



ESSAY

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 asked United States District Judge Emmet G. Sullivan to dismiss the felony charge against President Trump’s former National Security Advisor, Michael T. Flynn¹—despite Flynn already having pleaded guilty, twice, to the offense.² 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.”³ It 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.⁴

The Government has urged (and some commentators have opined)⁵ 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

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1. See Government’s Motion to Dismiss the Criminal Information Against the Defendant Michael T. Flynn at 1, *United States v. Flynn*, No. 1:17-cr-00232 (D.D.C. May 7, 2020).
2. Transcript of Plea Hearing at 2, *United States v. Flynn*, No. 1:17-cr-00232 (D.D.C. Dec. 1, 2017); Transcript of Sentencing Proceedings at 16, *United States v. Flynn*, No. 1:17-cr-00232 (D.D.C. Dec. 18, 2018).
3. FED. R. CRIM. P. 48(a).
4. For a critique of the government’s motion, see, for example, Katie Benner and Charlie Savage, *Dropping of Flynn Case Heightens Fears of Justice Dept. Politicization*, N.Y. TIMES (May 8, 2020), <https://perma.cc/2B7H-N88Q>.
5. See, e.g., Andrew C. McCarthy, *The Politicized Order Inviting Amicus Briefs Against the Flynn Case’s Dismissal*, NAT’L REV. (May 13, 2020, 11:53 AM), <https://perma.cc/L96R-7Y68>; Editorial Board, *Judge Sullivan’s Bad Judgment*, WALL STREET J. (May 13, 2020, 7:15 PM ET), <https://perma.cc/Y5YJ-TAMG>.

new charges.⁶ 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.⁷ In support, the Government relies in part on forty-year-old dicta in the sole Supreme Court case interpreting Rule 48(a), *Rinaldi v. United States*.⁸ There, the Court stated that the “leave of court” language was added to Rule 48(a) “without explanation,” but “apparently” this verbiage had as its “principal object . . . to protect a defendant against prosecutorial harassment.”⁹

But the Government’s position—and the Supreme Court language upon which it is based—is simply wrong.¹⁰ In fact, the “principal object” of Rule 48(a)’s “leave of court” requirement was not to protect the interests of individual defendants,¹¹ but rather to guard against dubious dismissals of criminal cases that would benefit powerful and well-connected defendants. In other words, it was drafted 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 reasons 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

6. See, e.g., *In re United States*, 345 F.3d 450, 453 (7th Cir. 2003) (noting judge “might rightly condition dismissal [under Rule 48(a)] on its being with prejudice” where government harasses defendant “by repeatedly filing charges and then dismissing them before they are adjudicated”).

7. See Government’s Motion to Dismiss the Criminal Information Against the Defendant Michael T. Flynn at 10-11, *United States v. Flynn*, No. 1:17-cr-00232 (D.D.C. May 7, 2020).

8. 434 U.S. 22 (1977) (per curiam).

9. *Id.* at 29 n.15.

10. *Rinaldi*, it is worth remembering, was summarily decided without argument or adversarial briefing. See *id.* at 34 (Rehnquist, J., dissenting) (“The apparent inability of the Court to agree on a rationale for enforcing the Government’s *Petite* policy at its request suggests that this case is inappropriate for summary disposition and should be set for full argument.”). Neither *Rinaldi*’s petition for certiorari nor the Government’s memorandum (also urging reversal) meaningfully addressed the history of Rule 48(a). See generally Petition for Writ of Certiorari, *Rinaldi*, 434 U.S. 22 (No. 76-6194); Memorandum for the United States on Petition for a Writ of Certiorari, *Rinaldi*, 434 U.S. 22 (No. 76-6194).

