FEATURE ARTICLE

ARE THE YATES MEMORANDUM AND THE FEDERAL JUDICIARY'S CONCERNS ABOUT OVER-CRIMINALIZATION DESTINED TO COLLIDE?

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Introduction

Two powerful trends in federal criminal law are on a collision course. The Justice Department is expanding its efforts to prosecute individuals in every type of criminal case, highlighted by a September 2015 Department-wide directive issued by Deputy Attorney General Sally Yates. At the same time, there is growing concern by federal courts, led by the Supreme Court, that federal prosecutors are interpreting the law too broadly in too many cases and attempting to criminalize conduct that is not criminal. Other branches of government have also expressed concerns about over-criminalization, including members of Congress who introduced a series of bills to help address the problem.

If the Justice Department stringently enforces the Yates Memorandum, and if the federal judiciary maintains its concerns about overly broad criminal statutes, the enforcement landscape will change in significant ways. The Department will succeed in bringing more criminal prosecutions, but that success will likely come at a significant cost. Because the Yates Memorandum exerts pressure on line prosecutors to increase the number of prosecutions beyond their current efforts, some line prosecutors will inevitably feel heightened pressure to adopt more expansive statutory interpretations, exercise less caution when evaluating the facts, or put more pressure on corporations to search for and to produce evidence of individual wrongdoing.

An increase in the number of marginal prosecutions would raise even more concerns within the federal judiciary, which has already begun to adopt narrower interpretations of federal statutes and has expressed concerns that the Justice Department is not exercising its prosecutorial discretion as wisely as it could. Strict enforcement of the Yates Memorandum could also change the way that corporations and individuals decide to cooperate with the Justice Department, which would affect the size, type, and number of corporate settlements. As

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companies reconsider whether they are willing to cooperate at all and, if so, how they must recalibrate their investigations to satisfy the Justice Department, the unintended consequences of the Yates Memorandum may actually hurt the law enforcement objectives that the Memorandum hopes to achieve.

These conflicting trends—one reflecting a strong desire for individual accountability, and the other reflecting worry about prosecutorial overreach—have not developed overnight. For over a decade, the Justice Department has entered into hundreds of plea agreements, deferred prosecution agreements, and non-prosecution agreements with companies to resolve high-profile criminal investigations.[1] While these settlements involve billions of dollars and admissions of guilt,[2] the Justice Department has not secured as many comparable indictments and convictions of senior executives.[3] In response, even senior Justice Department officials have begun to voice a variety of concerns about these agreements, despite the Department's unprecedented successes.[4] These officials note that the stock prices for some companies have increased in value after settlement announcements.[5] Some have even questioned whether the companies themselves withheld incriminating information about their senior officers through the investigation and negotiation process and succeeded in preventing prosecutions of individuals.[6]

Meanwhile, the federal judiciary has grown increasingly disenchanted with expansive interpretations of criminal statutes and over-criminalization in the United States Code. In recent years, the Supreme Court has repeatedly rejected far-reaching interpretations of criminal statutes with broad language, finding that narrower interpretations reflect a more realistic view of Congressional intent. Even dissenting Supreme Court justices, who prefer a more textual approach to statutory interpretation, have expressed concern about the issue of over-criminalization. For instance, while analyzing an obstruction of justice statute enacted as part of the Sarbanes-Oxley Act, Justice Elena Kagan expressed her discomfort that it was "a bad law" that was "too broad and undifferentiated" and "an emblem of a deeper pathology in the federal criminal code."[7] In the same case, despite his long commitment to enforcing the plain language of criminal statutes, Justice Antonin

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1. *See, e.g.*, Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 544 (2015).

2. *See, e.g.*, *id.* at 543–44, 576–78; Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, Essay, 45 AM. CRIM. L. REV. 159, 160–61 (2008).

3. *See, e.g.*, *infra* notes 14–22.

4. *See, e.g.*, Benjamin Gruenstein, *Beyond the Sentencing Guidelines: Recent Trends in Corporate Criminal Sentences*, *in* MANAGING WHITE COLLAR LEGAL ISSUES 99–100 (Aspatore 2015 ed.) (pointing out that corporate penalties have increased about 650 percent between 2001 and 2012 and that the Justice Department has "repeatedly secured record-breaking fines since 2012").

5. *See infra* notes 28–30 and accompanying text.

6. *Id.*

7. Yates v. United States, 135 S. Ct. 1074, 1101 (2015) (Kagan, J., dissenting).

Scalia wondered aloud during oral argument what kind of "mad prosecutor" would have charged a fisherman who destroyed undersized fish with an obstruction of justice charge carrying a twenty year maximum sentence.[8]

This Article seeks to describe these trends, detail how they came to exist, and explore their potential implications for judges, prosecutors, defense lawyers, and everyone else caught in the crossfire (including defendants, companies, employees, and average citizens). Part I provides an in-depth look at the Yates Memorandum, including the events leading to the Memorandum, an analysis of its substance, and a discussion of its potential implications. Part II discusses how federal courts' discomfort with over-criminalization has subtly changed the way that they analyze broad criminal statutes. Finally, Part III analyzes how these two trends—a call for increased prosecution of individuals through the Yates Memorandum and a growing sense in the judiciary that too many individuals are being prosecuted—could collide and what may result.

I. THE YATES MEMORANDUM AND THE CALL FOR MORE PROSECUTIONS OF INDIVIDUALS

The Yates Memorandum is a product of its time. It reflects the external forces pressuring the Justice Department to convict corporate executives and the internal doubts that the Justice Department itself eventually developed about its efforts even after all of its successes. This Part addresses the events leading up to the Yates Memorandum, the Memorandum's six directives, and three fundamental questions about the Memorandum that will influence its longevity and potential effectiveness.

A. The Events Leading to the Issuance of the Yates Memorandum

Momentum for the Yates Memorandum has been building for years. As the nation's newspapers have documented,[9] the Justice Department has been collecting record-breaking criminal fines during the last fifteen years against the largest national and international companies.[10] In that time, at least twenty-six *Fortune* 100 corporations have resolved federal criminal investigations through non-

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8. Transcript of Oral Argument at 28, *Yates*, 135 S. Ct. 1074 (2015) (No. 13-7451).

9. *See, e.g.*, Reuters, *Justice Dept. Sets Record in Penalties for Fraud*, N.Y. TIMES, Nov. 19, 2014, http://www.nytimes.com/2014/11/20/business/justice-dept-sets-record-in-penalties-for-fraud.html (discussing the "record . . . penalties" collected by the Justice Department in 2014 "bolstered" by payments from large companies); Michael S. Schmidt & Edward Wyatt, *Corporate Fraud Cases Often Spare Individuals*, N.Y. TIMES, Aug. 7, 2012, http://www.nytimes.com/2012/08/08/business/more-fraud-settlements-for-companies-but-rarely-individuals.html (discussing "ballooning settlements" that involve "some of the largest and most prominent companies").

10. Press Release, Dep't of Justice, Justice Department Collects More Than $23 Billion in Civil and Criminal Cases in Fiscal Year 2015 (Dec. 3, 2015), http://www.justice.gov/opa/pr/justice-department-collects-more-23-billion-civil-and-criminal-cases-fiscal-year-2015.

prosecution agreements, deferred prosecution agreements, or plea agreements.[11] On the Global *Fortune* 100 list, at least twenty-five corporations have entered into similar agreements,[12] even excluding criminal investigations that have resulted in declinations or civil settlements that have resulted in billion-dollar payouts to the government.[13] It is now almost routine for the Justice Department to collect billions of dollars in criminal or civil fines and penalties in a single case.[14]

Despite these historically large corporate settlements, there has been withering public criticism of the Justice Department for not being more aggressive with individual prosecutions, particularly following the 2008 financial crisis. Prominent critics of the Justice Department in Congress include Senator Elizabeth Warren (D-MA),[15] Senator Richard Shelby (R-AL),[16] Senator Charles Grassley (R-IA),[17] Senator Sherrod Brown (D-OH),[18] and Senator Ted Kaufman (D-DE).[19] Some federal judges[20] and public interest

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11. On file with the author.

12. On file with the author.

13. *See, e.g.*, Press Release, Dep't of Justice, Justice Department Recovers Over $3.5 Billion from False Claims Act Cases in Fiscal Year 2015 (Dec. 3, 2015), http://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015 (discussing civil False Claims Act settlements).

14. *See* Press Release, *supra* note 10 (providing two specific examples of individual settlements in civil cases over $1 billion).

15. *Wall Street Reform: Assessing and Enhancing the Financial Regulatory System: Hearing Before the S. Comm. on Banking, Housing, & Urban Affairs*, 113th Cong. (2014) ("No corporation can break the law unless an individual within that corporation broke the law . . . . The message to every Wall Street banker is loud and clear: if you break the law, you will not go to jail, but you might end up with a much bigger pay check.") (questioning by Sen. Warren).

16. *Id.* ("People should not be able, whoever they are . . . to buy their way out of culpability, especially when it is so strong, it defies rationality.") (questioning by Sen. Shelby).

17. *See, e.g.*, Letter from Sen. Charles Grassley to Eric Holder, Att'y Gen. (Dec. 12, 2012), http://www.grassley.senate.gov/sites/default/files/judiciary/upload/HSBC-12-13-12-letter-to-Holder-no-criminal-prosecutions.pdf (expressing disappointment that the Justice Department had not brought prosecutions of individuals in the HSBC case); *see also Oversight of the U.S. Dep't of Justice: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013) [hereinafter *Oversight of DOJ Hearing*] ("I think we're on a slippery slope . . . . I don't have recollection of DOJ prosecuting any high-profile financial criminal convictions of either companies or individuals.") (questioning by Sen. Grassley).

18. Joint Press Release, Senators Sherrod Brown and Charles Grassley, Sens. Brown, Grassley Press Justice Dep't On 'Too Big to Jail' (Jan. 29, 2013), http://www.brown.senate.gov/newsroom/press/release/sens-brown-grassley-press-justice-department-on-too-big-to-jail.

19. *Investigating and Prosecuting Financial Fraud After the Fraud Enforcement Recovery Act: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 1–2 (2010) ("[W]e have seen very little in the way of senior officer or boardroom-level prosecutions of the people on Wall Street who brought this country to the brink of financial ruin. Why is that?") (statement of Sen. Kaufman).

20. *See also* Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REVIEW OF BOOKS, Jan. 9, 2014, http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/ (suggesting that, if fraud were the cause of the financial crisis, "then the failure of the government to bring to justice those responsible for such colossal fraud bespeaks weaknesses in our prosecutorial system that need to be addressed"); Transcript of Hearing on the Joint Motion for Approval of Deferred Prosecution Agreement at 7–13, United States v. Barclays Bank PLC, No. CR 10-218 (D.D.C. Aug. 18, 2010) (transcribing Judge Emmet Sullivan's extensive questioning of a government attorney about why the Justice Department did not prosecute senior management and other individuals); Order at 1, Securities & Exchange Commission v.

groups[21] raised similar questions and concerns. These concerns are also reflected in mainstream media.[22]

The Justice Department publicly rejected this criticism. Both Attorney General Eric Holder[23] and Preet Bharara, the U.S. Attorney for the Southern District of New York,[24] rejected the premise that the Justice Department has not been vigilant in prosecuting individuals. Justice Department officials also reported that often there was insufficient evidence to warrant prosecutions of the individuals in question and that the critics clamoring for prosecutions simply did not have all the facts.[25] Indeed, the Justice Department has long believed that the best deterrent against corporate misconduct is the prosecution of both corporations and individuals.[26] Throughout the last fifteen years, the Justice Department has prosecuted a not-insignificant number of executives or employees, even after it has secured settlements from the companies in those cases.[27]

Citigroup, Inc., No. 10-1277-ESH (D.D.C. Aug. 17, 2010) (requesting that the government disclose "senior management" officials listed in the complaint and justify why it individually charged only two senior executives).

21. *See, e.g.*, Press Release, Bartlett Naylor, Financial Policy Advocate, Public Citizen's Congress Watch Division, With Deutsche Bank Settlement Over Financial Fraud, Justice Deferred — Again (Apr. 23, 2015), http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=5481.

22. *See, e.g.*, Michael S. Schmidt & Edward Wyatt, *Corporate Fraud Cases Often Spare Individuals*, N.Y. TIMES, Aug. 7, 2012, http://www.nytimes.com/2012/08/08/business/more-fraud-settlements-for-companies-but-rarely-individuals.html (noting that, while the government has collected record-breaking fines against companies, it has not prosecuted culpable individuals).

