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DOJ's Inconsistent Publicizing of Suspects (Not Accused)

Leslie R. Caldwell

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Lawyers practicing white-collar criminal law may not be aware that the U.S. Department of Justice's policy on publicly identifying individuals suspected - but not accused - of criminal wrongdoing depends entirely on which part of the department is handling a particular criminal case.

In cases brought by the department's criminal division and its 93 U.S. attorney's offices, there is a long-standing prohibition on identifying publicly in charging, plea, or other documents individuals who have not been charged with any crime. For example, uncharged executives in a corporate fraud case would not be identified by name in a plea agreement between the company and the government, regardless of the government's evidence and even if it planned to charge those individuals the very next day.

This prohibition is rooted in basic notions of due process, the requirement of grand jury indictment, and the belief that those accused of a crime should have the opportunity to face their accusers and contest the charges in court. It also has extensive judicial support, and is referenced multiple times in the Department's own U.S. Attorney's Manual, which governs the conduct of most federal prosecutors.

In contrast, the department's antitrust division does not abide by this prohibition. The division, whose docket includes a relatively modest number of criminal cases, has an unwritten but rigidly enforced policy that uncharged individuals not specifically covered by the terms of criminal antitrust plea agreements must be named publicly. Regardless whether they ever will be charged, individuals not covered by corporate plea agreements - those on so-called "carve-out lists" - are specifically identified by name in the agreements, which are made public in both court filings and on the antitrust division's Web site.

For those named, inclusion on a carve-out list can be tantamount to an accusation of criminal conduct against which they may never have an opportunity to defend. It also exposes the named individuals to potential collateral consequences prompted by the accusation, including public humiliation through media exposure, reputational damage and civil litigation. By insisting on publicly identifying the names of the "carve-outs," the department through its antitrust division disregards the very rights that its criminal division strives so carefully to protect.

There is a serious question whether the department's main justifications for naming uncharged individuals on antitrust carve-out lists, to motivate corporate cooperation in complex conspiracy cases and to ensure contractual clarity in plea agreements, warrant the potentially serious damage to the named individuals' due process rights and reputations. This is especially so because there are alternative means, regularly employed by the department's criminal division, to achieve corporate cooperation and contractual clarity without sacrificing constitutional rights.

Criminal Division Policy

The department's written policy on naming uncharged individuals in cases prosecuted by the criminal division and U.S. attorney's offices could not be more clear. "In all public filings and proceedings," it states, "federal prosecutors should remain sensitive to the privacy and reputation interests of uncharged third-

parties[I]n the absence of some significant justification, it is not appropriate to identify . . . a third-party wrongdoer unless that party has been officially charged with the misconduct at issue." U.S. Attorney's Manual 9-27.760.

Thus, uncharged third parties ordinarily may not be identified in indictments, even where the crime alleged is a conspiracy and the unindicted coconspirators' conduct is described in detail. This is so even when the government has sufficient evidence to charge the third party and intends to do so in the future.

Nor is the prohibition limited to charging documents. Like the courts, the department recognizes that equal stigma can attach from association with criminal activity at any stage of a criminal proceeding, including guilty plea hearings, plea agreements and sentencing proceedings. Indeed, the U.S. Attorney's Manual suggests several ways for prosecutors to avoid public reference to uncharged third parties at different stages of a criminal case, such as by sealed pleadings or using generic references in plea allocutions and sentencing proceedings.

The department's policy also reflects awareness that the potentially ruinous injury stemming from publication of the fact that a person is under investigation, even if that person ultimately never is accused in an indictment is the very reason for the secrecy surrounding grand jury proceedings. See, e.g., *United States v. Proctor & Gamble*, 356 U.S. 677, 682 (U.S. 1958) After all, in addition to its role as formal accuser, the grand jury "serv[es] as a shield for the citizen against baseless charges of crime and from misuse of power" *United States v. Briggs*, 514 F.2d at 803.

Thus, the department prohibits disclosure of the identities of those who have been under investigation - even if they remain under inquiry and are certain to be charged in the future.

These prohibitions are grounded in the Due Process Clause of the Fifth Amendment, which guarantees that an individual will not be accused of criminal misconduct absent an official indictment and a forum in which to proclaim his innocence. Courts consistently have held that the government violates due process rights when, short of an indictment, it identifies an individual in a way that implies he participated in a crime. See, e.g., *United States v. Briggs*, 514 F.2d 794, 803 (5th Cir. 1975). The department's written policy acknowledges the fundamental unfairness of stigmatizing an uncharged individual, and the policy agrees with uniform judicial opinion that "no legitimate governmental interest is served by an official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights." *In re Smith*, 656 F.2d 1101, 1106 (5th Cir. 1981); U.S. Attorney's Manual 9-27.760 (citing *Smith*).

Antitrust Division Policy

By contrast, the department's policy in antitrust division matters, which is unwritten, is designed mainly to induce corporate cooperation, is founded on contract rather than constitutional principles and has been subject to scant judicial review.

