



WTH is going on with Michael Flynn? Debating exoneration, unmasking, and intelligence leaks

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Danielle Pletka: Hi, I'm Danielle Pletka.

Marc Thiessen: I'm Marc Thiessen.

Danielle Pletka: Welcome to our podcast. What the hell? And I mean, what the hell is going on?

Marc Thiessen: You say that more empathetically every time we do a new podcast.

Danielle Pletka: I know, because I feel that way about pretty much everything. So what are we talking about?

Marc Thiessen: We're talking about Michael Flynn. So there's a whole lot to unpack here. Michael Flynn, former National Security Advisor for I think 23 days in the Trump administration. He pled guilty to lying to the FBI as part of the Mueller probe. And the Justice Department as part of its review, after the Mueller probe ended up showing us that the whole Russia collusion thing was a conspiracy theory, the Justice Department has been going back and looking at how we got to this place. And the Attorney General asked Jeff Jensen, who is a US attorney for the Eastern district of Missouri, a 10-year veteran of the FBI, 10-year veteran as a federal prosecutor to look at the Michael Flynn case. And he came back with a recommendation that the charges be dropped and laid out a pretty compelling case of FBI misconduct in the case of Michael Flynn.

Danielle Pletka: A lot of these stories, whether it's the Russia collusion story or the Michael Flynn story, give me that, there but for the grace of God go I story. It was like when we heard about the IRS investigating and no longer giving nonprofit exemptions to conservative organizations. Sometimes the power of government against the individual feels so untrammled that it's just ... You know, it's an every man's story. And in some ways I think coming back to Michael Flynn, despite the fact that I disagree with him on many, many things ...

Marc Thiessen: As do I.

Danielle Pletka: ... I think that that is where you feel that fear that if I get crosswise with one of these people, and you and I have both had this happen just even in the public square, if I get crosswise with one of these people, they have immense power to destroy my life.

- Marc Thiessen: Yep. No, I agree with you 100%, Dany, and we'll talk about Flynn specifically in a moment, but just on the broader issue. And you brought up the IRS. There's a real concern that the previous administration operationalized the federal government to go after its critics, the IRS going after conservative nonprofits. And there's a lot of evidence that the FBI was turned into a weapon, a political weapon to go after Trump and the people around him.
- Marc Thiessen: We spent two years and \$30 million chasing a conspiracy theory that Trump had colluded, or conspired is the legal word, with the Russian government to steal the election. And he didn't, it didn't happen. He had bad ideas about Russia. He had a-
- Danielle Pletka: Bad judgment.
- Marc Thiessen: Bad judgment.
- Danielle Pletka: Bad advisors, bad meetings.
- Marc Thiessen: But that's not a crime. Those are decisions for the American people to make. And the reality is that there is a lot of evidence that the FBI and people in the Justice Department as well, were using their powers in a politicized way.
- Danielle Pletka: Right. The politicization of these agencies is something to be regretted. So I have always been persuaded that one of the reasons why Michael Flynn supported Donald Trump was because he hated the Obama administration so much. He had a terrible experience with them. He was the head of the DIA. He was collecting intel. A lot of people, him and Jim Mattis, who subsequently became defense secretary in the Trump administration, were people who couldn't stand the Obama team because they didn't know what they were doing in the Middle East, they weren't acting on their principles, they put our nation in danger, and they were rotten to work for on top of all of that. Unfortunately-
- Marc Thiessen: I agree with everything you just said.
- Danielle Pletka: Right. But people whose politics are guided by, "you were mean to me and I don't like how you treated me and therefore I'm going to be with the other guys," tend not to be the greatest employees. That is true for Flynn. He also developed around the time of the Obama administration, a bizarre bias towards Russia that caused him, when he left the Obama administration, to go and work with Russia Today, which is an arm of the Putin government, to take money from basically Russian agents and Russian skills.
- Marc Thiessen: Look, if you asked me whether I would want Michael Flynn as National Security Advisor, the answer is no. But I wasn't elected president of the United States, that was his decision. And the fact that Michael Flynn, just like Donald Trump, had a terrible judgment when it comes to Russia is not criminal. And that's what we have here. What we have here is a case of gross misconduct by the FBI, gross misconduct by the Justice Department and their treatment of Michael Flynn. They went and interviewed him at the White House when there was no underlying investigation to justify doing that.
- Marc Thiessen: They didn't inform the White House counsel, Comey did this without informing his boss, Sally Yates at the Justice Department in doing it. Notes that were revealed the

day of the interview by Bill Priestap who says, transcript of what he said, "What is our goal?"

Danielle Pletka: Bill Priestap, who is an FBI agent.

Marc Thiessen: FBI agent. His notes and his conversations with the FBI, people who were going to interview Flynn, "What is our goal? Truth, admission, or get him to lie so we can prosecute him or get him fired." I'm sorry, that is not the job of the FBI. It's not your job to do that. And that interview should have never happened. And when it did, they broke multiple rules. They didn't tell him that lying to the FBI is a criminal charge.

