
No. 20-5143

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re MICHAEL T. FLYNN, *Petitioner*.

MOTION OF LAWYERS DEFENDING AMERICAN DEMOCRACY, INC.
FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN OPPOSITION
TO THE PETITION FOR A WRIT OF MANDAMUS

Lawyers Defending American Democracy, Inc. (“LDAD”) respectfully moves for leave to file a brief as *amicus curiae* in opposition to the petition for a writ of mandamus. The certificate of parties and *amici* and disclosure statement required by Circuit Rule 27(a)(4) are provided in the addendum to this motion.

1. LDAD is a not-for-profit non-partisan organization qualified under Internal Revenue Code § 501(c)(4) and incorporated in Massachusetts. Its purpose is to foster adherence to the rule of law. Since its founding in January 2019, LDAD has issued Open Letters and statements calling for adherence by public officials to the rule of law and encouraging our fellow lawyers, the leaders of national, state, and local bar associations, and the legal academy to join us in speaking out against threats to the

rule of law. LDAD's Open Letters have been signed by over 1500 lawyers, including former federal and state judges, former United States Attorneys, law deans and professors from around the country. Our Open Letters and statements are available at <https://lawyersdefendingdemocracy.org/statements/>. LDAD moved last week for leave to file a brief as *amicus curiae* in opposition to the Government's Fed. R. Crim. P. 48(a) motion in the District Court. The District Court has not yet ruled on LDAD's motion.

2. The mandamus petition seeks, among other things, the extraordinary remedy of an order directing the district judge to grant a pending Government motion to dismiss with prejudice a serious charge to which a former senior federal official has twice pled guilty. The Government's stated reasons for do not withstand scrutiny and the motion itself directly implicates the rule of law and constitutes a substantial threat to public confidence in the administration of justice. The mandamus petition does not satisfy the exacting standard for issuance of such a writ, for the reasons set forth in the brief tendered herewith.

3. Because Petitioner and the Government are aligned with respect to the Government's motion and presumably will be with respect to the mandamus petition, the normal adversary process is not functioning. The views of *amici* that – like LDAD – are associated with neither side are therefore necessary and appropriate to aid this Court in fully and fairly examining the issues.

For the foregoing reasons, LDAD respectfully moves for leave to file the brief tendered herewith in opposition to the mandamus petition.

Respectfully submitted,

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May 27, 2020

Certificate of Service

I certify that I have, this 27th day of May, 2020, filed the foregoing motion via the Court's CM/ECF system, which will send notice thereof to all counsel of record.

Eugene R. Fidell

ADDENDUM

CERTIFICATE OF PARTIES AND *AMICI CURIAE*

Except for LDAD and the other *amici* who have filed in this Court, all parties and *amici* appearing before the District Court and in this Court are listed in the petition. The District Court has not yet ruled on LDAD's motion below for leave to file a brief as *amicus curiae*.

DISCLOSURE STATEMENT

LDAD is a Massachusetts not-for-profit corporation. It has no shareholders, parent corporations or subsidiaries. It is not owned or controlled by any other entity. Nor does it own or control any other entity. Its purpose is to foster adherence to the rule of law in the United States.

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May 27, 2020

DISCLOSURE STATEMENT

In accordance with Circuit Rule 26.1, Lawyers Defending American Democracy, Inc. (“LDAD”) is a Massachusetts not-for-profit corporation. It has no shareholders, parent corporations or subsidiaries. It is not owned or controlled by any other entity. Nor does it own or control any other entity. Its purpose is to foster adherence to the rule of law in the United States.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *amici*. Except for LDAD and the other *amici* who have filed in this Court, all parties and *amici* appearing before the District Court and in this Court are listed in the petition. The District Court has not yet ruled on LDAD’s motion below for leave to file a brief as *amicus curiae*.

B. Rulings under review. Petitioner seeks review of an order that appointed an *amicus curiae*, ECF No. 205, and a minute order allowing that *amicus* to appear *pro hac vice* and setting a briefing schedule. He also seeks an order requiring the District Court to grant a pending Government motion to dismiss the information with prejudice under Fed. R. Crim. P. 48(a), ECF No. 198, and assigning the case to another judge for any additional proceedings.

C. Related cases. LDAD is unaware of any related cases other than the proceedings in the District Court.

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Brief *Amicus Curiae*

Identity, Interest, and Authority of the Amicus

Lawyers Defending American Democracy, Inc. (“LDAD”) is a not-for-profit, non-partisan organization incorporated in Massachusetts and qualified under section 501(c)(4) of the Internal Revenue Code. Its purpose is to foster adherence to the rule of law in the United States.

