Everything Old is New Again: Why the Yates Memo is Constitutionally Suspect

By Paul Monnin & Eric D. Stolze

The U.S. Department of Justice has a habit of promulgating constitutionally questionable policies in response to criticism of its reluctance to prosecute individuals for significant corporate fraud offenses. Thirteen years ago, after the dot-com bubble had burst and Enron and Worldcom had imploded, the Justice Department issued the Thompson Memo, which authorized federal prosecutors to indict companies that refused to waive their attorney-client privilege at the government’s request. Federal prosecutors also invoked the Thompson Memo to threaten cooperation credit for companies that failed to terminate employees who declined to be interviewed, that entered joint defense agreements with their staff or that advanced the legal fees of their officers and directors.

It was only after public outcry regarding coerced waiver of the corporate attorney-client privilege and courts dismissed charges against individuals who had been denied their legal right to fee advancement that DOJ changed its tactics. From 2006 until mid-2015, it was official Justice Department policy that, to preserve cooperation credit, companies merely had to furnish nonprivileged factual information regarding potentially culpable personnel. (DOJ’s McNulty Memo, issued in 2006, continued to authorize possible penalties for corporate fee advancement, entry of joint defense agreements, and failure to fire noncooperating employees through 2008, when the Filip Memo finally rescinded prosecutorial accounting of such matters.)

Stung by criticism of its failure to prosecute individuals in the wake of the financial crisis, however, the Justice Department dramatically sharpened its corporate cooperation policy by issuing the Yates Memo on September 9, 2015. It is now official DOJ policy that a company is entitled to no cooperation credit unless it has disclosed, to the government’s satisfaction, “all relevant facts about the individuals involved in corporate misconduct.”

The potential for constitutional abuse presented by the Yates Memo is substantial—particularly when companies happen to disagree with the government, yet are pressured to coerce employees to speak about alleged “wrongdoing” to preserve their employers’ existence. Not only can the Yates Memo have a destabilizing impact on corporate decision-making, it may also affect the integrity of federal prosecutions, as counsel for charged individuals pursue discovery of pre-indictment interaction between DOJ and their clients’ former employers.

State Actors May Not Compel Self-Incrimination Through Threat of Termination

Federal courts have long held, following cases like Garrity v. New Jersey, 385 U.S. 493 (1967), that the choice between self-incrimination and employment is inherently coercive. As a result, federal
prosecutors are trained to avoid incriminating statements resulting from administrative interrogation of public employees who, as a condition of their employment, are required to cooperate with their employers’ public integrity investigations. In such cases, criminal prosecutors are instructed to decline prosecution of public employees whose alleged misconduct fails to meet discretionary guidelines. Alternatively, they are told to ensure that the administrative investigation is stayed pending the outcome of a criminal investigation, or that the two investigations remain entirely separate, specifically with respect to interviews.

It follows that, at least in public employment cases, the Justice Department has concluded that the Fifth Amendment prevents criminal prosecutors from achieving indirectly, through their administrative and regulatory counterparts, what they could not do directly—namely, procure a criminal confession under threat of termination. But the Yates Memo effectively aims at just that. First, it outright denies cooperation credit not only to companies that disclose incomplete information regarding individual culpability, but also those that “decline to learn” of it. Second, it mandates that federal prosecutors consult with agency counsel to promote “the most thorough and appropriate resolution in every case.”

The Fifth and Sixth Amendment implications of this fundamental shift in DOJ policy, which in many respects mirror the constitutional mischief inherent in the Thompson and McNulty Memos, are likely to be litigated as the government enforces the Yates Memo to secure the indictment of individual defendants.

Corporations May Become State Actors in Their Quest for Cooperation Credit

The Fifth Amendment, which applies solely to individuals, accords no suppression remedy to criminal defendants in the absence of state action. In practice, this has meant that, so long as negative employment consequences associated with an internal corporate inquiry are motivated fundamentally by the corporation’s good faith efforts to police itself, no state action exists. This has been true even if a corporation ultimately shares evidence of employee misconduct with the government.

