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Amicus Curiae

Silencing a Watchdog: Government Seeks to Muzzle Amicus in John Edwards Prosecution


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In an unusual move, the United States–by far the most frequent *amicus curiae* in the federal courts–has sought to block the filing of a lone friend-of-the-court brief supporting former presidential candidate John Edwards's motion to dismiss the government's controversial criminal case against him. The Citizens for Responsibility and Ethics in Washington (CREW), a government watchdog group aimed at ensuring transparency and accountability in government, moved to file an *amicus* brief arguing that illicit payments allegedly made by third parties to Edwards's mistress did not violate the campaign finance laws and that such charges dilute and diminish laws aimed at punishing government corruption.

The United States not only refused to consent to the filing of the *amicus* brief, but also took the additional step of submitting a response urging the district court to deny leave for CREW to file. In the process, the government urged the court to apply a restrictive standard for granting leave to file *amicus* briefs–one that has been criticized by courts and commentators and is contrary to the government's own longstanding *amicus* practice.

The government's effort to silence CREW comes on the heels of a similar controversy earlier this year when the government sought to block all *amicus* support for another high-profile criminal defendant.[1] Amid the criticism in that case, the government reversed course and voluntarily withdrew its opposition to the defendant's *amici*. Now, less than eight months later, the United States has done it again.

Putting aside the irony of the United States government trying to silence a watchdog group whose mission is to ferret out government corruption, the Edwards situation raises important questions about the Justice Department's *amicus* policies. The government's selective resort to a restrictive *amicus* standard in some cases, while applying an "open door" approach in the vast majority of cases, evokes the perception of viewpoint discrimination and illustrates the need for a formal policy on friend-of-the-court briefs. Absent a department-wide policy, individual prosecutors from any one of the 94 U.S. Attorneys' offices remain free to urge courts to adopt a restrictive standard that could effectively shut the courthouse doors to organizations and individuals who traditionally have provided valuable assistance to the federal judiciary.

The Prosecution of John Edwards

– A Controversial Indictment

On June 3, 2011, the government indicted former U.S. Senator and presidential candidate John Edwards in federal district court in North Carolina for violations of campaign finance laws and related conspiracy and false-statement charges.[2] According to the indictment, Edwards began an extramarital affair in the midst

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of his 2008 presidential campaign, and his mistress became pregnant.[3] Two supporters of Edwards's campaign allegedly paid hundreds of thousands of dollars to the mistress, using a campaign assistant as an intermediary, in order to conceal the affair and the woman's pregnancy.[4] The indictment asserts that those payments exceeded the limits on "contributions" to Edwards's campaign and should have been disclosed to the Federal Election Commission (FEC).[5]

"The indictment triggered immediate criticism from a range of campaign finance and legal experts, who said the government's case is unprecedented and appears weak."[6] And on September 6, 2011, Edwards moved to dismiss the indictment against him.[7]

– Silencing a Watchdog

On September 21, 2011, CREW sought leave to file an *amicus* brief in support of Edwards's motion to dismiss.[8] CREW is a private non-profit government watchdog group that "employs the law as a tool to force officials to act ethically and lawfully and to bring unethical conduct to the public's attention."[9]

CREW's proposed *amicus* brief argued that the alleged payments to Edwards's mistress were not "campaign contributions," and that the government's novel legal theory violated Edwards's due-process right to fair warning that his conduct may constitute a criminal offense.[10] The brief highlighted that "the government's near boundless theory of criminal liability would sweep in anything of value given directly or indirectly to a candidate for federal office during his or her candidacy" and would "lead to absurd results" and "bizarre consequences."[11]

CREW sought the government's consent to file its *amicus* brief, but the government refused.[12] Beyond refusing consent, moreover, the Justice Department's Public Integrity Section and the U.S. Attorney's Office in North Carolina filed a response "in opposition" to CREW's motion for leave to file.[13] The government's opposition relied on a restrictive standard, employed by only one federal appellate court, under which *amicus* briefs would be allowed only when "(1) a party is not adequately represented (usually, is not represented at all); or (2) when the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief may, by operation of stare decisis or res judicata, materially affect that interest; or (3) when the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do."[14]

Based on this restrictive standard, the United States argued that the district court should deny leave for CREW to file because "Edwards is ably represented in this matter by at least four attorneys from three law firms," and CREW's *amicus* brief supposedly would "not aid the Court in resolving the issues" and "adds nothing to the legal issues that are presented by Edwards's counsel."[15] The government argued, rather, that the CREW brief "consists largely of conjecture based on purported 'facts' gleaned from news articles," and "there is no place for this form of story-telling in a criminal case."[16]

