This document is what I might have submitted as an amicus brief to the DC Circuit for its en banc consideration if they had wanted briefing. They have scheduled oral argument for August 11, but have not asked for briefing even from those directly involved—petitioner Flynn, the Justice Dept., and Judge Sullivan. The 3-judge panel accepted an amicus brief from me earlier, but I think I have new useful things to say, so I'll say them here, for the sake of the public and the lawyers, even though the judges won't see them. And maybe I'll write this up as an academic article in law or economics. I have the formatting ready from my panel amicus brief, so I'll keep that format here, mostly, but I will eliminate the table of authorities and certificates of word count, parties, and service and use single spacing and 10 point font.

NO. 20-5143
AUGUST 6, 2020

In the
United States Court of Appeals
for the District of Columbia Circuit

IN RE: MICHAEL T. FLYNN,
Petitioner

On Petition for a Writ of Mandamus to the
United States District Court
for the District of Columbia, en banc

Brief *Amicus Curiae* of Professor Eric Rasmusen in Support of Petitioner

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ERIC B. RASMUSEN
Kelley Sch. of Bus, Indiana University
1309 E. Tenth Street
Bloomington, Indiana 47401
(812)345-8573, Erasmuse61@gmail.com
pro se

TABLE OF CONTENTS

Interest of the *Amicus Curiae*

Eric Rasmusen is Professor of Business Economics and Public Policy at Indiana University's Kelley School of Business and has held visiting positions at the University of Tokyo, Oxford, the University of Chicago, the Harvard University Department of Economics, and Harvard and Yale Law Schools. He has been a director of the American Law and Economics Association and was several times chosen by George Mason's Law and Economics Center to teach economics to judges. He has published over 70 papers in scholarly journals, including over ten in law reviews and legal journals. His co-authors include Judges John Wiley and Richard Posner and law professors J. Mark Ramseyer (Harvard), Ian Ayres (Yale), Richard McAdams (Chicago), Minoru Nakazato (Tokyo), Frank Buckley (George Mason), and Jeffrey Stake, Ken Dau-Schmidt, and Robert Heidt (Indiana). With J. Mark Ramseyer, he is author of *Measuring Judicial Independence: The Political Economy of Judging in Japan* and many articles on prosecutors, attorneys, organized crime, and the Japanese judiciary. In economics, he is best known for his book on strategic behavior, *Games and Information*, which has been translated into Japanese, Italian, Spanish, French, and Chinese (two editions, simplified characters and complex).

The Flynn mandamus petition presents questions to which ideas drawn ultimately from law-and-economics can be usefully applied. These questions revolve around the first part of the standard test for mandamus: whether alternative relief is available. This question has been somewhat neglected by the parties and the other amici, who have focused on whether the district court's actions have been unlawful. Professor Rasmusen's research having touched on the structure of the judiciary in Japan and of prosecutions in the various U.S. states, political economy, social norm, precedent, ostracism, strategic behavior, and the effect of criminal stigma, he feels he may be able to provide inputs others do not.

No party or counsel for any party authored this brief in whole or in part or contributed funding to it or in connection with its preparation. No person other than this *amicus* contributed money to fund the preparation or submission of this brief.

Statement of the Case

On December 1, 2017, District Judge Rudolph Contreras accepted a guilty plea from Michael Flynn for making false statements to the FBI. Judge Contreras recused himself and the case was reassigned to District Judge Emmet G. Sullivan. In June 2019, General Flynn engaged new counsel. On January 14, 2020, he filed a motion for leave to withdraw his guilty plea. On May 7, 2020, the Department of Justice moved to dismiss the charges with prejudice in the interests of justice.

Four days later, the *Washington Post* published an article by John Gleeson and two other members of his law firm calling for Judge Sullivan to appoint an amicus to oppose dismissal. The next day, Judge Sullivan issued an invitation for amicus briefs on the issue of whether he should grant the motion to dismiss, and the day after that he appointed John Gleeson himself as *amicus curiae*.

On May 19, Flynn filed a mandamus petition with the D.C. Circuit Court of Appeals asking that:
(i) the prosecution be dismissed as requested;
(ii) the order appointing an *amicus curiae* be vacated; and
(iii) the case be reassigned away from Judge Sullivan.

