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Coercive plea bargaining is a national embarrassment

George F. Will

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Michael Flynn, who was President Trump's national security adviser for 24 days and who has been entangled in the criminal justice system for 40 months, pleaded guilty of lying to FBI agents and now recants that plea. We shall return to Flynn below, but first consider Habeeb Audu, who is resisting extradition from Britain to the United States, where he is charged with various financial crimes.

The Cato Institute's Clark Neily was asked by Audu's lawyers to write, in accordance with British extradition practices, a Declaration — an "expert report" — about the risk that Audu would not have a meaningful right to a fair U.S. trial. Neily, a member of the American Bar Association's Plea Bargaining Task Force and head of its subcommittee on impermissibly coercive plea bargains and plea practices, concludes that extradition would "guarantee" Audu's subjection to a process that "routinely" coerces through plea bargaining. So Audu probably would experience "intolerable pressure designed to induce a waiver of his fundamental right to a fair trial."

Plea bargaining is, Neily argues "pervasive and coercive" partly because of today's "trial penalty" — the difference between the sentences offered to those who plead guilty and the much more severe sentences typically imposed after a trial. This penalty discourages exercising a constitutional right. A defendant in a computer hacking case, Neily says, committed suicide during plea bargaining in which prosecutors said he could avoid a trial conviction and sentence of up to 35 years by pleading guilty and accepting a six-month sentence.

The pressure prosecutors can exert — piling on ("stacking") criminal charges to expose defendants to extreme sentences; pretrial detention, nearly always in squalid confines; threatening to indict family members — can cause innocent people to plead guilty in order to avoid risking protracted incarceration for themselves and loved ones. Such pressures effectively transfer sentencing power from judges to prosecutors. How exactly are these pressures morally preferable to those that used to be administered by truncheons in the back of police stations?

These are reasons why of the nearly 80,000 defendants in federal criminal cases in fiscal 2018, just 2% went to trial and 90% pleaded guilty. In 2018, 94.7% of criminal convictions were obtained through plea bargains in the Southern District of New York, which is seeking Audu's extradition.

Prosecutors have discovered that almost any defendant can be persuaded to plead guilty, given sufficient inducements. This discovery has been partly a response to the fact that the over-criminalization of life, and particularly Congress' indefensible multiplication of federal crimes, means that otherwise the court system would, in Justice Antonin Scalia's words, "grind to a halt."

There is, Neily says, “abundant, undisputed evidence” of innocent defendants pleading guilty. Of the 367 convicts exonerated by DNA analysis to date, 11% had pleaded guilty. Various studies have concluded that between 1.6% and 8% of defendants who plead guilty would not have been convicted in a trial. The lowest estimate would mean that in 2009 there were more than 1,250 innocent people incarcerated in the federal system alone, and many multiples of that number in state systems.

Responding to Neily’s Declaration, the Justice Department complacently asserts that U.S. law guarantees fair trials: Coercive plea bargains are forbidden, therefore they do not occur, so innocent people do not plead guilty. Move along, nothing to see here.

The DOJ should consult Jed S. Rakoff. In a 2014 essay, “Why Innocent People Plead Guilty,” he wrote that since the last third of the previous century, a fair trial — an adversarial process, conducted in public before a neutral judge and a jury of the defendant’s peers — has become “all a mirage.” Rakoff is a senior judge on the U.S. District Court for the Southern District of New York.

Now, about Flynn. Perhaps he lied in an interview with FBI agents. We must, however, take their word for this, because, in accordance with an archaic and self-serving practice, the agents did not record the interview. They wrote their unverifiable version. This, although all FBI agents carry recording capabilities in their smartphones. After prosecutors threatened to indict his son, who was his business partner (remember the axiom: “A prosecutor can get a grand jury to indict a ham sandwich”), a coerced and impoverished Flynn, facing many millions in legal bills and later selling his suburban Washington house, pleaded guilty.

Perhaps Flynn now regrets leading “Lock her up!” chants at the Republican National Convention. All Americans should regret the need for Neily’s many proposed reforms, including a DOJ Office of Plea Integrity to scrutinize coercive plea bargaining, a national embarrassment.