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## ESSAY

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### THE YATES MEMO VERSUS ADMINISTRATIVE LAW

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#### INTRODUCTION

There's no denying that the Department of Justice's response to the financial crisis of 2008 was underwhelming. Despite seemingly widespread fraud in the market for mortgage-backed securities, the Department secured only one conviction of a Wall Street executive.<sup>1</sup> The near-total absence of prosecutions proved publicly embarrassing—and politically costly—to the Department.<sup>2</sup> As criminal statutes of limitation expired, major media outlet after major media outlet published exposés on Wall Street leaders' apparent immunity from prosecution.<sup>3</sup>

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<sup>1</sup> See Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES MAG. (Apr. 30, 2014), [https://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html?\\_r=0](https://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html?_r=0) [<https://perma.cc/X4QE-J6Y2>] (identifying Kareem Serageldin, a former executive at Credit Suisse, as the lone Wall Street executive to be prosecuted).

<sup>2</sup> See Michael P. Kelly & Ruth E. Mandelbaum, *Are the Yates Memorandum and the Federal Judiciary's Concerns About Over-Criminalization Destined to Collide?*, 53 AM. CRIM. L. REV. 899, 902-05 (2016) (discussing the various groups who have criticized the Department's handling of the 2008 Financial Crisis, as well as the Department's response); Joseph W. Yockey, *Beyond Yates: From Engagement to Accountability in Corporate Crime*, 12 N.Y.U. J.L. & BUS. 407, 409 (2016) ("In recent years, and especially in the wake of the 2008 global financial crisis, many question the Department's track record in the prosecution of corporate wrongdoing."). *But see* Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265, 265-72 (2014) (arguing that prosecuting Wall Street executives would not have been as easy as critics of the Department often suggest).

<sup>3</sup> See, e.g., *Blind Justice: Why Have So Few Bankers Gone to Jail for Their Part in the Financial Crisis?*, ECONOMIST (May 4, 2013), <http://www.economist.com/news/finance-and-economics/21577064-why-have-so-few-bankers-gone-jail-their-part-crisis-blind-justice> [<https://perma.cc/74ET-XDPF>]; William D. Cohan, *How Wall Street's Bankers Stayed Out of Jail*, ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368> [<https://perma.cc/3JNQ-AZV6>]; David Dayen, *Eric Holder Didn't Send a Single Banker to Jail for the Mortgage Crisis. Is That Justice?*, GUARDIAN (Sept. 25, 2014), <https://www.theguardian.com/money/us-money-blog/2014/sep/25/eric->

Against this backdrop, the Department understood that it would need to strike back, and in a big way. Enter the “Yates Memo” in September 2015.<sup>4</sup> Henceforth, Deputy Attorney General Sally Yates announced, corporate crime prosecutors would focus on securing accountability—in the form of criminal prosecutions—for culpable individuals within business organizations.<sup>5</sup> Yates paired the Memo’s release with a public relations campaign. In a speech at the New York University School of Law, she described the Memo as “a substantial shift from our prior practice.”<sup>6</sup> Responding to criticism of the Department’s post-financial crisis performance, Yates told the *New York Times* that, “The public needs to have confidence that there is one system of justice and it applies equally regardless of whether that crime occurs on a street corner or in a boardroom.”<sup>7</sup>

The form of the Department’s announcement—a memo from the Deputy Attorney General to prosecutors—was nothing new. In form and, to a significant degree, in substance, the Yates Memo was a continuation of the Holder Memo (1999),<sup>8</sup> the Thompson Memo (2003),<sup>9</sup> the McNulty Memo (2006),<sup>10</sup> and the

holder-resign-mortgage-abuses-americans [https://perma.cc/VU5H-W7K2]; Eisinger, *supra* note 1; 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> [https://perma.cc/S62T-6ZEB]; *Frontline: The Untouchables* (PBS television broadcast Jan. 22, 2013), <http://www.pbs.org/wgbh/frontline/film/untouchables> [https://perma.cc/B25J-ASE8].

<sup>4</sup> Memorandum from Sally Quillian Yates, Deputy Attorney Gen., to Assistant Attorneys Gen. & U.S. Attorneys (Sept. 9, 2015) [hereinafter Yates Memo or Memo].

<sup>5</sup> *See id.* at 1 (“One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.”). Although the Yates Memo refers only to investigations of “corporations,” *see id.*, it also applies to noncorporate forms of business organizations, such as limited liability companies and partnerships. *See* U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.200 n.1 (2015), <https://www.justice.gov/usam/united-states-attorneys-manual> [https://perma.cc/QE37-DE5E] [hereinafter U.S. Attorneys’ Manual] (“While these guidelines refer to corporations, they apply to the consideration of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.”). This Essay likewise uses “corporate” to refer to all forms of business organizations.

<sup>6</sup> Press Release, Dep’t of Justice, Deputy Attorney Gen. Sally Quillian Yates Delivers Remarks at N.Y. Univ. School of Law Announcing New Policy on Individual Liab. in Matters of Corp. Wrongdoing (Sept. 10, 2015), <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school> [https://perma.cc/C9B4-LY2V] [hereinafter Yates NYU Speech].

<sup>7</sup> Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES (Sept. 9, 2015), <https://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html> [https://perma.cc/3FAP-XQZR].

<sup>8</sup> Memorandum from the Deputy Attorney Gen., to All Component Heads & U.S. Attorneys (June 16, 1999) [hereinafter Holder Memo].

<sup>9</sup> Memorandum from Larry D. Thompson, Deputy Attorney Gen., to Heads of Dep’t Components & U.S. Attorneys (Jan. 20, 2003) [hereinafter Thompson Memo].

<sup>10</sup> Memorandum from Paul J. McNulty, Deputy Attorney Gen., to Heads of Dep’t Components & U.S. Attorneys (Dec. 12, 2006) [hereinafter McNulty Memo].

Filip Memo (2008),<sup>11</sup> all authored by a then-current Deputy Attorney General. Each of the white-collar enforcement memos, spanning three presidential administrations, identified individual accountability as a Department priority in corporate investigations.

In one critical respect, however, Yates delivered on her promise of a “substantial shift” in policy. “In order for a company to receive *any* consideration for cooperation under the Principles of Federal Prosecution of Business Organizations,” the Yates Memo declares, “the company must completely disclose to the Department all relevant facts about individual misconduct.”<sup>12</sup> This was to be a “threshold requirement” for any organization seeking “cooperation credit.”<sup>13</sup>

As Yates made clear in announcing the Memo, the threshold disclosure requirement was meant to be the Department’s answer to critics of its performance in the financial crisis.<sup>14</sup> Nonetheless, it has proved a lightning rod for criticism. Some commentators question whether the change was substantial enough to accomplish the Department’s stated goal of individual accountability.<sup>15</sup> Others fear that it could prove counterproductive—corporate decisions are made by people, after all, and corporate leaders may prefer not cooperating to disclosing their own culpability, or they may find lower-level

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11 Memorandum from Mark Filip, Deputy Attorney Gen., to Heads of Dept’t Components & U.S. Attorneys (Aug. 28, 2008) [hereinafter Filip Memo].

