

The Flynn case isn't over until the judge says it's over

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The Justice Department's move to dismiss the prosecution of former national security adviser Michael Flynn does not need to be the end of the case — and it shouldn't be. The Justice Department has made conflicting statements to the federal judge overseeing the case, Emmet G. Sullivan. He has the authority, the tools and the obligation to assess the credibility of the department's stated reasons for abruptly reversing course.

The department's motion to dismiss the Flynn case is actually just a request — one that requires "leave of the court" before it is effective. The executive branch has unreviewable authority to decide whether to prosecute a case. But once it secures an indictment, the proceedings necessarily involve the judicial branch. And the law provides that the court — not the executive branch — decides whether an indictment may be dismissed. The responsible exercise of that authority is particularly important here, where a defendant's plea of guilty has already been accepted. Government motions to dismiss at this stage are virtually unheard of.

Prosecutors deserve a "presumption of regularity" — the benefit of the doubt that they are acting honestly and following the rules. But when the facts suggest they have abused their power, that presumption fades. If prosecutors attempt to dismiss a well-founded prosecution for impermissible or corrupt reasons, the



people would be ill-served if a court blindly approved their dismissal request. The independence of the court protects us all when executive-branch decisions smack of impropriety; it also protects the judiciary itself from becoming a party to corruption.

There has been nothing regular about the department's effort to dismiss the Flynn case. The record reeks of improper political influence. Hours after the career prosecutor abruptly withdrew, the department moved to dismiss the indictment in a filing signed only by an interim U.S. attorney, a former aide to Attorney General William P. Barr whom Barr had installed in the position months before.

The department now says it cannot prove its case. But Flynn had already *admitted* his guilt to lying to the FBI, and the court had accepted his plea. The purported reasons for the dismissal clash not only with the department's previous arguments in Flynn's case — where it assured the court of an important federal interest in punishing Flynn's dishonesty, an interest it now dismisses as insubstantial — but also with arguments it has routinely made for years in similar cases not involving defendants close to the president. And all of this followed a similarly troubling reversal, also preceded by the withdrawal of career prosecutors, in the sentencing of Roger Stone.

Courts often inquire as to the reasons for a government motion to dismiss, but this is the rare case that requires extra scrutiny, to ensure that, in the Supreme Court's words, "the waters of justice are not polluted."

Fortunately, the court has many tools to vindicate the public interest. It can require the career prosecutor to explain why he stepped off the case, as another federal judge recently did when the Trump administration attempted to replace a trial team litigating the politicization of the census. It can appoint an independent attorney to act as a "friend of the court," ensuring a full, adversarial inquiry, as the judge in the Flynn case has done in other situations where the department abdicated its prosecutorial role. If necessary, the court can hold hearings to resolve factual discrepancies.

And the court could compel the department to reveal the one thing it has thus far refused to show — the actual evidence underlying the prosecution. To help Flynn, the department has made public documents it jealously guards in almost every other case, including confidential memos and internal deliberations. But it has balked at disclosing the transcripts of the very conversations with the Russian ambassador that Flynn admitted he lied about when the FBI interviewed him.

The department once argued that those conversations confirmed Flynn's guilt. It now claims those conversations were innocuous. By ordering disclosure of the transcripts, the court can empower the American public to judge for itself — and assess why the department is trying to walk away from this important case.

Flynn's guilt has already been adjudicated. So if the court finds dismissal would result in a miscarriage of justice, it can deny the motion, refuse to permit withdrawal of the guilty plea and proceed to sentencing.

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