

ARTICLE: The Yates Memo: Looking for "Individual Accountability" in All the Wrong Places

July, 2017

Reporter

102 Iowa L. Rev. 1897 *

Length: 14575 words

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Highlight

ABSTRACT: The Department of Justice has received a great deal of criticism for its failure to prosecute both corporations and individuals involved in corporate fraud. In an effort to quiet some of that criticism, on September 9, 2015, then Deputy Attorney General Sally Q. Yates issued a policy entitled, "Individual Accountability for Corporate Wrongdoing," or the "Yates Memo," as it has been called. The main thrust of the Yates Memo is that in order for a corporation to receive any credit for cooperating with the government and obtain leniency in the form of a deferred prosecution agreement, the corporation must not only conduct an internal investigation and turn over the results, but it must also point the finger at culpable employees. The Yates Memo puts a particular emphasis on the need to hold high-level officials responsible for misconduct. This Article argues that the Yates Memo is a misguided attempt to further put law enforcement responsibilities on the backs of corporations rather than the Department of Justice. In addition, the Yates Memo jeopardizes the corporation's ability to conduct effective internal investigations into corporate wrongdoing because it threatens both the corporate attorney-client privilege and the relationship between employers and employees. This Article maintains that if the Department of Justice truly wants to find "individual accountability," it must stop relying on corporations and conduct its own investigations. Furthermore, if the Department of Justice wants to obtain criminal convictions of high-level executives, there may be a need for new legislation that holds high-level executives accountable for the criminal misdeeds of their subordinates.?

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I. Introduction

Over the past several years, the idea of individual criminal accountability for corporate misconduct, or even corporate criminal liability, has been illusory. The Department of Justice ("DOJ") has locked itself into the practice of having corporations do the difficult and expensive work of conducting internal investigations and turning over the results of those investigations to the DOJ. ¹ The DOJ calls this cooperation and rewards a corporation's assistance with a deferred prosecution agreement ("DPA"). ² A DPA permits a company to save its reputation by avoiding a criminal trial or indictment. ³ Instead, the DOJ files charges but holds them in abeyance for a period of years in exchange for the corporation paying a large fine and agreeing to stringent compliance measures. ⁴ The practice of entering into DPAs rather than indicting corporations, however, has led to a great deal of criticism of the DOJ. Critics claim that DPAs are an ineffective deterrent for corporations and that the best way to deter corporations is instead through individual prosecutions for corporate misconduct. ⁵ In particular, there has been a public [*1899] outcry over the fact that, while the financial system collapsed in 2008 due to fraudulent practices, the government has failed to hold individuals criminally accountable for the misconduct. ⁶ In short, many people have asserted that the DOJ is too soft on corporate crime.

In response to this criticism, the DOJ issued its newest corporate charging guidelines on September 9, 2015. Importantly, the policy, entitled, "Individual Accountability for Corporate Wrongdoing," or the "Yates Memo," does not focus on when Assistant U.S. Attorneys should bring criminal charges against corporations. ⁷ Instead, the focus is on prosecuting individuals within the corporate entity and explains that "one of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing." ⁸ In essence, the Yates Memo doubles down on the DOJ's policy of resolving corporate misconduct through DPAs and non-prosecution agreements ("NPA") and directs prosecutors to bring individual criminal prosecutions. This shift from corporate to individual accountability is, in some ways, a natural evolution from the previous policy. The previous policy, the 2008 version of the Principles of Federal Prosecution of Business Organizations, ⁹ explained

¹ See *infra* Part II (detailing the evolution of the DOJ's corporate investigations).

² David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, [72 Md. L. Rev. 1295, 1301 n.43 \(2013\)](#).

³ *Id.*

⁴ Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, [43 Am. Crim. L. Rev. 1095, 1104-05 \(2006\)](#).

⁵ See, e.g., Julie R. O'Sullivan, *How Prosecutors Apply the "Federal Prosecutions of Corporations" Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction*, [51 Am. Crim. L. Rev. 29, 30-31 \(2014\)](#) (arguing that DPAs "are not demonstrably better" than individual convictions in furthering the goals of criminal enforcement, including deterrence); Uhlmann, *supra* note 2, at 1298-99.

⁶ Office of Senator Elizabeth Warren, *Rigged Justice: 2016: How Weak Enforcement Lets Corporate Offenders Off Easy* 4 (2016), http://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf (arguing that although lax enforcement can be the result of statutory limitations, it often is the result of the failure to effectively use the tools already available); Ben Protess & Jessica Silver-Greenberg, *Two Giant Banks, Seen as Immune, Become Targets*, N.Y. Times: Dealbook (Apr. 29, 2014, 8:40 PM), <http://dealbook.nytimes.com/2014/04/29/u-s-close-to-bringing-criminal-charges-against-big-banks> ("A lack of criminal prosecutions of banks and their leaders fueled a public outcry over the perception that Wall Street giants are "too big to jail.").

⁷ Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice to All U.S. Att'ys et al., *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015) [hereinafter Yates Memo] (on file with author).

⁸ *Id.* at 1. The changes in the Yates Memo have now been worked into the Principles of Federal Prosecution of Business Organizations, which is part of the U.S. Attorneys' Manual. See 9-28.000 - Principles of Federal Prosecution of Business Organizations, U.S. Dep't of Justice, <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations> (last visited Apr. 9, 2017) [hereinafter U.S. Attorneys' Manual].

that the "prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation."¹⁰ Furthermore, the 2008 version of the guidelines spoke of the need to resolve a corporate criminal case through the use of non-prosecution and deferred prosecution agreements when the collateral consequences of conviction, such as the impact on employees, investors, and customers, outweighed the benefit of a criminal prosecution.¹¹ In those instances, the 2008 guidelines explained that **[*1900]** the non-prosecution and deferred prosecution agreements should be designed "to promote compliance with applicable law and to prevent recidivism."¹² Both the Yates Memo and the 2008 guidelines cite deterrence as the justification for pursuing criminal charges against individuals and corporations, respectively.¹³

There is certainly no easy answer to the question of whether individual or corporate criminal accountability is the more effective deterrent. Thus, the challenge for the DOJ in striking the correct balance between the two while protecting the public from the collateral consequences of a corporate criminal conviction cannot be overstated. The DOJ's issuance of the Yates Memo, however, signals its belief that the focus should be on individual criminal accountability. Yet even if one assumes, arguendo, that holding individuals criminally accountable is the most effective deterrent, the Yates Memo fails to solve the problem of actually holding individuals criminally accountable for corporate misconduct.

This failure is clearly shown in the Yates Memo's biggest policy change. As will be explained further below, the Yates Memo demanded that corporations turn over culpable individuals and all facts relating to their culpability before being considered for any cooperation credit.¹⁴ In other words, if a corporation refuses to turn over culpable employees and all of the facts about those employees, it will likely be ineligible for a DPA and will face indictment. Thus, cooperation has become an all or nothing proposition. However, the single greatest impediment to individual criminal accountability for corporate misconduct is not the lack of corporate cooperation; it is the government's over reliance on corporate internal investigations.¹⁵ **[*1901]** Specifically, while the Yates Memo emphasizes the need for corporate cooperation by turning over culpable employees, it also emphasizes the need for the government to

⁹ U.S. Dep't of Justice, U.S. Attorneys' Manual: Principles of Federal Prosecution of Business Organizations § 9-28.000-28.1300 (2008) [hereinafter 2008 U.S. Attorneys' Manual], <http://www.justice.gov/sites/default/files/opa/legacy/2008/08/28/corp-charging-guidelines.pdf>.

¹⁰ Id. § 9-28.200(B).

¹¹ Id. § 9-28.1000.

¹² Id. § 9-28.1000(B).

¹³ Id. § 9-28.1200; Yates Memo, supra note 7, at 1.

¹⁴ Yates Memo, supra note 7, at 1.

¹⁵ See Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. Rev. Books (Jan. 9, 2014), <http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions> (explaining that the DOJ no longer has "the experience or the resources to pursue" individual prosecutions). Judge Rakoff explains the current approach:

Early in the investigation, you invite in counsel to the company and explain to him or her why you suspect fraud. He or she responds by assuring you that the company wants to cooperate and do the right thing, and to that end the company has hired a former assistant US attorney, now a partner at a respected law firm, to do an internal investigation. The company's counsel asks you to defer your investigation until the company's own internal investigation is completed, on the condition that the company will share its results with you. In order to save time and resources, you agree.

Six months later the company's counsel returns, with a detailed report showing that mistakes were made but that the company is now intent on correcting them. You and the company then agree that the company will enter into a deferred prosecution agreement that couples some immediate fines with the imposition of expensive but internal prophylactic measures. For all practical purposes the case is now over. You are happy because you believe that you have helped prevent future crimes; the company is happy because it has avoided a devastating indictment; and perhaps the happiest of all are the executives, or former executives, who actually committed the underlying misconduct, for they are left untouched.

