WHY DO RULE 48(A) DISMISSALS REQUIRE "LEAVE OF COURT"?

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In an extraordinary development on May 7, 2020, the Department of Justice has asked United States District Judge Emmet G. Sullivan to dismiss the felony charge against President Trump's former National Security Advisor, Michael T. Flynn (despite Flynn already having pleaded guilty, twice, to the offense).[1] But the Government may not unilaterally dismiss the case. Rather, under Rule 48 of the Federal Rules of Criminal Procedure, prosecutors may do so only "with leave of court."[2] The task now falls to Judge Sullivan to determine whether to extend such leave, thereby placing the court's imprimatur on the Department of Justice's controversial decision.[3]

The Government has urged (and some commentators have opined) that Judge Sullivan has little choice but to grant the motion. The conventional view holds that it is necessary to distinguish between two types of motions to dismiss: (1) those where dismissal would benefit the defendant, and (2) those where dismissal might give the Government a tactical advantage against the defendant, perhaps because prosecutors seek to dismiss the case and then file new charges. The Government argues that Rule 48(a)'s "leave of court" requirement applies exclusively to the latter category of motions to dismiss; where the dismissal accrues to the benefit of the defendant, judicial meddling is unwarranted and improper.[4] In support, the Government relies on forty-year-old *dicta* in the sole U.S. Supreme Court case interpreting Rule 48(a), *Rinaldi v. United States*.[5] There, the Court stated that the "leave of court" language was added to Rule 48(a) "without

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1 *See United States v. Flynn*, Mot. to Dismiss Case (May 7, 2020), Dkt. 198, 1:17-cr-00232 (D.D.C.)

2 Fed. R. Crim. P. art. 48(a).

3 See, e.g., Katie Benner and Charlie Savage, *Flynn Case Raises Fears of a Politically Tainted Justice Dept.*, N.Y. TIMES, May 9, 2020, at A20.

4 S*ee* Mot. to Dismiss, p. 10-11.

5 434 U.S. 22 (1977)

explanation," but "apparently" this verbiage had as its "principal object . . . to protect a defendant against prosecutorial harassment."[6]

But the Government's position—and the U.S. Supreme Court language upon which it is based—is simply wrong. In fact, the "principal object" of Rule 48(a)'s "leave of court" requirement was not to protect the interests of individual defendants, but rather to guard against dubious dismissals of criminal cases that would benefit powerful and well-connected defendants. In other words, it was drafted and enacted precisely to deal with the situation that has arisen in *United States v. Flynn*: its purpose was to empower a district judge to halt a dismissal where the court suspects some impropriety has prompted prosecutors' attempt to abandon a case.

To be clear, there may be good reason for Judge Sullivan to grant the Government's motion to dismiss. Even if Rule 48(a), on its own terms, permits Judge Sullivan to reject the Government's request, important constitutional principles (rooted in the separation of powers) might counsel caution when the Judiciary contemplates meddling in the Executive's management of criminal prosecutions.[7] But the fiction that Rule 48(a) exists solely, or even chiefly, to protect defendants against prosecutorial mischief should be abandoned. This brief Essay recounts Rule 48's forgotten history.

I. The *Nolle Prosequi* Power Before the Federal Rules of Criminal Procedure

Prior to the enactment of the Federal Rules of Criminal Procedure, federal prosecutors wielded the power to drop criminal

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[6] *Id.* at 30, n.15

[7] *See In re United States*, 345 F.3d 450 (7th Cir. 2003) (Posner, J.); *see also* Memorandum of Mr. Justice Frankfurter, 323 U.S. 821, 822 (1944) ("Such a code can hardly escape provisions in which lurk serious questions for future adjudication by this Court. Every lawyer knows the difference between passing on a question concretely raised by specific litigation and the formulation of abstract rules . . .") (withholding approval of adoption of Rules). On the other hand, the argument that a district court's denial of a Rule 48 motion offends separation of powers principles is particularly weak in the post-plea setting. At this stage, all that is left for the trial court to do is sentence the defendant, a task that is firmly in the district judge's wheelhouse. Notably, separation of powers played no role in the Court's discussion of Rule 48's scope in *Rinaldi*, a case that similarly arose in the post-trial context.

charges (or, in the argot of lawyers, "enter a *nolle prosequi*") at their sole prerogative. Most States, however, abolished this power: once instituted, criminal charges could be dismissed only "in furtherance of justice" and with leave of court.[8]

