UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. MICHAEL T. FLYNN, *Defendant.*	Case No. 17-cr-00232 (EGS)

BRIEF *AMICI CURIAE* OF SEPARATION OF POWERS SCHOLARS LAURENCE H. TRIBE, PHILIP BOBBITT, LEE C. BOLLINGER, LEA BRILMAYER, ERWIN CHEMERINSKY, GEORGE T. CONWAY III, MICHAEL C. DORF, BRUCE FEIN, JOSHUA A. GELTZER, JEANNIE SUK GERSEN, DAVID M. GOLOVE, OONA A. HATHAWAY, HAROLD HONGJU KOH, MARTHA MINOW, RICHARD W. PAINTER, ROBERT POST, TREVOR POTTER, JUDITH RESNIK, GEOFFREY R. STONE, and DAVID A. STRAUSS, SUPPORTING DENIAL OF THE GOVERNMENT'S MOTION TO DISMISS

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INTEREST OF AMICI CURIAE

Amici share a strong academic and professional interest in the separation of powers and the rule of law.[1]

Laurence H. Tribe is the Carl M. Loeb University Professor at Harvard University and Professor of Constitutional Law at Harvard Law School, where he has taught since 1968 and where, in 2016, he gave the keynote address on separation of powers. The title "University Professor" is Harvard's highest academic honor, awarded to just a handful of professors at any given time and to just 72 professors in all of Harvard University's history. Professor Tribe helped draft the constitutions of South Africa, the Czech Republic, and the Marshall Islands. He has written more than 115 books and articles, including the treatise, American Constitutional Law, cited more than any other legal text since 1950. Former U.S. Solicitor General Erwin Griswold wrote: "[N]o book, and no lawyer not on the [Supreme] Court, has ever had a greater influence on the development of American constitutional law," and the Northwestern Law Review opined that no one else "in American history has… simultaneously achieved Tribe's preeminence . . . as a practitioner and . . . scholar of constitutional law." The New York Times has described him as "arguably the most famous constitutional scholar and Supreme Court practitioner in the country." He was appointed in 2010 by President Obama and Attorney General Holder to serve as the first Senior Counselor for Access to Justice. He has testified before the U.S. Congress approximately 47 times and has argued 36 cases before the U.S. Supreme Court, as well as dozens of cases before many other courts, prevailing in approximately three-fifths of those cases. He has received 11

[1] Pursuant to Local Rule 7(o)(5) and FRAP 29(a)(4), counsel state that no party's counsel authored the brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person contributed money that was intended to fund preparing or submitting the brief.

honorary degrees and has been elected to the American Academy of Arts and Sciences and to the American Philosophical Society.

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Lee C. Bollinger became Columbia University's 19th president in 2002 and is the longest serving Ivy League president. Bollinger is Columbia's first Seth Low Professor of the University, a member of the Law School faculty, and one of the nation's foremost First Amendment scholars. His latest book, *The Free Speech Century*, co-edited with Geoffrey R. Stone, was published in the fall of 2018 by Oxford University Press. Bollinger is a director of Graham Holdings Company (formerly The Washington Post Company) and serves as a member of the Pulitzer Prize Board. From 2007 to 2012, he was a director of the Federal Reserve Bank of New York, where he also served as Chair from 2010 to 2012. From 1996 to 2002, Bollinger was the President of the University of Michigan. He led the university's historic litigation in *Grutter v. Bollinger* and *Gratz*

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Erwin Chemerinsky became the 13th Dean of Berkeley Law on July 1, 2017, when he joined the faculty as the Jesse H. Choper Distinguished Professor of Law. Prior to assuming this position, from 2008-2017, he was the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at University of California, Irvine School of Law, with a joint appointment in Political Science. Before that he was the Alston and Bird Professor of Law and Political Science at Duke University from 2004-2008, and from 1983-2004 was a professor at the University of Southern California Law School, including as the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science. He also has taught at DePaul College of Law and UCLA Law School. He is the author of twelve books, including leading casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction. His most recent books are, *We the People: A Progressive Reading of the Constitution for the Twenty-First Century* (Picador Macmillan) published in November 2018, and two books published by Yale University Press in 2017, *Closing the Courthouse Doors: How Your*