23. Eric Holder, Att'y Gen., Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014), http://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law ("Our record demonstrates that when the evidence and the law support it, we do not hesitate to bring charges against *anyone*. Between 2009 and 2013, the Justice Department charged more white-collar defendants than during any previous five-year period going back to at least 1994.") (emphasis in original).

24. Matt Levine, *Levine on Wall Street: Dark Pools and Dollar Bets*, BLOOMBERG VIEW (Oct. 8, 2014, 7:39 AM), http://www.bloombergview.com/articles/2014-10-08/levine-on-wall-street-dark-pools-and-dollar-bets (quoting Bharara as stating "I would suggest that some of these critics go to law school and apply themselves and become prosecutors and make the case that they think we should be making. This is by reputation and track record the most aggressive office in white-collar crime in the country ever, and if we're not bringing a certain kind of case, it's because the evidence is not there. Pure and simple.").

25. *See, e.g.*, *Oversight of DOJ Hearing*, *supra* note 17 ("I think we've been . . . appropriately aggressive. These are not easy cases, necessarily, to make . . . . [T]he people in our criminal division . . . brought cases where we think we could have brought them.") (testimony of Attorney Gen. Eric Holder).

26. *See, e.g.*, Memorandum from Eric Holder, Deputy Attorney Gen., to All Component Heads and United States Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999), http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF ("Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Further, imposition of individual criminal liability on such individuals provides a strong deterrent against future corporate wrongdoing."); Lanny Breuer, Assistant Att'y Gen., Speech at the New York City Bar Association (Sept. 13, 2012) [hereinafter *Lanny Breuer Speech*], http://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association ("I have said before that the strongest deterrent against corporate crime is the prospect of prison time for individual employees—and we do not hesitate to seek long sentences when circumstances warrant.").

27. *See, e.g.*, Plea Agreement, United States v. Sigelman, No. 14-263 (JEI) (D.N.J. June 15, 2015) (ending FCPA prosecution against former Chief Executive Officer of PetroTiger with a misdemeanor plea and a sentence of probation); Judgment, United States v. Rainey, No. 12-291 (E.D. La. June 5, 2015) (finding defendant British

As the Justice Department defended its past actions, however, senior officials increasingly expressed discomfort with the status quo. For instance, in May 2014, Bharara complained that stock prices had risen and executives had received bonuses following the announcement of criminal settlements with the Justice Department.[28] Bharara also expressed concern about "Chicken Little" arguments from defense counsel about the consequences of a criminal charge against a corporation.[29] He concluded that the Justice Department should be more willing to bring criminal charges against corporations.[30]

Later that year, beginning in September 2014, senior officials in the Criminal Division made a series of speeches that foreshadowed the Yates Memorandum. For instance, Marshall Miller, the Principal Deputy in the Justice Department's Criminal Division, expressed concern that corporations were failing to disclose relevant facts and instead were trying to obtain the benefits of cooperation without actually cooperating.[31] Weeks later, Assistant Attorney General Leslie Caldwell followed with a speech that highlighted *PetroTiger*, a case in which the Department declined to bring criminal charges, as an example of how the government credits a company's cooperation in an investigation.[32] Caldwell repeated this theme throughout the year and emphasized the importance of corporations identifying all inculpatory facts about individuals in a timely way, suggesting that not all companies were meeting this standard.[33]

Petroleum not guilty on one count and dismissing other count in prosecution for false statements and obstruction of a congressional investigation); Second Superseding Indictment, United States v. Pierucci, No. 3:12CR238 (JBA) (D. Conn. July 30, 2013) (prosecution of former Alstom employee for alleged FCPA violations); Judgment of Acquittal, United States v. Weil, No. 08-cr-60322 (S.D. Fla. Nov. 3, 2014) (prosecution of former UBS employee concerning a tax conspiracy charge that ended in an acquittal); Indictment, United States v. Sharef, No. 11-1056, 2011 WL 6155788 (S.D.N.Y. Dec. 13, 2011) (indictment of seven former Siemens employees and a business consultant for FCPA-related violations).

28. Preet Bharara, U.S. Attorney for the Southern District of New York, Speech at the SIFMA's Compliance and Legal Society Annual Seminar (Mar. 31, 2014), http://www.justice.gov/usao-sdny/speech/sifma-s-compliance-and-legal-society-annual-seminar-prepared-remarks-us-attorney ("In fact, sometimes the sky brightens: stock prices remain steady, or go up, as the company is viewed as putting problems 'behind it[]'[;] clients and customers and key employees don't even bat an eye; and sometimes, the CEO even gets a raise.").

29. *Id.*

30. *Id.*

31. Marshall L. Miller, Principal Deputy Assistant Att'y Gen., Criminal Division, Remarks at the Global Investigation Review Program (Sept. 17, 2014) [hereinafter *Miller Speech*], http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller ("Voluntary disclosure of corporate misconduct does not constitute true cooperation, if the company avoids identifying the individuals who are criminally responsible. Even the identification of culpable individuals is not true cooperation, if the company fails to locate and provide facts and evidence at their disposal that implicate those individuals.").

32. In the PetroTiger case, the Justice Department declined to bring criminal charges against the company for foreign bribery violations after the complany provided facts implicating two of its CEOs and its general counsel. Leslie Caldwell, Assistant Att'y Gen, Criminal Division, Remarks at the American Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014), http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-conference-institute-s-31st.

33. *See, e.g.*, Leslie Caldwell, Remarks at New York University Law School's Program on Corporate Compliance and Enforcement (April 17, 2015), http://www.justice.gov/opa/speech/assistant-attorney-general-

These speeches laid the foundation for the Yates Memorandum, which incorporated many of the Criminal Division's themes, including the notion that company counsel should not "boil the ocean" in conducting internal investigations.[34] Describing the focus of the Memorandum at its launch, Yates gave credit to Caldwell and the Criminal Division for "demonstrating that corporate cooperation can and must focus on individual accountability, and our new policy guidance now makes that crystal clear."[35]

B. The Substance of the Yates Memorandum

On September 9, 2015, Yates issued her memorandum to all Justice Department enforcement components. In it, she announced six directives designed to ensure individuals are held accountable for corporate wrongdoing.[36] The three most influential directives: (1) require prosecutors to refuse to provide companies with any credit for cooperation if prosecutors find that those companies failed to provide all inculpatory information about individuals to the government;[37] (2) require prosecutors to develop a plan to prosecute individuals from the inception of the investigation;[38] and (3) require prosecutors to justify why they are *not* seeking the prosecution of individuals if those prosecutors propose a settlement with a company.[39] For the reasons explained below, these three directives have the greatest potential to change the enforcement landscape.

In addition, the Memorandum sets forth three other directives that are not as likely to change existing practices in federal criminal law enforcement. These directives (1) require coordination between the government's civil and criminal attorneys;[40] (2) prohibit protection for individuals in corporate settlements;[41] and (3) require the pursuit of civil enforcement actions without regard to the ability to recover from the defendant.[42] Prior to the Yates Memorandum, many prosecutors and civil enforcement attorneys were already cooperating in advancing their

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leslie-r-caldwell-delivers-remarks-new-york-university-law ("Perhaps most critically, we expect cooperating companies to identify culpable individuals—including senior executives if they were involved—and provide the facts about their wrongdoing.").

34. Sally Quillian Yates, Deputy Att'y Gen., Remarks at New York University School of Law (Sept. 10, 2015) [hereinafter *Yates Speech*], http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

35. *Id.*

36. Memorandum from Sally Quillian Yates, Deputy Att'y Gen., to All U.S. Attorneys et. al., Individual Accountability for Corporate Wrongdoing 2–3 (Sept. 9, 2015) [hereinafter *Yates Memorandum*], http://www.justice.gov/dag/file/769036/download/.

37. *Id.* at 3–4.

38. *Id.* at 4.

39. *Id.* at 6.

40. *Id.* at 4–5.

41. *Id.* at 5.

42. *Id.* at 6–7.

respective inquiries.[43] Similarly, with few exceptions (such as a well-established program in the Antitrust Division[44]), the Justice Department did not routinely provide immunity to individual officers or employees as part of corporate settlements.[45] The last directive, to pursue civil actions without regard to ability to pay, is somewhat counter-intuitive because it requires the government to pursue cases where there is likely no monetary benefit and a limited specific and general deterrent effect. Even if it is enforced, that directive is not likely to make a difference in most cases.

By contrast, a review of the three most important directives shows how the enforcement climate could change much more significantly if the Yates Memorandum is strictly interpreted.

1. The All-Or-Nothing Method of Judging Cooperation

> To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.[46]

The all-or-nothing nature of cooperation is one of the most important changes of the Yates Memorandum because it injects substantial uncertainty into the dynamic between the Department and cooperating companies.[47] The Yates Memorandum specifies a threshold test for cooperation: "the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct."[48] Once this threshold is met, the cooperation credit awarded to a

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43. *See, e.g.*, Memorandum from Eric Holder, Att'y Gen., to U.S. Attorneys (Jan. 30, 2012), http://www.justice.gov/usam/organization-and-functions-manual-27-parallel-proceedings (In white-collar cases, "Department policy is that criminal prosecutors and civil trial counsel should timely communicate, coordinate, and cooperate with one another and agency attorneys to the fullest extent appropriate to the case and permissible by law."). Examples of this type of close coordination can already be found in civil forfeiture actions, False Claims Act investigations, food safety matters, and FIRREA cases.

44. Policy Memoranda, Dep't of Justice, Antitrust Div., Leniency Policy for Individuals (Aug. 10, 1994), http://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0092.pdf.

45. *See, e.g.*, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-16.050 (2008) [hereinafter USAM] ("Charges against an individual defendant should not be dismissed on the basis of a plea of guilty by a corporate defendant unless there are special circumstances justifying the dismissal."); *Lanny Breuer Speech*, *supra* note 26 ("Another absolutely critical point is that regardless of whether we indict a company or agree to defer prosecution, individual wrongdoers can never secure immunity through the corporate resolution.").

46. *Yates Memorandum*, *supra* note 36, at 3.

47. The Justice Department has taken different positions on whether this is a new development. *Compare Miller Speech*, *supra* note 31 (stating that "[t]his principle of cooperation is not new or unique to companies" and that "[w]e have applied it to criminal cases of all kinds for decades") with *Yates Speech*, *supra* note 34 ("Those of you active in the white-collar area will recognize it as a substantial shift from our prior practice" and that "[t]he rules have just changed.").

48. *Yates Memorandum*, *supra* note 36, at 3.

company depends on various other traditionally applied factors.[49] Yates described the change as the following:

> 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. If they want any cooperation credit, they will need to investigate and identify the responsible parties, then provide all non-privileged evidence implicating those individuals.[50]

As an initial matter, without citing any supporting evidence, the Yates Memorandum assumes that a significant number of companies have been intentionally withholding evidence of inculpatory conduct by their executives.[51] The Justice Department does not assert any empirical basis for its assumption, and there are many reasons why companies and their counsel would not remotely consider taking that risk. For instance, even before the Yates Memorandum, a company would risk all benefits of cooperation if a prosecutor thought it was untruthful or withholding knowledge of inculpatory evidence.[52] If the government accused a company of lying or withholding evidence, the corporation and its counsel would also lose their credibility with the government in all future cases, a substantial sanction. The government could even accuse companies and their counsel of criminal obstruction of justice if they made any false statements while speaking with government officials.[53] Therefore, even before the Yates Memorandum, a prosecutor had many tools to punish companies and counsel for withholding evidence, and the Yates Memorandum does not provide any reason to believe that companies have been protecting executives or withholding incriminating evi-

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49. The *Yates Memorandum* clarifies that determining whether a company "identif[ied] all individuals" is only the first step in deciding whether the corporation has cooperated: if a corporation has met this "threshold requirement," then the "extent of that cooperation credit will depend on all of 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.)." *Yates Memorandum*, *supra* note 36, at 3.

50. *Yates Speech*, *supra* note 34.

51. *Yates Memorandum*, *supra* note 36, at 3 ("Companies cannot pick and choose what facts to disclose"); *id.* ("If a company seeking cooperation credit *declines* to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor . . . .") (emphasis added). *See also Yates Speech*, *supra* note 34 ("[U]ntil now, companies could cooperate with the government by voluntarily disclosing improper corporate practices, but *then stop short of identifying who engaged in the wrongdoing and what exactly they did.* While the companies weren't entitled to full credit for cooperation, they could still get credit for what they did do and that credit could be enough to avoid indictment.") (emphasis added).

52. It is very hard to imagine any federal prosecutor thinking, "That company was withholding evidence from me about its key executives, but I am still going to cut it a break because of its other cooperation."

