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# In Michael Flynn's case, there is nothing left to judge

## Judge Emmet Sullivan should not force Justice Department and former national security adviser to continue: Opposing view

David Oscar Markus, Opinion contributor

Chief Justice John Roberts said judges, like umpires, are there “to call balls and strikes and not to pitch or bat.” The Justice Department and Michael Flynn agree that their contest is over, so Judge Emmet Sullivan should not force the parties to keep playing.

Our Constitution grants judges power only in an actual controversy, which no longer exists here. This is no abstract principle. The Supreme Court described it as “fundamental to the [judiciary’s proper role](#) in our system of government.” Just this month, Justice Ruth Bader Ginsburg held for a unanimous court that the judiciary “should not ... sally forth each day [looking for wrongs to right](#).” This is especially true in a criminal case, where the judiciary’s role is to protect criminal defendants from overzealous prosecutors.

Yes, Attorney General William Barr’s decision looks political. But courts are not set up to address politics. When they do, it usually undermines the judiciary, as in *Bush v. Gore*.

If we look the other way in this case because we don’t like the defendant or his supporters, it will likely result in a more politicized judiciary, not a less politicized Justice Department.

The only time judges should weigh in on prosecutorial decisions is when the executive branch breaks a rule to hurt a defendant. The judiciary is meant to check government over-reaching, not to prod them into prosecuting. Prosecutors haven’t violated anyone’s rights by deciding to drop this case. Our system is riddled with prosecutorial abuses, including forcing innocent people to plead guilty with abusive tactics like threatening family members with charges. Those are the cases that should provoke outrage.

In our system, each side is responsible for its own case. Judges ensure that government treats the defendant fairly. They have no interest in forcing prosecutors to prosecute. The parties have resolved their dispute, so there is nothing left to judge. As Justice Roberts put it, “Nobody ever went to a ball game to see the umpire.”

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