Constitutional Rights Became Unenforceable and *Free Speech on Campus* (with Howard Gillman). He also is the author of more than 200 law review articles. He is a contributing writer for the Opinion section of the Los Angeles Times, and writes regular columns for the Sacramento Bee, the ABA Journal and the Daily Journal, and frequent op-eds in newspapers across the country. He frequently argues appellate cases, including in the United States Supreme Court. In 2016, he was named a fellow of the American Academy of Arts and Sciences. In 2017, National Jurist magazine again named Dean Chemerinsky as the most influential person in legal education in the United States.

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in a wide range of scholarly and popular publications including *The Atlantic*, the *Berkeley Journal of International Law*, *Defense One*, *Foreign Policy*, the *Journal of Constitutional Law*, the *New York Times*, *Parameters*, *Politico*, *Studies in Conflict & Terrorism*, and the *Washington Post*. He has testified before Congress on multiple occasions and has appeared on BBC, Bloomberg TV, CBS, CNN, C-SPAN, Fox News, MSNBC, National Public Radio, and more. Geltzer is a life member of the Council on Foreign Relations, a member of the American Law Institute, and a member of the American Bar Association's Rule of Law Initiative board.

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Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition, 85 NYU L. Rev. 932 (2010). Most of his research and writing focuses on the separation of powers and the historical role of the courts, especially in delicate disputes like those involving national security and foreign affairs.

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Harold Hongju Koh is Sterling Professor of International Law at Yale Law School, where he served as Dean from 2004-09. He has served as Assistant Secretary of State for Democracy, Human Rights and Labor (1998-2001) and Legal Adviser (2009-13) of the U.S. Department of State, as well as Attorney-Adviser in the Office of Legal Counsel, U.S. Department of Justice

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and Equality (Susanna Mancini and Michel Rosenfeld, eds., Cambridge University Press 2018); "Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics" (*California Law Review*, 2010); "Roe Rage: Democratic Constitutionalism and Backlash" (with Reva Siegel, *Harvard Civil-Rights Civil-Liberties Law Review,* 2007); "Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era" (*William & Mary Law Review*, 2006); "Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law" (*Harvard Law Review,* 2003); and "Subsidized Speech" (*Yale Law Journal*, 1996). He is a member of the American Law Institute and a fellow of both the American Philosophical Society and the American Academy of Arts and Sciences.

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and gender. Professor Resnik's books include *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (with Dennis Curtis, Yale University Press, 2011); *Federal Courts Stories* (co-edited with Vicki C. Jackson, Foundation Press, 2010); and *Migrations and Mobilities: Citizenship, Borders, and Gender* (co-edited with Seyla Benhabib, NYU, 2009). In 2014, Resnik was the co-editor (with Linda Greenhouse) of the Daedalus volume, *The Invention of Courts*.

Geoffrey R. Stone is the Edward H. Levi Distinguished Professor of Law at the University of Chicago. Professor Stone has served as Dean of the University of Chicago Law School and as Provost of the University of Chicago. He is one of our nation's preeminent constitutional scholars and has been elected a member of the American Law Institute, the American Academy of Arts and Sciences and the American Philosophical Society. He is the co-author of one of our nation's leading Constitutional Law casebooks and has written several important and influential books in the field of Constitutional Law, including *Perilous Times: Free Speech in Wartime* (2004), *War and Liberty: An American Dilemma* (2007); *Top Secret: When Government Keeps Us in the Dark* (2007), *Sex and the Constitution* (2018) and *Democracy and Equality: The Enduring Constitution Vision of the Warren Court* (2020). In addition, he has served as an editor of *The Supreme Court Review* for almost thirty years and is the editor of a twenty-volume series with Oxford University Press titled *Inalienable Rights*.

