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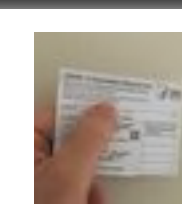
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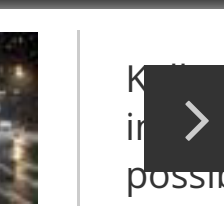
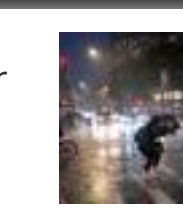
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VIEWPOINTS OPINION

The feds are breaking with history in the Floyd and Arbery cases. They should tell us why | Opinion

By MICHAEL MCAULIFFE
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Attorney General Merrick Garland speaks about a jury's verdict in the case against former Minneapolis Police Officer Derek Chauvin in the death of George Floyd, at the Department of Justice, Wednesday, April 21, 2021, in Washington. (Andrew Harnik/AP)

The U.S. Department of Justice (DOJ) has secured a federal indictment charging four former police officers, including Derek Chauvin, with criminal civil rights violations for George Floyd's death. This announcement came despite a state jury convicting Derek Chauvin in April of multiple state murder charges arising from the same event. Chauvin faces 40 years in state prison for the second degree murder conviction at a sentencing hearing in June. Three additional former officers face trial in the same case. The efforts to hold the perpetrators accountable for Floyd's death so far have been wholly successful.

DOJ also recently announced federal civil rights charges against three defendants in the death of Ahmaud Arbery even though the state murder case is scheduled to go to trial in October. Early investigator inaction and multiple district attorney recusals in the Arbery case have yielded to what is now a significant state criminal case. The state prosecution could result in life sentences for the defendants.



In bringing these federal cases while the state cases are active, the Justice Department is departing from long-established policy and practice concerning dual prosecutions in civil rights and other matters. The question is why.



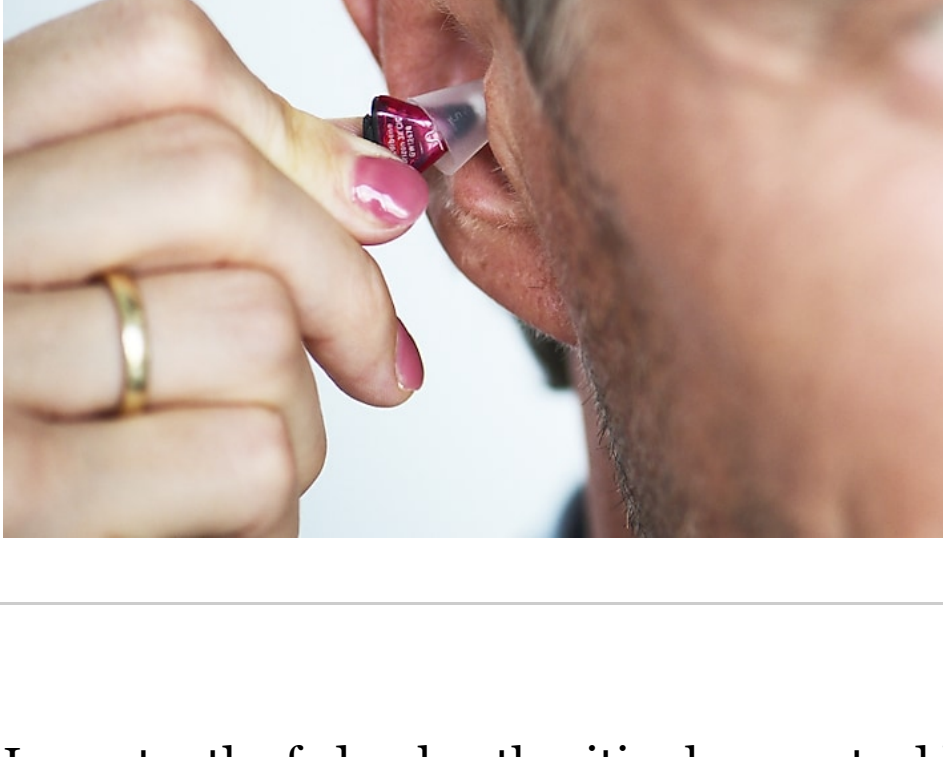
Michael McAuliffe is a former federal prosecutor serving both as a civil rights prosecutor at the Department of Justice and as a supervisory assistant U.S. attorney in the Southern District of Florida. Currently, he is an adjunct professor at William & Mary's Law School and a senior lecturing fellow at Duke University School of Law. (Courtesy)