On May 21, a three-judge panel from the D.C. Circuit ordered Judge Sullivan to respond by June 1 to petitioner's request, with special attention to the DC Circuit's *Fokker* case. The panel granted part (i) of the petition, with a dissent by Judge Wilkins. Judge Sullivan then petitioned the D.C. Circuit for en banc consideration. The D.C .Circuit vacated the panel decision and ordered en banc oral argument for August 11, with special attention to whether some other relief would do instead of mandamus. On August 5, the DC Circuit said that Flynn, the United States, and Judge Sullivan would all be given time in oral argument, and asked for special attention to "the effect, if any, of 28 U.S.C. §§ 455(a) and 455(b)(5)(i) on the District Court judge's Fed. R. App. P. 35(b) petition for en banc review."

ARGUMENT

I. Much of legal procedure can be usefully analyzed as ways to deal with the principal-agent problems of President supervising prosecutors and Supreme Court supervising judges: criminal rule 48 (judicial approval of criminal dismissals), appellate rule 35 (en banc), 28 U.S.C. §455 (recusal), reassignment, and mandamus.

I am a professor, so I will be didactic, but also, I hope, easy to read and interesting to those who enjoy law, as well as, of course, attempting to be useful to the Court in forming its thoughts. I am writing for the Court as my readers, though others are welcome to listen in. Do be patient. I will start out writing generally, like an economist, but will soon return to case citations and three-part tests. This will be a bit of a "Brandeis brief-- not one with facts and figures but with ideas I think can help you organize your thoughts about explaining existing law and filling gaps where existing law is lacking.

The decision you must make is all about organizing criminal justice and making sure everyone does what he's supposed to. Prosecutors and trial judges are the agents relevant to *In re Flynn*. The problem for any principal in dealing with an agent is that he doesn't want to do the task himself, so having an agent is useless if he must watch him every second, but if he doesn't watch the agent, the agent is free to disobey and do things he's not supposed to. If I as principal hire someone as agent to hire an employee, I have to worry that the agent will hire his relative, for personal gain, or hire whoever applies first, from laziness. In the same way, if the United States of America engages an attorney to prosecute, it must worry about the prosecutor continuing prosecutions from personal ambition or politics and about him ending prosecutions because of bribes or to avoid personal inconvenience. If the U.S. Courts engage a trial judge to preside over a case, it must worry about the trial judge aiding prosecutions because of personal ambition and ideology, and hindering prosecutions for the same reasons and to avoid personal inconvenience

The Court asked, in its orders for oral argument, about two points in particular:

(a) is the extraordinary remedy of mandamus appropriate, rather than just waiting for appeal?

(b) what role does possible bias of the trial judge play?

My panel amicus brief focused on (a), which I, too, saw as the crux of the matter. I will expand on that here, as well as addressing (b), which is intimately connected with it in the jurisprudence of the Flynn case. Indeed, the Flynn case is an excellent opportunity to better understand many issues connected with the roles of judge and prosecutor and of how to run a system of criminal justice generally.

II. The prosecutor as agent for the United State of America is controlled by reassignment and rule 48 (dismissal).

The prosecutor is an agent for his client, just like any lawyer. He is a true agent, in the sense that his client can fire him at any time (although he may have to pay him damages for breach of contract). Here, the client is the United States of America. This client does not hire the prosecutor directly. It works through an agent--- the US President. The US President is *not* a true agent in the legal sense, because he cannot be fired at will. He is more like a trustee, a fiduciary. See Eric Rasmusen, 1997, "A Theory of Trustees, and Other Thoughts," and the discussion in Ramseyer & Rasmusen, *Measuring Judicial Independence*. But he is acting on behalf of the principal, the USA, who is the "party" in the proceeding before the court. The President appoints an agent to whom he delegates his own authority—the Attorney-General—who is another true agent since he can be removed at will. The Attorney-General delegates to agents of his own, and going down the chain we come to the ultimate agent of the USA, the prosecutor who signs the filings in a particular case. That prosecutor is a true agent, because he can be removed at will as agent in that case. He may, indeed, have civil service protection from being fired as a government employee, but the Attorney-General can remove his authority to represent the USA in the particular case.

