WHITE-COLLAR RESET: THE DOJ'S YATES MEMO AND ITS POTENTIAL TO PROTECT HEALTH, SAFETY, AND THE ENVIRONMENT

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I. INTRODUCTION

On September 9, 2015, the Department of Justice ("DOJ") announced that it was modifying the *U.S. Attorneys' Manual* to spur the development of prosecutions against individual corporate defendants.[1] As has been the DOJ's practice since 1999,[2] the changes were transmitted in a memorandum written by Deputy Attorney General Sally Yates on the basis of extensive deliberations by an internal task force ("Yates Memo").[3] From now on, Yates declared, a corporation wishing to get *any* credit for cooperating with the government when negotiating the settlement of a potential criminal case must turn over all of the information it possesses regarding misdeeds by individual employees.[4] Prosecutors must ensure that the internal investigations conducted by companies to assemble such information are

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1. Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES, Sept. 10, 2015, at A1, A23 ("Stung by years of criticism that it has coddled Wall Street criminals, the Justice Department issued new policies on Wednesday that prioritize the prosecution of individual employees—not just their companies—and put pressure on corporations to turn over evidence against their executives.").

2. *U.S. Department of Justice Announces Updated Guidelines on Individual Accountability for Corporate Wrongdoing*, JONES DAY (Sept. 2015), http://www.jonesday.com/US-Department-of-Justice-Announces-Updated-Guidelines-on-Individual-Accountability-for-Corporate-Wrongdoing-09-16-2015/#.

3. Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to Head of Dep't Components & U.S. Att'ys, Individual Accountability for Corporate Wrongdoing 2 (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download [hereinafter Yates Memo].

4. *Id.* at 3.

thorough.[5] Cases against individual managers should be an overriding priority.[6] If a government investigation did not produce any individual charges, prosecutors must justify the omission in the materials they forward to their supervisors.[7]

Because cooperation is central to reducing criminal fines, and can even make the difference between a decision to bring or forgo criminal charges, the Yates Memo caused a small *tsunami* of alarm among the defense bar,[8] the Chamber of Commerce ("Chamber"),[9] and within the small group of academics who

5. *Id.* at 4.

6. *Id.*

7. *Id.*

8. *See, e.g.*, DLA PIPER, COMPLIANCE & RISK REPORT: CCOS UNDER SCRUTINY 3 (2016), https://www.dlapiper.com/~/media/Files/Insights/Publications/2016/04/DLA_Piper_Compliance_Risk_Survey_Report2016.pdf; LAURA G. HOEY ET AL., ROPES & GRAY, THE YATES MEMO: HAVE THE RULES REALLY CHANGED? (Mar. 29, 2016), https:// www.ropesgray.com/newsroom/news/2016/03/Attorneys-Examine-The-Yates-Memo-and-Changes-to-Individual-Prosecutions.aspx; STEVEN M. KAUFMANN ET AL., MORRISON & FOERSTER, THREE KEY TAKEAWAYS FROM DOJ'S NEW YATES MEMO ON INDIVIDUAL ACCOUNTABILITY FOR CORPORATE WRONGDOING 1 (Sept. 15, 2015), http://www.mofo.com/~/media/Files/ClientAlert/2015/09/150915DOJIndividualAccountability.pdf; HERRICK K. LIDSTONE, JR., BURNS, FIGA & WILL, THE DEPARTMENT OF JUSTICE'S YATES MEMO—IS IT NOW A CASE OF THE CORPORATION VERSUS ITS EXECUTIVES (Oct. 21, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2677459; Robert R. Stauffer & William C. Pericak, *Twenty Questions Raised by the Justice Department's Yates Memorandum*, 99 CRIM. L. REP. (BNA) 191 (May 18, 2016); Client Memorandum, Davis Polk, White Collar Update: The Department of Justice Incorporates Yates Memo's Focus on Individual Prosecutions into U.S. Attorneys' Manual (Dec. 1, 2015), https://www.davispolk.com/sites/default/files/2015_12_01_White_Collar_Update_DOJ_Incorporates_Yates_Memo_US_Attorneys_Manual.pdf; Robert E. Bloch et al., *8 Thoughts on Cartel Investigations Post-Yates Memo*, LAW360 (Mar. 15, 2016, 2:28 PM), http://www.law360.com/articles/771842/8-thoughts-on-cartel-investigations-post-yates-memo; *DOJ's Newest Policy Pronouncement: The Hunt for Corporate Executives*, GIBSON DUNN (Sept. 11, 2015), http://www.gibsondunn.com/publications/pages/Yates-Memo–DOJ-New-Posture-on-Prosecutions-of-Individuals–Consequences-for-Companies.aspx; Maria Douvas et al., *The Yates Memo: 6 Months Later*, LAW360 (Mar. 8, 2016, 8:38 PM), http://www.law360.com/articles/766556/the-yates-memo-6-months-later; Catherine Greaves, *DOJ Stresses Individual Accountability in New "Yates Memo,"* ABA HEALTH ESOURCE (Oct. 2015), http://www.americanbar.org/publications/aba_health_esource/2015-2016/october/yatesmemo.html; Paul Monnin & Eric D. Stolze, *Everything Old Is New Again: Why the Yates Memo Is Constitutionally Suspect*, PAUL HASTINGS (Jan. 11, 2016), http://www.paulhastings.com/publications-items/details/?id=5cffe769-2334-6428-811c-ff00004cbded; *The Justice Department's Yates Memorandum and Three Tips for Government Contractors to Manage the Risks*, BLANK ROME LLP (Feb. 2016), https://www.blankrome.com/index.cfm?contentID=37&itemID=385; *Unpacking the Yates Memo: What the "New" DOJ Policy Really Means*, MCGUIREWOODS (Sept. 11, 2015), https://www.mcguirewoods.com/Client-Resources/Alerts/2015/9/Unpacking-Yates-Memo-New-DOJ-Policy.aspx.

9. DLA PIPER, *supra* note 8, at 3; MATTHEW S. MINER, U.S. CHAMBER INST. FOR LEGAL REFORM, DOJ'S NEW THRESHOLD FOR "COOPERATION" 1 (May 2016), http://www.instituteforlegalreform.com/uploads/sites/1/YatesMemoPaper_Web.pdf.

watch such issues carefully.[10] No one should be surprised that the Chamber and the defense bar reacted badly, of course. Both have an immediate financial incentive to excoriate DOJ prosecutors for threatening harm to their constituents. But much of the negative criticism seems over the edge of reasoned policy analysis and betrays a surprising myopia about the pressure the DOJ is under to improve white-collar criminal enforcement.

Some alleged that the Yates Memo was a political move, timed to deflect criticism from the DOJ's decision to enter into a deferred prosecution agreement ("DPA") that suspended criminal charges against General Motors ("GM") for faulty ignition switches that caused dozens of fatal crashes.[11] DPAs are civil settlements that are typically accompanied by a statement of facts presenting the government's potential criminal case against the defendant.[12] But the agreements table criminal charges so long as the company abides by their terms.[13] Critics, including members of

10. *See, e.g.*, Brandon L. Garrett, *The Metamorphosis of Corporate Criminal Prosecutions*, 101 VA. L. REV. ONLINE 60 (2016), http://www.virginialawreview.org/sites/virginialawreview.org/files/Garrett_final_publish.pdf; Elizabeth E. Joh & Thomas W. Joo, *The Corporation As Snitch: The New DOJ Guidelines on Prosecuting White Collar Crime*, 101 VA. L. REV. ONLINE 51 (2015), http://www.virginialawreview.org/sites/virginialawreview.org/files/Joh%26Joo_Book.pdf; Joseph W. Yockey, *Beyond Yates: From Engagement to Accountability in Corporate Crime*, 12 N.Y.U. J.L. & BUS. 407 (2016).

11. *See* Joh & Joo, *supra* note 10, at 52. ("This tough talk about individual corporate agents is probably at least in part a short-term political move."). The Yates Memo appears to have been under development for some time by a task force of DOJ personnel, and it is unlikely that career prosecutors would have supported its content unless they thought DOJ as an institution would follow through on its commitments, at least to some extent. *See* Apuzzo & Protess, *supra* note 1 (stating that Attorney General Lynch foreshadowed this policy in speech to state attorney generals in February 2015 when she said, "Even imposing unprecedented financial penalties on the institutions whose conduct led to the financial crisis is not a substitute for holding individuals within those institutions personally accountable.").

12. Jonathan S. Sack & Elizabeth Haines, *Be Careful What You Wish For: How Deferred and Non-Prosecution Agreements Can Be Used in Civil Litigation*, BLOOMBERG BNA (Jan. 12, 2012), http://www.bna.com/deferred-and-non-prosecution-agreements/.

13. PUB. CITIZEN, JUSTICE DEFERRED: THE USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS IN THE AGE OF "TOO BIG TO JAIL" 5 (July 8, 2014), http://www.citizen.org/documents/justice-deferred-too-big-to-jail-report.pdf. In a deferred prosecution agreement, the Justice Department agrees to drop the criminal charges after a set period of time if the company in question abides by the terms of the settlement. *Id.* Such settlements are typically filed with a court, although prosecutors typically withhold the documents filed by the corporation to demonstrate compliance. *Id.* at 5–6. Non-prosecution agreements stipulate that no criminal charges will be filed and are never reviewed by a court. *Id.*; *see also* OFFICE OF THE U.S. ATT'Y, U.S. ATT'YS' MANUAL § 9-28.200 (rev. Nov. 2015) (noting the reasons to enter into such agreements), https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecut ion-business-organizations. *See generally* Brandon L. Garrett,

Congress, federal judges, and other commentators, note that DPAs have been used to whitewash some of the most egregious transgressions perpetrated by corporations and their executives.[14] They have played a central role in the DOJ's resolution of potential criminal charges against the financial institutions most directly involved in the market crash of 2008.[15]

In March 2013, Attorney General Eric Holder told the Senate Judiciary Committee that DPAs were necessary because some private sector corporations are so large that indicting them would have a negative impact on the national—and even the global—economies.[16] Under his leadership, the DOJ embraced DPAs enthusiastically, reaching multi-billion-dollar settlements with some of the world's largest corporations.[17] The embrace of DPAs—and the fact that the DOJ did not bring a single criminal case against any institution or manager involved in the 2008 market crash and subsequent recession—shrouded the DOJ in a cloud of laxity regarding white-collar crime.[18]

Of course, the DOJ rarely releases all of the information it accumulates and considers in deciding to forgo criminal charges

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The Rise of Bank Prosecutions, 126 YALE L.J.F. 33, 39 (2016), http://www.yalelawjournal.org/pdf/13.GarrettFinalPDF_8e7z 2u7f.pdf.

14. PUB. CITIZEN, *supra* note 13, at 5; RENA STEINZOR, WHY NOT JAIL? 265–68 (2015); Jed S. Rakoff, *The Financial Crisis: Why Have No High Level Executives Been Prosecuted?*, N.Y. REV. BOOKS 4–8 (Jan. 9, 2014); Gretchen Morgenson, *A Bank Too Big to Jail*, N.Y. TIMES (July 15, 2016), http://www.nytimes.com/2016/07/17/business/a-bank-too-big-to-jail.html.

15. Garrett, *supra* note 13, at 33, 35.

16. STEINZOR, *supra* note 14 (discussing Attorney General Holder's policy that certain banks are "too big to jail" and senators' astonishment at the leniency of the HSBC settlement); *see also* Editorial, *Too Big to Indict*, N.Y. TIMES, Dec. 12, 2012, at A36 ("It is a dark day for the rule of law.").

17. *See* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 5–6 (2014) (reporting that although corporate fines have increased substantially since President Obama took office, most of the larger settlements involved DPAs as opposed to criminal guilty pleas and fines).

18. For commentary criticizing the DOJ's failure to prosecute white-collar criminals, see, for example, MATT TAIBBI, THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WAGE GAP (2014); Rakoff, *supra* note 14; Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES MAG. (Apr. 30, 2014), http://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html; Glenn Greenwald, *The Untouchables: How the Obama Administration Protected Wall Street from Prosecutions*, THE GUARDIAN (Jan. 23, 2013, 7:27 AM), http://www.theguardian.com/commentisfree/2013/jan/23/untouchables-wall-street-prosecutions-obama; Jeff Madrick & Frank Partnoy, *Should Some Bankers Be Prosecuted?*, N.Y. REV. BOOKS (Nov. 10, 2011), http://www.nybooks.com/articles/2011/11/10/should-some-bankers-be-prosecuted/; *Too Big to Jail?*, MOYERS & CO. (Oct. 3, 2014), http://billmoyers.com/episode/too-big-to-jail/.

in any given case. But the biggest scandals that attract considerable congressional attention can provide telling insights to the flaws in the prosecutors' reasoning. For example, allowing GM and its executives to avoid criminal charges was a very poor decision based on the limited facts that have emerged publicly about the case.[19] The DPA required the company to pay the government $900 million in response to charges that its compact cars contained faulty ignition switches with so little torque that the engine would stall when drivers brushed the key fob with a knee.[20] An internal GM investigation known as the *Valukas Report* revealed that senior executives knew about the problem for many years yet did nothing to fix it.[21] One engineer, Ray DeGiorgio, who was in charge of the design of the models most susceptible to the problem, became so alarmed that, in 2005, he replaced the switch with a better version without changing the part number or warning drivers of cars with defective switches that were still on the road.[22] Chief Executive Officer Mary Barra fired fifteen people soon after news of the defect hit the national press.[23] Despite these clear indications that for some extensive period of time GM's

19. *See* Rena Steinzor, *(Still) Unsafe at Any Speed: Why Not Jail for Auto Executives?*, 9 HARV. L. & POL'Y REV. 443, 443–44 (2015) (arguing that automakers view civil penalties and tort damages "as unfortunate but routine costs of doing business," that these companies "have internal cultures . . . that make safety defects recede into the background," and that individual executives must feel a "personal threat" of prosecution if they do not ensure safety in their cars).