Danielle Pletka: But I want to point out one more important piece of information. Just because the FBI did the wrong thing, just because the Justice Department did the wrong thing, just because this was an outrageous abuse of power, doesn't mean that Flynn wasn't a liar. Why did he get fired from the White House? Because he lied to the Vice President about his meetings with the Russians. He lied to Sean Spicer about them. He lied to Reince Priebus about it. That's what got him fired. So again, everybody in this situation was a bad guy. Only one of them had a lot more power than the other.

Marc Thiessen: You can be wrong and have been wronged at the same time.

Danielle Pletka: Yup.

Marc Thiessen: And let's not forget the most serious abuse in this case is that they unmasked his name from his conversations with the Russian ambassador, which were wholly appropriate according to the Justice Department and somebody in the Obama administration leaked that to the press, which is a serious crime. If there was a crime committed in this case, it was not Michael Flynn's crime, it was the crime of leaking classified signals intelligence to the media.

Danielle Pletka: Okay. But Michael Flynn committed a couple of other crimes that weren't the ones that the FBI decided to prosecute him for. You know what we need here? We need a lawyer.

Marc Thiessen: We need a lawyer.

Danielle Pletka: We need a lawyer. Thank God, we've got one. So David-

Marc Thiessen: I hope we don't need a lawyer.

Danielle Pletka: Well, we may by the end of this podcast.

Danielle Pletka: David French is a lawyer, a senior editor at *The Dispatch*, which is a fantastic new publication that we commend to all of you. I write for them almost every week. And I think that they are doing a wonderful job and I've really enjoyed David's pieces. He has been a senior counsel for the American Center for Law and Justice and for the Alliance Defending Freedom. He served as the president of the Foundation for Individual Rights in Education, all causes we believe in. He was a staff writer for many years for *National Review* and a senior fellow at the National Review Center. He is a former major in the US Army Reserve, and a veteran of Operation Iraqi Freedom. In other words, he is the perfect person for us to talk to, so it's awesome that he was

able to be with us.

Marc Thiessen: Well, David, welcome to the podcast.

David French: Thanks so much for having me.

Marc Thiessen: You've actually had a series of fascinating pieces in *The Dispatch*. And by the way, for everyone who's listening, you should read David's column, the French Press in *The Dispatch*, but one of your recent headlines was, "[No, Michael Flynn Isn't 'Exonerated.'](#)" Explain.

David French: Yeah. We've seen the DOJ obviously moved to dismiss Michael Flynn's prosecution. And one of the things that I saw trending on Twitter was "Flynn exonerated." And what I wanted to point out in my piece is that there were multiple aspects of the Flynn prosecution. This case was not all about lying to the FBI piece of it. This was the story of Michael Flynn, it's sort of a long and winding story that involves not just lying to the FBI about some mythical Logan Act infraction or alleged mythical Logan Act infraction. But he was also, during the campaign, working as an unregistered foreign agent for the Turkish government. There is substantial evidence that he committed federal crimes and he entered into a plea bargain for one of the crimes that he could have been charged with, the lying to the FBI. And in exchange for entering into this plea bargain, he agreed to cooperate and the Department of Justice did not charge him with other counts under other statutes that it could have charged him.

David French: And so when the DOJ dropped an entire case, because it believes that one aspect of its case is tainted, that's not an exoneration. There was a much larger picture here. And so I think that the focus on the DOJ's conduct and in particular, the fateful interview of Flynn on January 24th 2017, while important, and while it is worth peeling that onion, it is not the entirety of Michael Flynn's alleged wrongdoing. And to say that the FBI may have treated him unfairly in that circumstance does not exonerate this man from the other unlawful conduct, that there's substantial evidence, including his own admission that he committed...

Danielle Pletka: David, but wait, will you let me interrupt you? Because what I want to do is actually take a step back and just reorient people into what happened. Would you mind?

David French: No. No.

Danielle Pletka: Okay. And then we can circle back to the Logan Act, which is really sort of the first thing. Take us back in the way back machine to where this all starts. Flynn is an advisor to the Trump campaign in 2016, Trump is elected and Flynn becomes the National Security Advisor, and then pretty much everything goes south from there. Just what are the outlines of the story?

David French: Yeah, this actually goes back to the Obama administration. So you have Michael Flynn coming out of the Bush administration as one of, frankly, one of the heroes of the Iraq war. A lot of people don't know this, but he was instrumental in creating one of the most ruthlessly efficient intelligence gathering machines ever seen in counter-insurgency warfare, indispensable in turning the tide during the Surge. And we used the fruits of Michael Flynn's labor when I was in Iraq in 2007-2008. He clashes with the Obama administration, eventually leaves the military, and retiring generals tend to take various different kinds of paths in their career.

