“THE BUCK STOPS AT THE TOP:” IN JANUARY, BILL BARR’S DOJ DECIDED THE CORRECT DECISION WAS TO SEND MIKE FLYNN TO PRISON

I’d like to make one more point about Billy Barr’s rant last night. Over and over again, Barr suggested that line prosecutors have been making hyper-aggressive decisions that the Department of Justice cannot answer for and that his involvement simply amounts to ensuring that the decisions DOJ makes are ones he’s willing to take responsibility for.

> Indeed, aside from the importance of not fully decoupling law enforcement from the constraining and moderating forces of politics, devolving all authority down to the most junior officials does not even make sense as a matter of basic management. Name one successful organization where the lowest level employees’ decisions are deemed sacrosanct. There aren’t any. Letting the most junior members set the agenda might be a good philosophy for a Montessori preschool, but it’s no way to run a federal agency. Good leaders at the Justice Department—as at any organization—need to trust and support their subordinates. But that does not mean blindly deferring to whatever those subordinates want to do.
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> This is what Presidents, the Congress, and the public expect. When something goes wrong at the Department of Justice, the buck stops at the top. 28 U.S.C. § 509 could not be plainer: “All functions of other officers of

> the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General."
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> And because I am ultimately accountable for every decision the Department makes, I have an obligation to ensure we make the correct ones. The Attorney General, the Assistant Attorneys General, and the U.S. Attorneys are not figureheads selected for their good looks and profound eloquence.
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> They are supervisors. Their job is to supervise. Anything less is an abdication.

To the extent Barr is talking about the Mueller investigation, every single prosecutorial decision was reviewed by Acting Attorney General Rod Rosenstein. For those decisions, then, Barr's not actually talking about decisions made by line prosecutors. He's talking about decisions overseen by someone vested, like him, with all the authority of DOJ.

For precisely the reason Barr lays out — that DOJ must be able to answer for things DOJ does — it's highly unusual for DOJ to flip-flop on prosecutorial decisions that past Attorneys General have approved.

But with one action in the Mike Flynn prosecution — possibly one he thought of when he invoked probation sentences in one of his last paragraphs — Barr's interventions into the cases of Donald Trump's flunkies is far worse than that.

> In short, it is important for prosecutors at the Department of Justice to understand that their mission — above all others — is to do justice. That means following the letter of the law, and the spirit of fairness. Sometimes that will mean investing months or years in an investigation and then concluding

> it without criminal charges. Other times it will mean aggressively prosecuting a person through trial and then recommending a lenient sentence, perhaps even one with no incarceration.

In moving to dismiss Flynn's prosecution, Barr was overriding a decision he himself had approved of. In January, DOJ called for prison time for Flynn, citing the materiality of his lies and his abuse of trust.

> The defendant's offense is serious, his characteristics and history present aggravating circumstances, and a sentence reflecting those factors is necessary to deter future criminal conduct. Similarly situated defendants have received terms of imprisonment.
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> Public office is a public trust. The defendant made multiple, material and false statements and omissions, to several DOJ entities, while serving as the President's National Security Advisor and a senior member of the Presidential Transition Team. As the government represented to the Court at the initial sentencing hearing, the defendant's offense was serious. See Gov't Sent'g Mem. at 2; 12/18/2018 Hearing Tr. at 32 (the Court explaining that "[t]his crime is very serious").
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> The integrity of our criminal justice depends on witnesses telling the truth. That is precisely why providing false statements to the government is a crime. As the Supreme Court has noted:
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> > In this constitutional process of securing a witness' testimony, perjury simply has no place whatsoever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints

> against this type of egregious offense are therefore imperative. The power of subpoena, broad as it is, and the power of contempt for refusing to answer, drastic as that is – and even the solemnity of the oath – cannot insure truthful answers. Hence, Congress has made the giving of false answers a criminal act punishable by severe penalties; in no other way can criminal conduct be flushed into the open where the law can deal with it.
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> United States v. Mandujano, 425 U.S. 564, 576 (1975); see also Nix v. Whiteside, 457 U.S. 157, 185 (1986) ("[t]his Court long ago noted: 'All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth.'") (quoting In re Michael, 326 U.S. 224, 227 (1945)). All persons carry that solemn obligation to tell the truth, especially to the FBI.
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> The defendant's repeated failure to fulfill his obligation to tell the truth merits a sentence within the applicable Guidelines range. As the Court has already found, his false statements to the FBI were material, regardless of the FBI's knowledge of the substance of any of his conversations with the Russian Ambassador. See Mem. Opinion at 51-52. The topic of sanctions went to the heart of the FBI's counterintelligence investigation. Any effort to undermine those sanctions could have been evidence of links or coordination between the Trump Campaign and Russia. For similar reasons, the defendant's false statements in his FARA filings were serious. His false statements and omissions deprived the public and the Trump Administration of the opportunity

> to learn about the Government of Turkey's covert efforts to influence policy and opinion, including its efforts to remove a person legally residing in the United States.
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> The defendant's conduct was more than just a series of lies; it was an abuse of trust. During the defendant's pattern of criminal conduct, he was the National Security Advisor to the President of the United States, the former Director of the Defense Intelligence Agency, and a retired U.S. Army Lieutenant General. He held a security clearance with access to the government's most sensitive information. The only reason the Russian Ambassador contacted the defendant about the sanctions is because the defendant was the incoming National Security Advisor, and thus would soon wield influence and control over the United States' foreign policy. That is the same reason the defendant's fledgling company was paid over $500,000 to work on issues for Turkey. The defendant monetized his power and influence over our government, and lied to mask it. When the FBI and DOJ needed information that only the defendant could provide, because of that power and influence, he denied them that information. And so an official tasked with protecting our national security, instead compromised it.

This was no decision made by rogue line prosecutors, Brandon Van Grack and Jocelyn Ballantine. In December, Jessie Liu signed a request for an extension so that the "multiple individuals and entities" that had to approve the new sentencing recommendation could do so.

> There are multiple individuals and entities who must review and approve the government's submission, including any changes from the government's prior sentencing memorandum and its specific

> sentencing recommendations.

And then again in January, Jessie Liu got an extension so the "multiple individuals and entities" who had to review the sentencing memo could do so.

> As the government represented in its initial motion, there are multiple individuals and entities who must review and approve the government's submission, including any changes from the government's prior sentencing memorandum and its specific sentencing recommendations. The government has worked assiduously over the holidays to complete this task, but we find that we require an additional 24 hours to do so.

Bill Barr says he is responsible for making the correct decision, and his DOJ reviewed the decision to imprison Mike Flynn at length. Taking him at his word, that means Bill Barr believed, in January, knowing all the details that were "new" to Timothy Shea when he wrote his motion to dismiss, but not new to Michael Horowitz and John Durham, who had already reviewed them, that the correct decision was to send Mike Flynn to prison.

It's bad enough that Barr has repeatedly refused to stand by decisions made by others imbued with the authority of the entire DOJ under 28 U.S.C. § 509.

But Bill Barr won't even stand by his past decisions.