20. Press Release, U.S. Dep't of Justice, General Motors Company Deferred Prosecution Documents (Sept. 17, 2015), https://www.justice.gov/usao-sdny/pr/general-motors-company-deferred-prosecution-documents; Press Release, U.S. Dep't of Justice, Manhattan U.S. Attorney Announces Criminal Charges Against General Motors and Deferred Prosecution Agreement with $900 Million Forfeiture (Sept. 17, 2015), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-general-motors-and-deferred [hereinafter DOJ Press Release Announcing Criminal Charges Against GM and DPA].

21. ANTON R. VALUKAS, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS 257–58 (2014), http://www.beasleyallen.com/webfiles/valukas-report-on-gm-redacted.pdf.

22. *See* Bill Vlasic, *A Fatally Flawed Switch, and a Burdened G.M. Engineer*, N.Y. TIMES (Nov. 13, 2014), http://www.nytimes.com/2014/11/14/business/a-fatally-flawed-switch-and-a-burdened-engineer.html; Bill Vlasic, *G.M. 'Bullied' Manufacturer over Poorly Designed Part, Email Says*, N.Y. TIMES (Nov. 21, 2014), http://www.nytimes. com/2014/11/22/business/gm-bullied-manufacturer-over-poorly-designed-part-email-says.html.

23. *See* Jeff Bennett & Mike Ramsey, *GM Fires 15 Employees over Recall Failures*, WALL STREET J. (June 5, 2014), http://www.wsj.com/articles/gm-ceo-probe-found-pattern-of-incompetence-1401973966; Bill Vlasic & Aaron M. Kessler, *At Hearing on G.M. Recall, Mary Barra Gives Little Ground*, N.Y. TIMES (July 17, 2014), http://www.nytimes.com/2014/07/18/business/senate-hearing-on-general-motors.html.

senior management had covered up the defect and that, as a result, people had died on the road, the DOJ decided to leave those individuals alone.[24]

If implemented aggressively, the Yates Memo represents a sharp departure from such accommodations and seems to represent a commitment by Holder's successor, Loretta Lynch, to dial back, if not quite eliminate, the negative legacy that the Obama Administration DOJ is soft on white-collar crime. Just as important, the Democrats' primary campaign emphasized strengthening white-collar prosecutions because Senator Bernie Sanders made repudiation of the so-called "too big to jail" approach a central tenet of his campaign for president.[25] Not to be outflanked on the progressive end of the political spectrum, Hillary Clinton soon took up his call for far stronger criminal enforcement.[26] DOJ career prosecutors seem set on a path of cracking down on white-collar crime.

The most salient criticism of the Yates Memo is that targeting individuals will cause excessive stress within a corporation subjected to a DOJ criminal investigation, creating a dog-eat-dog atmosphere.[27] Managers and internal investigators will turn on each other in a desperate effort to avoid identification as a potentially culpable party, and in the scrum, innocent employees' rights may be trampled.[28]

Less convincing criticisms betray the narcissistic impulses of the private bar. For example, a central preoccupation in such critiques is the possibility that the Yates Memo will compel corporate counsel to confront painful ethical dilemmas because

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24. Drew Harwell, *Why General Motors' $900 Million Fine for a Deadly Defect Is Just a Slap on the Wrist*, WASH. POST (Sept. 17, 2015), https://www.washingtonpost.com/news/business/wp/2015/09/17/why-general-motors-900-million-fine-for-a-deadly-defect-is-just-a-slap-o n-the-wrist/.

25. Bernie Sanders, Opinion, *To Rein in Wall Street, Fix the Fed*, N.Y. TIMES (Dec. 23, 2015), http://www.nytimes.com/2015/12/23/opinion/bernie-sanders-to-rein-in-wall-stree et-fix-the-fed.html; *see also* Rebecca Ballhaus & Ryan Tracy, *Bernie Sanders Sharpens His Attacks on Wall Street*, WALL STREET J. (Jan. 5, 2016), http://www.wsj.com/art icles/bernie-s anders-sharpens-his-attacks-on-wall-street-1452028742 (stating that Senator Sanders proposed a set of measures that would go beyond the Dodd-Frank Act to rein in big financial firms).

26. Hillary Clinton, Opinion, *Hillary Clinton: How I'd Rein in Wall Street*, N.Y. TIMES (Dec. 7, 2015), http://www.nytimes.com/2015/12/07/opinion/hillary-clinton-how-id-rei n-in-wall-street.html?_r=0.

27. MINER, *supra* note 9, at 15–19.

28. *Id.* at 18.

they represent the corporation, not the individual executives who will be implicated in the DOJ's criminal investigations.[29] At what point must they risk alienating their human clients by suggesting that they hire independent counsel because their interests conflict with the interests of the corporation?[30] Yet if they are doing their jobs correctly, these moments should happen routinely, long before the government shows up. For example, GM's ignition switch problems emerged most clearly when victims of crashes filed lawsuits, and outside counsel began writing memoranda to inside counsel waving red flags about a potentially serious defect.[31] The lawyers sat by and were heavily criticized as a result.[32]

I argue here that all of these misgivings—real and self-serving—must be placed in the context of the DOJ's anemic white-collar enforcement program and its effect on the American body politic.[33] As legal historian Lawrence Friedman explained, in addition to deterring harmful activity and punishing people who violate the law, the third equally important core function of the criminal law is to uphold the moral values of society as a whole:

> [C]riminal justice tells us where the moral boundaries are; where the line lies between good and bad. It patrols those boundary lines, day and night,

29. *Id.*

30. *Id.* at 16.

31. Alan Salpeter & Emily Newhouse Dillingham, *Lessons Counsel Should Learn from the GM Ignition Switch Failure*, INSIDE COUNS. (May 11, 2015), http://www.insidecounsel.com/2015/05/11/lessons-counsel-should-learn-from-the-gm-ignition.

32. Aaron M. Kessler, *G.M. Names New Counsel After Wave of Recalls*, N.Y. TIMES (Feb. 19, 2015), http://www.nytimes.com/2015/02/20/business/gm-replaces-its-top-lawyer-after-recall-scandal.html?_r=0.

33. Researchers at Syracuse University have used DOJ and FBI statistics to demonstrate that white-collar prosecutions are at a twenty-year low, although the database does not appear to consider key areas where prosecutorial activity has been significant, such as violations of federal environmental laws. *Federal White Collar Crime Prosecutions at 20-Year Low*, TRAC REP. (July 29, 2015), http://trac.syr.edu/tracreports/crim/398/; *see also* Alan Pyke, *Why the U.S. Isn't Prosecuting White Collar Criminals*, THINKPROGRESS (Aug. 4, 2015), http://thinkprogress.org/economy/2015/08/04/3687846/white-collar-crime-prosecution-failure/ (comparing the prison sentence given for Tom Hayes, a former UBS and Citigroup trader, in the United Kingdom with the lack of prosecution for Americans who commit financial crimes); James B. Stewart, *In Corporate Crimes, Individual Accountability Is Elusive*, N.Y. TIMES (Feb. 19, 2015), http://www.nytimes.com/2015/02/20/business/in-corporate-crimes-individual-accountability-is-elusive.html?_r=0 (stating that the only individuals who have been prosecuted for mortgage fraud or other financial crimes since the 2008 crisis have been low-level employees).

> rain or shine. It shows the rules directly, dramatically, visually, through asserting and enforcing them. (There are lessons from nonenforcement, too: from situations where the boundaries are indistinct, or the patrol corrupt or asleep; and society is quick to learn *these* lessons, too.)
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> . . . [T]he history of criminal justice is not only the history of the forms of rewards and punishment; it is also a story about the dominant *morality*, and hence a history of power.[34]

Many Americans are deeply disturbed by the fact that financial institutions and their employees could drain billions of dollars out of the economy by committing fraud in the issuance, bundling, and marketing of subprime mortgages, precipitating market collapse and a recession that caused millions of innocent bystanders to lose their jobs and their homes.[35] To add insult to

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34. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 10 (1993).

35. Gallup reported in June 2016 that "Americans' confidence in banks . . . remains below 30% for the eighth straight year after tumbling during the 2007-2009 recession." Justin McCarthy, *Americans' Confidence in Banks Still Languishing Below 30%*, GALLUP (June 16, 2016), http://www.gallup.com/poll/192719/americans-confidence-banks-languishing-below.aspx. The Pew Research Center reported in September 2013 that "[n]early seven-in-ten Americans say large banks and financial institutions have benefited the most from post-recession government policies. . . . In the public's view, the beneficiaries of these policies are large banks and financial institutions, large corporations and wealthy people." Bruce Drake, *Majority of Americans Say Banks, Large Corporations Benefitted Most from U.S. Economic Policies*, PEW RES. CTR. (Sept. 20, 2013), http://www.pewresearch.org/fact-tank/2013/09/20/majority-of-americans-say-banks-large-corporations-benefitted-most-from-u-s-economic-policies/. In September 2013, a Reuters/Ipsos poll found that:

> [O]f more than 1,400 adults, representing a cross-section of the U.S. population, . . . half the of the respondents believe there has not been enough reform [in the banking industry] to prevent a future crisis.
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> As many as 44 percent of those polled believe the government should not have bailed out financial institutions, while only 22 percent thought it was the right move. *Fifty-three percent think not enough was done to prosecute bankers;15 percent were satisfied with the effort.*

injury, many of these same institutions were bailed out of crisis by the government, and, even though they eventually paid the money back, they sidestepped the long-term ramifications of what they did.[36] Only one investment banker was charged in a case that, in retrospect, was an anomaly.[37] The last time bankers organized a comparable scam—namely, the savings and loan crisis that involved one-seventieth of the 2008 financial losses—their bad behavior resulted in a thousand felony convictions, including cases against six hundred individuals and three hundred institutions.[38] What possibly could be the explanation for the dearth of prosecutions this time around?

These perceptions of unfairness exacerbate the anger that increasingly drives our national politics.[39] Resentment of the yawning income gap between the richest one percent and the rest of the population, static wages, and the exodus of industrial jobs to poorer countries are themes that dominate the political debate.[40] The divide between how prosecutors deal with street

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Michael Erman, *Five Years After Lehman, Americans Still Angry at Wall Street: Reuters/Ipsos Poll*, REUTERS (Sept. 15, 2013, 7:05 AM) (emphasis added), http://www.reuters.com/article/us-wallstreet-cris is-idUSBRE98E06Q20130915.

36. In essence, the scheme was to issue subprime mortgages, bundle them into packages, and sell those investments to equally greedy counterparts. *See, e.g.*, MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE (2011); BETHANY MCLEAN & JOE NOCERA, ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS (2011); GRETCHEN MORGENSON & JOSHUA ROSNER, RECKLESS ENDANGERMENT: HOW OUTSIZED AMBITION, GREED, AND CORRUPTION CREATED THE WORST FINANCIAL CRISIS OF OUR TIME (2012); ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM AND THEMSELVES (2010); INSIDE JOB (Sony Pictures 2011); MARGIN CALL (Lionsgate 2011); THE BIG SHORT (Paramount Pictures 2016).

37. *See* Eisinger, *supra* note 18 (describing the case instituted against a loan investment banker named Kareem Serageldin).

38. Joshua Holland, *Hundreds of Wall Street Execs Went to Prison During the Last Fraud-Fueled Bank Crisis*, MOYERS & CO. (Sept. 17, 2013), http://billmoyers.com/2013/09/17/hundreds-of-wall-street-execs-went-to-prison-during-the-last-fraud-fueled-bank-crisis/.