- David French: I mean some joint corporate boards, some get TV commentary gigs, some join think tanks. Michael Flynn, in the zigzag of life, zagged the wrong way. One of the things he did is, in 2015, he took a substantial sum of money from criminal affiliated entities, showed up at an *Russia Today* dinner, where he was with Vladimir Putin. I believe he took almost \$70,000. In 2016, he had a company that capitalized on his national security experience for clients, and they took a client that paid him more than half a million dollars to advocate for the interests of the Turkish government. He was doing that during 2016 while he was a foreign policy advisor for the Trump campaign, and a guy who was really instrumental and key in the Trump campaign.
- David French: He'd taken this Russian money, he was taking large sums of Turkish cash. In fact, on election day, he wrote an op-ed in *The Hill* advocating the Turkish government's position on the extradition of a Turkish dissident, this Imam, his last name is Gulen, who the Turks believed was behind a coup attempt against Erdoğan. Flynn comes in to the national security advisor position having worked as an unregistered foreign agent right up until the election. At the same time that there is substantial evidence of Russian interference in the election and substantial evidence that the Russians had interfered specifically to assist Donald Trump, he had taken large sums of cash from Russian-affiliated entities.
- David French: We're talking about a guy who'd made a lot of very bad choices walking into the national security advisor position. In that circumstance, there's an open counter-intelligence file on him, there is a Logan Act investigation, we can talk more about that, which I think Logan Act investigations are bogus. I think the Act is unconstitutional. There hasn't been a prosecution under that law since what, 1850 something. I don't think there's ever been a conviction. There is an open investigation of him, counter-intelligence, Logan Act.
- Marc Thiessen: There wasn't a Logan Act investigation though, David, right? They had determined that Flynn had not, that he was cleared of any involvement in a conspiracy with Russia, which is what the investigation of him was, and they had determined to close that investigation, but hadn't yet closed it, and then they came up with the Logan Act pretext, but they had never opened a new investigation on the Logan Act. So there wasn't a Logan act investigation.
- David French: I don't think that you're going to find paperwork that says here's our Logan Act investigation, but that was the pretext.
- Marc Thiessen: Yeah.
- Danielle Pletka: Just to remind everybody, the Logan Act basically suggests that a non-government official cannot negotiate, or conduct foreign policy if you will, with a foreign official, and that that is a violation of the law. Is that a rough summary?
- David French: That's a rough summary. You can't purport to try to bind to the United States to any action, that's exactly right, no diplomacy as a private citizen. There are a lot of constitutional problems with it. There are a lot of practical problems with it. The idea that an incoming national security advisor cannot talk to a Russian ambassador about an issue that he's going to deal with immediately upon assuming office as a national security advisor, I think is ridiculous.
- Danielle Pletka: Ridiculous. We all came up with the same word.

- David French: Yeah, exactly. In my mind, there is no question that in the course in January of 2017, the FBI was opportunistic, unfair, and deceptive in its dealings with Michael Flynn, both internally within the DOJ, and directly in its dealings with Flynn. The phrase "perjury trap" is something that's used a lot, and I think it's a fair description of what the FBI sprung on Michael Flynn, a perjury trap. To be super, super clear, this is something that any federal criminal defense attorney will tell you is a pretty darn common FBI tactic.
- Danielle Pletka: Explain what a perjury trap is.
- David French: Essentially a perjury trap is when the FBI asks you a question and they know the truthful answer already. In other words, this is not a legitimate search for information. The FBI already knows the answer to the question, such as, "Did you speak to Vinnie the Butcher Soprano on January 10, 2018," and they've got the intercept, and you say, "No, I've never spoken to anybody named Vinnie the Butcher." They know the answer to the question. They ask you the question, particularly in a setting where you're deeply incentivized to lie, they get the lie and they have their 1001 violation, which is in addition to whatever criminal charges they're already investigating. Immediately that 1001, this is a provision of federal law that prohibits lying to the FBI in the circumstance, that becomes a club that the FBI can then wield against the defendant to provide additional leverage and plea bargaining, et cetera, et cetera. This is something that happens relatively frequently, and when it's getting a bad guy, it really is somebody like Vinnie the Butcher-
- Marc Thiessen: As opposed to a decorated military officer.
- David French: Right. People tend to cheer like, "Oh, how clever of the FBI and how stupid of Vinnie the Butcher," but when it happens to somebody who, particularly in our parts and political times, regardless of Flynn's recent bad actions, when it happens to somebody who's on a presidential administration, about half the country is going to say, "What the heck is going on," the other half is going to say, "Yay. They got their guy," and you see that breakdown. That perjury trap tactic is relatively common and Americans by and large accept it because they, by and large trusted that the FBI is going after bad guys.
- Marc Thiessen: It's an open question whether Flynn is a bad guy. He's a complicated figure. You've laid out his relationship with Russia and what he did with the Turkish government are certainly unsavory. But, one of the reasons why the Obama administration hated him so much is because he was the one who actually warned them, that if they pulled out of Iraq, that ISIS would rise up. He testified in 2014 of that and his DIA it later came out, had sent an assessment to the White House saying exactly what happened. That if you pull out, then they're going to take territory and build a caliphate and all the rest of it.
- Marc Thiessen: There's a reason why the Obama administration was very hostile to Michael Flynn, because he had predicted and warned them that they were going to create a disaster in Iraq. He's a complicated figure, but I think it's pretty clear here that one, this was a perjury trap, as you lay out, but also two the fact that, you've mentioned, that he pleaded guilty to this. There's a project called the Innocence Project, which maintains a database of all the wrongly convicted people. Eighteen percent of people who plead guilty later are proven by DNA evidence to have not pleaded guilty.

