



Former prosecutors outraged at decision to dismiss the Flynn case should focus on the real problems

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There are fair-minded people who are concerned about the Department of Justice's decision to dismiss the Michael Flynn case. And for many, it's more than concern. For example, a group of former prosecutors were so outraged by the decision, that they wrote a letter asking for the Attorney General's resignation because the motion to dismiss, they believed, "undermined [DOJ's] mission to ensure equal justice under the law."

For prosecutors legitimately concerned about equality under the law — to be sure, a hallmark of any legitimate justice system — there are bigger issues to be angry about than the dismissal of one case charging a relatively minor crime. Here are a few:

1. The United States sadly incarcerates more people than any other country in the world. The former prosecutors who signed the letter contributed to this eye-popping incarceration rate. To put it in perspective, we have higher incarceration rates than Russia, Iran, and Iraq — by a lot — because we jail people for every perceived societal problem — including non-violent first time offenders like Flynn — and we jail them longer than anywhere else.
2. Our system wrongfully punishes those who exercise their right to proceed to trial. Before DOJ's motion to dismiss, Flynn was looking at no prison time because he pleaded guilty and cooperated. Had he proceeded to trial, he would have been facing up to 5 years in prison on the false statement count alone. Faced with that uncertainty — probation versus risking 5 years — it's no surprise Flynn (along with 97 percent of defendants overall) chose to plead guilty instead of facing the penalty that would have resulted from proceeding to trial. Former Judge John Gleeson (whom Judge Emmet Sullivan appointed to argue against DOJ's motion to dismiss the Flynn case) wrote the forward to the "The Trial Penalty," a report by the National Association of Criminal Defense Lawyers in which he explained that even "innocent defendants now plead guilty." Judge Jed Rakoff, George Will and the Cato institute have made the same point.
3. Prosecutors coerce defendants into pleading guilty. It's bad enough that defendants face the prospect of years in prison with the trial penalty, but prosecutors also use other tactics for those defendants who have the gall to fight, including threatening to indict family members (as has been reported in the Flynn case), adding more serious charges and

seeking unaffordable bail. These tactics are employed every day in the criminal justice system, not just in high profile cases like Flynn and Lori Loughlin. If the rich and powerful can be pushed into pleading guilty, think about the relatively poor, who are especially vulnerable to prosecutorial overreaching and who (along with minorities) disproportionately and unjustly fill our prisons.

4. Law enforcement is not required to — and in fact does not — tape record its interviews. Because interviews aren't recorded, they are not retold neutrally. Jurors and the public deserve to know exactly what Flynn said, not what some agent said Flynn said. Mary B. McCord, an acting assistant attorney general for national security at the Justice Department from 2016 to 2017, apparently agrees that law enforcement does not do a good job summarizing interviews: In her recent op-ed "Bill Barr Twisted My Words in Dropping the Flynn Case. Here's the Truth," she complains that the motion to dismiss charges against Flynn — based in large part on a summary of an interview with her — is myopic, “disingenuous” and "twist[s] my words." McCord worked at DOJ for decades. Under her watch, thousands of non-recorded interviews took place and prosecutions relied on interview reports to convict people.
5. Prosecutors are almost never punished for keeping exculpatory evidence secret, or other misconduct. The Flynn prosecutors failed to disclose exculpatory information until after he pleaded guilty. The Lori Loughlin prosecutors waited a year to disclose that their main witness was forced to say things on tape that he didn't believe in. But these prosecutors keep on prosecuting with no repercussions.

The list of serious flaws with our criminal justice system could go on for many pages. Too many accused are held without bond. The prison system is not appropriately addressing the COVID-19 pandemic. The sentencing guidelines are not based on any empirical data and were plucked out of thin air. First-time non-violent offenders are arrested by SWAT teams in front of their families instead of being permitted to self-surrender. Defendants are not permitted to take depositions of the witnesses against them or even to see the witnesses' statements until they testify at trial. And on and on.

The truth is that our system has been broken for a long time. Instead of all of the outrage for a dismissal of one relatively minor criminal case, let's try fixing the real problems.

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