12 Yates Memo, *supra* note 4, at 3.

13 *Id.*

14 See *supra* text accompanying notes 6–7.

15 See, e.g., Brandon L. Garrett, *The Metamorphosis of Corporate Criminal Prosecutions*, 101 VA. L. REV. ONLINE 60, 65 (2016) (“One preliminary question is whether the latest round should even be considered a meaningful set of changes at all. Regarding the new stated focus on individual culpability, DOJ policy had already emphasized for some time that ‘[o]nly rarely should provable individual culpability not be pursued, particularly if it relates to high-level corporate officers,’ where the company settles its case with prosecutors (since, after all, the company’s liability is necessarily premised on the crimes of its agents. Supposedly, individuals were always a central focus of an investigation.” (footnote omitted) (quoting U.S. Attorneys’ Manual, *supra* note 5, § 9-28.200(B))); Peter J. Henning, *Why It Is Getting Harder to Prosecute Executives for Corporate Misconduct*, 41 VT. L. REV. 503, 506 (2017) (“Does the shift to emphasizing individual culpability mean there will be an upsurge of prosecutions of corporate executives who oversee companies that engage in misconduct? The short answer is no.”); Elizabeth E. Joh & Thomas W. Joo, *The Corporation as Snitch: The New DOJ Guidelines on Prosecuting White Collar Crime*, 101 VA. L. REV. ONLINE 51, 53-54 (2015) (noting that “it is not clear that the new cooperation policy will increase individual charges” because “[e]ven if corporations provide complete information about their agents’ conduct, individual charges may be stymied by the fact that harmful conduct is often caused by the acts of multiple agents who lack criminal intent and are unaware of each other’s acts,” and because “it is unclear whether the new cooperation policy will generate the kind of useful information the DOJ expects”); Yockey, *supra* note 2, at 412 (arguing that the Department has always asked “firms to identify culpable individuals if they wish to qualify for leniency”); Christopher Modlish, Note, *The Yates Memo: DOJ Public Relations Move or Meaningful Reform That Will End Impunity for Corporate Criminals?*, 58 B.C. L. REV. 743, 765-68 (2017) (highlighting various examples of the Department’s failure to hold individuals accountable for corporate criminality even after dissemination of the Yates Memo).

employees to scapegoat.<sup>16</sup> Practicing corporate defense lawyers further complain that the memo deputizes corporations as adjuncts of prosecutors.<sup>17</sup>

The Department, meanwhile, has been unmoved. In a series of speeches before her abrupt departure from office,<sup>18</sup> Yates reinforced the Department's policy of individual accountability and the Memo's strategy for achieving it.<sup>19</sup> While the new Administration has yet to explicitly affirm the Memo, Attorney General Sessions signaled his commitment to "individual accountability" at his confirmation hearing.<sup>20</sup> Another senior Department official, moreover, gave

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<sup>16</sup> See, e.g., Joh & Joo, *supra* note 15, at 58 ("If prosecutors are dependent on the corporation for information, they cannot know whether the board has implicated all the true culprits or merely offered up a scapegoat."); Yockey, *supra* note 2, at 415 ("[I]f cooperation credit now truly depends on handing over individuals to the DOJ, it is doubtful that managers will have trouble finding candidates to send packing. Managers are in the driver's seat to dictate the narrative of individual accountability. They control the information within the firm, as well as most of the procedural steps that govern the cooperative, public-private nature of corporate criminal enforcement.").

<sup>17</sup> See Kelly & Mandelbaum, *supra* note 2, at 909 ("Even more fundamentally, strict enforcement of the Yates Memorandum will change the relationship between companies and the Justice Department. A strict reading of the Yates Memorandum will push companies at the outset to formulate investigation plans designed not only to identify illegal conduct at the corporation, but also to identify all conceivable evidence that can be used in a criminal prosecution against individual employees."); Herrick K. Lidstone, Jr., *The Department of Justice's Yates Memo – Is It Now a Case of the Corporation Versus Its Executives?*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2677459](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2677459) [<https://perma.cc/6NBW-AB3Q>] ("It also remains to be seen whether the Yates Memo will encourage or discourage internal investigations by the corporations themselves, and whether corporations will be tempted to identify potentially responsible executives—and whether those executives will consider themselves to be scapegoats."); Amelia Toy Rudolph, *The Yates Memo and the Ethical and Strategic Challenges It Presents for White Collar Defense Attorneys* 10 (Aspatore, 2015 WL 9183828, 2015) ("Viewing the situation from the individual employee's perspective, employees aware of the Yates Memo will know they are potentially in the crosshairs of both the government and the corporation, even if they are merely in the group affected by the investigation and not necessarily 'culpable.' They will perceive that their employer has a powerful incentive to disclose to the government anything they say that could be incriminating, and to 'cooperate' with the government early and often, even if information is incomplete—thus leading to a nontrivial risk of hasty and perhaps ill-informed identification of scapegoats and sacrificial lambs.").

<sup>18</sup> See Michael D. Shear et al., *Trump Fires Acting Attorney General Who Defied Him*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/us/politics/trump-immigration-ban-memo.html> [<https://perma.cc/ZG3U-QK7B>] (detailing President Trump's decision to fire Sally Yates, then serving as Acting Attorney General).

<sup>19</sup> See *infra* Part I.

<sup>20</sup> At his confirmation hearing on January 11, 2017, Sessions was asked by Senator Mazie Hirono whether he would "hold accountable individual corporate officeholders should there be found to have been a violation of law." Sessions replied: "Sometimes it seems to me, Senator Hirono, that the corporate officers who caused the problem should be subjected to more severe punishment than the stockholders of the company who didn't know anything about it." *Attorney General Confirmation Hearing, Day 1 Part 4*, at 49:00 (C-SPAN television broadcast Jan. 10, 2017), <https://www.c-span.org/video/?420932-7/attorney-general-confirmation-hearing-day-1-part-4> [<https://perma.cc/GEC9-9AZB>]. Some have viewed the exchange as implicit support for the Yates Memo. See, e.g., Jody Godoy, *Sessions Hints Yates Memo, Fraud to Stay on DOJ Radar*, LAW360 (Jan. 11, 2017, 8:51 PM), <https://www.law360.com/articles/879816/sessions-hints-yates-memo-fraud-to-stay-on-doj-radar> [<https://perma.cc/969T-JM7F>] ("Linda Dale Hoffa, a former government attorney who practices at Dilworth Paxson LLP, said the comments generally square with Deputy Attorney General Sally Yates' 2015 memo incentivizing companies to cooperate in cases against their executives or employees.").

remarks in February 2017 that also appear to indicate the new Administration's support for the Memo.<sup>21</sup> And as of this writing, more than three months into the Trump Administration, the Department maintains a webpage explaining the policies set forth in the Yates Memo.<sup>22</sup> The page includes a "frequently asked questions" section geared for corporations (or their lawyers) seeking to comply with the new rules.<sup>23</sup> Therefore, despite the presidential transition, the Yates Memo apparently remains Department policy.<sup>24</sup>

Much has been written about the Yates Memo, for and against. But the Yates Memo has a problem that the ongoing debate has overlooked: the administrative law doctrine of "legislative rules." An administrative agency, like the Department of Justice, may issue a "legislative rule" only by following the notice-and-comment requirements of the Administrative Procedure Act (the "APA").<sup>25</sup> The Department did not put the Yates Memo through notice and comment. If it contains a legislative rule, it is therefore unlawful.<sup>26</sup>

The Department anticipated this challenge and attempted to circumvent it. In a footnote, the Yates Memo declares: "The measures laid out in this memo are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law."<sup>27</sup> The

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<sup>21</sup> See Hunton & Williams LLP, *Senior Justice Department Official Reaffirms Yates Memorandum, Will "Reevaluate" FCPA Declination Program*, LEXOLOGY (Feb. 20, 2017) <http://www.lexology.com/library/detail.aspx?g=5698652e-cf66-4cf1-a0c1-078baidd6df4> [<https://perma.cc/M6P3-7VWV>] ("While [Deputy Assistant Attorney General Trevor] McFadden did not directly mention the Yates Memo in his GIR remarks, he indicated that the department will continue to aggressively pursue individual wrongdoers in corporate investigations. His words suggest that the Yates Memo remains Department of Justice policy.").

