Of Damocles, General Flynn and Intellectual Goo

"GO BACK TO SULLIVAN'S DUNGEON"

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued August 11, 2020 Decided August 31, 2020

No. 20-5143

IN RE: MICHAEL T. FLYNN,
PETITIONER

On Emergency Petition for Writ of Mandamus

Sidney Powell argued the cause for petitioner Michael T. Flynn. With her on the opposition to the petition for rehearing en banc were *Molly McCann* and *Jesse R. Binnall.*

Jeffrey B. Wall, Acting Solicitor General, U.S. Department of Justice, argued the cause for United States of America. With him on the response to the petition for rehearing en banc were *Brian C. Rabbitt*, Acting Assistant Attorney General, *Hashim M. Mooppan*, Counselor to the Solicitor General, *Eric J. Feigin*, Deputy Solicitor General, *Frederick Liu*, Assistant to the Solicitor General, *Kenneth C. Kohl*, Acting Principal Assistant U.S. Attorney, and *Jocelyn Ballantine*, Assistant U.S. Attorney.

Beth A. Wilkinson argued the cause for Judge Emmet G.

(Sep. 2, 2020) — The U.S. Court of Appeals for the D.C. Circuit has rendered its "*per curiam*" decision (*i.e.*, no single judge wants to take credit/blame for it) in the continuing kabuki theater saga of the persecution of General Michael Flynn. General Flynn had sought mandamus relief to bring closure to a dispute which no longer existed between him and the U.S Government, but which was being held hostage by Judge Emmet Sullivan, not unlike a Sword of Damocles over Flynn and, by inference, President Trump. Former Justice Department attorney Andy McCarthy agrees.

Stated otherwise, there was no longer any dispute between a defendant – General Flynn – and the prosecutor – the United States Department of Justice. Despite the absence of a continuing "case or controversy" under the Constitution, Judge Sullivan persists in manufacturing a dispute between him – as the judge and not as a "party" – and the no-longer-adversaries Michael Flynn and the United States.

The sordid history of General Flynn's outrageous (and possibly criminal… where are you, John Durham….?) persecution emanating from the Obama Oval Office, aka the Second Usurper in Chief (for convenience, the "SUC"), the SUC's Department of Justice ("DOJ") and its corrupt appendage, the James Comey FBI, is chronicled here, here and here.

The long and short of it is that because General Flynn had been wrongfully prosecuted to begin with – including being blackmailed by the holdover prosecutors from the SUC's DOJ into pleading guilty to a crime he never committed in order to shield his son from a threatened different prosecution – the "new" DOJ headed up by Attorney General William Barr determined to drop the case. The prosecutorial misconduct by the SUC's DOJ attack dogs is manifest and incontrovertible, as the DOJ's motion to dismiss graphically confirms.

General Flynn's attorney, Sidney Powell, had demanded that because of profound and documented misconduct by SUC Regime prosecutors, the charges against her client needed to be dismissed. The Barr DOJ agreed – and given the circumstances, it could hardly have done otherwise – and, accordingly, prepared and filed a procedural "motion to dismiss" before the anything-but-unbiased Judge Emmet Sullivan. Sullivan refused and launched into a series of delaying strategies.

These unprecedented dilatory tactics have now culminated in the D.C. Circuit Court's remand of the matter back to Sullivan's court with the admonition that "we trust and expect the District Court to proceed with appropriate dispatch."

In response, Sullivan has now entered an order requiring the parties to prepare a "joint status report" with their "recommendations for further proceedings" to be filed by… wait for it…, wait for it…: September 21, 2020. Really? The order also solicits timelines for the filing of any "sur-reply" brief by General Flynn and any "consolidated response to any amicus brief of non-Court-appointed amicus curiae."

Sullivan cites, in addition, D.C. Circuit Court Rule 41(a)(3) as the purported reason for pushing the initial "joint status report" date out. That rule states that "[n]o mandate will issue in connection with an order granting or denying a writ of mandamus or other special writ, but the order or judgment granting or denying the relief sought will become effective automatically 21 days after issuance in the absence of an order or other special direction of this court to the contrary."

