Guilty!—But Not Really Guilty?

Clapper: “I solemnly swear to tell the truth, the whole truth, and nothing but the truth.”

by Victor Davis Hanson

In 2011, then Homeland Security Advisor to President Obama, John Brennan, swore before Congress that drone-targeted assassination missions near the Pakistani border had not led to “a single collateral death.”

That was an obvious lie with grave consequences, given that Brennan was sworn under oath and was one of the top officials in the US national security community. Yet there were no subsequent repercussions.

In fact, the opposite occurred. Brennan was subsequently rewarded with a 2013 appointment as CIA Director.

But the next year, once again, Brennan lied to Congress, assuring the Senate Intelligence Committee that his CIA had not secretly accessed senate staffers' computers. Again, there were no consequences for his repeated lies. Instead, Brennan, upon retirement, went on to be an MSNBC/NBC analyst who helped to promulgate the Russian collusion/laptop disinformation hoaxes.

In 2013, Director of National Intelligence James Clapper also lied under oath to Congress when he laughably stated that the National Security Agency did not spy on American citizens. Later, when called out by senators, Clapper fudged in a televised interview. "I responded in what I thought was the most truthful, or least untruthful, manner by saying no." Try that contortion with the IRS.

Some members of Congress referred a criminal complaint of perjury against Brennan to then Attorney General Eric Holder. Nothing happened. Again, one of the chiefs of the American national security community was exempted after lying to members of Congress.

Clapper went on to a lucrative position as a CNN national security analyst, and at one point he claimed that Trump was a Putin "asset."

As far as Eric Holder, he had earlier defied a congressional subpoena and was held in contempt by the House. The Department of Justice, however, chose not to pursue the complaint. Later in the Trump administration, Trump adviser Peter Navarro would be sentenced to four months in jail for similarly resisting a congressional subpoena. Was it a crime or not to resist a congressional subpoena?

The Justice Department's Inspector General concluded that Andrew McCabe, the former FBI deputy director and interim director, had lied repeatedly to a variety of officials, including FBI Director James Comey, various FBI agents, and

officials of the Office of the Inspector General.

On some of these occasions, McCabe was sworn under oath.

Yet in 2020, the Department of Justice chose not to pursue the IG's criminal referrals. McCabe went on to become an outspoken CNN News contributor. Note that Gen. Michael Flynn, Trump's National Security Advisor, was indicted—and convicted—for similarly lying to the FBI in 2017.

In 2016, an FBI investigation found that Hillary Clinton, as Secretary of State, had violated the law by transmitting and receiving classified information over an unsecured private server.

Subsequently, she destroyed thousands of emails and some devices, some of which were under subpoena. FBI Director James Comey found that "any reasonable person" should have known it was illegal to transmit classified information in such a sloppy fashion.

Comey, however, found that "Although there is evidence of potential violations of the statutes regarding the handling of classified information, our judgment is that no reasonable prosecutor would bring such a case."

Translated, that meant Hillary Clinton had likely broken the law, but it was unlikely that any prosecutor like Comey would indict the then-current Democratic nominee for president and former Secretary of State—at least in the fashion that state and federal prosecutors would later file over 90 indictments against Donald Trump.

In 2018, the now-former FBI Director James Comey on some 245 occasions claimed under oath to Congress that he did not know or could not remember essential facts in the FBI Crossfire Hurricane investigation of Donald Trump, which he had authorized.

In addition, the Office of the Inspector General of the Justice Department found that Comey had broken the law by violating both DOJ and FBI policies, as well as the FBI's employment agreement—especially by retaining in his personal safe copies of four bureau memos concerning a confidential conversation with President Trump.

Elements in the memos from that meeting likely contained classified information. Yet Comey leaked it to a friend without a security clearance in order to make it public. Despite the damning IG report, the Department of Justice chose not to prosecute Comey.

Is there a pattern here of likely guilt that is contextualized into a not guilty assessment—and not guilty due to the prosecutorial psychoanalysis of the jury—that a guilty verdict would be difficult to obtain?