<sup>22</sup> See *Individual Accountability*, DEP'T OF JUSTICE, <https://www.justice.gov/dag/individual-accountability> [<https://perma.cc/HH7W-TS3A>] (last visited May 7, 2017).

<sup>23</sup> *Frequently Asked Questions: Corporate Cooperation and the Individual Accountability Policy*, DEP'T OF JUSTICE, <https://www.justice.gov/dag/individual-accountability/faq> [<https://perma.cc/5AUV-FGHE>].

<sup>24</sup> For their part, commentators predict no major changes to the Yates Memo—aside from perhaps a rebranding—in the near term. See C. Ryan Barber, *DOJ's Sally Yates Is 'Optimistic' Trump Won't Trash Namesake Enforcement Memo*, NAT'L L.J. (Nov. 30, 2016), <http://www.nationallawjournal.com/id=1202773476363/DOJs-Sally-Yates-Is-Optimistic-Trump-Wont-Trash-Namesake-Enforcement-Memo?slreturn=20170407195848> [<https://perma.cc/3LGQ-7YPL>] (discussing how ongoing cases are unlikely to be dropped because of a change in administrations); see also James E. Connolly, *Trump Administration Likely to Maintain Yates Memo Priorities on Corporate Wrongdoing*, MONDAQ (Feb. 28, 2017), <http://www.mondaq.com/article.asp?action=login&articleid=571946> [<https://perma.cc/82WE-A6FQ>] ("Although agency heads and lower-level officers have barely begun to be appointed, early evidence suggests that the Yates Memo and its priorities will continue to hold sway."); *Yates Memo and Compliance Audits*, VENABLE LLP (Dec. 12, 2016), <https://www.venable.com/yates-memo-and-compliance-audits-12-12-2016> [<https://perma.cc/8CWJ-2KGL>] ("Deputy Attorney General Sally Yates' speech, . . . along with one by SEC Enforcement Director Andrew Ceresney, mirrored the topics she addressed in her September 2015 memorandum encouraging prosecutors to focus on individuals concurrently with any corporate investigation, and placing new cooperation and reporting requirements on companies.").

<sup>25</sup> See *infra* Part II.

<sup>26</sup> See *infra* Part II.

<sup>27</sup> Yates Memo, *supra* note 4, at 3 n.1.

Department thus invoked the APA exception for “general statements of policy,” which may be promulgated without notice and comment.<sup>28</sup>

The distinction between legislative rules and policy statements is famously fuzzy on the margins.<sup>29</sup> But at its core, it provides that an agency pronouncement imposing binding obligations on regulated parties or the agency itself is a legislative rule, not a statement of policy.<sup>30</sup> The Yates Memo appears to do precisely that. Corporations under investigation are bound—if they want cooperation credit—to disclose all facts they know or could learn about individual culpability. Prosecutors are similarly bound by the Yates Memo—they cannot, in exercising their prosecutorial discretion, consider a corporation’s cooperation until the company has cleared the threshold. As detailed below, courts have not hesitated to find that when an agency limits its officials’ prosecutorial discretion in a binding pronouncement, it has engaged in legislative rulemaking. And when an agency does so without notice and comment, its pronouncement is invalid.

The upshot is this: the Department of Justice’s principal response to critics of its performance in the financial crisis likely cannot be reconciled with established principles of administrative law. The Yates Memo—or at least its centerpiece, the threshold requirement for cooperation credit—is in all likelihood unlawful and subject to judicial invalidation.

This Essay proceeds in three parts. Part I places the Yates Memo in context. Part II then sets forth the legal case that the Memo’s threshold requirement likely violates the legislative rule doctrine of administrative law. Part III turns from the doctrinal to the normative, explaining why the legislative rule objection to the Yates Memo serves a useful social purpose. This Essay concludes by considering the broader implications of the Yates Memo’s likely unlawfulness.

Before I begin, an important caveat is in order. This Essay contains no critique of the policy underlying the Yates Memo. The Yates Memo may possess the right strategies to combat corporate crime, or critics may be right that its requirements will prove to be counterproductive or unfair. Such questions lay beyond the Essay’s scope. My claim is narrower, but more fundamental. If the Department of Justice is going to pursue a threshold disclosure requirement for corporate criminal investigations, it should abide by the APA.<sup>31</sup>

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<sup>28</sup> See 5 U.S.C. § 553(b)(A) (2012) (noting that the APA’s notice-and-comment requirements do not apply to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”).

<sup>29</sup> See *infra* note 71 and accompanying text.

<sup>30</sup> See *infra* Part II.

<sup>31</sup> One might wonder who would have standing to challenge the Yates Memo. While space constraints preclude a comprehensive standing analysis, if a company under criminal investigation

## I. THE YATES MEMO IN CONTEXT

In order to assess whether the Yates Memo's threshold requirement for cooperation credit is a "legislative rule," we must first understand what the Memo entails. And for that, we need some history.

Our story begins not in 2015, with the Yates Memo, or even in 2008, with the financial crisis. Instead, it begins in 1999, when then-Deputy Attorney General Eric Holder announced the Department of Justice's first formal policy on corporate criminal enforcement in response to a perceived uptick in white-collar crime.<sup>32</sup> The Holder Memo provided eight factors that "should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case."<sup>33</sup> Among the eight was "[t]he corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents."<sup>34</sup> The memo made clear, however, that the "factors" were "not outcome-determinative and are only guidelines."<sup>35</sup> A corporation's "willingness to identify the culprits within the corporation" was something that a prosecutor "*may* consider,"<sup>36</sup> but the memo stressed that prosecutors retained their full discretion.<sup>37</sup>

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does not wish to comply (or is unable to comply) with the threshold disclosure requirement, it likely would have standing to challenge the Yates Memo. The Memo precludes a prosecutor from considering the company's cooperation in any respect. A court likely would find that this is a concrete injury to the company that flows from the Yates Memo and that could be redressed by an order invalidating the Yates Memo. *See CropLife Am. v. EPA*, 329 F.3d 876, 884 (D.C. Cir. 2003) ("The disputed directive concretely injures petitioners, because it unambiguously precludes the agency's consideration of all third-party human studies . . ."); *see also* *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (setting forth standing requirements). For standing purposes, moreover, it likely does not matter that a prosecutor could ultimately decide not to prosecute a company that refuses to comply with the threshold disclosure requirement. *See CropLife Am.*, 329 F.3d at 884 ("Petitioners do not seek to require the agency to consider any particular human study. Instead, they simply ask the court to enjoin the agency's blanket refusal to consider any third-party human studies. Petitioners' standing to pursue this lawsuit is clear."). Standing is complicated, however, because it will rarely, if ever, be in the interests of a particular company under investigation to file a lawsuit challenging the Yates Memo while simultaneously negotiating with the Department—fear of reprisal would loom large. And even if one did file, its lawsuit would become moot once it resolved the underlying investigation. The most likely plaintiff is thus an organization that represents corporations. So long as the organization had at least one member with standing throughout the life of the lawsuit, the organization would have standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) ("[O]rganizations can assert the standing of their members.").

