Frontlines of Global Cartel Enforcement

Problems with Global Antitrust Enforcement
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Due Process and Antitrust

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I. Some Progress on Due Process in Antitrust Today
Due Process Progress: End of Public Carve-outs of Individuals in DOJ Corporate Guilty Pleas

- Pre-2013: In Air Cargo Investigation, employees were publicly carved-out of corporate guilty pleas – with no trial, no due process.
- Public Carving-out stigmatized. Lost their jobs and were unemployable in the industry.
- Air Cargo Investigation and individuals (counts through 2011):
  - 86 individuals were carved-outs
  - 21 were indicted
  - 7 pleaded guilty
- AAG Bill Baer announces new carve-out policy for the Antitrust Division in April 2013: No public carve-outs today
Due Process: Judicial Review of Antitrust Agency Actions

- European Dawn Raids subject to right of privacy and now limited in scope
  - General Court ruling in Power Cables
  - The probable cause – the amnesty statements will now be subject to post-facto review by judiciary
  - Dawn Raid violates rights if the scope of the Dawn Raid is broader than the probable cause the EC had – no “fishing expeditions”

- Australia: No anonymous witnesses in antitrust court proceedings

- USA: Amnesty promises cannot be broken; amnesty promises have a constitutional dimension and are strictly construed against the government. Stolt: Due Process had been violated.
II. Access to Evidence: *Brady*, Confrontation, and Amnesty
“But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of ‘reasonable probability’ is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”

The Prosecution’s Duty to Learn of Favorable Evidence from those “Acting on the Government’s Behalf”

“A prosecutor is charged not just with knowledge of evidence in her actual possession, but also with knowledge of evidence about which she ‘should have known.’ United States v. Joseph, 996 F.2d 36, 39 (3d. Cir. 1993). Such evidence is considered within the prosecutor’s ‘constructive possession.’ Therefore, Brady and its progeny place an affirmative obligation on a prosecutor ‘to learn of any favorable evidence known to the others acting on the government’s behalf in the case.’” Pelullo, 399 F.3d at 216 (quoting Kyles v. Whitley, 514 U.S. 419, 437 (1995)).”

“Simply put, the Government cannot make use of video segments that have been ‘cherry-picked’ when the remainder of the recording has been erased or recorded-over subsequent to defendant’s arrest.”

Prosecution’s Duty Under the Confrontation Clause to Produce Witnesses Actively

“Respondent asserts that we should find no Confrontation Clause violation in this case because petitioner had the ability to subpoena the analysts. But that power . . . is no substitute for the right of confrontation. **Unlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear.** See, e.g. *Davis*, 547 U.S. at 820 (‘The [witness] was subpoenaed, but she did not appear . . . at trial’). Converting the prosecution’s duty under the Confrontation Clause into the defendant’s privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.”

Prosecution’s Duty Under the Confrontation Clause

“Finally, respondent asks us to relax the requirements of the Confrontation Clause to accommodate the necessities of trial and the adversary process. It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.”

II. Why Context Evidence Matters: The Ambiguous Nature of Many Antitrust Issues
“The Supreme Court’s concerns about permitting the inference of a conspiracy from ambiguous circumstantial evidence in the antitrust context stem from its conclusion that mistakes by an overzealous judiciary would be ‘especially costly . . . chilling the very conduct the antitrust laws are designed to protect.’”

“In a social cost-benefit analysis of the choice between fining and imprisoning the white-collar criminal, the cost side of the analysis favors fining because, as we shall see, the cost of collecting a fine from one who can pay it (an important qualification) is lower than the cost of imprisonment. On the benefit side, there is no difference in principle between the sanctions. The fine for a white-collar crime can be set at whatever level imposes the same disutility on the defendant, and thus yield the same deterrence as the prison sentence that would have been imposed instead.”

“First, there may be no monetary equivalent for the discounted value of the incarcerative threat. For example, under the proposed recodification of the Federal Criminal Code . . . the maximum terms of imprisonment for Class A, Band C felonies are life, twenty years, and ten years, respectively. If the reader’s intuition matches my own, he will doubt that there is a monetary equivalent to any of these sentences.”

“In the case of incarceration, however, the declining marginal utility of imprisonment means that each increment of incarceration increases the perceived penalty by a less than proportionate amount. Or, reduced to its simplest terms, a two-year prison term is not twice as bad as a one-year term.”

IV. Extraterritoriality and Extradition
Extraterritoriality, Extradition & Constitutional Principles

- Interception and extradition of foreign nationals for extraterritorial violations of US law
  - What if a country gets upset about a youtube video posted by an American and applies their legal norms extraterritorially?
  - Would Americans have notice of the foreign country’s laws, particularly if they conflict with American constitutional principles?
  - E.g., if he activity is protected free speech here

- The free flow of information & the marketplace of ideas
  - Sherman Act recognizes lobbying & petitioning (First Amendment) in the *Noerr* doctrine
  - Europe makes information exchanges illegal
  - USA makes information exchanges presumptively lawful