Judges sometimes bristled at the federal approach, not least because it made them feel complicit in dealings they deemed corrupt. A leading case concerning federal prosecutors' *nolle prosequi* power, *United States v. Woody,*[9] put in stark relief the judge's dilemma when facing apparent improprieties. There, the Government indicted a young Montanan named Franklin H. Woody for embezzlement while working as a federal tax collector. *Id.* But young Mr. Woody was no ordinary defendant. The Woody Family was one of the first White families to settle in Montana.[10] His grandfather was Missoula's first mayor, a stern district judge known for his "antipathy to persons charged with crime."[11] His father was a personal friend of the Governor[12] and had served as Montana's Assistant Attorney General (and later, ironically, as General Counsel for the Montana Taxpayer's Association).[13] Eventually, the United States moved to dismiss the indictment. Among the reasons offered by the Assistant United States Attorney, the defendant was "of a prominent pioneer family, . . . [was] studying law in a California university, . . . and thus his 'career as a lawyer [would] be spoiled'" if the case proceeded.[14] Moreover, "the government's losses ha[d] been reimbursed," presumably by Mr. Woody or his kin.[15]

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[8] *See* A.L.I. CODE OF CRIMINAL PROCEDURE, COMMENTARY to § 295, at 895-97 (1930) (listing state statutes and various variations on wording).

[9] 2 F.2d 262 (D. Mont. 1924),

[10] *Wilson Grows Sociable*, The Missoulian (Missoula, Mont.), July 17, 1919, at 4 (reporting on life and death of Mrs. Sarah Elizabeth Countryman Woody); *Frank Woody Out for Associate Justice*, Independent-Record (Helena, Mont.), July 7, 1920, at 10 (discussing family history).

[11] *Reminiscences of Bench and Bar, By Senator Henry L. Myers*, ANACONDA STANDARD (Anaconda, Mont.), Nov. 15, 1925, at 24 (discussing early days practicing before Judge Woody).

[12] *Resignation Accepted at Last*, Anaconda Standard (Anaconda, Mont.) at Sept. 8, 1922; *Woody Prepares Dixon Tax Bills*, Independent-Record (Helena, Mont.) Jan 26, 1921, at 5.

[13] *Its Work Appreciated*, Helena Daily, 13 Apr. 1925, p. 5.

[14] *Woody*, 2 F.2d at 262

[15] *Id.*

The district judge made no secret of his displeasure. He wrote that such "reasons" were transparently dubious, "savor[ing] altogether too much of some variety of prestige and influence (family, friends, or money) that too often enables their possessors to violate the laws with impunity."[16] Such a dismissal would undermine the Judiciary, for it would "incite, if . . . not justify, the too common reproach that criminal law is for none but the poor, friendless, and uninfluential." *Id.* This belief in "disparity in treatment of offenders," in turn, undermined "courts, law, and order; and, in so far as it is well founded, the basis of it is a pernicious evil, and abhorrent to justice." *Id.*

Yet the judge was powerless to do anything about it. Under existing law, the federal prosecutor had:

> absolute control over criminal prosecutions, and [could] dismiss or refuse to prosecute, any of them at his discretion. The responsibility [was] wholly his. . . . The court [could not] control him, unless, as in some states, it [was] given the power by statute.[17]

Thus, the district court was compelled to grant the motion, "albeit reluctantly."[18] The court's opinion was carried in newspapers across the state.[19]

The dilemma faced by the district judge in *Woody* was well known in legal circles when the Rules of Criminal Procedure were developed (1941-1944). Several months after the Supreme Court appointed an Advisory Committee to draft the rules in February 1941, another federal district judge in California penned an impassioned plea for the federal courts to adopt a new approach to dismissals. Quoting at length from *Woody*, Judge Leon Yankwich urged that it was critical to grant judges greater "control . . . over criminal proceedings" so they would not be similarly "compelled to grant the dismissal of an

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[16] *Id.*

[17] *Id.* at 263.

[18] *Id.*

[19] *See Bourquin Scores Dismissal Filed by Attorney Higgins: Removal of Charge Against Former Collector Woods 'Savors of Influence (Family, Friends or Money),' Judge Says*, Great Falls Tribune, Oct. 4, 2014, at 11; *Judge Scores U.S. Attorney: Bourquin Raps Higgins' Reasons for Dismissing Case*, Billings Gazette (Billings, Mont.), Oct. 6, 1924, at 5.

indictment [when such a dismissal] savored too much of favoritism."[20] Echoing the judge in *Woody*, Judge Yankwich argued:

> The people of the United States may be done as great a disservice by discontinuing as by continuing a prosecution. The community tests criminal justice by what judges do. We are responsible for the errors which the zealous prosecutor induces us to commit. And their misconduct . . . is chargeable to us.
>
> So we should have a control commensurate with this responsibility, in order that the action taken in continuing or discontinuing a prosecution can be truly said to be the action of the court. It is not such at the present time.[21]

In short order that would change.