53. *See, e.g.*, Indictment, United States v. Stevens, No. 10-CR-0694 (D. Md.) (Nov. 8, 2010) (indicting corporate counsel for making false statements and withholding documents to prevent FDA investigation—though ultimately falling short of conviction as the district court eventually granted the corporate counsel's motion for acquittal at the end of the government's case-in-chief).

dence. The Yates Memorandum is not likely to achieve its goal of significantly increasing the number of individual prosecutions if its assumptions about companies shielding executives prove unfounded.

The more far-reaching aspect of the all-or-nothing approach is found in the statements that "we're not going to let corporations plead ignorance" and that "[i]f they don't know who is responsible, they will need to find out."[54] For companies deciding whether to cooperate, this statement presents a real conundrum. If a company cooperates and is unable to convince the government it has disclosed all of the facts, it may fail to receive any credit for its cooperation.[55] This is possible even without bad intent: the company may be unable to discover the issue in good faith within the statute of limitations; the company may look in the wrong places or be examining other issues in a complex, worldwide investigation; or the company may find the facts to be murkier than the government believes them to be. In other words, a company may conduct a costly and exhaustive investigation, only to be treated as if it had encouraged or condoned the misconduct and taken an adversarial position with the government. Contrary to the Yates Memorandum's goals, that sober possibility will cause companies to think twice before agreeing to cooperate with the government if the government applies the Memorandum as strictly as it is written.

Deputy Attorney General Yates anticipated this problem and suggested that the government would work with companies in creating an appropriate scope to an investigation:

> The purpose of this policy is to better identify responsible individuals, not to burden corporations with longer or more expensive internal investigations than necessary. 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 . . . . If you are representing a corporation and there's a question about the scope of what's required, you can do what many defense attorneys do now—pick up the phone and discuss it with the prosecutor.[56]

Yates' suggestion represents another significant change for many Justice Department attorneys, who traditionally have been reluctant to offer strong guidance on how a company should conduct an internal investigation.[57] In the view of these attorneys and their offices, it is not the role of the Justice Department to tell a

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54. *Yates Speech*, *supra* note 34.

55. *Yates Memorandum*, *supra* note 36, at 2–3.

56. *Yates Speech*, *supra* note 34.

57. One of Leslie Caldwell's speeches provides an example of the type of generalized language that a defense counsel might hear from a reluctant prosecutor about the scope of an investigation. *See* Leslie Caldwell, Assistant Att'y Gen., Remarks at the New York City Bar Association's Fourth Annual White Collar Crime Institute (May 12, 2015), http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-city-bar-0 ("We will not tell you how to, or how much to investigate. You decide. But from our point of view,

corporation how to conduct an investigation.[58] Instead, the Justice Department evaluates a company's cooperation and the sufficiency of its investigation after the fact and applies the Principles of Federal Prosecution of Business Organizations required by the United States Attorneys' Manual.[59] There are good reasons for caution: Justice Department attorneys may worry that their views will prematurely curtail an investigation and may believe that the company is better situated to assess the probability of discovering potential misconduct. In our view, if Justice Department attorneys now intend to offer more input about the direction that an investigation should take or how a company should deploy its external counsel, the Justice Department should take some responsibility for its suggestions. In those cases, the Justice Department should be careful not to penalize a corporation that honestly follows the government's views about the scope of an investigation and then fails to discover the misconduct of relevant employees.

Even more fundamentally, strict enforcement of the Yates Memorandum will change the relationship between companies and the Justice Department. A strict reading of the Yates Memorandum will push companies at the outset to formulate investigation plans designed not only to identify illegal conduct at the corporation, but also to identify all conceivable evidence that can be used in a criminal prosecution against individual employees.[60] That is a different mission, and it will raise questions for companies and their counsel as to whether the traditional *Upjohn* warning[61] alone is sufficient in those circumstances. Before a target of a criminal investigation testifies in front of a grand jury, the Justice Department has a longstanding policy to "advise witnesses who are known 'targets' of the investigation that their conduct is being investigated for possible violation of Federal criminal law."[62] If a corporation intends to interview an employee suspected of illegal activity for the purpose of disclosing that evidence to the Justice Department and furthering a criminal prosecution of that employee, it begins to look like a very similar situation, and companies may start to conclude there is a similar moral or ethical obligation to provide a similar "target" warning to employees before the interview begins. The natural consequence of that warning will result in less information being provided to the company and to the Justice Department.

Moreover, because internal investigations will have a different and sharper focus and will likely become more adversarial at an earlier stage as a consequence of the Yates Memorandum, many companies will feel compelled to ensure employees suspected of wrongdoing have access to separate attorneys much

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a good investigation should focus on the problem at issue, determine the scope of that problem and investigate accordingly, and also focus on what compliance or cultural shortcomings allowed that problem to exist.").

58. *See, e.g.*, *id.*

59. *See id.*; USAM § 9-28.000 (1997).

60. *Yates Memorandum*, *supra* note 36, at 2.

61. Upjohn v. United States, 449 U.S. 383, 390–97 (1981) (describing circumstances in which the corporation's attorney-client privilege applies to communications between the corporation's attorney and its employees).

62. USAM § 9-11.151 (1997).

earlier in an investigation. All of these complications will slow down investigations, add to their cost, and likely limit the information that a company receives and therefore can share with the government. More fundamentally, it will also cause boards of directors, chief executive officers, and general counsels to contemplate whether "complete" cooperation, as the Justice Department intends to define it,[63] is worth the risk and the costs under these circumstances.

Internal investigations may be further delayed as prosecutors comply with the Yates Memorandum's directive not to "wait for the company to deliver the information about individual wrongdoers" and instead "proactively investigat[e] individuals . . . before, during, and after any corporate cooperation."[64] This also represents a change from past practice for many prosecutors. In our experience, one of the prior benefits of cooperation for corporations was the ability to conduct the internal investigation without substantial interference. Thus, while the Justice Department may have received frequent updates from corporate counsel, a company could generally expect that it would not be required to respond to extensive subpoenas, information requests, and requests for interviews of employees from the government, all of which naturally would impede the internal investigation.

If Justice Department attorneys are forced to begin investigating before receiving information from defense counsel, this new directive will likely prove counter-productive both for companies and for the Justice Department. For example, when corporate resources are divided between conducting an investigation and responding to government requests for information and interviews, it will take longer for cooperating companies to identify and produce relevant information to the government, slowing both the corporate and government investigations. This is particularly true at the start of an investigation when the government has less information to formulate targeted requests and is still trying to determine where the relevant information resides.

As companies try to respond to the Justice Department's suspicions in this new environment that executives are being "shielded," companies may take new affirmative steps to show how their high-ranking officers have not engaged in criminal activity. In a large case with significant exposure, for instance, a cautious company may want its counsel to review the e-mail or electronic communications of high-ranking officers even if no indication exists that those officers were involved in misconduct. The purpose of the review would be to show the government that the company is not protecting high-ranking officers and that the government should credit the absence of evidence as proof that those officers have not engaged in misconduct. Without addressing this suspicion, companies may worry that prosecutors will prolong investigations until they have assurance

63. *See Yates Memorandum*, *supra* note 36, at 3–4.
64. *See id.*

that high-level executives were not involved. That type of review might not have been considered necessary prior to the Yates Memorandum in cases in which defense counsel could reasonably assert that there was no lead or evidence (including from witnesses who would have reason to know or documents that would be expected to refer to senior executives) that suggested the involvement of high-level executives.

Under all of these circumstances, the all-or-nothing directive increases the risks of cooperation for companies without a significant increase in corresponding benefits. Those risks may increase further in the future. In February 2016, the Justice Department confirmed that the Fraud Section intends to require companies to sign a "Certification of Cooperation" in which companies must certify that they have "fully disclosed all information about individuals involved in wrongdoing before finalizing a settlement agreement."[65] The purpose of a certification, of course, is to allow for criminal prosecution of the signatory (including the company and any individual who signs the certification) if the Justice Department later determines that the certification was inaccurate. If the Fraud Section adopts this certification, it will be yet another way that the risks of cooperation have only increased under a strict interpretation of the Yates Memorandum.

2. Individuals in the Crosshairs of Investigations From the Start

> Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.[66]

The second major initiative of the Yates Memorandum directs prosecutors and civil enforcement attorneys to "focus[] on building cases against individual wrongdoers from the inception of an investigation . . . ."[67] The Yates Memorandum explains that this directive is intended to maximize the likelihood of discovering misconduct, to increase the chances that individuals with knowledge of misconduct will provide incriminating information about higher-ranking executives, and to provide the best opportunity for the government to bring criminal or civil actions against individuals.[68] Deputy Attorney General Yates added that "[o]ne of the things we have learned from experience is that it is extremely difficult to build a case against individuals, civil or criminal, unless we focus on individuals from the very beginning."[69]

Prior to the Yates Memorandum, in our experience, nearly every federal prosecutor would evaluate the potential exposure of identifiable individuals at the

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65. Stephen Dockery, *U.S. Justice Dept. to Require Certification of Cooperation in Investigations*, WALL ST. J. RISK & COMPLIANCE REPORT BLOG (Feb. 4, 2016 11:58 AM), http://blogs.wsj.com/riskandcompliance/2016/02/04/u-s-justice-dept-to-require-certification-of-cooperation-in-investigations/.

66. *Yates Memorandum*, *supra* note 36, at 4.

67. *Id.*

68. *Id.*

69. *Yates Speech*, *supra* note 34.

beginning of the investigation. If an anonymous letter accused a chief financial officer of manipulating the financial statements, for instance, any prosecutor would have considered how to build a case against that officer if the allegations turned out to be true. Nothing in the Yates Memorandum changes a prosecutor's approach in that situation.

The problem, however, is that there is often no identifiable group of employees likely to be culpable. This makes it difficult to formulate a credible plan to investigate specific individuals, particularly in complicated cases. The Yates Memorandum observes, "[i]n large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt."[70] If an investigation plan focuses on the wrong people because of a rush to judgment in a complicated case, the investigation will not be nearly as efficient or productive. Prosecutors traditionally promise to "follow the facts where[ver] they lead."[71] The Yates Memorandum asks prosecutors to make a different promise: to follow high-ranking individuals in the hopes that the incriminating facts will appear.

Even more importantly, prioritizing investigation plans against individuals may have a more subtle and pernicious influence on how prosecutors and regulators view a case from the outset. A significant danger exists that this directive will encourage some prosecutors and civil enforcement attorneys to prejudge potential subjects and targets at an earlier stage in the investigation. Once a prosecutor makes a judgment about an individual, it becomes much more difficult for a defense lawyer to change the prosecutor's mind even if the facts warrant it. Social scientists refer to the problem as confirmation bias,[72] which can lead to the wrong results and to grave consequences for defendants.[73]

The Justice Department has promised to use its full arsenal of investigative tools to increase the likelihood of convicting individuals in white-collar cases. For instance, Marshall Miller observed in September 2014 that "we are vigorously employing proactive investigative tools that may not have been used frequently

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70. *Yates Memorandum*, *supra* note 36, at 2.

71. *E.g.*, Eric Holder, Att'y Gen., Speech at the Operation Guard Shack Press Conference (Oct. 6, 2010), https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-operation-guard-shack-press-conference.

72. *See* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV 1587, 1602–06 (2006) (discussing how prosecutors can suffer from several cognitive biases, which can encourage them to conduct investigations in ways that confirm initial presumptions of guilt).

73. A.M. Stroud III, Opinion, *Lead Prosecutor Apologizes for Role in Sending Man to Death Row*, SHREVEPORT TIMES, March 20, 2015, http://www.shreveporttimes.com/story/opinion/readers/2015/03/20/lead-prosecutor-offers-apology-in-the-case-of-exonerated-death-row-inmate-glenn-ford/25049063 (expressing the regret at not investigating theories contrary to his theory of the case when prosecuting a defendant in a death penalty case where the evidence later showed that the defendant was innocent; faulting himself for being "arrogant" and "judgmental" as a prosecutor and for not seriously considering that "sufficient information may have been out there that could have led to a different conclusion").

enough in white-collar cases in past years: tools like wiretaps, body wires, physical surveillance, and border searches, to name just a few."[74] Deputy Attorney General Yates continued the theme when speaking about the difficulty of proving complex criminal cases against high-ranking company officials, observing that "[w]ithout an inside cooperating witness, preferably one identified early enough to wear a wire, investigators are left to reconstruct what happened based on a painstaking review of corporate documents, looking for a smoking gun that most financial criminals are far too savvy to leave behind."[75]

With this guidance from the Deputy Attorney General, and with the renewed emphasis on individual prosecutions, it is a safe bet that prosecutors and civil enforcement attorneys will increasingly use these methods as a way of streamlining investigations and persuading employees with valuable information to act as cooperators. The government's focus on wiretaps in white-collar cases, however, has yielded mixed results so far. On the one hand, wiretaps helped to secure convictions of Raj Rajaratnam and several other defendants in insider trading cases.[76] On the other hand, the government's efforts to use wiretapping in a foreign bribery sting case resulted in acquittals for two defendants, mistrials for another seven defendants, and voluntary dismissals by the government with respect to the remaining sixteen defendants.[77] Notwithstanding this setback, the attraction of wiretaps will not dissipate for the government, and it is not inconceivable that, in a specific case, a corporation could be asked by the government to facilitate wiretapping of one or more of its employees as part of its cooperation.[78]

Prosecutors and civil enforcement attorneys are also likely to be quicker to assert theories of legal violations that are easier to prove than substantive crimes, such as charges of false statements and obstruction of justice. The Justice Department has frequently employed this technique in high profile cases.[79] Under

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74. *Miller Speech*, *supra* note 31.

