Case No. 17-10448

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

JOSEPH M. ARPAIO,

Defendant/Appellant.

On appeal from the United States District Court
for the District of Arizona
2:16-cr-01012-SRB

BRIEF IN SUPPORT OF *SUA SPONTE* REHEARING *EN BANC*

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June 26, 2018

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ARGUMENT

Defendant, by and through undersigned counsel, hereby files this brief in support of a rehearing *en banc* of the published order dated April 17, 2018, which has been requested by the Court *sua sponte*. This matter involves a question of exceptional importance:

> Can the Court "replace" the Attorney General as prosecutor in the appeal of a criminal contempt case, and appoint a private "special prosecutor" to represent Untied States, simply because the Attorney General concedes that the lower court erred—even though the Attorney General has appeared in the appeal and indicated that he intends to represent the United States' interest on appeal?

Under such circumstances, the Court has no authority to "replace" the Attorney General or to appoint "another" special prosecutor to represent the United States, including in a criminal contempt case, pursuant to both federal statute and regulation as interpreted by the United States Supreme Court—*see* 28 U.S.C.A. § 518, 28 C.F.R. § 0.20(b), and *United States v. Providence Journal Co*., 485 U.S. 693, 700 (1988)—as well as under broader principles of the separation of powers and due process. While Rule 42 clearly contemplates that a district court has the power to appoint a special prosecutor if the Attorney General "declines the request" to prosecute, or when the "interest of justice requires the appointment of another attorney" in the first instance, the Court has no power to "replace" the Attorney General if he has chosen to represent the interests of the United States, and especially not for

the mere reason that he was ethically obligated to concede an error by the lower court. Allowing the Court to replace the prosecutor under such circumstances raises serious questions about whether the court is actively participating in the prosecution, in violation of the Defendant's due process rights,[1] and it also amounts to an express usurpation of the exclusive powers of the Attorney General. As the Supreme Court noted in *U.S. v. Providence* (and the panel's own April 17th Order obliquely referenced), the Court is always free to appoint a true *amicus*, whose duties would be limited to briefing the court on legal issues—but not a "special prosecutor," who would be entitled to all of the powers that are inherently vested in prosecutors appointed to represent the United States, such as the power to file a criminal complaint, convene a grand jury to issue subpoenas, search warrants, indictments, arrest warrants, etc. While the panel points to its authority to appoint an "amicus" as somehow supportive of its decision, it is clear that it is in fact appointing a "special prosecutor" to represent the United States, which is something entirely different. ("For the reasons below, we will appoint a special prosecutor to provide briefing and argument to the merits panel.")

In *U.S. v. Providence*, the United States Supreme Court reviewed whether an appointed "special prosecutor" in a criminal contempt case had

[1] "[J]ustice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954)(discussing criminal contempt matters and Rule 42); *see also generally In re Murchison*, 349 U.S. 133 (1955); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016)(discussing how due process is violated when judge actually participates in prosecution or appears to).

the authority to represent the United States in order to file an appeal to the United States Supreme Court, without the authorization of the Attorney General and Solicitor General. 485 U.S. at 693. The Supreme Court found that the special prosecutor had no authority to appeal without the consent of the Solicitor General (to whom the Attorney General delegates such authority). The Supreme Court reasoned that the "United States usually should speak with one voice before this Court," and with a voice that reflects the "common interests of the Government and therefore all of the people," and that Attorney General/Solicitor General had the exclusive power to represent the United States. *Id.*, 485 U.S. at 693. The Court based its decision on subsection "a" of 28 U.S.C.A. § 518, which provides that: "…the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court…" The case at bar implicates subsection "b" of the same statute, which provides that "[w]hen the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so." 28 U.S.C.A. § 518(b). In this case, the Attorney General has appeared (by and through his Assistant Attorney General, along with other officers of the Department of Justice) and chosen to represent the United States in this appeal. (See Dkt. 12, "Statement of the United States" filed by Acting Assistant Attorney General John Cronan on December 12th, 2017: "The government has entered an appearance in this case and intends to