But the Yates Memo directs that criminal prosecutors must insert themselves at an early stage in both private and public corporate fraud investigations. Moreover, it dictates that corporations are ineligible for cooperation credit unless they affirmatively develop evidence of individual culpability, which, if criminal prosecutors are running the show, will have to conform to the government’s conception of right and wrong.

It is thus far from difficult to imagine that companies will threaten the livelihood of employees who refuse to incriminate themselves in connection with corporate inquiries that, in effect, are being run by criminal authorities. This is a product of two Yates Memo directives. First, criminal prosecutors must target individuals at the earliest opportunity. And second, in so doing, they are required to consult early and often with their legal counterparts—including administrative and corporate counsel. Simply put, the Yates Memo collapses the divide between criminal and corporate internal investigations that has traditionally left the Fifth Amendment—and a suppression remedy for its violation—out of the equation for targeted employees.

But the merger analysis for purposes of demonstrating state action does not end there. The Yates Memo denies cooperation credit altogether to companies that fail to learn of alleged misconduct. It further instructs that federal prosecutors may not await disclosure of a corporation’s investigative work product before “proactively investigating individuals at every step of the process.”
As a result, the Yates Memo effectively ensures that companies will press their employees, including by threat of termination, to cooperate in internal investigations informed principally by the government’s world-view. That is, companies will either launch or extend internal investigations even when they do not subscribe to the government’s theory of prosecution. After all, it is the Justice Department, not the investigating company, that decides eligibility for cooperation credit. And it is the Justice Department, through its indictment power and its direct and indirect debarment authority, that has the capacity to end a corporation’s existence.

It is the essence of state action for a company to disagree with the government, while at the same time threatening an employee’s job security for declining to incriminate himself in accordance with the government’s prosecution theory. This is especially true when current DOJ policy effectively allows a company to be charged for failing to secure incriminating statements in furtherance of the company’s obligation to "learn" of employee misconduct.

Indeed, this is largely what doomed the Thompson and McNulty Memos. In the so-called KPMG line of authority from 2006–2008, both the district court and U.S. Court of Appeals for the Second Circuit held multiple times that when an employer seeking cooperation credit from the Justice Department conditions employment on waiver of the Fifth Amendment, such coercion is "fairly attributable" to the government, necessitating the intervention of separate counsel and rendering any uncounseled statements criminally inadmissible. See, e.g., United States v. Stein (Stein II), 440 F. Supp. 2d 315, 330-33 (SDNY 2006).

To be clear, the Yates Memo does not expressly condition corporate cooperation credit on employee waiver of the Fifth Amendment. But in order to target individuals as quickly as possible, it mandates that prosecutors must direct the fact-gathering functions of their civil, administrative and corporate analogues. This obligatory agency relationship is presumably unknown to many individual (and, in most instances, uncounseled) investigative subjects. In combination with DOJ’s power to coerce companies (through denial of cooperation credit) into coercing their employees, it clearly has the potential to make prosecutors legally responsible for whether someone loses his job if he refuses to talk.

In short, the Yates Memo effectively implicates the Fifth Amendment as much or more than its constitutionally problematic predecessors.

‘Corporate Miranda’ Warnings are No Longer Enough

Because it has the potential to make corporations state actors, the Yates Memo also raises serious Sixth Amendment concerns. The purpose of Upjohn warnings is to ensure that employees who may incriminate themselves understand that, while their statements to corporate counsel are privileged, the corporation maintains the power to waive the privilege. As a corollary, corporate counsel seek to avoid polluting the company’s waiver authority by giving legal advice about whether an employee requires separate representation.

It is questionable, however, whether company lawyers may stand by idly and watch employees expose themselves to criminal liability in circumstances where the government has imparted its view of individual culpability to corporate counsel or where corporate counsel is actually aware that an administrative subpoena includes input and oversight from criminal prosecutors—each a likely Yates Memo scenario.
While the Sixth Amendment right to counsel does not attach until the government has committed itself to prosecute, the Yates Memo accelerates this process by inserting criminal prosecutors into the critical stages of regulatory and corporate internal investigations. This is particularly true when the Justice Department is satisfied it could sue and, in certain cases, charge a corporation, and the company proceeds to elicit inculpatory statements from its employees in pursuit of cooperation credit.

