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COMMENT

# Getting to Guilty: The Necessary Shift to Individual Accountability for Corporate Wrongdoing

*By Paige Wheeler\**

ABSTRACT

In September of 2015, Deputy Attorney General, Sally Yates, declared that the Department of Justice would shift its focus to pursuing individual accountability for cases of corporate wrongdoing. This shift reflects a change in directives, as the Department of Justice commonly resolved cases of corporate wrongdoing through the companies themselves prior to what is now commonly known as the Yates Memorandum. The Yates Memorandum centers on the conclusion that one of the most successful ways to tackle corporate misconduct is by making sure that the individuals who are committing the wrongdoing are held accountable for their actions. The Yates Memorandum hopes to achieve this goal of individual accountability by implementing incentives for large corporations to cooperate with the Department of Justice. Prosecuting corporate crime, however, presents unique issues that will likely still make holding individuals accountable for their corporate wrongdoing a challenge, regardless of the new directives set forth in the Yates Memorandum. Although the Yates Memorandum will not resolve all of the challenges involved in prosecuting corporate crimes, it is a necessary shift in the right direction that is an effective use of the Department of Justice's resources in an effort to identify the culpable individuals who commit corporate crimes and hold them accountable for their wrongdoing.

## I. INTRODUCTION

Traditionally, the Department of Justice (“DOJ”) has fixated on resolving cases of corporate wrongdoing against the companies themselves first, and then on individuals second.<sup>1</sup> In September of 2015, however, Deputy Attorney General Sally Yates announced new directives for the DOJ regarding companies seeking corporation credit, through what is commonly known as the Yates Memorandum.<sup>2</sup>

The sole focus of the Yates Memorandum was to announce to the DOJ the new directives that should be followed in regards to accountability for corporate wrongdoing, which involved a great shift from how these cases were handled in the past.<sup>3</sup> This new shift, directing attention to holding individuals accountable for corporate wrongdoing, came at a time when the DOJ was in a need of a change in approach to this problem, which in the eyes of many, was getting out of hand.<sup>4</sup> Now, with the financial crisis of 2008 in the rearview,<sup>5</sup> the DOJ has acknowledged its previous shortcomings and that there are better methods to bring individuals who engage in corporate wrongdoing to justice.

The corporate crime issue likely got out of hand because it is such a unique and complex creature, often leaving the DOJ with its hands tied in certain situations. Obtaining the necessary resources to prosecute corporate crimes of a complex nature presents a challenge in itself, not to mention chancing all of the time and money spent to litigate a case on the gamble that a jury will be able to return a conviction.

*People v. Davis* illustrates the difficulties and risks of litigating corporate crimes of a complicated nature.<sup>6</sup> The course of events in *Davis* exemplifies the extreme difficulty of presenting these infinitely complex cases to a panel of jurors in a way they can understand, let alone comprehend enough to find there is no reasonable doubt as to the criminal actions of these individuals.<sup>7</sup>

Even faced with these prosecutorial challenges, the DOJ recognized that there was room for improvement in the handling of corporate crime through the directives brought forward in the Yates Memorandum. This shift involved a new focus of

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1. William E. Lawler, III & Jeremy Keeney, *DOJ's Yates Memorandum: Focus Enforcement Efforts on Individuals*, 83 DEF. COUNS. J. 200, 203 (2016).

2. *Id.* at 201.

3. Memorandum from Sally Quillian Yates, Deputy Attorney Gen., U.S. Dep't of Justice, to Assistant Attorney Gen., Antitrust Div. 2 (Sept. 9, 2015) (on file with the University of Missouri Business, Entrepreneurship & Tax Law Review) [hereinafter Yates Memorandum] (noting that this memorandum was also addressed to several assistant attorneys general and all U.S. attorneys).

4. William E. Lawler, III & Jeremy Keeney, *White Collar Defense and Investigation and Corporate Counsel*, IADC COMMITTEE NEWSL. 3 (Dec. 2015), <https://www.velaw.com/insights/DOJ-s-Yates-Memorandum--Focus-Enforcement-Efforts-on-Individuals/>.

5. Kimberly Amadeo, *The 2008 Financial Crisis*, THE BALANCE (July 1, 2017), <https://www.the-balance.com/2008-financial-crisis-3305679>.

6. *People v. Davis et al.*, No. 773 (N.Y. 2014) (noting that this case was not the result of a federal indictment, but rather one by the state of New York).

7. Sara Randazzo & Nichole Hong, *Jury in Dewey Law-Firm Case Felt Inundated by Details*, WALL STREET J. (Oct. 20, 2015, 3:58 PM), <https://www.wsj.com/articles/jury-in-dewey-law-firm-case-inundated-by-details-1445333584>.

holding culpable individuals accountable for their actions, rather than the corporation as a whole.<sup>8</sup>

Seven months after the Yates Memorandum was issued, in April of 2016, the DOJ released the Fraud Section's Foreign Corrupt Practices Act Enforcement Plan, which is commonly known as the Pilot Program.<sup>9</sup> The Pilot Program declared that full cooperation by companies requires, "as set forth in the [Yates Memorandum] disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including all facts related to involvement in the criminal activity by the corporation's officer, employee's or agents."<sup>10</sup> Therefore, the Yates Memorandum, along with the Pilot Program, greatly contributes to the newly shaped meaning of "cooperation" through the DOJ's concentration on individuals.<sup>11</sup>

