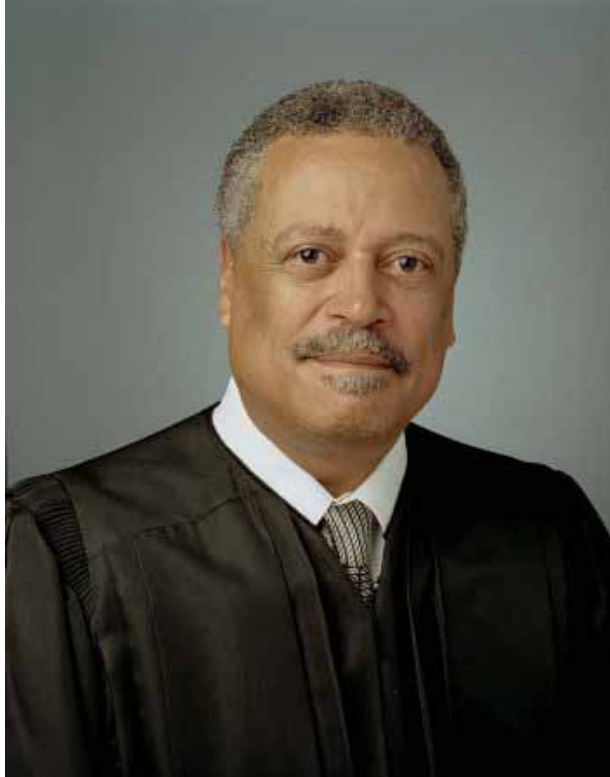


# With “Friends of the Court” Like These, Michael Flynn Needs No Enemies

“VERY UGLY”

by [Joseph DeMaio](#), ©2020



*U.S. District Court Judge Emmet G. Sullivan, [public domain](#)*

(May 13, 2020) — Really? I mean..., *really?* Following the filing by the Justice Department of a [motion](#) to dismiss the criminal charges against Michael Flynn, instead of ruling on the motion, the judge presiding over the case – one Emmet G. Sullivan, appointed to the federal District Court by Bill Clinton – has now determined to allow the filing of *amicus curiae* or “friend of the court” briefs.

In so doing, Judge Sullivan has unnecessarily extended the ordeal for Flynn, as his order ends with these vague words: “Accordingly, at the appropriate time, the Court will enter a Scheduling Order governing the submission of any *amicus curiae* briefs.” Translation: at some undefined date in the future – but clearly closer to November 3, 2020 than now – an order will be entered allowing “interested individuals and organizations” to prepare and file *amicus curiae* briefs.

Apart from the propriety or “wisdom” of allowing unrelated, purported “*amicus curiae*” persons or entities to participate at the *trial* level in a criminal case – a conceptual impediment glossed over by Judge Sullivan by citing one of his *own* rulings in a different criminal case pending in his *own* court (*ipse dixit* in action), he references by a “*cf.*” Latin signal (*i.e.*, “compare” the referenced thing to a previous statement) the case of [United States v. Fokker Services B.V.](#), 818 F.3d 733 (D.C. Cir. 2016).

That case is cited for the proposition that it allowed appointment of *amicus curiae* in a criminal case. Judge Sullivan conveniently omits that (a) the level where the *amicus curiae* participated was on appeal, *not* at the trial court level; (b) the appellate court on its *own* motion appointed the *amicus curiae* rather than on the motion of an unrelated, outside third party; and (c) the appellate court ultimately rejected the arguments made by the *amicus curiae*. Memo to litigants: when citing cases intended to support your position, choose ones that do not undercut it.

