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While the Michael Flynn prosecution is currently imploding, no matter how it ends, the key lesson is clear: The nakedly coercive tactics routinely used by federal prosecutors to obtain admissions of guilt render those admissions utterly unreliable — not just in Flynn's case, but in *every* case. Congress should act immediately to restore public confidence in the integrity of our criminal justice system by reforming this fundamentally lawless and un-American practice. And the Flynn case shows why that reform should be a top legislative priority.

In early May, federal prosecutors, on orders from Attorney General William Barr, filed a motion to dismiss the criminal case against Flynn. That move prompted a cacophony of outrage and elation, as partisans flocked to the airwaves and blogosphere to proclaim, with absolute certainty, that justice had been either perverted or served. In the midst of all this, the presiding judge, Emmet Sullivan, poured gas on the proverbial flames by first inviting interested groups to submit friend-of-the-court briefs regarding whether he should grant the motion to dismiss and then by designating a prominent former judge to present arguments against the motion and also provide input on whether Flynn can be held in criminal contempt of court for recanting his earlier confession. In short, if the Flynn case were a beer commercial, it would be the most interesting case in the world.

So, what do we know for certain about the events leading up to the prosecution of former national security adviser Michael Flynn? Distressingly little, it turns out, because of how thoroughly the Justice Department has bungled the case. We know the FBI opened a counterintelligence investigation called "Crossfire Hurricane" in July 2016 to look into allegations of collusion between members of the Trump campaign and Russian agents to interfere in the 2016 presidential election. We also know that a subpart of that investigation, dubbed "Crossfire Razor," sought to determine whether Gen. Flynn had improper contacts with Russian officials, particularly during the Obama-Trump transition. It appears undisputed that, having discovered no "derogatory information" about Flynn in that regard, the FBI agents responsible for Crossfire Razor decided to close the investigation. But high-ranking FBI agent Peter Strzok overrode that decision and ordered that the investigation remain open, evidently to provide a legal basis for the interview that Strzok and another agent, probably Joe Pientka, conducted with Flynn at the White House on Jan. 24, 2017.

And that's where things get murky. We don't know precisely what was said during the interview due to the FBI's archaic and palpably self-serving policy of not recording interviews electronically but instead having agents take notes, which are then typed up into a formal memorandum of interview called a Form 302. Notably, the original 302 of Flynn's interview has

never been produced; instead, the DOJ produced to Flynn's attorneys a version of the form that had been substantially edited by Strzok, FBI lawyer Lisa Page, and perhaps others not present at the interview, rendering its accuracy open to question. Still, it appears undisputed that Strzok and Pientka asked Flynn a number of questions about Flynn's conversations with Russian Ambassador Sergey Kislyak — questions to which they already knew the answers because the call between Flynn and Kislyak had been intercepted by an as-yet unidentified U.S. agency that provided transcripts to the FBI. Finally, recently disclosed handwritten notes from then-FBI counterintelligence director Bill Priestap show him musing about the rationale for conducting the Jan. 24 interview with Flynn: "What's our goal? Truth/Admission or to get him to lie, so we can prosecute him or get him fired?"

It has been reported that Strzok and Pientka initially reported that even though some of Flynn's responses to their questions about his conversations with Kislyak were inaccurate, they believed this was more likely a memory lapse than a deliberate intent to deceive. But a decision was nevertheless made at higher levels to prosecute Flynn for making materially false statements to the agents, which is a federal crime, even if the speaker was neither under oath nor mirandized at the time.

After months of litigation, during which Flynn is said to have spent upwards of $5 million on legal fees and sold his house to help fund his defense, Flynn decided to throw in the towel and plead guilty. Thus, on Nov. 30, 2017, as part of a plea bargain in which the DOJ initially agreed to recommend no prison time in exchange for Flynn's "substantial assistance" to special counsel Robert Mueller's Russia investigation, Flynn signed a "Statement of the Offense" in which he swore under penalty of perjury that he made materially false statements and omissions during the Jan. 24, 2017, FBI interview regarding his conversations with Ambassador Kislyak, and that he also made materially false statements and omissions in forms he submitted under the Foreign Agents Registration Act regarding work he had done on behalf of the Turkish government. The next day, Flynn appeared before Judge Sullivan and formally pleaded guilty.

Flynn has since had a change of defense counsel and a change of heart about his decision to plead guilty, which he claims was coerced by DOJ prosecutors who, among other things, threatened to indict Flynn's son and business associate, Michael G. Flynn. Flynn has sought to withdraw his guilty plea, and in January of this year, his new lawyers filed in court a 12-page sworn statement in which Flynn repudiates his prior admissions and describes in harrowing detail alleged conflicts of interest by his former lawyers and the excruciating pressure applied to him by DOJ prosecutors seeking to elicit a guilty plea.

Flynn's case for withdrawing his plea has recently been bolstered by an independent investigation of his case performed by the U.S. attorney for the Eastern District of Missouri, Jeff Jensen, whom Barr brought in to reassess the legitimacy of the prosecution, including particularly whether Flynn's alleged misstatements were material to any legitimate, ongoing investigation at the time. This has resulted in the production of documents to Flynn's new lawyers that shed light on FBI and DOJ machinations behind the scenes.

