

Flynn Case Wrongly Decided By Divided D.C. Circuit Court Panel

By a 2-1 vote, the D.C. Circuit Court of Appeals ruled on June 24th that District Court Judge Emmet G. Sullivan *had no choice* but to grant the government's motion to dismiss its case against former National Security Advisor, Michael Flynn, for lying to the FBI in its investigation of Russian interference in the 2016 presidential election. The court's decision was surprising because the rule under which the Justice Department moved to dismiss the case – Rule 48(a) of the Federal Rules of Criminal Procedure - expressly requires “leave of court” for any such dismissal. We believe the Court of Appeals was wrong in its ruling and that the case should be reheard and reversed by the full Court of Appeals. There are numerous reasons for it to do so.

First of all, the three-judge panel's ruling, if it stands, would greatly constrain the ability of trial courts to ferret out prosecutorial misconduct. The ruling would thus have significant precedential consequences.

Second, there is a significant possibility that improper influences are at work in the Justice Department's attempt to undo its successful prosecution of Flynn. The President, for example, asked the Department to “go easy” on Flynn and, on numerous occasions publicly castigated the Department for pursuing Flynn's wrongdoing in the first instance. It was, in addition, only during the sentencing phase of the case after Flynn pled guilty that the Department completely reversed itself and took the position that Flynn was innocent. No court could reasonably turn a blind's eye to circumstances like these in considering whether it should grant a government request to drop a case that the government previously thought was meritorious. The Court of Appeals should not require Judge Sullivan to do so in this case.

There are, in any event, major defects in the panel's opinion itself. It is logically inconsistent and contrary to precedent. It acknowledges, for example, that the reasons the government seeks permission to dismiss its case against Flynn are relevant to its own ruling but refuses to let the trial court look into them in deciding whether “leave of court” should be granted. Instead, says the panel, Judge Sullivan must simply accept as true what the government says about why it seeks to dismiss the case because to do otherwise would constitute an unconstitutional intrusion into the government's prosecutorial prerogatives.

Completely ignored is the fact that Flynn twice pled guilty to the charges and acknowledged before two federal judges that he was guilty as charged. Also ignored is the fact that the government reversed its decision to prosecute Flynn only after Attorney General Barr took over the case and disavowed everything the government had said before. Ignored, too, is the fact that the President, as indicated, made numerous public statements calling on the Justice Department to “go easy” on Flynn and that there is mounting evidence in the public record of improper political influence in criminal matters relating to friends of the President. It is not just happenstance that career Justice Department prosecutors resigned from the case when the

Department flip-flopped and called for Flynn to be exonerated. Suspicious circumstances like these compel further inquiry, yet the Court of Appeals majority says no.

Among the many defects in the majority's opinion is the contention that decisions to initiate or dismiss criminal charges are completely within the government's prosecutorial discretion. Rule 48(a) of the Federal Rules of Criminal Procedure, however, plainly says otherwise. Decades of precedent make clear that the "leave of court" requirement under Rule 48(a) means that the trial court must act as more than a rubber stamp when faced with a government request to drop a case it previously thought was meritorious.

According to the majority, however, Judge Sullivan must accede to the government's motion without examining the reasons behind it because Flynn has no objection to it. (Defendants sometimes object to the dismissal of charges against them because they fear they might suffer some kind of harm if the case does not proceed.) What the majority ignores is that neither Rule 48(a) itself nor anything in the history of its promulgation supports that view.

The proposition that possible prosecutorial misconduct cannot be examined if the defendant supports a motion to dismiss, moreover, also makes no sense. The Justice Department may bring charges against someone in the first instance only if it believes in good faith that a crime has been committed and can prove it in court. An abrupt about-face, as in this case, demands explanation even though prosecutorial decisions are normally to be given substantial deference. Deference does not mean blind acceptance.

The majority contends that looking into the reasons for a government's change of heart would intrude on the government's prosecutorial prerogatives because only the government can decide whether or not to bring a case. That obviously proves too much because the majority agrees that a prosecutor's desire to drop a case previously brought can be examined if the defendant objects. Examination of the government's motives is permissible in that case, says the Court, even if it intrudes on prosecutorial prerogatives. Prosecutorial prerogatives are apparently not sacrosanct.