75. *Yates Speech*, *supra* note 34.

76. *See* United States v. Rajaratnam, 719 F.3d 139, 160 (2d Cir. 2013) (affirming conviction of high profile defendant in insider trading trial where the conviction was obtained in part through use of wiretaps). The same wiretapping led to the conviction of two of Rajaratnam's colleagues, Danielle Chiesi and Rajat Gupta, and a guilty plea by a third, Anil Kumar. United States v. Rajaratnam, No. 09 CR 1184 RJH, 2010 WL 4867402 (S.D.N.Y. Nov. 24, 2010); United States v. Gupta, 747 F.3d 111, 122–29 (2d Cir. 2014) *cert. denied*, 135 S. Ct. 1841 (2015). Wiretaps have been used to obtain other white-collar convictions. *See, e.g.*, United States v. Durham, 766 F.3d 672, 688 (7th Cir. 2014) *cert. denied*, 136 S. Ct. 92 (2015) (affirming convictions on several counts that were based on evidence from wire tap in Ponzi scheme case).

77. *See* Government's Motion to Dismiss Pursuant to Fed. R. Crim. P. 48(a), United States v. Goncalves, No. 09-335 (RJL) (D.D.C. Feb. 21, 2012) (moving to dismiss, with prejudice, the superseding indictment and all underlying indictments in a FCPA sting case based on its conclusion that "continued prosecution of this case is not warranted under the circumstances").

78. However, it is more likely that the government would want to work directly with an employee who is cooperating rather than through corporate counsel.

79. *See, e.g.*, Judgment of Acquittal, United States v. Clemens, No. 1:10-cr-223 (D.D.C. June 27, 2012) (acquitting a former major league pitcher of charges of false statements); United States v. Libby, 498 F. Supp. 2d 1, 2 (D.D.C. 2007) (discussing conviction of top vice presidential aide of obstruction of justice, perjury, and false

the new directive, prosecutors may view threats of false statement charges as the most expeditious way to persuade employees to cooperate quickly rather than leave investigators with a mountain of documents to review in the hopes of piecing together some form of criminal activity.[80]

In the past, to gain convictions of individuals, prosecutors have used innovative theories to expand the scope of criminal statutes. For instance, in a well-known 2004 case, prosecutors in the Eastern District of New York obtained convictions for conspiracy to obstruct justice because the defendants made false statements not to government agents, but rather to corporate counsel conducting an internal investigation.[81] The theory of the charges was that these executives had lied to corporate counsel while knowing that corporate counsel would convey the false statements to federal prosecutors conducting an investigation and therefore would obstruct the government's investigation. This innovative argument has not been used again, but it exemplifies the kind of expansive theory that might reemerge in the wake of the Yates Memorandum.

The Yates Memorandum raises the stakes for attorneys representing individuals and considering whether to make a proffer to the government or to make their client available for an interview. Suppose the government has determined at an early stage that the defense attorney's client would be in a position to provide potentially incriminating evidence, including by wearing a wire. In order to gain leverage and encourage the client to wear a wire, the government may scrutinize the client's statements in a proffer or an interview even more closely in the hopes of finding a false statement that can be used as a basis for prosecution.

In short, although it appears relatively innocuous on its face, this directive could significantly change the dynamics of a typical government investigation. The directive encourages the government to be more aggressive against individuals from the outset of an investigation, to deploy more intrusive law enforcement tools, and to bring more false statement and obstruction charges. At the same time, the directive may unintentionally encourage prosecutors to prejudge targets of the investigation and to pursue individuals even before the facts lead them there.

3. Corporate Investigations Not Resolved Without a Clear Plan to Prosecute Individuals

> Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.[82]

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statements to federal investigators); United States v. Stewart, 433 F.3d 273, 279–80 (2d Cir. 2006) (affirming conviction of prominent businesswoman and her broker for conspiracy, concealing material information from and making false statements to government officials, and obstructing an agency proceeding).

80. *Yates Speech*, *supra* note 34.

81. *See, e.g.,* Information at 8–10, 13–14, United States v. Rivard, No. 04-329 (ILG) (E.D.N.Y. Apr. 8, 2004).

82. *Yates Memorandum*, *supra* note 36, at 6.

The third most important directive may appear to be only a bureaucratic hassle for line prosecutors with no real consequence for anyone else, but that would be wrong. The new directive will likely cause some people to be charged with crimes when they otherwise would have avoided prosecution. Paradoxically, the same directive may also be responsible for smaller corporate settlements. This directive states that:

> [i]f the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution or corporate authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigation plan to bring the matter to a resolution prior to the end of any statute of limitations period.[83]
>
> If a decision is made at the conclusion of the investigation not to bring civil claims or criminal charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General who handled the investigation, or their designees.[84]

Tolling agreements are expected to be a "rare exception," and all efforts are to be made to resolve charges against individuals within the statute of limitations.[85]

This directive puts the burden directly on line prosecutors to justify why they have not recommended prosecutions of individuals in connection with the resolution of a criminal investigation of a corporation. As a result, the decisions of line prosecutors may become colored by the worry of being perceived as too lenient if they recommend against charging individuals in connection with large corporate settlements and the Assistant Attorney General or the United States Attorney subsequently disagrees.[86] In some close cases, this worry, and the new bureaucratic hassle of having to justify a declination, will likely be the reason that an individual is charged when he otherwise would have been left alone.

This directive also may have the unexpected effect of reducing the size of settlements with corporations through the imposition of new time limits on prosecutors. By prioritizing the prosecution of individuals and attempting to wrap up settlements with corporations within the relevant statute of limitations,[87] prosecutors will likely have less patience for lengthy internal investigations, thus limiting the scope of those investigations. The size of a criminal settlement with a

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83. *Id.*

84. *Id.*

85. *Id.*

86. *See, e.g.*, Rakoff, *supra* note 20 (rejecting the notion that prosecutors shied away from prosecuting fraud at large financial institutions because "[i]n my experience, most federal prosecutors, at every level, are seeking to make a name for themselves, and the best way to do that is by prosecuting some high-level person.").

87. *See, e.g.*, 18 U.S.C. § 3282 (2012) (general five-year statute of limitations for non-capital offenses).

corporation is usually predicated on the amount of improper gain. If internal investigations begin to take a narrower scope, it will likely have the unexpected consequence of lowering some settlement values because more narrowly-tailored or shortened investigations are likely to discover fewer improper transactions and therefore less improper gain. The government, under the Yates Memorandum, may be willing to make this tradeoff in exchange for a greater opportunity to prosecute more individuals.

C. Lingering Questions After the Yates Memorandum

Even aside from the specific issues with individual directives, more fundamental questions must be answered about the Yates Memorandum: (i) whether there is any empirical basis to believe that the Yates Memorandum will identify white-collar crimes that are currently not being prosecuted; (ii) whether the Yates Memorandum will result in the wrong kinds of cases being prosecuted; and (iii) whether the new policy will last into the next administration and beyond.

1. Is There an Empirical Basis for the Justice Department's Belief That Individuals Are Avoiding Prosecution and Getting Away with Committing Crimes?

The Yates Memorandum assumes that individuals are committing criminal acts and not being prosecuted.[88] The Memorandum will result in significant public benefits, however, only if a demonstrable number of crimes are being committed by individuals who are not currently prosecuted, but who will be prosecuted under this new policy. Apart from anecdotal evidence and general references to its own experience, the Justice Department has not identified any empirical reason to believe that there are important and significant criminal cases against individuals that have not been prosecuted.[89] Indeed, the Justice Department's own vigorous defense of its prior prosecution decisions is not consistent with the idea that individuals have gotten away with significant white-collar crimes.[90] Even the Yates Memorandum concluded that it can be difficult for prosecutors to determine "the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs,"[91] and without further evidence, that description is also consistent with the innocence of those high-level executives.

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88. *See Yates Speech*, *supra* note 34 (expressing the concern that "most financial criminals are far too savvy to leave behind" the proverbial "smoking gun").

89. *See, e.g., id.* (discussing how a working group was formed to determine how to "overcome . . . challenges and maximize . . . efforts to make the strongest possible cases against individuals in corporate cases . . . [in order to] adapt [the Justice Department's practice] to evolving demands.").

90. *See, e.g.*, *Oversight of DOJ Hearing*, *supra* note 17 ("I think we've been . . . appropriately aggressive. These are not easy cases necessarily to make . . . [T]he people in our criminal division . . . brought cases where we think we could have brought them.") (testimony of Att'y Gen. Eric Holder).

91. *Yates Memorandum*, *supra* note 36 at 2.

The underlying problem is that it is difficult to quantify the number of white-collar crimes that have been committed and not prosecuted. For many criminal acts, such as murders and bank robberies, there is usually no reasonable dispute about whether crimes have occurred even if they cannot be solved. For other types of crimes, even without direct proof, the existence of crimes can be inferred from the surrounding circumstances. For instance, an increase in illegal narcotic distributions can often be inferred from hospital admissions. The existence of a white-collar crime, by contrast, cannot be declared with the same assurance because it is not necessarily clear whether individuals had criminal intent in business deals that have gone badly. Only time will tell if the Justice Department's assumption is correct. If the Yates Memorandum over-estimated the number of undetected white-collar crimes, the new policy will likely yield disappointing results.

2. Will the Yates Memorandum Result in the Wrong Types of Cases Being Brought?

The Yates Memorandum is intended to increase the pressure on line prosecutors and civil enforcement attorneys to bring more prosecutions and civil actions against individuals. And there is every reason to believe that prosecutors and civil enforcement attorneys within the Justice Department will give their best efforts to comply with the Yates Memorandum. If the Yates Memorandum is right about the number of undetected white-collar crimes, there will be more prosecutions of individuals, and the Yates Memorandum will achieve its objectives.

But what if the assumptions of the Yates Memorandum turn out to be wrong and prosecutors are nonetheless struggling to increase the number of prosecutions of individuals? In that scenario, the Yates Memorandum may apply exactly the wrong sort of pressure on prosecutors and cause them to pursue marginal cases that they otherwise never would have charged. In doing so, the Yates Memorandum may encourage prosecutors to exercise their prosecutorial discretion much differently, causing them to adopt more aggressive views of the facts and urge for broader statutory interpretations than they would have advocated otherwise.

A significant increase in the number of marginal or wrongful prosecutions would be a disaster for both the Justice Department and the individuals who are charged. It would lead to more reversals and bad precedent that could inhibit the Department's ability to prosecute more important and worthy cases in the future. It might lead Justice Department attorneys to credit witnesses that they otherwise might not have credited, to construct circumstantial cases that they earlier would not have found plausible, or to give favorable plea agreements to defendants who otherwise might not have earned prosecutors' trust. Most importantly for defendants, the Justice Department might obtain convictions that it later regrets. Since the Yates Memorandum is intended to apply pressure to line prosecutors, it will be important for the Justice Department to ensure not only an increase in individual

prosecutions, but also that the right kinds of cases are being prosecuted and that the Justice Department remains true to its mission.[92] A proposed solution to this problem is more fully addressed at the conclusion of this Article.