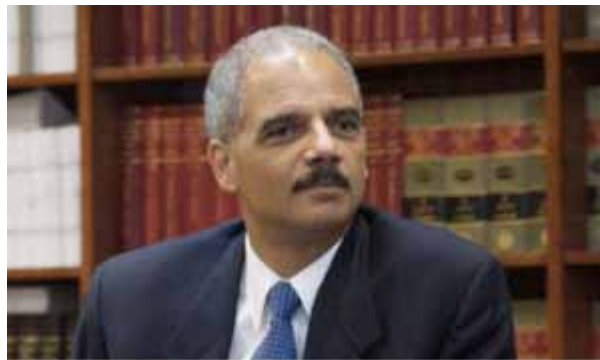
Moreover, while an argument can be made that the facts and legal issues in the *Fokker B.V.* case are distinguishable from those in the Flynn situation, much of what the Circuit Court had to say there has compelling relevance here. For example, in addressing the issue of the propriety of a trial judge “second-guessing” the prosecutorial decisions of the government’s lawyers, it noted: “The Constitution allocates primacy in criminal charging decisions to the Executive Branch. The Executive’s charging authority embraces decisions about whether to initiate charges, whom to prosecute, which charges to bring, *and whether to dismiss charges once brought*. It has long been settled that *the Judiciary generally lacks authority to second-guess those Executive determinations*, much less to impose its own charging preferences.” (Emphasis added)

In addition, the Circuit Court held: “Congress, in providing for courts to approve ... [legal standards in the statutes at issue in the *Fokker B.V.* case] acted against the backdrop of long-settled understandings about the independence of the Executive with regard to charging decisions. Nothing in the statute’s terms or structure suggests any intention to subvert those constitutionally rooted principles so as to enable the *Judiciary to second-guess the Executive’s exercise of discretion over the initiation and dismissal of criminal charges*. In vacating the district court order, we have no occasion to disagree (or agree) with that court’s concerns about the government’s charging decisions in this case. Rather, *the fundamental point is that those determinations are for the Executive – not the courts – to make.*” (Emphasis added)

Oh, and did I mention that one of the attorneys *successfully* representing the United States in the *Fokker B.V.* case – arguing in favor of recognition of the right of the prosecutor *alone* to determine whether and how to prosecute (or not prosecute) a defendant – was one Mary McCord? Yes, Virginia, the same Mary McCord now [battling](#) Attorney General Barr over the Justice Department’s decision to dismiss the charges in the Flynn case. Lawyers have an uncanny ability to do 180° flip-flops when necessary. Or expedient. And remember, Attorney General Barr did not make the recommendation that the charges be dismissed: that advice came from an independent counsel – District

U.S. Attorney [Jeffrey Jensen](#) from Missouri – who Barr had assigned to review the case. Barr merely accepted the advice.

Judge Sullivan’s nakedly partisan and political move allows the filing of *amicus curiae* briefs by people who have *zero* interest in being “friends of the court.” Instead, they seek only to “instruct the court” to deny the Justice Department’s motion to dismiss the charges and further extend Michael Flynn’s ordeal. Oh, and push the matter out as far as possible to further harass President Trump in the run-up to the general election. It is that simple. Perhaps one or more of the briefs will suggest that, if the judge “second-guesses” the Justice Department and denies the motion to dismiss, but the DOJ declines to participate in the “sentencing” phase of the case, an “independent prosecutor” should be appointed by Judge Sullivan. Who might fit the bill...?



*Eric Holder is now a [partner](#) at Covington & Burling, Flynn’s first law firm*

Ummm... how about Eric Holder, Attorney General under Barack Hussein Obama, Jr.? Nah... he now works at Covington & Burling, Flynn’s former lawyers. That law firm, some might argue, “sold him up the river” by cutting undisclosed “side deals” with the Justice Department’s prior assigned [prosecutor](#) and withheld some 330,000 documents from Flynn’s new lawyers. Conflict of interest.

How about former Obama administration Attorney General Loretta Lynch? Nah... that could bring up the June 2016 “golf and grandkids meeting” with Bill Clinton on the [tarmac](#) of Phoenix Sky Harbor International Airport. You remember..., that “social” visit just days before then-FBI head James Comey said no reasonable prosecutor would charge Hillary (“BleachBit-what-BleachBit?”) Clinton for housing classified State Department data on her home-brew computer and deleting over 30,000 emails which were already under congressional subpoena. Too risky.

As a last-ditch suggestion, maybe the “[Watergate Prosecutors](#)” could volunteer. Do not bet the farm that something like that is impossible. After all, Judge Sullivan has himself in court already asked the Justice Department attorneys whether or not they had considered recommending the death penalty for Flynn on the grounds of [treason](#).

This could get very ugly, very soon.