

A *Smear* By Any Other Name

With its 'carve-out' lists, the Antitrust Division unfairly fingers the uncharged.

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The Justice Department has adhered for years to an admirable policy: If a prosecutor is not charging a person with a crime, that person is not named as a suspect in the charging document. This policy has weathered multiple administrations, Democratic and Republican. Even independent counsel such as Kenneth Starr have followed the path.

Yet this same policy has been consistently ignored by one group of federal prosecutors—the Justice Department's own Antitrust Division.

When the division settles a case with a company, it routinely names in the filed plea agreement those company employees who have been "carved out" from the protections of the agreement. The plea agreements typically provide immunity to all company employees except those on the carve-out list. This list of the unlucky usually contains just a few names, and rarely more than a half-dozen or so out of the hundreds or even thousands of employees at the company being prosecuted.

The implication of the carve-out is, therefore, thoroughly unambiguous: The government suspects that the carved-out employees are guilty of criminal wrongdoing. As a result, those individuals are branded with a modern-day scarlet letter.

The Antitrust Division's practice is not one of merely academic import. As we and other experienced criminal antitrust counsel know well, those named on such lists quickly become *persona non grata* in their companies and often are targeted by the plaintiffs bar. They lose their jobs and have their professional reputations tarnished. Moreover, many people on such lists are never charged by

a grand jury, which means these victims of government abuse often have no forum to vindicate their innocence and restore their good name.

And what lies on the other side of the balance? Nothing, because no legitimate government interest is advanced by public allegations of wrongdoing against uncharged parties, regardless of whether the government is contemplating future charges. The Antitrust Division's practice is simply unworthy of the Justice Department.

JUSTICE SAYS

The department's general policy is not to name unindicted co-conspirators in charging instruments, plea agreements, or any other publicly filed documents. The United States Attorney's Manual could not be clearer on the subject.

The manual directs prosecutors to ensure that unindicted individuals remain free from accusation: "In all public filings and proceedings, federal prosecutors should remain sensitive to the privacy and reputation interests of uncharged third-parties. In the context of public plea . . . proceedings, this means that, in 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."

Elsewhere, it notes, "Ordinarily, there is no need to name a person as an unindicted co-conspirator in an indictment in order to fulfill any legitimate prosecutorial interest or duty." In the vast majority of cases, the manual states, "no legitimate governmental interest" is served by such an allegation of wrongdoing. Moreover, in "all but the most unusual case," any legitimate governmental interest can be advanced through other means.

And the reality is that, in the absence of some significant justification (such as required disclosure in a pending crimi-

inal proceeding), federal prosecutors in most branches of the Justice Department do not share the names of unindicted co-conspirators with the public.

LACK OF DUE PROCESS

The department's policy is rooted in the due process clause of the Fifth Amendment. As numerous courts—up to and including the Supreme Court—have indicated, the due process clause requires that the government not accuse an individual of criminal misconduct absent a proper indictment and a forum in which to proclaim his innocence.

In *United States v. Briggs* (1975), for example, the U.S. Court of Appeals for the 5th Circuit found that individuals' due process rights were violated when the government listed them as unindicted co-conspirators in an indictment. The court focused on the stigma of being associated with criminal activity without the chance to clear one's name: "If the charges are baseless, the named person should not be subjected to public branding, and if supported by probable cause he should not be denied a forum." The court also considered the related injury to economic interests, such as the ability to "hold specific private employment."

The 5th Circuit concluded that injury to one's reputation and impairment of one's ability to obtain employment are not only "substantial" but "legally cognizable interests entitled to constitutional protection against official governmental action that debases them." Other courts have reached the same conclusion.

Briggs dealt specifically with identification in an indictment. Its reasoning, however, applies to any instance where the government places people under the cloud of criminal wrongdoing without charging them. As the 5th Circuit subsequently noted in *In re Smith* (1981), "The point made in the *Briggs* decision is 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."