- David French: Let me stop you right there. When you're talking about people who plead guilty to crimes they didn't commit, you're usually not talking about retired three star generals represented by, was it Covington and Burling at the time?
- Danielle Pletka: Yes it was.
- Marc Thiessen: Sure.
- David French: What we're talking about, typically when we're talking about a coerced guilty plea, is a situation very different from the current situation. I think what happens is people who cite those statistics are shoehorning in things like, "Hey, there was an 18 hour interrogation in the basement and they threatened him with a first degree murder charge, and manslaughter was his way out." That's very different from he's represented by some of the most capable lawyers in the entire United States of America. He is one of the more sophisticated operators in the American military, and extremely sophisticated in the ways of American politics, and he pleads guilty to one charge out of multiple that could have been brought against him in exchange for cooperation. That's all very conventional.
- Marc Thiessen: Okay, but let me push back on you a little bit. I think we mostly agree rather than disagree on the Flynn case, but let me just push back on this for a second. James Comey, he didn't inform Sally Yates, his boss at the Justice Department, that he was going to conduct this interview. In fact, he didn't return her call the morning of the interview until the FBI agents were on the way so that he couldn't pull them back. She was apparently furious about that. They didn't go to the White House Council, which is standard practice, and ask if they could do the interview. They never informed Flynn, they never made a statement saying lying to the federal agent is a crime, which you're supposed to do. They didn't show him the transcripts of the phone calls that they had.
- Marc Thiessen: They weren't pursuing any information they didn't already know. Also, according to the motion that the justice department filed, the agents who interviewed him didn't think he was lying. It was Comey who pushed back and said, "Well, I don't know, it's a close one." Even the people contemporaneously talking to him didn't think he lied, and they were having the debate as to whether there was even a crime committed.
- David French: Right. That's why my position has been drop the 1001 charge and pursue the foreign agent charges, but I will say this, let me channel the federal criminal defense attorneys that are perhaps screaming into their headphones right now.
- David French: Everything you've described about how the FBI engaged in subterfuge and essentially, a word that I used in one of my pieces was tricked, tricked him into a sense of ease and comfort, and then snapped shut the trap, all these criminal defense attorneys are saying, "Yeah, that's what they do. That's been held time and time again, not to be a violation of his actual rights as a criminal suspect," but I agree with you, all of that is nefarious. Even though there have been people who've tried to strain to find justification for this conduct, I'm unconvinced by that. However, one of the things, and I think one of the reasons why Judge Sullivan has been so angry at Flynn, is he knows the full picture, that an array of charges could have been brought against him, and in exchange for not bringing that array, he pled guilty to one of the array and agreed to cooperate.

- David French: By dropping one of the array of charges that could have been brought against him, should not, in my view, end the case against him. That's my issue. An interesting factoid is, if in fact the DOJ succeeds in dropping the case, we can talk about the whole Sullivan aspect of this, in theory, a Democratic administration could come in and bring the FARA charges and the foreign agent charges against Flynn, which strikes me as something that could be quite destructive to our body politic, but also quite possible legally. I think my issue here is not, we're going to agree a lot on the Logan Act 1001 aspects of this, but why has that suddenly become the totality of the case?
- David French: There's a tactical issue here that I think, maybe the Special Counsel just frankly, made a wrong decision. If they were to choosing which count for him to plead guilty to, why did they choose that one, as opposed to the FARA confession? In Flynn's statement of offense, he confesses to a FARA violation. Why did they choose the 1001, which was, in my view, the weakest aspect of their case against him, and not choose the foreign agent aspect? That's a question that I'd be very curious to hear from a member of the Special Counsel's team.
- Danielle Pletka: I think this takes me to, actually, my next question. I think we know why they did that. It's because there's a Russia narrative that they want to press.
- Marc Thiessen: They weren't interested in the Turkey narrative?
- Danielle Pletka: Weird. I know. David, we've never talked about this, but Washington is a massive walking FARA violation.
- Marc Thiessen: You'd have to prosecute a lot of people.
- Danielle Pletka: That doesn't mean that it should be, or that it's okay, or that ignorance of the law is a defense, but the reality is, of course, that I would say, particularly when I was still running the foreign policy department at AEI, or when I was on Capitol Hill, I would regularly get calls from people at think tanks, and at law firms, and companies on behalf of foreign principals for whom they had not registered.
- Danielle Pletka: In fact, I would say not registering is the norm. The spate of FARA prosecutions that happened after Trump was elected, have this veneer of opportunism to them that is problematic.
- Danielle Pletka: Listen, I want to ask you about this Russia narrative, because I think it's hugely important, and I actually think this is where Flynn actually has shown unbelievably poor judgment and gotten himself into a lot of the trouble that he found himself in, aided and abetted by FBI officials who obviously had politics on their mind. Let's talk for a second about the unmasking. Because in fact, this is where a lot of this starts is during the Obama administration, the conviction among certain senior officials that there's something untoward happening between Russia and team Trump, and a lot of this centers on Flynn himself. So what happened there and was that in and of itself okay?
- David French: Yeah. So, let's at least give a shout out to a concept that I think is often missed in a lot of the analysis of 2016, and that is the fog of war. When complex events are underway, it's very, very difficult to have complete situational awareness. And so in 2016, there was a complex series of events underway. And I think a strong argument

that team Obama looked at this complex series of events and drew the worst possible inferences from them. But the complex series of events includes Russian active measures that are designed to disrupt the American election that eventually transformed into trying to some extent to assist Donald Trump's victory.

