# *The Filing by Judge Sullivan With The Circuit Court Is A Joke.*

Posted at 4:12 pm on June 2, 2020 by Shipwreckedcrew



I tweeted yesterday that I was going to try to resist the urge to blast out "hot takes" on the submission by Judge Sullivan in response to the Circuit Court's Order connected to Gen. Flynn's Petition for a Writ of Mandamus. I did post a few thoughts as I made my way through the document, and later I gave my "30,000 foot" view of the filing.

As I wrote earlier on Twitter, the submission filed by attorney Beth Wilkinson on behalf of Judge Sullivan seems to have not been interested in addressing the pointed question raised by the Court's order, but instead would be more accurately characterized as the proverbial ranting of an old man telling the neighbor kids to "Get off my lawn!"

More than anything else, the submission seeks to retain what Judge Sullivan believes are the prerogatives of the District Court, which is to get the first crack at writing whatever it is he feels entitled to write about Gen. Flynn and the DOJ motion, and once he's done the Circuit Court can grade his work. Until then, Judge Sullivan seems to be saying "Butt out!!"

I'm not going to cover the ground already well-worn by others and give you a full "briefing" on the arguments made by Wilkinson on Judge Sullivan's behalf. I will refer to the DOJ brief filed several hours after Judge Sullivan's submission where warranted, but I'm not going to take on an analysis of that brief here – that's a separate task that will require some effort because that brief is a serious piece of legal analysis that simply sweeps the board of all the pieces Judge Sullivan and the left-wing Anti-Trump/Flynn pundits think are in play.

Instead, I'm going to simply go to some key points in the Sullivan filing – key because they are so outrageous and unsupported by authority – and point out the issues as I see them.

First – and this really surprised me – Wilkinson made a blatant mis-statement of fact on P.1 when she baldly claimed that Judge Sullivan had found the "false statements" made by Gen. Flynn to the FBI were "material." I wrote a lengthy earlier article on this topic, and I encourage you to read it if you want a more comprehensive analysis:

## Judge Emmett Sullivan Likely Committed Reversible Error In Taking The Guilty Plea of General Michael Flynn

While it is true that the words did pass Judge Sullivan's lips during the December 18, 2018, hearing that began as a sentencing hearing and then became … something else, it's also true that at the end of that hearing Judge Sullivan said the following (found at p. 50 of the transcript):

> THE COURT: Let me just throw this out. Let me just share this with you. What I could do, and maybe it's not appropriate to do it now, and maybe it's not appropriate to do it in March. At some point — it probably won't surprise you that **I had many, many, many more questions**, and at some point what I may do is share those questions with counsel so you can give some thought, maybe do some additional research to be prepared for an eventual sentencing. I'm not sure if I want to do that. I was not going to spend another hour and share those questions with you in open court today, had you decided to postpone sentencing, but I may do that. I'm not sure. **These are questions that you would be prepared to answer anyway, such as, you know, how the government's investigation was impeded? What was the material impact of the criminality**? Things like that.

The submission by Wilkinson does not address at all these comments by Judge Sullivan which came in the same hearing he claims now to have found Gen. Flynn's statements to have been "material."

> "How the government's investigation was impeded. What was the material impact of the criminality."

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If the answers to those two questions are “It was not” and “None”, then the allegedly “false statements” were not material and there was no crime. That Sullivan was still expressing a need to have answers to those questions at the end of the hearing meant that Sullivan’s earlier “finding” that the allegedly false statements were “material” was factually baseless and improper on his part.

I’m going to digress for a moment to acknowledge that “actually” impairing an investigation is not necessary for the crime to have been committed. It’s only necessary that the false statement have been of a kind which could have led to the investigation being impeded. This is because many times the FBI will know that a false statement is “false” and will not be misled by it – but that doesn’t mean it wasn’t a crime to utter the false statement.



But Sullivan’s questions indicate he hadn’t even crossed that threshold before finding a crime had been committed because he hadn’t made any inquiry about why the allegedly “false statements” by Flynn were “material” and he said he had questions on the subject he would need to have answered by the parties. Consider the same problem in a different context, and you can see the absurdity of this circumstance.

Imagine this was a jury trial, and the jury had to make the factual finding as part of its verdict that Gen. Flynn’s statements were “material” – which is exactly what they would have had to do. What happened in the plea hearing is the same as if an FBI Agent testified in front of a jury that Gen. Flynn’s statements were “material,” but said nothing more. When asked on cross-examination to explain why the statements were material, the Judge interrupts and says to the jury “Don’t worry about that now. We’ll explain it to you after you reach a verdict. It’s enough for now that this Agent has used the magic word “material” in his answer.”

