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# The Controversy Over Amicus Curiae

**By Joel Cohen**

**In an understandable effort to gain transparency regarding who is subsidizing controversial litigations, let's not throw the baby out with the bathwater.**

Sen. Sheldon Whitehouse, D-R.I., held a Senate Judiciary Committee hearing last week under the provocative title "What's Wrong With the Supreme Court: The Big Money Assault." It was a hearing intended to advance his "Amicus Act"—a proposed statute designed to require (three time per year) amicus filers before the Supreme Court to identify donors who contributed more than $100,000 in the prior year.

Currently, Supreme Court Rule 37.6 that governs amicus filers requires them to indicate whether counsel for a party authored or made a monetary contribution to preparing the brief. It also requires disclosure of "every person other than the amicus, its members or counsel who made a monetary contribution."

Whitehouse, however, proposes to go much further—this time by a proposed statute that he's been running up the flagpole. He wants disclosure of donations exceeding $100,000 to the amicus filers—which he refers to as "dark money." So, for example, if the NRA, Planned Parenthood or other organizations that don't have tax exempt status or aren't otherwise required to disclosure the identity of contributions to them, they would be required to disclose the donors' identities when the organizations file amicus briefs.

He bases the need for this statute on a suspicion that rich contributors are trying to "buy" Supreme Court decisions. Kind of extreme—as the Wall Street Journal's editorial page argued on March 10. I doubt if it will pass, especially given the separation of powers issue implicated by such a statute and the extremely strident Committee witness testimony that maintained that the Supreme Court nomination process based, for example, on Federalist Society screening President Trump's appointees in particular, is corrupt.

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Courts very often decide matters with potential consequences way beyond the immediate case. Different perspectives may, indeed, be necessary. And so, even if courts don't typically solicit input from non-parties, courts, particularly appeals courts, will accept "amicus curiae" briefs that weigh in on that amicus's perspective about the law or the potential impact of a decision. No one really believes that these unsolicited submissions are drafted or submitted by totally objective observers. Even if they lack a direct stake in the case's outcome, they participate to present their own viewpoint, sometimes for a particular constituency.

In the Michael Flynn prosecution, after the Barr Justice Department proposed to dismiss Flynn's indictment, District Judge Emmet Sullivan raised eyebrows when he issued an order appearing to encourage amicus submissions. It seemed, to Judge Sullivan's detractors, that he had positioned himself to be bombarded with

amicus briefs, even though he appointed a former federal judge as amicus to present arguments opposing the government's motion to dismiss given the government's highly questionable decision to forfeit the case.

There are limits to what a court may actually do in terms of amicus submissions. Indeed, in May 2020 the Supreme Court unanimously—how often does that happen?—ruled that the Ninth Circuit had grossly overstepped its mark by not only asking three identified amici to submit amicus briefs—advocacy groups all—but to argue issues that hadn't been raised by the defendant's counsel (as an aside, the amici's arguments were successful at the Circuit Court). These particular briefs were truly submitted by "friends of the court," given how they came to be filed; but, the Supreme Court ruled, the process exceeded the intention of the amicus protocol. It would have been different had the parties themselves raised the issues.

Full disclosure: Recently, I personally signed onto my first amicus brief submitted in support of granting bail to the two defendants in Brooklyn who allegedly threw a Molotov cocktail into a (vacant) police car during a nighttime protest in the wake of George Floyd's murder. It was signed by some 50 former federal prosecutors identified as such. I myself find the defendants' conduct, if true, abhorrent and warranting prosecution. The brief, though, was limited to an issue in which I as a criminal defense lawyer (and former prosecutor) was interested. While I certainly believe in the righteousness of the issue we raised, frankly I was partly motivated knowing that I might someday need to make the same bail argument for a client. The lower court had granted the defendants' bail, relying largely on their good conduct preceding the night in question; but the government had argued at the Second Circuit that the lower court was wrong.

Now, these two defendants have extremely capable lawyers. And clearly, the Circuit Court probably recognized that most of the attorneys who signed the brief were hardly "objective"—all former prosecutors, most were defense lawyers likely opposed to an appeals court precedent that a bail-setting judge couldn't properly consider a defendant's better days before the act in question. Parenthetically, our side prevailed—the trial court's grant of bail was affirmed. I truly believe that there was great value in the amicus brief— the issue potentially impacted many cases and not simply these two defendants. Still, were we truly friends "of the court" in submitting this brief? Or, rather, individuals who supported the argument presented by these defendants' counsel?

Such is the case, incidentally, pretty much whenever advocacy groups support free speech, immigration, reproductive rights, Social Security issues, etc., through amicus briefs—typically not invited by the courts. Shouldn't they, then, be called "friend of the issue" briefs? It is extremely uncommon that a totally objective—down the middle—brief is submitted by an amicus: The amicus has a viewpoint that squares with one side in the battle, whether the litigation is between the government and a private litigant, or between two private parties. It's different when a court solicits a particular amicus to weigh in: for example, calling on the Solicitor General for the U.S. government's view of a case in which it is not a party. Or where the court seeks academic insight into an issue; or when states that may be affected wish to weigh in.

There is often an extremely valuable role played by non-parties to a litigation, perhaps advocacy groups such as the ACLU, the Pacific Legal Foundation, NORML, Planned Parenthood or the like, contributing to a court's decisional process, particularly if there will be a broader ruling or societal impact that might result from a case. Indeed, the Supreme Court's rules on the subject directs that amicus briefs should cover "relevant matter" not addressed by the parties which may be helpful. Notably, the amicus brief must identify which party the brief is supporting. (Parenthetically, the Supreme Court has appointed amicus curiae more than 45 times in its history when neither party has supported the lower court's decision).

But there is amicus, and amicus. A true amicus, when labelled as such, it seems, should provide a viewpoint that the court might not be familiar with or from the arguments of the parties' counsel, shouldn't it? I don't propose to limit the pile of briefs presented to judges on precedential cases that sometimes bring an

outpouring of extremely thoughtful amici. Rather, I propose to categorize the non-party submissions for what *some* really are.

Returning to the question posed earlier, though, the *Flynn* case raised, importantly, whether the government is omnipotent in deciding to dismiss a case. I wanted the courts (including the D.C. Circuit) deciding *Flynn* to have as much knowledge on the table as possible. Still, if a court chooses to hear from third parties, it should be clear to everyone precisely who those third party entities are and exactly why, and for whom, they came to the table.

In my judgment, however, what Senator Whitehouse proposes goes way too far. He is essentially discouraging contributions to potential amici, potentially raising First Amendment restrictions on the public. I may not be a fan of a particular advocacy group, e.g., a group supporting gun rights, but why should its contributors—who typically don't want their names publicized—have their significant contributions made public simply because the donee organization might choose to later file an amicus brief.

Senator Whitehouse is concerned that Supreme Court and other courts are being "bought" by lobby groups—so he propose to "out" their significant contributors. Next step down the slippery slope will require disclosure of those individuals or organizations who have nothing to do with a particular case, but choose to contribute money to help defend a particular criminal defendant? That shouldn't be required, any more than disclosing the identities of large contributors to Supreme Court amici organizations (beyond contributions to the amicus entity by the litigating party itself whose position the amicus supports).

There can be great value in amici briefs from both ends of the political or legal spectrum. In an understandable effort to gain transparency regarding who is subsidizing controversial litigations, let's not throw the baby out with the bathwater.

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