Cayman Compass

Persecuted, then forbidden from talking about it

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Imagine you were pursued for months by the government for crimes you did not commit – or for actions that, at worst, most people would not know were criminal. Now imagine that government officials overcharged you, so that in the face of hundreds of years in prison, the option of pleading guilty to the lesser crimes and a comparatively light sentence was an offer no reasonable person could resist.

But now imagine one more twist: In exchange for allowing you to plead to the lesser crimes that bring the lighter sentence, the government also swears you to secrecy. You can never claim that you were actually innocent. You can never discuss the overcharging, the ambiguousness of the laws, or the tactics that were used to bully you into admitting guilt.

Now imagine that the agency that did this to you does something similar in nearly every case resulting in a plea. It would be a good way to guarantee a boast-worthy track record. And it would be an easy way to cover up misconduct, wouldn't it?

This is the pattern that two libertarian organisations – the Cato Institute and the Institute for Justice – allege is happening at the Securities and Exchange Commission. In January, they filed a lawsuit on behalf of an anonymous client who was investigated both criminally and civilly by the agency. The client settled the civil case and was led to believe that doing so would also make the criminal case go away.

As part of the civil settlement, he also agreed to a gag order about his case. To his surprise, the Justice Department then indicted him anyway, on charges that could have brought several hundred years in prison. He took a plea bargain on charges that resulted in less than two years in a minimum-security prison. Now the client has written a book about his experience and about how unfairly he believes he was treated. The Cato Institute wants to publish that book. But the gag order prevents it from doing so. That is why Cato and the Institute for Justice filed their lawsuit.

The gag order was part of the man's civil settlement with the SEC, not the plea bargain in his criminal case. Clark Neily, Cato's vice president for constitutional studies, says that not only have gag orders become standard practice at the SEC, but also he's seeing similar practices from more conventional law enforcement agencies. "I doubt you'll see anything quite as blatant as a gag order policy from DOJ, because they know that in a criminal case, the courts would shoot it down in a heartbeat," he says. "But there are other ways that we're seeing federal prosecutors use plea bargains to cover up misconduct."

Neily points to a Justice Department practice of offering plea bargains that prohibit suspects from ever filling an open-records request to obtain the prosecutor's case file. "They claim that when they negotiate plea bargains, the suspect has all the information prosecutors have, including any potentially exculpatory evidence," he says. "If that's true, what's the point of barring someone from later using open records laws to obtain the prosecutor's file?"

It's worth noting here that there's one other way that the Justice Department hides misconduct and puts suspects at an informational disadvantage when discussing plea bargains: internal discipline. The Justice Department investigates all prosecutor misconduct complaints internally, referring them to the Office of Professional Responsibility (OPR). Even when OPR finds misconduct, it refuses to make the misconduct public. Even the Justice Department's Inspector General is not privy to OPR investigations.

If you were a suspect, would not it have been beneficial to know before you accepted a plea bargain that your prosecutor had a history of, say, withholding exculpatory evidence? (Or, perhaps more accurately, a history of accusations of withholding exculpatory evidence. According to what little information it has released, the Justice Department seldom disciplines federal prosecutors.)

The whole imbroglio brings to mind the case of Siobhan Reynolds, an advocate for chronic-pain patients who tragically died a few years ago in a plane crash. Reynolds had been advocating for a doctor in Kansas whom the government was pursuing for allegedly overprescribing opioids. Reynolds lined up a slew of pain patients who attested that, contrary to the government's portrayal of him, the doctor had dramatically improved their lives. In response, an assistant U.S. attorney opened a grand jury investigation into Reynolds's shoestring operation. That person issued an incredibly broad subpoena demanding a massive cache of emails, phone calls and other documents. Merely complying with the demand would have bankrupted Reynolds' organisation. She sued, but the Justice Department succeeded in imposing a gag order.

Reynolds took her case all the way to the Supreme Court, where she lost on both the subpoena and the gag order. Reynolds was never accused of any criminal wrongdoing, but the legal fight all but crushed her organisation's ability to advocate for pain patients. And she was barred from talking about any of it. Perhaps the most troubling part of the case is that in requesting the gag order, the Justice Department cited the secrecy of grand jury proceedings. But grand jury secrecy is supposed to protect those who are being investigated. The Justice Department turned all of that upside down.

In theory, the SEC could now reneg on its agreement with the man at the centre of the Cato/Institute for Justice case, because by seeking legal help and filing a lawsuit to overturn the gag order, he likely violated it. So far, that has not happened. But Neily says there's probably a good reason for that. "For now, they still don't know who he is."