In addition, by denying cooperation credit altogether to companies that fail to adhere to the government’s theory of criminal liability, the Yates Memo, by its terms, likely supplies the requisite adversity between a corporation and its employees sufficient to warrant separate counsel. That is, the Yates Memo makes it more likely that a company, to mitigate its exposure and in certain cases to preserve its very existence, will be adverse to its employees at an earlier, yet nonetheless critical, stage in an investigation.

At the very least, corporations are well-advised to revisit their fee advancement and indemnity provisions for purposes of determining whether—as dictated by the Yates Memo—the intervention of criminal prosecutors in an administrative or corporate internal investigation entitles individual investigative subjects to separate counsel. Indeed, if the purpose of corporate Miranda warnings is to preserve optionality in the event a company is criminally targeted, it is far better for its employees’ waiver of their Fifth Amendment privilege to be independently counseled. It remains difficult to cooperate through the proffer of an illegally obtained confession.

**Execution of the Yates Memo is Destabilizing—for Corporations and for Prosecutors**

Over time, the constitutional implications of the Thompson and McNulty Memos were exposed in court by individuals who had been indicted following the choice to incriminate themselves or lose access to fee advancement. The same will likely be true of the Yates Memo, as criminal prosecutors execute its provisions by inserting themselves, both overtly and in many cases covertly, in administrative, regulatory and corporate internal investigations of suspected corporate misconduct, and corporations respond to such intervention by siding with the government—even when they disagree with its liability theory—to ensure cooperation credit.

The Yates Memo’s Fifth and Sixth Amendment implications encourage individuals to claim post-indictment that their uncounseled admissions were coerced through state action. This is particularly likely where a court subscribes to the legal notion, supported by the case law, that the Yates Memo’s terms effectively merge criminal and corporate internal investigations in a way not previously contemplated by the Filip Memo—especially where a defendant proffers that his livelihood was jeopardized if he failed to cooperate.

Assuming a judge connects the legal dots, individual defendants may obtain discovery of the pre-indictment interaction between criminal prosecutors and their regulatory and corporate counterparts, potentially making the assigned prosecutors witnesses in their own criminal cases. And even if a court denies such relief, these same facts could come out in parallel bad faith termination and indemnity actions.

The Yates Memo also destabilizes corporate governance. By inserting criminal prosecutors in administrative matters and by denying cooperation credit to companies that fail to secure inculpatory testimony, the Yates Memo effectively ensures that corporate personnel will face a choice between self-incrimination and employment. And where employees are separately represented, it is virtually assured they will decline to participate in their employers’ inquiries. If a corporate officer is relieved of
his duties as a result, this could generate disclosure obligations to regulators, auditors and shareholders that the government, not the company, has precipitated, including through application of DOJ’s unilateral conception of corporate liability.

While it is laudable for the Justice Department to deter corporate fraud through prosecution of culpable individuals, the Yates Memo resurrec ts many of the same constitutional defects that condemned its predecessors. It is also questionable whether this policy shift is worth the constitutional risk. The government maintains many tools to prosecute individual offenders, including the extension of immunity, consensual monitoring, wiretaps, search warrants, grand jury subpoenas, and access to cooperators, whistleblowers and relators. Moreover, good corporate citizens should be entitled to conduct privileged investigations of suspected individual misconduct without intervention of constitutional considerations that will inevitably slow the progress of these inquiries and potentially curtail their prosecutability.

Reprinted with permission from the January 11, 2016 edition of Corporate Counsel © 2016 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382, reprints@alm.com or visit www.almreprints.com.

If you have any questions concerning these developing issues, please do not hesitate to contact the following Firm lawyers:

Atlanta
Paul Monnin
1.404.815.2138
paulmonnin@paulhastings.com

Eric D. Stolze
1.404.815.2315
ericstolze@paulhastings.com