3. Will the Yates Memorandum Be Strictly Enforced?

This Article has explored the potential consequences of the Yates Memorandum as though it will be applied as strictly as it has been written. But there are a number of reasons to believe that the Yates Memorandum will not be strictly enforced. First, not every Department of Justice initiative succeeds or becomes a permanent part of the enforcement landscape. For instance, in 2002, Attorney General John Ashcroft announced that the Justice Department would conduct real-time investigations.[93] The concept of real-time enforcement, while appealing on its face, proved much more difficult to implement on a uniform basis, particularly in complex investigations.[94] The initiative of real-time enforcement became even more impractical when the events of September 11, 2001 prompted the FBI to shift many of its agents away from white-collar criminal investigations and assign them to counterterrorism duties. The Justice Department's budget was also frozen or limited for many years. The Yates Memorandum implicitly acknowledged the Justice Department's retreat from real-time enforcement, emphasizing the importance of bringing prosecutions within the statute of limitations.[95]

While the Yates Memorandum has the potential to change the enforcement landscape, it soon will be evaluated by new leadership in the Justice Department, which will have to make its own judgments about the policy choices of the Yates Memorandum. Because the Yates Memorandum was issued just over a year before the new presidential elections and the installation of a new administration, it will not have the time to become well-settled policy before it is evaluated by new leadership. Moreover, given the time constraints, there will not be a large number of success stories that can be claimed by the Yates Memorandum before it is re-evaluated.

It would not be a surprise if new Justice Department leadership modified the Yates Memorandum. In an unusual development, even recently departed Justice

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92. *About DOJ,* DEP'T OF JUSTICE (last visited Feb. 24, 2016), http://www.justice.gov/about (stating that the DOJ's mission is "[t]o enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.").

93. John Ashcroft, Att'y Gen., Prepared Remarks at the Corporate Fraud/Responsibility Conference (Sept. 27, 2002), http://www.justice.gov/archive/ag/speeches/2002/092702agremarkscorporatefraudconference.htm. Ashcroft sought to launch and complete investigations quickly in order to resolve them before criminal activity caused broad financial damage. *Id.*

94. *See, e.g.,* Paul Pelletier, Opinion, *The Foreign Bribery Sinkhole at Justice*, WALL ST. J., April 20, 2015, http://www.wsj.com/articles/the-foreign-bribery-sinkhole-at-justice-1429572436 (stating that Justice Department investigations, including FCPA investigations, "have been drawn out interminably").

95. *Yates Memorandum*, *supra* note 36, at 6.

Department officials have already publicly criticized the Memorandum. Former Deputy Attorney General Jim Cole publicly stated that he recommended against the Yates Memorandum. Mr. Cole predicted that "as the memo is put into practice . . . this all-or-nothing approach . . . will prove to be impractical," that companies will not share information with even their own lawyers, and that the Justice Department will have to retreat over time from the Memorandum.[96] Mr. Cole has not been the only former Department official expressing dissatisfaction with the Yates Memorandum.[97]

Even if a subsequent administration agrees with the spirit of the Yates Memorandum, there are practical reasons why a future administration may choose to de-emphasize it. For instance, it may decide that the Yates Memorandum does not represent the best allocation of limited resources, or that the Memorandum failed to produce results. A future administration may be concerned that, if DOJ spends a disproportionate amount of time and resources on individual prosecutions, it may not influence the conduct of as many corporations or that it may not collect as many large-scale judgments, which could have concrete effects on the Justice Department's ability to compete for funding from Congress.[98]

Even if all of that turns out to be true, however, it would be wrong to assume that the Yates Memorandum will not have a significant impact on the enforcement of federal criminal law. The core of the Memorandum—emphasizing the importance of prosecutions of individuals as the best deterrent for corporate misconduct—is consistent with the core beliefs of the vast majority of federal prosecutors. As evidenced by the public statements of senior Justice Department officials throughout the past year, they are uncomfortable with the perceived current imbalance between high-profile corporate prosecutions and the relative infrequency of comparable high-profile prosecutions of corporate executives. Thus, regardless of whether some of its directives are eventually modified or withdrawn, the Yates

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96. Katelyn Polantz, *DOJ's 'Yates Memo' Goes Too Far, Former Deputy AG Says*, NAT'L L.J. (November 20, 2015), http://www.nationallawjournal.com/id=1202743031700/DOJs-Yates-Memo-Goes-Too-Far-Former-Deputy-AG-Says.

97. *See* Evan Weinberger, *Ex-Prosecutor Says Yates Memo Knocks Post-Crisis Cases*, LAW360 (November 17, 2015), http://www.law360.com/articles/728462/ex-prosecutor-says-yates-memo-knocks-post-crisis-cases (quoting a former acting head of DOJ's Criminal Division as saying "I was surprised, a little, that there was even an implicit acknowledgment that there weren't sufficient prosecutions brought against individuals, which, in my view, wasn't necessary to say").

98. The Justice Department often emphasizes in press releases that it collects more money from corporate fines than it receives from Congress. Dep't of Justice, *supra* note 10 ("Collections in FY 2015 represent more than seven and a half times the approximately $2.93 billion of the Justice Department's combined appropriations for the 94 U.S. Attorneys' offices and the main litigating divisions in that same period."); Press Release, Dep't of Justice, Justice Department Collects More Than $24 Billion in Civil and Criminal Cases in Fiscal Year 2014 (Nov. 19, 2014), http://www.justice.gov/opa/pr/justice-department-collects-more-24-billion-civil-and-criminal-cases-fiscal-year-2014 ("The more than $24 billion in collections in FY 2014 represents nearly eight and a half times the appropriated $2.91 billion budget for the 94 U.S. Attorneys' offices and the main litigating divisions of the Justice Department combined in that same period.").

Memorandum will likely spur increased efforts by federal prosecutors to charge senior corporate executives.

II. A DIFFERENT CONCERN ARISES FOR THE COURTS: OVER-CRIMINALIZATION

While the Justice Department and some federal district judges have focused on increasing the number of prosecutions of individuals, the Supreme Court has been focusing on a different problem: over-criminalization. In contrast to the Yates Memorandum, the Supreme Court has not made any bold or permanent changes in its precedent, but it has begun to embrace narrower interpretations of broad criminal statutes. Although the Court has articulated slightly different principles in each case, concerns about over-criminalization have been at the heart of each case. As a result, at the same time that the Yates Memorandum is encouraging prosecutors to be more aggressive in pursuing individuals, the Justice Department is losing cases relying on broadly-worded statutes that it might have won twenty years ago.

This Part considers the Supreme Court's new emphasis on adopting a realistic view of Congress's intent. It describes how the Supreme Court's methods of statutory interpretation have evolved in criminal cases over time and the shift of emphasis that first became apparent in *Skilling v. United States*.[99] Finally, this Part discusses how lower courts have been influenced by the Supreme Court's concerns about over-criminalization.

A. The Supreme Court's Traditional Approaches to the Interpretation of Criminal Statutes

Prior to its decision in *Skilling*,[100] the Supreme Court historically used one of two approaches in evaluating the scope of criminal statutes. In both approaches, the Supreme Court determined the breadth of federal criminal statutes by analyzing Congress's intent. In both approaches, the Supreme Court used the same tools of statutory construction. The results for each approach, however, varied dramatically: one led to a narrow view of the applicability of criminal statutes, and the other led to a much broader view.

Under the narrower approach, the Supreme Court begins with the presumption that criminal statutes are not to be construed broadly and has

> traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, and out of concern that a fair warning should be given to the world in language that the

99. 561 U.S. 358 (2010).
100. *Id.*

> common world will understand, of what the law intends to do if a certain line is passed.[101]

That restraint is "particularly appropriate . . . where the act underlying the conviction . . . is by itself innocuous."[102] For cases where the "criminal statute [ ]does not explicitly reach the conduct in question," the Court expresses "reluctan[ce] to base an expansive reading on inferences drawn from subjective and variable 'understandings.'"[103]

In these cases, after evaluating the consequences of a broad interpretation of the criminal statutes at issue, the Supreme Court reasons that Congress must not have intended those consequences and therefore adopts the narrower interpretation.[104] Although the Court considers the plain language of the statute, the plain language does not receive controlling weight as indicative of Congress's intent.[105] A number of cases illustrate this narrowing approach to the construction of criminal statutes.[106]

Yet, in other cases, the Supreme Court has used the same tools of statutory construction to reach the opposite result, reading criminal statutes broadly to encompass a larger range of criminal conduct.[107] Under this broader approach, the Supreme Court begins with the presumption that Congress means what it says in criminal statutes. The Supreme Court therefore presumes that Congress intended for broad interpretations of a criminal statute when it adopted broad language in such a statute. In these cases, if the plain language literally applies to the conduct at

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101. Arthur Andersen v. United States, 544 U.S. 696, 703 (2005) (citations omitted) (quoting United States v. Aguilar, 515 U.S. 593, 600 (1995)).

102. *Id.*

103. Williams v. United States, 458 U.S. 279, 286 (1982).

104. *See, e.g.*, Dowling v. United States, 473 U.S. 207, 228 (1985) (rejecting a broad interpretation of a statute because that interpretation "would support its extension to significant bodies of law that Congress gave no indication it intended to touch.").

105. *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994) (acknowledging that the "most grammatical reading of the statute" favored the broader interpretation, but finding that the narrower interpretation more accurately captured Congress's intent and resulted in fewer absurd consequences).

106. For a detailed explanation of this approach, *see Williams*, 458 U.S. 279. *See also X-Citement Video, Inc*., 513 U.S. at 70–78 (1994) (interpreting scienter requirement to apply to both elements of the statute and overturning convictions); *Dowling*, 473 U.S. at 228 (declining to apply the National Stolen Property Act to the interstate transportation of bootleg records); Staples v. United States, 511 U.S. 600, 619 (1994) (requiring the prosecution to prove that defendant knew his weapon had characteristics subjecting it to the National Firearms Act).

107. For a detailed example of the Supreme Court's rationale for broadly interpreting criminal statutes in certain situations, *see* Brogan v. United States, 522 U.S. 398 (1998); *see also* Fischer v. United States, 529 U.S. 667, 679–80 (2000) (holding that 18 U.S.C. § 666 applied to attempts to defraud a health care organization participating in the Medicare program because that organization received "benefits" from the federal government, even though the primary beneficiaries of the payments were elderly and disabled individuals covered by Medicare); United States v. Wells, 519 U.S. 482, 499 (1997) (holding that Congress did not intend for materiality to be an essential element of a prosecution under 18 U.S.C. § 1014); Smith v. United States, 508 U.S. 223, 241 (1993) (finding that that a defendant "used" a gun in a narcotics offense when the defendant traded the gun to an undercover officer in exchange for cocaine); Moskal v. United States, 498 U.S. 103, 106 (1990) (holding that "falsely made" securities include legitimately issued certificates that contain false information).

issue, the Supreme Court reasons that Congress must have intended the statute to apply to that conduct.[108] In addition to relying on supporting or inconclusive legislative history to uphold the broader interpretation, the Supreme Court often responds to concerns about over-criminalization by reasoning that if Congress intended the statute to encompass less conduct, it would have included limiting language in the statute and that it is not appropriate for the Court to rewrite a statute.[109]

B. The Supreme Court's Concern Builds Over Time

Beginning with *Skilling v. United States*,[110] the Supreme Court slowly shifted away from a presumption that Congress intended for broadly-drafted statutes to be interpreted broadly. The shift has been subtle but significant. During this transition, the Court has expressed a variety of concerns about broad interpretations offered by the Justice Department, including a need to be realistic in ascertaining Congress's intent,[111] the lack of historical precedent for overly broad interpretations,[112] and problems of federalism caused by increasing federal jurisdiction over traditional state crimes.[113] A consistent theme in the decisions has been the danger of ensnaring innocent people with overly broad interpretations of these statutes.[114]

1. Skilling v. United States

The Supreme Court's concerns first appeared in the 2010 appeal by former Enron executive Jeffrey Skilling.[115] He had been convicted of, among other things, defrauding Enron of "the intangible right of [his] honest services" in violation of 18 U.S.C. §§ 1343 and 1346.[116] The phrase "intangible right of honest services"

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108. *See, e.g.*, *Fischer*, 529 U.S. at 678 (finding "Congress's expansive, unambiguous intent" from the plain language of the statute); *Wells*, 519 U.S. at 490 (1997) (adopting a broader interpretation of 18 U.S.C. § 1014 where "a natural reading of the full text" suggested that Congress did not intend for materiality to be an element of the offense); United States v. Rodgers, 466 U.S. 475, 480 (1984) (declining to adopt a "narrow, technical definition" of a statutory term when it "clashes strongly with the sweeping, everyday language on either side of the term"); United States v. Yermian, 468 U.S. 63, 69 (1984) ("[I]n this case, the statutory language makes clear that Congress did not intend the terms 'knowingly and willfully' to establish the standard of culpability for the jurisdictional element of § 1001.").

109. *Brogan*, 522 U.S. at 408 ("Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread."); *Yermian*, 468 U.S. at 75 ("In the unlikely event that § 1001 could be the basis for imposing an unduly harsh result on those who intentionally make false statements to the Federal Government, it is for Congress and not this Court to amend the criminal statute.").

110. 561 U.S. 358 (2010).