The Attorney-General faces two agency problems: the prosecutor-agent who prosecutes too much, and the prosecutor-agent who prosecutes too little. See Eric Rasmusen, **"The Economics of Agency**

Law and Contract Formation," *American Law and Economics Review,* 6 (2): 369-409 (Fall 2004), on the agent who makes the wrong contact versus the agent who shirks. Here, the Attorney-General decided—as is his right—that he faced the first problem. The prosecutor-agents who conducted the case against Mr. Flynn were wrong to do it, according to the Attorney-General-principal. They are no longer his agents in this case, and have been replaced. (We do need not go into whether they were "fired" or "resigned".) That is right and proper; we do not want any prosecutor to have the freedom to go after his political or personal enemies or his personal hobbyhorse interests, and although the buck has to stop somewhere, we don't want every low-level government attorney to be able to prosecute people whenever he likes for whatever he wants. Rather, we give that discretion to the Attorney-General—really, to the President—because that focuses public opinion and accountability, not just for politicized or personalized cases, but for the decision of where to use the limited number of attorneys the Justice Department can afford to employ.

The second agency problem facing the Attorney-General is the prosecutor who prosecutes too little. He needs to worry about his prosecutor-agent going easy for the agent's own political preferences, or because he is bribed with immediate money or promise of future jobs, or from just plain laziness.

One form of malfeasance is the wrongly dismissed prosecution. Suppose Jeffrey Epstein had bribed a prosecutor to file a motion to dismiss with prejudice the case against him, and the judge had granted the motion. This would be fraud on the court, but it would be hard to prove if done with moderate care. The Attorney-General has granted the prosecutor the authority to file motions in this case-- all that is clear in the public docket— and it would be illegal to begin the prosecution anew just because the client—the USA-- says he thought his lawyer made a mistake. That's the client's problem, for hiring a bad lawyer and giving him authority to represent him; all he can do is fire his lawyer and complain to the Bar Association in this case (in other contexts "inadequate assistance of counsel" may allow proceedings to be reopened--- but not for criminal prosecutors). The Attorney-General would be shocked and dismayed; the prosecutor would be fired or never get promotions again; the public would be outraged--- but the Attorney-General would have to truthfully tell the public, "I can't undo the decision." He gave the line prosecutor the authority to dismiss, and he can't undo that, or it would mean he never really delegates that authority and no dismissed defendant could ever feel safe.

Enter Rule 48. Rule 48 says that the prosecutor cannot dismiss a case with prejudice unilaterally; the judge must sign off. This solves the agency problem. In our Epstein example, the judge is amazed by the motion to dismiss, and asks the Attorney-General if he really wants to dismiss. The next day, the Attorney-General says "No", and removes the prosecutor from the case. Problem solved. Since this maneuver won't work, defendants don't try to bribe prosecutors to dismiss.

Of course, the defendant could still bribe the Attorney-General to dismiss, or not to indict in the first place. The USA needs to have some agent, and there will always be some agency problem. But the Attorney-General is more expensive to bribe than a line prosecutor, and far more exposed to public view and criticism. We leave the remaining problem to public opinion and the political process.

In the *Flynn* case, exactly that has happened. Many people think that the Justice Department was wrong to indict Flynn in the first place; many other people think the Attorney-General was wrong to dismiss the charges. Voters can make up their minds as to who is right, and factor that into their decision of who to vote for.

Agency theory makes sense of Rule 48. Other theories do not. They founder on the problem that if the government really wants to go easy on someone, it can forego prosecution in the first place, or prosecute incompetently. Even with Rule 48, a bribed prosecutor can prosecute incompetently, but incompetence is slow and shows up in public filings and performance, allowing the Attorney-General to replace the prosecutor before too much damage is done, and it is not "with prejudice"; the Attorney-General's replacement can try to undo the damage. But Rule 48 prevents a bribed prosecutor from killing a case with a single, irremediable, act.

III. The trial judge as agent for the U. S. judiciary is controlled by appeal (for wrong decisions), mandamus (for making the wrong *kind* of decisions), and reassignment (for both).

What about the District Judge as agent? He, too, is ultimately an agent of the United States of America, but we have set up a system where he need not, and, indeed is forbidden, to follow the wishes of that ultimate principal. Rather, we have set up the Supreme Court as something like a trustee, with strong obligations to the trust document-- the U.S. Constitution—and with a beneficiary— the United States of America—but without any obligation to follow the wishes of the beneficiary, and, indeed, with the obligation to thwart the beneficiary's wishes if they conflict with the document executed by the grantors.

The Supreme Court acts as a trustee, but for the trustee as principal we set up agents by legislation: the judges of the circuit courts of appeal and the district courts. The district court judge is an agent of the Supreme Court, which has delegated its authority over him to the circuit court. (Perhaps the Supreme Court could set up agents using its inherent powers too, but we have avoided the nondelegation issue by having Congress pass statutes.)

