Examining 4 Areas Where DOJ Faced Recent Setbacks

By **Brook Dooley, Eric MacMichael and Nicholas Goldberg** (February 8, 2023, 3:00 PM EST)

For the U.S. Department of Justice, 2022 delivered disappointing results across some of its most high-profile cases and initiatives.

While the department can point to the convictions of **Roger Ng** in U.S. v. Jho over 1MDB bond deals;[1] former CEO **Elizabeth Holmes** and former chief operating officer **Ramesh Balwani** of Theranos;[2] and **Joseph Sullivan**, Uber's former security chief,[3] the DOJ experienced more setbacks than wins in four areas of focus in recent years.

Below we discuss how the government fared in its antitrust, Varsity Blues, China Initiative and foreign influence prosecutions.

Criminal Antitrust Cases

"I'm here to declare that we're not part of the chickenshit club." Those were **the words** of Assistant Attorney General for the Antitrust Division Jonathan Kanter in an April 2022 speech.

Coming on the heels of a string of setbacks, Kanter struck a defiant tone and signaled the Antitrust Division's commitment to vigorous criminal enforcement of antitrust laws.

But 2022 brought another wave of defeats for the DOJ, leading some commentators to question whether the department has stretched criminal antitrust enforcement too far.

Chicken Price-Fixing Investigation Collapses

The DOJ's yearslong investigation into allegations that major poultry companies conspired to fix bids collapsed in 2022.

After a multiyear investigation, 14 individual indictments and three trials, the government **failed** to obtain a single conviction, and secured a guilty plea from just one company.

In December 2021, the U.S. District Court for the District of Colorado **declared** a mistrial in U.S. v. Penn, the DOJ's first case against 10 executives after jurors deadlocked on the charges.[4]

The second trial, in March 2022, produced the same outcome as jurors once again **deadlocked**.

Nevertheless, the DOJ pursued a third trial, prompting U.S. District Judge Philip Brimmer, the judge overseeing the case, to take the extraordinary step of summoning the head of the Antitrust Division into court to **discuss** the department's decision.

The jury validated the judge's skepticism when, in July 2022, it **acquitted** all five defendants.

The government then dropped charges against several of the remaining individual defendants, as well as Claxton Poultry and Koch Foods.[5]

In October 2022, the DOJ **dropped** its final case against two Pilgrim's Pride Corp. executives, after a judge excluded most of the prosecution's evidence.[6]
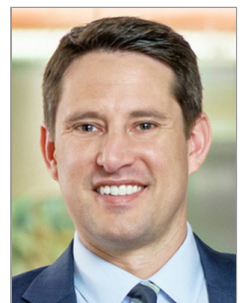
The implosion of the DOJ's high-profile poultry investigation prompted practitioners to question the
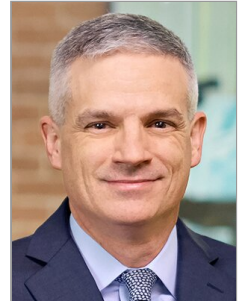
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government's tactics — including its unusual decision to refuse to meet with any of the 14 executives before charging them; reliance on shaky and largely circumstantial evidence; and decision to pursue a third trial despite failing to convict a single defendant in two prior attempts.

Labor Market Losses

The Antitrust Division also suffered back-to-back losses in its first-ever trials over alleged collusion in labor markets.

In April 2022, in U.S. v. Jindal, a jury in the U.S. District Court for the Eastern District of Texas **cleared** Neeraj Jindal and John Rodgers, the former operators of a physical therapist staffing company, of orchestrating a conspiracy to fix compensation rates.[7]

Although the jury convicted Jindal of obstructing a Federal Trade Commission probe, the DOJ failed to secure convictions for wage-fixing, a criminal theory that had been untested in the courts.

Just one day after its loss in Jindal, the DOJ suffered another defeat in U.S. v. DaVita Inc., when a jury in the U.S. District Court for the District of Colorado **acquitted** DaVita and its ex-CEO of conspiring with competitors not to hire each other's employees.[8]

In a decision that is likely to affect future no-poach prosecutions, the judge in DaVita issued jury instructions requiring the government to prove that the defendants acted "with the purpose of allocating the market for senior executives" — a burden not typically imposed in per se cases, where the government typically need only show the existence of an illegal agreement.