39. *See* Vanessa Barford, *Why Are Americans So Angry?*, BBC MAG. (Feb. 4, 2016), http://www.bbc.com/news/magazine-35406324. A poll from CNN/ORC from December 2015 "suggests 69% of Americans are either 'very angry' or 'somewhat angry' about 'the way things are going' in the US. And the same proportion—69%—are angry because the political system 'seems to only be working for insiders with money and power, like those on Wall Street or in Washington.'" *Id.*

40. *See, e.g.*, Jeremy Diamond, *Trump Slams Globalization, Promises to Upend Economic Status Quo*, CNN POL. (June 28, 2016, 4:51 PM), http://www.cnn.com/2016/06/28/politics/donald-trump-speech-pennsylvania-economy/ (describing Donald Trump's proposed policy, if elected, to return manufacturing jobs to domestic soil); Rana Foroohar, *How Hillary Proved She's an Economic Progressive*, TIME (July 29, 2016), http://ti

criminals and how they fail to pursue white-collar miscreants is an integral part of this larger picture. Critiques that consider the Yates Memo and the issues of white-collar enforcement, as if they exist independently of these larger problems, are based on patterns of thought that are both ahistorical and myopic.[41]

The Yates Memo has some decidedly rough edges, and the DOJ faces important tests of judgment if it is to implement the new rules fairly and with appropriate deference to individual constitutional rights, especially the right against self-incrimination provided by the Fifth Amendment.[42] Rather than attempt to clarify the worst fears about how it will be implemented through speeches by high-profile officials, which has been its modus operandi thus far,[43] the DOJ should issue formal guidance on these issues that, while not legally binding, at least would give defense counsel some concrete basis for complaints that prosecutors are abusing their discretion.

This article opens with a brief review of the evolution of the DOJ's policies regarding the prosecution of white-collar crime during the Obama Administration. It considers the major arguments made against the feasibility and integrity of the Yates Memo. The article explores the legitimate aspects of these critiques and suggests how careful implementation by the DOJ could respond to these concerns.

II. THE DOJ'S MOTIVATIONS

A. Corporations Too Big to Jail

The story of how the DOJ managed to maneuver itself into a position where it was perceived as soft on white-collar crime during the administration of one of the most progressive presidents in American history begins with the market crash of

me.com/4430469/hillary-clinton-economy/ (describing Hillary Clinton's proposed policy, if elected, to create better jobs with higher wages).

41. *See* sources cited *supra* notes 8, 10.

42. U.S. CONST. amend V.

43. *See* Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015) [hereinafter Yates Remarks at NYU], https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school [hereinafter Yates Remarks at NYU](discussing the implementation of the Yates Memo in the face of "unique challenges").

2008, which straddled the presidencies of George W. Bush and Barack Obama.[44] Dealing with the crash was President Obama's primary focus for months, and newly-appointed Attorney General Eric Holder viewed himself as a leading figure in the close-knit team of senior Obama Administration advisers that rode to the rescue of nothing less important than the global economy. Like all of the truly influential advisers to the new president, Holder appears to have embraced the notion that some financial institutions were "too big to fail."[45] From there, he appears to have embraced the idea that some institutions are too large and important to prosecute criminally.[46] But Holder was not a political or economic adviser; he was the nation's chief law enforcement officer.[47] To combat the perception that enforcement was influenced by political considerations, the Attorney General and the prosecutors he supervised at the DOJ needed to maintain the appearance that they were deciding whether institutions and individuals had committed a crime and whether the crime, the evidence government investigators had gathered, and the degree of corporate cooperation and remorse justified an indictment. When he institutionalized the consideration of an inappropriate factor—how important a company was to the economy—Holder began to compromise the integrity of federal white-collar crime enforcement. In fairness, attorneys general are always plagued by the difficulty of eliminating inappropriate considerations from prosecutorial decisions. But, Holder's failings had powerful implications for the general public's faith in the objectivity of American law enforcement.

Holder began this journey beyond traditional prosecutorial boundaries years before the 2008 crash when he served as deputy attorney general under Janet Reno during the second term of the

44. *See* Eisinger, *supra* note 18 (discussing how the DOJ was soft on Wall Street after the market crash in 2008).

45. Danielle Douglas, *Holder Concerned Megabanks Too Big to Jail*, WASH. POST (Mar. 6, 2013), https://www.washingtonpost.com/business/economy/holder-concerned-megabanks-too-big-to-jail/2013/03/06/6fa2b07a-869e-11e2-999e-5f8e0410cb9d_story.html.

46. *Id.*

47. *About the Office*, U.S. DEP'T OF JUST., https://www.justice.gov/ag/about-office (last visited Sept. 26, 2016) ("[T]he Office of the Attorney General . . . [is] the head of the Department of Justice and chief law enforcement officer of the Federal Government.").

Clinton Administration.[48] Among other duties, he led a task force that debated how to handle the prosecution of corporations and their executives, and was the author of the "Holder Memo," the first in the series of five such efforts, including the Yates Memo, that have developed policy in the area.[49] (The memos from the deputy attorneys general explain changes their task forces have decided to make to the criteria. Then they draft language to incorporate the changes into sections 9-28.010 *et seq.* of the *U.S. Attorneys' Manual*.[50])

The 1999 Holder Memo contained criteria that were straightforward and unquestionably appropriate, including the (1) "nature and seriousness of the offense"; (2) "pervasiveness of wrongdoing within the corporation"; (3) "corporation's history of similar conduct"; (4) "corporation's timely and voluntary disclosure of wrongdoing"; (5) "existence and adequacy of the corporation's compliance program"; (6) "corporation's remedial actions"; and (7) "adequacy of non-criminal remedies."[51] But, in a major departure from these case-specific factors, the Holder Memo added the instruction that prosecutors must consider whether an indictment would cause so-called collateral consequences to stockholders or employees:

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48. *About the Office, Attorney General: Eric H. Holder, Jr.*, U.S. DEP'T OF JUST., https://www.justice.gov/ag/bio/attorney-general-eric-h-holder-jr (last updated Aug. 21, 2015); Eisinger, *supra* note 18.

49. Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys, Bringing Criminal Charges Against Corporations (June 16, 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF [hereinafter Holder Memo]; *see also* Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf; Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006), https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf; Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Head of Dep't Components & U.S. Att'ys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf; Yates Memo, *supra* note 3.

50. OFFICE OF THE U.S. ATT'Y, U.S. ATT'YS' MANUAL § 9-28.000 (rev. Nov. 2015), https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organiz ations.

51. Holder Memo, *supra* note 49, at 3.

> One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (e.g., publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it.[52]

The collateral consequences factor was institutionalized, introducing a set of considerations and information that had little to do with the circumstances of the underlying criminal case.[53] As then-Criminal Division Chief Lanny Breuer explained in a speech to the New York Bar in 2012, companies under criminal investigation bring in teams of economists to explain how an indictment might harm the economy as a whole:

> In my conference room, over the years, I have heard sober predictions that a company or bank might fail if we indict, that innocent employees could lose their jobs, that entire industries may be affected, and even that global markets will feel the effects. . . . In reaching every charging decision, we must take into account the effect of an indictment on innocent employees and shareholders, just as we must take into account the nature of the crimes committed and the pervasiveness of the misconduct.[54]

I have been unable to find examples of such corporate presentations, which undoubtedly are regarded as confidential by

52. *Id.* at 9.

53. *Id.* (stating that factors to be considered in determining the weight of collateral consequences include "the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs").

54. Lanny A. Breuer, Assistant Att'y Gen., U.S. Dep't of Justice, Address at the New York City Bar Association (Sept. 13, 2012), https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association.

the DOJ and defense attorneys. Breuer's comments suggest, though, that at least two types of economic harm are probably discussed: (1) loss of revenue because of the stigma of indictment and (2) the withdrawal of licenses and permits to conduct business in a given field (e.g., accounting) upon conviction.

The DOJ repeatedly justifies use of the collateral consequences factor when it resolves a case using a DPA and explains that its decisions are a rational response to the Arthur Andersen case where, supposedly, a large, multinational accounting firm was put out of business by overzealous criminal prosecution.[55] DOJ attorneys not only believe this version of events, but they have also convinced members of the media that it is accurate.[56] Yet the urban legend surrounding Arthur Andersen's collapse ignores important aspects of what really happened.

Arthur Andersen was Enron's accountant.[57] It invented many of the accounting techniques that allowed Enron executives to earn large paper profits and then crash the company when these tricks caught up with them.[58] As soon as the news of Enron's demise hit the front pages in early October 2001, Arthur Andersen's clients must have begun to question the wisdom of continuing to retain a firm at the center of such a gigantic scandal. Meanwhile, worried about potential enforcement action, employees in Arthur Andersen's Houston office started shredding incriminating papers; they stopped only when the firm received a

55. *See, e.g.*, Gretchen Morgenson & Louise Story, *As Wall St. Polices Itself, Prosecutors Use Softer Approach*, N.Y. TIMES (July 7, 2011), http://www.nytimes.com/2011/07/08/business/in-shift-federal-prosecutors-are-lenient-as-companies-break-the-law.html ("The department began pulling back from a more aggressive pursuit of white-collar crime around 2005, say defense lawyers and former prosecutors, after the Supreme Court overturned a conviction it won against the accounting firm Arthur Andersen. That ended an era of brass-knuckle prosecutions related to fraud at companies like Enron.").

56. *See, e.g.*, Linda Greenhouse, *Justices Unanimously Overturn Conviction of Arthur Andersen*, N.Y. TIMES (May 31, 2005), http://www.nytimes.com/2005/05/31/business/justices-unanimously-overturn-conviction-of-arthur-andersen.html (stating that the Supreme Court's reversal of Arthur Andersen's conviction demonstrated its belief that the prosecution of the company went "too far" because of the low level of guilt presented in the jury instructions); Charles Lane, *Justices Overturn Andersen Conviction*, WASH. POST (June 1, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/05/31/AR2005053100491.html (stating the Supreme Court's decision was a "rebuke to the government" following one of the government's "biggest victories").

57. Ken Brown & Ianthe Jeanne Dugan, *Arthur Andersen's Fall from Grace Is a Sad Tale of Greed and Miscues*, WALL STREET J. (June 7, 2002), http://www.wsj.com/articles/SB1023409436545200.

58. *Id.*

subpoena from the Securities and Exchange Commission ("SEC") in mid-November 2001.[59] Worried that this escapade could worsen its legal liability, senior management informed the DOJ in January 2002.[60] The DOJ opened a criminal investigation and the parties tried to negotiate a settlement.[61] The DOJ indicted Arthur Andersen in March 2002 on one count of obstructing justice after months of wrangling punctuated by refusal to plead guilty to even a single criminal charge without an upfront pledge that the SEC would waive any requirement that its licenses be curtailed and the SEC's refusal to make that promise.[62]

Prosecutors won at trial and the decision was upheld on appeal,[63] but in 2005, long after the firm had dispersed, the Supreme Court reversed the conviction because it was troubled by a relatively technical problem with the jury instructions given by the judge.[64] The DOJ never retried the case because the company was a shadow of its former self at that point.[65] No question, Arthur Andersen's demise caused economic damage at home and abroad,[66] but its clients found other accountants and its employees found other jobs. The Supreme Court did not condemn the DOJ's prosecution in broad terms.[67] Arthur Andersen's self-inflicted wounds seem a fragile foundation for the extraordinary proposition that some corporations are too big to jail.

When the DOJ justifies signing a DPA on the basis that it wants to save jobs and avoid economic damage, it steps onto a slippery slope. Consider the facial inconsistencies between two settlements from 2012 with two multinational corporations, HSBC and BP, both of which are headquartered in the United

59. Kathleen F. Brickey, *Andersen's Fall from Grace*, 81 WASH. U. L.Q. 917, 920 (2003).

60. *Id.* at 924–27.

61. *Id.*

62. Indictment at 7–8, United States v. Arthur Andersen, LLP, No. CRH-02-121 (S.D. Tex. Mar. 7, 2002).

63. United States v. Arthur Andersen, LLP, 374 F.3d 281 (5th Cir. 2004).

64. Arthur Andersen, LLP v. United States, 544 U.S. 696, 708 (2005).

65. *See* Carrie Johnson, *U.S. Ends Prosecution of Arthur Andersen*, WASH. POST (Nov. 23, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/22/AR2005112201852.html ("The government has determined that it is in the interests of justice not to re-prosecute Andersen.").

66. *Id.*

67. *Arthur Andersen*, 544 U.S. at 706.