How do we address the problem of the circuit-court principal and the district-court agent? A trial judge can be "fired" from a case if necessary: reassignment. Ordinarily, however we use the appeals process to overrule him for the day-to-day mistakes unavoidable in any principal-agent relationship, but especially in law, where trial judges must often address novel questions. (In extreme cases, a judge can also be impeached by Congress, but this is so unusual and has proven so useless that we can ignore it here.)

In most cases, the problem is that the trial judge makes a mistake in the ordinary exercise of his authority. He is authorized to make the decision between X and Y, and he chooses X by mistake. We resolve this by telling the wronged party to collect together all the judge's mistakes in one document and bring them to the circuit court on appeal if he loses at trial. If he doesn't lose at trial, the mistakes don't matter, and we have saved time, expense, and the indignity of having to publicly declare that a judge got something wrong.

It is easy to see why mandamus is usually inappropriate, even if the court below has erred. We want a system where most cases are handled completely by one court--- one judge with, sometimes, the aid of a jury to decide questions of fact. The one judge will almost always get things right. Most cases are not hard, and the trial court has a good shot at being right even in hard cases. Individuals do make mistakes, though, even if they are judges, and so we have appellate courts. In the federal courts, the usual appeal is to a three-judge panel--- three, because (a) there is less room for individual mistake, and (b) we only allow the appeal court to devote a tiny fraction of the time to a case that the trial court spends, so we can afford to be more lavish with the number of judges.

To run efficiently, though, we don't want the appellate court to just repeat everything the trial court did but get it right this time. We strictly limit the time spent: the court refuses to attend to more than 100 or so pages of writing or 30 minutes of talk. We also limit what kind of mistakes the court will remedy and--- the topic at hand—*when* the court will start listening. Ordinarily, appellate courts reject interlocutory appeals and petitions for mandamus, not because the party asking for them is in the wrong, but because it's more efficient to wait until the trial court has finished and then let the losing party submit all his grievances at once, rather than piecemeal. We want justice to be done, but with the least cost in time and energy. That is what is behind our procedural statutes, court rules, and common law.

But what if a trial judge does something that cannot be undone on appeal? In particular, suppose it is not that he has decided wrongly chosen X instead of Y, but that he has decided to undertake some act completely outside his authority: the problem is not that he made the wrong decision in exercising his delegated authority, but that he did something completely outside his authority?

Enter mandamus. Let's take it as given that Judge Sullivan should not have a hearing or amici, and in these circumstances must simply grant the United State motion to dismiss criminal charges against Flynn. Why not wait till the end of the proceedings, whatever silly and unlawful things Judge Sullivan might decide to do? Why bother the busy court of appeals so early?

That is the question the en banc Court asked to be addressed. It turns completely on whether allowing the case to go forward is unlawful procedurally--- but we are taking that as given, for present purposes—and whether there are irremediable costs to allowing it to go forward—which still needs to be established. This is very much like the "irremediable harm" prong of the standard test for whether to grant a preliminary injunction. Taking it as given that someone is being treated unjustly, would it harm to him just to wait till later, be declared in the right, and collect money damages? If so, then however just may be his cause, we tell him to wait. It won't end up hurting him in the end.

Turning now to the specifics of what the courts have said about mandamus, the D.C. Circuit's recent *Fokker* decision lays out the standard test, which long precedes *Fokker*:

> Before a court may issue the writ, three conditions must be satisfied:
> (i) the petitioner must have 'no other adequate means to attain the relief he desires';
> (ii) the petitioner must show that his right to the writ is 'clear and indisputable'; and
> (iii) the court 'in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.' "
>
> -- *Fokker*, 818 F.3d 733 at 747 (citation omitted).

We are concerned with condition (i). The general purpose of mandamus is to keep government officials from going *ultra vires*, from going beyond the powers legally allocated to their particular office:

> The historic and still the central function of mandamus is to confine officials within the boundaries of their authorized powers.
>
> -- *In re United States*, 345 F.3d 450 (Posner, J.)

> Where the appeal statutes establish the conditions of appellate review an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. *Cobbledick v. United States*, 309 U.S. 323, 60 S.Ct. 540. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a 'plain evasion' of the Congressional enactment that only final judgments be brought up for appellate review."
>
> *Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 30 (1943).