Although the directive to hold individuals accountable for their corporate wrongdoing is seen as a favorable move by some, there is also growing concern that the Yates Memorandum may actually hinder the very objectives it hopes to achieve.<sup>12</sup> Both the legislative and judicial branches of government have expressed concern that federal prosecutors are attempting to criminalize conduct that is not criminal by construing the law too broadly, which would ultimately result in over-criminalization.<sup>13</sup>

*United States v. Pacific Gas and Electric Company* is an example of why federal courts, including the Supreme Court, have concerns of over-criminalization resulting from federal prosecutors broadening their interpretations of the law.<sup>14</sup> *Pacific Gas and Electric Company* involved the DOJ indicting and convicting Pacific Gas and Company ("PG&E") on a theory of corporate collective knowledge,<sup>15</sup> something that the DOJ has not done in over 30 years.<sup>16</sup> After receiving highly controversial grand jury instructions, the grand jury returned an indictment charging PG&E for "willfully" disregarding federal regulations, despite no evidence showing that any single employee acted willfully.<sup>17</sup> Additionally, PG&E, as a corporation, was convicted because several employees had knowledge of incriminating practices.<sup>18</sup> Those individuals did not face charges themselves.<sup>19</sup> Therefore, this decision directly contradicts the new directives laid out in the Yates Memorandum and causes speculation that the DOJ has not necessarily changed its ways.

This article will explain and analyze the directives taken by the DOJ to combat corporate wrongdoing. Part II will consider the unique challenges that prosecuting

8. Yates Memorandum, *supra* note 3, at 2.

9. Ann Sultan, *What Recent DOJ Corporate Enforcement Actions Mean for Cooperating Companies*, BLOOMBERG BNA 1 (Aug. 29, 2016), <https://www.millerchevalier.com/sites/default/files/resources/BloombergBNA-DOJ-Corporate-Enforcement-Actions.pdf>.

10. *Id.*

11. *Id.*

12. Michael P. Kelly & Ruth E. Mandelbaum, *Are the Yates Memorandum and the Federal Judiciary's Concerns About Over-Criminalization Destined to Collide?*, 53 AM. CRIM. L. REV. 899, 900 (2016).

13. *Id.* at 899.

14. *United States v. Pac. Gas & Elec. Co.*, No.14-cr-00175-TEH, 2016 BL 240175, at \*1 (N.D. Cal. July 26, 2016); Kelly & Mandelbaum, *supra* note 12, at 899.

15. *Pac. Gas & Elec. Co.*, 2016 BL 240175, at \*2-5.

16. Stephen P. Solow & Mark L. Farley, *What Does a Corporation Have to Know to Be Guilty of a Crime?: The Conviction of PG&E Bases on Corporate Collective Knowledge*, DAILY ENV'T REP. 1 (Aug. 22, 2016), [https://www.kattenlaw.com/files/162466\\_PGE\\_Solow\\_Farley.pdf](https://www.kattenlaw.com/files/162466_PGE_Solow_Farley.pdf).

17. *Id.* at 2.

18. *Id.*

19. *Id.*

corporate crime presents for the DOJ and the criticisms they have faced. Part III will discuss the new shift of focus to individual accountability taken to address this, and part IV will examine whether this was the right decision, amid growing concerns of expansive interpretation of the law and over-criminalization.

## II. PROSECUTORIAL CHALLENGES UNIQUE TO CORPORATE CRIME

Especially since the Financial Crisis of 2008, the DOJ has faced extensive criticism for not bringing individuals to justice for committing corporate financial crimes.<sup>20</sup> A recent pattern in the prosecution, or attempted prosecution, of corporate wrongdoing suggests that law enforcement officials are failing to choose the *right* cases, and prosecute them in the courtroom in a comprehensible way to jurors.<sup>21</sup> This issue arises because it is unlikely that the average working American can understand the modern financial system, given its immense, overwhelming complexities.<sup>22</sup>

Taking on a case that is destined for failure does not make good sense, especially when prosecuting individuals for complex corporate crimes.<sup>23</sup> Preparing for any trial requires vast resources, two of the most important being time and money.<sup>24</sup> Given the depletion of resources resulting from preparing cases of a complex nature for litigation, it is not a risk prosecutors are often willing to take, nor should they be expected to.<sup>25</sup>

### A. *People v. Davis*

A case prosecuted by the Manhattan District Attorney, *People v. Davis*,<sup>26</sup> involved the kind of fraud that is often pursued by the federal government. Its outcome effectively highlights the complications prosecutors face in seeking to hold individuals accountable for committing crimes of this complex nature.<sup>27</sup>

In March of 2014, after a two-year investigation, the state of New York indicted three individuals who had previously been top executives at Dewey & LeBoeuf LLP.<sup>28</sup> Chairman Steven Davis, former Executive Director, Stephen DiCarmine, and former Chief Financial Officer, Joel Sanders, were indicted on charges that “they misled lenders, other lawyers and investors about the firm’s financial health

20. Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES (Sept. 9, 2015), <https://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html>.

