

FULL DC CIRCUIT SHIFTS MIKE FLYNN ANALYSIS BACK TO WHAT IT SHOULD BE: UNUSUAL REMEDY

The full DC Circuit just announced it will rehear Mike Flynn's petition for a writ of mandamus on August 11.

That they're doing so is no surprise. Neomi Rao's opinion threatened to overturn not only precedent on mandamus, but also on false statements cases. The decision was all the more radical insofar as it granted relief to DOJ, which had not asked for it.

What's notable is that the Circuit is shifting the analysis back to where it should have been in the first place.

When the panel of Karen Henderson, Neomi Rao, and Robert Wilkins first invited briefing on this issue, they focused on whether *US v. Fokker* required Judge Sullivan to dismiss the case, as the government moved.

Today's order instructed the parties to be prepared to address whether there are not other adequate means to attain the relief desired, which goes to the core of writs of mandamus (which are only supposed to be available if something like an appeal is unavailable).

Even Karen Henderson suggested in the last hearing that Flynn did have other means of relief – an appeal of any decision that Sullivan actually makes (it has yet to be determined whether, by delaying the decision on whether to dismiss the case, Sullivan has taken an action at all).

Flynn will have a much harder time making this argument, as he can appeal whatever decision Sullivan makes. The government, however, will be

in a much more awkward place, because they're arguing – having not filed for a writ – that they'll face irreparable harm if they have to show up for a hearing before Judge Sullivan, a ridiculous claim yet nevertheless one Rao seized on to be able to rule for Flynn. It's unclear whether this new frame – which is what the court should have reviewed in the first place – will even leave space for the government to make that argument.

Which might mean Billy Barr will have to explain why DOJ flip-flopped even though nothing had changed from the time his own DOJ called for prison time for Mike Flynn.