Id.

focus on individuals from the outset of the investigation. These goals are wholly incompatible with one another. The government relies on the corporation's internal investigation to target culpable individuals. Thus, the only way for the government to focus on individuals from the outset of the investigation is to conduct the investigation itself. Consequently, if the government actually wants to hold high-level executives criminally accountable for corporate misconduct as it claims,¹⁶ it must conduct its own investigations of corporate misconduct.¹⁷

This Article therefore argues that without a fundamental shift in the manner in which the DOJ conducts internal investigations, the Yates Memo will not increase individual criminal accountability for corporate wrongdoing. This Article assesses the policies in the Yates Memo and the problems that it creates given the current environment of corporations sharing the results of their internal investigations with the government. Part I of this Article traces the evolution of the charging policies and how they disrupt the attorney-client privilege. Part II examines the problems created by the Yates Memo. Specifically, it argues that the Yates Memo will lead to further uncertainty in the application of the corporate attorney-client privilege and will disrupt the corporation's ability to conduct internal investigations. Part III argues that the DOJ should abandon the Yates Memo and instead conduct its own investigations into corporate wrongdoing if it wants to hold individuals criminally accountable. Furthermore, it argues that legislation that targets high-level officials is necessary to accomplish the DOJ's goal of holding high-level officials criminally accountable for their misconduct. This Article concludes that the benefits of the DOJ conducting investigations rather than relying on the results of corporate internal investigations outweighs the cost of this approach.

II. Background

The DOJ currently relies heavily on corporations performing their own investigations into criminal wrongdoing and then sharing the results with the [*1902] DOJ. After receiving the results of the investigation, the DOJ then makes the determination of whether to prosecute the corporation or grant some form of leniency, such as a deferred prosecution agreement.¹⁸ This reliance on the corporation's investigation, however, is not necessarily inevitable. Instead, the DOJ issued specific policy pronouncements that contributed to the current culture of the DOJ's reliance on corporations' internal investigation. This Part shows the DOJ's evolution through its policy pronouncement regarding the prosecution of corporations and illustrates that the reliance on internal, corporate investigations is not necessarily required. Further, it demonstrates that the DOJ explicitly targeted the corporate attorney-client privilege and work-product protection through earlier iterations of its charging policy and that the Yates Memo is an unfortunate return to that practice.

A. Internal Investigations, DPAs, and the Culture of Waiver

When a corporation is suspected of wrongdoing, it often conducts an internal investigation to gather the facts and, assuming that there has been misconduct, prepare to mount a legal defense. Corporations, however, are not protected by the Fifth Amendment against compelled self-incrimination.¹⁹ Therefore, in the event of a subpoena, any documents in the possession of the corporation must be turned over to the government. The only protection available to corporations is the corporate attorney-client privilege.²⁰ Corporations typically direct their attorneys,

¹⁶ 2008 U.S. Attorneys' Manual, *supra* note 9, § 9-28.200(B) (The "prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals" and "only rarely should provable individual culpability not be pursued, particularly if it relates to high-level corporate officers.").

¹⁷ See generally Rakoff, *supra* note 15 (explaining that the appropriate way to hold individuals responsible is to start at the bottom and flip individuals who can provide information about high-level officials rather than asking corporate counsel to perform an internal investigation and report the results to the government).

¹⁸ *Id.*

¹⁹ See *Braswell v. United States*, 487 U.S. 99, 104-05 (1988) (interpreting *Hale v. Henkel*, 201 U.S. 43 (1906), to mean that a corporation does not possess the Fifth Amendment right against compelled self-incrimination); *Hale*, 201 U.S. at 73, 75-76 (finding that the custodian of records for a corporation could not refuse to produce corporate documents pursuant to a subpoena on Fifth Amendment grounds).

whether inside or outside counsel, to conduct the investigation. Importantly, by having the attorneys conduct the investigation, the results of the investigation, such as interview memoranda, factual summaries, and the like, are protected by the corporate attorney-client privilege and the work-product doctrine.²¹ Therefore, while there is no doubt that the results of an internal investigation would be incredibly helpful to the government in building its case, so long as the investigation was performed by counsel, corporations can protect their findings.

[*1903] The government began to chip away at the protections of the attorney-client privilege and work-product doctrines in 1999 when then-Deputy Attorney General Eric Holder issued a memorandum entitled "Bringing Criminal Charges Against Corporations."²² The Holder Memorandum, as it became known, identified eight factors that prosecutors were permitted to weigh in deciding whether to indict a corporation or provide cooperation credit, such as a DPA.²³ The factor that was most relevant to the government's decision was the corporation's willingness to cooperate with the government during its investigation, which the Memo directly connected to the corporation's decision to waive its attorney-client and work-product doctrine privileges. The Holder Memorandum explained:

In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to ... disclose the complete results of its internal investigation, and to waive the attorney-client and work-product privileges.²⁴

The Holder Memorandum was the first step the DOJ took to gain access to corporate internal investigations. However, it was merely advisory.²⁵

In 2003, then-Deputy Attorney General Larry Thompson issued a memorandum to replace the Holder Memorandum entitled "Principles of Federal Prosecution of Business Organizations," which became known as the Thompson Memorandum.²⁶ The Thompson Memorandum was intended to "increase[] [the] emphasis on and scrutiny of the authenticity of a corporation's cooperation."²⁷ Like its predecessor, the Thompson Memorandum provided that cooperation included waiving the attorney-client and work-product privileges.²⁸ Although "the Thompson **[*1904]**

²⁰ See [Upjohn Co. v. United States, 449 U.S. 383, 389-97 \(1981\)](#) (holding that communications between employees and corporate counsel are protected by the corporate attorney-client privilege).

²¹ Id. The corporate attorney-client privilege protects communications between counsel and corporate employees. In contrast, the work-product doctrine is not restricted to communications between counsel and client. The goal of the work-product doctrine is to allow counsel to work "with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." [Hickman v. Taylor, 329 U.S. 495, 510-11 \(1947\)](#). Thus, the work-product doctrine protects from discovery counsel's written materials prepared in anticipation of litigation. Id.

²² Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., U.S. Dep't of Justice to All Component Heads & U.S. Att'ys (June 16, 1999) <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF> [hereinafter Holder Memorandum].

²³ The eight factors include: (1) "the nature and seriousness of the offense"; (2) the frequency of misconduct within the corporation; (3) the corporation's history of engaging in comparable conduct; (4) "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents"; (5) "the existence and adequacy of the corporation's compliance program"; (6) "the corporation's remedial actions"; (7) "collateral consequences"; and (8) "the adequacy of non-criminal remedies." Id. at II.A.

²⁴ Id. at VI.A.

²⁵ See generally id.

²⁶ Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice to Heads of Dep't Components & U.S. Att'ys (Jan. 20, 2003) [hereinafter Thompson Memorandum], http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf.

²⁷ Thompson Memorandum, supra note 26, at 1.

²⁸ Id. at II.A.4, VI.A.

Memorandum ... elevated the importance of waiver" in assessing cooperation, ²⁹ it never specified the "appropriate circumstances" for requesting waiver. ³⁰ Ultimately, this led to many prosecutors seeking waiver on a regular basis. ³¹

The Thompson Memorandum also instructed prosecutors to consider "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance." ³² This was the first indication that the prosecution of the corporation was not necessarily the DOJ's highest priority. The corporation's cooperation was still incredibly important, however, because the DOJ needed the results of the corporation's internal investigation to prosecute the responsible individuals within the corporation. Thus, the government was able to leverage the threat of corporate prosecution over the corporation to force them to cooperate with the government's investigation.

While the government was leveraging its indictment authority to convince corporations to cooperate and waive the corporate attorney-client privilege, it was also offering DPAs and NPAs as a reward for cooperation. ³³ As explained above, a DPA is a compromise between a declination and pursuing criminal charges. It gives the DOJ the opportunity to enact meaningful reforms to the corporate culture in an effort to prevent future misconduct. ³⁴ A DPA typically involves the corporation paying a large fine and [*1905] enacting compliance measures to prevent misconduct from recurring in the future. Additionally, a DPA is filed with the court and stays on the judge's docket until the term of the DPA is complete. ³⁵ An NPA, in contrast, has many of the same types of provisions as a DPA

²⁹ See Katrice Bridges Copeland, Preserving the Corporate Attorney-Client Privilege, [78 U. Cin. L. Rev. 1199, 1213 \(2010\)](#) (explaining that the Thompson Memorandum changed the wording of the Holder Memorandum to emphasize the importance of waiver of the attorney-client privilege and work-product protection). The memo also stopped referring to the attorney-client and work-product privileges as "privileges" and instead referred to them as "protections." *Id.*

³⁰ The Thompson Memorandum provided that prosecutors could request waiver of the attorney-client privilege and work-product protection in "appropriate circumstances." Thompson Memorandum, *supra* note 26, at VI.B. The lack of guidance, however, on when the circumstances were "appropriate" for the prosecutor to request a waiver meant that some prosecutors believed that waiver was appropriate in nearly every case. Copeland, *supra* note 29, at 1214.

³¹ Copeland, *supra* note 29, at 1213-14.

³² Thompson Memorandum, *supra* note 26, at II.A.8.

³³ See U.S. Gov't Accountability Office, GAO-10-110, Corporate Crime: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness 13 (2009). See generally Brandon L. Garrett, Structural Reform Prosecution, [93 Va. L. Rev. 853 \(2007\)](#).

³⁴ Professor Harry First has explained that "there is no standard agreement," but many of the agreements have some of the following conditions:

(1) an internal investigation; (2) a code of conduct and/or an effective compliance program to "prevent or deter violations of the law"; (3) corporate acceptance of responsibility; (4) the provision of specified information to the government with "full candor and completeness"; (5) waivers of attorney-client and work-product protections; (6) dismissals of errant employees; (7) a continuing duty to cooperate; (8) payment of restitution and/or a fine; and (9) probation with the use of continuing monitors, whose duties depend on the extent of the remedial actions to which the corporation has agreed.