Kingdom.[68] HSBC had the dual benefits of Holder's effect on the economy concerns and, as was recently revealed, vigorous lobbying by the British government.[69] BP signed a traditional criminal agreement.[70]

HSBC, then the fourth-largest bank in the world, laundered billions of dollars for murderous Mexican drug cartels and illegally provided banking services to the sanctioned states of Cuba, Iran, Libya, Sudan, and Burma.[71] The DPA required HSBC to pay $1.9 billion and to institute rigorous compliance programs.[72] At the press conference announcing the deal, then-Criminal Division Chief Lanny Breuer said: "Our goal here is not to bring HSBC down, it's not to cause a systemic effect on the economy, it's not for people to lose thousands of jobs."[73] A congressional investigation conducted by the staff of the House of Representatives Financial Services Committee, released in July 2016, revealed that Holder approved the DPA approach in consultation with British regulators who objected strongly to the criminal prosecution of the bank on economic grounds.[74] In the process, he overruled career DOJ prosecutors who wanted to indict the company.[75] Once he made the decision to go with a DPA, the terms of agreement were watered down substantially, including the elimination of standard DOJ language to the effect that prosecutors reserved the right to prosecute individual HSBC employees.[76]

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68. *See* Press Release, U.S. Dep't of Justice, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012) [hereinafter DOJ Press Release Announcing DPA with HSBC], https://www.justice.gov/opa /pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-vi olations; Azmat Khan, *BP to Pay Record $4.5 Billion for 2010 Gulf Oil Spill*, PBS (Nov. 15, 2012), http://www.pbs.org/wg bh/frontline/article/bp-to-pay-record-4-5-billion-for-2010-gulf-oil-spill/.

69. REPUBLICAN STAFF OF COMM. ON FIN. SERVS., 114TH CONG., TOO BIG TO JAIL: INSIDE THE OBAMA JUSTICE DEPARTMENT'S DECISION NOT TO HOLD WALL STREET ACCOUNTABLE 24–26 (Comm. Print 2016) [hereinafter HOUSE HSBC REPORT].

70. Khan, *supra* note 68.

71. HOUSE HSBC REPORT, *supra* note 69, at 4–5.

72. DOJ Press Release Announcing DPA with HSBC, *supra* note 68.

73. James O'Toole, *HSBC: Too Big to Jail?*, CNN MONEY (Dec. 12, 2012), http://money.cnn.com/2012/12/12/news /companies/hsbc-money-laundering/.

74. HOUSE HSBC REPORT, *supra* note 69, at 24–26.

75. *Id.* at 12–18.

76. *Id.* at 19–20.

In contrast, the DOJ insisted on a criminal settlement with BP in the wake of the blowout of the Macondo Well and destruction of the Deepwater Horizon oil rig in April 2010.[77] The agreement required BP to pay $4.5 billion in criminal fines and other penalties.[78] The explosion killed eleven people.[79] BP was unable to plug the well for several weeks, and it ultimately leaked 4.9 million barrels (205 million gallons) of crude oil into the Gulf of Mexico.[80] The company deserved indictment. But contemporaneous press accounts indicate that America's tough treatment of BP created a backlash within the British government because that country's pension funds were heavily invested in BP stock.[81]

How might we rationalize the two cases in juxtaposition to each other? Is money laundering on behalf of some of the most murderous criminals the world has known really less serious than hapless management, poor training, and broken equipment? HSBC is roughly ten times larger than BP.[82] Why did Holder consider it to be so much more vulnerable to the fallout of a criminal prosecution? We will never know, and in many respects that fact is the fatal weakness of the black box that is secret deliberations over collateral consequences. In the end, precisely because no one knows the basis for DOJ decision-making, its concerns about collateral consequences appear opportunistic and have little to do with the top three goals of the criminal law: punishment, deterrence, and reinforcement of moral values.

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77. Khan, *supra* note 68.

78. *Id.*

79. David Barstow et al., *Deepwater Horizon's Final Hours*, N.Y. TIMES (Dec. 25, 2010), http://www.nytimes.com /2010/12/26/us/26spill.html?pagewanted=all&_r=0.

80. Jeremy Repanich, *The Deepwater Horizon Oil Spill by the Numbers*, POPULAR MECHANICS (Aug. 10, 2010), http://www.popularmechanics.com/science/energy/a6032/bp-oil-spill-statistics/.

81. *See* Sarah Lyall & Julia Werdigier, *U.S. Fury at BP Stirs Backlash Among British*, N.Y. TIMES (June 10, 2010), http://www.nytimes.com/2010/06/11/business/11bp.html (discussing that because British pension funds were heavily invested in BP and the corporation was a mainstay of the country's economy, DOJ's aggressive prosecution created a backlash and a well of resentment among British investors and politicians).

82. BP, Annual Report (Form 20-F) 105 (2015), http://www.bp.com/content/dam/bp/pdf/investors/bp-annual-report-and-form-20f-2015.pdf (reporting that the company's assets totaled $261.8 billion in 2015); *Top Banks in the World*, BANKS AROUND THE WORLD, http://www.relbanks.com/worlds-top-banks/assets (last visited Oct. 29, 2016) (stating that HSBC reportedly had total assets of $2.608 trillion according to balance sheet figures from June 30, 2016).

Unfortunately, the Yates Memo makes no attempt to deal with DPAs and the damaging perception that their primary usefulness is as a vehicle for implementing decisions that an institution is too big to jail.[83] If the DOJ continues to use them in cases where public scrutiny is intense, it could sacrifice the palliative effects it seeks by re-emphasizing individual prosecutions.

B. Individuals Held Harmless

Between 2001 and 2014, federal prosecutors entered 306 deferred and non-prosecution agreements.[84] Individuals were indicted in only thirty-four percent of such cases.[85] These numbers are especially significant because DPAs have become the central vehicle used to settle cases developed in the wake of the 2008 market crash.[86] They have also become the favored approach in high-profile cases involving egregious violations in the health, safety, and environmental arenas.[87] The inevitable result is an overall reduction in white-collar criminal prosecutions. Jesse Eisinger, reporting for the *New York Times* on the troubling dearth of cases against Wall Street executives and institutions after the 2008 crash, notes that "[i]n the mid-'90s, white-collar prosecutions represented an average of 17.6 percent of all federal cases. In the three years ending in 2012, the share was 9.4 percent."[88]

In a sense, prosecuting a corporation without at least identifying and, if at all possible, charging the individuals that carried out the criminal acts, flouts the reasoning underlying the legal doctrine that a corporation can be held criminally culpable.[89]

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83. *See* Apuzzo & Protess, *supra* note 1 (stating that the Yates Memo was a "*tacit* acknowledgment" of criticisms of the DOJ's failure to prosecute corporate executives from the 2008 crisis) (emphasis added).

84. Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1791 (2015).

85. *Id.*

86. *See* GARRETT, *supra* note 17, at 5 (reporting that although corporate fines have increased substantially since President Obama took office, most of the larger settlements involved DPAs as opposed to criminal guilty pleas and fines).

87. STEINZOR, *supra* note 14, at 253–74 (discussing the DOJ's use of DPAs with corporate defendants in recent years).

88. Eisinger, *supra* note 18.

89. *See* N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495–96 (1909) (reasoning that corporations may be held criminally liable for the actions of their

Of course, corporations are legal entities created by written documents and cannot be sent to jail. But, as the Supreme Court reasoned in 1909 in *New York Central & Hudson River Railroad Co. v. United States*, corporations may be required to sacrifice their property by paying fines if an employee or group of employees, acting within the scope of their employment, commit an illegal act that would benefit the corporation.[90] (If the act does not benefit the corporation—for example, an employee embezzles funds from a corporate account—the individual is culpable but the corporation is not.)[91] The case and subsequent interpretations of the doctrine have a temporal element: first, the employees must act and then the corporation may be culpable.[92] In fact, a small but vocal group within the legal academy objects to this imputation of culpability from live human to paper entity, arguing that only individual people are legally capable of committing a crime and enduring punishment.[93] To charge a company without presenting evidence regarding the individual employees who implemented the criminal acts turns this doctrinal logic on its head.

When an imbalance arises as sharp as the one the DOJ has engineered in recent years, it enhances the growing perception that America has two systems of justice: one that jails poor people of color without mercy and one where the paper entity pays a kind of tithe that, as a practical matter, is little more than the cost of doing business while the people who engineered the crime walk free.

The DOJ argues that cases against individual defendants are very complex, time-consuming, and resource-intensive.[94] In a speech at New York University Law School the day after the Yates Memo was released, Deputy Attorney General Yates complained that in modern corporations, responsibility is "diffuse," making it "extremely difficult to identify the single person or group of

employees because not allowing this "would virtually take away the only means of effectually controlling" interstate commerce).

90. *Id.* at 491.

91. *Id.* at 493.

92. *Id.*

93. *See, e.g.*, Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 320 (1996) ("Corporations are legal fictions, and legal fictions cannot commit criminal acts . . . Only people can act and only people can have a guilty state of mind.").

94. Yates Remarks at NYU, *supra* note 43.

people who possessed the knowledge or criminal intent necessary to establish proof beyond a reasonable doubt."[95] She added that such difficulties are especially acute with respect to "high-level executives who are often insulated from the day-to-day activity in which the misconduct occurs."[96] What prosecutors need, said Yates, is an "inside cooperating witness, preferably one identified early enough to wear a wire."[97] Without a person to guide them through the document morass, investigators are left to sift through corporate documents looking for "a smoking gun that most financial criminals are far too savvy to leave behind."[98] This whiff of Tony Soprano[99] probably did not help the defense bar react constructively to her memo. It also ignores several recent cases where the DOJ's examination of documents was quite productive.[100] But Yates's deep concern about the resources needed to sift through hundreds of thousands of documents,[101] including ones created by cutting-edge technologies, is understandable, given growing government funding gaps.

Two excellent articles answer the crucial question of why the DOJ fell into such a hole in prosecuting financial services individuals and institutions in the wake of the 2008 crash: Judge Jed Rakoff's *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, published in the *New York Review of Books* in January 2014,[102] and Jesse Eisinger's *Why Only One Top Banker Went to Jail for the Financial Crisis*, published in the *New York Times Magazine* in April 2014.[103] Judge Rakoff is a United States District

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *The Sopranos* (HBO television broadcast 1999–2007).

100. Take, for example, the DOJ's long-running investigation of Libor interest rate manipulation. *See* Ben Protess, *Libor Prosecution Snares Two Former Deutsche Traders*, N.Y. TIMES (June 2, 2016), http://www.nytimes.com/2016/06/03/business/dealbook/former-deutsche-bank-traders-charged-in-libor-case.html. According to the *New York Times*, in June 2016, two former Deutsche Bank traders were indicted because of e-mails, including one sent by a defendant to a Libor "submitter" stating that "if possible, we need" Libor "as low as possible next few days." *Id.* The GM engineer who knew the ignition switch installed in the company's compact cars was defective referred to it as "the switch from hell" in an e-mail as early as 2002. Vlasic, *supra* note 22. In 2005, he secretly changed its design while retaining the same part number, leaving a second document trail. *Id.*

101. Yates Memo, *supra* note 3, at 2; *see also* Yates Remarks at NYU, *supra* note 43.

102. Rakoff, *supra* note 14.

103. Eisinger, *supra* note 18.

Court Judge on senior status in the Southern District of New York.[104] President Clinton appointed him to the bench in 1995.[105] Rakoff served as a prosecutor with the U.S. Attorney's Office for the Southern District of New York for seven years, the last two as Chief of the Business and Securities Fraud Prosecutions Unit, and then spent several years in private practice working on the defense side.[106] Eisinger was awarded a Pulitzer Prize in 2011 for reporting on the 2008 crash for ProPublica, where he is a senior reporter.[107] Their critiques converge on four problems: lack of resources, conflicting demands, bad management, and weak political will.[108]

Resources across the government have been constricting for quite a few years now. As Eisinger explains, the DOJ is "subject to periodic hiring freezes," and the Federal Bureau of Investigation ("FBI") has shifted most of its resources to terrorism.[109] Rakoff notes that by 2007, only 120 FBI agents were available to review 50,000 reports of mortgage fraud filed by the banks.[110] In 2009, Congress passed the Fraud Enforcement and Recovery Act,[111] a law intended to stiffen penalties and deliver hundreds of millions of dollars to the DOJ and other enforcement programs so that they could develop cases based on the financial fraud at the root of the 2008 crash.[112] In the end, though, the DOJ got only $65 million in 2010 and 2011.[113] As they have done with other agencies, Republicans in the House of Representatives slashed the SEC's budget, despite the significant expansion of its responsibilities under the Dodd-Frank Wall Street Reform and Consumer Protection Act, which went into effect in 2010.[114] For fiscal year 2012, the agency's budget was cut by $222 million, an

104. *See Jed Rakoff*, WALL STREET J., http://topics.wsj.com/person/R/jed-rakoff/5391 (last visited Oct. 29, 2016).

105. *Id.*

106. *Id.*

107. *About Us: Jesse Eisinger*, PROPUBLICA, https://www.propublica.org/site/author/jesse_eisinger (last visited Oct. 29, 2016).