21. Sheelah Kolhatkar, *Has It Become Impossible to Prosecute White-Collar Crime?*, BLOOMBERG (Oct. 21, 2015, 1:04 PM), <https://www.bloomberg.com/news/articles/2015-10-21/has-it-become-impossible-to-prosecute-white-collar-crime->.

22. *Id.*

23. Russell Mokhiber, *20 Things You Should Know About Corporate Crime*, HARV. L. REC. (Mar. 24, 2015), <http://hlrecord.org/2015/03/20-things-you-should-know-about-corporate-crime/>.

24. *Id.*

25. *Id.*

26. *People v. Davis et al.*, No. 773 (N.Y. 2014).

27. Chris Dolmetsch & Tiffany Kary, *Dewey & LeBoeuf Case Ends With Hung Jury and Mistrial*, BLOOMBERG (Oct. 19, 2015, 4:20 PM), <http://www.bloomberg.com/news/articles/2015-10-19/dewey-judge-declares-mistrial-after-jury-deadlocks-on-charges>.

28. Max Stendahl, *Former Dewey Leaders Indicted Over Historic Collapse*, LAW360 (Mar. 16, 2014, 10:52 AM), <http://www.law360.com/articles/515863/former-dewey-leaders-indicted-over-historic-collapse>.

before it spiraled into bankruptcy.”<sup>29</sup> The investigation, which led to these charges, began after a group of Dewey partners pushed Manhattan District Attorney, Cyrus Vance’s office to investigate possible wrongdoing at the firm.<sup>30</sup> One month after the investigation began in 2012, Dewey filed its Chapter 11 petition declaring bankruptcy, placing them in the record books as the largest U.S. law firm to ever go bankrupt.<sup>31</sup>

According to the indictment in the New York State Supreme Court, defendants “Davis, DiCarmine and Sanders were [each] charged . . . with grand larceny, fraud, falsifying business records and conspiracy.”<sup>32</sup> These allegations “contributed to the collapse of [the] prestigious international law firm, which forced thousands of people out of jobs and left creditors holding the bag on hundreds of millions of dollars owed to them.”<sup>33</sup> The prosecutors also contended that the defendants falsely reported that Dewey & LeBoeuf LLP was in compliance with a “cash flow covenant,” which required the firm to maintain a minimum year-end cash flow.<sup>34</sup> Further, the indictment stated that from late 2008 to 2012, Davis, DiCarmine, and Sanders allegedly caused other employees at the firm to make tens of millions of dollars of fraudulent accounting entries that made Dewey look healthier than it was.<sup>35</sup>

After a four-month trial, which included testimony from 41 witnesses, the case alleging that the three former executives were guilty of more than 150 counts in a financial fraud scheme that collapsed Dewey & LeBoeuf LLP, resulted only in proving that the complexity of the case was too much for jurors to handle.<sup>36</sup>

The mistrial . . . in the closely-watched case is the latest example of the hurdles prosecutors face bringing complex financial cases to a jury. Prosecutors and enforcement officials have been criticized for failing to charge individuals with wrongdoing in the wake of the financial crisis, often opting for large monetary settlements instead. But such cases can be highly complex and carry long odds of getting past juries with scant financial backgrounds.<sup>37</sup>

In sum, the *Davis* case effectively demonstrates why these types of cases often never reach the courtroom, but rather result in plea agreements. Thus, there is in fact a great risk involved in bringing an ambitious case to trial, contrary to popular belief. This risk involves suffering the loss of an immense amount of time and money on behalf of the government if anything other than a guilty verdict is returned, as shown here in the *Davis* case.

The prosecution’s case relied heavily on internal emails and the testimony of several cooperating witnesses, which included the firm’s former Finance Director, Frank Canellas, who informed the jury that he provided defendants Davis and Sanders with a list of accounting tricks in order to help conceal the firm’s financial

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29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Randazzo & Hong, *supra* note 7.

37. *Id.*

troubles.<sup>38</sup> Although the defense called no witnesses, the prosecution called more than 40, and defense council chose to use the cross-examination of these witnesses to prove to the jury that their clients did not know about the fraud.<sup>39</sup> The defense argument clearly left enough room for reasonable doubt in the minds of the jurors. The defense poked holes in Canella's credibility by depicting him as a bully in the workplace, and argued that even if the accounting practices were illegal, the prosecution did not show that the three defendant executives had criminal intent.<sup>40</sup> The defense also provoked doubt by contending that the firm's accounting was not the reason for their ultimate collapse, but rather it resulted from certain key partners leaving the firm.<sup>41</sup>

The *Davis* case proved to be too much for the jurors to handle from the start. "Opening statements turned into an hours-long explanation of concepts like disbursement write-offs and reclassifying lease termination payments."<sup>42</sup> Prosecutors struggled to lay out a clear narrative from the beginning, and the jurors' confusion continued from this point on.<sup>43</sup> This proved to neither be enough to acquit, nor convict the three former executives.<sup>44</sup> Yet, at the onset of deliberations, the jury determined various acquittals for various counts that were deemed not as serious as others.<sup>45</sup> On the larger counts, however, such as grand larceny, scheme to defraud, violating the Martin Act, and the New York Securities law, the jurors were deadlocked.<sup>46</sup>