That is what happened on December 18, 2018. Van Grack used the "magic words", Judge Sullivan repeated the "magic words", and viola, Gen. Flynn was guilty even though no one ever offered a factual explanation of WHY his allegedly false statements were "material" to the investigation.

I'm not arguing here that his answers were or were not "material" as an objective matter. All I'm saying here is that what happened on March 18, 2018, was not a legally sufficient finding of materiality because Judge Sullivan said as much when he said "I have more questions…."

Wilkinson's failure to address the totality of Sullivan's comments during the hearing , and only pointing to his "finding" of materiality is prima facia "bad faith" and borders on both judicial misconduct on the part of Judge Sullivan to have allowed this to be written, and ethical misconduct by Wilkinson to have written what she did without addressing this glaring inconsistency of WORDS THAT CAME OUT OF HER CLIENT'S MOUTH!!

If this was a case that was going to be the subject of oral argument before the panel, I expect that Wilkinson wouldn't be able to finish her first sentence claiming Sullivan found the statements to be "material" before being cut-off by a member of the panel and asked "Didn't Judge Sullivan say at the end of the hearing that he still had questions about materiality – how can both be true?"

It is just such a glaring red flag in the record, and for Wilkinson to simply ignore it, and not make any effort to deal with it – however unpersuasive – really cause me to question the purpose behind the filing.

As I said on Twitter, as I made it through the submission I was persuaded more and more that Sullivan and his supporters and counsel know the case law is against them, and fully expect that Circuit Court will grant the mandamus relief sought by the Petition. This filing is not about persuading the Circuit Court to do something other than that – this filing is more of a "manifesto" of the Anti-Flynn crowd, and an effort by Sullivan to claim for himself as a district court judge what he thinks he's entitled to regardless of what the Circuit Court might think.

Judge Sullivan might not have another opportunity in a public court filing to say anything about Gen. Flynn and his conduct. So Beth Wilkinson said it all for him in her

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submission. I really don't see any other purpose for much of what she wrote – and didn't write.

The Circuit Court directed Judge Sullivan's attention to its 2016 decision in *United States v. Fokker Services*. Judge Sullivan's submission said *United States v. Ammidown*, decided by the Court in 1973, was "controlling precedent" in the Circuit.

That is almost "laugh out loud" funny.

The DOJ brief goes into great detail as to why this claim is ridiculous. A primary basis for the argument against application of anything from *Ammidown* is that the language Judge Sullivan relies upon is "dicta". The term "dicta" is a reference to analysis in a court decision that – while present in the text – was unnecessary to the actual outcome of the case.

*Ammidown* involved the discretion of a district court to reject a plea agreement under Rule 11 of the Federal Rules of Criminal Procedure because the district court judge did not agree with the prosecutor's decision to allow the defendant to plead guilty to a "lesser" offense than he was originally charged with. In looking at various circumstances where a district court had some undefined level of "discretion" to reject government motions, the Court in *Ammidown* analyzed the discretion conferred to courts by Rule 48(a)'s "leave of court" requirement. In that analysis – where the *Ammidown* court turned to a variety of written opinions of district court judges around the country on what they thought "leave of court" meant – the Court came to certain conclusions about what Rule 48(a) allowed a district court to consider in exercising its discretion to grant "leave of court."

As the DOJ brief points out, all the "analysis" of Rule 48(a) in *Ammidown* is dicta because the issue of what discretion the "leave of court" language confers was not necessary to the Court's decision in *Ammidown* with regard to Rule 11.

A similar argument might be made with regard to *United States v. Fokker Services*, cited by the Circuit Court, since that case dealt with a provision of the Speedy Trial Act, and not Rule 48(a). The difference between the two cases is 1) after *Ammidown* the Supreme Court has said a lot more about separation of powers and deference by the Judiciary to decision-making by the Executive Branch on matters reserved to the Executive Branch, and 2) in *Fokker Services* the Circuit Court said that charging decisions by the

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Executive Branch are not subject to second-guessing by the Judiciary under any form of "discretionary review" authority conferred by any statute or rule of procedure. That declaration extends beyond the language of the Speedy Trial Act and applies to other expressions of "discretionary review" authority found in other places – such as Rule 48(a).