Harry First, Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions, [89 N.C. L. Rev. 23, 47 \(2010\)](#); see also Garrett, *supra* note 33, at 893-902 (providing a detailed analysis of terms incorporated into DPAs and NPAs).

³⁵ See U.S. Gov't Accountability Office, *supra* note 33, at 11-12 (explaining that the Speedy Trial Act, [18 U.S.C. § 3161](#), gives the court authority to "approve the deferral of a prosecution pursuant to a written agreement between the government and the defendant"). Many scholars have criticized the fact that judges do not play an active role in the approval of a DPA. Nor do they determine whether the terms of the DPA have been violated. That is solely within the prosecutor's discretion. See Candace Zierdt & Ellen S. Podgor, Corporate Deferred Prosecutions: Through the Looking Glass of Contract Policing, [96 Ky. L.J. 1, 3 \(2007\)](#) (There are not any "established policing mechanisms developed by the courts to oversee the agreements reached by the parties to a [DPA]. Thus, the government acquires total power over the alleged corporate offender. The net result is that deferred

but is not filed with the court.³⁶ Therefore, so long as the corporation complies with the requirements of the NPA, the prosecution agrees not to file it with the court.³⁷ With the rise in the use of DPAs and NPAs to resolve cases of corporate wrongdoing, the number of corporate prosecutions decreased dramatically.³⁸

Although the strategy of leveraging both the threat of prosecution and/or the availability of DPAs was successful at getting corporations to cooperate with government investigations by waiving the attorney-client privilege and work-product protection, it was not without criticism. The biggest criticism, from both conservatives and liberals alike, was that the Thompson Memorandum created a "culture of waiver" where corporations had no choice but to waive the corporate attorney-client privilege and work-product protections to be considered cooperators and save themselves from indictment.³⁹ After a considerable amount of pressure and the threat of **[*1906]** legislation to protect the corporate attorney-client privilege, the DOJ ultimately changed its policy two times.⁴⁰ The first change, the McNulty Memorandum,⁴¹ occurred in 2006 and put a process in place to make it more difficult for the government to request waiver of the attorney-client privilege and work-product protection.⁴² The legal community, however, continued to push the government to change the policy so that it no longer considered the waiver of the corporate attorney-client privilege when making a determination of whether a corporation sufficiently cooperated with the government's investigation.⁴³ Eventually, in 2008 the DOJ issued the Filip Guidelines, which were incorporated into the United States Attorneys' Manual,⁴⁴ and completely eliminated waiver of the corporate attorney-client privilege and work-product protections as factors to consider when determining a corporation's cooperation.⁴⁵

prosecution agreements are reached without considering theories of duress and unconscionability." (footnote omitted). However, in a recent case, a district court judge in the Eastern District of New York expressed greater willingness to scrutinize and monitor implementation of DPAs. See *United States v. HSBC Bank USA, N.A.*, No. 12- CR-763, 2013 WL 3306161, at 3-11 (E.D.N.Y. July 1, 2013) (analyzing the terms of the DPA and reserving power to supervise implementation of the DPA).

³⁶ U.S. Gov't Accountability Office, *supra* note 33, at 11-12.

³⁷ *Id.*

³⁸ *Id.* at 13.

³⁹ See, e.g., Copeland, *supra* note 29, at 1210-20 (discussing the historical and legal background of the culture of waiver); Gideon Mark & Thomas C. Pearson, Corporate Cooperation During Investigations and Audits, *13 Stan. J.L. Bus. & Fin.* 1, 5-6 (2007) (noting that "as a practical matter companies have had no choice but to waive the privilege"); Earl J. Silbert & Demme Doufekias Joannou, Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System, *43 Am. Crim. L. Rev.* 1225, 1229 (2006) (arguing that the pressure on corporations to waive the privilege undermines the adversarial nature of the justice system); Christopher A. Wray & Robert K. Hur, Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice, *43 Am. Crim. L. Rev.* 1095, 1172, 1179-80 (2006) (noting that defense lawyers often believed that waiver was required in order to avoid an indictment, and proposing possible reforms); Stephen Weigand, Comment, Waiver of the Attorney-Client Privilege and Work-Product Protection from Thompson to McNulty: A Distinction Without a Difference?, *76 U. Cin. L. Rev.* 1093, 1111-15 (2008) (discussing the criticisms and benefits of the shift away from the waiver of culture by the McNulty Memo).

⁴⁰ Copeland, *supra* note 29, at 1236.

⁴¹ Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice to Heads of Dep't Components & U.S. Att'ys, Principles of Federal Prosecution of Business Organizations (Dec. 12 2006) [hereinafter McNulty Memorandum], https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.

⁴² *Id.* at 8-11. The new procedure required a prosecutor to obtain written authorization from the U.S. Attorney before seeking a waiver to obtain "factual information" such as "copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel." *Id.* at 9. If the prosecutor wanted additional attorney-client privileged or work-product protected documents, the prosecutor would have to "obtain written authorization from a Deputy Attorney General." *Id.* at 10.

⁴³ Copeland, *supra* note 29, at 1228.

⁴⁴ 2008 U.S. Attorneys' Manual, *supra* note 9, §§9-28.000 to 9-28.1300.

Instead, the focus of the cooperation inquiry turned to whether the corporation had provided all of the relevant "facts" to the government.⁴⁶ According to the Filip Guidelines, in providing factual information, "the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the lawyers' interviews."⁴⁷ Instead, the corporation must provide "relevant factual information acquired through those interviews" and business records and e-mails between employees and agents.⁴⁸

B. The Yates Memo

The Yates Memo marks the first time that the DOJ changed the charging guidelines since 2008. In the time since the Filip Guidelines, the financial collapse occurred and new criticisms have been leveled at the DOJ for failing **[*1907]** to hold individuals criminally accountable for corporate wrongdoing.⁴⁹ Consequently, the Yates Memo sets forth six steps that the DOJ should take to ensure individual accountability for corporate misconduct. It explains:

(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 departmental 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.⁵⁰

The key provision for this Article is the first one, which requires employers to provide "all relevant facts" about the individuals involved in the misconduct before the company can "receive any consideration for cooperation" in the form of a DPA or NPA.⁵¹ Specifically, the Yates Memo explains that "to be eligible for any credit 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."⁵² Consequently, by making cooperation credit completely contingent on the corporation's willingness to turn over culpable employees, the DOJ is once again leveraging the threat of prosecution to gain access to the corporation's internal investigation and override the attorney-client privilege and work-product doctrine. Importantly, the Yates Memo also attempted to lessen the DOJ's reliance on a corporation's internal investigations when it explained that "Department attorneys should [not] wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process - before, during, and after any corporate cooperation."⁵³ At this early stage, however, it is unclear whether or **[*1908]** how prosecutors will aggressively pursue individuals without the assistance of the corporation.

⁴⁵ Id. § 9-28.720.

⁴⁶ Id. (explaining that the typical inquiry will concern "how and when did the alleged misconduct occur? Who promoted or approved it? Who was responsible for committing it?").

⁴⁷ Id. § 9-28.720(a) n.3.

⁴⁸ Id.

⁴⁹ See supra note 6 and accompanying text.

⁵⁰ Yates Memo, supra note 7, at 2-3.

⁵¹ Id. at 3 (emphasis in original).

⁵² Id.

⁵³ Id. at 4.

The Yates Memo's failure to hold individuals criminally accountable without corporate, internal investigations is clear from the DOJ's established "culture of waiver." This "culture of waiver" dictated that corporations would perform internal investigations, waive their corporate attorney-client privilege and work-product protection, and provide the results of the investigation to the DOJ in order to receive cooperation credit.⁵⁴ Although the DOJ claims that the "culture of waiver" never existed, they did in fact change their corporate charging policy two times to erase references to waiving the corporate attorney-client privilege.⁵⁵ While the Yates Memo does not explicitly reference the privilege, the current policy calls for corporations to turn over the relevant facts regarding individual culpability, without regard to whether those facts may have been a part of a privileged communication. Therefore, regardless of the language in their current charging policy, the DOJ is still very much reliant on the investigative work of corporate counsel. Whether corporations are "voluntarily" waiving the corporate attorney-client privilege to provide the DOJ with the facts or, per the Yates Memo, attempting to provide those facts without expressly waiving the privilege, the DOJ is still reaping the rewards of corporate counsel's investigative efforts. Consequently, unless and until that dynamic changes, the Yates Memo's directives will likely be ineffective.