David French: Now, did that have a material effect on the outcome of the election? I tend to think not, but you do have a foreign power who's trying to interfere in the election. And it eventually morphs into apparently trying to have one person elected. You have a leading foreign policy advisor of that person who was taking tens of thousands of dollars as recently as the previous year from that foreign power. You have multiple individuals within team Trump, although they didn't engage in collusion, as Mueller found, there's a lot of evidence that they kind of tried.

Danielle Pletka: Or they at least showed unbelievably poor judgment in their interactions with Russians. That's for sure.

David French: Right. I mean, when you're taking a meeting with somebody who says, "Hey, I have information from the Russian government in furtherance of the Russian government's effort to help Mr. Trump." And you're like, "yeah, let's have that meeting," even though it came to nothing, that doesn't exonerate your state of mind when you took the meeting. So you have a lot of evidence of, and to varying degrees they didn't have all this evidence in 2016, but they had a lot of issues that raised concerns. And so what then begins to happen? They begin to take a serious look at whether or not there is an active conspiracy or collusion. And then you drop into that mix the most malignant document that I can possibly think of in the modern history of American politics, which is the Steele Dossier.

David French: So you take an already high degree of suspicion that's connected to actual facts, and then you drop into that this piece of OPO that was a subcontracted out opposition research from a rival political campaign, Hillary Clinton's campaign, drop it into the mix. And then all of a sudden, you've got a situation that is extraordinarily toxic. So the unmasking itself has never really alarmed me. Unmasking is very common. So the Trump administration, for example, made about 17,000 unmasking requests a couple of years ago. The thing that did alarm me was the leaking. So you unmask an individual, you find out who person one is in a conversation between foreign nationals. Once you get the identity of person one, then somebody goes to the *Washington Post* and leaks that. Now, it's probable that that itself, the leak, was an illegal act because it's almost certain that they were leaking classified information.

David French: And so, in some ways, we've kind of focused around the wrong thing. Unmasking is relatively routine. It's the leaking that again poisoned the political discourse and furthered this narrative of active collusion, which then was put on steroids when the Steele Dossier leaked into, didn't leak, I mean, BuzzFeed just plopped it into the public square. You combine those two things at once and you began to create this incredible momentum for an active conspiracy narrative that turned out to be false. And so that's part of what was going on here and tainted and colored everything that proceeded later.

Marc Thiessen: Yeah. I agree with you 100% that the leaking is the crime, and certainly much more serious than anything Michael Flynn is accused of having done. But a couple of things that we have to emphasize, two year Mueller investigation, no evidence of conspiracy between anyone in the Trump campaign and the Russian government. So yes, we can go back to that meeting in Trump Tower and really bad judgment

and shouldn't have happened. But look, there was no conspiracy between the Trump campaign and the Russian government, full stop, according to the Mueller Probe. Second of all, when Flynn was interviewed, the FBI had already concluded that they were going to close the conspiracy case against him because of an absence of derogatory information in their eyes.

- Marc Thiessen: If they've already concluded that he wasn't conspiring, then why sit down with him and talk to him about the Russian ambassador? And then you have Obama officials who we've now got the list of unmasking. Well, there's only a small universe of people who have access to the intelligence that Michael Flynn was on that call. It's only eight people that had that unmasked information. So that's your list of suspects in the crime, right?
- David French: Well, the requests don't come from, like Joe Biden isn't putting on a Post It, I need this unmasked. This is coming from the vice president's office. So the universe of people is almost, I would say almost most assuredly much larger than eight people. But-
- Marc Thiessen: Eight people and their staffs.
- David French: Yeah. Which is a pretty large universe. I would say that, again, when you're talking about all of the conduct that occurred up to January 24th, 2017, I remember that date so well because it's actually my birthday. It just sticks in my mind. "Oh yeah, I remember the Flynn interview day." And so, yeah, one of the things about it that you see from the record is they were supposed to close this thing right around January 4, but they just never got around to doing it. And so they had kind of this, "Wow, eureka, nobody actually closed this investigation up. We can go do this."
- David French: And all of that is really unsavory. All of that is really unsavory. And again, I'm putting on my criminal defense lawyer hat. All the criminal defense lawyers around the country are saying, "welcome to FBI investigations." And it's really interesting if you look at a lot of the public commentary about this, and not all of it, but a lot of it, you'll find former prosecutors who were appalled. They're like, "this is not the way we do business." And you'll have a lot of current and former defense attorneys going, "oh yes, it is the way you do business." And part of that, that's part of the controversy around the motion to dismiss is that the motion to dismiss the case is really based around "this was just wrong. We shouldn't have done this. This wasn't fair." It was not based around, that "we violated Flynn's rights," which is normally what a motion to dismiss, especially a prosecution after a plea.
- Marc Thiessen: I think it did, David. What they said was there was an absence of derogatory information and the case was supposed to be closed on the collusion part of it. And so his lie, if he made it, and the agents in the room were not sure that he did, was not material to an ongoing investigation. The materiality is essential to the crime.
- David French: Yeah. But that's not the standard that is the standard applied in case law and by the DOJ and the FBI.
- Marc Thiessen: And he also pleaded to having made a material lie and was never told that the Russia investigation against him had been closed or had been concluded that he hadn't done anything. So he pleaded to a crime that he didn't commit.