Or sometimes prosecutors make the assumption that there was no criminal intent on the part of such a well-known public figure or that the crime was relatively inadvertent.

In other words, the above suspects were guilty of breaking laws, many of them felonies, but prosecutors chose not to prosecute them. And this same exemption reappears in the two most recent cases of felony exemption due to extenuating political or ideological circumstances.

Special Counsel Robert Hur—charged with examining whether President Joe Biden unlawfully removed classified documents, crimes for which the other special counsel, Jack Smith, was concurrently indicting Donald Trump—recently found the President culpable for removing classified files.

Hur noted that Biden had unlawfully and knowingly removed and retained classified files since his senate days—or possibly over a half-century. Biden had also removed the files to multiple locations, few of which were secure.

Hur compiled photos of the mess in Biden's garage, where files were stored in delipidated boxes. Moreover, Biden removed them not inadvertently. He did so to further his political career and to profit by providing a ghostwriter with classified material to enhance his memoirs—which had garnered an $8 million advance in a book deal.

Biden, as a senator and vice president, had no legal authority to declassify any of these classified files. Hur further found that Biden made the files' presence and contents known to his ghostwriter, Mark Zwonitzer. The latter had no security clearance to view such documents.

In addition, Biden was on tape at least as early as 2017, admitting that he was in violation of the law. Yet he did not come forward for nearly six years. And when he did contact authorities, it was only in fear that his own DOJ's special counsel was soon to indict Trump for the very same exposure—willfully retaining files at his home that he knew were classified.

Worse still, ghostwriter Zwonitzer willfully destroyed state's evidence when he erased his incriminating tapes (recovered partially by Hur through forensics and transcripts). Yet, mysteriously, he was never prosecuted for obstruction of justice or destroying requested materials.

After reviewing Biden's culpability, Hur chose not to prosecute him. As he put it, "Our investigation uncovered evidence that President Biden willfully retained and disclosed classified materials after his vice presidency, when he was a private citizen."

And why the exemption? Hur explained his reasons further:

"We have also considered that, at trial, Mr. Biden would likely present himself to a jury, as he did during our interview of him, as a sympathetic, well-meaning, elderly man with a poor memory. Based on our direct interactions with and

observations of him, he is someone for whom many jurors will want to identify reasonable doubt. It would be difficult to convince a jury that they should convict him—by then a former president well into his eighties—of a serious felony that requires a mental state of willfulness."

Translated, Biden was likely guilty but, in Hur's view, too cognitively challenged and thus too sympathetic a figure to be found guilty—but apparently not enough impaired to serve as President of the United States.

Finally, we come to the case of Fulton County, Georgia, prosecutor Fani Willis. Judge Scott McAfee chose not to remove her from leveraging a racketeering charge against Trump despite clear evidence that she had lied under oath and was likely guilty of obstruction of justice, witness tampering, and fraud.

Two associates of Fani Willis testified that she had a romantic relationship with a clearly unqualified Nathan Wade before she appointed him as her chief special Trump prosecutor. Wade had no criminal trial experience, was sexually involved with Willis, and took her on expensive junkets in quid pro quo fashion.

Telephone records located Willis and Wade at her residence during times when they had sworn there was no romantic relationship. Thousands of personal texts between the two confirmed their intimacy. Willis produced no proof she had ever paid Wade back for the expensive trips he took her on, lamely pleading that she had reimbursed him with cash—although she produced no records to that effect.

Willis had campaigned for office and raised money on promises to get Trump. She had come up with the novel idea of using a racketeering charge to indict him for questioning the 2020 Georgia balloting. Both in her testimony and a church appearance, Willis played the race card, alleging that she was

the victim of racial bias.

Yet despite lying under oath, colluding with Wade to produce near identical testimonies, and having no clear defense of her free trips from Wade, Judge McAfee chose not to dismiss her from the case, despite giving her the option to remove Wade.