11. The *Rinaldi* Court appears to have drawn such language from cases like *United States v. Cox*, 342 F.2d 167, 179 (5th Cir. 1965) (Rives, J., Gewin, J., and Bell, J., concurring in part and dissenting in part) (“Except for a very limited discretion, however, the court’s power to withhold leave to dismiss an indictment is solely for the protection of the defendant.”). However, it ignored the substantially more detailed recounting of Rule 48(a)’s drafting partially outlined in *United States v. Cowan*, 524 F.2d 504, 509-11 (5th Cir. 1975) (“In situations like these history has its claims, and we think it is appropriate to review it.”). The oversight is puzzling: *Cowan* is quoted throughout the *Rinaldi* opinion.

principles (rooted in the separation of powers) might counsel caution when the judiciary contemplates meddling in the executive branch’s management of criminal prosecutions.¹² 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(a)’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 charges (or, in the argot of lawyers, “enter a *nolle prosequi*”) at will. Most States, however, abolished this power: Once instituted, criminal charges could be dismissed only “in furtherance of justice” and with “leave of the court.”¹³

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*,¹⁴ 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.¹⁵ But young Mr. Woody was no ordinary defendant. The Woody family was one of the first white families to settle in Montana.¹⁶ Franklin Woody’s grandfather was Missoula’s first Mayor,¹⁷ a stern district judge known for his “antipathy

12. See *In re United States*, 345 F.3d 450 (7th Cir. 2003) (“The Constitution’s ‘take Care’ clause (art. II, § 3) places the power to prosecute in the executive branch, just as Article I places the power to legislate in Congress. A judge could not properly refuse to enforce a statute because he thought the legislators were acting in bad faith or that the statute disserved the public interest; it is hard to see, therefore, how he could properly refuse to dismiss a prosecution merely because he was convinced that the prosecutor was acting in bad faith or contrary to the public interest.”). On the other hand, the argument that a district court’s denial of a Rule 48(a) 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. See *United States v. Ammidown*, 497 F.2d 615, 621 (D.C. Cir. 1973) (“It is axiomatic that, within the limits imposed by the legislature, imposition of sentence is a matter for discretion of the trial judge.”). Notably, separation of powers played no role in the Court’s discussion of Rule 48(a)’s scope in *Rinaldi*, a case that similarly arose in the post-trial context. See 434 U.S. 22.

13. See CODE OF CRIMINAL PROCEDURE § 295, cmt. at 895-97 (AM. LAW INST. 1930) (listing state statutes and variations on wording).

14. 2 F.2d 262 (D. Mont. 1924).

15. *Id.*

16. *Americanize Them*, DAILY MISSOULIAN (Mont.), July 17, 1919, at 4 (reporting on life and death of Mrs. Sarah Elizabeth Countryman Woody); see also *Frank Woody out for Associate Justice*, HELENA INDEP. (Mont.), July 7, 1920, at 10 (discussing family history).

17. Kim Briggeman, *Judge Frank Woody: Missoula’s first Christmas was Merry and White*, DAILY MISSOULIAN (Mont.) (Dec. 25, 2016), <https://perma.cc/73GB-6ZMW>.

to persons charged with crime.”¹⁸ His father was a personal friend of the Governor¹⁹ and had served as Montana’s Assistant Attorney General (and later, ironically, as general counsel for the Montana Taxpayer’s Association).²⁰ Eventually, the United States moved to dismiss the indictment. Among the reasons offered by the Assistant United States Attorney were that 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.²¹ Moreover, “the government’s losses ha[d] been reimbursed,”²² presumably by Mr. Woody or his kin.

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.”²³ 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.”²⁴ 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.”²⁵

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 [were] given the power by statute.”²⁶ Thus, the district court was compelled to grant the motion, “albeit reluctantly.”²⁷ Excerpts of the court’s opinion appeared in newspapers across the state.²⁸

The dilemma faced by the district judge in *Woody* was well-known in legal circles when the Rules of Criminal Procedure were developed between 1941 and 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

18. Henry L. Myers, *Reminiscences of Bench and Bar*, ANACONDA STANDARD (Mont.), Nov. 15, 1925, at 6 (discussing early days practicing before Judge Woody).

19. *Resignation Is Accepted at Last*, ANACONDA STANDARD (Mont.), Sept. 8, 1922, at 2.