- David French: Again, that's a legal argument that is a violation of his rights. If I'm a criminal defense attorney and I make that argument and ask a court to dismiss a case on that basis, as the defense, not as a prosecution exercising prosecutorial discretion, that's the point from defense attorneys, I'm losing that motion. Because the definition of materiality is not the definition as the way the DOJ applied it in that motion to dismiss. That's why you have so many people who have said, "wait a minute, this DOJ motion is completely abnormal and unusual," not because Flynn was treated fairly, but because the legal argument and the standards that the DOJ is applying, that's what defense attorneys have tried to get to be applied to FBI conduct and failed for a very long time.
- David French: And so that's what I say when I say that his rights weren't violated. It's not that there isn't an argument that his rights weren't violated. It's the legal standard has been very, very pro prosecution on that materiality point for a very, very long time. That's been pretty settled that that materiality element is not interpreted the way the DOJ interpreted it here. So that's one of the reasons for controversy. And I think a lot of people don't pay close attention to this. When you hear unfair, unfair, unfair, and I agree. I totally agree. When you hear unfair, they think in their mind illegal, and those are different concepts.
- Danielle Pletka: Yeah. Especially when it comes to the FBI. There's a lot of controversy about this motion to dismiss because of the why, because it's so uncommon. What do you think is behind it? And then I want to ask you about Judge Sullivan.
- David French: I think there is an enormous amount of political momentum on the right... Let me put it this way, the exoneration of Trump has been over interpreted into that there was nothing to investigate and that no one did anything wrong. Now we do know that no one did anything unlawful with regard to Russia, but it's been interpreted to, "this was a giant witch hunt that uncovered nothing meaningful at all." That's the over interpretation. You're now into the vengeance cycle. And I think a lot of people have sort of taken Flynn, maybe more than any other person, as sort of the symbol of the FBI's overreach and the special counsel's overreach. So I think he is a symbol beyond, in importance beyond his actual role and his actual, as I said, his actual innocence of criminal law.
- David French: And so there's an enormous amount of political attention to Flynn that is not applied to Manafort or to Roger Stone or to Michael Cohen, to other individuals caught in all of this. And so, it is hard for me to read that document in all honesty and not see the heavy hand of political influence, to read the DOJ's motion. And I think one of the reasons why Sullivan is so angry is that look, 80 to 90% about what we know, we've known for some time about the Flynn prosecution. And in fact, in December 2018, Sullivan was so concerned about what he read in the Flynn defense team's briefing that he called the hearing to essentially say, "Are you sure you want to plead? Because I'm new to the case, a brand new judge onto the case. The original judge recused himself after he took Flynn's guilty plea."
- David French: And he says, "Are you sure you want to plead, because I'm going to give you an opportunity right now to withdraw the plea." He swore Flynn in, put Flynn under oath again, and Flynn walked through his confession once again. And then the judge says very clearly, "So I just want to be clear that you could have been indicted," or he's talking to the prosecution, that "Flynn could have been indicted on another case that had recently been filed by the DOJ." And they said, "Yes, he could have been indicted, but we have this plea bargain, he's cooperating." And so

a lot of Sullivan's fury, I think, is related to that December, 2018 hearing where he said, "I'm giving you a chance to withdraw this plea. And I'm not going to be in the business of letting someone be sentenced that's not guilty of the crime."

