

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued June 12, 2020

Decided June 24, 2020

No. 20-5143

IN RE: MICHAEL T. FLYNN,
PETITIONER

On Emergency Petition for a Writ of Mandamus

Sidney Powell argued the cause for petitioner. With her on the petition for a writ of mandamus were *Molly McCann* and *Jesse R. Binnall*.

Jeffrey B. Wall, Deputy Solicitor General, U.S. Department of Justice, argued the cause for respondent United States of America. With him on the response to the petition for a writ of mandamus were *Noel J. Francisco*, Solicitor General, *Eric J. Feigin*, Deputy Solicitor General, *Frederick Liu*, Assistant to the Solicitor General, *Kenneth C. Kohl*, Acting Principal Assistant U.S. Attorney, and *Jocelyn Ballantine*, Assistant U.S. Attorney.

David Yost, Attorney General, Office of the Attorney General for the State of Ohio, *Benjamin M. Flowers*, Solicitor General, *Steve Marshall*, Attorney General, Office of the Attorney General for the State of Alabama, *Kevin G. Clarkson*, Attorney General, Office of the Attorney General for the State of Alaska, *Leslie Rutledge*, Attorney General, Office of the Attorney General for the State of Arkansas, *Ashley Moody*, Attorney General, Office of the Attorney General for the State

of Florida, *Christopher M. Carr*, Attorney General, Office of the Attorney General for the State of Georgia, *Jeff Landry*, Attorney General, Office of the Attorney General for the State of Louisiana, *Lynn Fitch*, Attorney General, Office of the Attorney General for the State of Mississippi, *Eric Schmitt*, Attorney General, Office of the Attorney General for the State of Missouri, *Timothy C. Fox*, Attorney General, Office of the Attorney General for the State of Montana, *Mike Hunter*, Attorney General, Office of the Attorney General for the State of Oklahoma, *Alan Wilson*, Attorney General, Office of the Attorney General for the State of South Carolina, *Ken Paxton*, Attorney General, Office of the Attorney General for the State of Texas, *Sean D. Reyes*, Attorney General, Office of the Attorney General for the State of Utah, and *Patrick Morrissey*, Attorney General, Office of the Attorney General for the State of West Virginia, were on the brief for *amici curiae* the States in support of petitioner.

William J. Olson, *Jeremiah L. Morgan*, *Herbert W. Titus*, and *Robert J. Olson* were on the brief for *amici curiae* Former United States Attorney General Edwin Meese III and Conservative Legal Defense and Education Fund in support of petitioner.

Jerome M. Marcus was on the brief for *amici curiae* Eleven Members of the United States House of Representatives in support of petitioner.

John Reeves, pro se, was on the brief for *amicus curiae* John M. Reeves in support of petitioner and the United States.

Michael H. McGinley was on the brief for *amici curiae* Majority Leader Mitch McConnell and Senators Tom Cotton,

Mike Braun, Kevin Cramer, Ted Cruz, Charles E. Grassley, and Rick Scott in support of the United States.

Leslie McAdoo Gordon was on the brief for *amicus curiae* Federal Practitioners in support of petitioner and the United States.

Eric B. Rasmusen, pro se, was on the brief for *amicus curiae* Professor Eric Rasmusen in support of petitioner.

Beth A. Wilkinson argued the cause for respondent Judge Emmet G. Sullivan. With her on the response to the petition for a writ of mandamus were *Kosta S. Stojilkovic* and *Rakesh Kilaru*.

Eugene R. Fidell, Stanley J. Marcus, and Gershon M. Ratner were on the brief for *amicus curiae* Lawyers Defending American Democracy, Inc. in support of respondent.

Lawrence Robbins, Alan E. Untereiner, D. Hunter Smith, and William W. Taylor III were on the brief for *amicus curiae* Watergate Prosecutors in support of respondent.

Daniel E. Jackson and John W. Kecker were on the brief for *amicus curiae* Former Federal District Court Jurists in support of respondent.

Gregory S. Smith was on the brief for *amicus curiae* New York City Bar Association in support of respondent.

Before: HENDERSON, WILKINS, and RAO, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* RAO.

Opinion dissenting in part filed by *Circuit Judge* WILKINS.

RAO, *Circuit Judge*: Michael Flynn, former National Security Advisor to President Donald J. Trump, pleaded guilty to making false statements under 18 U.S.C. § 1001. Before sentencing, Flynn moved to withdraw his plea, alleging that the government failed to produce material exculpatory evidence and breached the plea agreement. Several months later, the U.S. Attorney for the District of Columbia filed a motion to dismiss all charges. *See* FED. R. CRIM. P. 48(a) (“The government may, with leave of court, dismiss an indictment, information, or complaint.”). In its motion, the government explains that in light of newly discovered evidence of misconduct by the Federal Bureau of Investigation, the prosecution can no longer prove beyond a reasonable doubt that any false statements made by Flynn were material to a legitimate investigation—an element the government contends is necessary under Section 1001. *See United States v. Gaudin*, 515 U.S. 506, 509 (1995). The government’s motion to dismiss also explains that “continued prosecution of the charged crime does not serve a substantial federal interest.” Gov’t Mot. Dismiss Criminal Information, No. 1:17-cr-232, ECF No. 198, at 2 (May 7, 2020). The district judge currently presiding over the case has yet to decide the government’s motion. Instead, he has appointed an amicus to present arguments in opposition to the government’s motion and to address whether Flynn should be held in criminal contempt for perjury. The district judge has also scheduled a hearing on these questions for July 16, 2020.

Flynn petitioned for a writ of mandamus before this court pursuant to the All Writs Act, 28 U.S.C. § 1651, seeking three forms of relief: (1) an order directing the district court to grant the motion to dismiss; (2) an order vacating the amicus appointment; and (3) an order reassigning the case to a different

district judge. For this court to grant a writ of mandamus, “the right to relief must be ‘clear and indisputable’; there must be ‘no other adequate means to attain the relief’; and ‘the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.’” *In re Cheney*, 544 F.3d 311, 312–13 (D.C. Cir. 2008) (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004)). Applying these standards, we grant Flynn’s petition in part.

Although Rule 48 requires “leave of court” before dismissing charges, “decisions to dismiss pending criminal charges—no less than decisions to initiate charges and to identify which charges to bring—lie squarely within the ken of prosecutorial discretion.” *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016). “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.” *Id.*; see also *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (“Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding ... whether to dismiss a proceeding once brought.”). The Judiciary’s role under Rule 48 is thus confined to “extremely limited circumstances in extraordinary cases.” *United States v. Hamm*, 659 F.2d 624, 629 (5th Cir. 1981); *United States v. Ammidown*, 497 F.2d 615, 621 (D.C. Cir. 1973) (emphasizing that Rule 48 motions must be granted “in the overwhelming number of cases”). More specifically, “[t]he principal object of the ‘leave of court’ requirement is ... to protect a defendant against prosecutorial harassment ... when the Government moves to dismiss an indictment over the defendant’s objection.” *Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977). Rule 48 thus “gives no power to a district court to deny a prosecutor’s ... motion to dismiss charges based on a

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