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author of *The Living Constitution* (Oxford University Press, 2010) and several influential articles on constitutional law and other subjects. He was elected to the American Academy of Arts and Sciences in 2001. He was a visiting professor at Harvard Law School in 2011, 2017, and 2019. He has won the graduating students' award for teaching excellence at the University of Chicago Law School five times. He has been an editor of the *Supreme Court Review* since 1989, and he has argued nineteen cases before the U.S. Supreme Court.

INTRODUCTION

This case is ultimately about judicial independence and the integrity of the Judicial Branch and therefore about the rule of law in our constitutional democracy. The government's motion to dismiss the case against Michael Flynn, after he twice pled guilty to violating 18 U.S.C. § 1001, asks this Court to place its imprimatur on the Executive Branch's virtually unprecedented decision to dismiss a prosecution after the case has been won. This Court should deny that invitation.

Some have suggested that the Executive Branch's prosecutorial discretion and the separation of powers compel this Court to grant the government's motion. Such suggestions are profoundly misguided. If anything, the separation of powers militates in the opposite direction and protects this Court's authority to complete the resolution of this case, free from the interference of the Executive Branch. By denying the government's motion, this Court would not be invading the prosecutorial discretion of the Executive Branch but rather ensuring the independence and integrity of the judiciary, which are fundamental values safeguarded by the separation of powers.

This case does not involve a decision by the Executive Branch simply to "drop" a prosecution. The prosecutors brought this case against Mr. Flynn in November 2017 and won it. They secured two guilty pleas and made their sentencing recommendations in the form of two

sentencing memoranda. All that remains is for this Court to decide what sentence to impose,[2] and sentencing is a core judicial (not executive) power. In fact, this Court was fully prepared to sentence Mr. Flynn on December 18, 2018, until he requested a continuance after this Court explained to him its usual practice of postponing sentencing until a defendant's cooperation with prosecutors is complete.

Where (as here) the Executive Branch has formally commenced a criminal proceeding, secured a guilty plea, and filed its sentencing recommendation, the judiciary acquires an independent stake in the matter. Both Judge Contreras and this Court held extensive colloquies with Mr. Flynn, ensuring that his guilty pleas were knowing, adequately counseled, fully voluntary, and properly predicated. This Court has already held a sentencing proceeding. It has made a significant commitment of the Article III Judicial Power in this proceeding. Under the separation of powers, courts do not simply do the bidding of the Executive Branch. Rather, they have a constitutionally established interest in their own integrity and independence, and a constitutional *duty* to protect that interest.

The government's motion improperly seeks to make this Court complicit in the Executive Branch's inexplicable about-face in the Flynn prosecution, by asking this Court to issue an order certifying that dismissal is in the "public interest." In addition, the government seeks to nullify this Court's determination formally accepting Mr. Flynn's guilty plea. The motion, in effect, seeks to reduce this Article III Court to a subordinate of the Article II Department of Justice, treating the federal judiciary as though it were an agency located on the Executive Branch organization chart headed by the President.

[2] Although Mr. Flynn has sought to withdraw his plea of guilty, the Court has not resolved that request, and the government's motion to dismiss does not depend on the motion for withdrawal of the plea. Rather, the government seeks to dismiss the prosecution entirely.

Nothing required the Executive Branch to prosecute Michael Flynn in the first place, and nothing but possible hesitation to accept the political consequences prevents the President from pardoning him.[3] Although Mr. Flynn has twice admitted under oath that he lied to the FBI, and although members of the administration, including the President himself, agreed publicly that he lied, the Executive Branch enjoys wide discretion over charging decisions. And the President has wide latitude in using his pardon power.

But the flipside of the proposition that there is no judicial power to direct the Executive Branch to initiate a prosecution (or, for that matter, to direct the Legislative Branch to legislate) is that there is no political power, legislative or executive, to oversee or direct the Judicial Branch in its final disposition of a fully prosecuted case. The Department of Justice may recommend a sentence, but it cannot impose one itself. Nor can it prevent this Court from imposing a lawful sentence on Michael Flynn. And just as this Court may reject a plea agreement proposed by a prosecutor, it has the authority – and arguably the duty, given the circumstances of this case and the separation of powers – to deny the government's motion to dismiss.

