
No. 20-5143

JUNE 5, 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**

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

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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 10 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, 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, and invited the Department of Justice to respond. Judge Sullivan responded, via counsel, and so did the Department of Justice--- in support of the mandamus petition. Various amicus briefs were submitted, and on June 2 the panel said that any further motions for leave to participate as amici curiae, and associated briefs, should be submitted by June 5. The present brief is one example.

ARGUMENT

I. Mandamus is not about trial judges making wrong decisions, but about trial judges making the wrong kind of decisions.

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.

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. As I just said, we strictly limit the time: the court refuses to look at more than 100 or so pages of writing or to listen to more than 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.

Now consider the present case. Flynn says that the court should have granted the Department of Justice's motion to dismiss the prosecution and should not have asked for amicus curiae to participate. His claim is not just that the judge is wrong about the dismissal decision, which in fact has not even been made yet. Crucially, he claims that some of what the trial court is doing goes beyond its authority, and some of what it is doing shirks its duty. The trial court is doing too much and too little. The trial court is appointing an amicus, which is beyond its authority, and refusing to dismiss the prosecution, which is its duty. Flynn's third petition point is that he claims the trial judge is so bad in both directions, at least in this particular case, that he should be replaced.

Let us not here consider whether Flynn is right or wrong about the trial court's malfeasance, nonfeasance, and general inability to stay on track. The parties and other amici discuss that at length, and I have nothing new to say on it. Suppose he is right. Why should this Court act now, instead of waiting?

The Court should act now precisely because this is not a question of fixing a mistake the trial court made in making the kind of decisions trial courts are tasked with making. The trial court is supposed to be carrying out its assigned duty--- approving dismissal, or denying dismissal if it has good reasons to deny--- but instead is delaying its decision for no good reason, and, worse, is initiating new proceedings not within its authority. If the trial court has good reasons to deny the motion to dismiss, it should deny the motion, and state its reasons so that later that decisions can be reviewed by an appellate court. If the trial court just has suspicions that there might exist good reason to deny the motion to dismiss, it should swallow its doubts and dismiss anyway. What the trial court should not do is say that it has doubts about dismissal and needs to start a novel kind of investigation, an investigation with unclear parameters and of possibly unbounded length, soliciting evidence from everybody in Washington who might care to enter with facts, law, or opinion. It isn't entirely clear what Rule 48 means exactly, but it doesn't empower the trial court to launch investigations of corruption in high places. That's what grand juries do, not judges.

Let us now turn to the particular mandamus law of the federal courts of the United States of America.

II. Federal law, in particular, uses mandamus to make judges do what judges are supposed to do, not to make them do it right.

This Court's recent *Fokker* decision lays out the standard test for mandamus, 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.2011080311044844](https://doi.org/10.1093/oi/authority.2011080311044844)
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III. Judge Sullivan’s actions will create irreparable harm if not reversed.

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 later. So what’s the harm?

Dilatory and frivolous proceedings will have cost Flynn tens of thousands of dollars in legal costs, to be sure--- perhaps hundreds of thousands--- but it isn’t clear that the law considers that a wrong, rather than 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.

But of course the main harm in the astrologer hypothetical is not to the defendant or the prosecutor, but to the court. If such a thing were to happen, the court would be a laughingstock. The trial 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.

IV. 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; 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