: You mentioned --

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

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

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

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

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

JUDGE MILLETT: Your pushing in the Stevens case

was okay. Tell me exactly what pushing was okay.

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

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

MS. POWELL: That's correct.

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

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

JUDGE MILLETT: Is there a rule against it?

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

JUDGE MILLETT: Okay.

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

JUDGE MILLETT: Is there --

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

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

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

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

MS. POWELL: I do not know.

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

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

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

Correct?

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

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

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

JUDGE MILLETT: It cannot.

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

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

JUDGE SRINIVASAN: Thank you. Judge Pillard.

JUDGE PILLARD: Good morning, Ms. Powell.

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

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

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

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

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

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

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

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

JUDGE PILLARD: Do you disagree with Richards on --

MS. POWELL: (Indiscernible) improper service.

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

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

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

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

JUDGE PILLARD: Yes. Why?

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

JUDGE PILLARD: Why?

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

JUDGE PILLARD: I mean your --

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

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

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

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

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

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

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

JUDGE PILLARD: But the reason --

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

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

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

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

JUDGE PILLARD: Where --

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

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

MS. POWELL: Yes.

JUDGE PILLARD: Okay. No further questions.

MS. POWELL: It is a very limited --

JUDGE SRINIVASAN: Thank you. Thank you.

MS. POWELL: -- review.

JUDGE SRINIVASAN: Judge Wilkins.

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

MS. POWELL: Good morning.

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

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

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

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

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

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

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

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

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

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

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

JUDGE SRINIVASAN: Thank you. Judge Rao.

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

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

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

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

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

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

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

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

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

MS. POWELL: No, sir.

JUDGE SRINIVASAN: Okay, thank you. Judge Henderson.

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

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

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

JUDGE SRINIVASAN: Judge Rogers.

JUDGE ROGERS: No questions.

JUDGE SRINIVASAN: Thank you. Judge Tatel.

JUDGE TATEL: No questions.

JUDGE SRINIVASAN: Thank you. Judge Garland.

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

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

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

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

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

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

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

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

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

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

JUDGE GARLAND: Okay.

MS. POWELL: So --

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

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

JUDGE GARLAND: Did you argue the other factors?

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

JUDGE GARLAND: Okay --

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

JUDGE GARLAND: Thank you. Appreciate the

answers.

MS. POWELL: Thank you.

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

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

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

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

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

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

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

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

JUDGE GRIFFITH: Do you disagree with that history?

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

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

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

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

MS. POWELL: Yes.

JUDGE GRIFFITH: Okay. Thank you very much.

JUDGE SRINIVASAN: Thank you. Judge Millett.

JUDGE MILLETT: Yes, just a couple questions. Just to follow up on Judge Garland's question about your

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

MS. POWELL: No, because --

JUDGE MILLETT: No, it does not.

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

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

MS. POWELL: Right.

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

MS. POWELL: Yes.

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

MS. POWELL: I believe that's correct.

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

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

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

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

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

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

JUDGE SRINIVASAN: Thank you. Judge Pillard.

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

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

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

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

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

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

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

MS. POWELL: Exactly.

JUDGE PILLARD: Is that right?

MS. POWELL: Yes.

JUDGE PILLARD: Thank you. No further questions.

JUDGE SRINIVASAN: Thank you. Judge Wilkins.

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

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

JUDGE WILKINS: And you base that on Fokker?

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

JUDGE WILKINS: Okay, thank you.

JUDGE SRINIVASAN: Thank you. Judge Rao.

JUDGE RAO: No further questions.

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

ORAL ARGUMENT OF JEFFREY B. WALL, ESQ.

ON BEHALF OF THE U.S. DEPARTMENT OF JUSTICE

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

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

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

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

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

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

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

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

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

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

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

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

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

the grant of mandamus. If they --

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

MR. WALL: Right.

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

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

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

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

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

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

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

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

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

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

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

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

JUDGE HENDERSON: Thank you.

JUDGE SRINIVASAN: Thank you. Judge Rogers.

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

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

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

JUDGE ROGERS: (Indiscernible.)

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

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

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

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

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

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

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

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

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

JUDGE SRINIVASAN: Thank you. Judge Tatel.

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

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

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

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

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

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

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

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

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

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

JUDGE SRINIVASAN: Thank you. Judge Garland.

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

MR. WALL: Good morning.

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

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

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

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

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

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

happens to decide a case?

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

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

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

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

MR. WALL: Yes.

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

much in your motion to dismiss?

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

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

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

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

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

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

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

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

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

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

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

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

JUDGE GARLAND: (Indiscernible.)

MR. WALL: (Indiscernible) prosecutorial discretion.

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

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

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

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

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

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

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

JUDGE SRINIVASAN: Thank you. Judge Griffith.

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

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

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

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

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

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

JUDGE GRIFFITH: And that's (indiscernible).

MR. WALL: (Indiscernible.)

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

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

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

hearing?

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

JUDGE GRIFFITH: What's your authority for that?

