JUDGE SULLIVAN USES MIKE FLYNN DISMISSAL TO EMPHASIZE HIS OWN AUTHORITY

Judge Emmet Sullivan just dismissed, as moot, the prosecution of Mike Flynn (he did not dismiss the case with prejudice, as DOJ had asked, but that likely does not matter). He did three things, which I'll take in turn in a series of posts.

First, he asserted the ability to deny DOJ's motion to dismiss — while stopping short of doing so — in a way that DOJ might otherwise appeal if this were not mooted.

As a reminder, when Bill Barr interfered in this prosecution in May, he ceded that Judge Sullivan had *some* say over the dismissal. But along the way DOJ repeatedly argued that Sullivan couldn't actually examine the circumstances of the dismissal. In this opinion, Sullivan asserted the ability to weigh just that. He made it clear that the Supreme Court intended courts to have a say.

> Despite the Supreme Court's concerns, the Advisory Committee's final draft of Rule 48(a) again required only that prosecutors submit a statement of reasons for dismissal. See Frampton, Why Do Rule 48(a) Dismissals Require "Leave of Court"?, supra, at 36-37. However, in promulgating the rule, the Supreme Court deleted this requirement and added the requirement that the prosecutor obtain leave of court. Id. at 37; see also Ammidown, 497 F.2d at 620. In so doing, the Court made it "manifestly clear that [it] intended to clothe the federal courts with a discretion broad enough to protect the public interest in the fair administration of criminal justice."

> Cowan, 524 F.2d at 512.

He then invokes Ammidown for the principle that the court can weigh whether these actions are in the public interest.

> This Circuit's precedent is consistent with this history. For example, in Ammidown, the D.C. Circuit acknowledged that Rule 48(a) "gives the court a role" when "the defendant concurs in the dismissal but the court is concerned whether the action sufficiently protects the public." 497 F.2d at 620. The D.C. Circuit explained that courts carry out this role in such a situation "to prevent abuse of the uncontrolled power of dismissal previously enjoyed by prosecutors." Id. (citation omitted).

He then addresses DOJ's argument that Fokker only gives District courts the ability to protect a defendant, not to protect public interest, arguing that it is not on point here, because this involved a guilty plea.

> Despite this language in Ammidown, however, the government relies on United States v. Fokker Services B.V., 818 F.3d 733 (D.C. Cir. 2016), to argue that judicial intervention is warranted only when the defendant objects to dismissal because "the 'principal object of the leave of court requirement' has been understood to be a narrow one—'to protect a defendant against prosecutorial harassment.'" Gov't's Reply, ECF No. 227 at 20-21 (quoting Fokker, 818 F.3d at 742).
>
> But Fokker does not address the Court's authority to consider an unopposed Rule 48(a) motion; it involved a deferred prosecution agreement rather than a guilty plea. Fokker, 818 F.3d at 737. Fokker also does not suggest that courts

> may only review opposed Rule 48(a) motions for prosecutorial harassment—the case simply quotes language from Rinaldi, stating that preventing harassment is the principal object of the rule. Id. at 742 (quoting Rinaldi, 434 U.S. at 29 n.15).

Importantly, Sullivan addressed a claim DOJ made that is not based on precedent — that the District does not have to operate as a rubber stamp, but his only role is to determine whether the entire Executive Branch supported an outcome. Sullivan made the case that a District court can still make a decision about the public interest, not just what the Executive wanted.

> At the September 29, 2020 motion hearing, the government emphasized a different aspect of its argument. It conceded that the Court should not act as a rubber stamp and that it has a role to play when presented with an unopposed Rule 48(a) motion. Hr'g Tr., ECF No. 266 at 40:9-12. But, in the government's view, this role is limited to determining whether "the decision to dismiss is the considered view, the authoritative view of the Executive Branch as a whole," id.; rather than being the "rogue" decision of an individual prosecutor, id. at 99:16-23.7 The government argued that this standard appropriately reconciles the concerns about favoritism and pretext that led to the "leave of court" language in the Rule with the separation of powers principal that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." United States v. Nixon, 418 U.S. 683, 693 (1974) (citation omitted); see also Fokker, 818 F.3d at 742 ("[D]ecisions to dismiss pending charges . . . lie squarely within the ken of prosecutorial

> discretion."). The Court is not persuaded by the government's argument, however, because it fails to acknowledge the possibility that the "considered view of the Executive Branch as a whole" could be contrary to the public interest.

In so doing, Sullivan makes the case that Districts can also review a case for prosecutorial abuse.

> The court's role is not "to serve merely as a rubber stamp for the prosecutor's decision," even when "the defendant concurs in the dismissal." Ammidown, 497 F.2d at 620, 622. Rather, it is the court's "duty to exercise a discretion for the protection of the public interest." Cowan, 524 F.2d at 511. The trial court therefore conducts an "examination of the record" to ensure that the government's "efforts to terminate the prosecution [are not] tainted with impropriety." Rinaldi, 434 U.S. at 30.

Later in the opinion, Sullivan noted that because the government had chosen to give more than conclusory statements about why they wanted to dismiss the prosecution, he could weight those more substantive reasons.

> The majority of the cases finding denial of leave appropriate based on "conclusory statements" most often involve motions providing only one or two sentences referring generally to the "public interest." See, e.g., Derr, 726 F.2d at 619 (affirming denial of leave to dismiss when the government offered no reasons for dismissal other than that it would "best meet the ends of justice"). Here, on the other hand, the government has sought to justify its decision to seek dismissal by providing

> several reasons and facts underlying its decision. See id.
>
> However, while not conclusory, many of the government's reasons for why it has decided to reverse course and seek dismissal in this case appear pretextual, particularly in view of the surrounding circumstances.

Then, buried on page 25, Sullivan argues that District courts can rule against DOJ in these narrow circumstances to protect the public interest and reiterates the authority of courts to rule against the government in case of corruption.

> With the above principles in mind, in response to the government's motion to dismiss under Rule 48(a), the Court holds that a judge may deny an unopposed Rule 48(a) motion if, after an examination of the record, (1) she is not "satisfied that the reasons advanced for the proposed dismissal are substantial"; or (2) she finds that the prosecutor has otherwise "abused his discretion." Ammidown, 497 F.2d at 620-22.
>
> [snip]
>
> In addition, as indicated by the history of Rule 48(a), the corrupt dismissal of politically well-connected individuals would also constitute an abuse of discretion. See Woody, 2 F.2d at 262.

So at a key level, the opinion lays out the principle that DOJ fought hard to deny — that judges have their own authority and they serve the public.

Since this case has been mooted, DOJ will have a very difficult time challenging this language (other DC District judges could rely on it going forward, but it is not a precedent). Sullivan,

knowing that DOJ also had no more authority to challenge his order, asserted his authority.

This language, while not circuit precedent, may be cited going forward.