

CORRUPTION

Here's Why Judge Sullivan Can't Legally Punish Michael Flynn For 'Perjury'

Sullivan should not embark on any contempt proceeding against Michael Flynn. Doing so would be a misuse of his contempt power.

Stunning developments in the criminal case of Lt. Gen. Michael Flynn exploded onto the national scene the past two weeks. First, the government moved to dismiss the case, a one-count plea for allegedly making false statements to the FBI.

Then the trial judge, Emmet Sullivan, issued an order permitting people and groups claiming to have an interest in the matter to file briefs about whether he should grant the government's motion. Further, Sullivan appointed a retired federal judge, John Gleeson, to act as amicus curiae (friend of the court) to present opposing arguments to the government's motion.

Much has been and will be written about these developments, but somewhat lost in the uproar they've caused is the second portion of the order appointing Gleeson, which directs him to advise Sullivan on whether he should issue a show-cause order to Flynn for criminal contempt for perjury.

I can save Gleeson the trouble. The controlling legal authority from the Supreme Court holds that contempt power cannot be used to punish people for making statements, even under oath, that the judge deems false.

Why Did Flynn Plead Guilty?

When Flynn pleaded guilty, and again with Sullivan, he acknowledged under oath to the FBI agents who questioned him at Russian ambassador. He made these statements to counsel who had an apparent conflict of interest that the FBI lacked a legitimate reason to



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More recently, after Flynn obtained new counsel, he moved to withdraw his guilty plea and submitted a declaration stating that he was innocent of the crime. The potential discrepancy between that declaration and his earlier statements appears to be the basis for Sullivan flagging the perjury issue.

Flynn may well have legitimate defenses to any charge for perjury that might be brought against him, such as reliance on conflicted counsel and ignorance of the defect in the FBI's interview of him, which render any statement he made legally immaterial. Of more interest is whether Sullivan has a legal basis to explore these issues in a contempt proceeding.

Sullivan Lacks Authority to Charge Flynn with Perjury

A court issues a show-cause order for contempt as a prelude to possibly punishing a person for alleged misconduct. It describes the misconduct and requires the person to defend against that allegation. It is similar to an indictment except the court, rather than a prosecutor, initiates it. The person receiving a show-cause order must appear and defend the accusation but has certain due process rights, such as the right to notice, the right to counsel, and the right to present a defense.

Sullivan has not yet issued a show-cause order to Flynn, but he has directed Gleeson to advise him as to whether he should do so. The answer is absolutely not, because Sullivan lacks the authority to sanction Flynn for perjury.

Under the separation of powers established by the Constitution, criminal charges are brought by the executive branch and adjudicated by the judiciary. Thus, any actual prosecution of Flynn under federal statutes for perjury would have to be brought by the Department of Justice.

Courts are, however, permitted to initiate contempt proceedings. Contempt is behavior that disobeys, offends, or obstructs the court. It can occur directly in court, or indirectly through the actions of others. Judges have the authority to summarily punish for contempt in certain instances.

The federal criminal code specifically requires that a violation of 18 U.S.C. 401 of the federal criminal code provide



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authority, consisting of misbehavior in i
justice.

Rule 42 of the Federal Rules of Criminal Procedure governs contempt proceedings. It provides that, generally, a person charged with contempt shall be given notice of the charge, a prosecutor shall be appointed, and a trial shall occur to adjudicate the charge. If the potential punishment exceeds 180 days, the defendant also has a right to a jury trial.

Precedent Cuts Against Seeking a Contempt Proceeding

But the Supreme Court decided 100 years ago in a case called *Ex parte Hudgings* that perjury does not constitute contempt of court under Section 401. In that case, a judge held a witness in criminal contempt for giving what in the judge's view was perjured testimony.

The Supreme Court held that to convict the witness of contempt for alleged perjury, "there must be added to the essential elements of perjury ... the further element of obstruction to the court in the performance of its duty." It voided the contempt conviction because "the punishment was imposed for the supposed perjury alone without reference to any circumstance or condition giving it an obstructive effect."

The D.C. Circuit, which sits over Sullivan, has reinforced the *Hudgings* limitation and emphasized that "actual, not theoretical, obstruction is the test, and that any claimed obstruction must be proven precisely." That decision, called *In re Brown*, involved a person who falsely claimed to be, and acted as, an attorney in a criminal proceeding before the court. The D.C. Circuit ruled that this conduct, however fraudulent, had not obstructed the proceeding.

Flynn's statements in connection with his plea did not obstruct the court in the performance of its duty. Thus, they simpl
long-standing precedent. Sullivan should
proceeding. Doing so would be a misuse

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