

SIDNEY POWELL ARGUES AGAINST HERSELF, BILLY BARR, AND DOJ IN A PETITION FOR WRIT OF MANDAMUS

As predicted, Mike Flynn's legal team has petitioned for a writ of mandamus with the DC Circuit. [Update: Josh Gerstein has a good explainer of what this means here.]

Technically, Sidney Powell is complaining that Judge Emmet Sullivan appointed John Gleeson as an amicus to represent the view that DOJ had taken up until two weeks ago. Although she slipped in Sullivan's non-action in response to the motion to dismiss (she's oddly not complaining about Sullivan's non-action in DOJ's still pending sentencing memorandum, the first version of which called for prison time).

The district court's appointment of an amicus curiae to consider additional charges against General Flynn, ECF No. 205; its unnumbered minute order of May 18, 2020, granting amicus pro hac vice status in the case; its order indicating it will grant a schedule for amici, App. 3; and, its failure to grant the Government's Motion to Dismiss with Prejudice pursuant to Rule 48(a), ECF No. 198.

Of course, Sidney Powell literally wrote a book applauding Judge Sullivan's authority to do more – to appoint a Special Master – in cases of DOJ abuse. So this is a curious argument for her to take.

But ultimately, she's not arguing about that, she's complaining about the non-action, that Sullivan didn't immediately respond to the government's motion by dismissing the case. To

argue that Sullivan erred by not dismissing the case, she cited an inapt case (which pertains to the terms of a plea agreement at sentencing, not to dismissal after the government has fully briefed sentencing) in a different circuit.

As Judge Posner noted in a much less contentious case, "No statute authorizes the Government to appeal from a denial of the dismissal of a count or case, but we do not think that there can be much doubt that such relief is available by way of mandamus." *In re United States*, 345 F.3d 450, 452 (7th Cir. 2003). There is even less doubt here, where continuation of the proceedings for the indefinite future will subject the Department of Justice to sustained assaults on its integrity and cast doubt on its authority to terminate criminal proceedings it has determined do not serve the interests of the United States.

As Judge Posner wryly noted in the above-cited case, "The judge . . . is playing U.S. Attorney. It is no doubt a position that he could fill with distinction, but it is occupied by another person." *Id.* at 453. Here, that person is the signatory of the Government's Motion to Dismiss, the United States Attorney for the District of Columbia. Like the district judge in *In Re United States*, the district judge below has taken over the role of prosecutor. "Mandamus serves as a check on that kind of 'usurpation of judicial power.'" *Fokker Servs.*, 818 F.3d at 750.

Somehow, Powell neglects to mention that Billy Barr has already publicly conceded that Judge Sullivan does get a say here.

Does Judge Sullivan have a say?

Yes. Under the rules, the case can be

dismissed with leave of court.

Generally, the courts have said that that provision is in there to protect defendants, to make sure the government doesn't play games by bringing a charge and then dismissing it; bringing another charge, dismissing it. But he does have a say.

Moreover, she misrepresents the status of the case, not least by ignoring DOJ's past assertions that Flynn's lies were material, Sullivan's existing ruling that they were, and DOJ's silence about whether these new materials are Brady (a claim neither DOJ nor the outside reviewers on this case have raised). Even if it were Brady, though, Flynn has already sworn under oath that he's not entitled to it, and sworn under oath that he doesn't want it.

Which brings us to the biggest silence here.

Powell mentions Sullivan's order to Gleeson to consider whether he should hold Flynn in contempt for his sworn lies, both before this court and to other official proceedings. But she doesn't argue against it.

Not only is this petition premature (because the action it complains about – appointing an amicus – is something uncontroversial, something Powell is on the record aggressively defending). But because Sullivan included perjury in his order, it makes his order far less reviewable. What court, at any level, is going to hold that a judge has no recourse when someone lies under oath in his court?

Flynn's team makes much of Sullivan's comments about treason at his first sentencing, which may well be effective. But that would have been far more effective if this petition weren't premature for the argument it's making.

Update: I should explain my claim that the appointment of an amicus was uncontroversial. Flynn has cited a recent Supreme Court precedent holding that Judges cannot appoint an amicus to

address *new* issues. But Gleeson won't actually do so; he'll address whether Flynn's lies were material, something DOJ has been making representations about for years. Gleeson *will* address the perjury question, too, but that's something that *is* within Judge Sullivan's authority.