<sup>32</sup> Holder Memo, *supra* note 8; *see also* Garrett, *supra* note 15, at 63 ("In 1999, then-Deputy Attorney General Eric Holder issued the first DOJ memo providing more general guidelines for corporate prosecutions.").

<sup>33</sup> Holder Memo, *supra* note 8, at 1.

<sup>34</sup> *Id.* at 3.

<sup>35</sup> *Id.* at 1.

<sup>36</sup> *Id.* at 5 (emphasis added).

<sup>37</sup> *Id.* at 1.

In 2003, a new memo signed by George W. Bush's first Senate-confirmed Deputy Attorney General, Larry Thompson, superseded the Holder Memo.<sup>38</sup> With respect to individual accountability and corporate cooperation, the Thompson Memo was in line with its predecessor—a corporation's willingness to point the finger at individuals within the corporation remained a "factor" that prosecutors "may consider."<sup>39</sup> The memo reiterated that the factors discussed were "intended to provide guidance rather than to mandate a particular result."<sup>40</sup> When the Department again revised its white-collar guidance in 2006, a corporation's willingness to provide evidence against individuals became a "factor" that prosecutors "must" consider, but the new Deputy Attorney General, Paul McNulty, again emphasized that "prosecutors must exercise their judgment in applying and balancing the[] factors and this process does not mandate a particular result."<sup>41</sup>

Deputy Attorney General Mark Filip issued the Filip Memo, the Yates Memo's immediate predecessor, in 2008.<sup>42</sup> It again addressed corporate cooperation in, noting that companies "may choose to cooperate by disclosing the facts, and the government may give credit for the party's disclosures."<sup>43</sup> The memo explained that for the corporation to receive credit for "such cooperation," it, "like any person, must disclose the relevant facts of which it has knowledge."<sup>44</sup> Like each of its predecessors, the Filip Memo stressed that it was a guidance document that did not constrain prosecutors' discretion: "Of course, prosecutors must exercise their thoughtful and pragmatic judgment in applying and balancing these factors, so as to achieve a fair and just outcome and promote respect for the law."<sup>45</sup>

We arrive then at the Yates Memo. The Yates Memo's core policy shift was its threshold requirement that corporations disclose all information they have or can learn about individuals in order to receive any cooperation credit.<sup>46</sup> Because (as explained in Part II) courts applying the legislative rule doctrine closely examine how agencies phrase their announcements, I quote the requirement at length:

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<sup>38</sup> See generally Thompson Memo, *supra* note 9.

<sup>39</sup> *Id.* at 6.

<sup>40</sup> *Id.* at 4.

<sup>41</sup> McNulty Memo, *supra* note 10, at 5, 7.

<sup>42</sup> See generally Filip Memo, *supra* note 11.

<sup>43</sup> *Id.* at 9.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 4.

<sup>46</sup> The Memo also addressed internal Department policies and procedures. For instance, the Memo announced that civil attorneys should bring civil matters against individuals without regard for the individual's ability to pay. See Yates Memo, *supra* note 4, at 6-7.



In order for a company to receive *any* consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company *must* completely disclose to the Department all relevant facts about individual misconduct. Companies *cannot* pick and choose what facts to disclose. That is, 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. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 *et seq.* Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit.<sup>47</sup>

Three separate times in the paragraph (in the italicized language), the Memo tells companies what they must or cannot do if they want “cooperation credit” in an investigation. They must disclose everything they know about individual responsibility for wrongdoing. And if they lack such knowledge, they must undertake an investigation to acquire it. For convenience, I refer to these obligations as the “threshold disclosure requirement.” The Memo also specifies a sanction if the company does not qualify for “cooperation credit”: a prosecutor cannot consider cooperation as a “mitigating factor” in the exercise of her discretion. Thus, against the baseline of the “cooperating” company, an investigative target that does not comply with the threshold disclosure requirement faces an increased risk of indictment or, if a pre-indictment settlement is still possible, harsher terms.<sup>48</sup>

Absent from the Yates Memo is the language we have seen in the Holder, Thompson, McNulty, and Filip Memos insisting that prosecutors must exercise judgment and discretion in corporate criminal enforcement. It is not hard to see why. Individualized judgments about cooperation would be inconsistent with a Department-wide threshold policy. In the familiar logic of rules and standards, the Department has substituted the standards-based

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<sup>47</sup> *Id.* at 3 (first emphasis removed) (second emphasis added) (footnote omitted).

<sup>48</sup> Because cooperation is the norm in corporate investigations, not the exception, this is the appropriate baseline. See *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 4 (2006) (statement of Paul J. McNulty, Deputy Atty Gen. of the United States) (“[M]ost corporations . . . are anxious to cooperate with Government investigations. Whether it is the Holder memo, the Thompson memo, or no memo, corporations will continue to cooperate in order to bring criminal investigations to an end, to bring them out from under the dark cloud of potential prosecution.”); John A. Gallagher, Note, *Legislation Is Necessary for Deferred Prosecution of Corporate Crime*, 43 SUFFOLK U. L. REV. 447, 449 (2010) (noting that “[i]n accordance with the Thompson Memorandum, federal prosecutors entered into numerous deferred prosecution agreements with corporations in return for the corporation’s assistance in prosecuting individual employees”).

methodology of the Holder, Thompson, McNulty, and Filip Memos for a rule-based approach.<sup>49</sup>

Rather than reaffirm the principle of prosecutorial discretion, the Yates Memo included this language in a footnote: “The measures laid out in this memo are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law.”<sup>50</sup> The Memo never explains how to reconcile its text—which, again, repeatedly tells investigative targets what they must and may not do to receive “cooperation credit”—with the disclaimer that the memo is “intended solely to guide [DOJ] attorneys.”<sup>51</sup> In post-Memo speeches, however, then-Deputy Attorney General Yates made it clear that the text, not the footnote, represents Department policy.

Yates publicly announced the Memo in a speech at the New York University School of Law.<sup>52</sup> Whereas in the past a corporation could disclose illegal corporate conduct, refuse to identify the individuals responsible, and still receive (at the prosecutor’s discretion) “partial” credit for cooperating, now, Yates made clear, identifying individuals is an “all or nothing” decision.<sup>53</sup> “The rules have just changed,” Yates explained.<sup>54</sup> “Effective today,” she continued, “if a company wants any consideration for its cooperation, it must give up the individuals, no matter where they sit within the company.”<sup>55</sup> With the new policy, the Department was “changing what we expect of companies.”<sup>56</sup>

In November 2015, the Department incorporated the Yates Memo into the United States Attorneys’ Manual, which Yates announced in a speech to the American Banking Association.<sup>57</sup> She used the occasion to respond to critics of the threshold requirement who had argued that companies may choose not to cooperate rather than inculcate individuals.<sup>58</sup> Yates dismissed the possibility: “I have a hard time imagining that it will truly be in a company’s best interest to forego the substantial benefits accorded for cooperation solely

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49 To be sure, the Filip Memo may approach the line of a legislative rule with its requirement that a corporation “must disclose the relevant facts of which it has knowledge” to receive cooperation credit. Filip Memo, *supra* note 11, at 9. Even if so, the Yates Memo goes materially further, for instance in that it lacks the Filip Memo’s language extolling prosecutorial discretion. *See supra* text accompanying note 45.