According to CREW, no court has ever denied the organization leave to file as an *amicus*, and the United States has never objected when CREW has sought to file *amicus* briefs supporting the government in other cases.[17]

Commentary

– A Flawed Standard

The United States was wrong to oppose CREW's *amicus* brief. For one, the government relied on an unduly restrictive standard for allowing *amicus* briefs that has been adopted by only one court of appeals and has long been criticized as "too narrow and grudging."[18] Specifically, the government's opposition to CREW's *amicus* brief relied on a decision by Judge Richard A. Posner of the Seventh Circuit, who has been the primary proponent of a restrictive *amicus* standard.[19] Notably, in *Neonatology Associates, P.A. v. Comm'r of Internal Revenue*, then-Judge Samuel Alito issued the leading decision explaining why this minority standard is inappropriate.[20] *Neonatology* explicitly disagreed with the two decisions relied upon by the government in its opposition to CREW's brief.[21]

Relying on the restrictive standard, the government's opposition principally argued that "Edwards is ably represented in this matter by at least four attorneys," and the CREW brief "adds nothing to the legal issues that are presented by Edwards's counsel."[22] Then-Judge Alito explained why these are not valid bases for restricting *amicus* participation:

> "Even when a party is very well represented, an amicus may provide important assistance to the court. 'Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group.'"[23]

Further, while "me too" briefs certainly are disfavored, "[a] restrictive practice regarding motions for leave to file seems to be an unpromising strategy for lightening a court's work load [since] the time required for skeptical scrutiny of proposed amicus briefs may equal, if not exceed, the time that would have been needed to study the briefs at the merits stage if leave had been granted."[24] Though the CREW brief appears to have included arguments and materials not discussed in Edwards's motion to dismiss, even if the *amicus* brief was duplicative, the district court likely will spend more time comparing the two briefs in considering the government's opposition, than if the government had simply consented to the filing.

In addition, the government's opposition and reliance on the minority restrictive standard for *amicus* briefs places the district court in a difficult position. "A restrictive policy with respect to granting leave to file may . . . create at least the perception

of viewpoint discrimination" and convey "an unfortunate message about the openness of the court. Unless a court follows a policy of either granting or denying motions for leave to file in virtually all cases, instances of seemingly disparate treatment are predictable."[25] That is particularly the case in a high-profile, politically-charged prosecution like the one against Edwards.

At bottom, the restrictive *amicus* standard proposed by the government is simply unnecessary since "private amicus briefs are not submitted in the vast majority of court of appeals cases,"[26] much less district court cases like the Edwards prosecution. For instance, in a recent survey of federal judges, roughly 80 percent of district court judges who responded reported that "amicus activity is nominal or zero," and the other 20 percent indicated that "approximately 5% of their docket involves amici curiae."[27] The survey also found that the "overwhelming" response of federal judges, including district court judges, was that they "do not seek to close the doors on amicus participation by enacting stricter procedural rules."[28]

– The Need for a Consistent Policy

Beyond the substantive flaws in the restrictive *amicus* standard, the government's approach to CREW's participation in the Edwards case is contrary to its own *amicus* practices. While a nongovernmental *amicus* generally must obtain the parties' consent or leave of court, the United States may file an *amicus* brief in any case without consent or leave of court.[29] The United States frequently files *amicus* briefs–or "Statements of Interests"–in district court proceedings where the government is not a party. The United States also is known as the most frequent *amicus* filer in the federal appellate courts.[30] Moreover, the government routinely consents to the filing of nongovernmental *amicus* briefs.[31] Yet, here, where the government is bringing weighty criminal charges against a citizen based on a novel legal theory, it seeks to silence a lone *amicus* supporting the defendant.

In past similar episodes where the government has acted so contrary to its own *amicus* practices, it ultimately corrected the situation. Earlier this year, in another controversial high-profile criminal case, the prosecuting U.S. Attorney's office, like the offices prosecuting Edwards, urged the Eighth Circuit to block all *amicus* briefs supporting the defendant in a widely-publicized criminal appeal.[32] The government cited the same restrictive *amicus* standard cited by the Edwards prosecutors.[33] Amid criticism over the move, the government later withdrew its opposition to the briefs.[34] The government should take the same course in the Edwards case.

