Of Amici Curiae and Radical Transformations

"IT NEEDS TO STOP"

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Date	#	Docket Text
[illegible]2020	200	ERRATA by USA as to MICHAEL T. FLYNN 198 MOTION to Dismiss Case filed by USA (Ballantine, Jocelyn) (Entered: 05/11/2020)
05/12/2020	202	NOTICE *of Consent to Government's Motion to Dismiss* by MICHAEL T. FLYNN re 198 MOTION to Dismiss Case (Binnall, Jesse) (Entered: 05/12/2020)
05/12/2020		MINUTE ORDER as to MICHAEL T. FLYNN. Given the current posture of this case, the Court anticipates that individuals and organizations will seek leave of the Court to file amicus curiae briefs pursuant to Local Civil Rule 7(o). There is no analogous rule in the Local Criminal Rules, but "[the Local Civil] Rules govern all proceedings in the United States District Court for the District of Columbia." LCvR 1.1. "An amicus curiae, defined as friend of the court,... does not represent the parties but participates only for the benefit of the Court." *United States v. Microsoft Corp.*, No. 98-cv-1232(CKK), 2002 WL 319366, at *2 (D.D.C. Feb. 28, 2002) (internal quotation marks omitted). Thus, "[i]t is solely within the court's discretion to determine the fact, extent, and manner of the participation." *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008) (citation and internal quotation marks omitted). "An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. Otherwise, leave to file an amicus curiae brief should be denied." *Id.* at 137 (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th Cir. 1997)); *see also* LCvR 7(o). Although there is no corollary in the Local Criminal Rules to Local Civil Rule 7(o), a person or entity may seek leave of the Court to file an amicus curiae brief in a criminal case. *See* Min. Order, *United States v. Simmons*, No. 18-cr-344 (EGS) (D.D.C. May 5, 2020); *cf. United States v. Fokker Servs. B.V.*, 818 F.3d 733, 740 (D.C. Cir. 2016) (appointing amicus curiae in a criminal case). As Judge Amy Berman Jackson has observed, "while there may be individuals with an interest in this matter, a criminal proceeding is not a free for all." Min. Order, *United States v. Stone*, No. 19-cr-18 (ABJ) (D.D.C. Feb. 28, 2019). Accordingly, at the appropriate time, the Court will enter a Scheduling Order governing the submission of any amicus curiae briefs. Signed by Judge Emmet G. Sullivan on 5/12/2020. (lcegs3) (Entered: 05/12/2020)

(May 14, 2020) — The strange case against Michael Flynn metastasizes into the bizarre. After entering an order stating that he would "at the appropriate time" issue a "scheduling order" allowing essentially anyone on the planet to prepare and file *amicus curiae* briefs in the case of *United States v. Michael Flynn*, Judge Emmet Sullivan has on his own appointed his own personal "*amicus curiae*" to advise him on what next to do.

The appointed *amicus curiae* is a retired federal judge, one John Gleeson, now in private practice. He recently was the co-author of a *Washington* ("Hello Darkness, My Old Friend") *Post* op-ed suggesting that the DOJ motion to dismiss the charges would result in a "miscarriage of justice" and should be denied. No wonder Sullivan tapped this guy to "advise" him.

The stated purpose of the appointment in Sullivan's order is to "present arguments in opposition to the government's motion to dismiss" and to advise the judge on whether he should issue an "order to show cause" to Flynn as to why he should not be held in "criminal contempt for perjury" under 18 U.S.C. § 401; Federal Rule of Criminal Procedure 42; and (this is good): "the Court's inherent authority, and any other applicable statutes, rules or controlling law."

18 U.S.C. § 401 empowers a court to punish the "misbehavior" of any person in its presence or so near thereto as to obstruct the administration of justice; the "misbehavior" of any of its officers in their official transactions; or the disobedience or resistance to its lawful writ, process, order, rule, decree, or command. Ummmm.... while "perjury" is technically a form of "misbehavior," the federal crime of "perjury" is mentioned *nowhere*

in the statute. Perhaps Sullivan meant to reference that statute in his order, but failed to do so. It will be interesting to see what Gleeson can conjure up as "perjurious" statements by Flynn.

Wait… wait… maybe the "perjury" is Flynn's entering a plea of guilty when he *knew* he was innocent. Would that not be ironic? Do not put it past Gleeson – or one of the other 411 leftist *amici curiae* law professors, attorneys, and "interested parties" contemplating submitting briefs to Sullivan – to make that argument. In fact, the only people guilty of "misbehavior" in this evolving train-wreck – and arguably aggravated *criminal* misbehavior – are those from the Obama cabal responsible for the framing, entrapment, threatening, false and malicious prosecution and "unmasking" of General Flynn in the first place.