Mandamus is not meant simply to correct mistaken decisions, no matter how wrong they may be:

> This is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U. S. 258, 259–260 (1947)
>
> *Cheney v. U.S. District Court for the District of Columbia,*542 U.S. 367, 380 (2004)

> [T]he general principle which governs proceedings by mandamus is, that whatever can be done without the employment of that extraordinary remedy, may not be done with it.
>
> *Ex parte Rowland,* 104 U.S. 604, 617 (1881)

> Mandamus is not to be "used as a substitute for the regular appeals process,"
>
> *Dhiab v. Obama*, 787 F.3d 563, 568 (D.C. Cir. 2015) (quoting *Cheney*, 542 U.S. 367 at 380–81),

> "[E]xtraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay."
>
> *Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379, 383 (1953) (citation omitted))

Most simply mandamus is an application of the maxim of equity, "Every right has its remedy" ("*Ubi jus ibi remedium"*, "Where there's a right, there's a remedy") See *"Ubi jus ibi remedium - Oxford Reference". www.oxfordreference.com. doi:10.1093/oi/authority.20110803110448446*

IV. Sullivan's actions create irreparable harm: delay and money for Flynn, delay and money for the Justice Department, and ridicule for the D.C. Circuit.

But does Flynn have any right to be remedied? If his claims are correct, then eventually, whatever Judge Sullivan does, the prosecution against Flynn will be dropped, because Flynn can appeal and win later. So what's the harm?

Dilatory and frivolous proceedings will have cost Flynn tens of thousands of dollars in legal costs, perhaps hundreds of thousands. I have heard in private correspondence with a practitioner that courts don't consider that kind of harm a wrong, just the cost of justice. This Court said in *Fokker* itself:

> It is well established, however, that the `mere burden of submitting to trial proceedings that will be wasted if the appellant's position is correct does not support collateral order appeal.'" 15A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3911.4 (2d ed.1992).
>
> --*Fokker,* 818 F.3d 733, 748.

I would invite the Court to think more about that, and perhaps it does not apply to the facts in the present case. *Fokker* was a very complex case involving a judge turning down a plea deal, and it wasn't clear what would happen next if the mandamus were denied. It isn't clear here, either, so let me propose a hypothetical.

For the hypothetical, suppose a federal prosecutor moves to dismiss prosecution in the interests of justice and the trial judge responds by saying he has consulted his astrologer, who tells him that he should postpone making the decision for two years, until the planet have aligned in such a way that the astrologer can provide further input. Suppose further that the judge issues an order appointing the astrologer *amicus curiae*, with a directive that he is to report back in two years and provide his opinion as advice to the court.

This is an outlandish hypothetical, but brings the problem out sharply. What can the parties do? They can easily satisfy *Fokker* condition (ii): the judge is in the wrong. But what about condition (i)? The judge has not denied the motion to dismiss. Nor has he said he will base his decision on astrology--- just that he will allow his astrologer to submit an amicus brief in the same way as anyone can at the court's discretion. The astrologer is not an attorney, but that is not a bar to being an amicus. Amicus briefs are very frequently submitted by non-lawyers, and this very brief is an example. They can even be *pro se*, as this brief is. Even if they couldn't, the astrologer could be represented by counsel—indeed, he probably would be, if only to get the certificates and margin widths correct. So what's the harm?

In thinking about what the harm is, it's helpful to distinguish cases where a judge makes a mistaken decision (say, refuses a motion to dismiss when he ought to have granted it) from cases where a judge goes *ultra vires* or refrains from doing something duty requires him to do--- the kinds of cases everybody thinks suitable for mandamus consideration. Higher legal fees are indeed the cost of justice for dealing with fallible judges who do the things judges are tasked with doing but do them poorly. They are not the cost of justice for dealing with rogue judges who trespass onto the jurisdiction of other actors in our society.

But legal fees are not the only cost. In our astrologer hypothetical, what is the harm? Part of it is that the defendant is in limbo for two more years. "Justice delayed is justice denied." Vindication is valuable, especially to criminal defendants, even if, as with Flynn, the defendant is not waiting out the time till trial in jail. Indeed, one possible application of Rule 48 is to a situation where the prosecution moves to dismiss prosecution, but the defendant objects, and can persuade the judge to deny the motion. An important function of courts is to provide certification of who has committed bad acts and who has not, so that the public knows the truth when they need to interact with someone--- whether to hire someone as a daycare center manager, a security guard, or an accountant. If someone is charged with a crime, stigmatization starts immediately, because the government rarely brings charges without good reason, even if the reason may not turn out to be good enough by the end of the trial. A defendant who is charged with a crime for purely political reasons may not wish to have the charges dropped. He might prefer to have them dropped only if the prosecutor forcefully and publicly

declares his innocence, or he might wish to be brought to a trial that would end in humiliation of the prosecutor and his own well-publicized vindication. See Eric Rasmusen, "Stigma and Self-Fulfilling Expectations of Criminality," *The Journal of Law and Economics (*October 1996) 39: 519-544.