108. Rakoff, *supra* note 14; Eisinger, *supra* note 18.

109. Eisinger, *supra* note 18.

110. Rakoff, *supra* note 14.

111. Fraud Enforcement and Recovery Act, 18 U.S.C. § 1348 (2012).

112. Eisinger, *supra* note 18.

113. *Id.*

114. Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u-6 (2012); *see also* Rakoff, *supra* note 14 (noting that budget limitations caused the SEC to "focus on the smaller, easily resolved cases that will beef up their statistics when they go to Congress begging for money").

amount that would have been provided by fees paid by the financial services industry and therefore did not have any impact on the federal budget deficit.[115]

These problems were exacerbated by very poor management decisions. At the SEC, for example, withering criticism in the wake of the agency's failure to stop Bernie Madoff's Ponzi scheme produced a preoccupation with other Ponzi-like schemes that distracted its attention from more pervasive fraud.[116] At the DOJ, Holder and Breuer decided to distribute responsibility for the investigation of financial fraud cases among several U.S. Attorneys' offices despite the steep learning curve successful prosecution of such cases required.[117] The adverse impact of this dispersal was exacerbated by the fact that the office with the best expertise in financial fraud cases, the Southern District of New York, had just begun the prosecution of insider-trading cases based on tapes provided by Raj Rajaratnam.[118] Rakoff "venture[s] to guess," as a "former chief of that unit," that the cases involving the financial crisis were parceled out to Assistant U.S. Attorneys who were also responsible for insider-trading cases.[119]

> Which do you think an assistant would devote most of her attention to: an insider-trading case that was already nearly ready to go to indictment and that might lead to a high-visibility trial, or a financial crisis case that was just getting started, would take years to complete, and had no guarantee of even leading to an indictment? Of course, she would put her energy into the insider-trading case, and if she was lucky, it would go to trial, she would win, and in some cases she would then take a job with a large law firm. And in the

115. James B. Stewart, *As Watchdog Starves, Wall Street Is Tossed a Bone*, N.Y. TIMES (July 15, 2010), http://www.nytimes.com/2011/07/16/business/budget-cuts-to-sec-reduce-its-effectiveness.html.

116. Rakoff, *supra* note 14.

117. *Id.*

118. *Id.*; *see also* Peter Lattman & Azam Ahmed, *Hedge Fund Billionaire Is Guilty of Insider Trading*, N.Y. TIMES (May 11, 2011, 10:50 AM), http://dealbook.nytimes.com/2011/05/11/rajaratnam-found-guilty/?_r=0 (reporting that Rajaratnam, head of the Galleon hedge fund, was found guilty of insider trading in 2011).

119. Rakoff, *supra* note 14.

> process, the financial fraud case would get lost in the shuffle.[120]

Beginning to understand the corrosive effect that the failure to prosecute 2008 crash cases was having on the DOJ's reputation, frustrated prosecutors proposed to Breuer that he establish a mortgage fraud initiative.[121] But rather than pulling together the "Prosecutorial Strike Force" they envisioned, DOJ leadership appointed the "Financial Fraud Enforcement Task Force," which Eisinger describes as "an enormous coordinating committee with essentially no investigative operation."[122]

All of these missteps, plus the DOJ leadership's embrace of DPAs, led to an erosion of career attorneys' trial skills.[123] They started to lose cases and, as one unnamed former federal prosecutor told Eisinger, "For sure, . . . politicos care about winning and losing."[124] This anxiety, fed by what Eisinger describes as the "fear first wrought by the Andersen case,"[125] spurred reliance on DPAs, including one with UBS for tax violations and one with HSBC for money laundering and banking charges.[126] It began to look like federal prosecutors were hesitant to go to court, a development that may well have increased the pressure on the defense bar to demand better deals. A vicious circle was in full rotation.

But one piece of the puzzle remains to be explained: Why was the DOJ so focused on corporations rather than the individual managers who invented and engineered the sale of credit default swaps and all the other exotic financial instruments of the period? Eisinger reports that this trend began in the 1980s when corporate fraud prosecutors became envious of their organized crime colleagues who "t[ook] down entire mafia families, like the Gambino and Bonanno clans."[127] The lesson was that "[t]he best way to root out corruption was to take on the whole

120. *Id.*
121. Eisinger, *supra* note 18.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*

organization."[128] If this observation is true—and I cannot think of a realistic way to test it—how ironic that such dashing militancy morphed into the weak tea of the financial services enforcement program we have today.

Rakoff suggests that part of the problem was overly conservative, and sometimes erroneous, interpretations of the law.[129] First, he chides the DOJ for its exaggerated phobia regarding the proof of intent on the part of high-level management, reflected most recently in the Yates Memo.[130] He acknowledges that top executives are insulated from daily sales of the securities instruments that brought the financial system and its biggest firms to their knees, but he wonders why none of these top-tier individuals paid attention to the "suspicious activity reports" regarding mortgage fraud that "increased so hugely in the years leading up to the crisis."[131] The reports gave even the loftiest executives notice of mortgage shenanigans.[132] Because they thus had a pathway to discover something was wrong, their insistence that they did not know runs afoul of the willful blindness doctrine.[133] Willful blindness is a perfectly legitimate approach to measuring the mens rea of such defendants; courts should not require prosecutors to prove that executives actually laid eyes upon evidence that actually convinced them specific people had committed a crime.[134] I would add that the DOJ's concern about proving the case against top executives overlooks the reality that prosecuting division heads, inside counsel who abetted cover-ups, and vice presidents in charge of specific aspects of company operations could provide not just deterrence but a sense of justice served in more white-collar cases.

As for erroneous interpretations of the law, Rakoff explains that when Breuer was head of the Criminal Division, he claimed erroneously that the legal standard for proving criminal culpability was not only that a defendant made a fraudulent claim but also that the other party to the transaction "relied on" what the

128. *Id.*

129. Rakoff, *supra* note 14.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*; *see also* STEINZOR, *supra* note 14, at 51, 228–31 (discussing the willful blindness standard and its relevance to health, safety, and environmental cases).

defendant had said.[135] Or, in other words, because both sides to the transaction were sophisticated and able to protect themselves, no harm was done and no crime was committed. "In actuality, in a criminal fraud case, the government is never required to prove—ever—that one party to a transaction relied on the word of another," counters Rakoff.[136]

The upshot of past mistakes is that senior DOJ officials have their work cut out for them in re-orienting prosecutors, developing trial and substantive expertise, and, not least, convincing front-line attorneys that they are quite serious about developing individual white-collar prosecutions. The opposition posed by the defense bar and academics must be overcome, both in case-specific and larger contexts.

III. THE ATTACKS ON THE YATES MEMO

Reaction to the release of the Yates Memo in September 2015 was rapid. Major law firms with white-collar practices issued briefing memos to their clients on the ramifications of the new policy, some within weeks of its release.[137] The Institute for Legal Reform ("ILR") of the United States Chamber of Commerce commissioned an extensive and vigorously negative report, which was issued in May 2016 and written by Matthew Miner, a partner with Morgan, Lewis, and Bockius, as well as a former federal prosecutor and counsel to the Senate Judiciary Committee.[138] A handful of academics also joined the fray, and their critiques were especially withering, for reasons that are unclear.[139]

The briefings from the private bar were split on the significance of the Yates Memo, with some lawyers arguing that it was a hugely significant and highly objectionable change in DOJ policy and others characterizing it as little more than a reiteration of what has been happening for some time.[140] All of these

135. Rakoff, *supra* note 14.

136. *Id.*

137. *See* sources cited *supra* note 8.

138. MINER, *supra* note 9; *Our People: Matthew S. Miner*, MORGAN LEWIS, https://www.morganlewis.com/bios/mminer (last visited Oct. 29, 2016).

139. *See* sources cited *supra* note 8.

140. *Compare* Monnin & Stolze, *supra* note 8 (predicting big changes following the Yates Memo), *with* Stauffer & Pericak, *supra* note 8 (predicting the Yates Memo will not change anything).

documents basically agreed on the gist of what the DOJ hopes the Yates Memo will achieve. That narrative goes something like the following:

> *When a corporation is notified that it may be the subject of a federal criminal investigation, the DOJ assumes its top leadership will consult with inside and outside counsel to develop a strategy for dealing with the government. Executives and their lawyers will inevitably find attractive the possibility of settling the case with the government, preferably for a DPA with affordable penalties and minimal injunctive relief. Credit for cooperation is a highly valuable commodity that can make a tremendous difference in the amount of fines paid or the stringency of settlement terms. The Yates Memo states that in order to get credit for cooperating with the government, corporate leadership must turn over all of the information it has that implicates individual employees. This requirement means that in order to receive cooperation credit, corporations must commence an investigation that has as its dual goals identifying individual miscreants among the managerial ranks and improving compliance.*
>
> *Such investigations must be all-encompassing in the area of the identified violations. They might take months—even years—to complete and are typically expensive. The Yates Memo acknowledges that the attorney-client privilege applies to the content of the reports that grow out of such investigations. But the DOJ will push hard to narrow the applicability of such confidentiality and extract as much information about individual malfeasance out of the reports as possible. Although it remains to be seen how militant the DOJ will be in conditioning credit on disclosure, the Yates Memo is written in uncompromising language, and targets should expect considerably more pressure to identify culpable individuals. Individuals who are identified as potentially culpable should expect to be investigated thoroughly and, if possible, "flipped" to identify other individual violators and/or indicted.*[141]

141. *See* sources cited *supra* note 8.

The Yates Memo does not say who should conduct internal audits, although law firms have undoubtedly marketed the benefits of the audits they could conduct.[142] Indeed, without an outside, independent, and comprehensive audit, senior management's efforts to forestall prosecution by remediating non-compliance would be more difficult to both implement and demonstrate.

Critics of the Yates Memo advance four major arguments explaining why the Yates Memo is misguided, counterproductive, unduly invasive, and perhaps even unconstitutional:

1. Backlash and Dismissal. The Yates Memo will not make any difference in the real world for two reasons.[143] First, the DOJ will justly find it impossible under existing law and criminal practice to improve its track record on individual white-collar prosecutions.[144] Second, the Memo raises the stakes so high that corporations will rebel, refusing to cooperate.[145]

2. Dissension in the Ranks. The DOJ's insistence on forcing corporate leadership to launch internal investigations will spawn acute dissension in managerial ranks, crippling a company's ability to compete and thrive.[146] That dissension will make it difficult, if

142. *See* HOEY ET AL., *supra* note 8 ("In the wake of the Yates memo, board members, executives, and audit committees will need to assess carefully whether it is appropriate to use a single law firm to investigate matters and provide counsel regarding resolutions with the government."). During the seven years (1987–1994) when I was in private practice with a Washington, D.C. firm that represented publicly-owned utilities, we prepared monthly memoranda briefing clients on relevant new developments in environmental law. Every August, the topic of the series was criminal culpability. We were conscious that this memorandum could lead to audit work, and we explained to clients who inquired about such services that we would add engineers to our team who were familiar with the multiple technical aspects of compliance and that the participation of lawyers would allow clients to keep the report confidential under the attorney-client privilege. We were quite aware that other law firms took the same approach. *Cf.* Jon W. Monson, *10 Ways to Retain Confidentiality During (and After) an Internal Investigation: A Strategy for Minimizing the Damage of Disclosure*, O'MELVENY (2007), https://www.omm.com/files/upload/Monson10ways.pdf (suggesting ways to organize "clients' internal investigations in a way that will maximize the probability of retaining confidentiality").

143. *See* Yockey, *supra* note 10, at 411–16 (explaining that, despite the Yates Memo's attempt at reform, old DOJ corporate investigation practices will remain in place due to "practical barriers" and "policy concerns").

144. *Id.* at 413–14.

145. *Id.* at 416.

146. *Id.* at 415–16.

not impossible, for the corporation to achieve compliance because everyone necessary to such a project will be filled with paranoia and likely refuse to cooperate, especially because complex ethical issues will drive a wedge between top leadership and in-house counsel.[147]

3. Boiling the Ocean. Conducting an internal investigation that will satisfy prosecutors will be unnecessarily and extraordinarily expensive, requiring firms to "boil the ocean" for information, further deterring their compliance efforts.[148]

4. Persecution of the Individual. Corporate efforts to comply with the Yates Memo will end up ensnaring individual employees, causing them to be fired if they resist, forcing them to spend significant amounts of money to hire their own defense counsel, and violating their constitutional right against self-incrimination.[149]

A. Backlash and Dismissal

> [The Yates Memo] amount[s] to political talking points that are unlikely to produce meaningful change. As a practical matter, the guidelines are virtually impossible to execute, at least in ways that differ from what occurs in the present enforcement regime.
>
> –Professor Joseph Yockey[150]

> [I]t is not clear that the new cooperation policy will increase individual charges. Even if corporations provide complete information about their agents' conduct, individual charges may be stymied by the fact that harmful conduct is often caused by the acts of multiple agents who lack criminal intent and are unaware of each other's acts. . . . [T]he DOJ seems to

147. Michael P. Kelly & Ruth E. Mandelbaum, *Are the Yates Memorandum and the Federal Judiciary's Concerns About Over-Criminalization Destined to Collide?*, 53 AM. CRIM. L. REV. 899, 909 (2016).

148. *Id.* at 908.