The strenuous deliberations came to an end when the jury sent a note to the court for the third time expressing that it was deadlocked on the major counts.<sup>47</sup> After the jury indicated that it was "hopelessly" deadlocked, Justice Robert Stolz asked the jurors if further instruction on the law would help.<sup>48</sup> After the jury said that further instruction on the law would not be beneficial, Justice Stolz declared a mistrial.<sup>49</sup>

At the conclusion of all the testimony, and after 22 days and over 120 hours of deliberations, some of the jurors voiced their frustration at the lack of a verdict.<sup>50</sup> The general consensus was that the piles of evidence and testimony were just too difficult to absorb.<sup>51</sup> One juror said that she felt like "people were going a little crazy toward the end because they really didn't understand the law" and that "[they] couldn't go any further."<sup>52</sup> Another juror said that many jurors made up their minds early on and favored acquittal on the bulk of the counts, but they refused to budge

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38. Brendan Pierson, *Judge Declares Mistrial in Criminal Trial of Ex-Dewey & LeBoeuf Executives*, REUTERS (Oct. 19, 2015, 3:01 PM), <http://www.reuters.com/article/usa-crime-dewey-idUSL1N12J1T320151019>.

39. Dolmetsch & Kary, *supra* note 27.

40. Pierson, *supra* note 38.

41. *Id.*

42. Randazzo, & Hong, *supra* note 7.

43. *Id.*

44. Pierson, *supra* note 38.

45. Randazzo & Hong, *supra* note 7.

46. Pierson, *supra* note 38.

47. *Id.*

48. *Id.*

49. *Id.*

50. Randazzo & Hong, *supra* note 7.

51. *Id.*

52. *Id.*

during deliberations.<sup>53</sup> A third juror said that there was “absolute confusion” among the jurors and heated arguments erupted because “some were looking for that smoking gun.”<sup>54</sup>

The *Davis* outcome suggests that the prosecutors miscalculated by overwhelming the panel of jurors with too much detail.<sup>55</sup> This is evident due to the jurors expressing that they needed “more explanation of what [exactly] made the accounting adjustments illegal[,] and . . . which exhibits corresponded with which charges.”<sup>56</sup> This issue may very well be where the nucleus of the problem lies: in the fact that the average juror cannot understand the vast complexities cases of this nature present, and are further challenged to decipher how the complicated situation at hand is applied to the law.

*B. Has Corporate Crime Grown So Complex That it is Beyond the Law?*

The challenges presented to prosecuting attorneys in *People v. Davis*<sup>57</sup> shed light on a deeper problem and emerging concern: the idea that due to growing complexities, corporate crime is becoming increasingly difficult to prosecute, which makes it a crime on the verge of being “beyond the reach of the law.”<sup>58</sup>

White-collar crime is not nearly as dramatic and straightforward as violent crime; however, its financial impact is immense, and can affect a large sum of people.<sup>59</sup> As an illustration, if someone with a gun walked into a bank and made off with less than \$5,000, he would likely be charged, convicted at trial without complication, and depending on the defendant’s history, spend at least an estimated five years in prison.<sup>60</sup> Most jurors can easily connect the dots in this type of crime.<sup>61</sup> In comparison, the estimated range of \$300 billion to \$600 billion that fraud, con jobs, and embezzlement reportedly cost taxpayers, coupled with the fact that few, if any, of the financial executives that commit these crimes serve any time in prison, can provide for frustration among American taxpayers.<sup>62</sup> The problems underlying complex financial crimes are more complicated than most Americans know.

Violent crimes and white-collar crimes differ in many ways, but above all, the most important factor that separates the two is the level of understanding required to investigate the crimes, bring charges, and get a conviction from a panel of jurors. For example, fraud and money laundering allegations require knowledge of much different concepts than violent crimes.<sup>63</sup> These unique challenges for the government often present themselves long before opening statements begin at trial.<sup>64</sup> First,

53. Pierson, *supra* note 38.

54. *Id.*

55. Randazzo & Hong, *supra* note 7.

56. *Id.*

57. *People v. Davis et al.*, No. 773 (N.Y. 2014).

58. Kolhatkar, *supra* note 21.

59. Bruce Kennedy, *Why White Collar Criminals Often Get Away*, CBS NEWS: MONEYWATCH (May 11, 2015, 3:38 PM), <http://www.cbsnews.com/news/getting-away-with-white-collar-crime/>.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Could the Complexity of White Collar Crime Help Defendants?*, FRANK BURINO, <http://www.frankrubino.com/Legal-Articles/Could-the-Complexity-of-White-Collar-Crimes-Help-Defendants.shtml> (last visited Dec. 19, 2017).