Other amicus filings will no doubt document the troubling facts raised by the Department of Justice's switch in positions in this case. However those facts are viewed, and however any controversies surrounding them might be resolved, this much is plain: the judiciary has a constitutionally cognizable interest in resisting the Executive Branch's request to place a judicial imprimatur on the government's request for dismissal in this case.

Indeed, even if the Department had a valid reason for its unprecedented abandonment of the Flynn prosecution, separation of powers principles would still protect this Court's authority to

[3] Of course, "a pardon does not blot out guilt or expunge a judgment of conviction." *In re North (George Fee Application)*, 62 F.3d 1434, 1437 (D.C. Cir. 1994) (per curiam). It does not establish innocence but relieves the offender of the consequences of conviction.

deny the government's motion and complete the resolution of this case. For what matters – regardless of *why* the Department is seeking to undo this Court's acceptance of Mr. Flynn's two guilty pleas – is that the political branches do not have, and cannot be given, any role in overseeing the adjudication of individual cases by the courts and in the final disposition of cases that already have been fully prosecuted. This Court need not find any improper purpose in order to conclude that the government's motion should be denied.

ARGUMENT

This case involves a motion to dismiss a case in which this Court has been heavily invested, at the request of the Department of Justice, over the past two and a half years. The Executive Branch made the decision to commence its prosecution of Michael Flynn in November 2017 and to charge him with violating 18 U.S.C. § 1001. Nothing compelled the Executive Branch to file its criminal information in the first place; separation of powers principles properly recognize the Executive Branch's wide latitude with respect to charging decisions. Similarly, the President's virtually limitless pardon power would allow him to relieve Mr. Flynn of the consequences of a criminal conviction, without any participation by the Judicial Branch.

But this case involves neither a charging decision nor an exercise of the pardon power. Rather, the Executive Branch made the choice to enlist the Judicial Branch in the prosecution of Michael Flynn and to trigger the judicial machinery established pursuant to Article III of the Constitution. This Court has already (twice) gone through the formal and solemn process of accepting Mr. Flynn's guilty plea and ensuring that it met all preconditions for validity.

On November 30, 2017, Mr. Flynn signed a sworn statement attesting to the Statement of Offense and Plea Agreement filed with the Court: "I make this statement knowingly and voluntarily and because I am, in fact, guilty of the crime charged. . . . I have read every word of this Statement of Offence, or have had it read to me," and "declare under penalty of perjury that it

is true and correct." (Dkt. 4, at 6). On December 1, 2017, Judge Contreras held a plea agreement hearing at which Mr. Flynn formally entered a plea of guilty as to the charged violation of 18 U.S.C. § 1001.

On December 18, 2018, the Court held a sentencing hearing in which Mr. Flynn again acknowledged his offense, under penalty of perjury:

> THE COURT: Do you wish to challenge the circumstances on which you were interviewed by the FBI?
>
> THE DEFENDANT: No, Your Honor.
>
> THE COURT: Do you understand that by maintaining your guilty plea and continuing with sentencing, you will give up your right forever to challenge the circumstances under which you were interviewed?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Do you have any concerns that you entered your guilty plea before you or your attorneys were able to review information that could have been helpful to your defense?
>
> THE DEFENDANT: No, Your Honor.

Dkt. 103, 12/18/18 Tr. 8:8-19. This Court offered Mr. Flynn additional time to reconsider his plea, as well as the opportunity to have an independent counsel appointed to provide him with a "second opinion." Mr. Flynn declined. *Id.* at 9:8-10:20. The Court asked Mr. Flynn numerous questions to ensure his plea was knowing, adequately counseled, fully voluntary, and properly predicated, and this Court made clear that it would proceed only if Mr. Flynn were prepared to admit his guilt:

> THE COURT: Mr. Flynn, anything else you want to discuss with me about your plea of guilty? This is not a trick. I'm not trying to trick you. If you want some time to withdraw your plea or try to withdraw your plea, I'll give you that time. If you want to proceed because you are guilty of this offense, I will finally accept your plea.
>
> THE DEFENDANT: I would like to proceed, Your Honor.