The majority, moreover, accepts without question the government's contention that there is "newly discovered evidence casting Flynn's guilt into doubt," that there is "evidence that the FBI interview at which Flynn allegedly made false statements was 'untethered to, and unjustified by, the FBI's counterintelligence investigation'" and that the government "cannot prove either the relevant false statements or their materiality beyond a reasonable doubt." If these facts are relevant, they obviously must be tested. The majority, nonetheless, not only accepts these contentions at face value itself, but commands the trial court to do so as well despite the trial court's responsibility under Rule 48(a) to determine whether dismissal of the charges is in the public interest or corruptly or improperly motivated. Were a trial court to examine these matters, says the majority, it would "usurp" prerogatives of the executive branch and thus violate constitutional separation of powers principles. Appellate court usurpation of trial court responsibilities under Rule 48(a), however, apparently is permissible.

Perhaps most revealing of the majority's tortured reasoning in this case is its contention that "[e]ach of the three coequal branches [of government] should be encouraged to self-correct when it errs," and that "[i]f evidence comes to light calling into question the integrity or purpose of an underlying criminal investigation, the Executive Branch must have the authority to decide that further prosecution is not in the interest of justice." (Emphasis supplied.) Whether the executive branch acts with integrity in a criminal investigation is, thus, to be determined only by the executive itself unless the defendant alleges otherwise and is not subject to review by the courts. This is like asking the fox to guard the chicken coop.

Judge Robert L. Wilkins, the dissenting judge in the case, cogently lays out reasons the majority's reasoning does not pass muster and why the Court of Appeals order to Judge Sullivan should be reversed. Among other things he observes that neither the D.C. Circuit nor any other Court of Appeals has ever read Rule 48(a)'s "leave of court" provision to mean that a district court may not evaluate a motion to dismiss charges before deciding whether "leave of court" is warranted. He also observes that, "[i]n fact, some of our case law clearly points in the opposite direction ...," noting that "The requirement of judicial approval entitles the judge to obtain and *evaluate* the prosecutor's reasons'." (Italics in original.) Judge Wilkins further observes that there is much precedent authorizing a trial court to examine the reasons a prosecutor seeks to dismiss charges it previously brought and determine whether dropping the charges is in "the public interest."

Among the precedents he cites are those that note that "the impetus behind the Supreme Court's insertion into Rule 48(a) of the 'leave of court' requirement was the protection of the public interest, not simply the prevention of abuse of the defendant," that Rule 48(a) "permits courts faced with dismissal motions to consider the public interest in the fair administration of criminal justice and the need to preserve the integrity of the courts," that it is "manifestly clear that the Supreme Court intended to clothe the federal courts with a discretion broad enough to protect the public interest in the fair administration of criminal justice," that a district court in receipt of an unopposed Rule 48(a) motion to dismiss is "entitle[d] ... to obtain and evaluate the prosecutor's reasons" and not "serv[e] merely as a rubber stamp for the prosecutor's decision," and that "the judge should be satisfied that the agreement [with the defendant to drop charges] adequately protects the public interest." Judge Wilkins also notes that one of the D.C. Circuit's own cases has held that the trial judge "may withhold approval if he finds that the prosecutor committed such a departure from sound prosecutorial principle as to [constitute] an abuse of prosecutorial discretion."

As Judge Wilkins points out, the issue before the Court of Appeals was not about what evidence or other information the District Court may use to make his decision. "This is a case about whether a district judge *may even hold a hearing* on a Rule 48(a) motion." (Italics in original.) Judge Wilkins observes as do we that prohibiting the trial court from holding a hearing on the government's motives for wanting to dismiss its charges against Flynn is to make Rule 48(a) nothing more than a "dead letter."

The majority contends that the Flynn case is not “unusual.” That is disingenuous in the extreme. The case involves a former National Security Advisor to the President deeply involved in the President’s election campaign who admitted he lied to the government in a counter-intelligence investigation related to the campaign. He acknowledged that he committed a crime when he did so. The government is presumed to have prosecuted him in good faith in the first instance but now says, in effect, “never mind.”

This case is far from usual. It takes place in a highly charged political environment in which, as indicated, the President asked the Justice Department to go easy on Flynn, repeatedly castigated the Justice Department for having prosecuted him in the first place and ordered or permitted his attorney general to take the case away from career prosecutors. For the majority to put blinders on and prohibit the trial court from examining what is really going on under the pretext that this an ordinary case is an abuse of process and a clear threat to the rule of law.