II. The Advisory Committee, the Court, and the Drafting of Rule 48(a)

On the heels of the much-lauded drafting of the Federal Rules of Civil Procedure, momentum built for a similar project to simplify and reform the convoluted landscape of federal criminal litigation.[22] In February 1941, the Supreme Court appointed an Advisory Committee composed of eighteen prominent legal figures to draft the federal criminal rules. Although the Court appeared to be unaware of this fact when it decided *Rinaldi* in 1977, the work of the Advisory Committee (including its communications with the Court and members of the broader legal community) sheds significant insight into the purpose of Rule 48(a)'s "leave of court" provision. Most importantly, the historical record makes clear that what became Rule 48(a) had almost nothing to do with the rights of the accused[23]; instead, the final text was

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[20] Hon. Leon R. Yankwich, *Increasing Judicial Discretion in Criminal Proceedings*, 1 F.R.D. 746, 752 (1941) (remarks before the Judicial Conference of the Ninth Circuit, June 19-21, 1941)

[21] Hon. Leon R. Yankwich, *Increasing Judicial Discretion in Criminal Proceedings*, 1 F.R.D. 746, 752 (1941)

[22] See generally Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697 (2017).

[23] Indeed, with Committee secretary Assistant Attorney General Alexander Hotlzoff wielding outsized influence, concern for "prosecutorial efficiency" was more often the dominant concern during the drafting process. Meyn, *Why Civil and Criminal Procedure Are So Different*, at 712-13.

understood as vesting district judges with the power to limit unwarranted dismissals by corruptly motivated prosecutors.

The question whether the trial court should wield the power to deny a motion to dismiss first prompted debate at the Advisory Committee's January 13, 1942 meeting. From the outset, the Advisory Committee's concern focused on the possibility that improper political influence might spur a prosecutor's decision to drop a case. Harvard Law School professor Murray Seasongood first raised the issue:

> Mr. Chairman, this raises an important question of policy; that is, whether it shall be necessary to get the approval of the judge before the indictment may be nolled. I understand in many States it is necessary to get the consent of the judge. I have seen cases nolled which in my opinion should not have been nolled. I have seen some cases nolled after intercession from Washington; also some gross income tax fraud cases.[24]

The Advisory Committee's secretary, former Assistant Attorney General Alexander Holtzoff, was the leading voice against such a requirement. He countered that while requiring the "consent of the court" might be necessary in state court, because "the average county prosecutor is steeped in politics in the first place," federal prosecutors were immune to such untoward pressures.[25] A skeptical Aaron Youngquist (himself a formal federal prosecutor) countered: "You don't have the same degree, perhaps."[26] An initial vote on requiring the court's approval for a dismissal resulted in a 7-7 tie.[27] As a compromise, the Committee abandoned the leave-of-court requirement, but approved draft language requiring that prosecutors first place on the record the reasons for any dismissal.[28]

At the May 1942 meeting, the Committee revisited the matter, and again the conversation focused on dismissals motivated by corrupt purposes, not protection of the accused. One member recalled the discussion the previous summer at the Ninth Circuit's Judicial Conference (where Judge Yankwich's remarks, quoted above, were delivered).[29] Such dismissals, another Committee member noted, "have

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[24] Meeting Minutes (Jan. 13, 1942, at p. 300).

[25] *Id.* at 305.

[26] *Id.* at 306.

[27] *Id.* at 303.

[28] *Id.* at 316. *See also* Meeting Minutes (May 19, 1942) at 440 (noting "compromise" from earlier meeting).

[29] Meeting Minutes (May 19, 1942) at 440.

been the subject of political overturns and charges of corruption. Certainly in Massachusetts corruption was the reason why the statutory change was made, requiring a statement of the reason being endorsed on the paper."[30] The debate continued:

> Mr. Seasongood : I think it creates a very bad impression on the ordinary person to have a solemn accusation which has been made just dismissed without ever knowing what the reason was for it. I know of instances where the dismissal has been very improper.
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> Mr. Holtzoff: You mean in the state courts?
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> Mr. Seasongood: No, sir. I mean in the Federal courts, where there have been election frauds and where there have been income tax frauds, and somebody got those cases dismissed. That is a fact.
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> Mr. Waite: In the *Glasser* cases, too.[31]

Throughout the conversation, the question of whether "leave of court" might be necessary to protect the rights of the accused was almost never mentioned.[32]

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[30] *Id.* at 445.