represent the government's interest in this appeal…") The Attorney General has not "abandoned" the appeal, as the April 17th Order intimates, or even "abandoned" a position that he previously took in front of the lower court on behalf of the United States. Rather, the Attorney General continues to assert the *same* position that he took before the lower court, and which he has clearly deemed to be in the interests of the United States. ("[T]he government intends to argue, as it did in the district court, that the motion to vacate should have been granted.") In *Providence*, the Supreme Court expressly rejected arguments that a special prosecutor could be appointed to represent just the interests of the "Judicial Branch," without violating the Attorney General's right to represent the entire United States. *Providence*, 485 U.S. at 706; 485 U.S. at 699, 704, *see especially* n. 9. The Supreme Court referred to the proposition that "there is more than one 'United States' that may appear before this Court" as "somewhat startling," and it reinforced its prior rulings that the nature of the plaintiff in a criminal contempt case does not differ from any other criminal case: "proceedings at law for criminal contempt are between the public and the defendant," and "[p]rivate attorneys appointed to prosecute a criminal contempt action *represent the United States*...." *Id.*, 485 U.S. at 700-701 (emphasis original). The Court also rejected the notion that Rule 42, or the court's inherent judicial powers, allowed for the court to appoint a special prosecutor to take over the role of the Attorney General/Solicitor General. The Court based this decision on the fact that there is no "exception" language found in 28 U.S.C.A. § 518 (like the language

found in some related statutes, 28 U.S.C. §§ 516 and 547, beginning with "[e]xcept as otherwise provided by law…"). The specific authority that Congress granted under § 518 to the Attorney General and Solicitor General to represent the United States—either in an appeal to the Supreme Court under subsection "a," or in any case where the Attorney General has chosen to represent the United States under subsection "b"—therefore overrides the Court's general authority under Rule 42 to appoint a special prosecutor to represent the United States, or its inherent authority to do so (under the *Young* case, which is specifically discussed in *Providence*. *See* 485 U.S. at 699, 704, *especially* n. 9 (discussing *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987)). In other words, a court-appointed private special prosecutor can only prosecute a case if the Attorney General has chosen not to participate (and even then, only in front of a district or appellate court, without the Attorney General/Solicitor General's consent). Per 28 U.S.C.A. § 518(b), if the Attorney General chooses to conduct and argue any case on behalf of the United States, then he may do so, and neither Rule 42 nor the court's inherent powers may change this result.

In its April 17th Order, the panel refers to cases in which the Supreme Court appointed an amicus to "represent the position taken by the United States below when the United States refuses to defend its prior position," in support of its decision to appoint a "replacement" special prosecutor—but again, there is a material distinction between appointing a mere amicus to brief legal issues, and appointing a special prosecutor to represent the United

States. (And again, the United States has not "refused to defend its prior position"—rather, it has decided to defend its prior position, which happens to be that the lower court erred.) The panel's April 17th Order clearly erred by ordering the appointment of a "special prosecutor" to represent the United States in this appeal, because the Attorney General has already chosen to represent the United States and is clearly entitled to do so under 28 U.S.C.A. § 518(b). The panel has no authority under either Rule 42(b) or the Court's inherent powers to "replace" the Attorney General or override his authority. The panel is free to appoint a true "amicus," who lacks the powers of a prosecutor, and whose brief is truly intended only to aid the court with legal research and analysis.

RESPECTFULLY SUBMITTED this 22nd day of June, 2018.

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CERTIFICATE OF COMPLIANCE

This brief is **1,469** words, excluding the portions exempted by Fed. R. App. P. 32(f), and complies with the limits set forth in this Court's Order dated June 1, 2018 at Docket Entry 26. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

RESPECTFULLY SUBMITTED this 22nd day of June, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED: June 22, 2018.

/s/ Wendy L. Echols