Delay is also harmful to the prosecutor. Prosecutors want to clear their dockets, just as judges do. They don't want to have to put a sticky note in their calendar reminding them to come back in two years. And if the prosecutor finds he has made a mistake in bringing charges and does the right thing and confesses this in court, it seems ignoble to repay him by keeping his mistake in the public view for more time than necessary.

The federal courts do, of course, recognize the problem of frivolous proceedings. Bring a frivolous suit against someone is not a legal wrong, to be sure. In general, the defendant victim cannot sue for damages, even when the plaintiff or prosecutor admits to lying and to being motivated by pure malice. Prosecutors, in particular, enjoy absolute immunity. I do not have time to research the law here, which in any case differs by jurisdiction, but what I see in Wikipedia's malicious prosecution article strikes me as correct in its quote about how judges view frivolous suits:

> Declining to expand the tort of malicious prosecution, a unanimous California Supreme Court in the case of *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 873 (1989) observed:
>
> "While the filing of frivolous lawsuits is certainly improper and cannot in any way be condoned, in our view the better means of addressing the problem of unjustified litigation is through the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct within that first action itself, rather than through an expansion of the opportunities for initiating one or more additional rounds of malicious prosecution litigation after the first action has been concluded."

But although it is difficult for the victims of frivolous proceedings to obtain tort damages, the courts do have other means for deterring frivolous proceedings. In particular, in federal civil suits, the victim may appeal to Rule 11, under which the court may punish a litigant who makes false claims about facts and false mispresentations about the law. The idea of Rule 11 is not to compensate victims, but to penalize offenders, as courts have widely recognized (though I lack the time to provide cites here today). At the same time, the usual method of its operation is for the victimized party to make a motion to the court requesting it to declare that the other party has violated the rule and to order the violator to pay a money penalty to the victim. This payment is not compensation-- the victim cannot complain that he has not been fully compensated—but the court will ordinarily make a rough estimate of the cost to the victim and order the violator to pay something similar, since the proper size of a fine to deter misbehavior is roughly proportional to the harm caused. Whether or not the victim is compensated, though, potential offenders are deterred. And Rule 11 also allow the court to impose a money or other penalty sua sponte, and to require the money to be paid to the government rather than to the other party if the court so decides. And Rule 11 is not just for deterring frivolous complaints: it can be applied, for example, to a frivolous motion that a party uses to try to delay the court from resolving the case, even if the suit itself is neither meritless to bring nor meritless in the claims made by the defendant. So the courts do care about frivolous proceedings, even if they are not legal wrongs that entitle a party to be paid damages or even entitle them to any other remedy *in personam*. Rather, frivolous proceedings are a legal wrong to the public, as represented by the court, a legal wrong to the dignity of the judicial system and to the money and talent which the public-- that ultimate principal, the United States of America—employs in making the judicial system run.

So a party to a lawsuit cannot bring a frivolous suit or delay proceedings with frivolous motions. But what if a judge brings a frivolous suit or delays proceedings with frivolous motions?

Such a thing sounds outlandish. How can a judge bring a frivolous suit? He's not a party. And motions are made to the court, not by the court.

We get the same effect, though, if the court will not allow the parties to drop a meritless suit, or if he orders sua sponte the same thing that would be frivolous if a party requested it by motion.

That is the question in In re Flynn. Has the trial court judge ordered, *sua sponte*, that the proceedings drag on after the law has declared that they are finished? We cannot apply Rule 11 to the judge. It would be unseemly and impractical to ask a court of appeals to make a district judge pay fines to litigants on whom he had inflicted damage by lawless legal delays. (Even though we could imagine

that—remember, this is not for legal mistakes in deciding Yes instead of No, but for a judge who has extended himself to ordering things beyond his authority altogether.) Instead, since we cannot wait for appeal and order the malfeasor to pay money damages, with pre-judgement interest, to his victims, we use the procedure of mandamus. This prevents the irreparable harm and protects the dignity of the courts.