The petition seeks, among other things, an order directing the District Court to grant a Government motion under Rule 48(a) of the Federal Rules of Criminal Procedure to dismiss with prejudice charges under 18 U.S.C. §1001 for material false statements in the course of the FBI’s investigation into Russian interference in the 2016 presidential election. Petitioner pled guilty and is awaiting sentencing.

The petition raises grave rule of law issues. Granting it would threaten public confidence in the administration of justice that this and other Article III courts have sought to foster for more than two centuries. To order the District Court to grant the Government’s motion before it has had an opportunity to develop a proper record, hear from counsel, and render a considered decision would needlessly depart from the normal course of proceedings and, on the merits, would effectively nullify the requirement that such a motion be granted only with leave of court. Whether the petition is well-founded requires fact-finding for which an appellate court is ill-

sued. Dueling briefs are not a substitute for the normal course of record-development.

This brief has been authorized by LDAD's Steering Committee. No party or counsel for any party authored this brief in whole or in part or contributed funding to it or in connection with its preparation. No person other than LDAD and its counsel contributed money to fund the preparation or submission of this brief.

Questions Presented

DOES PETITIONER HAVE A CLEAR AND INDISPUTABLE RIGHT TO RELIEF?

SHOULD THE DISTRICT COURT BE ORDERED TO GRANT A PROSECUTION MOTION TO DISMISS UNDER FED. R. CRIM. P. 48(a) BEFORE IT HAS EXAMINED THE FACTS, HEARD ORAL ARGUMENT, AND RULED?

Facts

Petitioner was charged in 2017 under 18 U.S.C. § 1001 with making a false statement to the Government. The District Court accepted his guilty plea in both 2017 and 2018.

While Petitioner was awaiting sentencing, the Government moved to dismiss the charges with prejudice. This motion was based on pages of alleged factual assertions, none of which had been previously presented to the District Court. At the same time, the Government's motion came against the backdrop of dozens of Tweets and other public statements by President Trump making it clear that exonerating

Petitioner is a priority for the President. For example, in spite of evidence of wrongdoing by Petitioner and his two guilty pleas, the President has called the prosecution a “witch hunt” and said that the officials who investigated Petitioner were themselves guilty of treason. He has further stated that he didn’t think Petitioner had done anything wrong, and that he was charged in order to “take down a president.”

Governing Statute and Rule

The All Writs Act, 28 U.S.C. § 1651, provides in pertinent part:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Rule 48(a) of the Federal Rules of Criminal Procedure provides:

BY THE GOVERNMENT. The Government may, with leave of court, dismiss an indictment, information, or complaint. The Government may not dismiss the prosecution during trial without the defendant’s consent.

Summary of Argument

The petition should be dismissed because Petitioner does not have the requisite clear and indisputable right to relief. There is no reason to interfere with the District Court’s ongoing consideration of the Government’s Rule 48(a) motion. Allowing the District Court to develop a record, hear from counsel, and prepare a reasoned decision will afford both Petitioner and the Government a better basis for

deciding on their future course of action, and will, importantly, provide this Court and, should it come to that, the Supreme Court, a firmer basis on which to conduct appellate review.

Argument

PETITIONER DOES NOT HAVE A CLEAR
AND INDISPUTABLE RIGHT TO RELIEF

A

*The District Court should be permitted to
continue its consideration of the Rule 48(a) motion*

At common law, prosecutors had unfettered discretion to decide not to proceed with the prosecution of a case against a defendant, under the principle of *nolle prosequi*. In 1944, with the adoption of Rule 48(a), the Supreme Court fundamentally altered that practice by requiring leave of court for any such dismissal in federal court.¹ Numerous cases since the adoption of Rule 48(a) make clear that the role of the courts in granting leave for any such dismissal is to ensure that the dismissal is consistent with the law and reflects good faith decision-making by the Government.²

¹ Advisory Comm. Note to Fed. R. Crim. P. 48 (1944).

² *United States v. James*, 861 F. Supp. 151, 155 (D.D.C. 1994) (under Rule 48(a), “as considerable precedent has emphasized, the only protection against the abuse of prosecutorial discretion lies with the court”).