///. The Yates Memo Creates New Problems for the DOJ

The specific guidance in the Yates Memo creates two problems that are inextricably linked. First, similar to the issues inherent in the previous guidelines, the Yates Memo relies upon the internal investigation of the corporation and is therefore an attack on the corporate attorney-client privilege and work-product protection. Second, it pits employers against employees, making it more difficult for counsel to conduct the internal investigation.⁵⁶ The DOJ's cooperation policy has always been problematic for both the relationship between employees and employers and the corporate attorney-client privilege.⁵⁷ As previously explained, the DOJ's past policy regarding cooperation forced corporations to waive the corporate **[*1909]** attorney-client privilege and work-product protection in order to gain cooperation credit and receive lenient treatment in the form of a DPA or NPA.⁵⁸ The expectation under those policies was that corporations would throw the culpable employees under the bus in order to save themselves from indictment. Additionally, by requiring waiver of the corporate attorney-client privilege and work-product protection before a corporation could receive cooperation credit, the DOJ was able to obtain the fruits of the internal investigation without the need to expend government resources.⁵⁹ The DOJ effectively deputized defense counsel and co-opted their internal investigations.⁶⁰

As far as the employee-employer relationship is concerned, not only will the typical employee not understand that the corporation might choose to save itself by waiving the corporate attorney-client privilege, but the investigating attorney has no obligation to explain that the corporation might choose to cooperate with the government.⁶¹

⁵⁴ See, e.g., Copeland, *supra* note 29, at 1210-20 (discussing the historical and legal background of the culture of waiver); Mark & Pearson, *supra* note 39, at 5 (noting that "as a practical matter companies have had no choice but to waive the privilege ..."); Silbert & Joannou, *supra* note 39, at 1229 (arguing that the pressure on corporations to waive the privilege undermines the adversarial nature of the justice system); Weigand, *supra* note 39, at 1111-15 (discussing the criticisms and benefits of the shift away from the culture of waiver by the McNulty Memo); Wray & Hur, *supra* note 39, at 1172, 1179-80 (noting that defense lawyers often believed that waiver was required in order to avoid an indictment, and proposing possible reforms).

⁵⁵ See generally 2008 U.S. Attorneys' Manual, *supra* note 9; McNulty Memorandum, *supra* note 41.

⁵⁶ The Yates Memo states that, "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." Yates Memo, *supra* note 7, at 2.

⁵⁷ Copeland, *supra* note 29, at 1210-20.

⁵⁸ See Copeland, *supra* note 29, at 1210-20 (explaining that the DOJ's earlier policies, such as the Holder Memorandum and the Thompson Memorandum, explicitly required waiver of the corporate attorney-client privilege to demonstrate cooperation with the government); see also *supra* Part II.

⁵⁹ See Copeland, *supra* note 29, at 1215 (explaining that the government could avoid the costs of "securing witness cooperation agreements or sifting through thousands of documents" by requiring waiver of the privilege).

⁶⁰ See *id.* at 1216-17 (explaining that once corporate counsel knew that the corporation would waive the privilege corporate counsel was investigating with the purpose of reporting to the government).

Furthermore, employees are often warned that they must cooperate with the internal investigation or face termination.⁶² Unless there was already a grand jury subpoena requiring the testimony of the employee or the company had some reason to believe that the employee was involved in misconduct, the employee would not have her own counsel present at the interview to explain the implications of the warning given to the employee at the start of the interview.⁶³ Finally, employees tend to not have a say in whether the corporation should waive the corporate attorney-client privilege, even if the employee incriminated herself during her interview with counsel.⁶⁴ Each issue will now be considered in detail.

[*1910]

A. The Problem of Waiver

With respect to cooperation, the 2008 corporate charging policy states that in deciding whether a corporation is entitled to cooperation credit, the government should consider, "the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives."⁶⁵ As for the corporate attorney-client privilege, the 2008 policy explains that despite the fact that a "wide range of commentators and members of the American legal community and criminal justice system have asserted that the Department's policies have been used, either wittingly or unwittingly, to coerce business entities into waiving attorney-client [sic] privilege and work-product protection," such waiver has "never been a prerequisite ... for a corporation to be viewed as cooperative."⁶⁶ However, notwithstanding the DOJ's denial that waiver of the corporate attorney-client privilege is or ever was a prerequisite for cooperation credit, the current policy under the Yates Memo still calls for disclosure of all of the relevant facts gathered through the corporation's internal investigation.⁶⁷

Specifically, although "facts" are not privileged,⁶⁸ it is not at all clear how a corporation provides those facts regarding culpable individuals without revealing the substance of an attorney-client communication, thereby waiving the corporate attorney-client privilege.⁶⁹ The current charging policy suggests that corporations conduct their internal investigations without lawyers.⁷⁰ It seems unlikely, however, that a corporation would do so given **[*1911]**

⁶¹ Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, [54 B.C. L. Rev. 73, 110-11 \(2013\)](#) (explaining that ethics rules favor the corporation over the employee).

⁶² [Id. at 99.](#)

⁶³ [Id. at 100.](#)

⁶⁴ [Id. at 101.](#)

⁶⁵ 2008 U.S. Attorneys' Manual, *supra* note 9, § 9-28.700.

⁶⁶ *Id.* § 9-28.710.

⁶⁷ *Id.* § 9-28.720.

⁶⁸ See [Upjohn Co. v. United States, 449 U.S. 383, 395-96 \(1981\)](#) (explaining that the attorney-client privilege's protections apply to communications, but not to the underlying facts).

⁶⁹ See *infra* Part III.A.1 (explaining the circumstances under which the attorney-client privilege is waived).

⁷⁰ U.S. Attorneys' Manual, *supra* note 8, § 9-28.720(a). In making the case that cooperation credit does not depend on whether the documents are protected by the attorney-client or work-product protections, the U.S. Attorneys' Manual states:

Individuals and corporations often obtain knowledge of facts in different ways. An individual knows the facts of his or others' misconduct through his own experience and perceptions. A corporation is an artificial construct that cannot, by definition, have personal knowledge of the facts. Some of those facts may be reflected in documentary or electronic media like emails, transaction or accounting documents, and other records. Often, the corporation gathers facts through an internal investigation. Exactly how and by whom the facts are gathered is for the corporation to decide. Many corporations choose to collect

that corporations are not protected by the Fifth Amendment thereby limiting their ability to withhold any corporate documents from disclosure.⁷¹ Consequently, the corporate attorney-client privilege is the only protection that corporations have during a government investigation. By specifically requiring that corporations turn over information about culpable employees before receiving any consideration for cooperation credit, the Yates memo magnifies the problem of waiver present in the previous policies.

1. When is the Attorney-Client Privilege Waived?

The attorney-client privilege ensures that communications between clients and their attorneys for the purpose of securing legal advice will remain confidential.⁷² The Supreme Court has explained that "the attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."⁷³ The purpose of the privilege is "to protect not [*1912] only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."⁷⁴

information about potential misconduct through lawyers, a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected. Other corporations may choose a method of fact-gathering that does not have that effect - for example, having employee or other witness statements collected after interviews by non-attorney personnel. Whichever process the corporation selects, the government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information - not whether the corporation discloses attorney-client or work product materials. Accordingly, a corporation should receive the same credit for disclosing facts contained in materials that are not protected by the attorney-client privilege or attorney work product as it would for disclosing identical facts contained in materials that are so protected.

Id.

⁷¹ See [Braswell v. United States, 487 U.S. 99, 105, 123 \(1988\)](#) (interpreting Hale to mean that a corporation does not possess the Fifth Amendment right against compelled self-incrimination); [Hale v. Henkel, 201 U.S. 43, 74-78 \(1906\)](#) (finding that the custodian of records for a corporation could not refuse to produce corporate documents pursuant to a subpoena on Fifth Amendment grounds).

⁷² In *United States v. Jones*, the Fourth Circuit described the "classic test" for the attorney-client privilege:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

[United States v. Jones, 696 F.2d 1069, 1072 \(4th Cir. 1982\)](#) (quoting [United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 \(D. Mass. 1950\)](#)).

⁷³ [Upjohn Co. v. United States, 449 U.S. 383, 389 \(1981\)](#). In *Upjohn Co. v. United States*, the Supreme Court affirmed that the attorney-client privilege applies to corporations. See [id. at 389-90](#) ("Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation, and the Government does not contest the general proposition." (citation omitted)). It held that, in the context of an internal investigation, conversations between counsel and mid-, or even low-level, employees were protected by the corporate attorney-client privilege so long as they were for the purpose of securing legal advice for the corporation. [id. at 392-93](#). The Court rejected the "control group test" of the Court of Appeals that, in short, the privilege applies only to upper-level management's communications to attorneys. [id. at 390-93](#). The Court explained, inter alia, that such a standard "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." [id. at 392](#).

⁷⁴ [id. at 390](#). "It is now well established that the privilege attaches not only to communications by the client to the attorney, but also to advice rendered by the attorney to the client, at least to the extent that such advice may reflect confidential information conveyed by the client." [Bank Brussels Lambert v. Credit Lyonnais \(Suisse\) S.A., 160 F.R.D. 437, 441-42 \(S.D.N.Y. 1995\)](#).