And that brings us to the last and perhaps most important category of harm, beyond the harm to defendant Flynn and the harm to prosecutor Justice Department: the harm to the D.C. Circuit court. The main harm in the astrologer hypothetical is not to defendant or prosecutor, but to the court. The main harm from an agent's misbehavior is to his principal, not to the third parties with whom he interacts. If a judge were to delay proceedings two years so he could listen to astrologers, as in our hypothetical, not just he but his court would become a laughingstock. The judge, of course, is willing to accept this burden, since he thinks that justice demands he wait for the planets to align properly and he is willing to accept ridicule. *Fiat justitia ruat caelum*. But it is not just the judge that bears the cost, but the court. The judge's colleagues on the bench lose credibility when he loses credibility. They lose even more credibility if they are asked to intervene and do nothing. The public soon forgets which particular judge relies on astrology, but they remember that the court in that city is staffed by people who rely on astrology, and by other people who, even if they don't use it themselves, don't seem to mind if their colleagues do.

In my scholarly area, the Japanese judiciary, I emphasize that different judicial systems use different methods to avoid politicization and maintain legitimacy. In Japan, judges (except for supreme court judges) join the bench after passing a highly competitive examination at a young age, and then rise through the ranks, as in the U. S. Foreign Service. If you are especially promising, you start in Tokyo District Court, then are assigned to the boondocks to keep you modest, then return if you do well. If you do badly, however, you end up doing divorces in Okinawa for the rest of your life. The Secretariat which controls judicial assignments to cities and courts is extremely powerful, but the good side of this is that hard-working, responsible, and especially talented judges (they are all talented) are rewarded. A less capable judge can be quarantined in a relatively unimportant job. See J. Mark Ramseyer and Eric Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan,* Chicago: The University of Chicago Press, 2003; J. Mark Ramseyer and Eric Rasmusen, "Why Are Japanese Judges So Conservative in Politically Charged Cases?" *American Political Science Review*, 95(2): 331-344 (June 2001).

In the U.S. federal system, on the other hand, judges are neither promoted nor demoted. Impeachment, and appointment to the Supreme Court, are both so rare as to be ineffective as sticks and carrots. Judges stay in the same job and the same city, as a general rule. District judges do not desire to be circuit judges, nor do circuit judges desire to be district judges, though both can and do request temporary visiting positions in the others' courtroom so they can better learn how to do their own jobs.

Thus, we have need of procedures such as mandamus to maintain incentives. Mandamus is important to right particular wrongs, but also to deter judges who might be tempted to overstep their authority. A U.S. federal judge soon learns to have a thick skin when it comes to what people think about him, except for one particular class of people--- other judges. That concern, on top of the desire to do one's duty which we hope everyone has but which for most of us needs strengthening by material or reputational incentives, is important to maintaining the integrity of the courts.

The loss to a court from a judge engaging in frivolous and politicized proceedings increases with the time those proceedings entertain the public and create heat that divides the public and the bar along partisan lines, lending evidence to the claims commonly made in different ways by uneducated and highly educated people that justice is "the will of the stronger," rather than "doing what is right, whether that hurts friend or foe." (Plato, *The Republic*, Book I).

Judge Sullivan's brief says,

> "Mr. Flynn likewise errs in seeking mandamus on the basis that further proceedings in the district court "will subject [DOJ] to sustained assaults on its integrity." Pet. 28. Judge Sullivan has not disparaged DOJ's integrity in any way."

Judge Sullivan doesn't get it. It's not that further proceedings in the district court will subject the Department of Justice to sustained assaults on its integrity. The Department of Justice has come clean and acknowledged its prosecution was improper, contrary to the interests of justice. No--- the problem is that further proceedings in the district court will subject the D.C. Circuit to sustained assaults on its integrity. The longer the circus continues, the longer the D.C. Circuit--- the members of which are jointly responsible for monitoring their colleagues—looks bad. If the public loses faith in prosecutors, that is no great loss. Everyone knows lawyers are supposed to represent clients, and prosecutorial zeal, even if sometimes excessive, is at least balanced by the sometimes excessive zeal of the defense bar. Even though we expect attorneys to be biased, we know the courts can--- if they choose--- restrain abuse of the legal process. If the public loses faith in the courts, however, that is fatal to the rule of law. If the courts lose legitimacy, final judgments will no longer be final, because "the Court ruled against you" will become, "Judge Sullivan ruled against you," no more dispositive than "President Trump says you're stupid." Loss of faith in the courts is irreparable harm indeed.

V. En banc procedure is another example of the principal-agent problem, with the full court sitting en banc to correct the errors of its agent, the three-judge panel, but it is not something to which any of its agent, including the panel or a judge subject to mandamus, has a legal right.

