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WILL "POLITICAL CONSIDERATIONS" PLAY A ROLE?

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JUDGES OF THE COURT

Chief Judge

Sri Srinivasan

Circuit Judges

Karen LeCraft Henderson
Judith W. Rogers
David S. Tatel
Merrick B. Garland
Thomas B. Griffith
Patricia A. Millett
Cornelia T.L. Pillard
Robert L. Wilkins
Gregory G. Katsas
Neomi Rao

(Jul. 11, 2020) — Well, it looks as if the Emmet Sullivan clown show will continue – at least for a while – because remember, general election shoppers, as of today, there are only 109 delay and dilatory tactic days before November 3, 2020. In order to keep the cloud of doubt sulking over General Michael Flynn – and by implication, over President Trump as well – the Carnival on the Potomac must go on.

Stated otherwise, in response to Judge Sullivan's "Petition for Rehearing *en banc*" challenging the June 24 prior order of a three-judge panel of the court ruling in favor of General Michael Flynn, the U.S. Court of Appeals for the D.C. Circuit has entered an order directing that General Flynn's attorney, Sidney Powell, file a response to the petition by July 20.

The order also extends an "invitation" to the "government" to do the same and adds that, absent another court order, no reply brief will be accepted for filing from Judge Sullivan's attorney. Finally, the operation of the three-judge panel's prior order in favor of General Flynn is stayed "pending disposition of the petition for rehearing *en banc*."

As this traveling circus moves forward, faithful P&E readers should keep a couple of things in mind. First, it is generally perilous to guess how a court will rule on a particular issue when only one side of the argument has been made. Here, that "one side" is the petition now pending filed by Judge Sullivan's lawyer, Beth Wilkinson. Until Sidney Powell's response – and any response to be filed by the government – is presented, it would be premature to speculate on the fate of the petition.

That said, your faithful servant has read Judge Sullivan's petition and is unpersuaded that it should be granted. It is largely a repackaged and rearranged version of Judge Wilkins' dissent in the original opinion sought to be reheard. On the other hand, P&E readers may wish to read the petition themselves and arrive at their own conclusions.

The petition, of course, would be deficient if it did not rely heavily on Judge Wilkins' dissent. But the petition fails, again in your humble servant's view, to adequately answer the responses to that dissent already made by Judges Rao and Henderson in the majority opinion now challenged by the petition. Perhaps another offering after the response(s) to the petition are filed would be appropriate… stay tuned.

Second, Rule 35(d) of the Circuit Court's rules states, in part: "(d) Disposition of Petition. A petition for rehearing ordinarily will not be granted, nor will an opinion or judgment be modified in any significant respect in response to a petition for rehearing, in the absence of a request by the court for a response to the petition." Thus, it would seem that Judge Sullivan's lawyers have cleared the first hurdle in seeking the rehearing, the court having not just "requested" a response from Powell, but "ordering" the same and "inviting" the United States (DOJ) to do the same and file a response "in its discretion."

Third, Rule 35(a) provides, in relevant part: "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Significantly for purposes of this discussion, the rule also provides: "A majority of the circuit judges who are in regular active service [*i.e.,* not on senior status] and who are not disqualified [*i.e.,* the judges who were on the panel for the opinion sought to be reheard] may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc."

There are presently 11 "regular active service" judges on the court. While everyone pays lip service to the proposition that, once appointed to a lifetime position as a federal judge, the judges lose all political bias, most people would also acknowledge that this assumption is largely a fantasy. Those who believe that judges do not take political implications of their decisions into consideration – overtly or covertly – are either (a) not paying attention to Senate "advice and consent" judicial confirmation hearings, or (b) partaking of too much medicinal or recreational weed.

At present, the D.C. Circuit Court of Appeals is populated by seven "active" judges appointed to their current positions by Democrat presidents: Judges Sri Srinivasan (Chief Judge); Judith W. Rogers; David S. Tatel; Merrick Garland; Patricia Millett; Cornelia T.L. Pillard; and Robert L. Wilkins. The four "active" judges appointed by Republican presidents include: Karen LeCraft Henderson; Thomas B. Griffith; Gregory G. Katsas; and Neomi Rao.

Removing judges Henderson (appointed by President George H.W. Bush) and Rao (appointed by President Trump) from the *en banc* pool (because they were on the panel at issue) leaves two (2) judges appointed by Republican presidents. Removing Judge

Wilkins (appointed by Barack Hussein Obama, Jr.) from the mix leaves six (6) judges appointed by Democrats. Expressed mathematically: $6 > 2$.

Stated otherwise, a total eligible "pool" of eight judges – six appointed by Democrats, two appointed by Republicans – will decide whether to grant or deny the Sullivan petition. If a "majority" of the pool – five out of the eight judges – determines to grant the petition, it will move forward. The court may, if deemed necessary, require additional briefing. Circuit Rule 35(d) also provides: "If the en banc court divides evenly, a new judgment affirming the decision under review will be issued."

Against this backdrop, and if political considerations were to play any role, it is not exactly rocket science to speculate that the chances of the petition for rehearing being granted are bigger than zero. To be clear, political considerations should *never* play a role in such determinations and your faithful servant's observations should not be interpreted otherwise: the law and its application to the facts of a case alone should drive the decisions.

Lamentably, in current times, virtually everything has been infected by political considerations. One can only hope that the Circuit Court of Appeals is less infected than other institutions. In a perfect world, the potential for a politically-driven determination of whether the petition should be granted or denied would not exist. But as is apparent, unless you have been dwelling under a rock, we live in a very imperfect world.

We now live in a world where reason and rational thought often give way to mob rule and violence. We live in a world where those favored by the Deep State are dealt with one way, but those who are disfavored are treated much differently. We live in a world where merely saying that "all lives matter" can get you excoriated, marginalized and even fired from your job. And woe be to you if you say anything nice about President Trump. Is it just me, or does the term "cancel culture" sound a lot like "cancer culture?"

Because we live in an imperfect world and the U.S. Court of Appeals for the District of Columbia Circuit sits at the epicenter of the Deep State – Washington, D.C. – do not bet the farm that the petition for rehearing will be denied.

Hope springs eternal, but remember what you learned in math class: $6 > 2$.