DC CIRCUIT SENDS FLYNN BACK TO JUDGE SULLIVAN'S COURTROOM

The full DC Circuit (with Greg Katsas recusing) just sent Mike Flynn's case back to Judge Sullivan. The decision itself is not that interesting because the decision itself is a no-brainer. Flynn (and the government) have alternative remedies available to them, so they should just wait until Sullivan issues an order before seeking that remedy, if appropriate.

The most dramatic claim in the majority opinion is that the case is not moot until the government's motion to dismiss is granted.

> We also hold that the case is not moot. While the Government has filed a motion to dismiss and Petitioner (defendant below) consents, there remains a case or controversy unless and until that motion is granted by the District Court. Cf. Rinaldi v. United States, 434 U.S. 22, 31–32 (1977) (per curiam) (reviewing a district court's denial of an unopposed Rule 48(a) motion).

The per curiam majority opinion itself is notable for the number of times it lays out ways that Sidney Powell fucked up procedurally (along with the government in some cases): First, in not objecting specifically to the appointment of John Gleeson.

> The interest in allowing the District Court to decide a pending motion in the first instance is especially pronounced here, given that neither Petitioner nor the Government raised an objection in the District Court to the appointment of the *amicus* or more generally to the course of proceedings for resolving the

> Rule 48(a) motion.

Then, in not challenging Sullivan's scheduling order as a deprivation of his liberty.

> Nor did Petitioner independently challenge before the District Court or this Court the District Court's orders or their timing on due process grounds as a clearly unwarranted deprivation of liberty.

And finally, in not presenting the harms of the process ordered by Sullivan.

> And at this stage, those harms are speculative, especially when the arguments advanced here against that process were not first presented to the District Court by Petitioner or the Government.

There, and later, the panel also described that the harms that a hearing poses to the government are speculative (the kind of judgement that virtually always goes against the non-government party in an appeal).

> Petitioner, likewise, argued that the District Judge might "usurp[] the power of the Attorney General to bring additional charges." Pet'r's Reply at 18. But those harms are speculative and may never come to pass.

If Flynn doesn't appeal this, the opinion makes clear, Sullivan can have his hearing and then Flynn (or the government) can file a petition for mandamus.

As others have pointed out, the most important part of this decision is in Thomas Griffith's concurrence (issued on his last day as a judge, but on the same day he issued a batshit opinion saying that Congress can't go to court to enforce their own subpoena power). He lays out

that the question before the panel is not one of politics, but instead of Constitution.

> This proceeding is not about the merits of the prosecution of General Flynn or the Government's decision to abandon that prosecution. Rather, this proceeding involves questions about the structure of the Judiciary and its relationship to the Executive Branch. There are two central problems in this case: defining the scope of the authority of the Judiciary to inquire into the exercise of a core function of the Executive and deciding how the relationship between the district court and our court shapes a challenge to that inquiry. Those questions are far removed from the partisan skirmishes of the day. The resolution of those questions in this case involves nothing more and nothing less than the application of neutral principles about which reasonable jurists on this court disagree. See Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971). And that principled disagreement revisits a long-running debate about the relative powers of the Executive and Judicial Branches. Today we reach the unexceptional yet important conclusion that a court of appeals should stay its hand and allow the district court to finish its work rather than hear a challenge to a decision not yet made. That is a policy the federal courts have followed since the beginning of the Republic, see Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84; 28 U.S.C. § 1291, and we are aware of no case in which a court of appeals has ordered a district judge to decide a pending motion in a particular way.

It's unlikely to placate the frothers. But it

might lead SCOTUS to deny any appeal.