149. *Id.*

150. Yockey, *supra* note 10, at 408.

> underestimate the complexity of misconduct and decisionmaking in the corporate setting . . . .
> –Professors Elizabeth Joh and Thomas Joo[151]

> The Yates Memo comes at a time when corporations, particularly in the financial services industry, have been particularly vilified and feel under siege by a barrage of seriatim investigations and efforts by new or newly ambitious regulatory bodies to expand their reach and stretch the limits of their oversight authority. Settlements where the government has demanded hundreds of millions to billions of dollars are now routine. Some of the funds extracted have not gone to the Treasury, but rather have been used to fund social program objectives.
> –McGuire Woods LLP[152]

> The way in which the Department has now conditioned cooperation undermines the settled expectations of businesses facing government enforcement. Companies no longer know what "cooperation" means, and accordingly the decision to cooperate may no longer be an easy one for corporations to make.
> –U.S. Chamber of Commerce, Institute for Legal Reform[153]

Academic critiques of the Yates Memo were just as dismissive of the DOJ's motives and methodology as the private bar. The first quote was written by Professor Joseph Yockey, whose critique of the Yates Memo is both sweeping and relentlessly negative. Yockey argues that prosecutors will always have a very difficult time proving guilt because mens rea gives upper level managers ample incentives to diffuse responsibility among subordinates, insulating themselves from culpability.[154] Yockey worries that, given this dynamic, DOJ pressure will result in senior managers displacing culpability on lower-level employees with the

151. Joh & Joo, *supra* note 10, at 53, 55.
152. *Unpacking the Yates Memo: What the "New" DOJ Policy Really Means*, *supra* note 8.
153. MINER, *supra* note 9, at 5.
154. Yockey, *supra* note 10, at 413–14.

result that the workforce will come "to feel like outsiders in an environment where they feel undervalued, unsupported, and perceive a risk of unfair treatment."[155] All of these unfortunate results will not produce more individual prosecutions because "[c]onnecting the dots necessary for indictment, let alone conviction, is therefore often impossible, at least on any level other than a very small scale."[156] He predicts that:

> Morale could take a hit, and the price of Director & Office (D&O) insurance might go up, but expect mainline corporate enforcement and settlement practices to remain consistent with recent trends. Indeed, despite the best intentions that surely animate the Yates memo's attempt at reform, there is arguably not much more that *can* or *should* change in light of well-known practical and normative issues that affect the situation.[157]

The influence of such pronouncements remains to be seen. While we are waiting, a more interesting question arises: Why do Yockey's judgments diverge so sharply from the positions stated by, for example, Judge Rakoff, who argues that determined prosecutors can and should bring many more viable criminal cases?[158] The explanation lies in their divergent interpretations of the criminal law. Yockey says:

> Various temporal, spatial, and physical considerations further complicate matters. Many of the managerial behaviors that seem most distressing in corporate cases frequently look more like omissions—which the criminal law rarely sanctions—than positive, direct actions of a type that might trigger liability. The actions and events that culminate in an end-result of corporate wrongdoing also typically evolve over the course of many months or years, and they may appear entirely innocent or immaterial in isolation. Standard

155. *Id.* at 415.
156. *Id.* at 414.
157. *Id.* at 412–13.
158. *See supra* notes 129–36 and accompanying text.

> monitoring and surveillance practices can do little to overcome these issues.[159]

In contrast, writing about the 2008 crash, which we now know was fueled by the intensive marketing of sub-prime mortgages and the collection of billions of dollars in transaction fees,[160] Judge Rakoff says that lower-level players committed intentional fraud, while higher-level executives adopted a posture of "willful blindness" in the face of ample warnings regarding the criminal activity of their subordinates.[161] Quoting *Global-Tech Appliances, Inc. v. SEB S.A.*, he reminds us that the Supreme Court has "consistently approved"[162] the doctrine:

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine have held that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge.[163]

Yockey is not alone among academics in promoting a very conservative interpretation of the criminal law in a white-collar crime context, and he is not even by himself in his withering critique of the Yates Memo.[164] Professors Elizabeth Joh and Thomas Joo joined his attack in a brief article posted by the *Virginia Law Review Online*.[165] At the threshold, Joh and Joo agree with Yockey that "individual charges may be stymied by the fact that harmful conduct is often caused by the acts of multiple agents

159. Yockey, *supra* note 10, at 414.

160. Rakoff, *supra* note 14.

161. *Id.*

162. *Id.*

163. Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 766 (2011).

164. *See* STEINZOR, *supra* note 14, at 69–78 (discussing how academics view the criminal law in the white-collar context).

165. Joh & Joo, *supra* note 10.

who lack criminal intent and are unaware of each other's acts."[166] They worry that "the new cooperation policy's emphasis on individual prosecutions could itself result in leniency: prosecutors may award excessively generous credit to corporations in order to build cases against individuals."[167] They argue that white-collar criminals should not be flipped on each other; that is, threatening one person with prosecution to get her to testify against another person is unreliable in the drug dealer context, and the practice should not migrate to white-collar crime.[168] They say that flipping is particularly inappropriate in the corporate setting because the practice "delegates enforcement discretion to the informants themselves."[169] They do not explain this startling observation.

The white-collar defense bar does not spend much energy disputing corporate or individual criminal liability, and the overall tone of its briefing papers to clients is more respectful of the prosecutors its members may well confront one day. McGuire Woods's assertion that people in the financial services industry feel "vilified" and "under siege"[170] may be true, although it has a tone-deaf undercurrent that probably should cause clients to wonder about the firm's public relations skills.[171] The ILR's observation that the Yates Memo creates uncertainty regarding the nature and scope of what it means for a corporation to cooperate with the DOJ[172] seems significantly more important.

As the Yates Memo is implemented by line prosecutors, companies will be confronted with choices: whether to allow government investigators full access to their files and whether to begin their own investigations early on. In theory, the Yates Memo suggests that once that choice is made, no one may turn back. If a corporation demurs, the DOJ will remove potential cooperation credit from the negotiations and it will never be available again.[173] But prosecutors are likely to take many different approaches. Some will demand an upfront decision and then, depending on what they discover as they embark on an investigation without

166. *Id.* at 53.
167. *Id.* at 54.
168. *Id.*
169. *Id.* at 58.
170. *Unpacking the Yates Memo: What the "New" DOJ Policy Really Means*, *supra* note 8.
171. *See* sources cited *supra* note 35.
172. MINER, *supra* note 9, at 6.
173. Yates Memo, *supra* note 3, at 3.

corporate cooperation, either reopen the opportunity to cooperate or leave that door closed.

Rather than letting these interpretations of discretion develop on an ad hoc basis, the DOJ could quell some of the most frantic criticisms of the Yates Memo by acknowledging that individual prosecutors retain the autonomy to make such decisions depending on the circumstances of each individual case. Granting such discretion explicitly rather than implicitly runs little risk of undermining the core purposes of the Yates Memo because two additional aspects of its requirements hedge prosecutorial discretion and promote a new, uniform direction quite effectively. First, the Memo provides that "[a]bsent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals."[174] This edict ensures that corporate settlement negotiations will close without the resolution of individual prosecutions in the vast majority of cases, thus removing the opportunity for corporate counsel to leverage better treatment for executives by using the company's money to pay larger fines or to support more stringent injunctive relief.[175] Second, when prosecutors forward memoranda recommending either prosecution of the corporation or settlement, they must include a "clear plan to resolve related individual cases before the statute of limitations expires."[176] "Declinations," decisions not to prosecute, must be "memorialized."[177] This instruction means that prosecutors must have a justification when they recommend a corporate resolution but did not build individual cases from the information gathered about a company.[178] If the DOJ's top leadership is staunch, these modest requirements are likely to change prosecutorial behavior more effectively than the uncertain timing that concerns the defense bar.

174. *Id.* at 5.

175. Patrick J. Preston, *White Collar Reform: The U.S. Department of Justice's All-or-Nothing Proposition for Corporations Under Fire*, N.W. LAW., Apr.–May 2016, at 12, 13–14; Yates Memo, *supra* note 3, at 6.

176. Yates Memo, *supra* note 3, at 6.

177. *Id.*

178. *Id.*

B. Dissension in the Ranks

> [T]he new policy risks alienating personnel whose cooperation and knowledge of facts are essential to any corporate internal investigation. It may also complicate compliance. For example, if company employees become reluctant to raise their hands to report transgressions for fear of drawing too much attention to themselves, the company has a greatly reduced ability to assess whether controls or existing compliance programs work, or how to improve them.
>
> . . . .
>
> Corporate and in-house counsel will therefore find themselves at the intersection of competing interests. On the one hand, corporations—which have always been incentivized to root out misconduct and engage in their own internal investigations . . . also face the added pressure of providing to the government a complete dossier on individual employees, directors, and officers engaged in culpable conduct . . . . On the other [hand], individual actors may find their own legal interests to be at odds with those of the company's.
>
> . . . .
>
> . . . Junior personnel may decide to secure their own attorneys early, without going through corporate channels, thus complicating an internal investigation to degrees typically only seen in the most extreme cases of criminal misconduct.
>
> –U.S. Chamber of Commerce, Institute for Legal Reform[179]

Companies should also prepare for the complexities of turning in employees for potential prosecution. If the individuals at issue are senior leaders, long-term or popular employees, or someone with a distressed

179. MINER, *supra* note 9, at 1, 15–17.

> situation, such an action could be difficult and traumatic.
>
> –Catherine Greaves, King & Spalding[180]

Notification of a government criminal investigation inevitably causes dissension within a corporate workforce, as well as anxiety, the emergence of intensified self-interest, and an instinct to obscure bad behavior.[181] But it is fair to ask whether this dissension is being visited on a workplace that otherwise operates on a congenial and cooperative basis. None of the books about the events leading up to the 2008 crash and what happened within more culpable financial services institutions depict such conditions.[182]

A second problem with the argument that when the government arrives, people react badly, is that it is unclear how the government might ameliorate these outcomes. Should the government limit its investigation to the production of documents and forgo individual interviews in order to make the corporate workforce feel less threatened? Presumably, no one who valued his credibility would take the argument to that extreme.

If coping with the government's presence is a fact of life, the question becomes how to manage the dissension. Companies that already have an internal compliance audit program that is robust and effective will be in far better shape, not least because that staff, known as "corporate compliance officers" ("CCOs"), will assume responsibility for dealing with government investigators.[183] Recognizing the limits of its own resources, as well as the small chance that its funding will increase in the foreseeable future, the DOJ is clearly interested in using the existence and quality of such programs as its first indicia of whether a company provides fertile ground for further investigation.[184] No special

180. Greaves, *supra* note 8.

181. *See* MINER, *supra* note 9, at 18 (describing an "every man for himself" mindset within the company upon a government investigation); Greaves, *supra* note 8 (describing the "complexities" of turning in employees for criminal prosecution as "difficult and traumatic").

182. *See* sources cited *supra* note 36.

183. MINER, *supra* note 9, at 2.

184. Yates Memo, *supra* note 3, at 3 ("The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (e.g., the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).").

insight is necessary to discern that a central goal of the Yates Memo is to reinforce the message that establishing such programs should be viewed as a necessity by firms that engage in heavily-regulated activity.[185]

To underscore this objective, the Fraud Section of the Criminal Division has hired Hui Chen as its first compliance counsel.[186] Chen is a former prosecutor who also has extensive experience counseling corporations on compliance.[187] She served as Global Head for Anti-Bribery and Corruption for Standard Chartered Bank right before she joined the DOJ; she has also worked for Pfizer and Microsoft in supervising compliance programs in Europe and Asia.[188] In November 2015, Chen participated on a panel with her boss, Andrew Weissmann, Chief of the Fraud Section of the DOJ's Criminal Division.[189] Weissmann commented that having an expert in corporate compliance could only help companies and the DOJ; but he could not resist adding a barely veiled threat: "The only downside I can see is for companies that are trying to pass off a program that is not the real thing."[190] Chen said that compliance programs "are dynamic, they're evolving" and that "your compliance program will look different three years from now."[191] She identified four key questions that the DOJ will use to assess such programs: (1) whether the design of the program is thoughtful; (2) whether the program is operational; (3) how well stakeholders communicate together; and (4) whether the program has adequate resources.[192] In short, she was neither specific nor reassuring.

DLA Piper, the second-largest multinational law firm with headquarters in the United States, commissioned a survey of how CCOs are reacting to the Yates Memo and the hiring of Hui

185. MINER, *supra* note 9, at 3.

186. *Id.* at 12.

187. Press Release, U.S. Dep't of Justice, New Compliance Counsel Expert Retained by the DOJ Fraud Section (Nov. 2, 2015), https://www.justice.gov/criminal-fraud/file/790236/download.

188. *Id.*

189. News Release, N.Y. Univ. Sch. of Law, At PCCE Roundtable, Andrew Weissmann and Hui Chen Discuss Role of Corporate Compliance Counsel (Nov. 25, 2015), http://www.law.nyu.edu/news/hui-chen-andrew-weissmann-pcce-roundtable.