64. *Id.*



law enforcement officials must focus on their most pressing needs, and allocate their resources accordingly.<sup>65</sup> While any complex case can drain resources, white-collar crimes expend more time and money than most other types of cases.<sup>66</sup> In fact, this draining of resources, time and money, needed to investigate such activities is one of the major obstacles in combating white-collar crime, especially when it comes down to following the money trail.<sup>67</sup>

Susan Deehan, Chair and CEO of Actionable Intelligence Technology, a developer and supplier of financial investigation systems, expressed that white-collar crime is far down on the list in terms of closed cases.<sup>68</sup> Deehan described “[t]he reason for this is not inattention or indifference on the part of law enforcement, but on the complexity of white collar crime and the difficulty of making and proving a case.”<sup>69</sup> In fact, even prosecutors can struggle to understand the complicated financial scenarios encompassed in some white-collar crimes.<sup>70</sup> They are often advised to simplify the issues, something that is easier said than done.<sup>71</sup>

If a case is headed to a jury . . . the prosecuting attorneys may have the difficult task [of] turning thousands of pages of financial records, accounting procedures and other complex evidence into information that a jury of laypeople can easily understand. They face added challenges because jurors are generally unfamiliar with white collar crimes, and the defendants are often upstanding members of a community.<sup>72</sup>

The challenges present both in investigating and prosecuting white-collar crimes, can often result in leaving defendants with opportunities for strong defense cases.<sup>73</sup> If the prosecutor finds difficulty in understanding and sorting through the intricate link of facts that gave rise to charges, this leaves holes for a defense attorney to identify weaknesses in the evidence, and can use these to create doubt and make the defendant’s case stronger.<sup>74</sup> Needless to say, there are many risks involved in litigating complex corporate crime cases. To say that prosecutors worry about whether jurors will understand and buy into a case involving white collar crime is an understatement.<sup>75</sup> This worry could therefore encourage prosecutors to enter into plea agreements with individuals charged with these types of corporate crimes in order to avoid the risks involved with taking cases of this nature to trial.<sup>76</sup>

Likely as a product of these challenges and the risks involved with taking a multifaceted corporate crime case to trial, the DOJ frequently enters into plea agreements, deferred prosecution agreements, or non-prosecution agreements in order to resolve criminal investigations.<sup>77</sup> As a result of these types of agreements, many

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65. *Id.*

66. *Id.*

67. Kennedy, *supra* note 59.

68. *Id.*

69. *Id.*

70. *Could the Complexity of White Collar Crime Help Defendants?*, *supra* note 63.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *See id.*

76. *Id.*

77. Kelly & Mandelbaum, *supra* note 12, at 900.

top-level executives are able to insulate themselves from personal accountability, leaving the corporation itself taking the complete fall and punishment for the criminal conduct of individuals.<sup>78</sup>

### III. A CHANGE IN DIRECTIVE

Not holding individuals accountable for their white-collar criminal actions has sparked outrage, especially following the financial crisis of 2008.<sup>79</sup> This has forced the DOJ to acknowledge the issue, and ultimately caused them to take action in response by issuing new directives to be followed in how corporate wrongdoing is handled.<sup>80</sup>

#### A. *The Yates Memorandum*

The DOJ's initial action to getting a grasp on battling the corporate crime problem was through the issuing of a memorandum by Deputy Attorney General, Sally Yates, which came to be commonly known as the "Yates Memorandum."<sup>81</sup> The Yates Memorandum in its entirety focused on the conclusion that one of the most effective ways to battle misconduct by corporations is by holding accountable those individuals who are perpetrating the wrongdoing.<sup>82</sup>

The Yates Memorandum started off by expressing that "[f]ighting corporate fraud and other misconduct is a top priority of the Department of Justice."<sup>83</sup> The measures described in the Yates Memorandum are instructed to be steps that are to be taken "in any investigation of corporate misconduct."<sup>84</sup> Notably, Yates said that "[the] [M]emo is designed to ensure that all attorneys across the Department are consistent in [their] best efforts to hold to account the individuals responsible for illegal corporate conduct."<sup>85</sup> Yates expressed that individual accountability is important for a number of reasons: "it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in [the] justice system."<sup>86</sup> The Yates Memorandum specifically instructs the DOJ to look more broadly from the beginning of its investigation.<sup>87</sup> In doing so, the DOJ would focus its collective attention on both the corporation and the individuals suspected of corporate wrongdoing starting at the onset of an investigation.<sup>88</sup>

The Memo has six key steps to be followed in order for the DOJ to support its pursuit of individual corporate wrongdoing.<sup>89</sup> The six steps outlined in the Memorandum include the following:

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78. Kolhatkar, *supra* note 21.

79. *Id.*

80. Yates Memorandum, *supra* note 3, at 2.

81. *Id.*

82. *Id.*

83. *Id.* at 1.

84. *Id.* at 2.

85. *Id.*

86. *Id.* at 1.

87. Lawler & Keeney, *supra* note 4, at 203-04.

88. Yates Memorandum, *supra* note 3, at 2.

89. *Id.*

- (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct;
- (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation;
- (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another;
- (4) absent extraordinary circumstances or approved department policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation;
- (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and
- (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.<sup>90</sup>

Deputy Attorney General Yates has also directed certain provisions in the United States Attorney's Manual to reflect the changes and that the guidance provided throughout the Memo will be applicable to all of the Department's future investigations of corporate wrongdoing.<sup>91</sup> Generally speaking, these directives impose various requirements on cooperating companies.<sup>92</sup> Most notable, is the requirement directing such companies being investigated for corporate wrongdoing to affirmatively hand over possible culpable employees.<sup>93</sup> For many, this was seen as the DOJ's response to Congress and others who have critiqued the DOJ for not sufficiently going after the individuals responsible for corporate wrongdoing.<sup>94</sup> Now, in light of the Yates Memorandum, the DOJ is explicitly directed to focus its enforcement efforts on these individuals, who previously may have otherwise escaped liability.<sup>95</sup>

The Yates Memorandum outlines incentives for corporations to be forthright with suspected individuals involved in misconduct from the start of the investigation.<sup>96</sup> For example, "in order for a company to receive any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct."<sup>97</sup> Therefore, in order "to be eligible for any credit for cooperation, the company [being investigated] must identify all individuals involved in or

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90. *Id.* at 2-3.