Let us now return to a less grand theme: the jurisprudence of the en banc sitting. Rule 35 provides for this because courts organize themselves, in the interests of efficient justice, by a sort of triage. In triage, the wounded are divided into three groups: the lightly wounded who receive no treatment; the heavily wounded who, too likely to die, receive no treatment; and the moderately wounded, on whom the doctors expend their utmost care. A petition for mandamus commonly meets with a simple *per curiam* reply to the effect of "Denied", with no need for further proceedings. We could also imagine a simple *per curiam* reply of "Granted". The hard cases, like the present one, are given to a three-judge panel for close consideration. That panel is an agent of the full court. If, as happens occasionally, it seems the panel may not have represented the full court correctly, the full court decides to sit en banc and figure out whether that supposition was correct, vacating the panel's decision and replacing it with one by the full court (though of course the full court could decide to make the replacement word-for-word the same as the original if it decides, on due consideration, that the panel was right after all).

Rule 35 allows the parties to petition for an en banc decision, but they have no right to one; it is merely a petition, as with mandamus or certiorari. The court can sit en banc *sua sponte* too, and that would be the most desirable outcome, as with mandamus, but panels decide so many cases that it is convenient to wait for a party to ask first, since it is troublesome enough to file such a petition that parties will not file them as a matter of course. In a high-profile, politicized, case like In re Flynn, we can expect enough members of the Court to be following what the three-judge panel do that a petition is hardly necessary.

Rule 35 says specifically that parties may petition for an en banc decision. It does not say that non-parties cannot so petition, leaving that an interesting question. On the one hand, *expressio unius, exclusio alterius:* allowing parties implies not allowing nonparties. On the other hand, since the parties have no right to have their petition granted, just a right to present it, and the court could go en banc *sua sponte* anyway, the logic of Rule 35 is that the reason for the petition is just to bring something to the court's attention that would be for the good of the court, not of the party bringing the petition, and a non-party can bring information bearing on the public good to the court just as well as a party can. Indeed, a non-party has less bias, although this combines with the unfortunate and usually fatal problem that having no bias means no personal incentive to go to the trouble of petitioning.

There is one particular kind of non-party who should NOT be allowed to petition, however: judges. Judges are agents of their court. They are supposed to follow the orders of their court. If a district judge is reversed by the court of appeals, he has no right to petition the Supreme Court to reinstate his decision. He is not supposed to care about his decision, except insofar as it lines up with the law as laid down by his court. If the court of appeals tells him he is wrong, he is supposed to be quiet, even if

he thinks the appellate judges are wrong--- as indeed, is probably the situation 90% of the time when a district judge is reversed. He is not supposed to publicly criticize the appellate judges. If he were to petition the Supreme Court to reverse the appellate court, that would in itself be public criticism. Similarly, a dissenting member of a three-judge panel is not a party to the case and cannot petition for en banc rehearing or petition the Supreme Court for reversal. He has had his chance to disagree, and it is perfectly proper for him to write a dissenting opinion, but he should not publicly challenge his court.

Thus, in *In re Flynn,* it was improper for Judge Sullivan to petition the D.C. Circuit Court of Appeals for an en banc decision. Moreover, even if he were to do so, he could have minimized the damage to judicial integrity by petitioning in one sentence, without a brief criticizing the Court's panel. (I use "integrity" here in the sense of "the state of being whole and undivided " and "a sound, unimpaired, or perfect condition", not "adherence to moral and ethical principles; soundness of moral character; honesty".)

Judge Sullivan's petition suggests that he has been swept away by personal emotion in this case, become Judge Ahab chasing Moby Flynn, like Moby Trump, that great white whale against whom so many investigators have wandered the sea looking for something to throw a harpoon at. That would argue for reassignment of the case to someone more dispassionate with respect to this particular matter.

VI. Conclusion

For the reasons stated in the Government's Motion to Dismiss, and the further reasons set out above, a writ of mandamus should issue, instructing the district court: to grant the Justice Department's Motion to Dismiss unless the district court finds reason in the existing record not to do so; to vacate the district court's order appointing *amicus curiae*; and to reassign the case to another district judge for any further proceedings as may be required.

Respectfully submitted,

Eric B. Rasmusen

ERIC B. RASMUSEN
Kelley Sch. of Bus, Indiana University
1309 E. Tenth Street
Bloomington, Indiana 47401
(812) 345-8573, Erasmuse61@gmail.com
pro se