



MISES INSTITUTE

Michael Flynn, Lori Loughlin, and the Permanent Culture of Prosecutorial Abuse

William L. Anderson

June 1, 2020

When US attorney general William Barr recently announced that the Department of Justice was reversing course and dropping all charges against former Trump adviser Michael Flynn, the response from Democrats, the mainstream news media, and Never-Trump Republicans such as David French was thermonuclear, to put it mildly. The *New York Times*, which many times has editorialized against prosecutorial tactics that drive people to plead guilty instead of going to trial, reminded its readers that Flynn had twice pled guilty, which to the editors constituted absolute proof of his guilt.

The *NYT* went on to editorialize elsewhere that Barr had “politicized” the DOJ and was using his powers to pervert justice. On the airwaves, NBC News purposely truncated a Barr quote in order to present a very different picture of his views than what Barr actually had expressed. This is not the first time NBC has done something like that, as it deliberately changed a transcript of George Zimmerman’s 911 conversation with the police shortly before he shot and killed Trayvon Martin in an attempt to make the killing look racially motivated.

Meanwhile, in another break from the near-uniformly awful coverage of the COVID-19 pandemic and the government policies of placing healthy citizens under house arrest, media breathlessly reported that actress Lori Loughlin and her husband Mossimo Giannulli are pleading guilty to bribery in the so-called Varsity Blues case led by federal prosecutors. Since there is no federal bribery statute to which they could actually plead, the journalists are wrong there, too, but no matter. As I wrote earlier this year, it is a stretch to claim that Loughlin and her husband actually committed real crimes, but neither the media nor the political classes—both groups bound tightly to each other—appear to be concerned by this.

There actually is another story that includes both the Flynn and Loughlin cases, a story that goes to the very heart of why the US Constitution even has a Bill of Rights, a story that every fair-minded journalist should have written but has not. This is a story of an all-powerful federal government whose agents from the wrongly named Department of Justice can target anyone they choose and force them into prison, even if they have not committed anything one can call a real crime.

Furthermore, because the mainstream news media is allied with the DOJ and federal prosecutors, it is nearly impossible for anyone accused to get fair treatment from either the media or the political classes. Once federal agents target someone, that is it. Even if those agents are caught lying, their media will protect them. And that is the real story.

Let us look at the Flynn case and its aftermath first. Clark Neily of the Cato Institute has an excellent piece on the Flynn prosecution, a solid account that one will never read in the *NYT*. He

writes that there are “two fundamental errors” that most critics of Flynn and the Trump administration’s role in this case have made:

Those errors, which turn out to be inextricably intertwined, are: (1) Flynn is plainly guilty of lying to FBI agents, so the attorney general's motives in dropping the case against him must necessarily be suspect; and (2) given the character of the defendant and the alleged crime, the Flynn case must necessarily be a poor vehicle for spotlighting the pernicious role of coercive plea bargaining in our criminal justice system—as Pulitzer-Prize-winning columnist George Will did yesterday.

In other words, Flynn is guilty and that is the end of it. So says the *NYT* and David French, and any move to drop the charges is itself an affront to Lady Justice and all those hardworking men and women in the DOJ who are unselfishly laboring to protect us from malefactors like Flynn. But maybe, writes Neily, there is more to the story—just as there is more to the Loughlin story as well, even if our media elites and political classes don’t want to hear it.

Both Neily and George Will explain the case in some detail and I will not rehash the particulars here except to say that in looking to pursue the case in the fall of 2016, James Comey (yes, THAT James Comey—more about him later) of the DOJ claimed that perhaps Flynn had violated the Logan Act, something that the media dutifully played back. That no one has been convicted of or imprisoned for violating the Logan Act, which forbids private US citizens from negotiating with foreign governments without US government permission, was unimportant, and it became quite clear to FBI agents who had wiretapped communications between Flynn and the Russian ambassador that Flynn had not even violated the law.

However, the FBI still called Flynn in for questioning and there the whole thing becomes a legal morass that the DOJ always tries to create when it doesn’t have a case. Keep in mind that the FBI already had concluded that Flynn did not break the Logan Act (which isn’t enforced, anyway), but still demanded to interview him about the law he didn’t break. As always, the FBI refuses to record or memorialize these interviews in any way that would actually permit someone to know what was said, and then, if it so chooses, the FBI can claim that the person interviewed lied, which is a felony. All an agent has to do is claim that the interviewee lied. Even though the FBI handbook specifically instructs its agents to lie during interviews, the FBI always speaks the truth when it claims that others are lying. Or so say prosecutors, the courts, and their ever adoring news media.