91. *Id.* at 3.

92. Lawler & Keeney, *supra* note 4, at 201.

93. *Id.*

94. *Id.*

95. *Id.*

96. Yates Memorandum, *supra* note 3, at 2.

97. *Id.* at 3.

responsible for the misconduct [in question], regardless of their position, status or seniority, and [further] provide to the Department all facts relating to [the alleged] misconduct.”<sup>98</sup>

### B. *Foreign Corrupt Practices Act Enforcement Plan and Guidance*

After the Yates Memorandum was published, in April of 2016, the DOJ released the Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan (“FCPA”).<sup>99</sup> The FCPA regulates international corruption through the use of two approaches.<sup>100</sup> These two approaches consist of the accounting provisions, and the anti-bribery provisions.<sup>101</sup> The accounting provisions require subject corporations to provide regular reports to the SEC, “mandate maintenance of accurate records, and require the establishment of internal compliance controls.”<sup>102</sup> These subject corporations include both foreign and domestic companies traded on U.S. stock exchanges.<sup>103</sup> In addition, “the FCPA’s anti-bribery provisions criminalize the transfer of money or other gifts to foreign officials and political actors with the intent to influence[,] obtain[,] or retain business.”<sup>104</sup> These anti-bribery prohibitions pertain to conduct by securities issuers, U.S. citizens and entities, and certain foreign nationals and entities.<sup>105</sup>

The DOJ recognizes that FCPA investigations involve unique challenges that create a undeniable need for “centralized supervision, guidance, and resolution, including complex issues involving transnational detection, collection of evidence, and enforcement.”<sup>106</sup> Due to this, the Fraud Section frequently partners with the United States Attorney’s Office on these matters.<sup>107</sup> As a whole, the DOJ is committed to enhancing its efforts to uncover and prosecute both individuals and companies for violations of the FCPA.<sup>108</sup>

The FCPA’s plan has in fact its own memorandum written by Andrew Weissmann, Chief of the Fraud Section within the Criminal Division of the DOJ.<sup>109</sup> This memorandum sets forth three steps in an enhanced FCPA enforcement strategy.<sup>110</sup> The first step involves the DOJ strengthening its investigative and prosecutorial efforts by significantly increasing its FCPA law enforcement resources.<sup>111</sup> This step is very important because the new resources will substantially enhance “the ability of the Criminal Division’s Fraud Section and the [FBI] to detect and prosecute individuals and companies that violate the FCPA.”<sup>112</sup> The second step is the DOJ

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98. *Id.*

99. Andrew Weissmann, *The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance*, U.S. DEP’T OF JUST. 1 (Apr. 5, 2016), <https://www.justice.gov/archives/opa/blog-entry/file/838386/download>.

100. Barr Benyamin et al., *Foreign Corrupt Practices Act*, 53 AM. CRIM. L. REV. 1333, 1335 (2016).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1335-36.

106. Weissmann, *supra* note 99, at 1, n. 2.

107. *Id.*

108. *Id.* at 1.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

taking action to “strengthe[n] its coordination with foreign counterparts in the effort to hold corrupt individuals and companies accountable.”<sup>113</sup> The third step, and the most notable, is the guidance to FCPA attorneys about how the Fraud Section will pursue what has come to be known as the Pilot Program.<sup>114</sup>

The Pilot Program ties in directly with the Yates Memorandum and applies to companies that voluntarily cooperate or disclose matters during the one-year pilot period under the FCPA.<sup>115</sup> “The principal goal of this [P]rogram is to promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to voluntarily selfdisclose FCPA-related misconduct, [to] fully cooperate with the Fraud Section, and, where appropriate, [to] remediate flaws in their controls and compliance programs.”<sup>116</sup> If the Pilot Program is successful it will “serve to further deter individuals and companies from engaging in FCPA violations in the first place [and] encourage companies to implement strong anti-corruption compliance programs to prevent and detect FCPA violations.”<sup>117</sup> Consistent with the Yates Memorandum, if the Pilot Program is successful, it will also improve the Fraud Section’s ability to prosecute individuals for their corporate wrongdoing, many of whom likely would have gone undiscovered, by gathering proof that would otherwise would not have been discovered.<sup>118</sup>