111. *See, e.g.*, Bond v. United States, 134 S. Ct. 2077, 2088 (2014).

112. *See, e.g.*, *Skilling*, 561 U.S. at 404–09.

113. *See, e.g.*, *Bond*, 134 S. Ct. at 2088–93.

114. *See, e.g.*, *Yates*, 135 S. Ct. at 1100 (Kagan, J., dissenting).

115. *Skilling*, 561 U.S. 358 (2010).

116. *Id.* at 369.

was (and still is) not defined in the statute.[117] Prosecutors argued that Mr. Skilling violated the "honest services" fraud statute when he misrepresented Enron's financial condition so that he could earn more compensation from Enron.[118] The government's interpretation easily could have been upheld as a literal reading of the honest services statute, which did not distinguish between dishonest services caused by outside forces (such as bribery and kickbacks) and dishonest services caused by internal motivations (such as Mr. Skilling's desire to earn additional compensation).[119]

However, the Supreme Court rejected the Justice Department's broad interpretation, ruling that Congress intended for the statute to cover only employees who defrauded their employers of honest services through bribery or kickbacks.[120] After examining the history of the statute, the Court concluded that Congress intended to permit prosecution of honest services cases involving bribery or corruption but that it had not clearly indicated that it intended for the statute to be more expansive.[121] Moreover, the Court reasoned that the government's interpretation, which would cover anyone engaged in the "amorphous category" of "undisclosed self-dealing," would raise due process concerns.[122] Broad language in a criminal statute was not enough to prove Congress's intent.[123]

2. Bond v. United States

In 2014, the Supreme Court returned to the same subject and rejected another broad interpretation by federal prosecutors. Federal prosecutors had convicted Carol Bond, a woman who had been involved in a domestic dispute with her husband's mistress, for possessing and using chemical weapons.[124] Prosecutors argued that Ms. Bond possessed and used chemical weapons when she sprinkled a powder on the mistress's belongings and caused the mistress to suffer a mild thumb burn easily treated by water.[125] Again, because the chemical weapons statute was drafted so broadly and because her conduct met the literal language of the statute,[126] Ms. Bond's conviction easily could have been upheld as a literal

117. *See* 18 U.S.C. § 1346 (2012).

118. *Skilling*, 561 U.S. at 369.

119. *See* 18 U.S.C. § 1346.

120. *Skilling*, 561 U.S. at 410 (finding that a "reasonable limiting construction of § 1346 must exclude this amorphous category of cases" involving failure to disclose a conflict of interest or self-dealing).

121. *Id.* at 408–09.

122. *Id.* at 409–10.

123. *See id.* at 404–11.

124. Bond v. United States, 134 S. Ct. 2077, 2083 (2014).

125. *Id.*

126. The act "forbids any person knowingly 'to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon.'" *Id.* at 2085 (quoting 18 U.S.C. § 229(a)(1) (2012)). Chemical weapon, in turn, is defined to include a toxic chemical —— "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or

application of the statute.[127]

The Supreme Court overturned Ms. Bond's conviction, warning about the dangers of a boundless reading of the law and highlighting the atrocities of chemical warfare that motivated Congress to pass the law.[128] The Court emphasized the importance of adopting a realistic view of Congress's intent in enacting a statute, commenting that "[p]art of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions."[129] The unexpressed presumptions are intended to limit the reach of otherwise broad criminal statutes.[130] The Court again focused on the practical problems with the government's interpretation and found that prosecutors' interpretation of the chemical weapons statute "would sweep in everything from the detergent under the kitchen sink to the stain remover in the laundry room."[131] In doing so, the Supreme Court emphasized, as it did in *Skilling*,[132] that the broadest reading of a criminal statute without any limiting language was not the only possible reading of the statute and, in this case, was not the proper reading of the statute.[133]

3. Yates v. United States

In 2015, the Supreme Court took up the issue again in a case involving a fisherman who failed to preserve fish in a federal investigation.[134] Federal prosecutors sought to uphold an obstruction of justice charge against the captain of a fishing boat, John Yates. A state inspector had boarded Mr. Yates' boat, concluded that some of the fish on the boat were undersized and unlawfully caught, and therefore ordered Mr. Yates to preserve the fish until he returned to port.[135] Apparently unfazed by the order, Mr. Yates told a crewmember to throw the

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permanent harm to humans or animals." *Id.* (quoting 18 U.S.C. § 229F(8)(A) (2012) (internal quotation marks omitted)).

127. Indeed, Justice Scalia, writing for two other Justices concurring in the judgment, found that the plain language of the statute covered the conduct at issue, and he called the majority opinion "result-driven antitextualism," which performed "gruesome surgery" on the statute. *Id.* at 2095, 2097 (Scalia, J., concurring). However, these three concurring Justices would have invalidated the conviction because the statute as applied was unconstitutional. *Id.* at 2098 (Scalia, J., concurring).

128. *Id.* at 2083.

129. *Id.* (quoting EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)). In Ms. Bond's case, the unexpressed presumptions included that (1) criminal statutes derived from common law presumptively contain a mens rea element; (2) absent a clear statement, federal statutes do not apply outside the United States; and (3) it is incumbent upon federal courts to be certain of Congress's intent before finding that federal law overrides the usual constitutional balance of federal and state powers. *Id.* at 2088–89. This last presumption proved decisive in Ms. Bond's case. *Id.* at 2090.

130. *See id*.

131. *Id.* at 2091.

132. Skilling v. United States, 561 U.S. 358, 404–11 (2010).

133. *Bond*, 134 S. Ct. at 2090–94.

134. Yates v. United States, 135 S. Ct. 1074, 1079 (2015) (plurality opinion).

135. *Id.* at 1080.

undersized fish into the sea.[136] The Justice Department argued that the obstruction charge should stand because the statute applied to destruction of any "tangible objects"—including discarded fish.[137] Just as it had done in *Skilling*[138] and *Bond*,[139] the government's theory was primarily based on the traditional argument that the plain text of the statute controls and that Congress must have had a broad intent when it used broad language when enacting this offense.[140]

In a plurality opinion, the Supreme Court disagreed again, emphasizing the importance of context in interpreting criminal statutes.[141] Congress had passed this obstruction statute as part of the Sarbanes-Oxley Act, where the concern was the destruction of financial records, not fish.[142] The plurality opinion relied on a number of interpretive guides in order to conclude that the obstruction statute should be construed to apply only to financial fraud and suggested that Congress had the burden of revising the statute if it wanted a broader scope.[143] Justice Alito, who concurred in judgment, relied on a narrower set of tools of statutory construction to reach the same result.[144]

This was the third case in which the Supreme Court placed greater weight on context than the plain language of the statute, and this prompted a dissent by four justices. The dissent, written by Justice Kagan, argued that the real issue motivating the decision was "overcriminalization and excessive punishment in the U.S. Code."[145] The dissent agreed that this obstruction statute was "a bad law" that was "too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion."[146] More broadly, the dissent viewed the statute as "an emblem of a deeper pathology in the federal criminal code," but contended that judges should express their disagreement in lectures, law review articles, and in dicta, and not by overturning criminal convictions obtained through overly broad but unambiguous statutes.[147]

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136. *Id.*

137. *Id.*

138. Skilling v. United States, 561 U.S. 358, 369 (2010).

139. Bond v. United States, 134 S. Ct. 2077, 2083 (2014).

140. *See Yates*, 135 S. Ct. at 1080.

141. *Id.* at 1081 ("Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words.").

142. *Id.*

143. *Id.* at 1083–88 (relying on a series of tools of statutory construction concerning the placement of words in the statute, the placement of this provision against other broader provisions, the presumption against rendering other statutory provisions superfluous, the presumption against attributing broad meanings to a general word at the end of a long list of specific words, and the rule of lenity).

144. *Id.* at 1089–90 (relying on tools of statutory construction concerning use of a list in a statute and the statute's title) (Alito, J., concurring).

145. *Id.* at 1101 (Kagan, J., dissenting).

146. *Id.*

147. *Id*.

B. The Lower Courts Follow Suit

Following the lead of the Supreme Court, lower courts have also grown increasingly skeptical of broad statutory interpretations and are increasingly ruling against the Justice Department.[148] Even when the opinions do not expressly refer to concerns about over-criminalization, it is evident from the courts' opinions that this issue is driving many of the rulings unfavorable to the government.[149]

1. The Second Circuit's Decision in United States v. Newman

One of the most high profile recent losses for the government occurred in the landmark *Newman* insider trading case in the Southern District of New York.[150] The government charged two portfolio managers with insider trading even though they were several steps removed from the insiders.[151] The government alleged that a group of analysts at hedge funds and investment firms had obtained insider information from employees at publicly traded technology companies and then passed that information to the two portfolio managers.[152] The portfolio managers then made $72 million in profits from their subsequent trades.[153] The prosecutors argued that, in order to obtain a conviction, they did not need to prove that the portfolio managers knew the corporate insiders received a personal benefit in exchange for breaching their fiduciary duties.[154]

In reversing the convictions, the Second Circuit disagreed and found that "in order to sustain a conviction for insider trading, the Government must prove beyond a reasonable doubt that the tippee knew that an insider disclosed confidential information and that he did so in exchange for a personal benefit."[155] In doing so, the Second Circuit rejected the government's attempts to invoke dicta from prior decisions to justify its broad interpretation of the securities laws.[156] In a criticism humming with concerns of over-criminalization, the Second Circuit observed that "[t]he Government's overreliance on our prior dicta merely highlights the doctrinal novelty of its recent insider trading prosecutions, which are increasingly targeted at remote tippees many levels removed from corporate insiders."[157] The Second Circuit did not preclude the government from pursuing

148. *See, e.g.*, United States v. Newman, 773 F.3d 438, 447–48 (2d Cir. 2014).
149. *See, e.g.*, *id.* at 448.
150. United States v. Newman, 773 F.3d 438 (2d Cir. 2014).
151. *Id.* at 442–43.
152. *Id.* at 442.
153. *Id.* at 443.
154. *Id.* at 447.
155. *Id.* at 442 (emphasis omitted). The Second Circuit also concluded, as an evidentiary matter, that no reasonable jury could have found that (i) the insiders received a personal benefit in exchange for disclosing confidential information; or (ii) the portfolio managers knew that they were trading on information obtained from insiders in violation of their fiduciary duties. *Id.*
156. *Id.* at 447–48.
157. *Id.* at 448.

remote tippees, but the decision has the effect of making these types of prosecutions significantly harder to bring.

2. The Ninth Circuit's Decision in United States v. Barry Bonds

In another high-profile setback for the Justice Department, the Ninth Circuit Court of Appeals reversed the obstruction of justice conviction of former baseball player Barry Bonds.[158] Mr. Bonds had been questioned before a grand jury about his use of steroids.[159] Although he was charged with four counts of making false statements and obstruction of justice, he was only convicted of the obstruction charge based on one statement that he made to the grand jury.[160] When the government had asked if his trainer gave him "anything" that required a syringe to inject, Mr. Bonds responded with a nonresponsive answer about how he did not discuss baseball with his trainer and how only one doctor touched him.[161] The jury found this response to be an obstruction of justice.[162]

After a panel on the Ninth Circuit affirmed the conviction,[163] the full Ninth Circuit reversed the conviction, worrying about the broad interpretation that had been given to the obstruction of justice statute.[164] That statute imposed criminal penalties on anyone who "corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice . . . ."[165] The per curiam Ninth Circuit opinion recognized how the broad language of the statute could be applied to many everyday activities, including litigation.[166] For instance, it observed that "[s]tretched to its limits, section 1503 poses a significant hazard to everyone involved in our system of justice, because so much of the adversary process called for could be construed as obstruction."[167] The Ninth Circuit resolved this problem by imposing a materiality requirement in Section 1503 and concluded that Mr. Bonds' testimony did not have the capacity to divert the government from its investigation or influence the grand jury's decision to indict anyone.[168] Therefore, based entirely on concerns about over-criminalization, the Ninth Circuit found insufficient evidence to sustain the conviction.[169]

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158. United States v. Bonds, 784 F.3d 582 (9th Cir. 2015) (per curiam).
159. *Id.* at 583.
160. *Id.* at 582–83.
161. *Id.* at 583.
162. *Id.*
163. United States v. Bonds, 730 F.3d 890 (9th Cir. 2013).
164. *Bonds*, 784 F.3d at 586.
165. 18 U.S.C. § 1503(a) (2012).
166. *Bonds*, 784 F.3d at 584.
167. *Id.*
168. *Id.* at 585.
169. *Id.* at 586.