Id. at 15:23-16:4.[4]

This Court formally accepted Mr. Flynn's guilty plea.[5]

Two and a half years after filing a criminal information, and after securing two guilty pleas under penalty of perjury, the Executive Branch has now made the virtually unheard-of decision to seek to dismiss the prosecution.

But the Executive Branch does not have unilateral authority to do so. As the government's motion acknowledges, its request for dismissal needs this Court's approval pursuant to Federal Rule of Criminal Procedure 48(a), which requires "leave of court." The government's motion therefore raises two fundamental issues under the separation of powers.

(1) In order to grant the government's motion under Rule 48(a), this Court must make an independent determination that dismissal would be in the "public interest" and issue an order to that effect. *Rinaldi v. United States*, 434 U.S. 22, 29, n. 15 (1977) (citing *United States v. Ammidown*, 497 F.2d 615, 620 (D.C. Cir. 1973)). "When this rule was promulgated by the Supreme Court in 1944, it substituted the requirement that dismissal be obtained only by leave of

[4] In the Defendant's Memorandum in Aid of Sentencing filed in December 2018, Mr. Flynn reiterated that he "accepted responsibility for his conduct." (Dkt. 50, at 1). The memorandum informed the Court that "General Flynn does not take issue with the description of the nature and circumstances of the offense contained in the Government's sentencing memorandum and the Presentence Investigation Report." *Id*. at 7. "As General Flynn has frankly acknowledged in his own words, he recognizes that his actions were wrong and he accepts full responsibility for them." *Id*. "Even when circumstances later came to light that prompted extensive public debate about the investigation of General Flynn, including revelations that certain FBI officials involved in the January 24 interview of General Flynn were themselves being investigated for misconduct, General Flynn did not back away from accepting responsibility for his actions." *Id.* at 10. "On the day he entered his guilty plea, he said he was 'working to set things right.'" *Id*. at 13.

[5] The Supreme Court has made clear, in a trilogy of decisions authored by Justice White, that a knowing, voluntary, adequately counseled guilty plea waives the right to attack irregularities in the government's case. *See McMann v. Richardson*, 397 U.S. 759, 771-74 (1970); *Brady v. United States*, 397 U.S. 742, 748, 756-58 (1970); *Parker v. North Carolina*, 397 U.S. 790, 796-98 (1970).

court," rejecting a provision allowing unlimited prosecutorial discretion. *Ammidown*, 497 F.2d at 620. The Court's communication to the Advisory Committee on the Rules of Procedure included a citation to *Young v. United States*, 315 U.S. 257 (1942), which held that a prosecutor's confession of error "does not relieve th[e] Court of the performance of the judicial function" because "the proper administration of the criminal law cannot be left merely to the stipulation of parties." *Id.* at 258-59.

The history of Rule 48 reflects a deeper principle: the Constitution highly disfavors unchecked power rather than checks and balances. Accordingly, the Rule should not be construed as conferring limitless power or discretion on the Executive Branch, absent clear and express text to the contrary. "Our constitutional structure is premised" on the notion that "unaccountable power is inconsistent with individual liberty." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 688 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). "The purpose of the separation and equilibration of powers" was "not merely to assure effective government but to preserve individual freedom." *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting). The Constitution was crafted "by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983). Thus, James Madison famously warned that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 301. Alexander Hamilton wisely noted, "there is no liberty if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78, at 466 (quoting 1 Baron de Montesquieu, The Spirit of Laws 181 (Nugent trans., 10th ed. 1773)); *see also Department of Transp. v. Association of American Railroads*, 575 U.S. 43, 75 (2015) (Thomas, J., concurring in the judgment) ("At the center of the Framers' dedication to the

separation of powers was individual liberty."); *Boumediene v. Bush*, 553 U.S. 723, 742-43 (2008) ("[Separation of powers] serves not only to make Government accountable but also to secure individual liberty. . . . '[E]ven before the birth of this country, separation of powers was known to be a defense against tyranny.'") (citation omitted); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