The Pilot Program “sets forth the requirements . . . a company must [fulfill in order] to qualify for credit for voluntary self-disclosure, cooperation, and timely and appropriate remediation.”<sup>119</sup> The Pilot Program declared that full cooperation by companies requires, “as set forth in the [Yates Memorandum], disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including all facts related to involvement in the criminal activity by the corporation’s officers, employees or agents.”<sup>120</sup> Thus, the meaning of “cooperation” is beginning to take new shape as a result of the DOJ’s emphasis on individuals per both the Yates Memorandum and the Pilot Program.<sup>121</sup> Since the Pilot Program has been implemented, however, the DOJ has not necessarily been consistent in the amount of credit given for the necessary cooperation it seeks from companies with respect to individuals.<sup>122</sup>

#### IV. FEARS OF EXPANSIVE STATUTORY INTERPRETATION

The enforcement landscape will drastically change if the DOJ strictly enforces the Yates Memorandum and the federal judiciary maintains concerns about expansive criminal statutes.<sup>123</sup> “The DOJ [may] succeed in bringing more criminal prosecutions [for corporate wrongdoing; however, this] success will likely come at a significant cost.”<sup>124</sup> Some prosecutors will predictably feel increased pressure to “adopt more expansive statutory interpretations, exercise less caution when

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113. *Id.* at 3.

114. *Id.*

115. Sultan, *supra* note 9, at 1.

116. Weissmann, *supra* note 99, at 2.

117. *Id.*

118. *Id.*

119. *Id.* at 4.

120. Sultan, *supra* note 9, at 1.

121. *Id.*

122. *Id.* at 3.

123. Kelly & Mandelbaum, *supra* note 12, at 899.

124. *Id.*

evaluating the facts, or put more pressure on corporations to search for and to produce evidence of individual wrongdoing” due to the fact that the Yates Memorandum exerts pressure on prosecutors to further increase the number of prosecutions in addition to their current efforts.<sup>125</sup> “Strict enforcement of the Yates Memorandum could also [alter] the way that corporations and individuals decide to cooperate with the [DOJ].”<sup>126</sup> In turn, this could then influence “the size, type, and number of corporate settlements.”<sup>127</sup> Companies will have to consider whether they are willing to cooperate, and if they are willing to cooperate at all, how they must readjust their investigations to satisfy the DOJ.<sup>128</sup> Thus, the law enforcement objectives that the Memorandum aims to achieve may actually be hindered by these unintended consequences.<sup>129</sup>

These conflicting trends, a “strong desire for individual accountability”, and “worry about prosecutorial overreach” are nothing new.<sup>130</sup> For over a decade, in order to resolve prominent criminal investigations, the DOJ “has entered into hundreds of plea agreements, deferred prosecution agreements, and non-prosecution agreements with companies.”<sup>131</sup> Although settlements of this type involve admissions of guilt and billions of dollars in fines, the DOJ has not secured nearly “as many comparable indictments and convictions of senior executives.”<sup>132</sup> In response to these agreements, senior DOJ officials have begun voicing a variety of concerns.<sup>133</sup> In relevant part, some officials have “questioned whether the companies themselves withheld incriminating [evidence and] information about their senior officers through the investigation process . . . succeed[ing] in preventing the prosecution of [these] individuals.”<sup>134</sup>

While the DOJ has these developing concerns, the federal judiciary has growing concerns of its own.<sup>135</sup> Specifically, the federal judiciary has grown increasingly dissatisfied with expansive interpretations of criminal statutes and over-criminalization in the United States Code.<sup>136</sup> The Supreme Court has found “that narrower interpretations reflect a more realistic view of congressional intent” and in recent years, has continually rejected over-expansive interpretations of criminal statutes with broad language.<sup>137</sup>

#### A. *United States v. Pacific Gas and Electric Company*

Once the Yates Memorandum came to light, it seems as though many were under the impression that in cases of corporate wrongdoing, only the individuals responsible would take the fall.<sup>138</sup> *United States v. Pacific Gas and Electric*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 899-900.

129. *Id.*

130. *Id.* at 900.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. See Elizabeth E. Joh & Thomas W. Joo, *The Corporation as Snitch: The New DOJ Guidelines on Prosecuting White Collar Crime*, 101 Va. L. Rev. Online 51 (2015).

*Company*,<sup>139</sup> however, effectively illustrates why the federal judiciary is concerned about over-criminalization as a result of federal prosecutors broadening the interpretation of the law; this case also provides a great example of a situation in which individual accountability may still be unattainable.<sup>140</sup>

The prosecution of PG&E followed the rupture of a natural gas transmission line owned and operated by the company on September 9, 2010, in San Bruno, California.<sup>141</sup> PG&E was convicted of five counts of violating the federal Pipeline Safety Act (“PSA”), and one count of obstructing the National Transportation Safety Board investigation into the 2010 pipeline explosion.<sup>142</sup> In *United States v. Pacific Gas and Electric Company*,<sup>143</sup> the DOJ indicted and convicted PG&E on a theory of corporate collective knowledge, a largely unused basis for imposing criminal liability, which is what makes this case so significant.<sup>144</sup> The theory of corporate collective knowledge “seeks to aggregate pieces of knowledge held by different employees, and impute the totality of that knowledge to the corporation as a basis for imposing criminal liability on the company.”<sup>145</sup>

The indictment in this case alleged that PG&E knowingly and willfully violated PSA violations by the following:

- (1) failing to keep records of pressure testing and repairs on natural gas transmission lines, (2) relying on erroneous and incomplete information when evaluating the integrity of the natural gas transmissions lines, (3) failing to identify and evaluate potential threats to the integrity of the lines[,] and (4) failing to prioritize lines as high risk after a changed circumstance.<sup>146</sup>

With respect to these violations, this case is noteworthy due to the jury instructions filed in accordance with them, pertaining to the theory of corporate collective knowledge.<sup>147</sup> PG&E challenged this theory in a motion to dismiss the indictment for erroneous instructions to the grand jury, arguing “that the prosecutor incorrectly instructed the grand jury that they could issue an indictment for a knowing and willful violation based on a regulatory duty to act and evidence that employees of the company knew that the regulatory duty was not being met.”<sup>148</sup> The trial judge denied the motion.<sup>149</sup>

In the final instruction to the jury on the PSA counts, the court instructed that:

[t]he corporation is . . . considered to have acquired the collective knowledge of its employees. The corporation’s “knowledge” is therefore the totality of what its employees know within the scope of their

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139. *United States v. Pac. Gas & Elec. Co.*, No.14-cr-00175-TEH, 2016 BL 240175, at \*1 (N.D. Cal. July 26, 2016).

140. Kelly & Mandelbaum, *supra* note 12, at 899.

141. Solow & Farley, *supra* note 16, at 2.

142. *Id.* at 1.

143. *Pac. Gas & Elec. Co.*, 2016 BL 240175, at \*1.

144. *Id.*; Solow & Farley, *supra* note 16, at 1.

145. Solow & Farley, *supra* note 16, at 1.

146. *Id.* at 2.

147. *Id.*

148. *Id.*

149. *Id.*

employment. The willfulness of corporate employees acting within the scope of their employment is imputed to the corporation. Accordingly, if a specific employee acted willfully within the scope of his or her employment, then the corporation can be said to have acted willfully.<sup>150</sup>

The first part of this instruction is based on a 1987 decision pertaining to a cash transaction reporting and has not been widely accepted in prior prosecutions.<sup>151</sup> As a result of these instructions, PG&E was not only indicted under this theory, but also convicted under the theory of corporate collective knowledge.<sup>152</sup> Overall, these jury instructions proved to be highly controversial and “PG&E filed a motion for judgment of acquittal, arguing that the government [did not meet its burden and] failed to present sufficient evidence to establish that any single [PG&E] employee acted willfully.”<sup>153</sup>

This decision could have significant impact on the future of corporate criminal prosecutions.<sup>154</sup> If PG&E’s motion for judgment of acquittal is unsuccessful, PG&E will likely appeal the conviction and challenge the government’s theory of corporate liability before the Ninth Circuit.<sup>155</sup> No matter how the court decides the case, its decision will be significant in shaping the future of corporate criminal prosecutions.<sup>156</sup> Regardless, this case has upended traditional principles of corporate vicarious liability by allowing the government to aggregate the innocent conduct of company employees to “manufacture a corporate criminal.”<sup>157</sup> Nonetheless, this case appears to directly contradict with the Yates Memorandum and its directives to hold individuals accountable for corporate wrongdoing.<sup>158</sup>

## V. CONCLUSION

The issuing of the Yates Memorandum is a step in the right direction as the DOJ shifts its focus to holding individuals accountable for their corporate crimes. However, bringing individuals to justice likely will not be as easy as the Yates Memorandum makes it out to be. The issuing of the Yates Memorandum will not eliminate the overwhelming complexities involved with corporate criminal cases and it also does not provide tools for prosecutors to effectively explain these complexities to a panel of jurors. Although these new directives will not eliminate the risk prosecutors take in bringing a complex corporate crime to trial, the directives and incentives will hopefully provide prosecutors with a better avenue to obtain all of the relevant evidence needed to present a case to a jury, assuming that corporations cooperate with the DOJ.

Although the Yates Memorandum contains directives that will surely enhance the DOJ’s capability in holding individuals accountable for corporate wrongdoing, it does not change the fact that pursuing individuals for the misconduct of

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150. *Id.* at 3.

151. *Id.*

152. *Id.* at 2.

153. *Id.* at 3.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 2.

158. *Id.*



corporations presents its own unique challenges. Responsibility can be diffused in large corporations and decisions are made at various levels.<sup>159</sup> With this, it can be extremely “difficult to determine if an employee possessed the knowledge and criminal intent necessary to establish guilt beyond a reasonable doubt”, much like the situation the government faced in prosecuting the PG&E case.<sup>160</sup> Particularly, high-level executives may still be insulated from the day-to-day activities in which the misconduct occurs.<sup>161</sup> These challenges, however, highlight the importance in the DOJ fully using its resources in an effort to identify the blameworthy individuals at all levels in corporate cases.<sup>162</sup> Thus, the issuing of the Yates Memorandum, paired with the Pilot Program, provided the directives and incentives for the DOJ to make a necessary shift to individual accountability for corporate wrongdoing. This shift may not resolve all challenges that prosecuting corporate crime presents, but it is surely a step in the right direction.

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159. Yates Memorandum, *supra* note 3, at 2.

160. *Id.*

161. *Id.*

162. *Id.*