20. *Its Work Appreciated*, HELENA INDEP. (Mont.), Apr. 13, 1925, at 5.

21. *Woody*, 2 F.2d at 262.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 262-63.

27. *Id.* at 263.

28. See *Judge Scores U.S. Attorney: Bourquin Raps Higgins’ Reasons for Dismissing Case*, BILLINGS GAZETTE (Mont.), Oct. 6, 1924, at 5; *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 TRIB. (Mont.), Oct. 4, 1924, at 11.

approach to dismissals.²⁹ 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 indictment [when such a dismissal] savored too much of favoritism.”³⁰ 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.³¹

In short order that lack of control 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.³² In February 1941, the Supreme Court appointed an Advisory Committee, composed of eighteen prominent legal figures, to draft the federal criminal rules.³³ 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) provides 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;³⁴ instead, the final text was 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

29. 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).

30. *Id.*

31. *Id.*

32. See generally Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697 (2017) (discussing drafting history and reformers’ abandoned attempt at crafting unified procedural code to govern both civil and criminal cases).

33. 1 MADELEINE J. WILKEN & NICHOLAS TRIFFIN, DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE xi (1991).

34. Indeed, with Committee Secretary Alexander Holtzoff, who was then an Assistant Attorney General, wielding outsized influence, concern for “prosecutorial efficiency” was more often the dominant concern during the drafting process. Meyn, *supra* note 34, at 712-13.

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. Murray Seasongood, a law professor and the former Mayor of Cincinnati,³⁵ 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 nolle. I understand in many States it is necessary to get the consent of the judge. I have seen cases nolle which in my opinion should not have been nolle. I have seen some cases nolle after intercession from Washington; also some gross income tax fraud cases.³⁶

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.³⁷ A skeptical Aaron Youngquist (himself a formal federal prosecutor³⁸) countered: “You don’t have it to the same degree, perhaps.”³⁹ An initial vote on requiring the court’s approval for a dismissal resulted in a 7-7 tie.⁴⁰ As a compromise, the Committee abandoned the leave-of-court requirement, but approved draft language requiring that prosecutors first place the reasons for any dismissal on the record.⁴¹

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).⁴² Such dismissals, another Committee member noted, “have 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.”⁴³ The debate continued:

35. *Murray Seasongood, Lawyer; Ex-Cincinnati Mayor was 104*, N.Y. TIMES (Feb. 23, 1983), <https://perma.cc/H3M9-AVHB>.

36. Advisory Comm. on Rules of Criminal Procedure, Conference of Senior Circuit Judges, Minutes of Meetings 300 (Jan. 13, 1942), <https://perma.cc/63J9-KDNR>.

37. *Id.* at 305-06.

38. *Minnesotan Gets Willebrandt Post*, N.Y. TIMES (Nov. 2, 1929), <https://perma.cc/Y3XV-LPU6>.

39. Advisory Comm. on Rules of Criminal Procedure, Conference of Senior Circuit Judges, Minutes of Meetings 306.

40. *Id.* at 302-03.

41. *Id.* at 315-16. *See also* Advisory Comm. on Rules of Criminal Procedure, Conference of Senior Circuit Judges, Minutes of Meetings 441-42 (May 19, 1942), <https://perma.cc/HZE3-DYJN> (noting “compromise” from earlier meeting).

42. Advisory Comm. on Rules of Criminal Procedure, Conference of Senior Circuit Judges, Minutes of Meetings 440 (May 19, 1942), <https://perma.cc/P3DW-FHPK>.

43. *Id.* at 445.

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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.

Mr. Holtzoff: You mean in the state courts?

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.