190. *Id.*

191. *Id.*

192. *Id.*

Chen.[193] The results were not pretty. Seventy-eight of the CCOs contacted submitted a response.[194] According to the press release that accompanied the report:

> With federal agencies turning up the heat and as investigative and enforcement activities abound, 81 percent of compliance officers have increased apprehension when it comes to their personal liability in situations of corporate misconduct . . . .
>
> Some of the most significant findings of [the survey] revolve around the recent tone and articulation of priorities emanating from Washington, including [the DOJ's] appointment of Hui Chen as its first-ever compliance counsel, and the release of the Yates Memo.[195]

The press release noted that Chen was "making waves" and that seventy-seven percent of the survey's respondents believe she will "intensify the pursuit of cases against CCOs."[196] Chen appears to have a high profile and is well-known among her colleagues; why they expect her to become such a vigorous change agent is not clear.

A major reason for the high level of anxiety among CCOs, survey respondents reported, was that they did not have sufficient resources to do their jobs: only one-third said they had support "to a great extent," while twenty-eight percent "don't think they have sufficient budget," and twenty-seven percent "don't know whether they do or not."[197] Forty-seven percent said they had encountered resistance when asking for additional resources; others commented that the Yates Memo would be helpful to their efforts to get more money because "[s]ometimes . . . senior executives and board members need to be 'scared straight.'"[198]

193. DLA PIPER, *supra* note 8; *see also America's Largest 350 Law Firms*, INTERNET LEGAL RES. GROUP, https://www.ilrg.com/nlj250/ (last visited Oct. 29, 2016) (listing DLA Piper as the second-largest law firm headquartered in the United States).

194. DLA PIPER, *supra* note 8.

195. *Id.* at 1–2.

196. *Id.* at 2.

197. *Id.* at 3.

198. *Id.* at 6.

CCOs, as a class of professionals, are quite vulnerable to scapegoating.[199] If they have insufficient resources, are perceived as excluded from other areas of corporate decision-making, do not report to an executive powerful enough or committed enough to support them, are less than charismatic themselves, and lack the skills to network within corporate management, they can easily become sitting ducks.[200] In fact, mid-level executives who run their profit centers at the edge of the law and are trying to rise in the company have every incentive to evade or confuse the compliance audit program.[201]

The pool of respondents who responded to the DLA Piper survey were well aware of these risks, and sixty-five percent said that the increased scrutiny promised by the Yates Memo would affect their career choices and, specifically, their willingness to remain as CCOs in "heavily regulated industries, including financial services, healthcare, and chemicals."[202] "If it's a higher-risk company or one with a prosecutorial history, you're going to weigh the risk of whether it could destroy your career and your personal life."[203]

Forty-four percent of respondents said that the CCO reports to the company's chief legal officer, while twenty-five percent said they report to the chief executive officer, and eleven percent said they report directly to the company's board of directors.[204] The authors of the DLA Piper report observed that reporting to the board "has the clear advantage of creating a direct line to the ultimate decision makers and would satisfy the oversight requirement in the federal sentencing guidelines."[205] Yet many survey respondents did not agree, with twenty-eight percent preferring a direct report to the chief legal office and twenty-nine percent preferring to report to the chief executive officer.[206] In

199. *See* Julie Dimauro, *The State of the Chief Compliance Officer in 2016*, CORP. COMPLIANCE INSIGHTS (May 25, 2016), http://corporatecomplianceinsights.com/state-chief-compliance-officer-2016/ (describing how CCOs fear that the firm may not "'have their . . . back' when violations occur").

200. *Id.*

201. Greaves, *supra* note 8.

202. DLA PIPER, *supra* note 8, at 2.

203. *Id.*

204. *Id.* at 7–9.

205. *Id.* at 8–9.

206. *Id.*

general, the role of CCO is undergoing elevation in the corporate hierarchy.[207]

The complaints of in-house counsel that the Yates Memo will cause them difficult ethical problems seem badly overblown. The reality is that these problems not only pre-exist the Yates Memo but are triggered by many other factors, especially liability risks from lawsuits brought by shareholders, aggrieved customers, or civil investigations launched by state and federal regulators.[208] Lower-level employees may well seek the advice of counsel in such situations, making it more difficult for in-house counsel to control what they say to investigators.[209] Conversely, because in-house counsel represent the corporation, not the individual executive, they must be constantly alert to the possibility that when they perceive the company's interest beginning to diverge from the individual, they must notify the employee that they are not his lawyers, and he should consider hiring some of his own.[210] Dilemmas like these must be topics of constant discussion among in-house and outside counsel, and it is far too soon to determine how the Yates Memo will affect their frequency and intensity.

C. Boiling the Ocean

> After all, what benefit is there to boiling the ocean in search of facts and turning employees against one another if there is no guarantee the end result will be some form of favorable credit? . . .
>
> . . . .
>
> . . . Former Secretary of Defense Donald Rumsfeld famously said, "[T]here are known knowns, there are

207. *Id.* at 9.

208. *See, e.g.*, Scott L. Olson, *The Potential Liabilities Faced by In-House Counsel*, 7 U. MIAMI BUS. L. REV. 1, 3 (1999) (discussing that in-house attorneys experience different tensions and conflicts from, and are subject to greater liability than, outside attorneys because they are simultaneously "attorney and client, a businessperson and legal counsel, and investigator and compliance officer").

209. David Jacobs, *Federal Guidelines May Make It Easier to Hold High Level Executives Accountable for Corporate Misconduct*, BUS. REP. (July 20, 2016), https://www.businessreport.com/business/federal-guidelines-may-make-easier-hold-high-level-executives-accountable-corporate-misconduct.

210. Upjohn v. United States, 449 U.S. 383, 390 (1981).

> things we know we know. We also know there are known unknowns . . . . But there are also unknown unknowns." . . . How can a company adequately satisfy its burden of disclosing what it cannot find if it does not know what it is looking for?
>
> –U.S. Chamber of Commerce, Institute for Legal Reform[211]

The vivid phrase "boil the ocean" refers to the prospect that the DOJ will not be satisfied with any investigation conducted by a corporation hoping to get cooperation credit unless the search for incriminating evidence is so broad and deep as to stop normal business in its tracks. Aware of the possibility of such a disconcerting outcome, this kind of overreach was one of the first objections the defense bar voiced about the Yates Memo. Deputy Attorney General Yates explicitly disavowed that the DOJ intended to require such an extensive effort in her speech at New York University School of Law the day after the memo was released: "*We are not asking companies to 'boil the ocean,' so to speak, and embark upon a multimillion-dollar investigation every time they learn about misconduct.* We expect thorough investigations tailored to the scope of the wrongdoing."[212] On the other hand, she also said, "Effective today, if a company wants any consideration for its cooperation, it must give up the individuals, no matter where they sit within the company. *And we're not going to let corporations plead ignorance. If they don't know who is responsible, they will need to find out.*"[213]

What should corporate counsel do if they cannot find a path that navigates the wide gap between these two statements? Pick up the phone and call the prosecutors, advises Yates,[214] a solution that must have prompted some silent groans in her audience of corporate counsel that day.

The complexity of the factors at play in corporate leadership's decisions whether to launch an investigation to uncover wrongdoing by employees is formidable. Corporate counsel's first instinct may well be to circumscribe the internal investigation to the maximum extent. On some fundamental level,

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211. MINER, *supra* note 9, at 6, 19.

212. Yates Remarks at NYU, *supra* note 43 (emphasis added).

213. *Id.* (emphasis added).

214. *Id.*

the notion of using corporate money to set up employees for criminal charges—of not only failing to protect those employees but paying to arrange their demise at the hands of the opponent—cuts against the instincts lawyers are encouraged to develop in school and practice. But corporate counsel cannot afford to leave the train of thought there. The question is: What is the best strategy for the company as a whole? One high-profile example illustrates the benefits that can be gained from setting out to boil the ocean in a very public way.

As GM entered the maelstrom provoked by its failure to fix the ignition switch defect in its compact cars despite having known about the problem for many years,[215] CEO Mary Barra, who had been on the job for a matter of weeks, hired former federal prosecutor Antonin Valukas to conduct an extensive internal investigation.[216] Barra is the first woman to lead GM, one of a small handful of women selected to serve as a CEO of a Fortune 100 company, and widely considered a great success despite the extensive bad publicity generated by the problem.[217] She even managed to sell her bold strategy to her toughest audience: GM employees.[218]

Valukas and his team of lawyers from Jenner & Block had "unlimited access" to internal documents and employees.[219] They

215. Ben Geier, *GM's Mary Barra: Crisis Manager of the Year*, FORTUNE (Dec. 28, 2014), http://fortune.com/2014/12/28/gms-barra-crisis-manager/?iid=sr-link2.

216. *See* VALUKAS, *supra* note 21 (detailing the findings of Antonin Valukas's internal investigation of GM following its failure to repair the ignition switch defect).

217. Geier, *supra* note 215; Chris Isidore, *GM CEO Mary Barra's Pay Jumps 77% to $29 Million*, CNN MONEY (Apr. 22, 2016), http://money.cnn.com/2016/04/22/news/companies/gm-ceo-mary-barra-pay-jump/; Joann Muller, *Four Reasons Mary Barra Earned the Chairman's Job at GM*, FORBES (Jan. 4, 2016), http://www.forbes.com/sites/joannmuller/2016/01/04/four-reasons-mary-barra-earned-the-chairmans-job-at-gm/#6d532daa32df.

218. Press Release, GM Corp. Newsroom, GM CEO Mary Barra's Remarks to Employees on Valukas Report Findings (June 5, 2014), http://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2014/Jun/060514-mary-remarks.html. In an effort to win over GM employees, Barra stated:

> But as I lead GM through this crisis, I want everyone to know that I am guided by two clear principles: First, that we do the right thing for those who were harmed; and, second, that we accept responsibility for our mistakes and commit to doing everything within our power to prevent this problem from ever happening again.

Id.

219. VALUKAS, *supra* note 21, at 14.

ended up interviewing 230 employees, some of them more than once, for a total of 350 interviews, all of which were conducted with at least two lawyers present.[220] The 315-page report that Barra decided to release publicly documented the history of the company's long and overly tortured effort to come to grips with the problem.[221] Not incidentally, it also exonerated Barra, giving her the valuable opportunity to claim that the company had turned a corner because of her leadership at the same time that it had come clean with the public.[222]

To be sure, the come clean strategy had other components. Barra testified before Congress several times, for the most part maintaining a posture of sincere contrition.[223] She appointed Kenneth Feinberg to run a compensation fund that would provide quick financial relief to grieving families.[224] She fired fifteen employees identified as playing central roles in covering up the defect.[225] GM developed a fix and implemented a recall for cars affected by the defect, although not without some implementation problems.[226] While Barra was bowing her head and apologizing in public, the company vigorously resisted liability in court, managing to persuade a bankruptcy judge to cut off liability for "Old GM"[227]—the company's legal identity before it declared bankruptcy in 2009.[228] That decision has since been reversed.[229]

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220. *Id.*

221. *Id.* at 2.

222. *Id.* at 227.

223. *See, e.g.*, Bill Vlasic & Danielle Ivory, *Barra Faces Scrutiny in House over G.M. Recalls*, N.Y. TIMES (June 18, 2014), http://www.nytimes.com/2014/06/19/business/house-hearing-on-general-motors-recalls.html?_r=0 (discussing Barra's testimony to Congress, where she "repeated her apologies for G.M.'s failure to repair defective cars . . . [and] asserted that the [Valukas Report] had uncovered all the mistakes inside G.M. that contributed to the long-delayed switch recall").

224. Bill Vlasic & Matthew L. Wald, *G.M. Hires Lawyer Specializing in Disaster Relief*, N.Y. TIMES (Apr. 1, 2014), http://www.nytimes.com/2014/04/02/business/gm-chief-expresses-remorse-at-house-hearing.html?_r=0.

225. Kyle Stock, *GM's Mary Barra Fires 15, Says More Recalls Are Coming*, BLOOMBERG BUS. (June 5, 2014), http://www.bloomberg.com/news/articles/2014-06-05/gms-mary-barra-fires-15-says-more-recalls-are-coming.

226. Hilary Stout & Rebecca R. Ruiz, *Recalled G.M. Cars Remain Unrepaired*, N.Y. TIMES (Nov. 3, 2014), http://www.nytimes.com/2014/11/04/business/Recalled-GM-cars-remain-unrepaired-as-safety-concerns-persist.html.

227. Ashby Jones, *GM Says It Has Shield from Some Liability*, WALL STREET J., June 15, 2014, at B1, B7.

228. Mike Spector, *GM Heads Back into Court*, WALL STREET J. (Feb. 16, 2015), http://www.wsj.com/articles/gm-heads-back-into-court-1424128905.