3. The Sixth Circuit's Decision in United States v. Toviave

In a much lower profile loss for the Justice Department, in the summer of 2014, the Sixth Circuit set aside an immigrant's conviction under the forced labor statute and expressed concerns that prosecutors had interpreted the statute too broadly.[170] The defendant, Jean Toviave, was the guardian of four children and forced the children to complete household chores.[171] Mr. Toviave also physically abused the children.[172]

The Sixth Circuit found Mr. Toviave's behavior to be reprehensible and a violation of state child abuse laws, but rejected the government's interpretation that forcing children to perform chores amounted to illegal forced labor under the federal forced labor statute.[173] The Sixth Circuit expressed concern that "[t]he government's interpretation of 18 U.S.C. § 1589 would make a federal crime of the exercise of . . . innocuous, widely accepted parental rights" such as forcing a child to take out the garbage or make his bed.[174] Following the logic of the *Bond* case, the Sixth Circuit also cited the problem of federalization of state law and the need to adopt a realistic view of Congress's intent.[175] The Sixth Circuit concluded that "[t]he line between required chores and forced labor may be a fine one in some circumstances, but that cannot mean that all household chores are forced labor, with only the discretion of prosecutors protecting thoughtful parents from federal prosecution."[176]

Through the *Skilling*,[177] *Bond*,[178] and *Yates*[179] cases, the Supreme Court has highlighted ways to adopt narrower interpretations of broad criminal statutes. In doing so, the Supreme Court has provided a roadmap to the lower courts, as seen in *Newman,*[180] *Bonds*,[181] and *Toviave*,[182] that illustrates an appropriate legal analysis to use when those courts are concerned that the Justice Department is using criminal statutes in ways that Congress never intended. These cases do not suggest that the Justice Department can never use a creative legal interpretation. They do suggest, however, that the Justice Department must be able to offer statutory interpretations that realistically reflect Congress's intent. If the Justice Department

170. United States v. Toviave, 761 F.3d 623 (6th Cir. 2014).
171. *Id.* at 623–24.
172. *Id.*
173. *Id.* at 625.
174. *Id.*
175. *Id.* at 627.
176. *Id.* at 630.
177. Skilling v. United States, 561 U.S. 358 (2010).
178. Bond v. United States, 134 S. Ct. 2077 (2014).
179. Yates v. United States, 135 S. Ct. 1074 (2015) (plurality opinion).
180. United States v. Newman, 773 F.3d 438 (2d Cir. 2014).
181. United States v. Bonds, 784 F.3d 582 (9th Cir. 2015) (per curiam).
182. United States v. Toviave, 761 F.3d 623 (6th Cir. 2014).

does not respond to the federal judiciary's concerns, it should expect to experience more defeats in tightly-contested cases.

C. Courts' Concerns About Over-Criminalization Reflect Broader Societal Concerns

The federal judiciary is not the only branch of the federal government that has expressed concern about the problem of over-criminalization. In May 2013, the House Judiciary Committee created a bipartisan Over-Criminalization Task Force to review expansive federal criminal statutes and recommend improvements designed to curb the rate of federal criminal prosecutions and incarceration.[183] Similarly, in June 2015, the House Judiciary Committee launched a bipartisan Criminal Justice Reform Initiative to review and address issues in the criminal justice system, including over-criminalization.[184] Although bills have been proposed as a result of these initiatives, they have not yet gained bipartisan support in Congress and none of the bills have been passed by the House as of the time that this Article was sent to publication.[185]

In his final years in office, President Obama has also shone a spotlight on the problem of over-criminalization. For instance, in July 2015, he expressed concern about over-criminalization, observing that "[m]ass incarceration makes our country worse off, and we need to do something about it."[186] He also became the first United States president to visit a federal prison while in office.[187] Despite his concerns, which have principally focused on lowering the prison population and addressing specific issues such as mandatory minimums, President Obama has not directed the Justice Department to undertake any systematic review of overbroad criminal statutes.

The Justice Department, led by Attorney General Eric Holder, publically advocated for sentencing reforms in some areas,[188] which has already resulted in a

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183. H. JUDICIARY COMM., 113TH CONG, OVER-CRIMINALIZATION TASK FORCE RESOLUTION OF 2014 (2014), http://judiciary.house.gov/_cache/files/337718ed-ed2f-4b33-a926-33a6bc7ccd32/over-crim-task-force-resolution.pdf.

184. Press Release, H.R. Judiciary Committee, House Judiciary Committee Announces Criminal Justice Reform Initiative (June 10, 2015), http://judiciary.house.gov/index.cfm/press-releases?ID=9A79947D-9FFF-4DF8-B133-8E27B5E92394.

185. Press Release, H.R. Judiciary Committee, House Judiciary Committee Unveils Bills to Address Federal Over-Criminalization (Nov. 17, 2015), http://judiciary.house.gov/index.cfm/press-releases?id=2D52E31E-2EA6-4B44-8841-B253EBD4480A.

186. Barack Obama, President, Remarks at the NAACP Conference at the Pennsylvania Convention Center in Philadelphia (July 14, 2015), https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference.

187. *See* David Jackson & Susan Davis, *Obama Visit Prison to Promote Criminal Justice Plans*, USA TODAY, July 16, 2015, http://www.usatoday.com/story/news/nation/2015/07/16/obama-el-reno-federal-correctional-institution-criminal-justice-reform/30234017/.

188. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY (August 2013), http://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf.

moderate decrease in incarceration rates.[189] Holder also supported amendments to reduce guideline sentencing levels for drug offenders.[190]

The efforts by Congress, President Obama, and the Justice Department are noteworthy because they reflect a broad sentiment in the country that too many individuals have been incarcerated and that the costs to society and to those individuals have been too great. While there has not been any consensus about a solution to over-criminalization, this broad sentiment will continue to focus attention on the problem, and federal judges will be forced to confront the issue as they examine each criminal case before them. At a time when Supreme Court justices are expressing concerns about "a deeper pathology in the federal criminal code,"[191] more defendants will raise the issue, suggesting that over-criminalization is not an issue that is likely to fade away.

III. WHAT HAPPENS WHEN THESE TWO TRENDS COLLIDE?

If enforced as written, the Justice Department's Yates Memorandum will encourage prosecutions of individuals that will inevitably raise more concerns for the federal judiciary. As the federal judiciary becomes more worried about the quality of the prosecutorial discretion being exercised with respect to broadly-drafted criminal statutes, it will likely continue to adopt narrow interpretations of those statutes as a more realistic assessment of Congress's intent. Perhaps over the long run, if the Supreme Court becomes more comfortable with the quality of prosecutorial discretion being exercised, it would be willing to return to the older, more deferential interpretation of statutes where the Supreme Court assumes that Congress means what it says in broadly-drafted statutes.

This Part addresses: (A) the issues that the federal judiciary should confront as it interprets criminal statutes in light of concerns about over-criminalization; (B) the strategies that the Justice Department should use to avoid or mitigate the worst potential outcomes of the Yates Memorandum; and (C) the likely reaction from the defense bar to the interaction between these two trends. These are the key questions facing courts, prosecutors, defense attorneys, and individuals under investigation or indictment.

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189. Transcript, National Press Club Luncheon with Att'y Gen. Eric Holder at 5 (Feb. 17, 2015), https://www.press.org/sites/default/files/20150217_holder.pdf (noting that as a result of the DOJ's sentencing reform initiative, prosecutors pursued fewer drug offenders, shifted their focus to the "worst offenders," and sought fewer mandatory minimum sentences for low-level, non-violent drug offenders).

190. *Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines: Hearing Before the U.S. Sentencing Commission* at 12–14, Mar. 13, 2014 (Holder testified: "certain types of cases result in too many Americans going to prison for too long, and at times, for no truly good law enforcement reason."). The amendments were adopted and applied retroactively, lowering the maximum sentences for nonviolent drug offenders and leading to the release of thousands of prisoners beginning in November 2015. *See* Jean Casarez, *6,600 Federal Inmates to be Released this Weekend*, CNN (Oct. 31, 2015), http://www.cnn.com/2015/10/30/us/federal-inmate-release/.

191. Yates v. United States, 135 S. Ct. 1074, 1101 (2015) (Kagan, J., dissenting).

A. Will Courts Continue to Apply Close Scrutiny to Expansive Government Theories?

The biggest questions for the federal judiciary in this area are (i) whether it will continue to apply the same level of scrutiny to expansive statutory interpretations by the government in future cases; (ii) whether it will apply more scrutiny to over-criminalization issues raised by motions to dismiss; and (iii) whether it will do the same with respect to pleas.

Because the Court's rulings on over-criminalization rely on nuanced reasoning with respect to the facts in individual cases, these rulings are fragile. At any point, without a significant doctrinal shift and without having to overrule any prior precedent, the Supreme Court could return to construing federal criminal statutes broadly, placing greater emphasis on the plain language of the statute and lesser emphasis on assuming that Congress would not have intended unjust results. The Supreme Court will soon decide two cases that will provide additional insight into the gravity of the Court's concerns about over-criminalization and its commitment to interpreting broadly-drafted criminal statutes in a narrow way.[192]

Right now, however, even the most ardent champions of strict textual construction are questioning the government's exercise of prosecutorial discretion. In the *Yates* case, for instance, Justice Scalia questioned the government's wisdom in using a broad criminal statute with a long statutory maximum sentence to prosecute a fisherman for a seemingly minor offense. The exchange at oral argument illustrates how even Justice Scalia openly wondered about whether poor prosecutorial discretion should change the way he interpreted the breadth of criminal statutes:

> JUSTICE SCALIA: . . . . [W]ho do you have out there that . . . exercises prosecutorial discretion? Is this the same guy that . . . brought the prosecution in Bond last term?
>
> [Assistant Solicitor General]: Your Honor, I think a couple points on that. First of all, Congress passed a broad statute . . . . It was reported out of committee with 10 years, and it was ultimately at . . . the suggestion of the House of Representatives, upped to 20 years.
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> JUSTICE SCALIA: No, I'm not talking about Congress. I'm talking about the prosecutor. What kind of a mad prosecutor would try to send this guy up for 20 years or risk sending him up for 20 years? . . .

192. McDonnell v. United States, 136 S. Ct. 891 (2016) (granting Petition for Writ of Certiorari (No. 15-474) in the case of former Virginia Governor Robert McDonnell, to address whether "official action" under the bribery statute and honest-services fraud statute is limited to exercising, threatening to exercise, or pressuring others to exercise actual government power); Salman v. United States, 136 S. Ct. 899 (2016) (granting Petition for Writ of Certiorari (No. 15-628) on the question of whether, in an insider trading prosecution, the personal benefit to an insider requires proof of a potential pecuniary, or similarly valuable gain, or whether a close family relationship between the tippee and insider is enough).

> JUSTICE GINSBURG: You charged two offenses: [18 U.S.C. §] 2232, and Yates is not questioning the applicability of that. Is there any guidance that comes from Justice to prosecutors? I mean, the code is filled with overlapping offenses. So here's a case where the one statute has a 5-year maximum, the other 20. The one that has the 5-year clearly covers the situation.
>
> Is there anything in any kind of manual in the Department of Justice that instructs U.S. attorneys what to do when there are these overlapping statutes?
>
> [Assistant Solicitor General]: Your Honor, . . . my understanding of the U.S. Attorney's Manual is that the general guidance that's given is that the prosecutor should charge — once the decision is made to bring a criminal prosecution, the prosecutor should charge the . . . offense that's the most severe under the law. That's not a hard and fast rule, but that's kind of the default principle. In this case that was Section 1519.
>
> JUSTICE SCALIA: Well, if that's going to be the Justice Department's position, then we're going to have to be much more careful about how extensive statutes are. I mean, if you're saying we're always going to prosecute the most severe, I'm going to be very careful about how severe I make statutes.[193]

Despite his reservations, although he was in the minority, Justice Scalia ultimately sided with the Justice Department and voted to affirm the conviction.[194] For other judges faced with similar problems, much will depend on their perception of how well the government is exercising its prosecutorial discretion in future cases. If the Yates Memorandum causes prosecutors to bring marginal cases under broad statutes, courts will be unlikely to veer from this approach of adopting narrow interpretations.

If courts continue to press the Justice Department, the next question is whether those courts will decide they are willing to apply this closer scrutiny in deciding motions to dismiss[195] and in deciding whether to accept plea agreements. The cases identified in this Article all occurred after the defendant proceeded to trial and lost. In most cases, in order to mount a vigorous defense, the defendant must have financial resources, emotional fortitude, and no small amount of courage in order to proceed all the way to trial, knowing that a much longer prison sentence may await if the trial results in a guilty verdict. Indeed, many defendants would rather accept the security of a guilty plea than the greater risk of going to trial.[196]

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193. Transcript of Oral Argument at 27, Yates v. United States, 135 S. Ct. 1074 (2015) (No. 13-7451).