The attorney-client privilege does not just protect oral communications; it also protects documents that memorialize those communications.⁷⁵ Thus, there is no question that documents produced during an internal investigation for the purpose of giving legal advice to the corporation, such as witness interview memoranda and internal investigation reports that contain communications between corporate counsel and corporate employees, are protected by the corporate attorney-client privilege.⁷⁶ The underlying facts, however, are not privileged.⁷⁷ Therefore, if the government has some other means of discovering those facts, such as conducting its own interviews of employees, the client cannot raise the attorney-client privilege to prevent the government from learning those facts.⁷⁸ In *Upjohn*, for instance, the Supreme Court explained that the "application of the attorney-client [sic] privilege to communications such as those involved [in an internal investigation] ... puts the adversary in no worse position than if the communications had never taken place."⁷⁹ However, as Professor Timothy P. Glynn has explained, "the attorney-client privilege is a mess."⁸⁰ The rules regarding the protection afforded by the privilege and when that protection has been waived vary within and between states as well as within and between federal circuits.⁸¹ This [*1913] variation leads to a great deal of uncertainty in the application of the attorney-client privilege.⁸²

Nevertheless, because many courts view it as an impediment to the truth, the attorney-client privilege is strictly construed by the courts and they examine whether all of the requirements for the privilege are met.⁸³ One requirement that receives considerable attention is whether the communication between the attorney and client was confidential or intended to be confidential.⁸⁴ The issue of confidentiality and waiver can sometimes intersect, as it is a fundamental principle that "any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege."⁸⁵ Therefore, in some situations the court will find that the

⁷⁵ Jerold S. Solovy et al., *Protecting Confidential Legal Information*, SN009 ALI-ABA 549 I.A.1 (2007).

⁷⁶ [Upjohn, 449 U.S. at 401-02](#); Solovy et al., *supra* note 75 ("The broad sweep of privileged communications encompasses not only oral communications, but also documents or other records in which communications have been recorded.") (citing [Restatement \(Third\) of the Law Governing Lawyers § 69](#) (Am. Law Inst. 2016)); John W. Strong et al., *McCormick on Evidence* § 89 (5th ed. 1999); 24 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure: Federal Rules of Evidence* § 5484 (1st ed. 2017).

⁷⁷ [Upjohn, 449 U.S. at 395-96](#).

⁷⁸ The individual may, however, be able to assert her Fifth Amendment privilege against self-incrimination. See *id.* Despite this individual protection, the individual may not assert the Fifth Amendment privilege on behalf of the corporation. See [Braswell v. United States, 487 U.S. 99, 104-10 \(1988\)](#) (explaining the legal history of the "collective entity doctrine").

⁷⁹ [Upjohn, 449 U.S. at 395](#).

⁸⁰ Timothy P. Glynn, *Federalizing Privilege*, [52 Am. U. L. Rev. 59, 60 \(2002\)](#).

⁸¹ [Id. at 98-121](#) (discussing some of the many disagreements between jurisdictions).

⁸² See *supra* Part II.

⁸³ See [Trammel v. United States, 445 U.S. 40, 50 \(1980\)](#) ("Testimonial exclusionary rules and privileges contravene the fundamental principle that "the public ... has a right to every man's evidence." (quoting [United States v. Bryan, 339 U.S. 323, 331 \(1950\)](#) (omission in original))).

⁸⁴ See *id.* at 45 ("In 1953 the Uniform Rules of Evidence, drafted by the National Conference of Commissioners on Uniform State Laws, followed a similar course; it limited the privilege to confidential communications and "abolished the rule, still existing in some states, and largely a sentimental relic, of not requiring one spouse to testify against the other in a criminal action." (alteration in original)).

attorney-client privilege never attached because the communication was not confidential or intended to be confidential, while in other cases the court will find that the attorney-client privilege was waived due to a disclosure that destroyed confidentiality.⁸⁶

[*1914] With respect to waiver of the attorney-client privilege, a disclosure of attorney-client communications to one party waives the privilege as to all other parties.⁸⁷ This includes situations where a corporation waives the privilege in order to gain cooperation credit with the government. As the privilege is strictly construed, waiver of the privilege can be express, implied, or even inadvertent.⁸⁸ In cases involving express waiver, the corporation's management makes a conscious choice to waive the corporate attorney-client privilege.⁸⁹

Waiver of the attorney-client privilege may also be implied. There are two circumstances where an implied waiver of the privilege may occur. "The attorney-client privilege may be waived "by placing the subject matter of counsel's advice in issue or by making selective disclosure of only part of such advice."⁹⁰ This prevents a client from using the attorney-client privilege as both a sword and a shield. For example, if a client claims that she acted in good faith on the reliance of counsel's advice, she cannot then refuse to produce the attorney-client communications related to that advice.

⁸⁵ [United States v. Jones, 696 F.2d 1069, 1072 \(4th Cir. 1982\)](#). The court goes on to explain that: "Any voluntary disclosure by the client to a third party waives the privilege not only as to the specific communication disclosed, but often as to all other communications relating to the same subject matter." *Id.* (citing [In re Sealed Case, 676 F.2d 793, 808-09 \(D.C. Cir. 1982\)](#)).

⁸⁶ See, e.g., [In re Grand Jury Proceedings, 727 F.2d 1352, 1356 \(4th Cir. 1984\)](#) (explaining that the attorney-client privilege "does not apply to the situation where it is the intention or understanding of the client that the communication is to be made known to others"); [United States v. El Paso Co., 682 F.2d 530, 538 \(5th Cir. 1982\)](#) (explaining that disclosure of certain documents destroyed the confidentiality of those documents and any claim to the attorney-client privilege); [United States v. Landof, 591 F.2d 36, 38-39 \(9th Cir. 1978\)](#) (explaining that the presence of a third party during the meeting between the attorney and client destroyed the privilege because the communication was not confidential); see also Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 390-91 (5th ed. 2007).

The existence of the privilege and its waiver are analytically distinguishable, although similar circumstances may give rise to a judicial determination that the privilege never attached in the first instance, or that although it attached, it has been waived. Disclosure of the privileged communication to third persons at the time of the communication may prevent the creation of the privilege. The necessary element of confidentiality will be found to be lacking. Disclosure to third persons after the making of an otherwise privileged communication may constitute a waiver of the privilege. The effect is the same: There is no privilege because disclosure was intended or has in fact occurred. The analysis of why the privilege does not apply, however, is best kept distinct.

Id.

⁸⁷ See [In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 302 \(6th Cir. 2002\)](#) (rejecting the doctrine of selective waiver because it would transform the attorney-client privilege into a tool to be used for strategic advantage against various opponents).

⁸⁸ See Epstein, *supra* note 86, at 391 (quoting 8 Wigmore, *Evidence* § 2327 (McNaughton rev. 1961)) ("A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that the [sic] privilege shall cease whether he intended that result or not.").

⁸⁹ See [Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 \(1985\)](#) (explaining that the power to waive the privilege is typically exercised by officers and directors "in a manner consistent with their fiduciary duty to act in the best interests of the corporation.").

⁹⁰ James P. McLoughlin, Jr. et al., *Navigating Implied Waiver of the Attorney-Client Privilege After Adoption of Federal Rule 502 of the Federal Rules of Evidence*, [67 N.Y.U. Ann. Surv. Am. L. 693, 724-25 \(2012\)](#) (footnote omitted) (quoting [Soho Generation v. Tri-City Ins. Brokers, 653 N.Y.S.2d 924, 925 \(App. Div. 1997\)](#)).

Waiver of the attorney-client privilege, however, is not always express or implied based on the circumstances. Waiver may also occur if the client or the client's counsel inadvertently discloses attorney-client communications.⁹¹ Under the [Federal Rule of Evidence 502\(b\)](#), unintentional disclosure of privileged materials does not result in waiver of the privilege only if "(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error."⁹² However, while there are clearly protections in place to avoid inadvertent waiver, it is certainly possible that a court may find that a corporation inadvertently waived its corporate attorney-client privilege by disclosing the "facts" to the government. For example, a court may be faced with a situation where a corporation attempted to cooperate with the government by disclosing the facts that counsel learned **[*1915]** from an employee interview. In that situation, the court may find that because the attorney knows the "facts" about the subject through the client's communications, disclosure of those "facts" necessarily reveals the content of the attorney-client communication. Therefore, the disclosure of the "facts" would constitute a waiver of the attorney-client privilege.

2. The Problems of Waiver in the Yates Memo

There are two related questions concerning the viability of the corporate attorney-client privilege and the Yates Memo. The first question is whether the corporate attorney-client privilege applies to the internal investigation when there is an expectation that the results of that investigation will be shared with the government. In other words, is there an expectation of confidentiality? Second, if the corporate attorney-client privilege does apply to the internal investigation, does a corporation either expressly or inadvertently waive the privilege by complying with the Yates Memo's requirement to provide all of the facts about culpable employees?

As previously explained, "when material is conveyed to an attorney with the intention, knowledge, or expectation that the attorney will incorporate the matter so conveyed directly or indirectly into a disclosure to third parties, the requisite intention of confidentiality is lacking ab initio."⁹³ Therefore, there is a real danger that courts may find that the attorney-client privilege does not attach to documents prepared pursuant to an internal investigation if the company intends to comply with the Yates Memo and divulge information learned during the investigation about culpable employees to the government. So long as the corporation actually shares the information about culpable employees with the DOJ,⁹⁴ a subsequent court may find that the corporate attorney-client privilege never attached to any aspect of the internal investigation because there was never an expectation of confidentiality. Thus, interview memoranda and other documents created during the internal investigation may end up discoverable by third parties.

Even if the court were to find that there was an expectation of privacy, and that the attorney-client privilege therefore attached to the internal investigation, there would still be the question of whether the corporation waived the privilege by divulging facts about culpable employees. Although "facts" are not privileged, in the context of an internal investigation, the facts learned from employees would not be known but for the attorney-client **[*1916]** communication. Specifically, the attorney conducting the internal investigation ultimately becomes a repository of information and she will put a lot of the facts that she learns into interview memoranda and other documents created during the internal investigation. The decision to later provide those facts to the government would be a strategic one to save the corporation from indictment. Realistically speaking, therefore, there is no way to divulge these facts without revealing the attorney-client communication. The issue that a court would need to decide,

⁹¹ See [Fed. R. Evid. 502\(b\)](#).