Guilty Pleas

The news wasn't all bad for criminal antitrust enforcers in 2022, as the DOJ secured guilty pleas in two closely watched cases.

In October 2022, Nathan Zito **pled guilty** in the U.S. District Court for the District of Montana to attempting to monopolize the market for highway crack-sealing services,[9] capping off the DOJ's first criminal monopolization prosecution in four decades.

Also in October, the government **notched** its first successful criminal prosecution for a labor market antitrust violation, when health care staffing company VDA OC LLC pled guilty in the U.S. District Court for the District of Nevada to conspiring to allocate employee nurses and fix their wages.[10]

Looking Ahead

Despite suffering significant setbacks in 2022, the Antitrust Division has vowed not to back down from its aggressive approach to criminal enforcement.

Companies, executives and practitioners should expect the DOJ to continue to pursue not only bread-and-butter antitrust cases, but also novel cases in the labor markets and stepped-up enforcement of monopolization.

Varsity Blues

The government's "Varsity Blues" college admissions prosecutions also had a difficult year in 2022. After securing dozens of guilty pleas and enjoying an unblemished record at trial heading into the year, 2022 saw the government experience a series of setbacks that threaten the central tenet of its prosecutions.

In June, the government suffered its first trial **defeat** when a jury in the U.S. District Court for the District of Massachusetts acquitted Amin Khoury on charges that he bribed the tennis coach at Georgetown University in order to secure his daughter's admission.[11]

Khoury's case was different from other prosecutions in that it did not involve the mastermind William "Rick" Singer. Instead, the government introduced testimony that Khoury used an intermediary to funnel $180,000 in cash in a paper bag to Georgetown's tennis coach to ensure his daughter's admission.

The jury, though, accepted Khoury's defense that the payment was a gift and not a bribe. The jury was also seemingly swayed by Khoury's contention that college admissions are not a meritocracy, and that private schools such as Georgetown actively look for candidates from wealthy backgrounds whose families have a higher likelihood of making donations.

The government was dealt another setback in September, in U.S. v. Ernst, when U.S. District Judge Indira Talwani **granted a motion** for a new trial filed by Jovan Vavic, the former University of Southern California water polo coach who was convicted by a jury in the District of Massachusets earlier in the year.[12]

In setting aside the conviction, the court agreed with the defense that USC could not be considered a victim of the bribery scheme orchestrated by Singer because there was no evidence that Vavic used the money for his own benefit or that the payments were to the detriment of USC.

Echoing arguments made by the defense in the Khoury case, Judge Talwani also wrote, "However distasteful, there is nothing inherently illegal about a private institution accepting money in exchange for a student's admission."

Judge Talwani's conclusion that the recipient of a bribe cannot be considered the victim of the bribery scheme supports one of the main arguments raised in the bellwether appeal of the first Varsity Blues convictions.[13]

John Wilson's and Gamal Abdelaziz's appeals were argued in November to a panel of U.S. Court of Appeals for the First Circuit judges who, over the course of a lengthy hearing, **expressed** serious doubts about the legal and factual underpinnings of the government's case.

In particular, the panel focused on the U.S. Supreme Court's 1946 decision in Kotteakos v. U.S.,[14] which held that two people who do not know each other do not necessarily enter into a conspiracy just because they both are connected to the same person with criminal intent.

The First Circuit panel expressed concern that the government's theory violated the holding in Kotteakos and was fatally flawed because it was predicated on the assumption that the different parents who worked with Singer — who did not know one another and who were spread out across the country — somehow operated interdependently with one another.

Without that interdependence, the panel observed, there was no basis for the government to admit the testimony of other parents at the trials of Wilson and Abdelaziz.

The judges also wondered whether double jeopardy would bar a retrial in the event the convictions were overturned.

Looking ahead to 2023, the parents whose convictions are currently up on appeal will be anxiously awaiting the First Circuit's decision.

A favorable outcome for Wilson and Abdelaziz would have substantial implications for those cases currently on appeal, and potentially for defendants who pled guilty in the sprawling Varsity Blues investigation.

China Initiative

2022 also saw the final demise of the DOJ's China Initiative.