This Court therefore has the responsibility under Rule 48(a) as well as the separation of powers to scrutinize the government's motion closely. And such review must recognize that the government's motion requests the *active participation* of this Court in the termination of the Flynn prosecution – a role that implicates the independence of the judiciary and the integrity of this Court. The determination required by Rule 48(a) gives this Court an institutional stake in the dismissal sought by the government, because granting the motion would entail an official certification by this Court as to where the public interest lies in this proceeding. Given the extraordinary factual and legal circumstances presented by the Department's abandonment of the Flynn prosecution, such a certification is fraught with political risks to the Judicial Branch. In assessing the perils of the step the government asks the judiciary to take, this Court should heed the instruction of Chief Justice Roberts, who opined for the Court just last Term that courts are "not required to exhibit a naiveté from which ordinary citizens are free." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting Judge Friendly). "[I]n order to fulfill its designated constitutional role, the judiciary must be independent in all ways that might affect substantive decisionmaking." *Hastings v. Judicial Conference of U.S.*, 770 F.2d 1093, 1104 (D.C. Cir. 1985) (Edwards, J., concurring).

It is "crucial" that courts "maintain[] public perception of fairness and integrity in the justice system." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018). Thus, the Chief Justice has expressed concerns about the participation of federal courts in approving questionable settlement terms in civil litigation. *See Marek v. Lane*, 134 S. Ct. 8 (2013) (opinion of Roberts, C.J., respecting the denial of certiorari). Justices Alito and Kavanaugh voiced similar concerns in a subsequent case.[6] Placing the imprimatur of the federal judiciary on the dismissal of the Flynn prosecution would carry even greater risks to the integrity – and, candidly, to the public credibility – of the Article III Judicial Branch.

(2) Second, the separation of powers and respect for the Executive Branch's prosecutorial discretion do not compel this Court to grant the government's motion. Rather, the separation of powers protects this Court's authority to render a final disposition in a fully prosecuted case. This Court has already (twice) formally accepted Mr. Flynn's guilty plea. The Department of Justice has already filed a sentencing memorandum (twice). Dkts. 46, 150. All that remains is a sentencing determination entirely within the purview of this Court. In fact, Mr. Flynn asked this Court to proceed with sentencing, and this Court held a sentencing proceeding at his request in December 2018. Dkt. 103. This Court was fully prepared to sentence Mr. Flynn on December 18, 2018, and refrained from doing so only after Mr. Flynn changed his mind and sought a last-minute continuance (after this Court explained to him its usual practice of deferring sentencing until a defendant's cooperation with prosecutors is complete). Dkt. 103, 12/18/18 Tr. 38:24-39:1, 48:1-12.

Even if the government had a proper purpose for seeking dismissal of the Flynn prosecution, the government's motion comes far too late in the day. The case already has been

[6] *See* No. 17-961, *Frank v. Gao*s, Tr. Oral Arg. 50, 56, 59, 61, 63 (U.S. S. Ct.).

fully prosecuted. Neither the government nor Mr. Flynn can point to any case in which the Executive Branch has moved to dismiss a prosecution after a guilty plea has been secured (let alone two guilty pleas) and a sentencing proceeding has already been commenced. The absence of precedent is telling; it confirms the constitutional defect in the government's motion.