⁹² Id.

⁹³ Epstein, *supra* note 86, at 246.

⁹⁴ Id. at 247 ("A client, however, may convey information to an attorney with the initial intention that the information will be conveyed to third parties and thereafter change his or her mind. In such a case, it is the subsequent intention of confidentiality rather than the initial intention of disclosure that would prevail, provided no disclosure had in fact been made."); see [United States v. \(Under Seal\), 748 F.2d 871, 875-76 \(4th Cir. 1984\)](#) (explaining "that if a client communicates information to his attorney with the understanding that the information will be revealed to others" then the privilege does not attach to that communication).

however, is whether that is enough to find either an express or inadvertent waiver of the corporate attorney-client privilege. In addition, if the court were to find that waiver had occurred, would it be a partial waiver or would it waive the privilege with respect to all materials of the same subject matter?

It is not clear how a court would rule on these issues. In addition, it may be a long time before this type of issue makes its way to a court because these issues arise pre-indictment. Specifically, a company would have to go along with the requirements of the Yates Memo and then have their corporate attorney-client privilege challenged in a subsequent case by a third party before the issue would be squarely before a court. As noted above, the danger here is in the uncertainty and the potential for a lack of uniformity in courts' rulings. As the Supreme Court has explained, "an uncertain privilege ... is little better than no privilege at all."⁹⁵ If there is uncertainty around the application of the corporate attorney-client privilege, it may discourage the free flow of information and make it more difficult for counsel to provide good legal advice.⁹⁶

B. The Problems in Employer-Employee Relationships

Because corporations often cooperate with the government and share the results of their investigations, for many years, a typical criticism of the corporate internal investigation has been that lawyers conducting the investigation are in essence government agents.⁹⁷ For employees of the corporation, this means that the government could bring criminal charges [*1917] against them based on information provided by the corporation that would otherwise be protected by the corporate attorney-client privilege.⁹⁸ Furthermore, as the employees of the corporation are not the attorney's client,⁹⁹ there has always been tension for the attorney between serving the interests of the client (i.e. avoiding indictment of the corporation by any means necessary) and the ethical obligation not to mislead employees during interviews. That tension is clearly exacerbated by the Yates Memo, which states that, "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."¹⁰⁰ Therefore, it is necessary to consider the appropriate warning that corporate counsel should provide prior to interviewing employees.

Internal investigations are incredibly important and useful tools for corporations. By conducting an internal investigation, the corporation can determine whether misconduct occurred, who committed the misconduct, and the potential liability that the corporation may face as a result of that misconduct. Furthermore, the corporation can determine how it will defend itself against any potential charges. As noted above, typically corporate counsel conducts the internal investigation on behalf of the corporation.¹⁰¹ By doing so, the results of the internal investigation are protected by the corporate attorney-client privilege.¹⁰² As part of the internal investigation,

⁹⁵ [Upjohn Co. v. United States, 449 U.S. 383, 393 \(1981\)](#).

⁹⁶ Glynn, *supra* note 80, at 74 (explaining that in order "for society to reap benefits from the privilege, it must afford sufficiently certain protection for attorney-client communications").

⁹⁷ See, e.g., Copeland, *supra* note 29, at 1211 (observing that the government could piggyback off of the efforts of the corporation's outside counsel by obtaining the results of internal investigations); Sarah Helene Duggin, Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview, [2003 Colum. Bus. L. Rev. 859, 865 \(2003\)](#) (explaining that employees are unaware that corporate counsel may be acting as a "de facto government agent[]"); First, *supra* note 34, at 48 (explaining that the use of DPAs "have further shifted the role of corporations in the criminal process from criminal target to prosecutorial agent"); Green & Podgor, *supra* note 61, at 78-79 ("When corporate criminal conduct exists, corporate counsel's allegiance to the entity translates into an investigation that is minimally independent and more practically an investigation to accumulate evidence that the government cannot obtain from the corporation without trading leniency for the corporation's waiver of privilege.").

⁹⁸ Duggin, *supra* note 97, at 864-65.

⁹⁹ Green & Podgor, *supra* note 61, at 107-09.

¹⁰⁰ Yates Memo, *supra* note 7, at 2.

¹⁰¹ See *supra* notes 20-21 and accompanying text.

corporate counsel will gather and review relevant documents and interview employees who may have knowledge of the relevant issue.

When corporate counsel conducts an employee interview, she provides a fairly standard disclaimer to the employee that has been termed the "Upjohn Warning."¹⁰³ Under this doctrine, the attorney must explain to the employee that: (1) the attorney has been hired by the corporation to investigate and provide legal advice on a specific matter; (2) the attorney represents the corporation, not the employee individually; (3) the interview is protected by the corporation's attorney-client privilege; (4) it is the corporation's right to waive the attorney-client privilege; and (5) the corporation expects the employee to keep the interview confidential.¹⁰⁴ By giving that warning, corporate counsel has fulfilled her ethical duty under the Model Rules of **[*1918]** Professional Conduct¹⁰⁵ to clarify that she does not represent the employees.¹⁰⁶ Furthermore, by providing that blanket warning to each employee before an interview, counsel does not need to determine ahead of time whether the interests of the corporation are adverse to the interests of the employee.¹⁰⁷ However, as Professors Bruce Green and Ellen Podgor so eloquently put it, "once the lawyers have clarified their role, the ethics rules do not forbid them from developing and taking advantage of individuals' expectation that the corporation's interests are aligned with their own and that the corporation, including its lawyers, will protect them."¹⁰⁸ This is because internal investigations are unregulated.¹⁰⁹ The chief concern, therefore, is that unsophisticated employees will tell all of their misdeeds to corporate counsel because they do not understand that it is often in the corporation's best interest to throw the employees under the bus in order to save itself.¹¹⁰ Furthermore, it is important to note that corporate counsel is not required to inform employees that the corporation may choose to cooperate with the government and waive the attorney-client privilege, which could lead to criminal charges against the employees.¹¹¹ Additionally, once the corporation decides to waive the corporate attorney-client privilege and share the results of the internal investigation with the

¹⁰² See supra notes 20-21 and accompanying text.

¹⁰³ See Am. Coll. of Trial Lawyers, Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations, *46 Am. Crim. L. Rev.* 73, 95 n.67 (2009) (explaining that although Upjohn itself did not deal with the question of warnings, "Upjohn Warnings have [been used to make] clear to Constituents that the corporation, and the corporation alone, is the holder of the privilege"). See generally *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

¹⁰⁴ Am. Coll. of Trial Lawyers, supra note 103, at 95-96.

¹⁰⁵ The American Bar Association adopted the Model Rules of Professional Conduct in 1983. ABA Model Rules of Professional Conduct: About the Model Rules, Am. Bar Ass'n, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Apr. 9, 2017). Since that time, most states have adopted the Model Rules of Professional Conduct as models for their ethics rules. Id.

¹⁰⁶ See Model Rules of Prof'l Conduct r. 1.13(a) (Am. Bar Ass'n 2016). Rule 1.13(a) states: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Id.

¹⁰⁷ See id. r. 1.13(f). Rule 1.13(f) states: "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." Id.

¹⁰⁸ Green & Podgor, supra note 61, at 75.

¹⁰⁹ Id.

¹¹⁰ Id. (explaining that "individuals with little or no legal training, and unaware of the ramifications and personal consequences, readily cooperate in providing information to corporate lawyers ... even when the corporation is already assisting government prosecutors or regulators in their investigation of corporate employees or anticipates doing so in exchange for leniency").

¹¹¹ Id.

government (as the Yates Memo essentially requires), the employees are virtually powerless to prevent the corporation from divulging their incriminating statements.¹¹²

[*1919] Even though the government is often the recipient of the information from the internal investigation, the investigation is not subject to the rules that would apply if the government were conducting the investigation itself.¹¹³ Thus, employees do not have a right to counsel or a Fifth Amendment right against self-incrimination because an employee interview during an internal investigation is not a government interrogation.¹¹⁴ Further complicating this dynamic is the fact that corporations may threaten to fire employees who refuse to cooperate with the internal investigation.¹¹⁵ Thus, employees may cooperate with the internal investigation and incriminate themselves because they are afraid of losing their jobs. Unfortunately, those employees do not necessarily understand that their statements to counsel could be turned over to the government and lead to criminal charges. This issue is heightened due to the fact that, as previously stated, counsel has no ethical obligation to inform employees that they may decide to cooperate with the government's investigation.