Begun in 2018 under the leadership of then-Attorney General Jeff Sessions, the stated purpose of the China Initiative was to "[counter] Chinese national security threats" by identifying and prosecuting "priority Chinese trade theft cases."[15]

Many of the defendants charged under the rubric of the China Initiative, however, were academics accused not of economic espionage, but of making false statements — either on government grant applications or to government agents during their interviews.

Moreover, the DOJ's track record was mixed in its China Initiative prosecutions. The government secured several guilty pleas, and in 2021, it **convicted** Charles Lieber, a prominent Harvard chemistry professor, in the District of Massachusetts on charges of falsely denying his relationship with a Chinese university to U.S. Department of Defense investigators and to Harvard officials.[16]

On the other hand, the first China Initiative case to go to trial, U.S. v. Hu — against University of Tennessee, Knoxville researcher Anming Hu — **ended** in acquittal in 2021.[17]

Then, in January 2022, the government **dropped charges** alleging that Massachusetts Institute of Technology professor Gang Chen failed to disclose his ties to China when he applied for federal grant money. [18]

The Chen case was notable for the vocal public support Chen received from MIT's president and its faculty after charges were announced.

The Chen case was not the only setback for the DOJ's China Initiative in 2022. In May, Southern Illinois University professor Mingqing Xiao **defeated** fraud charges that he failed to disclose his relationship to a Chinese university in a National Science Foundation grant application.[19]

And in September, the U.S. District Court for the District of Kansas **overturned** three of the four convictions returned by a jury against Feng "Franklin" Tao, a University of Kansas professor similarly charged with concealing his affiliation with a Chinese university.[20]

Against this backdrop, and facing claims that the China Initiative amounted to racial profiling and contributed to anti-Asian American sentiment, the DOJ **scrapped** the program in February 2022.

In announcing the DOJ's decision, National Security Division chief Matthew Olsen acknowledged that the China Initiative

> helped give rise to a harmful perception that the department applies a lower standard to investigate and prosecute criminal conduct related to that country or … view[s] people with racial, ethnic or familial ties to China differently.[21]

With the formal demise of the China Initiative, white collar practitioners will be watching in the coming year to see how much the DOJ's approach actually changes when it comes to cases involving alleged Chinese influence and espionage.

Indeed, in the same speech in which he announced the end of the China Initiative, Olsen emphasized that the "[d]epartment will continue to prioritize and aggressively counter the actions of the PRC government."

Foreign Influence Campaigns

The Foreign Agents Registration Act requires those who work on behalf of a foreign government to register as an agent of that government and disclose information about their lobbying activities on behalf of the foreign principal.[22]

The DOJ's interest in prosecuting FARA violations increased markedly after the 2016 presidential election, as concerns about Russian and Chinese influence in U.S. politics intensified.

But despite the DOJ's enthusiasm, the department stumbled in several high-profile prosecutions involving FARA and other foreign lobbying and false statement-related statutes in 2022.

In May, Michael Sussman, a lawyer with ties to Hillary Clinton's presidential campaign, was **acquitted** in the U.S. District Court for the District of Columbia of lying to the FBI when he shared a tip about a possible connection between the Trump Organization Inc. and a Russian bank thought to be linked to the Russian government.

The acquittal was a blow to the special counsel, John Durham, who the Trump administration had appointed to explore potential wrongdoing related to the Trump-Russia investigation.

In October, casino mogul Steve Wynn persuaded the District of Columbia federal court to **dismiss** a civil lawsuit the DOJ brought seeking to compel him to register as an agent of the Chinese government based on past lobbying efforts undertaken during the Trump administration.[23]

The court said the DOJ could not retroactively require foreign agents to register once they were no longer carrying out influence work, prompting a now-pending appeal to the U.S. Court of Appeals for the District of Columbia Circuit.

Finally, in U.S. v. Al Malik Alshahhi, Thomas Barrack — the one-time chair of former President Donald Trump's inaugural committee — was **acquitted** in November in the U.S. District Court for the Eastern District of New York on charges alleging he acted as an unregistered agent of the United Arab Emirates.[24]

Barrack had long-standing ties to the region and persuaded the jury that he was not acting at the direction of UAE officials, but rather pursing activities that made sense for his own business.