When this Court (twice) went through the formal and solemn process of accepting Mr. Flynn's guilty plea and ensuring its validity through extensive colloquies, it rendered a decision with Article III significance. And, as Justice Scalia remarked, rulings by Article III courts are not the "property" of litigants, to be erased or vacated at the parties' request. *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994) (internal quotation marks and citation omitted). Rather, such rulings "are presumptively correct and valuable to the legal community as a whole." *Id.*

Moreover, the sentencing phase of a criminal proceeding is uniquely within this Court's purview. As the D.C. Circuit explained, in a decision that has been repeatedly mischaracterized by Mr. Flynn and his supporters, "the Executive's traditional power over *charging decisions*" exists simultaneously with "the Judiciary's traditional authority over *sentencing decisions*." *United States v. Fokker Services, B.V.*, 818 F.3d 733, 746 (D.C. Cir. 2016) (emphasis added). The Court of Appeals noted (and approved of) "a district court's authority to 'accept' or 'reject' a proposed plea agreement under Rule 11" as "rooted in the Judiciary's traditional power over criminal sentencing." *Id.* at 745. By recognizing the court's role in the sentencing context, which is part of the judiciary's authority protected by the separation of powers, *Fokker Services* exposes

the lacuna in the government's motion, which entirely fails to appreciate this Court's supremacy at the sentencing phase.[7]

The government's motion would override this Court's acceptance of Mr. Flynn's guilty plea and short-circuit this Court's role in sentencing him. Yet executive officers may not exercise judicial power. Article III, Section 1 vests "the judicial Power" exclusively in the federal courts. *See Department of Transp.*, 575 U.S. at 67-68 (Thomas, J., concurring in the judgment) ("These [constitutional] grants are exclusive. When the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it.").

Nearly 230 years ago, the Supreme Court made clear that the Constitution does not authorize the Executive Branch to engage in the judicial function of superintending the determinations of federal courts. In *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), Chief Justice Jay and Justice Cushing opined that "by the Constitution, neither the Secretary at War, nor any other Executive officer . . . are authorized to sit as a court of errors on the judicial acts or opinions of this court." *Id.* at 410. Justices Wilson and Blair likewise concluded that the "revision and control" of judicial judgments by the Executive Branch would conflict "with the independence of that judicial power which is vested in the courts." *Id.* at 411; *see also Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948). As Justice Scalia observed, "judges" – not executive officers – "handle individual cases." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1176 (1989).

[7] The D.C. Circuit's decision in *Fokker Services* supplies no authority for the government's motion to dismiss; it involved a deferred prosecution agreement rather than a guilty plea (let alone two).

Even when both political branches act together, they must respect the independent and final authority of the judiciary to adjudicate individual cases. Hence, the separation of powers prevents the political branches "from requiring federal courts to exercise the judicial power in a manner that Article III forbids," or from "usurp[ing] a court's power to interpret and apply the law to the circumstances before it." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322-23 (2016) (brackets, citations, and internal quotation marks omitted). More than two centuries ago, Justice Chase explained that the political branches may "command what is right and prohibit what is wrong; but they cannot change innocence into guilt." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798). Nor, he might have added, may they transmute judicially determined guilt into innocence.

Article III grants the judiciary "the power, not merely to rule on cases, but to *decide* them." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (emphasis in original). The political branches may not "comman[d] the federal courts to reopen final judgments," *id.* at 219, or "prescribe rules of decision to the Judicial Department ... in [pending] cases." *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872). Thus, in *Klein*, the Court held that a post-Civil War statute invaded the province of the judiciary by providing that no pardon should be admissible as proof of loyalty on the part of former Confederates and directing the Court of Claims and the Supreme Court to dismiss for want of jurisdiction any claim based on a pardon. If the judiciary is protected from the incursions of both political branches, acting together, then a fortiori, the courts are protected from the unilateral actions of the Executive Branch. *See also Robertson v. Seattle Audubon Society*, 503 U.S. 429, 438 (1992) (political branches may not "compel[] . . . findings or results under [preexisting] law").

The separation of powers protects this Court's authority to complete the resolution of this case, free from the interference of the Executive Branch. As Alexander Hamilton recognized,

"[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution." The Federalist No. 78, at 466.

CONCLUSION

The government's motion should be denied.

Respectfully submitted.

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