SECRETS OF THE GRAND JURY

Besides violating the individual's constitutional rights, naming someone as exempt from a plea agreement publicly identifies that person as the subject or target of an ongoing grand jury investigation. That contravenes the spirit if not also the letter of the Federal Rules of Criminal Procedure. Under Rule 6(e)(2)(B)(vi), an attorney for the government "must not" disclose matters occurring before the grand jury. The injury caused by publication of the fact that a person is under investigation is the reason for the secrecy.

Courts have rightly focused their concern on what happens to the innocent who are investigated by the grand jury but ultimately not charged. As the U.S. District Court for the Southern District of New York wrote in *Application of United Electrical, Radio & Machine Workers of America* (1953): "[T]he paramount purpose is the protection of those who are under investigation from irreparable damage if no indictment is found." The Supreme Court affirmed that point in *United States v. Procter & Gamble Co.*

(1958): The purpose of grand jury secrecy is to protect the innocent "from disclosure of the fact that he has been under investigation."

SEE NO HARM

The Antitrust Division has defended its identification of uncharged individuals in plea agreements on three grounds, none of which withstands serious scrutiny.

First, prosecutors defending the Antitrust Division's policy claim that being named in a carve-out list does not result in any opprobrium at all and thus is not akin to being named an unindicted co-conspirator or otherwise alleged by the government to have done something wrong.

On Aug. 22, the U.S. District Court for the District of Columbia accepted this rationale in *Doe v. Hammond*. The court found that where a continuing investigation or possible culpability were among the justifications offered for a carve-out, an individual's appearance on the list did not violate due process since the plea agreement did not explicitly or implicitly accuse the named individual of being a co-conspirator. On the same day, the same judge ruled on similar grounds in *United States v. Korean Air Lines Co.* that the carve-out provision in a plea agreement did not violate due process.

This claim blinks at reality. Membership in a limited group of individuals named in a federal plea agreement as unworthy of immunity—out of thousands of the individuals' fellow employees—has only one reasonable connotation: Beware of those individuals. They are, at the very least, under investigation and, at worst, government targets.

Even if there were only a minor risk of such opprobrium, why name these people in the plea agreement? There is no countervailing interest in pointing the finger at them and thus no reason to run the risk of harm.

YES, WE MEAN YOU

The government's second proffered reason for the Antitrust Division's practice is even thinner. Prosecutors have argued that publication of a carve-out list is necessary to provide notice to other employees not named on the list that they *are* covered by the plea agreement's protections.

Obviously, this need can be met by myriad less injurious methods. For example, a single sentence stating "All individuals not covered by the agreement have been so notified" would serve the same purpose. Any individual not so notified would know that he is covered.

If that is not clear enough, the individuals carved out of the plea agreement could be named in copies of the agreement provided to them, while their names were redacted from the publicly filed document.

RIGHT TO KNOW?

Third, the Antitrust Division claims that the public has a First Amendment right to know the full content of plea agreements. But this argument skips right over the main problem—whether the names should be in the plea agreement in the first place. And as Rule 6(e) makes clear, the

public does not have a right to know who may be the subjects of grand jury investigations.

More importantly, the public's alleged right to know the content of plea agreements cannot supersede an individual's due process right not to be accused of a crime except by indictment or other formal charge. The 3rd Circuit wrote in *United States v. Smith* (1985) that prohibiting public access to the names of unindicted co-conspirators was "narrowly tailored" to shield their "privacy and reputational interests." The First Amendment protects the public's access to the names of those whom the government is charging, but not to the names of those whom it is still investigating.

That should make the case against the Antitrust Division's practice very simple. Identifying individuals on a carve-out list places them under a cloud of criminal

suspicion yet affords them no forum to proclaim their innocence. It violates constitutional rights, statutory protections, and Justice Department policy. New Attorney General Michael Mukasey should immediately end this unjustified naming of names.

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