[31] *Id.* at 446-47. Mr. Waite was presumably referencing *United States v. Glasser*, 315 U.S. 60 (1942), a landmark Supreme Court case (better remembered today as a Sixth Amendment case) in which a Chicago federal prosecutor successfully appealed his conviction for fixing the results of liquor cases.

[32] I have found but one possible exception in the entire drafting process. During the May 1942 meeting, former U.S. Attorney George Z. Medalie recalled a case where an indictment was dismissed without prosecutors publicly stating their reason. There, a "very eminent counsel appeared for the defendants" and the judge ordered the matter set for trial the following Monday. *Id.* at 447. The Government was caught unprepared and abruptly dismissed the charges. *Id.* Prosecutors subsequently reindicted the defendant "and in due course of proper preparation, tried and convicted the defendants." *Id.* But, in context, it is unclear whether Mr. Medalie ultimately viewed the dismissal in the case he described as improper. At a later meeting, Mr. Medalie spoke against placing any limitations on prosecutors' power to dismiss. *See* Meeting Minutes (Feb. 23, 1943, at p. 1111-14). For a critical take on the nolle-and-reinstitute tactic in contemporary practice, see Joseph A. Thorp, *Nolle-and-Reinstitution: Opening the Door to Regulation of Charging Powers*, 71 N.Y.U. ANN. SURV. AM. L. 429 (2015).

The Committee first an sent an "unpublished" draft of its work to the Supreme Court in May 1942.[33] In this initial version, the Rule for dismissals gave prosecutors the power to dismiss a case without the court's permission (while requiring a statement of reasons).[34] On June 10, 1942, the Court returned comments, offering "the first expression of the Court's thinking on the Rules [that] helped shape the later Preliminary Drafts that were issued to the public."[35] The Court was skeptical:

> Rule 24. This rule apparently gives the Attorney General or the United States Attorney unqualified authority to nolle pros a case without consent of the court. Is this now the law, and in any event should it be the law, any more than that the Government can confess error in a criminal case without the consent of the court? See Young v. United States, decided this term.[36]

In the recent case to which the Court directed the Advisory Committee's attention, the Court explained that "a confession [of error by the Government] does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed."[37] Emphasizing the need to ensure that every criminal proceeding in fact "promotes a well-ordered society," the Court rejected the suggestion that "the enforcing officers" of the law alone should be entrusted with representing the public interest; rather, "[t]hat interest is entrusted to our consideration and protection as well."[38]

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[33] This document was actually the Committee's fourth tentative draft, although it was the first submitted to the Supreme Court. The Committee asked for permission to circulate the document "to the bench and bar" for feedback, but the Court denied such permission until further annotations could be prepared. *See* 1 MADELEINE J. WILKEN & NICHOLAS TRIFFIN, DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE xii (1991).

[34] In this version, the draft rule (then Rule 24) provided as follows: "The Attorney General or the United States attorney may file a dismissal of the indictment or information with a statement of the reasons therefor and the prosecution shall thereupon terminate."

[35] 1 Wilken & Triffin, *supra* note __, at xii.

[36] *See* Memorandum, June 10, 1942.

[37] *Young v. United States*, 315 U.S. 257, 258 (1942).

[38] *Id.* at 259.

With the Court's feedback in hand,[39] the rule was again debated. Once more, the battle lines were clear: one contingent (led by Holtzoff) insisted that prosecutors could be entrusted with the responsibility to wield their dismissal power responsibly, free from judicial oversight, while the other (led by Seasongood) insisted that a "leave of court" requirement provided a salutary check against the prosecutor whose independence was compromised by orders from "Washington."[40] (Neither side, as the Court later assumed, evinced any concern for "protect[ing] a defendant against prosecutorial harassment."[41]). Ultimately, efforts to insert "leave of court" language into the First Preliminary Draft (which circulated in the American legal community from May 1943 to September 1943)[42] fell short, this time by a vote of 6-8.[43]

The Advisory Committee submitted a Second Preliminary Draft to the Court in late 1943,[44] and in April 1944, the Court again shared concerns with the Advisory Committee regarding the lack of a "leave of court" requirement for dismissals. The Court treaded cautiously, emphasizing that it was merely offering "suggestions" and flagging matters "which should be seriously considered before the final draft is submitted."[45] But after this opaque windup, the Court bluntly signaled that the Committee's compromise language was underwhelming: "Two members of the Court think that the United States Attorney should not be permitted to dismiss an indictment without the consent of the court." The Advisory Committee did not get the hint. When the final draft of the Rules was submitted to the Court in July 1944, the draft Rule yet again granted prosecutors unfettered permission to dismiss a case, so long as they supplied "a statement of the reasons therefor."