The rule is “intended to allow the courts to consider the ‘public interest, fair administration of criminal justice and preservation of judicial integrity.’ To advance these broader goals, a district court may act where a prosecutor acts in bad faith, or where the prosecution’s motion ‘is prompted by considerations clearly contrary to the public interest.’”³ Among the uses that are seen as contrary to the public interest is the strategic use of Rule 48(a) to correct what the government perceives to be defects in its case.⁴

Rule 48(a) does not “confer on the Judiciary the power and authority to usurp or interfere with the good faith exercise of the Executive power to take care that the laws are faithfully executed. . . . The exercise of its discretion with respect to the termination of pending prosecutions should not be judicially disturbed unless clearly contrary to manifest public interest.”⁵ However, when it makes a Rule 48(a) motion, the government “is under an obligation to supply sufficient reasons — reasons that constitute more than a ‘mere conclusory interest.’”⁶ While courts indulge a

³ *Id.* at 155-56 (quoting *United States v. Strayer*, 846 F.2d 1262, 1265 (10th Cir. 1988)).

⁴ *United States v. Pitts*, 331 F.R.D. 199, 205 (D.D.C. 2019) (noting that strategic use of Rule 48(a) is not permitted “simply because the government seeks to cure its self-inflicted defects in this case”).

⁵ *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975).

⁶ *United States v. Salinas*, 693 F.2d 348, 352 (5th Cir. 1982) (quoting *United States v. Hamm*, 659 F.2d 624, 631 n.23 (5th Cir. 1981)).

presumption of good faith when the government seeks dismissal under Rule 48(a), that presumption is rebutted when evidence is presented that the motion is not made in good faith. “In such a case, Rule 48(a) mandates that the court deny the Government’s motion to dismiss the indictment: ‘under the discretion yielded to [the court] by [Rule] 48(a) to “check [an] abuse of Executive prerogative,” the court can and must deny the motion to dismiss.’”⁷ While the government enjoys significant discretion in deciding whether to make a Rule 48(a) motion, the Court should not “serve merely as a rubber stamp for the prosecutor’s decision.”⁸

Petitioner cites *United States v. Fokker Services B.V.*, 818 F.3d 733 (D.C. Cir. 2016), for the proposition that courts “generally” do not second guess decisions by the prosecution on whether to dismiss a case against a defendant. We agree. As this Court pointed out, a “‘presumption of regularity’ applies to ‘prosecutorial decisions, and in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties.’”⁹ Given the substantial evidence of a lack of good faith on the part of the Government in deciding to dismiss this case,

⁷ *Salinas*, 693 F.2d at 352 (quoting *In re Washington*, 544 F.2d 203, 209 (5th Cir. 1976) (en banc), *rev’d on other grounds sub nom. Rinaldi v. United States*, 434 U.S. 22 (1977) (citation omitted)).

⁸ *United States v. Ammidown*, 497 F.2d 615, 622 (D.C. Cir. 1973).

⁹ *Fokker*, 813 F.3d at 741-42 (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)) (internal quotation marks, quotation and alterations omitted).

the district court must have the opportunity to determine whether this constitutes “clear evidence” that the Government did not properly discharge its official duties.

More importantly, unlike *Fokker*, this case does not involve any already-made and, thus, reviewable decision on the Government’s motion to drop the charges. The District Court has yet to rule on the Rule 48(a) motion. In theory, it could go either way. Thus far, all the District Court has done is announce its determination to carefully examine the facts and circumstances pertinent to the decision it must eventually make under Rule 48(a).

It is obviously premature for this Court to inquire into the basis of a decision the District Court has yet to make. *A fortiori*, it is inappropriate to order it to rule one way or the other. After all, Rule 48(a) is addressed to the discretion of the District Court; this Court’s function is one of appellate review applying the conventional standard for matters that are reviewable for abuse of discretion. To grant a mandamus would be inconsistent with Rule 48(a)’s requirement that the court exercise discretion when it decides whether to grant such a motion. If this Court were to grant a mandamus as a way to effectuate a Rule 48(a) dismissal, the leave-of-court requirement would be meaningless. It would be odd indeed to preempt a decision that the law thus entrusts in the first instance to the trial court. If such a case exists in the context of Rule 48(a), we have not found it and Petitioner has not cited it.

Perhaps most disturbing about Petitioner's demand that this Court decide the Rule 48(a) issue in the first instance is that this Court would have to evaluate the host of factual matters he asserts as grounds for granting the Government's motion. This Court would be determining the truth of those multifarious allegations and evaluating their relevance and probative value, without being able to take sworn testimony under oath in open court, evaluate witnesses' demeanor, and consider the evidence against the backdrop of several years' worth of prior proceedings.

