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RETHINKING DOJ'S SILENT GOODBYE

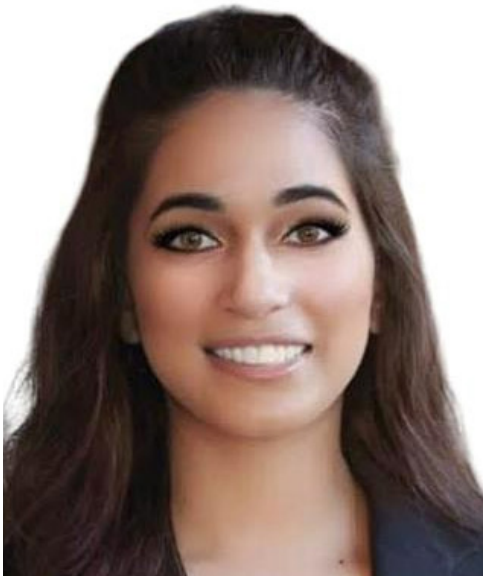
By Joshua M. Robbins and Manisha Malhotra

In a recent New York Times op-ed and on his popular podcast, former Manhattan U.S. Attorney Preet Bharara broached a topic that white collar defense lawyers know all too well, but that has received little public attention: the Justice Department's longstanding practice of generally declining to tell subjects of a criminal investigation when that investigation has ended. While nothing in the DOJ's published Justice Manual prohibits or even discourages such notice, it is typically only provided in high-profile matters, such as investigations of public officials seeking elected office, or in prosecutions of law enforcement officers and other civil rights cases.

The consequences are both unfortunate and acute. Whether notorious or obscure, the opening of a federal criminal investigation takes an immense toll not only on the psyche of those implicated in it, but often on their legal, financial, and social status as well. Particularly when news of the investigation becomes public, business associates and even friends will often distance themselves, while banks and other financial institutions may close out accounts or refuse to extend credit. If the subject is party to a civil suit related to the investigation, he may be forced to invoke his Fifth Amendment privilege to remain silent, potentially undermining his case. Unless and until the government gives notice that no charges will be filed, these collateral effects will linger and oppress.

Bharara's proposed solution is straightforward and appealing: DOJ should simply adopt a default policy of notifying subjects and targets when an investigation has closed, with limited and defined exceptions. That may well be the best course; as Bharara has recounted, neither he nor any of the former prosecutors he has spoken with have been able to articulate a sound reason for the current practice. But if this issue is to be pressed more broadly--and we think it should--it is worth an even deeper dive.

What are the counterarguments? Prosecutors may object that the applicable statute of limitations already tells a subject when he is no longer at risk of prosecution, so that a separate notice of closure is not needed. But limitations periods in federal cases typically run five years--and often ten years when financial institutions are involved--which can be an unreasonably long time to leave a subject



in limbo, at least when the government knows it has no plans to proceed.

Prosecutors may also object that if they are forced to disclose the

closure of an investigation, and then later decide to re-open it for some reason (e.g., discovery of new evidence or witnesses), the defendant may seek to use the initial notice against them in any resulting prosecution. The argument might be, for example, that the government closed the matter because it knew it had no case, and the new evidence is too weak to make a difference. A defendant might also seek to pry into the decision-making regarding the closure and reopening, and claim that it indicates additional exculpatory material or else an improper government motive. But it is not clear whether the administrative closure of an investigation would be considered relevant and admissible in trial, and any internal DOJ deliberations would likely be deemed non-discoverable attorney work product.

Another concern is that disclosing the closure of an investigation may tip off subjects of separate but related investigations that are still underway, potentially compromising them. But that scenario would likely be rare, and could be made a specific exception to the policy. Similarly, when an investigation has remained entirely covert and neither the public nor the subject have been notified of it, there would presumably be no (or fewer) negative effects on the subject, so that disclosure may not be necessary.

A related, practical issue may be that prosecutors, seeking to avoid the obligation, may simply leave investigations open indefinitely, so that there is nothing to give notice of. This might be resolved through a separate default requirement that if no investigative steps have been taken for a certain period of time--say, a year--then the prosecuting office should formally review the matter for possible closure. There are already certain internal processes within DOJ and some specific U.S. Attorney's Offices designed to prevent "zombie cases" from lingering indefinitely, but they are not always enforced in practice, and something more formal, straightforward, and public could be an improvement. Such a proposal would likely face push-back from prosecutors not keen to be put on a clock, and in some cases could backfire for subjects by causing the government to move forward with cases that might otherwise simply fade away.

DOJ's case closure practice is long overdue for its time in the spotlight, and it is fortunate that as prominent a figure as Mr. Bharara has chosen to champion the issue. But for reform to move from the op-ed page to the Justice Manual, it will take not only additional voices, but also a more detailed discussion of how a new policy would play out in practice. Here's to hoping the conversation continues.

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