"The Sword of Damocles," oil painting, 1812, public domain

However, there is absolutely *nothing* in that rule *at all* that would have prevented Sullivan from setting a date far sooner than he did. Ah, but since that would not have been consistent with the objective of dragging the ordeal out past the general election, it is a useful tool to further delay resolution of the matter. It's that Damocles thing again. Brilliant.

This species of "dispatch" gives new meaning to the term "appropriate" and virtually guarantees that the persecution of General Flynn will continue past November 3, 2020…. unless something else happens in the meantime. One option could be the filing of an application for an emergency stay in the Supreme Court. The downside of that approach, of course, is that it might well be denied since the Justice to whom it would be directed – as the jurist assigned to such matters for the District of Columbia – is: John Roberts. Gulp.

Another option, always one of the arrows in the quiver, is an immediate pardon by President Trump. That path, of course, would be seized upon by CNN, Chris ("Where-does-it-say-protests-must-be-peaceful?" Cuomo, the Gray Trollop and The Washington ("Democracy Dies in Darkness") Post as further evidence that the Harris-Biden tick…. oh…, sorry…, my bad…, the Biden-Harris ticket needed to prevail on election day.

Accordingly, returning to the Circuit Court's majority opinion (the two Republican-appointed judges filed cogent separate dissents, each concurring in the other's), after initially stating that "[w]e conclude that mandamus is unavailable because an 'adequate alternative remedy exists…'"the majority then goes through a byzantine, reverse-engineered discussion to justify that result.

The majority opinion is largely intellectual goo. Even a cursory review of the opinion explains why the nation's judiciary – particularly in the D.C. Circuit – has fallen into such disrepute. And if you review the transcript of the oral arguments on the *en banc* petition, that conclusion is unavoidable. Some judges can be really rude.

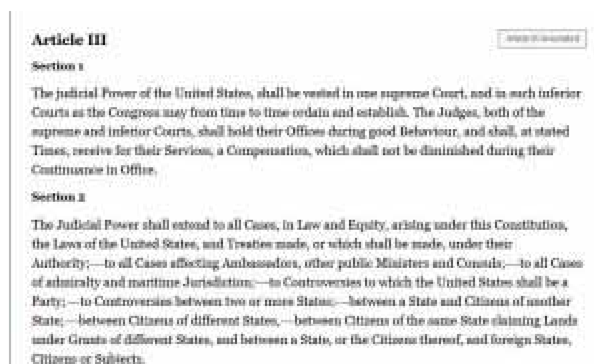
That the Circuit Court majority opinion is a sham is confirmed by what a first-year night school law student could immediately spot: footnote 2 of the opinion. By sloughing off the "case or controversy" issue in a footnote, the court was then liberated to wander off on a different weeded path leading to its desired result: the mandamus petition is denied, so go back to Sullivan's dungeon.

Specifically, in purported explanation for why the matter was not moot and that a constitutional "case or controversy" still existed, the footnote states: "We also hold that the case is not moot. While the Government has filed a motion to dismiss and Petitioner (defendant below) consents, there remains a case or controversy unless and until that motion is granted by the District Court. *Cf.* *Rinaldi v. United States*, 434 U.S. 22, 31–32 (1977) (*per curiam*) (reviewing a district court's denial of an unopposed Rule 48(a) motion)."

Stay with me here, as this gets a bit convoluted and obtuse…, but it is important.

First, the DOJ lawyers argued in opposition to Judge Sullivan's petition for *en banc* rehearing to the full Circuit Court that "under Article III, a court may exercise 'judicial Power' only over an 'actual controversy,' *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974) – *i.e.*, a live 'dispute between parties who face each other in an adversary proceeding,' *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937). *Once the prosecution and the defense agree that a case should come to an end, there no longer remains a case or controversy over which a court may exert judicial power.*" (Emphasis added).

In layman's terms, if there is no longer a live, *actual* dispute between a defendant and a prosecutor – to be distinguished from a dispute between, on the one hand the now-kumbayah defendant and the prosecutor and, on the other hand, a recalcitrant judge – there is no longer a constitutional basis for the court to hear the case, regardless of any pending procedural or ministerial motions. That position, articulated by the DOJ, is absolutely correct. Period. Boom. Full stop. The Circuit Court majority, of course, dismisses that constitutional requirement with a "*cf.*" reader's signal, now discussed.