The latest episode thus presents some lessons and ironies. A core lesson is that the Department of Justice needs, as we have previously argued, to adopt a consistent policy on nongovernmental amicus briefs.[35] The Department's U.S. Attorney's Manual already requires the Solicitor General's authorization for the filing of *amicus* briefs on behalf of the government, but does not address policies concerning nongovernmental amicus. The Justice Department should update the Manual to provide that the United States should grant consent for timely amicus briefs absent exceptional circumstances or an abuse of the amicus process. The Manual further should require divisions of the Department and U.S. Attorneys to obtain the Solicitor General's authorization to refuse consent or oppose the filing of such briefs. This policy would help ensure consistency, comport with longstanding government amicus practice, and avoid the perception of "viewpoint discrimination" by the United States.

As for ironies from the government's opposition to Edwards's *amicus*, there are at least two. By objecting to CREW's amicus brief, the government only drew more attention to it. But worse, by doing so, the federal government sought to silence an organization whose mission is to "ensure government officials–regardless of party affiliation–act with honesty and integrity and merit the public trust." That is a voice the government should want to be heard.

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The views expressed herein are those of the authors alone and not of Arnold & Porter LLP or any of the firm's clients.

[1] *See* Anthony J. Franze & R. Stanton Jones, Bloomberg Law Reports®, Federal Practice, Vol. 5, No. 8, *With Friends Like These: The Troubling Implications of the Government's Recent Effort to Block Amicus Curiae Briefs in a Controversial While Collar Appeal* (Feb. 22, 2011).

[2] Indictment, *United States v. Edwards*, No. 11-cr-00161 (M.D.N.C. June 3, 2011).

[3] *Id.* ¶ 3.

[4] *Id.* ¶¶ 15-30.

[5] *Id.* ¶¶ 13-41.

[6] Jerry Markon, *John Edwards Indicted on Campaign Finance Charges*, Wash. Post, June 3, 2011.

[7] Mot. to Dismiss No. 1, *Edwards*, No. 11-cr-00161 (M.D.N.C. Sept. 6, 2011).

[8] Mot. of CREW for Leave to File Brief as *Amicus Curiae* at 1, *Edwards*, No. 11-cr-00161 (M.D.N.C. Sept. 21, 2011) (CREW Mot.).

[9] About CREW, http://www.citizensforethics.org/pages/about.

[10] Proposed *Amicus Curiae* Brief By CREW at 5, 22, *Edwards*, No. 11-cr-00161 (M.D.N.C. Sept. 21, 2011) (CREW Br.).

[11] *Id.* at 15, 19.

[12] CREW Mot. at 3.

[13] Gov't Response to CREW Mot. at 1, *Edwards*, No. 11-cr-00161 (M.D.N.C. Sept. 26, 2011) (Gov't Opp.).

[14] *Nat'l Org. for Women v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (Posner, J.) (cited in Gov't Opp. at 3).

[15] Gov't Opp. at 2-3.

[16] *Id.* at 2.

[17] CREW Mot. at 3.

[18] Andrew Frey, *Amici Curiae: Friends of the Court or Nuisances?*, 33 No. 1 Litig. 5, 5 (2006).

[19] *See* Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 Fla. St. U. L. Rev. 315, 326-28 (2008) (discussing and disagreeing with minority approach reflected in series of decisions by Judge Posner).

[20] 293 F.3d 128 (3d Cir. 2002).

[21] *Id.* at 130.

[22] Gov't Opp. at 2.

[23] *Neonatology Assocs.*, 293 F.3d at 132 (quoting Luther T. Munford, *When Does the Curiae Need an Amicus?*, 1 J. App. Prac. & Process 279 (1999)).

[24] *Id.* at 133.

[25] *Id.*

[26] *Id.*

[27] Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 Rev. Litig. 669, 687 (2008).

[28] *Id.* at 700.

[29] Fed. R. App. P. 29(a); S. Ct. R. 37.3; 28 U.S.C. § 517 (providing that the United States may appear in any court in the United States "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States").

[30] *See* Franze & Jones, *supra*, at 5.

[31] *Id.* at 6.

[32] *Id.* at 1.

[33] *Id.* at 3.

[34] *See* Anthony J. Franze & R. Stanton Jones, *Lessons from the Rubashkin Amicus Debacle: The Government's About-Face Calls for a DOJ Policy on Friend-of-the-Court Briefs*, The Legal Pulse, Washington Legal Foundation, Mar. 10, 2011, *available at* http://wlflegalpulse.com.

[35] *See id.*