That was an incoherent decision, given that Willis had hired Wade, had become romantically involved with him, and had collated their testimonies. Willis, not Wade, was the architect of the deceit and yet remained free to continue her prosecution of Trump.

As in the Hur case, in compensatory fashion, McAfee editorialized about the roguery of the two. And also, as in the Hur case, the judge essentially exempted Willis from the legal consequences that her criminality had earned.

“However, an odor of mendacity remains. The Court is not under an obligation to ferret out every instance of potential dishonesty from each witness or defendant ever presented …Yet reasonable questions about whether the District Attorney and her hand-selected lead SADA testified untruthfully about the timing of their relationship further underpin the finding of an appearance of impropriety and the need to make proportional efforts to cure it.”

In the end, the judge gave Willis the choice to remove herself or her paramour Wade from the prosecution; she chose Wade.

But apparently forgotten was the reality that Willis, not Wade, appointed such an unqualified boyfriend as her chief counsel and established his compensation. It was Willis, not Wade, who was the recipient of free trips and perks. It was Willis, not Wade, who was most contradicted by other witnesses. And, of course, Willis, not Wade, was the driver behind the entire prosecution of the ex-president and current leading contender for the presidency.

What are the common denominators of such exempted criminality?

First, we can start by identifying those who were not exempted due to an asymmetrical application of our laws. Trump advisor Peter Navarro was convicted and sentenced to jail for failure to obey a congressional subpoena in the manner that both Eric Holder and Hunter Biden were not.

Trump was indicted for making false statements in a manner that Brennan, Clapper, Comey, Wade, and Willis were not. Biden disclosed classified materials. Comey likely did as well. And Clinton clearly violated the law by knowingly using an unsecured server for classified material. None were indicted.

Second, in such high-profile cases, prosecutors and judges find ways to justify not charging or pursuing those they deem guilty of breaking the law, either by claiming—in the fashion Comey did in the Clinton case or Hur did with Biden—a jury, in their opinion, would not convict them.

But since when do such prosecutors with ample funding and resources predicate guilt or innocence, not based on the facts of the case, but whether the defendant would appear sympathetic to a jury or perhaps too powerful to risk such a controversial indictment?

Third, to excuse their laxity or unequal application of the law, judges and prosecutors blast the soon-to-be excused defendant, as if such editorialization makes up for preferential exemption. So Joe Biden is not prosecuted for clearly unlawfully removing classified files. But as a booby prize, Hur offers up the sting of Biden as "a sympathetic, well-meaning, elderly man with a poor memory."

Judge McAfee, more or less, does not pursue a clearly guilty Willis but offers us the compensatory, "However, an odor of mendacity remains."

Almost all the prosecutorial decisions not to pursue these

guilty parties—a McCabe, a Comey, a Brennan—are couched with excuses and contextualizations rarely, if ever, offered to most Americans.

Fourth, all these people are an incestuous lot. Holder does not prosecute Clapper or Brennan, but himself was not prosecuted for resisting a congressional subpoena. Comey lets Hillary off, but he himself is let off after leaking a likely classified document. A Biden-administration-appointed special prosecutor exempts Biden, but another Biden prosecutor indicts Trump. After receiving their exemptions, the pots Brennan, Clapper, Comey, and McCabe all turn up on cable news blasting the kettle Trump.

What is the common explanation for all this madness?

Our criminal justice system no longer treats the accused equally under the law. If the defendant is deemed a conservative, like a Michael Flynn, Peter Navarro, or Donald Trump, then the full force of prosecution falls upon them.

But if a Biden, Brennan, Clapper, Clinton, Holder, or Willis, then the state contorts itself to find excuses, exemptions, and mitigating circumstances not to pursue justice—and so often to the point of absurdity and the erosion of Americans' confidence in their laws. In these high-profile cases in this polarized era, a cynical public now expects any accused prominent leftist to remain unindicted, while any non-leftwing target will be indicted, convicted, and jailed—for the same alleged offenses.

First published in the *American Thinker*.