- David French: And so I think that people are forgetting that he had this whole second bite at the apple based largely on many of the facts we've already talked about, and he chose not to take it. And Sullivan, I'm sure you guys have heard this by now... I'm trying to think of the right description. He has his own mind. He can be famously difficult to deal with, especially if he feels like counsel is not being straight with him. And so I think that explains a lot of what's going on here.
- Danielle Pletka: Okay. So I think that's actually a great explication and much more than most people have accorded to understanding where Sullivan is coming from. On the other hand, just speaking as a member of the public, the notion that the guys who are prosecuting me, in this case DOJ, decide that they no longer want to prosecute me. And then the judge turns around and calls BS on them and then goes and appoints another person who's already got established opinions that are shared with the public on this issue and goes after... This seems to me to be truly a perversion of the way the justice system should work. Am I just confused about how things are?
- David French: Well, there are two holy crap moments here.
- Danielle Pletka: That would have been a good name for this podcast too, by the way, Marc.
- David French: There might even be three holy crap moments. So holy crap moment number one was the dismissal motion after a guilty plea and a re-affirmative of the guilty plea without really an argument like the arguments that are classically used to dismiss a criminal charge against somebody who's pled guilty and reaffirmed that plea. It's totally different if you have a situation where they say we have radiant exculpatory information, et cetera, et cetera. But this was a very different motion from that. And so that was holy crap moment number one. I'm not going to say unprecedented, I'm going to say not many precedents for that. Then holy crap moment number two, is the judge saying not only, hey, I invite Amicus brief, but I'm going to consider using my contempt power to nail Flynn for perjury.
- David French: That is something I've never seen before. If the first one was holy crap, all lowercase, then the next one is holy crap, all caps because I've never seen that. And the Amicus brief is what people are focused on, which is to me, the less interesting aspect of this. The more interesting aspect of this is his contempt threat because a contempt of court charge really rests with the judge. This is when it removes things from the prosecution. This is the judge removing prosecutorial discretion, potentially, from the prosecutor. And he's saying, "hey, wait, I swore in Flynn and under oath he said ABC and D and he's now backing out on that. Did he commit perjury in my court?" So that's the sort of all caps holy crap. And then number three is the DC circuit immediately taking up this question and asking briefing on it, which is again, lower caps holy crap, because that's somewhat expected in a circumstance.
- David French: You've got three things that are unprecedented or either nearly unprecedented or entirely unprecedented. Well, there's a substantive legal argument here and that is, Rule 48 of the Federal Rules of Criminal Procedure does not give the prosecutor the unchallenged ability to drop a case. And Rule 48 says essentially that there is a leave of court requirement. So once the prosecution seeks to dismiss, it is not automatic, it is by leave of court. And so the question then is, what does that provision mean?

And the typical interpretation of that is that it means that the court should protect the defendant's interests. And here's what I mean. If a prosecutor is filing and dismissing charges against a person, that can be a form of harassment. We're filing and then we're dismissing, we're filing and then we're dismissing.

David French: It keeps a person in the state of permanent suspended animation in their status in the legal system. The counter argument is that actually, when a Rule 48 was being drafted, that's not what was intended by leave of court. And that by leave of court it's a more holistic analysis of the circumstances. In practice and according to circuit court precedent, the charging decision is typically said to be, it's just the prosecution's.

David French: The charging decision is the prosecution's. The twist here is of course that he's pled guilty, not once, but essentially twice. And so this is in a very different procedural posture. So the question, the legal issue at the heart of this is what does that phrase by leave of court mean? Does it give him any discretion under these circumstances to deny the prosecution's motion? And so for those who are saying that what Sullivan is doing is completely, totally frivolous, they're applying a meaning of by leave of court that essentially reads that out of the rule that it really is truly the prosecution's decision.

Danielle Pletka: Exit question from me and I want you to put on your Carnac the Magnificent hat here. What's going to happen?

David French: From the beginning, I've thought the DOJ is going to prevail in its motion to dismiss. My first thought before the appellate court intervened so quickly, my first thought was that Sullivan would absolutely... There would be an open hearing. Sullivan would just wear out the prosecution, wear out Flynn, sort of vent his spleen and then grant the motion to dismiss the case. So not unheard of for judges to just want to have an opportunity to vent. Not all, but many federal district court judges have earned their reputation for using their courtroom as an opportunity and a platform to pontificate at best and sometimes rage at worst. So that was my expectation is that he was going to chew out the prosecution, chew out Flynn, dismiss the case. I did not think he was going to follow through on his contempt threat.

David French: I did not think he was going to reject the prosecution's motion. Now I think it's an open question as to whether or not he'll even get that opportunity. But either way, I think at the end of the day, the DOJ will prevail.

Marc Thiessen: Because Trump will pardon Flynn? You think?

David French: Now that's a really interesting question. Because if Trump loses, which is far from a foregone conclusion, and if he loses pretty decisively, there's going to be a lot of pressure brought on the next DOJ to prosecute Trump era officials that maybe the Democratic base doesn't believe they got off scot free. And if there is a realistic or even perceived to be a chance that Flynn would be brought up on charges for FARA violations, maybe Trump would pardon him in that lame duck period. I think it may even be likely. In fact, it wouldn't shock me at all if Trump loses, if he pardons, basically everyone who's been convicted.

Danielle Pletka: And a few people who haven't.