The antitrust division prides itself on the use of its Corporate Leniency or Amnesty Program in criminal cartel investigations. Under the Amnesty Program, the first company to report an antitrust violation generally receives amnesty from prosecution along with all of its culpable employees. For the remaining companies under investigation, it becomes a race to the division's door. The next or "second-in" company will face prosecution, but may receive some measure of leniency, the "third-in" generally will receive more harsh treatment, and so on. Antitrust Division, U.S. Department of Justice Corporate Leniency Policy (1993).

One "reward" that the antitrust division dangles to induce cooperation by suspected companies is the opportunity to minimize the number of individual employees who remain subject to prosecution following a corporate plea agreement. Generally, the earlier a company cooperates, the fewer of its employees will be "carved-out."

This has obvious benefits to a company that wishes to retain valuable employees even though they may have participated in an antitrust violation. As to who will be included on a carve-out list, the antitrust division has made clear that it "will typically carve out only the highest-level culpable employees as well as any employees who refuse to cooperate [with the division's investigation]." E.g., Address by Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, "Measuring the Value of Second-In Cooperation in Plea Negotiations" (<http://www.usdoj.gov/atr/public/speeches/215514.htm>).

Once carved out, uncharged individuals are identified by name in two separate provisions of the corporate plea agreement, which is made public at the time of the guilty plea. First, under the section titled "Defendant's Cooperation," the corporate defendant agrees to use its best efforts to secure the cooperation of current and former employees, with the exception of those included in the carve-out list. Second, under the "Government's Agreement" section, the government agrees not to bring criminal charges against any current or former employees for any offense covered by the plea agreement, with the exception of those on the carve-out list. Those individuals are then subject to prosecution, although the antitrust division's track record reflects that some will never face formal charges.

The department justifies its inclusion of carve-out lists in antitrust plea agreements on several grounds. First, that because the plea agreements do not contain allegations of specific wrongdoing by those named, inclusion in a carve-out list is not akin to an accusation of misconduct.

This ignores reality. The antitrust division itself has defined carve-out lists to contain the names of only the most culpable and least cooperative employees. Corporate plea agreements also make plain that the government's agreement not to bring formal charges against company employees does not apply to those on the carve-out list.

Understandably the media and public widely assume that those on carve-out lists are believed by the government to have engaged in criminal misconduct. That the list is filed as part of a pleading in which the named individuals' employer is admitting having engaged in criminal conduct - when a corporation can act only through its employees - also strongly insinuates that the government considers those singled out by the carve-out to be culpable.

The department also justifies the published carve-out list on the ground that it provides contractual clarity, so that a company and its employees are on notice of exactly who is and is not covered by the plea agreement's protections. While this may seem desirable from a pure contract law perspective, equal clarity easily is attainable in a way that does not tread on individual rights.

For example, a plea agreement simply could state that it binds a company and its present and former employees, "except those who have been notified that they are not bound by the agreement." These individuals then could formally be notified of their status by letter. This simple step would accomplish the department's legitimate goal of promoting timely corporate cooperation by offering protection from prosecution for a maximum number of employees, without damaging individual rights and reputations.

Another justification presented by the department, that failure to disclose the identities of individuals not covered by the plea agreement violates the public's and crime victims' right to full, transparent access to court proceedings, is simply wrong. Crime victims do have a statutory right to attend and be apprised of filings in a proceeding once it has been brought. Crime Victims' Rights Act of 2004, 18 U.S.C. 3771. However, neither victims nor the general public have any right of access to investigative information, such as the identities of suspected but uncharged individuals, or of those who refused to cooperate with the government. Indeed, by invoking the rights of crime victims as a justification for publication of names of uncharged individuals, the government undercuts its own position that inclusion in a carve-out list is not tantamount to a public accusation of criminal wrongdoing.

Conclusion

The department's position that in antitrust division cases corporate cooperation and contractual clarity can be achieved only by openly naming specific uncharged individuals as either the "highest-level culpable employees" or employees "who refuse to cooperate" is contrary to sound department policy and practice in all other criminal cases. Nor is the practice necessary to attain the department's stated goal of cooperation in complex conspiracy cases. Companies still would be motivated to obtain the considerable cooperation benefits offered by the Amnesty Program - amnesty for the "first-in" company and all its employees, and the ensuing degrees of leniency for those who followed - even if the practice of publishing carve-out lists were halted.

Whatever marginal inducement to corporate cooperation the threat of publication may provide, it hardly seems adequate to warrant the antitrust division's practice of deviating from established department policy in nearly all other criminal cases.

Leslie R. Caldwell, formerly the director of the Department of Justice's Enron Task Force, is co-chair of corporate investigations and white-collar practice at Morgan, Lewis & Bockius. **Lisa Tenorio-Kutzkey**, an associate at the firm, assisted with the research for this article.

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