194. *See Yates*, 135 S. Ct. at 1090 (2015) (Kagan, J., dissenting).

195. FED. R. CRIM. P. 12.

196. For instance, in Fiscal Year 2014, over 97.1% of federal criminal cases resulted in guilty pleas. UNITED STATES SENTENCING COMMISSION, U.S. SENTENCING COMMISSION FINAL QUARTERLY DATA REPORT 2014, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014_Quarterly_Report_Final.pdf.

At the same time, many courts currently take a very conservative approach in deciding motions to dismiss under Rule 12.[197] These courts reason that anything approaching a factual question is reserved for the jury and not for a judge, and that an indictment only needs to recite the elements of an offense in order to defeat a motion to dismiss.[198] The weakness of that approach is that it allows the government to adopt very expansive statutory interpretations without a substantial amount of judicial oversight, and a defendant has to wait until the end of the government's case-in-chief to present a Rule 29 motion in order to obtain meaningful judicial review of the government's prosecution theory.[199] Rather than face the cost and uncertainty of proceeding to trial, some defendants may decide not to challenge overly-broad statutory interpretations and to accept plea agreements despite believing that the law did not prohibit their conduct.

Similarly, when entering guilty pleas, most defendants generally have no reason to believe that judges will closely scrutinize the government's theory. Although some courts have begun to scrutinize corporate deferred prosecution agreements more closely than they have in the past,[200] there has been generally less scrutiny of individual plea agreements. Rule 11 requires courts to determine that "there is a factual basis for a plea"[201] and make the ultimate decision whether to accept or reject the plea agreement. Courts do not, however, typically engage in any in-depth legal analysis as to whether the government has over-stretched the scope of the statute at issue. These courts may have good reasons not to upset plea agreements where the legal reach of the statute is unclear, reasoning that the agreement reflects the carefully bargained-for positions of the parties, that the defendant may have negotiated a more attractive position even if there have not been many traditional prosecutions under that statutory theory, and that courts should not upset these agreements lightly. But one consequence of that philosophy is to contribute to an environment where broader statutory theories can be used without judicial oversight. Looking ahead, federal courts should consider whether that hands-off approach should continue.

B. How Can the Justice Department Avoid the Worst Possible Outcomes of the Yates Memorandum?

This Article has set forth some of the worst possible outcomes of the Yates Memorandum, including (i) the potential for marginal cases to be brought to

197. *See* James M. Burnham, *Why Don't Courts Dismiss Indictments?*, 18 GREEN BAG 2d 347, 356–57 (2015).

198. *Id.* at 356 (quoting United States v. Lockhart, 382 F.3d 447 (4th Cir. 2004)).

199. FED. R. CRIM. P. 29.

200. *See, e.g.*, United States v. HSBC Bank U.S.A., N.A., No. 12-CR-763, 2013 WL 3306161, at *1 (E.D.N.Y. July 1, 2013) (approving deferred prosecution agreement after discussing the appropriateness of the agreement at length); United States v. Fokker Servs. B.V., 79 F. Supp. 3d 160, 167 (D.D.C. 2015) (declining to approve a deferred prosecution agreement proposed by the government and a defendant).

201. FED. R. CRIM. P. 11(b)(3).

satisfy the directive for more individual prosecutions; (ii) the potential loss of credibility with the federal judiciary because of overly aggressive statutory interpretations; and (iii) the potential loss of cooperation from corporations and individuals who may believe that the risks of cooperation now outweigh the potential benefits. These results, however, are not set in stone, and the Justice Department can avoid many of the worst possible outcomes while still trying to achieve the objectives of the Yates Memorandum.

The Justice Department's biggest worry should be that some prosecutors will not bring the right kinds of cases and instead will bring attenuated charges to comply with the directives of the Yates Memorandum. The Justice Department is well aware of the difficulty of obtaining convictions in white-collar criminal cases, particularly where the individuals have sufficient resources to defend themselves.[202]

To evaluate whether the Yates Memorandum is working properly, the Justice Department should study whether the Memorandum is causing prosecutors to bring the right kinds of cases. In particular, the Justice Department would be wise to direct its working group to study closely whether (i) the Yates Memorandum has produced the types of prosecutions of individuals that were actually intended by the Memorandum; (ii) whether there is actually an empirical basis to believe that there are white-collar crimes being committed that have escaped prosecution; and (iii) whether the Justice Department has adequate safeguards in place to ensure that it is not asserting overly broad statutory theories that could jeopardize the Department's credibility with the courts. In doing so, the working group should not place undue weight on statistics, which can be misleading in any number of ways, but should take a hard look at the merits of the individual cases to determine whether each prosecution was the kind of case that Congress intended the given statute to cover. The *Yates*[203] and *Bond*[204] cases, in particular, are the types of cases that should raise red flags, particularly at a time when the Supreme Court, Congress, and even the President are expressing concerns about over-criminalization.

Over the long term, the Justice Department should take a leadership position with respect to the issue of over-criminalization, including for white-collar criminal statutes. In particular, the Justice Department should consider undertaking a comprehensive study of whether there are federal criminal statutes that are

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202. *See, e.g.*, Amended Judgment of Acquittal, United States v. Bajoghli, No. 14-278 (E.D. Va. Dec. 3, 2015) (acquittal); Plea Agreement, United States v. Sigelman, No. 14-263 (JEI) (D.N.J. June 15, 2015) (ending prosecution with a misdemeanor plea and a sentence of probation); Judgment, United States v. Rainey, No. 12-291 (E.D. La. June 5, 2015) (finding defendant not guilty on one count and dismissing other counts); Judgment of Acquittal, United States v. Clemens, No. 1:10-cr-223 (D.D.C. June 27, 2012) (acquittal); Judgment of Acquittal, United States v. Weil, No. 08-cr-60322 (S.D. Fla. Nov. 3, 2014) (acquittal).

203. Yates v. United States, 135 S. Ct. 1074 (2015) (plurality opinion).

204. Bond v. United States, 134 S. Ct. 2077 (2014).

written too broadly, as has been suggested by the Supreme Court,[205] and that could be narrowed without hindering the Justice Department's ability to vigorously enforce the law.[206] A demonstration of that kind of commitment to the fair and even-handed enforcement of the law would enhance the Justice Department's credibility on close questions when it is important for the Department to argue to the courts that a statute should be construed broadly. Such a study would also provide an invaluable service to members of Congress, who may feel compelled to pass broad criminal statutes on a mistaken belief that the Justice Department needs these kinds of broad statutes and wide discretion in order to effectively advance law enforcement interests.

With respect to corporations and individuals who question the benefits of cooperation, the Justice Department should be very deliberate in deciding to deny credit to a corporation for its cooperation. In a heated investigation, it can be easy for a prosecutor to accuse a corporation of not disclosing all relevant facts or not admitting to misconduct that the prosecutor believes occurred. If the Justice Department acts based on suspicions and without a strong basis to know that the company is "shielding" executives, it could begin to jeopardize the future cooperation of many other companies. In the same way, if the Justice Department gains a reputation for unfair tactics or for threatening low-level employees with false statement or obstruction of justice charges in order to compel cooperation, it will make attorneys and clients think very carefully before agreeing to cooperate in future investigations.

Finally, the Justice Department should give due weight to the fact that there are thousands of lawyers in the Justice Department and that prosecutors are not fungible. Such a large group of prosecutors (as with any other group filled with smart, creative people) will inevitably have varying degrees of sensibilities and comfort levels while walking the thin line between aggressive law enforcement and over-criminalization. The success of the Yates Memorandum will depend in large part on how skillfully and artfully the individual prosecutors spread throughout the Justice Department will exercise their prosecutorial discretion. The best course for the Justice Department is to emphasize continually to its prosecutors that wise judgment is the most prized attribute at the Justice Department, not the ability to obtain the most convictions of individuals.

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205. *See* Skilling v. United States, 561 U.S. 358, 408–10 (2000) (employing a "reasonable limiting construction" of the statute, despite its generally broad language); Bond v. United States, 134 S. Ct. 2077, 2091 (2014) (a literal interpretation of the statute "would sweep in everything from the detergent under the kitchen sink to the stain remover in the laundry room"); Yates v. United States, 135 S. Ct. 1074, 1101 (2015) (statute was "too broad and undifferentiated") (Kagan, J., dissenting).

206. In fact, Congress is considering a bill that would require federal agencies to do something quite like this. Regulatory Reporting Act of 2015, H.R. 4003, 114th Cong. (2015) (requiring federal agencies to report to the House Judiciary Committee all agency rules that could result in a criminal penalty and justify why a criminal penalty is necessary).

C. How Will Companies, Individuals, and Their Defense Counsel React to the Yates Memorandum and the Judiciary's Recent Skepticism of Broad Statutory Interpretations?

At this early stage, companies, individuals, and their defense counsel will likely take a wait-and-see approach to the Yates Memorandum and the judiciary's recent skepticism. For instance, the Yates Memorandum does not have to be enforced as strictly as it is written. The Justice Department does not have to deny credit for cooperation if it believes that a company was trying to disclose all relevant facts even if the company was unsuccessful in locating all of the facts. Unless the Justice Department begins arbitrarily determining that corporations have not cooperated despite extensive investigations, the substantial incentives provided by cooperation will likely continue to persuade most companies to cooperate where there is a clear problem and where there are clear benefits to cooperation. If the existence of the problem is murkier (including real questions about whether any crime was committed at all), companies will likely conduct a more thorough investigation and then deliberate even more carefully before deciding whether to self-report.

Individuals will likely take a similar approach in deciding whether to cooperate with company internal investigations. From our experience, when employees receive an interview request, most worry more about their job security than their potential exposure to a federal criminal investigation. If the Justice Department dramatically increases the number of prosecutions of individuals, more employees will decline to participate in interviews even if that decision potentially jeopardizes their jobs. At the very least, employees will exercise greater caution in making proffers to the government and will likely make more extensive demands on their companies before cooperating. For example, employees will want to ensure that they have seen all relevant documents and will not inadvertently forget facts when a mistaken recollection is more likely to be used later by the government to support a false statement charge.

The harder question in the short term is whether more defendants will aggressively challenge broad statutory interpretations if indicted. Now that the Supreme Court has spoken with a stronger voice on over-criminalization, it will encourage more defendants to challenge broad statutory interpretations. But there can be benefits to plea bargains (including a lesser sentence) that a defendant will not receive if he or she decides to move to dismiss an indictment. Although Fed. R. Crim. P. 11(a)(2) allows pleas to be entered conditioned on the resolution of a disputed legal issue by a court, prosecutors often want the finality of a plea agreement and will not agree to a conditional plea agreement. Whether to challenge an over-expansive statutory interpretation in these cases will likely be a profoundly difficult decision for many defendants that will depend on the breadth of the government's statutory interpretation, the defendant's individual circumstances, and the likelihood of a successful motion.

CONCLUSION

This past September, the Yates Memorandum gave new urgency to the government's efforts to prosecute high-ranking individuals. If it is stringently enforced, the Yates Memorandum is likely to change the dynamic that the Justice Department experiences with cooperating companies and with individuals who are swept up in investigations. A stringent enforcement of the Memorandum also creates new risks for the Justice Department, including the possibility that prosecutors will bring more marginal cases and that the Yates Memorandum might unintentionally inhibit the flow of information to the Justice Department.

These risks are heightened by the Supreme Court's existing concern that prosecutors are pushing the boundaries of broadly-drafted statutes too far from Congress's original intent. If the Justice Department implements the Yates Memorandum without responding to the concerns of the federal judiciary, the Justice Department will not be satisfied with the decisions that it is likely to receive. If courts continue to worry about the overall quality of the Justice Department's exercise of prosecutorial discretion, courts may overturn convictions that are important to the leadership of the Justice Department with even greater frequency. Courts may start to limit broad statutory tools that the Justice Department has grown accustomed to wielding.

There is a timeless quality to the conflict between the desire for aggressive prosecution and the worry about prosecutorial overreach. There will always be a desire by society to achieve justice and to hold individuals accountable for their perceived crimes. There will always be a concern by society that the government has gone too far in prosecuting innocent people and in inflicting collateral damage on society. It is safe to say that, generations from now, our society will still struggle to find equipoise between these two competing forces. As the Yates Memorandum and the judiciary's concerns about over-criminalization collide over the next few years, courts, prosecutors, and defense attorneys have new and difficult questions to ponder. The answers to these questions have the potential to change the enforcement of federal criminal law in the United States in dramatic ways.