This less-than-stellar track record, and the 2019 **acquittal** of attorney Gregory Craig on charges he deceived DOJ officials to avoid registering as an agent of the Ukrainian government, will likely cause the department to

be more selective in choosing FARA-related cases to prosecute.

It may also portend a shift away from cases built primarily on circumstantial evidence in favor of cases involving, for instance, a direct exchange of money in return for an explicit directive from a foreign government.

Despite these setbacks, however, the DOJ may nevertheless have achieved one of its key objectives in this area: The number of new FARA registrations has dramatically increased in each of the last few years, likely in response to the DOJ's increased efforts to combat covert foreign influence campaigns.

Conclusion

The book is not closed on the DOJ's criminal antitrust initiative, and the government's victories in the Varsity Blues cases may be upheld. The government will also continue to pursue economic espionage and foreign influence cases.

However, the DOJ's setbacks in these areas in 2022 bear consideration as the department sets out on new initiatives in 2023. The DOJ under the Biden administration promised more aggressive enforcement activity following a lull during the Trump administration, and practitioners should expect to see an uptick in cases this year related to emerging issues involving cryptocurrencies, sanctions evasion and cybersecurity, among other things.

The setbacks in 2022 will likely subject these cases to greater internal scrutiny before they are brought. But given the promised spike in enforcement, practitioners should expect DOJ to continue to pursue white collar cases vigorously across an array of areas in 2023.

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[1] United States v. Low Taek Jho, et al., Case No. 1:18-cr-00538 (E.D.N.Y.).

[2] United States v. Elizabeth Holmes, et al. , Case No. 5:18-cr-00258 (N.D. Cal.).

[3] United States v. Sullivan , Case No. 3:20-cr-00337 (N.D. Cal.).

[4] United States v. Penn , Case No. 1:20-cr-00152 (D. Colo.).

[5] United States v. Norman W. Fries, Inc., Case No. 1:21-cr-00168 (D. Colo.).

[6] United States v. McGuire, Case No. 1:21-cr-00246 (D. Colo.).

[7] United States v. Jindal , Case No. 4:20-cr-00358 (E.D. Tex.).

[8] United States v. DaVita Inc. , Case No. 1:21-cr-00229 (D. Colo.).

[9] United States v. Zito , Case No. 1:22-cr-00113 (D. Mont.).

[10] United States v. VDA OC, LLC, Case No. 2:21-cr-00098 (D. Nev.).

[11] United States v. Khoury , Case No. 1:20-cr-10177 (D. Mass.).

[12] United States v. Ernst, et al. , Case No. 1:19-cr-10081 (D. Mass.).

[13] United States v. Abdelaziz, Case No. 22-1129 (1st Cir.); United States v. Wilson, Case No. 22-1138 (1st Cir.).

[14] Kotteakos v. U.S. , 328 U.S. 750 (1946).

[15] Attorney General Jeff Session's China Initiative Fact Sheet, November 1, 2018 (available at https://www.justice.gov/opa/speech/file/1107256/download).

[16] United States v. Lieber 🔴 , Case No. 1:20-cr-10111 (D. Mass.).

[17] United States v. Hu 🔴 , Case No. 3:20-cr-21 (E.D. Tenn.).

[18] United States v. Chen 🔴 , Case No. 1:21-cr-10018 (D. Mass.).

[19] United States v. Xiao 🔴 , Case No. 4:21-cr-40039 (S.D. Ill.).

[20] United States v. Tao 🔴 , Case No. 2:19-cr-20052 (D. Kan.).

[21] Department of Justice, Assistant Attorney General Matthew Olsen Delivers Remarks on Countering Nation-State Threats, February 23, 2022, https://www.justice.gov/opa/speech/assistant-attorney-general-matthew-olsen-delivers-remarks-countering-nation-state-threats.

[22] See 22 U.S.C. §§ 611 et seq.

[23] Attorney General of the United States v. Wynn 🔴 , Case No. 1:22-cv-01372 (D.D.C.).

[24] United States v. al Malik Alshahhi, et al. 🔴 , Case No. 1:21-cr-00371 (E.D.N.Y.). Barrack was not charged under FARA but rather under 18 U.S.C. § 951, a statute that requires agents operating under the control of foreign governments or foreign officials to notify the Attorney General before acting. Registration under FARA serves as the requisite notification.