So, bottom line: Did Michael Flynn commit federal crimes or not? Other than members of the chattering classes, none of whom has any firsthand knowledge of the key facts, it turns out it

depends on whom you ask and when. As noted, Flynn originally said he committed no crimes; then, he said he did commit one crime, lying to FBI agents; but now, he says he was right the first time and that he committed no crimes. Likewise, DOJ and FBI officials first took the position that Flynn committed no crimes; then, they decided that, in fact, he had; and now, the DOJ is back to saying he did not. And, as noted, Judge Sullivan has intimated that Flynn's very act of pleading guilty and admitting to various allegations that he now denies may itself constitute the crime of perjury and/or criminal contempt of court. So, where does this leave us?

Abundant empirical evidence demonstrates beyond any doubt that innocent people regularly plead guilty to crimes they did not commit. Whether or not Flynn did so is of relatively minor significance compared with the far more urgent question of what to do about the DOJ's penchant for short-cutting the constitutional process for adjudicating criminal charges in favor of the extra-constitutional, unreliable, and fundamentally un-American practice of coercive plea bargaining. Fortunately, as explained below, there are several policies Congress can and should implement to address this cancer in our criminal justice system.

If truth is the first casualty of war, the Flynn case suggests that the same may be said of criminal prosecutions featuring what has become both the bête noire and the sine qua non of American-style criminal justice: coercive plea bargaining. Simply put, the reason we still have no clear understanding of precisely what Flynn did or didn't do, and what crimes he did or didn't commit, is because the entire case against him boils down to an in-court admission that Flynn now claims was coerced by DOJ prosecutors applying intolerable pressure to induce him to waive his right to a trial and simply confess his guilt, just as more than 90% of federal criminal defendants do today. Indeed, it is hardly an exaggeration to say that criminal jury trials are nearly extinct on American soil: Some 97.4% of federal criminal convictions are obtained through plea bargains, and in some judicial circuits, it's as high as 99%.

Recent developments in the Flynn case, including evidence that senior FBI officials engaged in shockingly inappropriate, perhaps even criminal, behavior during the Flynn investigation, give rise to a stark but crucial question: How many other guilty pleas would disintegrate as spectacularly as Flynn's if the underlying case were subjected to the same searching review that Flynn's finally received more than two years after the entry of his guilty plea?

Proponents of the current plea-driven system will likely counter that Flynn's case was a politicized fluke, nothing more. But there are good reasons to doubt that assurance. Consider the 2018 prosecution of rancher Cliven Bundy in Nevada for inciting violence against federal agents in the midst of a dispute over federal grazing land. That case was dismissed with prejudice after the judge determined that DOJ prosecutors showed a "reckless disregard for the constitutional obligation to seek and provide evidence" by withholding documents and misstating facts about the case. Or consider the 2008 corruption prosecution of Sen. Ted Stevens before the same judge in the Flynn case, Emmet Sullivan, during which DOJ prosecutors systematically withheld explosive exculpatory evidence that would have thoroughly gutted their case against Stevens. Besides dismissing the charges against Stevens, an incensed Sullivan commissioned a thorough investigation of the DOJ's misconduct in the case that culminated in a 500-page report that documents, in mind-boggling detail, prosecutors' serial misdeeds in their corrupt attack upon a sitting senator.

Again, defenders of the current system will say those particular examples are rare, which is true — but so are trials in our plea-driven federal system, in which just 2% of cases go to trial. If every single case went to trial with defense counsel as tenacious and aggressive as Flynn's new team, how many of those cases might blow up as spectacularly as the Flynn, Bundy, or Stevens cases? And if every one of those cases got the same internal tire-kicking by the DOJ that Flynn's finally received, how many of them would simply be dismissed outright, as the DOJ now seeks to do with Flynn?

There's no reason the latter question has to remain hypothetical, and Congress should move swiftly to ensure that it does not. The pathologies engendered by the DOJ's overreliance on coercive plea bargaining are too numerous and too deeply ingrained in our system to address all at once. But something Congress can do immediately is establish within the Department of Justice an Office of Plea Integrity that would be charged with doing on a full-time basis what Jeff Jensen was brought in to do in the Flynn case, namely, pop the hood and give the whole case a searching and perhaps even skeptical review before clearing it to proceed to a guilty plea. With upwards of 80,000 federal criminal prosecutions each year, it probably isn't feasible to review every case, but it should not be unduly difficult to develop a system for selecting a mix of random and specially designated cases, including ones involving prosecutions of particular public interest, such as the Flynn and Stevens cases, for review.

Other reforms Congress should consider in the longer term include a statutory cap on the notorious "trial penalty," which is the often substantial differential between the sentence offered in a plea bargain and the much harsher sentence the defendant will receive if he exercises his right to trial; imposing a legal duty on prosecutors to provide materially favorable evidence to the defense before any plea discussions occur, something that is not always done currently; and the elimination of absolute prosecutorial immunity, a judicially invented legal doctrine that makes it impossible for victims of even the most blatant misconduct to sue prosecutors for anything they do in the course of their prosecutorial duties.

Again, those are policies Congress may consider in the fullness of time. But the creation of a Plea Integrity Unit within the DOJ is an obvious and urgent response to a botched high-profile prosecution that has justifiably shaken people's faith in the competence and the integrity of the federal criminal justice system.

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