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Judge Sullivan's refusal to immediately dismiss Flynn's case raises novel questions about the limits of judicial power

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The pitched legal battle over the fate of President Trump's former national security adviser Michael Flynn raises unsettled, novel questions about what happens when a judge refuses to go along when prosecutors no longer want to pursue their case.

Judge Emmet G. Sullivan's decision not to immediately dismiss Flynn's case has led to an extraordinary situation in which the district judge in Washington is under orders from his colleagues on the appeals court to quickly defend his actions. Sullivan himself has taken the unusual step of enlisting a high-powered trial attorney to respond by Monday after Flynn's lawyers asked the U.S. Court of Appeals for the D.C. Circuit to order the judge to drop the case and accused him of bias.

Some of the rules of the road are clear. Prosecutors can drop charges against a criminal defendant only with permission from the presiding judge, and Sullivan has the power to decide whether tossing Flynn's case is in the public interest.

But legal experts and former judges disagree on the limits of Sullivan's authority and how he should make that call. In practice, judges typically defer to prosecutors, and it would be difficult for a judge to go forward with sentencing, for instance, if the prosecutor has had a change of heart.

"The standard tilts heavily in the direction of saying that a judge should grant dismissal unless there's some reason to think that dismissal would violate an important public interest," said Stanford law professor Robert Weisberg, who teaches criminal law and procedure. "The customary and very strong presumption is that a judge will and should agree to the dismissal. But it's not a requirement."

And there is nothing customary about Flynn's case, which has sparked dramatic debate over the Constitution's separation of powers, judicial independence and allegations that Justice Department leaders are protecting the president's friends.

Earlier this month, the department moved to abandon its long-running prosecution of the retired three-star general, who admitted to lying to the FBI in 2017 about his contacts with Russia's ambassador to the United States. The reversal came after political appointees at the department determined that the FBI had no valid basis to question Flynn, so any lies he told were irrelevant to the investigation into Russian interference in the 2016 election. The remaining member of former special counsel Robert S. Mueller III's team who was working on the case withdrew before the dismissal motion was filed.

The decision prompted intense criticism, including from law enforcement officials and Democrats, who said the department had given in to political pressure. Trump's supporters and Flynn's lawyers argued the retired general was a victim of FBI overreach. The day the decision was announced, Trump called Flynn "an even greater warrior."

Flynn's lawyers tried last week to circumvent Sullivan's plan to assess the Justice Department's move and asked the appeals court to quickly put an end to the matter. The defense team objected to Sullivan's appointment of retired federal judge John Gleeson to argue against the department's position and examine whether Flynn should face a criminal contempt hearing for perjury after pleading guilty to a crime he and the Justice Department now say didn't happen. The judge also invited independent groups to comment.

The appeals court agreed to review Sullivan's actions, but there is also disagreement over whether it should get involved at this time.

Former appeals court judge Michael Luttig wrote in a recent column in The Washington Post that in most cases, one would expect the appeals court to wait and give Sullivan an opportunity to rule before stepping in. But Luttig said the appeals court would be justified to intervene now. He characterized Sullivan's invitation to Gleeson and outside groups as "troubling" and said it would "make a circus of the solemn judicial proceeding."

Others disagreed, saying it would be premature for the appeals court to act and pointing to a long tradition of judges appointing outside lawyers to ensure an adversarial process. Judges rely on clashes in opinions to help them make decisions. Courts, including the D.C. Circuit and the Supreme Court, often tap lawyers to defend government policies, for instance, when the presidency changes hands and the new administration takes a different position.

“It’s very sensible for the judge to think, ‘What’s going on here? Why the reversal? I want to hear the other side of the argument,’ ” said Stanford law professor David Alan Sklansky.

Even if prosecutors have broad discretion when it comes to charging decisions, Sklansky said the federal rules mean judges can and should scrutinize a case like Flynn’s in which the former national security adviser has pleaded guilty under oath, and the trial judge considered and rejected the defendant’s claims of government misconduct.

As to Luttig’s concerns about Gleeson’s appointment, Sklansky said, “Sullivan isn’t looking for somebody to offer an impartial assessment. That’s what Sullivan will provide.”

Flynn’s lawyers have also asked the appeals court to assign the case to a different judge and criticized Sullivan for suggesting at a 2018 hearing that Flynn may have committed “treason,” before correcting himself, and saying the former general had “sold [his] country out.”

To prevail at the D.C. Circuit at this stage, Flynn’s lawyers must show a “clear and indisputable” right to reverse an error by a court. Meeting that bar may be difficult, because Sullivan has outlined a process but has not yet made a decision.

The D.C. Circuit may have hinted at its thinking in its brief May 21 order. In giving Sullivan 10 days to respond to Flynn’s petition, the three-judge panel — made up of Judges Karen LeCraft Henderson, Robert Wilkins and Neomi Rao — cited an earlier appeals court decision that put limits on a judge’s discretion.

In that 2016 case, which was not about a plea agreement, Chief Judge Sri Srinivasan noted that criminal charging decisions — to initiate and dismiss charges — are the domain of the executive branch. The judiciary generally lacks authority to “second-guess” those decisions, he wrote, “much less to impose its own charging preferences. The courts instead take the prosecution’s charging decisions largely as a given.”

Even if Sullivan argues that it is incumbent on the independent judiciary to ensure that the justice system is not tainted by politics, Clark Neily, vice president for criminal justice at the Cato Institute, said he does not think it will be enough to get past the holdings of related court rulings.

In that case, the District Court judge rejected as too lenient a “deferred prosecution agreement” surrounding one corporation’s $21 million settlement with the Justice Department over Iran sanctions violations.

The D.C. Circuit reversed, and “it wasn’t a close call,” Neily said.

Regardless of how the panel rules, its decision can be appealed to the full D.C. Circuit or to the Supreme Court.