

JEFF WALL ADMITS THAT ANY SCRUTINY OF DOJ'S MOTION TO DISMISS FLYNN PROSECUTION WILL CAUSE IRREPARABLE HARM TO BILL BARR

The hearing in Mike Flynn's petition for a writ of mandamus just ended.

The key takeaway, given the make-up of the court, is that for the majority of the hearing, Judge Karen LeCraft Henderson seemed clear that it was too early to overturn any action Judge Emmet Sullivan has made. He has the authority to hold a hearing, she was clear. But if he decides not to grant the motion to dismiss, she seemed to indicate, she would favor a writ of mandamus overturning Sullivan's decision. Henderson clearly believes that Gleeson's filing, thus far, is intemperate, which is pretty funny given what Sidney Powell has done in this case.

At the very end of the hearing, she invited Principal Deputy Solicitor General Jeff Wall to address a claim made in DOJ's brief: that DOJ should be permitted to self-correct the harm of a bad faith prosecution. So she may have been reserving that as a reason to rule for Flynn – ultimately ruling instead for DOJ. But her comments through the rest of the hearing suggest this petition will fail.

But the notion this might involve *ruling for DOJ* is the most interesting part of this hearing. Flynn filed the petition, not DOJ. Powell's argument for Flynn was predictably flimsy, self-contradictory, and false. Even Judge Neomi Rao, who will clearly rule for Flynn, seemed to be struggling to find a way to agree with Flynn.

The more interesting argument came from Wall. He argued, repeatedly, that DOJ will be irreparably harmed if Sullivan is permitted to hold a hearing on DOJ's motion to dismiss. In particular, he seemed horrified that Sullivan might require sworn declarations of affidavits.

As Beth Wilkinson, arguing for Sullivan, mentioned, neither Sullivan nor Amicus John Gleeson has called for such a thing. Both are simply moving towards a hearing scheduled for July 16. Wilkinson also noted that District courts hold such hearings all the time. (And they predictably will have to in another case where DOJ has moved to end a prosecution recently, in which – unlike this case – there appears to have been prosecutorial misconduct, Ali Sadr Hashemi Nejad, which I'll return to).

Wall is literally arguing that DOJ will be permanently damaged if it has to show up and answer for its actions in this case (in particular, to explain why the prosecutors in this case didn't sign the motion to dismiss).

That Wall argued so forcibly as to the injury that DOJ would suffer if it had to show up and defend its motion to dismiss is all the crazier given that they didn't file the petition. The only harm that matters here procedurally is any harm to Flynn, not DOJ, and Powell really made no such case.

When Robert Wilkins pointed out that DOJ had not filed this petition, Wall basically asked for a mulligan, the opportunity to file their own mini-writ of mandamus. Judge Henderson responded by asking (as she had more generally) why this case shouldn't proceed under regular order, in which when DOJ missed the opportunity to file their own writ, they can't be granted a mulligan to do so after the fact.

Along the way, Wall and Powell both repeatedly misrepresented the status of the case. More importantly, both claimed DOJ's motion was very detailed, without noting that it also made false claims, claims on which DOJ has reversed itself

at the Circuit level. That will matter in a hearing, which may be why Wall was so insistent that a hearing would do real damage to DOJ.

As noted, given Henderson's questions for the bulk of the hearing, the Circuit will likely deny this petition. But the most striking takeaway is how panicked Wall was that DOJ might be asked to explain itself.