Flynn Judge Should Not Change Role Of Amicus Curiae

By **Lawrence Ebner** (May 20, 2020)

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As I wrote last week, U.S. District Judge Emmet G. Sullivan's May 13 appointment of former U.S. District Judge John Gleeson as amicus curiae in the case of former Trump national security adviser Michael Flynn — specifically, to argue against the U.S. Department of Justice's motion to drop its prosecution in light of recently uncovered exculpatory evidence — is troubling on many levels.

Flynn case developments since last week have only heightened my professional anxiety about the way that Judge Sullivan is attempting to use amici curiae. More specifically, as an appellate attorney who has authored numerous amicus briefs, and written and spoken about the proper role of amici curiae in the federal judicial system, I am deeply concerned about Judge Sullivan's transformation of amici curiae into 11th-hour prosecutorial intermeddlers.

Fast-Moving Developments

To recap, on May 12 — five days after the U.S. attorney for the District of Columbia moved to dismiss the information against Flynn, and one day after a group of "former Watergate prosecutors" notified the court of their intent to file an amicus brief — Judge Sullivan entered a minute order that signaled his willingness to accept amicus briefs from "individuals and organizations." The same day, Flynn's attorneys filed an opposition to submission of any such brief. They argued that any such third-party amicus filing in a criminal proceeding violates the separation of powers and thus would be improper.

But on May 13, Judge Sullivan issued a sua sponte order appointing Gleeson as amicus curiae "to present arguments in opposition to the government's motion to dismiss," and to "address whether the Court should issue an Order to Show Cause why Mr. Flynn should not be held in criminal contempt."

Gleeson followed up his appointment as amicus curiae by submitting on May 15 a motion to establish a briefing schedule. In that motion, Gleeson not only requested to have until June 10 to file an amicus brief, but also asked for the opportunity to submit a reply to the briefs that the government and Flynn will file in response to his amicus brief. And Gleeson also requested that a date be set for oral argument, in which he presumably would participate.

On May 18, 15 states' attorneys general filed an amicus brief illuminating the separation of powers concerns that Judge Sullivan's appointment of Gleeson has triggered. The state AGs' brief explains that "the federal judiciary has no authority to make the executive branch pursue (or continue to pursue) a criminal conviction." Further, the AGs brief cautions that any "commentary" by the court on the wisdom of the Justice Department's decision to dismiss the Flynn case, including through submission of amicus briefs arguing against dismissal, would be "punditry [that] disrobes the judiciary of its cloak of impartiality."

Nonetheless, on May 19, Judge Sullivan, in lockstep with Gleeson, issued a minute order establishing the requested briefing schedule. The minute order allows Gleeson to file not only an amicus brief, but also a reply to the government's and Flynn's responses to that brief.

On top of that, the order allows the government and Flynn to file surreplies to Gleeson's reply. The order appears to grant the former Watergate prosecutors' request to file an amicus brief. It also sets deadlines for additional amici to seek permission to file, and for the government, Flynn and Gleeson to file "a consolidated response" to those non-court-appointed amicus briefs. Significantly, the minute order sets July 16 as the date for oral argument, which presumably would include oral argument from Gleeson.

All this may be for naught since on May 19, Flynn filed an emergency petition for a writ of mandamus in the U.S. Court of Appeals for the District of Columbia Circuit. The petition argues that case law precedent, especially United States v. Fokker Services BV,[1] establishes that Judge Sullivan lacked authority to appoint an amicus curiae to argue against dismissal of the case, and that dismissal must be granted.

An Amicus Curiae Cannot Serve as a Substitute Prosecutor

In the vast majority of cases, service as an amicus curiae entails a single event — submission of an amicus brief in civil litigation. And such briefs almost always are filed at the appellate level, not in trial courts. In fact, although federal district courts sometimes exercise their discretion to entertain nongovernmental amicus briefs, the local rules of the U.S. District Court for the District of Columbia are unusual because they include Local Rule 7(o) ("Brief Of an Amicus Curiae").

Amici curiae almost never are allowed to file reply briefs, much less surreplies to other amicus briefs. And except when the solicitor general participates in U.S. Supreme Court hearings as amicus curiae on behalf of the United States, amici curiae, especially nongovernmental amici curiae, usually are not afforded the opportunity to present oral argument in federal courts.

Aside from the expanded written and oral advocacy role that Judge Sullivan is allowing Gleeson to play as an amicus curiae — and the impropriety of Gleeson advocating against dismissal of a criminal prosecution that the government has decided not to continue pursuing — there is an additional alarming aspect to the apparently well-coordinated amicus effort that Judge Sullivan has appointed Gleeson to undertake: In his May 15 motion, Gleeson requested to have until June 10 to submit a brief addressing, among other things, "any additional factual development I may need before finalizing my argument in opposition to the government's motion in this case."

The idea that an amicus curiae, even a court-appointed retired federal judge, is somehow entitled to enlist a federal district court's aid in developing additional facts needed to draft an amicus brief against dismissal of a criminal case turns the proper role of an amicus curiae on its head. An amicus curiae is supposed to bring additional matter within its knowledge (e.g., legal argument; nonadjudicatory information) to the attention of a court — not obtain additional evidence from a court.

For example, Supreme Court Rule 29.1 states that "[a]n amicus curiae brief that brings to the attention of the Court relevant matter relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored."

An amicus curiae is not a party or an intervenor. It has no right to elicit from the court or the parties (e.g., the United States or Flynn) any factual material not already in the public record of a case. And an amicus curiae cannot introduce its own adjudicatory facts, because the parties have no right to test such evidence through cross-examination. This is why the

traditional role of an amicus curiae is to file a brief in an appellate court, where the evidentiary record already is established.

One can only imagine what Gleeson may have in mind by his reference to "any additional factual development that [he] may need" to fulfill his role as amicus curiae in opposition to dismissal of the Flynn case. Would he like to cross-examine Flynn and/or current or former government officials before submitting his brief? That would be outrageous.

An amicus curiae is a creature of the federal government's judicial branch, not the executive branch. He is not, and cannot be, a prosecutor, much less a substitute for the U.S. attorney in the Flynn case. An amicus curiae has no ability to hijack — or delay — a judicial proceeding in the manner that Gleeson, apparently with Judge Sullivan's encouragement, seems to be planning.

Hopefully, the D.C. Circuit will issue a writ of mandamus and direct Judge Sullivan (or a replacement for Judge Sullivan) to dismiss the Flynn case at once. Such a mandate not only would afford Flynn the justice he deserves, but also would preserve the proper role of an amicus curiae in the federal judicial system.

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[1] United States v. Fokker Services, B.V., 818 F.3d 733 (D.C. Cir. 2016)