EMMET SULLIVAN TELLS POTENTIAL AMICI NOT TO BUG HIM YET

We've been waiting for Emmet Sullivan's response to the government's motion to withdraw the Mike Flynn prosecution. Flynn filed to say they'd put all their other requests on ice in light of the government's motion. Then today, they said — nudge nudge — they'd be happy with the government's request.

Yesterday, Timothy Shea sort of cleaned up his mess with using Jesse Liu's bar number to submit something utterly conflicting with what has previously been submitted under Liu's bar number.

That revealed there's a gap in the docket — someone did something under seal.

05/11/2020	200 R	ERRATA by USA as to MICHAEL T. FLYNN 198 R MOTION to Dismiss Case filed by USA (Ballantine, Jocelyn) (Entered: 05/11/2020)
05/12/2020	202 R	NOTICE *of Consent to Government's Motion to Dismiss* by MICHAEL T. FLYNN re 198 R MOTION to Dismiss Case (Binnall, Jesse) (Entered: 05/12/2020)

Finally, Sullivan just issued this order:

> 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)

My *guess* is that someone submitted a sealed motion to file an amicus brief (as happened in the Stone case already, when some right wingers intervened on the jury challenge), and that this order is intended to lay out the basis under which Sullivan might entertain an amicus:

- When a party is not represented competently or represented at all (as the government is not)
- When an amicus has an interest in some other case that may be affected by this one
- When an amicus has a unique perspective the lawyers in the case cannot offer

The other thing this means is that this is not done yet, and Sullivan is definitely not going to just dismiss this case.

Update: The potential amici are a group that Flynn's lawyers call the Watergate Prosecutors. Their argument against intervention is bad, but not as bad as their normal work.

Update: Here's the brief the Watergate Prosecutors submitted. They emphasize that once a guilty plea has been entered courts must be certain there is a basis in fact for overturning the verdict.

> But the D.C. Circuit has explained, in a decision that the Government fails to cite, that "considerations[] other than protection of [the] defendant . . . have been taken into account by courts" when evaluating consented-to dismissal motions under Rule 48(a). United States v. Ammidown, 497 F.2d 615, 620 (D.C. Cir. 1973). Courts have exercised their authority under Rule 48(a) where "it appears that the assigned reason for the

> dismissal has no basis in fact." Id. at 620– 21. Even when the Government represents that the evidence is not sufficient to warrant prosecution, courts have sought to "satisf[y]" themselves that there has been "a considered judgment" and "an application [for dismissal] made in good faith." Id. at 620.
>
> [snip]
>
> No party before the Court will address the question whether the Government's proffered reasons for dismissal have a "basis in fact," Ammidown, 497 F.2d at 621, or other reasons that may lead the Court to conclude that it should not grant the Motion. The Watergate Prosecutors, for reasons set forth in the accompanying Statement of Interest, are uniquely suited to help ensure a fair presentation of the issues raised by the Government's Motion, which include, without limitation, the accuracy of the facts and law presented in the Motion, the significance of the Defendant's prior admissions of guilt and this Court's orders to date, the Trump administration's opposition to the prosecution of the Defendant, and whether the Government's change of position reflects improper political influence undermining determinations made by the Special Counsel's Office.

Meanwhile, CBS has released the full interview with Billy Barr, which makes it clear the only "new" facts he claims to be relying on are not: the FBI correspondence showing they almost closed but then reopened the case against Flynn (something that has been public since before the House Intelligence Committee Report came out), and the Bill Priestap notes showing deliberations on how to interview Flynn, which would have been reviewed in any of the four investigations of those meetings.