- David French: Exactly. Exactly.
- Danielle Pletka: Marvelous. Well, you've been terrific, David.
- Marc Thiessen: Thank you so much for joining us. We really appreciate it.
- David French: Yeah. Thanks for having me. I really appreciate it.
- Danielle Pletka: So one of the things that's been fascinating to me in the wake of all of this scandal, and it is a scandal about how the FBI behaved, is that bygones are so incredibly bygones. You saw that the President was asked whether he would rehire Michael Flynn. And he was like, sure. Wait a minute, didn't you fire him for reasons having nothing to do with the whole prosecution because he lied to your vice president? Is that all just water under the bridge?
- Marc Thiessen: Yeah. I mean look, you don't have to think that Michael Flynn should be in government to think that Michael Flynn was wrong. And I don't think that Michael Flynn should be the National Security Advisor. As I said, and then talking to David, I think he's a complicated person who did a lot of good things in his career in the military, who was a very good Director of the Defense Intelligence Agency who predicted the disaster that Obama wreaked in Iraq by withdrawing before it happened, but who also got cozy with Putin and with..
- Danielle Pletka: With Erdogan.
- Marc Thiessen: With Erdogan and just again, complicated figure. But just because you're a complicated figure, just because you show bad judgment, doesn't mean that the FBI should be weaponized against you.
- Danielle Pletka: So we didn't talk a lot either with David or in our intro about the whole Erdogan Fethullah Gulen story. So to sort of read people in very, very briefly, Fethullah Gulen ran a very large group of educational institutes throughout Turkey. He is an Islamist. Not a terrorist, not a supporter of terrorism, but he is a very enthusiastic Islamist. And he was very close to Turkey's quasi-dictator now a Recep Tayyip Erdogan, but then he turned on him because he didn't want somebody around him who had so much power. Gulen leaves and comes to the United States, a testament to how our country is an open one.
- Danielle Pletka: And there's a coup attempt in Turkey. Maybe it was real, maybe it wasn't and 10,000 Gulenists or alleged Gulenists are rounded up. In steps Michael Flynn to take money from agents of Erdogan to help get Gulen extradited and expelled from the United States to Turkey. I mean, what the hell lack of judgment for the former head of the DIA, who knows, must know, absolutely how bad Erdogan is that he did that.
- Marc Thiessen: Bad judgment one on doing that, but also two, this is a problem I see all the time in Washington, which is look, there are two career paths you can take once you leave government. One is you can work for whoever you want and take whoever's money you want and register for it. Or you can go back into public service and serve at high levels. You can't do both. I mean, Paul Manafort wouldn't be in jail today if he hadn't run the Trump campaign. If he had just gone and kept his lobbying business, nobody would have known, nobody would have cared what he was doing. But he wanted to have it both ways. He wanted to be in the spotlight, be back in charge,

run a presidential campaign, maybe serve in the White House, but he also wanted to have his lobbying business. It's like, you got to make choices in life. You're either a hired gun or you're a public servant. You can't be both.

Marc Thiessen: And Michael Flynn was trying to be both a public servant and a hired gun at the same time.

Danielle Pletka: But also a hired gun for the most unsavory people. I have a lot of sympathy with people...

Marc Thiessen: Well the argument against that, Dany, is that, yes. I agree with you that Erdogan is unsavory. I'm not an Erdogan fan, I don't consider personally Turkey to be an ally in the small "A" sense, but they are an ally in the capital "A" sense because they are a member of NATO. From a lobbying perspective, you can just say, well, I'm lobbying for a NATO ally.

Danielle Pletka: And what about Russia? Less so.

Marc Thiessen: Yeah, less so.

Danielle Pletka: Not a NATO ally, last time I checked. Look, it all comes down to a bunch of questions. If you want to focus on Michael Flynn, you are going to find a very flawed character and someone who may have done things, in fact, as David said, that were illegal, but those were not the things that the Justice Department decided to prosecute him on. And so they hoist their own petard potentially, but at the same time, we recognize that he was treated in a way that no American should be treated by the FBI. And those text messages between those two agents having an affair were just disgusting.

Marc Thiessen: Yes, absolutely. And the way the FBI handled the investigation of Flynn and the interview of Flynn was equally disgusting. But again, to wrap this up, this is part of a larger, the reason why this is resonating, it's not because people are defending Michael Flynn because he's a good guy, though some people say that and seem to believe that, I don't agree with them, but because this is in the larger context of what was a now three year effort to destroy Donald Trump with false charges of collusion with Russia. And no president has ever been put through what Donald Trump has been put through.

Marc Thiessen: In many cases he's caused a lot of his own problems but we spent all this time on a conspiracy theory. The President of the United States and his campaign never colluded with the Russian government, never conspired to steal the election. And Flynn was caught up in this effort to destroy Trump. And you don't have to like Trump to understand that we don't want this to happen to any president. We wouldn't want this to happen to the next Democratic president.

Danielle Pletka: You don't have to like Trump or embrace the entire exoneration line that Marc did.

Marc Thiessen: On Russia.

Danielle Pletka: On anything.

Marc Thiessen: You disagree that he was exonerated on Russia?

Danielle Pletka: I don't think that the Mueller Report is quite the gorgeous document exonerating Donald Trump.

Marc Thiessen: On the Russia part.

Danielle Pletka: I do not believe that Mueller presented any evidence of collusion. Well, again, we just talked about the difference between what getting off and being exonerated are. But that's not why we're here today, Marc. Why we're here today is to talk about Michael Flynn and no matter what you think about Donald Trump...

Marc Thiessen: Who was exonerated in the Russia collusion conspiracy theory.

Danielle Pletka: It's like we're married. No matter what you think about Trump or about Russia or about collusion, the reality is no American has an interest in seeing people treated the way that Michael Flynn has been treated.

Marc Thiessen: Amen to that.

Danielle Pletka: Finally. Bye, everybody. Thanks for being with us.