With the new Yates Memo rule that the corporation must turn over culpable employees or receive no cooperation credit, it seems unfathomable that the ethical duty of corporate counsel ends with the Upjohn warning. Although there is zero ambiguity about the fact that the interests of the corporation and the interests of the individual employees are out of alignment, the Upjohn warning makes clear that the corporation is the client, and that is all that is required by Rule 1.13(f) of the Model Rules of Professional Conduct.¹¹⁶ Importantly, Rule 4.3 of the Model Rules of Professional Conduct may be applicable here. Rule 4.3 says that when a lawyer is dealing with an unrepresented person (likely the case when an employee is being interviewed) and "the lawyer knows or reasonably should know" that **[*1920]** there is a misunderstanding with respect to the lawyer's role, "the lawyer shall make reasonable efforts to correct the misunderstanding."¹¹⁷ Furthermore, it provides that the only legal

¹¹² In order for a corporate employee to prevent disclosure of her communications with corporate counsel, the employee has to convince the court that she had a reasonable belief that counsel was representing the employee individually. To assert the privilege, the employee must show that five factors exist. See [In re Beville, 805 F.2d 120, 123-25 \(3d Cir. 1986\)](#). The Beville test, which many circuits have adopted, requires:

First, [employees] must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And, fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.

Id. at 123 (second and subsequent alterations in original) (quoting [In re Grand Jury Investigation No. 83-30557, 575 F. Supp. 777, 780 \(N.D. Ga. 1983\)](#); see also Lawton P. Cummings, *The Ethical Mine Field: Corporate Internal Investigations and Individual Assertions of the Attorney-Client Privilege*, [109 W. Va. L. Rev. 669, 669-70, 679 \(2007\)](#) (explaining that many employees who participate internal investigations are operating under the false impression that corporate counsel represents them individually and that they have a say in whether information counsel learned during the interview will be disclosed to the government).

¹¹³ Green & Podgor, *supra* note 61, at 78.

¹¹⁴ *Id.* at 87 (citing [Miranda v. Arizona, 384 U.S. 436, 444 \(1966\)](#)).

¹¹⁵ *Id.*; see also [United States v. Stein, 435 F. Supp. 2d 330, 344-49 \(S.D.N.Y. 2006\)](#) (explaining that KPMG fired employees who refused to cooperate).

¹¹⁶ Model Rules of Prof'l Conduct r. 1.13(f) (Am. Bar Ass'n 2016).

¹¹⁷ *Id.* r. 4.3. Rule 4.3 states:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's

advice that an attorney representing a party can give to an unrepresented person is the advice to obtain legal counsel. ¹¹⁸ The Comment to Rule 4.3 explains that "in order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person." ¹¹⁹ Thus, the question becomes whether corporate counsel must give some additional warning to employees before interviewing them or even tell them that they should secure their own attorneys. However, the Model Rules and commentary simply do not do enough to address the unique issues involved in internal investigations, especially those conducted under the new Yates Memo.

While it may not be directly required by the rules, it seems that an early assessment of the potential for conflicts when operating under the Yates Memo means that every employee needs her own attorney. In the past, attorneys may have been able to convince employees that the corporation was on their side, but under the Yates Memo, the best interests of the corporation and those of the employees are antithetical to one another. It is always difficult to assess conflicts at an early stage, but in the past, corporate attorneys would examine the documents concerning a particular employee and any prior statements by other employees to make a decision about whether or not a conflict existed prior to interviewing the employee. ¹²⁰ In the absence of clear red flags in the documents or a grand jury subpoena requiring the employee to testify, corporate counsel would typically determine that a conflict did not exist and would proceed with interviewing the employee. ¹²¹ If, however, something came up during the interview that demonstrated a clear conflict, counsel would stop the interview and advise the employee to obtain her own [*1921] counsel. ¹²² In many situations, the corporation would pay for the employee's attorney. ¹²³

After the Yates Memo, however, there is no real need to assess whether a potential conflict between the interests of the corporation and the interests of the employee exists. The government's issuance of the Yates Memo frames the scenario such that the employees are nothing more than potential bargaining chips in the hands of the corporation. If the corporation has any intention whatsoever of complying with the Yates Memo and turning over culpable employees, or even if the corporation is just considering it, there can be no doubt that a conflict exists. The question therefore becomes what level of warning is necessary to make employees aware of the conflict between them and the interests of the corporation. One possibility is that corporate counsel could, as part of the Upjohn warning, explain to the employee that in order for a corporation to receive leniency for any wrongdoing, the corporation must cooperate by turning over information about culpable employees. Therefore, if the corporation determines that the employee has engaged in wrongdoing then the corporation will turn that information over to the government, which could result in criminal charges. That type of warning would clearly lay out the potential conflict for the employee and the employee would understand the potential pitfalls of cooperating with the internal investigation. At the same time, however, it seems that any employee, whether culpable or not, would be scared by that warning and may decide not to speak with corporate counsel. Such a result would frustrate the internal investigation process. Of course, the corporation could still threaten to fire non-cooperating employees. However, in this context that would

role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Id.

¹¹⁸ Id.

¹¹⁹ Id. at cmt. 1.

¹²⁰ See Am. Coll. of Trial Lawyers, *supra* note 103, at 93-94 (explaining that interviews should begin after counsel has reviewed the relevant documents and that it may sometimes be necessary for an employee to have separate legal counsel before being interviewed if the employee has or appears to have "interests adverse to the Company").

¹²¹ See id.

¹²² See id. at 94 (explaining that there is no need for separate legal counsel for employees until "adversity becomes sufficiently clear, or until an employee makes a reasonable request for separate counsel").

¹²³ Id.; see also [United States v. Stein](#), 435 F. Supp. 2d 330, 355-56 (S.D.N.Y. 2006) (noting KPMG's longstanding policy of paying its employees' legal fees).

seem to add fuel to the fire that corporate counsel is acting as a government agent and that the employees should have the same rights they would have if they were being interviewed by the government. ¹²⁴

The other potential warning would be to instruct all employees that they need their own attorney before participating in the internal investigation. This is a bit more direct in that it does not rely on the employee to draw her own conclusion about what it means for the corporation to have interests that are opposed to the individual. Again, however, this would likely slow down the internal investigation or bring it to a swift conclusion. To begin with, **[*1922]** employees are going to be worried about the fact that they need counsel. Second, they will be concerned about how to pay for their own counsel. If the corporation opts to pay for their employees' counsel, it will greatly increase the cost of the internal investigation. Furthermore, some employees may not trust corporation-provided counsel even if the attorney explains that she represents the interests of the employee and not the corporation. Third, once counsel is present at the interviews, there may be many questions that counsel instructs the employee not to answer. Therefore, the employees may not give corporate counsel the critical information that it needs to determine whether or not misconduct occurred and who may be responsible for that misconduct. Similar to the suggestion above, corporate counsel may try to strong arm the employees into answering questions by threatening to fire them for failure to cooperate with an internal investigation. For an employee who has engaged in wrongdoing, this leaves her in the cruel trilemma of confessing the wrongdoing and being subject to criminal prosecution when the corporation turns over that testimony to the government, lying about the misconduct, or losing her job. Even if the employee did not engage in any wrongdoing, she may be hesitant to speak with corporate counsel in a situation where the interests of the corporation and those of the employees are not aligned in any way.

Either option - giving a more extensive warning about the conflict or advising the employee to obtain her own counsel - will greatly frustrate the progress of the internal investigation and it will be more difficult for corporate counsel to gather the information that is necessary to properly advise the corporation. Furthermore, it will make it more difficult to cooperate with the government as employees will understand that they are nothing more than bargaining chips to be used at the discretion of the corporation to save itself. Due to the significant drawbacks from the Yates Memo, there needs to be a different approach to holding individuals accountable that does not rely upon the corporation performing the investigation and turning over the results to the government.

IV. The Yates Memo is Not the Answer

Holding individuals responsible for corporate crimes has consistently been a difficult issue. As Professor Brandon Garrett has observed, "despite the remarkable access prosecutors can obtain from companies, prosecutors still often do not succeed in holding individuals accountable." ¹²⁵ Furthermore, he notes that even when the government pursues individuals, they are often lower-level employees rather than higher-up individuals. ¹²⁶ **[*1923]** Thus, the critical question for the government is whether the Yates Memo does anything to change that dynamic. In other words, if the goal is to obtain convictions of high-level officials, will the Yates Memo help the government to achieve that goal? Finally, and perhaps more importantly, is it the correct law enforcement approach for obtaining individual accountability?

This Part argues that the Yates Memo does not provide a big enough incentive for corporations to implicate their high-level executives in misconduct. In addition, it argues that in order to respect the boundaries between the defense and prosecution function, the government must conduct its own investigation into corporate misconduct

¹²⁴ Abbe David Lowell & Christopher D. Man, Federalizing Corporate Internal Investigations and the Erosion of Employees' Fifth Amendment Rights, 40 Geo. L.J. Ann. Rev. Crim. Proc. iii, iii-v, xxix-xxx (2011) (arguing that the government should not be able to circumvent Constitutional rights that would constrain its conduct by compelling the corporation to do it instead, and arguing that such Constitutional restrictions should apply during interviews and internal investigations).

¹²⁵ Brandon L. Garrett, The Corporate Criminal As Scapegoat, [101 Va. L. Rev. 1789, 1794 \(2015\)](#) (explaining that in theory it should be easier to bring prosecutions against individuals with the corporation's cooperation). He further explains that the individual prosecutions have led to many dismissals and acquittals because they are difficult cases to win. [Id. at 1808.](#)

¹²⁶ [Id. at 1794-95.](#)

rather than relying on the corporation's investigation. Furthermore, if the government conducts its own investigation into corporate wrongdoing, the problems with the attorney-client privilege are greatly diminished. Finally, this Part argues that a legislative solution is necessary to ensure individual accountability.