Mr. Waite: In the Glasser cases, too.⁴⁴

During the meeting, only one member made comments that (even arguably) connected the “leave of court” requirement to the interests of the accused; the discussion quickly moved on.⁴⁵

The Committee sent an “unpublished” draft of its work to the Supreme Court for the first time in May 1942, and the Court’s tepid response to what would become Rule 48(a) is revealing.⁴⁶ The Committee’s draft dismissal rule vested prosecutors with the power to dismiss a case absent a court’s leave (so long as prosecutors supplied a statement of reasons).⁴⁷ On June 10, 1942, the Court returned comments, offering “the first expression of the Court’s thinking on the Rules.”⁴⁸ The Justices were skeptical:

This rule apparently gives the Attorney General or the United States Attorney unqualified authority to *nolle prosequi* 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

44. *Id.* at 446-47. In *Glasser v. United States*, 315 U.S. 60 (1942), a Chicago federal prosecutor successfully appealed his conviction for fixing liquor cases.

45. During the meeting, former U.S. Attorney George Z. Medalie recalled a case in which prosecutors dismissed charges while being rushed into trial by an impatient judge. Advisory Comm. on Rules of Criminal Procedure, Conference of Senior Circuit Judges, Minutes of Meetings 447 (May 19, 1942), <https://perma.cc/RJ4L-JLHK>. Prosecutors subsequently re-indicted the defendant “and in due course of proper preparation, tried and convicted the defendants.” *Id.* It is possible Medalie viewed such a dismissal as unfair to the defendant, who was likely deprived of an acquittal. *Cf.* see Joseph A. Thorp, *Nolle-and-Reinstitution: Opening the Door to Regulation of Charging Powers*, 71 N.Y.U. ANN. SURV. AM. L. 429 (2016) (criticizing similar prosecutorial tactics in contemporary practice). As likely, however, the anecdote was offered to illustrate the wisdom of empowering prosecutors with an effective trump card to thwart an overeager judge. At a later meeting, Medalie spoke against placing any limitations on prosecutors’ power to dismiss. *See* Advisory Comm. on Rules of Criminal Procedure, Conference of Senior Circuit Judges, Minutes of Meetings 1111-14 (Feb. 23, 1943), <https://perma.cc/Y7FM-ZVY3>.

46. This document was actually the Committee’s fifth preliminary draft, but it was the first complete iteration that the Court reviewed. *See* 1 WILKEN & TRIFFIN, *supra* note 35, at xii.

47. 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.” *Id.*

48. 1 WILKEN & TRIFFIN, *supra* note 35, at xii.

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Government can confess error in a criminal case without the consent of the court? See *Young v. United States*, decided this term.⁴⁹

The Court’s reference to *Young* signals that the Court was not oblivious to the thorny separation-of-powers concerns a “leave of court” requirement for dismissals might pose. In that case, decided four months earlier, the Court had explained that “a confession [of error by the Government] does not relieve this Court of the performance of the judicial function.”⁵⁰ The Court was prepared to give “great weight” to the Department of Justice’s assessment that reversible error had occurred (and, hence, a criminal conviction should be vacated), but reasoned “our judicial obligations [still] compel us to examine independently the errors confessed.”⁵¹ 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.”⁵²

With the Court’s feedback in hand,⁵³ 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.”⁵⁴ Neither side, as the Court later assumed, evinced any concern for “protect[ing] a defendant against prosecutorial harassment.”⁵⁵ 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)⁵⁶ fell short, this time by a vote of 6-8.⁵⁷

The Advisory Committee submitted a Second Preliminary Draft to the Court in late 1943.⁵⁸ In April 1944, the Court again shared concerns with the

49. See *id.* at 7.

50. *Young v. United States*, 315 U.S. 257, 258 (1942).

51. *Id.* at 258-59.

52. *Id.* at 259.

53. See Advisory Comm. on Rules of Criminal Procedure, Conference of Senior Circuit Judges, Minutes of Meetings 1119 (Feb. 23, 1943), <https://perma.cc/EG8Q-CZ3W> (“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.”).

54. *Id.* at 1120.

55. Compare *id.* with *Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977) (per curiam).

56. 1 WILKEN & TRIFFIN, *supra* note 35, at xiii.

57. Advisory Comm. on Rules of Criminal Procedure, Conference of Senior Circuit Judges, Minutes of Meetings 1121-22 (Feb. 23, 1943), <https://perma.cc/72B3-4JD8>.