The extensive internal investigation, designed to give the impression that GM was indeed attempting to boil its own ocean, worked out very well for the company, allowing it to emerge from its self-created public fiasco with about the best possible settlement the DOJ could offer.[230] The company settled with the government for a deferred prosecution agreement that required payment of $900 million in penalties but did not require any admission that federal criminal laws were violated.[231] Preet Bharara, U.S. Attorney for the Southern District of New York, hinted strongly that he did not anticipate prosecuting any individual employed by GM at the time the defect was discovered because "criminal intent can be hard to prove."[232]

Of course, it is unclear what lessons other companies will draw from the GM scenario. On one hand, GM's situation was exceptional, not just because of the extensive publicity it received, but also because it involved death and money, rather than money alone.[233] The company's incentives to cooperate were strong, and were only magnified by Barra's opportunity to play the role of new broom sweeping clean. On the prosecutor's side, as Bharara pointed out during his press conference, the law that applies in such cases is very weak: the Motor Vehicle Safety Act does not contain a provision that makes it a crime to put a defective motor vehicle into commerce.[234] Yet it would be a mistake for companies that become targets of the DOJ investigations to exclude this option from initial consideration. The stakes are very high, but the rewards are great.

229. Associated Press, *Appeals Court Lets Suits over Faulty GM Ignitions Proceed*, N.Y. TIMES (July 13, 2016), http://www.nytimes.com/2016/07/14/business/appeals-court-lets-suits-over-faulty-gm-ignitions-proceed.html.

230. Bill Vlasic & Danielle Ivory, *$900 Million Penalty for G.M.'s Deadly Defect Leaves Many Cold*, N.Y. TIMES (Sept. 17, 2015), http://www.nytimes.com/2015/09/18/business/gm-to-pay-us-900-million-over-ignition-switch-flaw.html?_r=0.

231. DOJ Press Release Announcing Criminal Charges Against GM and DPA, *supra* note 20.

232. *Id.*; *see also* Dance Heart, *General Motors to Pay $900 Million; No Criminal Charges, Full Press Conference*, YOUTUBE (Oct. 29, 2015), https://www.youtube.com/watch?v=fQXScfWg93s.

233. Vlasic & Ivory, *supra* note 230.

234. Heart, *supra* note 232.

D. Persecution of the Individual

> The potential for constitutional abuse presented by the Yates Memo is substantial—particularly when companies happen to disagree with the government, yet are pressured to coerce employees to speak about alleged "wrongdoing" to preserve their employers' existence. Not only can the Yates Memo have a destabilizing impact on corporate decision-making, it may also affect the integrity of federal prosecutions.
>
> –Paul Monnin and Eric Stolze, Paul Hastings[235]

The concern that when DOJ prosecutors pressure corporations, senior executives will react by pressuring subordinates in unethical and potentially illegal ways, is nothing new and, unfortunately, is not just theoretical. Back in the DOJ's prosecutorial heyday, when it was rounding up (literally) hundreds of executives in the wake of the WorldCom[236] and Enron scandals,[237] it was brought up short by a federal district court judge for micromanaging the internal investigation of illegal tax shelters by KPMG, one of the nation's largest accounting firms.[238]

Operating in high dudgeon, the DOJ demanded that KPMG stop paying attorneys' fees for its executives if it wanted to avoid indictment.[239] Federal District Court Judge Lewis Kaplan held that the DOJ had violated the employees' constitutional rights to due process: "Those who commit crimes—regardless of whether they wear white or blue collars—must be brought to justice. The government, however, has let its zeal get in the way of its judgment. It has violated the Constitution it is sworn to defend."[240] He added: "[F]airness in criminal proceedings requires that the defendant be firmly in the driver's seat, and that the prosecution not be a backseat driver."[241] The DOJ eventually

235. Monnin & Stolze, *supra* note 8, at 1.

236. David Hancock, *World-Class Scandal at WorldCom*, CBS (June 26, 2002, 9:23 AM), http://www.cbsnews.com/news/world-class-scandal-at-worldcom/.

237. *The Real Scandal*, The ECONOMIST (Jan. 17, 2002), http://www.economist.com/node/940091.

238. United States v. Stein, 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006).

239. *Id.* at 337.

240. *Id.* at 336.

241. *Id.* at 358.

granted KPMG a deferred prosecution agreement, compounding its micromanagement problems by inserting extensive requirements that the firm's management consult with prosecutors regarding every important aspect of its operations.[242]

In reaction to the issuance of the Yates Memo, Paul Hastings attorneys Paul Monnin and Eric Stolze wrote a piece entitled *Everything Old Is New Again: Why the Yates Memo Is Constitutionally Suspect*, which predicted darkly that the DOJ would soon be up to all of its old and discredited tricks: "Simply put, the Yates Memo collapses the divide between criminal and corporate internal investigations that has traditionally left the Fifth Amendment—and a suppression remedy for its violation—out of the equation for targeted employees."[243] The two attorneys assumed that when pressured by the government, companies will not resist, and will instead "threaten the livelihood of employees who refuse to incriminate themselves."[244]

A second scenario they do not mention is the possibility that supervisors could threaten employees with the loss of their jobs or the loss of company-supported legal representation if the employee refuses to misrepresent the facts to protect corporate interests. Such misrepresentations would be very difficult for the government to discover. Outside counsel would probably be less likely to participate in such cover-ups, although the pressure to keep large clients satisfied can be intense. Building cases on coerced misrepresentations is obviously not in the interests of the DOJ, although it is difficult to see how prosecutors could deter abuses they cannot discover.

Monnin and Stolze advise their clients to "revisit their fee advancement and indemnity provisions for purposes of determining whether—as dictated by the Yates Memo—the intervention of criminal prosecutors in an administrative or corporate internal investigation entitles individual investigative subjects to separate counsel."[245] They do not clarify why they read the Yates Memo as mandating this result, although corporate counsel undoubtedly face an ethical dilemma if they pressure

242. *See* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 358–62 (2007) (discussing the terms of the DPA with KPMG and their ramifications).

243. Monnin & Stolze, *supra* note 8, at 2.

244. *Id.*

245. *Id.* at 4.

employees to cooperate with an internal investigation and it later turns out that an employee incriminated herself without the advice of a lawyer committed only to her interests.[246]

The Supreme Court has held that when public employees are threatened with loss of employment if they do not cooperate with a state-sanctioned investigation, the procedure violates their constitutional rights.[247] *Garrity v. New Jersey* involved police officers under investigation by the State Attorney General for irregularities in the handling of cases in the municipal courts.[248] The officers were under the impression that they would lose their jobs if they did not answer investigators' questions.[249] Justice Douglas, writing for a majority of six, found that when the state prosecutors tried to use self-incriminating statements made by the officers in subsequent prosecutions, the officers' constitutional right against self-incrimination was violated.[250] Some scholars use the case and its successors to argue that even if the government does not become directly involved in the daily management of an internal investigation, when it pushes corporations to expand an inquiry's scope and intensity, it runs the risk of conferring the color of state action to abuses of employees' Fifth Amendment rights.[251]

Drawing bright lines that prosecutors should never cross in this area will be difficult. But the DOJ clearly has a lot to lose. As much as prosecutors thirst for the information locked in a file drawer, cyberspace, or the brain of an employee, overbalancing on these sensitive issues could provoke a backlash that undermines white-collar enforcement more than it strengthens it. If corporate executives succumb to the temptation of bullying in-house counsel, the board of directors, and senior management to use the dual cudgels of dismissal and termination of company-funded attorneys' fees, the behavior could provide an important weapon to alert defense counsel as the case develops. Should abused employee whistle-blowers emerge, the publicity asserting government abuse of rights will be just awful.

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246. Timothy M. Middleton, *"Watered-Down Warnings": The Legal and Ethical Requirements of Corporate Attorneys in Providing Employees with "*Upjohn *Warnings" in Internal Investigations*, 21 GEO. J. LEGAL ETHICS 951, 960 (2008).

247. Garrity v. New Jersey, 385 U.S. 493, 494 (1967).

248. *Id.*

249. *Id.* at 495.

250. *Id.* at 497.

251. Griffin, *supra* note 242, at 360.

One weak solution is to ensure that everyone working as a first or second chair on a case understands fully the implications of the KPMG and *Garrity* situations. The upshot is likely to be a quiet, internal understanding that prosecutors should avoid statements that could be interpreted as coercion when they are discussing the treatment of employees in an internal investigation with counsel who represent the corporation.

A bolder, more effective approach would be to prohibit such conversations, instead focusing the dialogue between prosecutors and corporate counsel on the details of the substantive issues prosecutors want the internal investigation to address. The DOJ should issue a semi-formal memorandum or guidance (not just a speech) clarifying that the Yates Memo does not authorize prosecutors to interfere with corporate personnel policies. The ramifications of any discovery that employees may have engaged in criminal conduct while on the job are decisions left to the corporation, and the corporation alone.[252]

IV. THE UPSHOT

Sooner or later, the nation must come to grips with the terrible problem of mass incarceration. The issue has earned a broad spectrum of support from very conservative groups and individuals like Freedom Works and the Koch brothers, to very liberal groups like the National Association for the Advancement of Colored People and the Leadership Conference Education Fund.[253] Congress made considerable progress toward enacting legislation that would reform sentencing for nonviolent crime,[254] but in the spring of 2016, as the imminence of the presidential election began closing the window for productive work, Senator Orrin Hatch (R-Utah) tried to trade legislation that would increase the burden prosecutors must meet in proving mens rea,

252. *But see* MINER, *supra* note 9, at 24 (discussing that the "all-or-nothing" approach for cooperation credit creates a level of "dialogue and transparency" between the corporation and government that did not exist prior to the Yates Memo).

253. Carl Hulse, *Unlikely Cause United the Left and the Right*, N.Y. TIMES (Feb. 18, 2015), http://www.nytimes.com/2015/02/19/us/politics/unlikely-cause-unites-the-left-and-the-right-justice-reform.html?_r=0; *The Importance of Action*, COALITION FOR PUB. SAFETY, http://www.coalitionforpublicsafety.org (last visited Oct. 29, 2016).

254. Mike DeBonis, *Congress Is Closer than Ever to Easing Sentences for Drug Offenders*, WASH. POST (Apr. 29, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/04/29/the-time-for-criminal-justice-reform-might-at-last-be-nigh/.

especially in white-collar cases, for his support of broadly bipartisan legislation that concentrated on sentencing reform alone.[255] He was unsuccessful.[256] On the House side, Representative John Conyers (D-Mich.) agreed to a similar trade with Representative Bob Goodlatte (R-Va.), but the legislation never made it to the floor.[257] The DOJ and a loose assembly of liberal groups opposed the mens rea provision,[258] but the real reason they prevailed was not the merits of their position, which were considerable, but rather timing.[259]

When Congress returns to work, these reforms will be back on the table, if not front and center, of the legislative agenda. It is possible—and if I was a betting woman and had to put real money on the line, I would even say likely—that some ambitious legislator will advance provisions to curtail, and maybe even eradicate, the Yates Memo. A legislator would find it far easier to serve his business constituents through such a broad policy initiative than by interfering in a case involving specific institutions and individuals. In a polarized environment, where negotiations need not produce consistent policy and where reasoned objections sometimes do not emerge from the twenty-four-seven scrum of conflicting information, this new idea might well get traction.

The DOJ's leadership would be well-advised to think defensively about this possibility. Rather than hedge prosecutorial bets by throwing an occasional bon mot to captive audiences of members of the defense bar, it should work to make the new policy more defensible.

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255. *See* Rena Steinzor, *Dangerous Bedfellows: The Stalemate on Criminal Justice Reform*, 27 AM. PROSPECT, no. 2, 2016, at 7–8, http://prospect.org/article/dangerous-bedfellows (explaining the legislative machinations at play in this effort); *see also* Matt Apuzzo & Eric Lipton, *Rare White House Accord with Koch Brothers on Sentencing Frays*, N.Y. TIMES (Nov. 24, 2015), http://www.nytimes.com/2015/11/25/us/politics/rare-alliance-of-libertarians-and-white-house-on-sentencing-begins-to-fray.html?_r=0 (discussing a bipartisan coalition that has pushed for significant liberalization of criminal justice laws, and the pushback from the DOJ against that coalition).

256. Steinzor, *supra* note 255, at 72.

257. *Id.*

258. Apuzzo & Lipton, *supra* note 255.

259. *See* Laura Barron-Lopez, *Time Is Running Out for the Senate to Finally Do Something About Sentencing Reform*, HUFFINGTON POST (May 24, 2016, 6:34 PM), http://www.huffingtonpost.com/entry/criminal-justice-reform-senate_us_5744ba18e4b055bb11707faa (stating that the bill is unlikely to pass if it is not pushed through both chambers before Congress's summer recess); DeBonis, *supra* note 254 (stating that it would be difficult to obtain floor time for the bill).