

APPOINTED AMICUS JOHN GLEESON ARGUES DOJ ENGAGED IN GROSS PROSECUTORIAL MISCONDUCT IN MOVING TO DISMISS FLYNN PROSECUTION

I'm painting and doing other chores today and so my analysis of the amicus John Gleeson submitted in the Mike Flynn prosecution will have to wait. I did a thread of my initial read of the filing here.

The short version, however, is this.

Gleeson argues there are two bases for denying a motion to dismiss a prosecution: the prosecutor's reasons for doing so, or clear evidence of gross prosecutorial abuse.

Guided by Rule 48(a)'s text and history, as well as separation of powers principles, there are two grounds for denying leave of court. First, "the requirement of judicial approval entitles the judge to obtain and evaluate the prosecutor's reasons." *Ammidown*, 497 F.2d at 622. Those reasons must be real and credible; where they are demonstrably pretextual, the court may deny leave under Rule 48(a). Second, courts may deny Rule 48(a) motions based on clear evidence of gross prosecutorial abuse. See *id.*

He then argues that DOJ's reasons for moving to dismiss are such obviously bullshit, the only explanation for the motion is that Flynn is a political ally of President Trump.

Both grounds for denying leave of court under Rule 48(a) are present in this case. The reasons offered by the Government are so irregular, and so obviously pretextual, that they are deficient. Moreover, the facts surrounding the filing of the Government's motion constitute clear evidence of gross prosecutorial abuse. They reveal an unconvincing effort to disguise as legitimate a decision to dismiss that is based solely on the fact that Flynn is a political ally of President Trump.

Of all the places where Gleeson might (and in some cases, does) use DOJ or Barr's prior statements against DOJ, the most effective one is quoting Barr's statement that Trump's tweets about investigations into his flunkies "make it impossible to do [his] job" to substantiate a claim that any DOJ independence has severely broken down.

These [over 100 Trump tweets complaining about the Flynn prosecution] were issued against the background of a severe breakdown in the traditional independence of the Justice Department from the President. As Professor Jack Goldsmith notes, "every presidency since Watergate has embraced policies for preserving DOJ and FBI independence from the President in certain law enforcement and intelligence matters."⁵⁷ One component of that independence is "resistance to politicized influence."⁵⁸ Yet President Trump has overtly claimed and exercised the "absolute right to do what I want to do with the Justice Department."⁵⁹ The Attorney General stated earlier this year that President Trump's "public statements and tweets" about pending cases "make it impossible to do my job and to assure the courts and the prosecutors in the department

that we're doing our work with integrity."60

Which leads Gleeson to concede that DOJ is permitted to exercise its prosecutorial discretion to help a Trump ally for sound reasons, not not for pretextual ones.

The Government may permissibly exercise its discretion for sound reasons even if doing so benefits a friend and political ally of the President (who, as noted, tried unsuccessfully to persuade the FBI Director at the time to "let this go," ECF No. 79-6 at 26). But the Government may not enlist a court in dismissing a case solely because the defendant is a friend and political ally of the President—and where the ostensible reasons advanced for dismissal amount to a thin and unpersuasive disguise. Only by acting as a rubber stamp could the Court presume that all of this is regular and that the Government's reasons here are anything but pretextual. Unfortunately, what is actually happening in this case is precisely what Rule 48(a) was intended to guard against. If the Executive wishes for the Judiciary to dismiss criminal charges—as opposed to issuing a pardon or taking other unilateral action—the reasons it offers must be real and credible. Its professed concerns about materiality are neither.

Ultimately, Gleeson argues that Judge Emmet Sullivan should deny DOJ's motion to dismiss, but that he should not hold Flynn in contempt, but instead factor Flynn's materially conflicting lies into his sentence.