58. This draft was dated February 1944, following the Supreme Court’s instruction that the latest version again be circulated in the legal community. See 1 WILKEN & TRIFFIN, *supra* note 35, at xiii-xiv.

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.”⁵⁹ 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.”⁶⁰ The Advisory Committee did not take 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.”⁶¹

Both the First and Second Preliminary Drafts were also circulated throughout the legal community for comment, and hundreds of lawyers and judges chimed in.⁶² The plight of the defendant never registered as a concern, at least not with respect to Rule 48(a). 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.”⁶³ 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.”⁶⁴ Not a single

59. Letter from Harlan F. Stone, Chief Justice, U.S. Supreme Court, to Arthur T. Vanderbilt, Chairman, Advisory Comm. on the Fed. Rules of Criminal Procedure (Apr. 11, 1944).

60. 7 MADELEINE J. WILKEN & NICHOLAS TRIFFIN, DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 9 (1991).

61. *Id.* at 11.

62. These comments, recommendations, and suggestions are collected in Volumes II and III of Wilken & Triffin’s indispensable seven-volume *Drafting History*. See generally 2 MADELEINE J. WILKEN & NICHOLAS TRIFFIN, DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE (1991); 3 MADELEINE J. WILKEN & NICHOLAS TRIFFIN, DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE (1991).

63. Letter from James P. Alexander, Chief Justice, Tex. Supreme Court, to the Secretary [of the Advisory Comm. on the Fed. Rules of Criminal Procedure] (Aug. 31, 1943) in 2 MADELEINE J. WILKEN & NICHOLAS TRIFFIN, DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 269 (1991).

64. Memorandum from James E. Ruffin, Att’y, Dep’t of Justice (Aug. 7, 1943) in 3 MADELEINE J. WILKEN & NICHOLAS TRIFFIN, DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 535-36 (1991). Some correspondents additionally argued that a “statement of reasons” requirement would generate pro forma justifications, a concern echoed by some Advisory Committee members. George H. Dession, *The New Federal Rules of Criminal Procedure: II*, 56 YALE L.J. 197, 251 n.303 (1947).

correspondent suggested that “leave of court” language was necessary to protect the rights of the defendant.

Ultimately, the responsibility fell to the Supreme Court to prescribe a final set of rules, which the Court transmitted to the Attorney General and Congress in December 1944. For the most part, the Court adopted the Advisory Committee’s proposals.⁶⁵ But there was a significant change to rules governing the dismissal of cases. In the final 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.”⁶⁶ The Court offered little public explanation for its final revisions, at least at the time.⁶⁷ In context, however, the Court’s addition of a “leave of court” requirement is best understood as signaling approval for the position championed over the previous years by Seasongood and the Advisory Committee’s dissenters: The final Rules armed the district judge with a powerful tool to halt corrupt or politically motivated dismissals of cases.

* * *

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.”⁶⁸ 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*.

65. Largely, but not entirely: The Court dropped three proposed Rules and modified some other language. See Arthur T. Vanderbilt, *Preparation of the Rules, Their Adoption by the Supreme Court and Submission to Congress*, 5 F.R.D. 88, 93-94 (1946) (suggesting that “[a]n 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.”).

66. See 7 WILKEN & TRIFFIN, *supra* note 62.

67. Justice Frankfurter authored a fascinating memorandum “withholding approval” on the grounds that the Court was “not an appropriate agency for formulating” such rules (though signaling “no opinion on their merits”). See Memorandum from Felix Frankfurter, Justice, 323 U.S. 821-23 (Dec. 26, 1944). Justice Black also dissented, but without further comment. *Id.* at 821. The Justices’ archives likely hold more clues. Although the Manuscript Division of the Library of Congress is currently closed due to the pandemic, Box 608 of the William O. Douglas Papers, Boxes 279 and 325 of the Hugo Black Papers, and Box 83 of the Robert H. Jackson Papers all appear to contain materials related to the drafting of the Rules of Criminal Procedure.

68. *Rinaldi v. United States*, 434 U.S. 22, 30 n.15 (1977) (per curiam).