So, let us recount how this goes (the same nightmare that Martha Stewart experienced). The FBI already knew that Flynn had not broken the law but then claimed that he lied to them about not breaking the law, just as it claimed that Stewart had lied to them when she said that she did not engage in insider trading. The FBI charged her with lying but did not charge her with insider trading, just as it charged Flynn with lying but not with breaking the Logan Act, which supposedly had really been worrying Comey.

To make matters worse, it is doubtful that Flynn even lied, at least according to Neily:

it now appears the two FBI agents who conducted the interview with Flynn on which the subsequent false-statements charge was predicated at first reported to their superiors that they did not think Flynn had been deceitful during the interview and that any inaccurate responses to their questions were the result of a memory lapse, not a deliberate attempt to deceive.

To make sure that it prevailed, the DOJ did what it often does—take hostages. In forcing a guilty plea from Michael Milken for actions the government never before—or after—had labeled as crimes, federal prosecutors agreed not to prosecute Milken’s brother and his ninety-year-old grandfather. The feds got Flynn to plead guilty to lying by promising not to prosecute his son. Since Flynn already owed millions of dollars to his attorneys and had to sell his house, he lacked the financial ability to continue to fight.

Likewise, in the case of Loughlin and her husband, federal prosecutors (and, once again, their adoring amen corner with the media) threw out the possibility of the two spending forty years in prison should they be convicted at trial, leaving their daughters without parents. This is Hostage Taking 101.

Indeed, for Loughlin, the plea deal in which she will spend two months in federal prison (her husband will spend five months) will seem quite sweet compared to spending the rest of her life in a government cage. (We won’t know the final sentences until August 21.) So, what was the “crime” to which they pleaded? According to CNN:

Loughlin pleaded guilty to conspiracy to commit wire and mail fraud, and Giannulli pleaded guilty to conspiracy to commit wire and mail fraud and honest services wire and mail fraud.

Note that not one of these “crimes” actually involves engaging in behavior that has harmed anyone. As I wrote in a previous article on this case:

the fact is that most of the parents who took part in this scheme are white, wealthy, prominent, and utterly unfamiliar with how federal criminal law works. That is why the feds can threaten Loughlin and her husband with up to forty-five years in prison if they are convicted. That is more than most murderers, rapists, and armed robbers receive for their crimes. Yet Loughlin harmed no one. Yes, one can argue that if her daughters had been accepted at USC undeservedly, two other perhaps more promising students would have been denied entry. However, that clearly would be a *civil*, not criminal, matter, and any students who were left out can seek remedy in court.

This is not an endorsement of what Loughlin and her husband did, but they hardly were masterminds of any criminal activity. Yes, they were dishonest, but they never engaged in the kind of dishonest behavior we see regularly from federal agents that actually is destructive, ruins families, and drives people to their graves.

As I noted earlier, I will write more about Comey. I end with something that former investment banker Frank Quattrone recently posted on his Facebook page about Comey and the morally bankrupt universe in which he operates. (In 2004 I wrote about Quattrone and his short-lived conviction in federal court, a conviction that a federal appeals court later overturned.) I can assure readers that Quattrone neither is ranting nor exaggerating. Unlike Comey, he is telling the truth:

Another reminder from my trial—the government and media conspired to dirty me up in advance of my trial to make sure the judge and jury would view me in the most unsympathetic light possible.

James Comey, then US Attorney for the Southern District of NY, made material false statements about me on national TV, breathlessly and falsely accusing me of instructing my team to destroy

documents I knew were called for by a subpoena, when all I had done was reinforce a teammate's reminder to follow a document retention policy that requires employees to SAVE all docs covered by subpoena.

The government also threatened my teammates with indictments to try to coerce them to provide false testimony against me, forced my employer to waive attorney client privilege to produce documents helpful to the prosecutors while blocking them from producing such documents that were helpful to our case, and even sued my communications consultant to try to obtain confidential documents of our internal communications with my lawyers (we prevailed in court).

The NASD (now FINRA) brought a series of false accusations about our business practices and, after I had already provided two days of testimony, ordered me to appear for additional testimony, knowing that whatever testimony I provided could be used in the pending criminal trial and that by refusing to do so on advice of counsel they could ban me for life from the securities industry.

The media did its part in spreading these falsehoods and the government rewarded them by leaking out of context emails they could use for additional articles painting me as an unethical criminal—but only on the condition that if they wrote our side of the story they would no longer receive such leaks.

Of course years later I prevailed on every single charge brought by the NASD, but meanwhile their dirty work helped pave the way for my wrongful conviction for obstruction, in which I also ultimately prevailed almost five years after Comey made the false statements.

He ends with this prophetic statement that needs no further explanation:

It's important to call the government and media on this unholy alliance whether you view their targets as sympathetic or not. If we stay silent when they come for our enemies, they will ultimately come for us.