Article III

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

https://constitution.congress.gov/constitution/

Second, footnote 2 of the Circuit Court's majority opinion claims that "there remains a case or controversy unless and until [the DOJ] motion is granted by the District Court." That claim is, at bottom, *ipse dixit*: "it is so because we say it is so." In fact, the court's reference to the *Rinaldi* case in the footnote is preceded by the reader signal "*Cf.*" rather than the different signal "*see*." "*Cf.*" is an abbreviation for the Latin term "conferateur" or "compare with."

While the facts of the *Rinaldi* case indicate that, as a practical matter, the parties likely were proceeding on the basis of an *assumption* that a true "case" or "controversy" remained after the DOJ determined in that case to drop its prosecution, *the "case or controversy" issue was never addressed*. In fact, the word "controversy" appears ***nowhere*** in the *Rinaldi* opinion at all.

Third, while in legal writing a "*cf.*" signal placed after a statement and before a cited source (such as a case decision) is intended to alert the reader that he/she should "compare" the preceding statement with an analogous, but not identical, source, the different signal – "*see*" – functions to alert the reader that the statement preceding the signal is *directly* supported by the following citation. So in this case, it is important to note that the decision in the *Rinaldi* case did ***not*** involve any analysis of whether a "case or controversy" existed. Any suggestion to the contrary is disingenuous.

In fact, the *Rinaldi* case involved a question of whether a person convicted in both state and federal court of the same criminal conduct (*i.e.*, conspiracy to rob safe-deposit boxes at a Florida hotel) was properly sentenced for both the state and federal crimes. The "case or controversy" constitutional requirement was never at issue in *Rinaldi*.

That is why, no doubt, the *per curiam* majority opinion here signaled its footnote 2 citation to the *Rinaldi* case (at pp. 31-32) with a "*cf.*" signal, meaning "compare by analogy" rather than a "*see*" signal, designating the cited source as being in direct support of the claimed proposition, *i.e.*, that "there remains a case or controversy unless and until that motion is granted by the District Court. Cf. Rinaldi v. United States, 434 U.S. 22, 31–32 (1977) (*per curiam*) (reviewing a district court's denial of an unopposed Rule 48(a) motion)."

At least the court (or one of the court's law clerks) realized that if the *Rinaldi* case was going to be cited at all for the claimed proposition, *only* a "*cf.*" signal was appropriate, because a "*see*" signal would have been too much of a red flag. Your faithful servant picks up on red flags… and, as here, yellow ones, too. The fact that the parties in *Rinaldi* may have been proceeding on the faulty or questionable assumption that a true "case or controversy" still existed does not make it so.

Accordingly, the real outrage of the Circuit Court's majority opinion lies in its cavalier treatment of the constitutional "case and controversy" strictures of Art. 3, § 2 of the Constitution. That restriction on the power of the judiciary requires that only "real" or "actual" as opposed to "theoretical" or "hypothetical" disputes are properly brought before the courts.

If a once-real dispute gets settled between the parties – the judge having no say in the negotiations between the litigants – there is no longer an "actual" dispute. That being the case, the court lacks "subject matter jurisdiction" under the Constitution to proceed, even in the *absence* of actions by the parties, including the filing of a "motion to dismiss" by one or the other of the parties. The dispute has vanished and with it, the power of the court to adjudicate anything.

Even noted constitutional law guru Alan Dershowitz – no conservative himself, but a defender of the Constitution – has noted that as soon as General Flynn and the DOJ were in agreement, the criminal proceeding should be dropped, as any "case" and/or "controversy" that might have theretofore existed evaporated. Indeed, he argues that because Judge Sullivan persists in his personal pogrom against General Flynn, he is violating the Constitution and should be impeached.

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That, of course, will never happen, because (a) the present House of Representatives would never entertain such a bill, and (b) Judge Sullivan is an African-American. Besides, Speaker Nancy ("I left my brain in San Crapcisco") Pelosi is no doubt too busy getting her hair done in violation of People's Republic of California mask and beauty parlor dictates to be bothered with such nonsense as impeaching a fellow Democrat.

In conclusion, valued P&E readers…, vote very carefully on November 3, 2020. There is a lot at stake.