50 Yates Memo, *supra* note 4, at 3 n.1.

51 *Id.*

52 Yates NYU Speech, *supra* note 6.

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 Press Release, U.S. Dep’t of Justice, Deputy Attorney Gen. Sally Quillian Yates Delivers Remarks at Am. Banking Ass’n & Am. Bar Ass’n Money Laundering Enf’t Conference (Nov. 16, 2015), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-o> [<https://perma.cc/2JFF-5T8T>] [hereinafter Yates ABA Speech].

58 *See id.* (“Some have speculated that the new policy may mean that fewer companies cooperate with the government because of some perception that the new standard is too difficult to meet.”).

to avoid having to provide all the facts about individual conduct.”<sup>59</sup> The Department has too much leverage, in other words, for companies to credibly threaten to walk away from the negotiating table.<sup>60</sup>

With respect to the threshold disclosure requirement, the revisions to the United States Attorneys’ Manual track the Yates Memo itself, with some stylistic modifications.<sup>61</sup> Thus, like the Memo, the revised Manual provides that to be eligible for any cooperation credit, companies must disclose all information about individual wrongdoing and, if necessary, investigate to obtain information that can then be disclosed.<sup>62</sup> And, under the revised Manual, until a corporation clears that bar, prosecutors have no discretion to consider their cooperation in determining how or whether to proceed with a case.<sup>63</sup>

Yates again addressed the threshold requirement for cooperation in a speech to the New York City Bar Association in May 2016.<sup>64</sup> Early in the speech, Yates disabused the crowd of the notion that the Memo was only for the internal direction of Department attorneys, explaining that “[t]he policy was certainly designed to change practices, both within the department and outside the department.”<sup>65</sup> Yates concluded her remarks by acknowledging candidly that the Memo had changed the “rules of the road.”<sup>66</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> NACDLvideo, *Special Remarks & Luncheon Keynote Address*, YOUTUBE (July 21, 2016), [https://www.youtube.com/watch?v=\\_u5UHn8c1SI](https://www.youtube.com/watch?v=_u5UHn8c1SI) [<https://perma.cc/RG3E-MXFH>].

<sup>61</sup> U.S. Attorneys’ Manual, *supra* note 5, § 9-28.700.

<sup>62</sup> *Id.* The Manual does acknowledge that “[t]here may be circumstances where, despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence or is actually prohibited from disclosing it to the government.” *Id.* at n.1. When this happens, “the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor.” *Id.*

<sup>63</sup> *See id.* (“If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about the individuals involved, its cooperation will not be considered a mitigating factor under this section. Nor, if a company is prosecuted, will the Department support a cooperation-related reduction at sentencing.”). In inserting the Yates Memo language in the Manual, the Department did not remove all of the pre-existing language from the Filip Memo. This has led to two internal tensions. First, the revised Manual preserved the language from the Filip Memo stating that “prosecutors must exercise their thoughtful and pragmatic judgment in applying and balancing these factors, so as to achieve a fair and just outcome and promote respect for the law.” *Id.* § 9-28.300. As noted, this language is hard to reconcile with the threshold disclosure requirement’s withdrawal of prosecutorial discretion where cooperating companies do not disclose all information about individual targets. Second, the revised Manual maintains language from the Filip Memo to the effect that “the government cannot compel, and the corporation has no obligation to make, [cooperation-related] disclosures.” *Id.* § 9-28.720. Read in context, this appears to stand only for the proposition that corporations have no obligation to disclose *unless* they seek cooperation credit. If a corporation wishes to have a prosecutor take its cooperation into account, however, it is obliged to disclose all information about individual culpability.

<sup>64</sup> Press Release, U.S. Dep’t of Justice, Deputy Attorney Gen. Sally Q. Yates Delivers Remarks at the N.Y. City Bar Ass’n White Collar Crime Conference (May 10, 2016), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association> [<https://perma.cc/7V37-KT43>] [hereinafter Yates Bar Ass’n Speech].

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

## II. THE LEGAL CASE

Notice-and-comment rulemaking is the Administrative Procedure Act's most important tool of agency policymaking.<sup>67</sup> Not all agency rules, however, must undergo the notice-and-comment process. Key here, "general statements of [agency] policy" are an exempt category.<sup>68</sup> The Yates Memo, which purports to be such a general statement of policy, was promulgated without notice and an opportunity for comment.<sup>69</sup> Of course, the Department's approach is lawful only if the Yates Memo really is a "general statement of policy." If it is a legislative rule in disguise, the Department's failure to abide by the notice-and-comment requirements of § 553 is fatal.<sup>70</sup>

Scholars and courts alike have bemoaned the lack of a clean dividing line between legislative rules and policy statements.<sup>71</sup> Yet while fuzzy cases at the margin abound, a core distinction persists, developed in common-law fashion by the courts of appeals—in particular the D.C. Circuit. This mode of doctrinal development is not unusual in administrative law, where the Supreme Court often leaves the task of filling out the APA's spare text to the circuit courts, especially the D.C. Circuit.<sup>72</sup>

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<sup>67</sup> See 5 U.S.C. § 553 (2012) (setting out the requirements for notice and comment); see also *id.* § 551(4) (defining "rule").

<sup>68</sup> See 5 U.S.C. § 553(b)(3)(A) (providing that the notice-and-comment requirements of § 553 do not apply, unless otherwise required by statute, to "general statements of policy").

<sup>69</sup> This is the point of the Memo's footnote 1: "The measures laid out in this memo are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law." Yates Memo, *supra* note 4, at 3 n.1. Nonetheless, the exception for procedural rules is considered *infra* at note 112.

<sup>70</sup> See, e.g., *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 385 (D.C. Cir. 2002) (holding that an EPA guidance document was procedurally invalid because it was a "legislative rule" promulgated without notice or comment).

<sup>71</sup> See, e.g., *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (per curiam) ("The distinction between legislative rules and interpretative rules or policy statements has been described at various times as 'tenuous,' 'fuzzy,' 'blurred,' and, perhaps most picturesquely, 'enshrouded in considerable smog'" (citations omitted)); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 282-89 (2010) (detailing the difficulties in distinguishing between legislative rules and nonlegislative rules); Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1708-13 (2007) (same); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 922 (2004) ("Given the level of generality at which the D.C. Circuit articulates such criteria, it is difficult, at best, to draw meaningful distinctions between interpretive and legislative rules.").