You know some of their surnames: Comey; McCabe; Strzok; Brennan; Clapper; Biden; and, yes, the Second Usurper-in-Chief of the United States, Obama. But since those defalcations took place in the bowels of the Deep State and the Oval Office rather than in the actual presence of Sullivan, that statute would likely not apply to them. It will be interesting to see what "misbehavior" Gleeson will conjure up as to General Flynn.

As for Federal Rule of Criminal Procedure Rule 42, much like 18 U.S.C. § 401, it provides for the punishment of "criminal contempt" of court. In general, contempt of court is broadly defined as any act which is calculated to embarrass, hinder, or obstruct a court in the administration of justice or which is calculated to lessen the authority or dignity of a court. That is an exceedingly broad definition which could extend, for example, to a U.S. Supreme Court unanimous decision which excoriates a lower court – say, the U.S. Court of Appeals for the Ninth Circuit – for commandeering the theory of a criminal case before it and altering it, on the advice of its own appointed *amici curiae* counsel, to suit its own view of what the charges and result *should* be. More on that in a moment…

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Syllabus

First Amendment. In accord with the *amici's* arguments, the Ninth Circuit held that §1324(a)(1)(A)(iv) is unconstitutionally overbroad.

Held: The Ninth Circuit panel's drastic departure from the principle of party presentation constituted an abuse of discretion.

The Nation's adversarial adjudication system follows the principle of party presentation. *Greenlaw* v. *United States*, 554 U. S. 237, 243. "In both civil and criminal cases, . . . we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.*, at 243.

That principle forecloses the controlling role the Ninth Circuit took on in this case. No extraordinary circumstances justified the panel's takeover of the appeal. Sineneng-Smith, represented by competent counsel, had raised a vagueness argument and First Amendment arguments homing in on her own conduct, not that of others. Electing not to address the party-presented controversy, the panel projected that §1324(a)(1)(A)(iv) might cover a wide swath of protected speech, including abstract advocacy and legal advice. It did so even though Sineneng-Smith's counsel had presented a contrary theory of the case in her briefs and before the District Court. A court is not hidebound by counsel's precise arguments, but the Ninth Circuit's radical transformation of this case goes well beyond the pale. On remand, the case is to be reconsidered shorn of the overbreadth inquiry interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties. Pp. 3–9.

910 F. 3d 461, vacated and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion.

https://www.supremecourt.gov/opinions/19pdf/19-67_n6io.pdf

Finally, Sullivan's order directs Gleeson to consider other bases for sanctions, including "controlling law." How's this for some "controlling law?": On May 7, 2020, the Supreme Court handed down its unanimous (9-0) decision in *United States v. Sineneng-Smith*. The opinion, written by Justice Ginsburg – with a concurring opinion by Justice Thomas… how often will you see *that?* – dealt with a criminal prosecution and conviction of a person for immigration fraud. At the district court level, the parties, through their lawyers, presented their respective cases. The defendant appealed.

On appeal to the Ninth Circuit, however, instead of reviewing and adjudicating the case presented by the parties, the appellate panel on its own motion named three "pro-immigration" *amici curiae* and invited them to brief and argue issues framed not by the parties, but by the Ninth Circuit panel. This included a question never raised by Sineneng-Smith: whether the statute under which she was convicted was unconstitutionally overbroad under the First Amendment. In accord with the *amici's* arguments, the Ninth Circuit held – shockingly – that the subject statute was overbroad.

In reversing and vacating the Ninth Circuit decision (imagine that….), the Supreme Court – did I mention, unanimously – held that the panel's "drastic departure from the principle of party presentation constituted an abuse of discretion." The Court added that "[t]he Nation's adversarial adjudication system follows the principle of party presentation…" and that "in both civil *and criminal cases*, . . . we rely on the parties to frame the issues for decision and *assign to courts the role of neutral arbiter of matters the parties present.*" (Emphasis added). The Court observed that there were no "extraordinary circumstances" justifying the "takeover of the appeal…" and noted that "a court is not hidebound by the precise arguments of counsel, *but the Ninth Circuit's radical transformation of this case goes well beyond the pale*." (Emphasis added) Recall, these are the words of Ruth Bader Ginsburg.

Respectfully, a cogent analogous argument can be made that Judge Sullivan's actions in the Flynn case – inviting, potentially, dozens if not scores or hundreds of *amicus curiae* briefs, further delaying final justice for General Flynn – is precisely the species of "radical transformation" condemned by the Supreme Court in the *Sineneng-Smith* case. There would appear to be no rational reason for Judge Sullivan's actions other than delay, perhaps into November …after all, it will take a long time to read and analyze 411 – or more – *amicus curiae* briefs.

As predicted, this case becomes uglier with each passing day. It needs to stop.