The District Court is the proper forum for making this decision in the first instance. If it denies the Rule 48(a) motion, an appeal will lie as of right and the normal standards for appellate review would apply. Proceeding in the usual manner preserves the proper allocation of responsibilities between trial and appellate courts and avoids the egregious misuse of the writ of mandamus Petitioner seeks. Mandamus is certainly not appropriate when it is transparently used as a substitute for the appellate procedure prescribed by Congress.

A court that is asked to grant a writ of mandamus must be satisfied that the petitioner has demonstrated "that his right to issuance of the writ is clear and indisputable, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires, and the issuing court, in the exercise of its discretion,

must be satisfied that the writ is appropriate under the circumstances.”¹⁰ “Mandamus is a drastic and extraordinary remedy reserved for really extraordinary causes.”¹¹ The mere fact that a case has generated a great deal of public attention, that the defendant was previously a high public official, or that the moving papers claim that the circumstances constitute an emergency, does not turn the case into an extraordinary cause for All Writs Act purposes.

A petitioner whose case is still before a district court on a motion that has not yet been decided because of unresolved factual and legal issues cannot reasonably be regarded as having demonstrated that he has a “clear and indisputable right” to mandamus. A petitioner who has the right to appeal a decision on a motion to dismiss if the decision is adverse clearly has an adequate means to attain the relief he desires. Far from presenting a compelling “clear and indisputable” case for appellate intervention by extraordinary writ, a mandamus petition concerning a matter on which the District Court has not even ruled is manifestly premature.

¹⁰ *In re Al-Nashiri*, 921 F.3d 224, 233 (D.C. Cir. 2019) (internal quotation marks and brackets omitted) (quoting *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 380 (2004)).

¹¹ *In re Al Hawsawi*, 955 F. 3d 152, 157 (quoting *In re Khadr*, 823 F. 3d 92, 97 (D.C. Cir. 2016) (quoting *Cheney v. United States Dist. Ct.*, 542 U.S. at 380)).

B

Three unresolved issues further show that Petitioner lacks a clear and indisputable right to mandamus

The deficient basis for Petitioner's claim on the merits aside, three additional factors indicate that he does not have the requisite clear and indisputable right to a writ of mandamus dismissing the prosecution.

First, the equitable doctrine of clean hands applies to the writ of mandamus. *United States ex rel. Turner v. Fisher*, 222 U.S. 204, 209 (1911) (mem.); e.g., *Jackson v. McCall*, 509 F. Supp. 504, 506-07 (D.D.C. 1981). Given the District Court's stated concern that Petitioner may have committed perjury in the course of the proceedings below, this Court should be especially loath to grant a writ of mandamus until any question of clean hands has been resolved.

Second, even if Petitioner's case were otherwise well-founded, the burden is on him to show not only that he had a clear and indisputable right to dismissal of the information, he would *also* need to show that that he had a clear and indisputable right to a dismissal *with prejudice*. This is plainly an extremely tall order on mandamus, and he has not even come close to making such a showing so as to bind the federal government for all time.

Finally, the structure and text of Rule 48(a) suggest that it does not apply after pleas have been accepted. In *United States v. Smith*, 467 F.3d 785, 789 (D.C. Cir. 2006), which Petitioner nowhere cites, this Court expressly did not reach the

question “whether Rule 48 alone can properly be used to vacate a final conviction.” Whether or not the advanced posture of the case *alone* is fatal, nothing in *Smith* suggests that timing either cannot or should not be taken into account in deciding whether to grant a Rule 48(a) motion. Here again, Petitioner has failed to make out a clear and indisputable right. Quite the contrary, *Smith* suggests that a major interpretive issue that is directly pertinent to the disposition of the Government’s motion and Petitioner’s right to a writ of mandamus is unresolved. That issue too ought to be resolved by the District Court in the first instance.

For these additional reasons, by definition, Petitioner does not have a clear and indisputable right to the relief he seeks.

Conclusion

Because compelling the District Court to grant the Government’s Rule 48(a) motion would unjustifiably interfere with the normal allocation of decision-making responsibilities as between this Court and the District Court, and because Petitioner has fallen far short of demonstrating a clear and indisputable right to relief, the petition should be denied.

Respectfully submitted,

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May 27, 2020

Certificate of Service

I certify that I have, this 27th day of May, 2020, filed the foregoing brief via the Court's CM/ECF system, which will send notice thereof to all counsel of record.

Eugene R. Fidell

Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(3) because it contains 2548 words, excluding the parts exempted by Fed. R. App P. 32(f) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

Eugene R. Fidell