<sup>72</sup> See Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1363 (1998) ("When Congress gave the D.C. Circuit the special authority to review a huge fare of administrative cases under the Administrative Procedure Act, it knew full well that it was not creating jurisdiction for just another set of purely legal cases. Congress was assigning to the court a special review function, and thereby giving the court an integral role in the Administrative Procedure Act's dynamic structure of rule making."). To be sure, the Supreme Court does not always give the D.C. Circuit a free hand to interpret the APA. See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206-10 (2015) (reversing a decision of the D.C. Circuit, and holding that an agency does not necessarily need to use the APA's notice-and-comment procedures when it issues a new interpretation of a regulation that differs significantly from a previous interpretation); *Vt. Yankee*

Historically, the D.C. Circuit used two tests to distinguish legislative rules and policy statements. The first looked to the effects of the agency's announcement on regulated parties and the agency itself, considering whether the announcement (i) "impose[s] any rights [or] obligations," and (ii) "genuinely leaves the agency and its decisionmakers free to exercise discretion."<sup>73</sup> The second formulation focused on the agency's intentions, taking into account (i) "the [a]gency's own characterization of the action," (ii) whether it "was published in the Federal Register or the Code of Federal Regulations," and (iii) "whether the action has binding effects on private parties or on the agency."<sup>74</sup>

More recently, the D.C. Circuit has synthesized the two tests. In *General Electric Co. v. EPA*, the court explained that they "overlap" where they analyze "whether the agency action binds private parties or the agency itself with the 'force of law.'"<sup>75</sup> The court then endorsed Professor Robert Anthony's formulation of the distinction:

If a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures.<sup>76</sup>

The lodestar is thus whether the agency's announcement imposes "binding norms" on regulated parties or agency officials.<sup>77</sup> "Mandatory language" in a pronouncement—i.e., language dictating what a regulated person or official

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Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 549-58 (1978) (reversing the D.C. Circuit, and holding that reviewing courts may not impose procedural requirements on agencies beyond those contained in the APA); see also Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1215 (1992) (describing the relationship between the Supreme Court and D.C. Circuit as "uneasy" and "often unpleasant," and stating that the Court has repeatedly "disapproved what is perceived as overly stringent review by the Circuit").

<sup>73</sup> *Cnty. Nutrition Inst.*, 818 F.2d at 946 (quoting *Am. Bus Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980)); see also *CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) (noting that "the case law reflects two related formulations for determining whether a challenged action constitutes a regulation or merely a statement of policy," and that the *Community Nutrition Institute* "line of analysis focuses on the effects of the agency action").

<sup>74</sup> *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999); see also *Croplife Am.*, 329 F.3d at 883 (noting that the *Molycorp* "line of analysis focuses on the agency's expressed intentions").

<sup>75</sup> 290 F.3d at 382.

<sup>76</sup> *Id.* at 382-83 (quoting Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1355 (1992)).

<sup>77</sup> Application of the binding norms test to agency statements that bind officials, but not the public, is controversial, see Brief of Administrative Law Scholars as Amici Curiae in Support of Petitioners at 8-17, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674) (arguing that "the APA does not require notice and comment for guidance that binds lower-level agency officials"), and may not be the law in every circuit. See *id.* at 8 n.5 (citing cases from the Ninth Circuit and Federal Court holding that courts are to look to the binding effect of agency policy statements on outside parties, not the agency itself, to determine if they are legislative rules).

“must” or “cannot” do—“alone can be sufficient to render it binding.”<sup>78</sup> When an agency’s announcement contains mandatory language, moreover, a “boilerplate” disclaimer insisting that the document is only guidance cannot save it.<sup>79</sup> As the D.C. Circuit has explained, “the agency’s characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the ‘force of law,’ but the record indicates otherwise.”<sup>80</sup> While the legislative rule versus policy statement distinction has not been as thoroughly developed in other circuits, the same essential principles (generally) apply.<sup>81</sup>

A first-pass application of these principles to the Yates Memo is straightforward. The Memo (like the revisions to the United States Attorneys’ Memo implementing it) uses mandatory language to specify what a corporation “must” do if it seeks cooperation credit—“the company *must* identify all individuals involved in or responsible for the misconduct at issue.”<sup>82</sup> Notwithstanding the Department’s boilerplate disclaimer, the *essence* of the Yates Memo is to create

78 *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002); *see also Cmty. Nutrition Inst.*, 818 F.2d at 946 (“[W]e have, for example, found decisive the choice between the words ‘will’ and ‘may.’”). Occasional mandatory language, however, does not doom an agency announcement if, as a whole, it “lacks precision in its directives” and “there is no indication of how the enunciated policies are to be prioritized.” *Wilderness Soc’y v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006).

79 *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000) (holding that a “boilerplate” disclaimer could not save a purported guidance document that otherwise “reflect[ed] a settled agency position which has legal consequences both for State agencies administering their permit programs and for companies like those represented by petitioners who must obtain” the permits at issue).

80 *CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) Despite criticism, the D.C. Circuit takes the view that agency announcements are legislative rules if they are legally or “practically” binding. *See Gen. Elec. Co.*, 290 F.3d at 383 (“Our cases likewise make clear that an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding.” (citations omitted)). For the criticism, *see generally* RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE § 6.3 (5th ed. 2010) (arguing that the “practically binding” test is “too broad” and “extremely difficult to apply”); Cass R. Sunstein, *Practically Binding: General Policy Statements and Notice-and-Comment Rulemaking*, 68 ADMIN. L. REV. 491 (2016) (arguing that the “practically binding” test runs afoul of the Supreme Court’s decision in *Vermont Yankee*).

81 *See, e.g., Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015) (“We evaluate two criteria to distinguish policy statements from substantive rules: whether the rule (1) ‘impose[s] any rights and obligations’ and (2) ‘genuinely leaves the agency and its decision-makers free to exercise discretion.’” (alteration in original)), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016); *id.* at 202 (King, J., dissenting) (“As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm,” and thus need not go through the procedures of notice-and-comment.” (quoting *Prof’ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596-97 (5th Cir. 1995)); *Iowa League of Cities v. EPA*, 711 F.3d 844, 862 (8th Cir. 2013) (“[A]n agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding.” (alteration in original) (quoting *Gen. Elec. Co.*, 290 F.3d at 377)); *see also* 1 PIERCE, JR., *supra* note 80, § 6.3 at 423 (citing cases from various circuits that considered whether an agency announcement had binding legal effect). *But see supra* note 77 (noting that not all circuit courts look to the binding effect on low-level administrators).

82 Yates Memo, *supra* note 4, at 3 (emphasis added).

a new binding obligation on corporations that want cooperation credit. From the Department's perspective, this is a feature of the Yates Memo, not a bug. The Memo likewise binds prosecutors by barring them from considering an investigative target's cooperation unless and until the company satisfies its disclosure obligations.<sup>83</sup> For both companies under investigation and prosecutors, the Yates Memo thus appears binding.<sup>84</sup>

This first-pass application, while useful, is too quick—the caveat, “if the corporation seeks cooperation credit,” needs further analysis. The Department has no obligation to afford corporations (or anyone) cooperation credit. To the contrary, the Department's decision to grant or deny cooperation credit—indeed its decision to prosecute, negotiate, or walk away from an investigation—is a quintessential exercise of (generally) unreviewable prosecutorial discretion.<sup>85</sup> The Memo, like the United States Attorneys' Manual, expressly denies that it “create[s] a right or benefit, substantive or procedural” that is “enforceable at law by a party to litigation with the United States,”<sup>86</sup> and courts have consistently respected the limitation in litigation over both the U.S. Attorneys' Manual and similar manuals.<sup>87</sup> Cooperation, moreover, is just one of the ten factors that the United States Attorneys' Manual directs prosecutors to evaluate in corporate investigations.<sup>88</sup> This means that a cooperating corporation might still be prosecuted, and that a noncooperating corporation might not.

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<sup>83</sup> See *id.* (“If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor . . .”).

<sup>84</sup> Although it would be useful to know whether Department prosecutors on the ground are complying with the Yates Memo and treating the threshold disclosure requirement as binding, the privacy of negotiations between prosecutors and defense attorneys effectively shields this information.

<sup>85</sup> See *Heckler v. Chaney*, 470 U.S. 821, 837-38 (1985) (holding that the FDA's decision not to commence an enforcement action was not subject to review under the APA); see also *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016) (“Decisions to initiate charges, or to dismiss charges once brought, ‘lie[] at the core of the Executive's duty to see to the faithful execution of the laws.’ The Supreme Court thus has repeatedly emphasized that ‘[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.’” (alterations in original) (citation omitted)).