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

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

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

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

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

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

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

JUDGE GRIFFITH: Okay. Thank you very much.

JUDGE SRINIVASAN: Thank you. Judge Millett.

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

MR. WALL: Good morning.

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

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

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

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

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

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

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

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

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

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

JUDGE MILLETT: Well --

MR. WALL: -- on other authorities.

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

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

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

MR. WALL: I would --

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

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

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

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

JUDGE MILLETT: Well --

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

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

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

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

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

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

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

MR. WALL: Yes.

JUDGE MILLETT: -- granting the motion sua sponte.

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

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

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

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

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

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

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

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

MR. WALL: No. May I explain why?

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

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

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

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

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

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

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

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

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

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

JUDGE MILLETT: All right, thank you.

JUDGE SRINIVASAN: Thank you. Judge Pillard.

JUDGE PILLARD: Good morning, Solicitor General Wall.

MR. WALL: Good morning.

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

But then the district judge at your urging, at the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. WALL: With all respect --

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

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

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

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

MR. WALL: Yes, it is --

JUDGE PILLARD: (Indiscernible) leave of court.

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

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

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

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

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

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

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

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

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

JUDGE PILLARD: Thank you.

JUDGE SRINIVASAN: Thank you. Judge Wilkins.

JUDGE WILKINS: Yes. Good morning, General Wall.

MR. WALL: Good morning.

JUDGE WILKINS: So, in your view, Fokker

foreclosures may factual development at a Rule 48(a) hearing, yes or no?

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

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

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

JUDGE WILKINS: No. My hypothetical is that --

MR. WALL: (Indiscernible.)

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

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

JUDGE WILKINS: And that is based on Fokker?

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

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

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

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

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

MR. WALL: Yes, and --

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

MR. WALL: Maybe if I --

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

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

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

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

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

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

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

JUDGE SRINIVASAN: Thank you. Judge Rao.

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

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

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

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

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

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

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

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

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

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

I understand that there is some skepticism on the

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

JUDGE RAO: Thank you.

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

MR. WALL: Yes, sir.

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

MR. WALL: Yes, that's right.

JUDGE SRINIVASAN: Okay, thank you. Judge Henderson.

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

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

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

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

JUDGE HENDERSON: Thank you.

JUDGE SRINIVASAN: Thank you. Judge Rogers.

JUDGE ROGERS: I'll pass.

JUDGE SRINIVASAN: Thank you. Judge Tatel.

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

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

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

MR. WALL: Decisions to dismiss pending criminal charges lie squarely within the can of prosecutorial discretion. 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 --

JUDGE TATEL: Right.

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

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

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

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

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

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

JUDGE SRINIVASAN: Thank you. Judge Garland.

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

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

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

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

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

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

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

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

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

on the merits, as you know.

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

MR. WALL: Right. And --

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

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

JUDGE GARLAND: (Indiscernible.)

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

up which usurps our exercise of prosecutorial discretion. There's no way to undo that harm.

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

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

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

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

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

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

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

JUDGE SRINIVASAN: Thank you. Judge Griffith.

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

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

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

JUDGE GRIFFITH: Okay, thank you.

JUDGE SRINIVASAN: Thank you. Judge Millett.

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

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

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

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

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

MR. WALL: I don't --

JUDGE MILLETT: (Indiscernible) Armstrong?

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

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

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

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

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

very narrow exception required by the --

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

MR. WALL: Right.

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

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

sensitive information because --

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

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

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

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

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

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

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

Brady violation in this case.

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

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

JUDGE MILLETT: I understand you --

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

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

MR. WALL: But yes, it is --

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

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

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

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

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

JUDGE MILLETT: Okay. So Rule 43 does allow

involving the Court in a mockery?

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

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

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

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

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

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

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

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

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

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

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

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

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

JUDGE MILLETT: Okay, thank you.

JUDGE SRINIVASAN: Thank you. Judge Pillard.

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

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

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

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

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

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

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

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

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

MR. WALL: Right.

JUDGE PILLARD: -- no role on these facts.

MR. WALL: But even --

JUDGE PILLARD: (Indiscernible) that the Court --

MR. WALL: Sorry.

JUDGE PILLARD: Go ahead.

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

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

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

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

JUDGE PILLARD: Yes.

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

JUDGE PILLARD: Yes, yes, yes.

JUDGE SRINIVASAN: -- get to Ms. Wilkinson.

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

JUDGE SRINIVASAN: Thank you. Judge Wilkins.

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

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

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

JUDGE WILKINS: Nothing further.

JUDGE SRINIVASAN: Thank you. Judge Rao.

JUDGE RAO: No further questions. Thank you.

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

ORAL ARGUMENT OF BETH A. WILKINSON, ESQ.

ON BEHALF OF THE HON. EMMET G. SULLIVAN

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

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

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

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

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

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

MS. WILKINSON: I think it would be very

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

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

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

MS. WILKINSON: Yes.

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

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

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

questions.

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

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

JUDGE HENDERSON: No questions.