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[39] *See* Hearing Minutes (Feb. 1943) at 1119 ("Now, the Supreme Court has put something into the Memorandum, the Reporter says, which Suggested, "Such a requirement might be desirable and reference was had to a recent decision of the Supreme Court, Young v. United States, 315 U.S.," and then he quotes the language."

[40] *Id.* at 1120.

[41] *Rinaldi*, 434 U.S. at 30, n.15.

[42] 1 Wilken & Triffin, *supra* note __, at xiii.

[43] *Id.* at 1122.

[44] This draft was dated February 1944, following the Supreme Court's instruction that the latest version again be circulated in the legal community. 1 Wilken & Triffin, *supra* note __, at xiv.

[45] Letter of Chief Justice Stone, Apr. 11, 1944.

Both the First and Second Preliminary Drafts were also circulated throughout the legal community for comment, and hundreds of lawyers and judges chimed in.[46] In the correspondence regarding the draft Dismissal rules, the plight of the defendant never registered as a concern. As within the Advisory Committee itself, opinion was split between those favoring no limits on prosecutorial discretion, and those who fretted about the possibility of improper influence and corruption. The Chief Justice of the Supreme Court of Texas, James P. Alexander, fell into the latter camp, warning that without "leave of court" language, "[o]ne corrupt United States attorney could dismiss an indictment and defeat the judicial process."[47] Others felt that the existing "statement of reasons" requirement was already too onerous: one DOJ attorney wrote that he saw "no reason why attorneys for the Government should be thus regulated in all cases. There will be cases in which the public interest would not be served by an honest statement of the reasons for dismissal."[48] Not a single correspondent suggested that a "leave of court" language was necessary to protect the rights of the defendant.

The final version of the Rules prescribed by the Supreme Court (transmitted to the Attorney General and Congress in December 1944) largely adopted the Advisory Committee's proposals.[49] But there was a significant change to rules governing the dismissal of cases. In the final

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[46] These comments, recommendations, and suggestions are collected at Volumes II and III of Wilken & Triffin's indispensable seven-volume *Drafting History*.

[47] 2 Wilken & Triffin, *supra* note __, at 269 (Letter to the Secretary, dated Aug. 31, 1943).

[48] 3 Wilken & Triffin, *supra* note __, at 536.

[49] Largely, but not entirely. The Court dropped three proposed Rules and modified some other language, largely where the Committee failed to heed the "suggestions" in the Court's April 1944 memorandum. *See* Vanderbilt, *Preparation of The Rules, Their Adoption by the Supreme Court and Submission to Congress*, 5 F.R.D. 90, 93-94 (1946) ("The Supreme Court studied the draft over several months and then made a few changes and finally submitted the rules to the Congress at the opening of the present session, on January 3rd, 1945. An interesting study might be made of the differences between the final report of the Advisory Committee and the draft as submitted by the Supreme Court to the Congress. I think it would reveal that on at least one subject, namely Criminal Procedure, that the Supreme Court is inclined to be somewhat conservative, at least some members of the Advisory Committee off the record, hold to that opinion.").

version of Rule 48(a), the Court eliminated the requirement that prosecutors provide a "statement of the reasons" for a dismissal, imposing instead a requirement that prosecutors obtain "leave of court." The Court thus resolved years of debate by taking the path championed by Seasongood and the Advisory Committee's dissenters: it armed the district judge with a powerful tool to halt corrupt or politically motivated dismissals of cases.

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None of the foregoing resolves the difficult choice now facing Judge Sullivan as he weighs the Government's motion to dismiss the prosecution of Michael Flynn. The record provides no precise yardstick to determine when a motion for dismissal appears so dubious as to warrant denial. But it does correct a historical error that for too long has been taken for granted. Rule 48(a)'s "principal object" was never "to protect a defendant against prosecutorial harassment."[50] Rather, it was implemented to give district judges a modest means of safeguarding the public interest when evaluating a motion like the one that has been filed in *United States v. Flynn*.

[50] *Id.* at 30, n.15