<sup>86</sup> Yates Memo, *supra* note 4, at 3 n.1.

<sup>87</sup> See, e.g., *United States v. Apel*, 134 S. Ct. 1144, 1151 (2014) (“Apel also relies on the fact that some Executive Branch documents, including the United States Attorneys' Manual and opinions of the Air Force Judge Advocate General, have said that § 1382 requires exclusive possession. So they have, and that is a point in his favor. But those opinions are not intended to be binding.” (citation omitted)); *United States v. Gourley*, 835 F.2d 249, 251 (10th Cir. 1987) (holding that the federal government's “failure to obtain proper approval,” as required by the U.S. Attorneys' Manual, “does not create an enforceable right in the defendant”); *BP Expl. & Oil, Inc. v. U.S. Dep't of Transp.*, 44 F. Supp. 2d 34, 38 (D.D.C. 1999) (holding that the Marine Safety Manual, which repeatedly noted that it was meant only for guidance, was not intended to bind Coast Guard hearing officers). Thus, a corporation could not ask a court to enforce the Memo by, for instance, ordering the government to award “cooperation credit.” Note, however, that while the Manual denies creating legal “rights,” it does not deny creating “obligations.”

<sup>88</sup> See U.S. Attorneys' Manual, *supra* note 5, § 9-28.300 (listing factors).

In short, the Yates Memo raises a question that the typical dispute over whether an agency announcement is a legislative rule or a policy statement does not: how to evaluate agency pronouncements of “binding obligations” that limit the agency’s exercise of its unreviewable prosecutorial discretion. But while the question is not typical, neither is it unprecedented. In a series of cases beginning in the 1980s, the D.C. Circuit has concluded that “cabining of an agency’s prosecutorial discretion can in fact rise to the level of a substantive, legislative rule.”<sup>89</sup> Of these cases, *Chamber of Commerce v. Department of Labor*, is the most analogous.<sup>90</sup>

In *Chamber of Commerce*, the Occupational Safety and Health Administration (OSHA) instituted a program, without notice or comment, whereby it agreed to reduce workplace safety inspections by seventy to ninety percent for companies that “voluntarily” agreed to participate in its Cooperative Compliance Program.<sup>91</sup> Participation meant, among other things, putting in place safety and health measures beyond what OSHA could require.<sup>92</sup> A company that refused to participate was virtually guaranteed to be the subject of an OSHA inspection.<sup>93</sup> The D.C. Circuit explained that OSHA was “intentionally using the leverage it has by virtue solely of its power to inspect.”<sup>94</sup>

Although the agency’s announcement did not “formally require anything,” the court explained that it was “the practical equivalent of a rule that obliges an employer to comply or suffer the consequences; the voluntary form of the rule is but a veil for the threat it obscures.”<sup>95</sup> The court thus rejected OSHA’s claim that its program announcement was a statement of policy exempt from notice-and-comment.<sup>96</sup> The court granted that “[a]t first glance, one might think that a rule could not be considered a ‘binding norm’ unless it is backed by a threat of legal sanction.”<sup>97</sup> But the court found the appeal of OSHA’s

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<sup>89</sup> *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987) (citing *Nader v. Civil Aeronautics Bd.*, 657 F.2d 453, 455 (D.C. Cir. 1981)); *see also* Manning, *supra* note 71, at 923 n.162 (noting that the D.C. Circuit has held that a “putative policy statement” has binding effect if the agency “bases enforcement actions on the policies or interpretations formulated in the document” (quoting *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000)). *But see* Ass’n of Irrigated Residents v. EPA, 494 F.3d 1027, 1037 (D.C. Cir. 2007) (Rogers, J., dissenting) (“However much enforcement discretion EPA may have in determining whether or not to file enforcement actions and whether to settle and on what terms, Congress has not authorized EPA to allow the regulated community to buy its way out of compliance with the statutes.”).

<sup>90</sup> 174 F.3d 206 (D.C. Cir. 1999).

<sup>91</sup> *Id.* at 208-09.

<sup>92</sup> *Id.* at 208.

<sup>93</sup> *See id.* (noting that companies invited to participate in the program would be “placed on a so-called ‘primary inspection list’ and subjected to a comprehensive inspection,” and that they would remain on the list unless they voluntarily participated in the newly established program).

<sup>94</sup> *Id.* at 210.

<sup>95</sup> *Id.* at 209-10.

<sup>96</sup> *Id.* at 209-11.

<sup>97</sup> *Id.* at 212.



contention “fleeting,”<sup>98</sup> principally because refusing to participate in the program guaranteed an OSHA inspection, with “no room for discretionary choices by inspectors in the field.”<sup>99</sup> While an OSHA inspection is not a formal legal sanction, “as a practical matter being subjected to a safety inspection can be quite as onerous for an employer as paying a fine imposed by the OSHA.”<sup>100</sup> Because OSHA’s program announcement was binding on OSHA inspectors and coercive to regulated parties, it was not a mere policy statement.<sup>101</sup>

There are many parallels between the OSHA program in *Chamber of Commerce* and the Yates Memo. First, just as the OSHA program eliminated the discretion of OSHA field inspectors to select inspection sites, the Yates Memo eliminates the discretion of prosecutors to consider the cooperation of corporate criminal targets that choose not to satisfy (or that cannot satisfy) the threshold disclosure requirement. Second, for the targets of corporate criminal investigations, the consequences of not cooperating are potentially devastating.<sup>102</sup> The Yates Memo leverages these consequences to push companies to do something they are not otherwise required to do—disclose all information about individual wrongdoing. Likewise, OSHA sought to leverage the cost of inspections to push companies to institute safety and health measures not otherwise required by law. Third, in both cases, the agency’s “stick” to compel compliance—inspections for OSHA and denial of “cooperation credit” in the Yates Memo—was something less than a formal legal sanction. But in both cases the stick was, as a practical matter, costly to the point of coercive.<sup>103</sup>

The Yates Memo does pose a final twist beyond *Chamber of Commerce*. In *Chamber of Commerce*, a company’s decision not to participate in OSHA’s

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 213 (internal quotation marks omitted).

<sup>100</sup> *Id.* at 209.

<sup>101</sup> See Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449, 1463 (2011) (noting that courts, like in *Chamber of Commerce*, “sometimes conclude that an agency pronouncement is a legislative rule, even if it lacks the force of law in a formal sense, if the pronouncement in question appears to bind the agency to an inflexible policy that exerts a substantial coercive effect on regulated parties”).

<sup>102</sup> See Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 855 (2007) (identifying “catastrophic punitive fines and severe reputational consequences of a conviction” as potential consequences); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 339 (2007) (“Because both the litigation costs and the public relations debacle of indictment can be fatal to corporations, especially in highly regulated industries, ‘they are often compelled to settle, even if it means taking positions contrary to their officers and employees,’ and even though ‘the case [is] largely settled before a court has weighed the first bit of evidence or tested a single legal theory.’” (alteration in original) (footnote omitted)).

<sup>103</sup> See Daniel Richman, *Federal White Collar Sentencing in the United States: A Work in Progress*, 76 J.L. & CONTEMP. PROBS. 53, 67-68 (2013) (arguing that the United States relies on the possibility of “vastly greater prison time” to induce defendants in criminal cases to cooperate—leverage “of the sort recognized everywhere except criminal procedure doctrine as ‘coercion’”).