As did Judge Sullivan in his order authorizing the filing of amicus briefs regarding the DOJ motion to dismiss, Wilkinson refers to the district court's "inherent authority" to appoint an amicus counsel in a criminal case to argue the contrary position on the DOJ motion given that both parties to the case are in agreement. Let me decipher the code that is present in the "inherent authority" phrase — it is a phrase used by courts to glom on to whatever "power" they think they need to do whatever it is they want to do. It's amorphous and undefined – so it actually doesn't exist. It is just "judicial fiat" that can be better summed up by saying "I'm the district judge and you're not."

Next is an issue raised by the filing that is an example of a phenomenon which always brought me great amusement as an prosecutor when working through arguments in a defense brief. I'm going to call this the "Magic Argument That Appears Out of Thin Air" – or "Examples of Where Lawyers Just Make Shit Up."

In a few places in the filing Wilkinson uses the term "plausible judicial question" as a basis to justify the inquiry that Judge Sullivan intends on pursuing.

I'm going to confess that I did not read every word of every case cited by her in the filing, and I'll gladly append a note to this article if someone makes it necessary.

But I did not see the phrase "plausible judicial question" anywhere in any of the cases she cited that I did read, and I don't see her having cited to any particular case where she says the existence of a "plausible judicial question" is the standard for a district court having the authority to do anything connected to what Judge Sullivan claims he wants to do.

In other words, she just made it up.

She made it up in the context of looking for a basis to overcome what *Fokker Services* says is a "presumption of regularity" that must be given to filings by the government that are within the normal course of the government's work before the court. At P.27 she writes:

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> "The record before the district court raises at least a plausible question whether the central premise of Fokker's deference to the government – the "presumption of regularity" that applies to prosecutorial decisions ... could be overcome."

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While there is an internal citation to the *Fokker* case that I omitted, that citation isn't support for the proposition that the Court must address "plausible questions" in order to rule on the motion. She cites no authority for that claim – she made it up.

The citation to *Fokker* is to support the proposition advance by her that "presumption of regularity" is the "central premise" behind "deference to the government." Other than the fact that a "presumption of regularity" must be provided to DOJ's decision, everything else she wrote about the existence of a "plausible judicial question" that might "overcome the presumption" is made up by her.

Finally, she rolls out the "hobby horse" of the anti-Flynn/Trump forces that "no line prosecutors signed the DOJ motion to dismiss" – without any suggestion as to why that should be deemed significant.

I have written before that even ASKING Van Grack to sign the Motion to Dismiss would have been a huge professional disservice to the man because it would have put him in the position of signing a motion that basically confesses that he played a role in a long-running effort that misled the defendant, the defendant's counsel, and the Court about the true facts and circumstances surrounding the investigation and prosecution of Gen. Flynn. The motion is not kind to the SCO or its members. If Van Grack signed it, it would have been read as a "confession" by Van Grack to unethical conduct. I'm sure Van Grack disagreed with the motion, and earnestly believes that his efforts directed towards the Flynn case were appropriate and lawful. So the fact that he didn't sign it is a worthless and meaningless observation.

But, a more powerful response to this point can be found in the DOJ brief filed yesterday – although it is not obvious at first glance.

The listing of DOJ counsel on the front of the Brief begins with the Solicitor General, Noel Francisco. Based on my experience it is rare to see the Solicitor General appear on a brief submitted to a Circuit Court of Appeal. The Solicitor General's Office appears on behalf of the United States

before the Supreme Court. Appearances in the Circuit Courts are generally left to US Attorneys and the Appellate Section of DOJ.

But more importantly in my opinion is that under the list of attorneys from the US Attorney's Office for the District of Columbia is listed Jocyelyn Ballentine, Assistant United States Attorney.

Ballentine was the co-prosecutor on Gen. Flynn's case along with Brandon Van Grack after the SCO closed up shop, and responsibility for the case fell to the US Attorney's Office in the District of Columbia.
Ballentine is one of the "line prosecutors" who did not sign the Motion to Dismiss – as pointed out by Judge Sullivan's filing.

But if you turn to the last page of the DOJ brief filed yesterday, you see that the signature line for the attorney who actually filed the brief with the Circuit Court was – Jocyelyn Ballentine.

She put her name on the line advocating to the Circuit Court that the Writ of Mandamus should be issued for the reasons set forth, and the case against Gen. Flynn should be dismissed.

So much for the "no line prosecutors signed" idiocy.



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