JUDGE SRINIVASAN: Thank you. Judge Rogers.

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

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

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

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

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

Supreme Court's application of Cheney is sufficiently limited?

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

JUDGE ROGERS: Thank you.

JUDGE SRINIVASAN: Thank you. Judge Tatel.

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

motion to dismiss. That's your argument.

MS. WILKINSON: Yes, Your Honor.

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

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

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

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

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

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

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

JUDGE TATEL: (Indiscernible).

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

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

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

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

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

JUDGE SRINIVASAN: Thank you. Judge Garland.

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

Is this different than what happened in the

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

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

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

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

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

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

JUDGE GARLAND: Thank you.

JUDGE SRINIVASAN: Thank you. Judge Griffith.

JUDGE GRIFFITH: Yes. Thank you, Ms. Wilkinson. Are you then telling us that such questions won't be asked at the hearing? You said you don't want to forecast the hearing. Maybe you should forecast the hearing a little bit. And are you telling us that those lines of inquiry will not be pursued?

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

arguments.

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

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

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

JUDGE GRIFFITH: What would happen if, we were at

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

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

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

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

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

JUDGE GRIFFITH: Okay.

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

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

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

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

MS. WILKINSON: Yes. It would be much more

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

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

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

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

JUDGE GRIFFITH: Okay, thank you.

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

JUDGE PILLARD: Hi, can you hear me?

MS. WILKINSON: Yes, Judge Pillard.

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

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

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

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

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

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

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

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

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

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

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

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

JUDGE PILLARD: Right, right.

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

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

MS. WILKINSON: Yes.

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

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

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

JUDGE PILLARD: Right.

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

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

JUDGE SRINIVASAN: Thank you.

JUDGE PILLARD: No further questions.

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

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

to address the grounds for the Government's position, the Government's filing, is your position that that could not be mandamused?

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

JUDGE MILLETT: No, go ahead.

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

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

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

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

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

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

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

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

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

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

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

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

the Government comes in --

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

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

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

MS. WILKINSON: Well of course everyone --

JUDGE MILLETT: (Indiscernible) shouldn't they?

MS. WILKINSON: The court should go as fast as

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

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

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

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

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

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

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

JUDGE MILLETT: He's not at liberty --

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

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

every case.

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

JUDGE MILLETT: I know, but --

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

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

MS. WILKINSON: This Court has had that --

JUDGE MILLETT: (Indiscernible.)

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

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

MS. WILKINSON: No, no, no.

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

MS. WILKINSON: No.

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

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

JUDGE MILLETT: All right. My time is up.

JUDGE SRINIVASAN: Thank you. Judge Wilkins.

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

MS. WILKINSON: Good morning, Your Honor.

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

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

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

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

JUDGE SRINIVASAN: Thank you. Judge Rao.

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

will be made below?

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

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

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

JUDGE RAO: Right. And that process played out at

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

MS. WILKINSON: Well there's --

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. WILKINSON: No.

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

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

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

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

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

JUDGE RAO: Thank you.

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

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

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

JUDGE HENDERSON: Well you --

MS. WILKINSON: -- an en banc --

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

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

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

JUDGE SRINIVASAN: Thank you. Judge Rogers.

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

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

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

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

But I'm trying to understand, the acting Solicitor

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

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

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

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

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

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

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

JUDGE ROGERS: Thank you.

JUDGE SRINIVASAN: Thank you. Judge Tatel.

JUDGE TATEL: I have no questions.

JUDGE SRINIVASAN: Thank you. Judge Garland.

JUDGE GARLAND: No further questions. Thank you.

JUDGE SRINIVASAN: Thank you. Judge Griffith.

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

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

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

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

JUDGE GRIFFITH: Okay. Thank you very much.

JUDGE SRINIVASAN: Thank you. Judge Millett.

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

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

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

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

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

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

don't, I didn't understand that.

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

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

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

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

order around May 20th.

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

JUDGE SRINIVASAN: Thank you. Judge Pillard.

JUDGE PILLARD: I have no questions.

JUDGE SRINIVASAN: Thank you. Judge Wilkins.

JUDGE WILKINS: No questions.

JUDGE SRINIVASAN: Thank you. Judge Rao.

JUDGE RAO: No further questions.

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

MS. WILKINSON: Thank you, Your Honor.

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

MS. POWELL: Thank you, Your Honor.

JUDGE SRINIVASAN: Welcome back.

FURTHER ORAL ARGUMENT OF SIDNEY POWELL, ESQ.

ON BEHALF OF THE PETITIONER

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

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

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

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

decision in Al-Nashiri.

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

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

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

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

FURTHER ORAL ARGUMENT OF JEFFREY B. WALL, ESQ.

ON BEHALF OF THE U.S. DEPARTMENT OF JUSTICE

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

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

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

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

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

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

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

(Whereupon, at 1:19 p.m., the proceedings were concluded.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

_____ August 17, 2020

Mary Rettig Date

DEPOSITION SERVICES, INC.