The Justice Department has written requirements that determine the process when federal authorities wish to pursue federal charges after, or in addition to, state criminal cases arising from the same facts. The overwhelming justification for bringing what's often labelled a "successive" or "dual" prosecution is that the federal interests in holding wrongdoers accountable have not been adequately vindicated — that there is unfinished business in the matter. For example, if a violent hate crime is undercharged by local prosecutors or the case resulted in minimal punishment at the state level, DOJ — not bound by double jeopardy because the federal and state governments are separate sovereigns — can bring a separate case if it can prove a federal crime. In order to do so, however, federal prosecutors must seek high-level approval in the Justice Department. And to do that, they have to establish why it's necessary and appropriate to bring a new case based on an incident already addressed by the state.

Dual prosecutions don't happen often, for several reasons. One is simple resources. Another is whether a federal prosecution would result in a different or better outcome than the state case. Life imprisonment is still life, whether in state or federal custody. A third factor, especially in the area of civil rights enforcement, is that DOJ encourages state authorities to bring righteous cases even when they are controversial or difficult. The historical record is replete with examples of federal prosecutors deferring to good faith state efforts to vindicate the rights of victims of racial violence and police abuse. The Department tries to avoid dual prosecutions becoming dueling prosecutions. As if to reinforce that point, the presiding judge in the George Floyd state case cited the new federal charges as one factor in delaying the state trial of the three remaining defendants.

In most civil rights matters, the feds exist as the backstop in the event the state refuses to act, the result is deemed inadequate or the incident warrants a subsequent and separate evaluation. So it is notable, even seismic, that the federal government has brought federal civil rights charges in quick succession for the Floyd and Arbery deaths despite pending state prosecutions in both incidents. Only adding to the magnitude of the change is the fact that the state cases could not in any way be deemed inadequate in terms of the charges themselves or the potential punishments.

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Importantly, federal authorities have not addressed why federal charges are warranted in the Floyd and Arbery matters while the state cases are ongoing. The Department should have justified, or at least explained, the significant shift in approach to dual prosecutions in federal criminal civil rights matters. If the Department is embarking on a new era of enforcement actions that involves changing existing policies, it should tell us.

What the Attorney General or his team could say is that the justification for the federal cases (and possibly others) lays outside the legal and policy aspects of dual prosecutions. That DOJ's policy wasn't drafted for these times of social and cultural conflict. That the recent federal indictments reflect an equally compelling narrative of accountability that can co-exist with state enforcement efforts in the rare situations where the harm inflicted is more profound than normal and the treatment required isn't just to save a wound, but to cure a decease.

That needs to be conveyed to the public but unfortunately hasn't been so far.

The Department is emerging from years of decision-making in the dark and diminished credibility. Let's hope going forward the Justice Department is more transparent about high profile dual prosecution cases. The feds can have a separate story to tell, but they should share why an additional one is needed.

Michael McAuliffe is a former federal prosecutor serving both as a civil rights prosecutor at the Department of Justice and as a supervisory assistant U.S. attorney in the Southern District of Florida. Currently, he is an adjunct professor at William & Mary's Law School and a senior lecturing fellow at Duke University School of Law.

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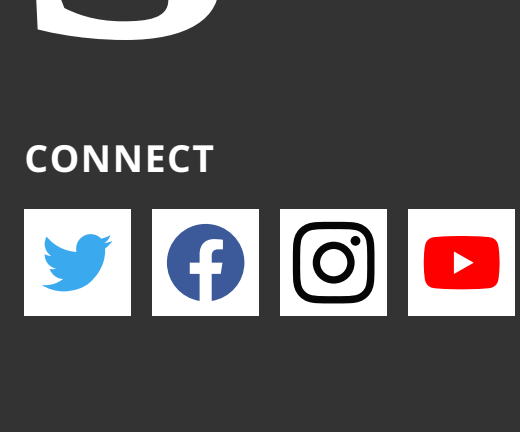
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