A. The Government Must Conduct its Own Investigation

Unfortunately, it is not clear that the policy changes in the Yates Memo will lead to an increase in criminal convictions of high-level corporate executives. This is because the Yates Memo is still relying upon the same method of resolving cases - DPAs with corporations and possible prosecutions of individuals based on corporate cooperation.¹²⁷ Professor Garrett, who has extensively studied the data on the relationship between DPAs and individual prosecutions, explains that:

We are not likely to see any sharp changes in the trend, unless prosecutors change their priorities and approaches towards these cases. Prosecutors may say that they now focus on holding individuals accountable, but more evidence will have to support any claim that there is actually some new trend towards doing so.¹²⁸

The fact is that the incentive to cooperate by providing information about high-level culpable employees does not change significantly due to the Yates Memo. The reward for cooperation is still a DPA or NPA for the corporation¹²⁹ and the corporation still pays a fine and agrees to compliance measures in exchange for the DOJ declining to prosecute the corporation.¹³⁰ There is nothing in the Yates Memo to suggest that the requirements of the DPA would be any less onerous, either in the form of a lower fine or less stringent compliance requirements, in exchange for providing information about culpable high-level executives. Nor is there any reason to believe that the prosecution of those high-level executives would be more successful under [*1924] the Yates Memo than prior to its existence. Specifically, the same problems that have plagued those prosecutions in the past would still exist. As Professor Garrett has noted, responsibility within a corporation can be diffused and it can be difficult to point the finger at a particular individual.¹³¹

Importantly, even if one were to assume, *arguendo*, that the Yates Memo would lead to more successful prosecutions of upper-level employees, that does not necessarily mean that it is the correct law enforcement approach. One of the principal problems with the government's approach to corporate crime is that the government expects the corporation to police itself. The notion that the corporation should perform the prosecutor's function of investigating, identifying, and providing evidence against the wrongdoer within the corporation is ludicrous. Defense counsel's job is to perform an internal investigation to determine whether wrongdoing occurred and, if such wrongdoing occurred, advise the corporation how to respond to it internally or defend itself against any potential charges. It is inappropriate for the government to delegate its prosecutorial function to corporations. Although white collar crime and street crimes are certainly different, it is hard to imagine a situation where a prosecutor would ask and rely upon defense counsel to conduct a murder investigation and provide evidence against her client.

If the government truly wants to achieve individual accountability, it must therefore conduct its own investigations from start to finish, rather than relying upon the corporation's internal investigation. From a practical perspective, the corporation may turn over a scapegoat rather than a high-level executive. Furthermore, due to the longstanding culture of waiver of the corporate attorney-client privilege and work-product protection, corporate counsel may not write everything that she learns down on paper.¹³² Ultimately, that means that the government may not get the full

¹²⁷ [Id. at 1803-04](#) (explaining that the data from 2001 to 2014 shows that the uptick in DPAs has not been accompanied by an increase in the number of individual prosecutions).

¹²⁸ [Id. at 1804](#).

¹²⁹ U.S. Attorneys' Manual, *supra* note 7, § 9-28.200.

¹³⁰ *Id.*

¹³¹ Garrett, *supra* note 125, at 1824.

story from the corporation's internal investigation. Therefore, the over-reliance on corporate internal investigations as the principal means of achieving law enforcement goals needs to end. It is in the public interest to have these types of investigations conducted by the government so that the rights of both the corporation and the individuals are protected. Specifically, corporate counsel will be able to conduct a thorough investigation with full cooperation from employees without concern about waiver of the attorney-client privilege or work-product protection. Furthermore, if the government conducts the investigation, employees will be entitled to an attorney for their conversation with the government and will be able to assert their Fifth Amendment privilege against self-incrimination without being put in the position of potentially losing their jobs. Ultimately, this will permit defense counsel to go [*1925] back to its job of defending corporations rather than working on behalf of the government.

Admittedly, there is no doubt that this is a costlier approach, on the part of the government, to obtain individual accountability. The government will have to use its own resources to review documents, identify individuals to interview, conduct those interviews, and in some cases grant immunity in order to obtain incriminating information on high-level executives. Importantly, however, while it may be more difficult to obtain information in the corporate context, the government's ability to make deals for information is no different than in street crime cases and can be used effectively.

The alternative approach detailed above of providing employees with additional warnings about the ramifications of cooperating with the internal investigation makes it more difficult for corporate counsel to learn critical information that it needs to advise the corporation. Or, even worse, if corporate counsel discloses the fact that the corporation intends to cooperate by turning over all information about culpable employees as required in the Yates Memo, the internal investigation may come to a screeching halt completely. ¹³³

This is particularly concerning due to the impact that it may have on a corporation's ability to protect the corporate attorney-client privilege and work-product protection during the investigation. As explained in Part III, *supra*, the Yates Memo brings back the culture of waiver and once again threatens the attorney-client privilege and work-product protection. Therefore, because both conservatives and liberals agree that the attorney-client privilege and work-product protection are sacrosanct, ¹³⁴ a solution that requires the government, rather than the corporations, to investigate corporate misconduct is a far more attractive solution.

B. A Legislative Solution Would be More Effective

Once the government has completed its own investigation of the corporation, it may still be difficult to hold high-level executives accountable for corporate misconduct without some change in the law. A legislative solution, therefore, may be needed to accomplish the government's goals.

A good example can be found in the healthcare and environmental context, where the government can prosecute high-level executives by using the responsible corporate officer doctrine. ¹³⁵ The doctrine, which the [*1926] Supreme Court created in *United States v. Dotterweich* ¹³⁶ and *United States v. Park*, ¹³⁷ permits the government

¹³² Glynn, *supra* note 80, at 76-81.

¹³³ Green & Podgor, *supra* note 61, at 76.

¹³⁴ Copeland, *supra* note 29, at 1199 & n.3 (explaining that both liberal and conservative groups were against the culture of waiver of the attorney-client privilege and work-product protection and lobbied the DOJ to change its policy that required waiver to demonstrate cooperation).

¹³⁵ In the healthcare context, the available charges are for strict liability regulatory offenses such as violation of the Food, Drug, and Cosmetic Act. Katrice Bridges Copeland, *The Crime of Being in Charge: Executive Culpability and Collateral Consequences*, [51 Am. Crim. L. Rev. 799, 827 \(2014\)](#). The responsible corporate officer doctrine is used in the healthcare and environmental context because the court has determined that they are public welfare offenses, which means that they involve "dangerous activities or materials" and a "reasonable person should be aware of the risks involved with [the] activities" because they "seriously threaten the community's health or safety." [Id. at 805](#).

to prosecute an executive for a misdemeanor violation, regardless of the officer's lack of awareness of misconduct, if, by reason of the officer's position in the company, she had the responsibility and authority either: (1) to prevent the misconduct in the first place; or (2) to promptly correct the violation, but failed to do so.¹³⁸

While scholars have criticized the responsible corporate officer doctrine on the basis that there is essentially no defense available to charges based on the doctrine,¹³⁹ it could serve as a legislative model for the prosecution of corporate officers in cases that do not involve public welfare offenses. The goal for the prosecution of high-level executives should be felony, rather than misdemeanor, offenses. Therefore, because there needs to be some level of moral blameworthiness that can be attributed to the executive, the potential legislation should require knowledge of, or involvement in, the misconduct before felony liability could attach to a high-level executive. It should also be possible to demonstrate knowledge through willful blindness so that high-level executives cannot insulate themselves from liability through secret agreements with their subordinates.

Even with this type of legislation, however, it will still be hard to prosecute individuals because it is often difficult to prove intent.¹⁴⁰ Nonetheless, if the government performs its own investigation, makes deals with individuals to obtain incriminating information about high-level officials, and then has the assistance of legislation which permits it to prosecute high-level executives for the misconduct of their subordinates, it will be much more successful than it would be by simply relying on the investigation of the corporation and the Yates Memo to pressure the corporation to provide information about culpable individuals in order to save itself from prosecution.

V. Conclusion

The Yates Memo is nothing more than a return to the "culture of waiver" that was reviled by the legal community. Its requirement that corporations identify and provide all relevant information concerning individual wrongdoers within the corporation in the name of cooperation is no different [***1927**] than requiring waiver of the corporate attorney-client privilege to prove cooperation. Furthermore, not only does the Yates Memo put the corporate attorney-client privilege in grave jeopardy, but it also threatens the employer-employee relationship. Over the past twenty years, the government has become too reliant on the internal investigations of corporate counsel. If the government wants to hold individuals accountable for corporate wrongdoing, it is time for it to do its own job. It is in the public interest that the government, rather than corporate counsel, perform investigations and make the case that individuals broke the law. Finally, with legislation that is loosely modeled on the responsible corporate officer doctrine, the prosecution is much more likely to be successful at holding high-level executives criminally accountable for misconduct within the organization.

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¹³⁶ [United States v. Dotterweich, 320 U.S. 277, 283-85 \(1943\).](#)

¹³⁷ See generally [United States v. Park, 421 U.S. 658 \(1975\).](#)

¹³⁸ [Id. at 673-74.](#)

¹³⁹ See Copeland, *supra* note 135, at 804 (explaining that the doctrine is "flawed" because it does not matter whether the executive is knowledgeable about the offense and the only defense is impossibility but that it has never been used successfully in a responsible corporate officer case).

¹⁴⁰ See Garrett, *supra* note 125, at 1831-37.