CITING PRESUMPTION OF REGULARITY, DC CIRCUIT RULES AGAINST EMMET SULLIVAN TO PREVENT EMBARRASSING BILLY BARR

Neomi Rao just ruled against Emmet Sullivan in "Mike Flynn's" petition for a writ of mandamus. She did so on two grounds. First, DOJ is entitled to a presumption of regularity, something I predicted would be central to this (under binding precedent, it takes a great deal to be able to argue something is awry at DOJ).

> The government's representations about the insufficiency of the evidence are entitled to a "presumption of regularity … in the absence of clear evidence to the contrary." United States v. Armstrong, 517 U.S. 456, 464 (1996) (quotation marks omitted). On the record before the district court, there is no clear evidence contrary to the government's representations. The justifications the district court offers in support of further inquiry—for instance, that only the U.S. Attorney signed the motion, without any line prosecutors, and that the motion is longer than most Rule 48(a) motions—are insufficient to rebut the presumption of regularity to which the government is entitled.

She also argued that DOJ was correcting itself, though without laying out any basis that DOJ had found that it had made an error.

> Finally, each of our three coequal

> branches should be encouraged to self-correct when it errs. If evidence comes to light calling into question the integrity or purpose of an underlying criminal investigation, the Executive Branch must have the authority to decide that further prosecution is not in the interest of justice.2 As the Supreme Court has explained, "the capacity of prosecutorial discretion to provide individualized justice is firmly entrenched in American law. …

This is particularly ridiculous given that, in its most recent filing, DOJ made clear that DOJ had not erred. Nevertheless, this argument was likely critical to getting Karen Henderson on board; I had noted Henderson raised this right at the end of the arguments as a potential way to side with Rao.

> At the very end of the hearing, she invited Principal Deputy Solicitor General Jeff Wall to address a claim made in DOJ's brief: that DOJ should be permitted to self-correct the harm of a bad faith prosecution. So she may have been reserving that as a reason to rule for Flynn — ultimately ruling instead for DOJ. But her comments through the rest of the hearing suggest this petition will fail.

Of significant import, Rao's opinion makes no attempt to defend Flynn's argument. Rather, her order is entirely about preventing DOJ — Bill Barr — from the embarrassment of being forced to explain his decision.

> In this case, the district court's actions will result in specific harms to the exercise of the Executive Branch's exclusive prosecutorial power. The contemplated proceedings would likely require the Executive to reveal the internal deliberative process behind its

> exercise of prosecutorial discretion, interfering with the Article II charging authority. Newman, 382 F.2d at 481 (citing United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965)). Thus, the district court's appointment of the amicus and demonstrated intent to scrutinize the reasoning and motives of the Department of Justice constitute irreparable harms that cannot be remedied on appeal. See Cobell, 334 F.3d at 1140 ("[I]nterference with the internal deliberations of a Department of the Government of the United States … cannot be remedied by an appeal from the final judgment."); see also Cheney, 542 U.S. at 382.
>
> We must also assure ourselves that issuance of the writ "is appropriate under the circumstances." Cheney, 542 U.S. at 381. The circumstances of this case demonstrate that mandamus is appropriate to prevent the judicial usurpation of executive power. The first troubling indication of the district court's mistaken understanding of its role in ruling on an unopposed Rule 48(a) motion was the appointment of John Gleeson to "present arguments in opposition to the government's Motion." Order Appointing Amicus Curiae, No. 1:17-cr-232, ECF No. 205, at 1 (May 13, 2020) (emphasis added). Whatever the extent of the district court's "narrow" role under Rule 48(a), see Fokker Servs., 818 F.3d at 742, that role does not include designating an advocate to defend Flynn's continued prosecution. The district court's order put two "coequal branches of the Government … on a collision course." Cheney, 542 U.S. at 389. The district court chose an amicus who had publicly advocated for a full adversarial process. Based on the record before us, the contemplated hearing could require the government to defend

> its charging decision on two fronts—answering the district court's inquiries as well as combatting Gleeson's arguments. Moreover, the district court's invitation to members of the general public to appear as amici suggests anything but a circumscribed review. See May 12, 2020, Minute Order, No. 1:17-cr-232. This sort of broadside inquiry would rewrite Rule 48(a)'s narrow "leave of court" provision.
>
> And we need not guess if this irregular and searching scrutiny will continue; it already has. On May 15, Gleeson moved for permission to file a brief addressing, among other things, "any additional factual development [he] may need before finalizing [his] argument" and suggesting a briefing and argument schedule. Mot. to File Amicus Br., No. 1:17-cr-232, ECF No. 209, at 1–2 (May 15, 2020). The district court granted the motion and then set a lengthy briefing schedule and a July 16, 2020, hearing. See May 19, 2020, Minute Order, No. 1:17- cr-232. In his brief opposing the government's motion, Gleeson asserted the government's reasons for dismissal were "pretext" and accused the government of "gross prosecutorial abuse." Amicus Br., No. 1:17-cr-232, ECF No. 225, at 38–59 (June 10,
>
> 2020). He relied on news stories, tweets, and other facts outside the record to contrast the government's grounds for dismissal here with its rationales for prosecution in other cases. See id. at 43, 46–47, 57–59. These actions foretell not only that the scrutiny will continue but that it may intensify. Among other things, the government may be required to justify its charging decisions, not only in this case, but also in the past or pending cases cited in Gleeson's brief.

> Moreover, Gleeson encouraged the district court to scrutinize the government's view of the strength of its case—a core aspect of the Executive's charging authority. See In re United States, 345 F.3d 450, 453 (7th Cir. 2003) (condemning district court's failure to dismiss criminal charges based on its view that "the government has exaggerated the risk of losing at trial"). As explained above, our cases are crystal clear that the district court is without authority to do so. See Fokker Servs., 818 F.3d at 742; Ammidown, 497 F.2d at 623.

This order is entirely about preventing Billy Barr from embarrassment. It has zero to do with Mike Flynn's case.

Robert Wilkins wrote a dissent that makes a lot of sound points that — if Sullivan chooses to ask for an en banc hearing — might be very powerful. I'll lay those out in an update.