

EMMET SULLIVAN'S “APPROPRIATE DISPATCH” MAY EXTEND PAST NOVEMBER 3

As noted, yesterday the DC Circuit rejected Mike Flynn's request that they order Judge Emmet Sullivan to grant the motion to dismiss requested by the government. While the per curiam opinion deferred to Sullivan to resolve the motion to dismiss and left him on the case, the last line of the majority opinion ordered Sullivan to hurry things along.

As the underlying criminal case resumes in the District Court, we trust and expect the District Court to proceed with appropriate dispatch.

Today, in an order effectively written immediately after the Circuit Court order, Judge Sullivan instructed the two sides to resume the process he set back before Flynn moved for a writ of mandamus.

In light of the Opinion and Order issued by the Court of Appeals on August 31, 2020 and Circuit Rule 41(a)(3), which states that an order denying mandamus relief “will become effective automatically 21 days after issuance in the absence of an order or other special direction... to the contrary,” the parties are directed to file a joint status report with a recommendation for further proceedings by no later than September 21, 2020. The parties' joint status report shall propose a briefing schedule regarding the deadlines for (1) the government and Mr. Flynn to file any sur-reply briefs; and (2) the government, Mr. Flynn, and the Court-appointed amicus curiae to file a

consolidated response to any amicus brief of non-Court-appointed amicus curiae. It is FURTHER ORDERED that the parties shall propose three dates and times to hold oral argument. If the parties are unable to agree on a joint recommendation, the joint status report shall include each party's individual recommendations.

In legal terms, the order requiring a status report on September 21 is *also* an immediate action. Circuit Court orders don't go into effect for 21 days, in part to give the parties an opportunity to appeal. So Sullivan couldn't require any action before September 21. It asks the parties to act immediately.

But it might well stretch past November 3, in any case. At the very least, it might force Billy Barr's DOJ to explain why they lied to Sullivan to justify blowing up the prosecution of a guy who lied for Trump's benefit during the last weeks of the election season.

Back when Sullivan laid out the process that the DC Circuit just let him continue on May 19, he gave amicus John Gleeson 21 days to file his opening brief, then a week for each response, with a surreply granted to Flynn and the government from the start.

MINUTE ORDER as to MICHAEL T. FLYNN granting 209 Motion to File Amicus Brief. The following schedule shall govern the proceedings in this case subject to a motion for reconsideration, for good cause shown, filed by no later than 12:00 PM on May 26, 2020: (1) the Court-appointed amicus curiae shall file the amicus brief by no later than 12:00 PM on June 10, 2020; (2) any motion seeking leave to file an amicus brief by non-Court-appointed amicus curiae shall be filed by no later than 12:00 PM on June 10, 2020; (3) the government and Mr. Flynn shall file their responses to

the amicus brief of the Court-appointed amicus curiae by no later than 12:00 PM on June 17, 2020; (4) the Court-appointed amicus curiae shall file a reply brief by no later than 12:00 PM on June 24, 2020; (5) the government and Mr. Flynn shall file any sur-reply briefs by no later than 12:00 PM on June 26, 2020; and (6) the government, Mr. Flynn, and the Court-appointed amicus curiae shall file a consolidated response to any amicus brief of non-Court-appointed amicus curiae by no later than 12:00 PM on July 2, 2020. Movants seeking leave to file an amicus brief are HEREBY NOTIFIED that the Court will deny any motion for leave to file an amicus brief that fails to strictly comply with the applicable Local Rules. It is FURTHER ORDERED that the Court schedules oral argument for July 16, 2020 at 11:00 AM in Courtroom 24A.

The initial briefs have been submitted, and Gleeson completed it, but did not submit it because it would have been posted on the day Neomi Rao initially upheld Flynn's petition for a writ.

So Gleeson could presumably submit his reply brief on September 21, and the government and Flynn could – and presumably would want to – submit their surreply two days later, on September 23.

But Sullivan also included time in the original order for the two sides to reply to the other amicus briefs (some of which support Flynn and the government). He originally provided 8 days for that to happen, or 6 after the surreply.

If the parties used the same amount of time, it would put that deadline on September 29.

But – again, according to the original schedule – the hearing would not have happened until two weeks later. According to this schedule, that

would put any hearing on October 13. That would put the hearing just three weeks before the Presidential election on November 3, lightening fast for the kind of meticulous opinions Sullivan has written earlier in this case.

By all appearances, Sullivan is responding with appropriate dispatch, as ordered by the Circuit, implementing his prior schedule on the quickest possible track given the earlier deadlines. But appropriate dispatch might still drag this thing out until it becomes clear whether Donald Trump will remain President.

[In parallel news, the Second Circuit has issued a stay on Cy Vance's subpoena for Trump's tax returns, and that is virtually guaranteed to drag out past the election as well.]