“voluntary” program was the end of the matter.<sup>104</sup> Once the decision was made, an inspection was guaranteed. With the Yates Memo, a company’s decision not to disclose information that it possesses about individual culpability is the end of the matter for “cooperation credit,” but a prosecutor must still consider the remaining factors set forth in the United States Attorneys’ Manual to determine whether to bring charges and what charges to bring.<sup>105</sup> Thus, as noted above, a cooperating company might still be prosecuted, and a non-cooperating company might not.<sup>106</sup>

Does this distinction between the Yates Memo and the OSHA program in *Chamber of Commerce* necessitate a different resolution of the legislative rule versus policy statement question? Likely not. A pre-*Chamber of Commerce* D.C. Circuit case, *Nader v. Civil Aeronautics Board*, is instructive.<sup>107</sup> The Civil Aeronautics Board (CAB) was authorized to suspend airfares.<sup>108</sup> It issued guidelines that specified a dollar amount by which airlines could raise airfares in order to have a “limited risk” that the fares would be suspended.<sup>109</sup> Specifically, so long as airlines stayed within the prescribed limit, the CAB would only suspend an airfare on a “clear showing of abuse of market power.”<sup>110</sup> Thus, like the Department of Justice in the Yates Memo, the CAB narrowly cabined a portion, but not all, of its discretion. Because the CAB had used mandatory language and “narrowly circumscribe[d]” its own discretion, the D.C. Circuit found that the guidelines constituted a legislative rule rather than a statement of policy.<sup>111</sup> The Yates Memo is likely subject to the same fate.<sup>112</sup>

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<sup>104</sup> *Chamber of Commerce*, 174 F.3d at 211-13.

<sup>105</sup> See U.S. Attorneys’ Manual, *supra* note 5, § 9-28.300 (requiring prosecutors to consider, among other factors, “the pervasiveness of wrongdoing within the corporation,” “the existence and effectiveness of the corporation’s pre-existing compliance program,” and “the corporation’s remedial actions”).

<sup>106</sup> Or a prosecutor might take (non)cooperation into account when determining the price of a deferred prosecution or non-prosecution agreement, and the fact of noncooperation would surely increase the agreement’s price. In the *Chamber of Commerce* framework, that is likely enough to trigger a legislative rule.

<sup>107</sup> 657 F.2d 453 (D.C. Cir. 1981).

<sup>108</sup> *Id.* at 454.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 455.

<sup>111</sup> *Id.* at 456.

<sup>112</sup> The Department may claim that the threshold disclosure requirement is (in addition to being a policy statement) an exempt “procedural rule” under 5 U.S.C. § 553(b)(3)(A) (2012). Space constraints prevent extended discussion of this procedural rules exception. It suffices to note that if the threshold disclosure requirement is not a policy statement, it is likely not a procedural rule either. Where an agency pronouncement “trenches on substantial private rights and interests,” the procedural rules exception does not apply. *Batterton v. Marshall*, 648 F.2d 694, 708 (D.C. Cir. 1980). The D.C. Circuit’s much-cited opinion in *American Hospital Ass’n v. Bowen* is instructive. There, the court determined that a manual issued by the Department of Health and Human Services (HHS) to guide the enforcement activities of its Medicare monitors was a procedural rule exempt from notice and comment. 834 F.2d 1037, 1049-51 (D.C. Cir. 1987). But the court noted that if HHS had

I repeat the caveat in the Introduction. Nothing I have said calls into question the wisdom of the policies in the Yates Memo. Whether the Yates Memo is good policy or not, the APA and case law construing it appear to require that the Department have issued a procedurally valid legislative rule before conditioning a prosecutor's consideration of a corporate target's cooperation on the company clearing a rigid threshold requirement.<sup>113</sup>

### III. THE NORMATIVE CASE

Thus far, this Essay's focus has been doctrinal. My aim has been to show that the Yates Memo—or at least its threshold disclosure requirement—is probably unlawful as a matter of positive law. For some readers, nothing more need be said. But other readers may want to know whether a judicial decision setting aside the Yates Memo would serve a worthwhile social purpose. To assess that question, I turn next to the purposes underlying the legislative rule doctrine. As I round the corner from doctrinal to normative, I remain agnostic about the substance of the Yates Memo. My normative point—like my doctrinal point—is about process.

As noted in Part II, legislative rule cases involving an agency's self-imposed limitations on its prosecutorial discretion are atypical.<sup>114</sup> The normative inquiry thus starts with the purposes of the legislative rule doctrine in the “ordinary

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“inserted a new standard of review” governing enforcement scrutiny or if it had “inserted a presumption of invalidity when reviewing certain operations,” then “its measures would surely require notice and comment.” *Id.* at 1051. That is, of course, what the Yates Memo purports to do. The putatively “voluntary” nature of cooperation credit, moreover, does not make the Yates Memo's threshold disclosure requirement procedural. *See* *Chamber of Commerce of the U.S. v. Dept of Labor*, 174 F.3d 206, 211-12 (D.C. Cir. 1999) (“At least to the extent that participation in the CCP requires more than adherence to existing law, the Directive imposes upon employers more than ‘the incidental inconveniences of complying with an enforcement scheme,’ it has a substantive component.” (citation omitted)).

<sup>113</sup> Ordinarily, when a court invalidates a procedurally invalid legislative rule, the agency can reissue it with notice and comment. *See, e.g., Chamber of Commerce*, 174 F.3d at 213 (vacating the agency's pronouncement but leaving it to “the agency to repromulgate it after observing the required procedures”). The Department, however, runs into an additional complication. Agencies may issue legislative rules only with statutory permission, and the Department of Justice possesses no general-purpose rulemaking authorization. *See* 1 PIERCE, JR., *supra* note 80, § 6.2 (“An agency has the power to issue a legislative rule only if and to the extent that Congress has granted it the power to do so.”). The most likely source of authority for the Department is the “Housekeeping Statute,” 5 U.S.C. § 301 (2012), a residual grant of rulemaking power that the Department often invokes as authority for its rules. Yet, whether the Housekeeping Statute authorizes substantive legislative rules is a close question. *Compare* *Georgia v. United States*, 411 U.S. 526, 536 (1973) (holding that the Housekeeping Statute authorized Department of Justice Rules setting the Department's enforcement standard on the Voting Rights Act), *abrogated on other grounds by* *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013), *with* *Chrysler Corp. v. Brown*, 441 U.S. 281, 308-12 (1979) (holding that the Housekeeping Statute did not authorize a regulation permitting Department of Labor officials to release proprietary information where the disclosure is not mandated by the Freedom of Information Act).

<sup>114</sup> *See supra* text accompanying note 89.

case,” where an agency’s statement binds (the challenger alleges) the primary conduct of a regulated entity or the public.<sup>115</sup> In these cases, the legislative rule doctrine reflects two values that permeate the APA: (i) agency deliberation informed by public input; and (ii) agency flexibility.<sup>116</sup> As E. Donald Elliott has explained, the doctrine gives agencies a choice.<sup>117</sup> On the one hand, an agency can engage in the deliberative process of notice and comment rulemaking, with its final product subject to judicial review. For engaging in that process, the legislative rule doctrine rewards the agency by making the announcement binding law. Or, agencies can announce a policy statement without notice and comment, preserving their flexibility while signaling their regulatory intentions. The agency (largely) avoids both publicly informed deliberation and judicial review—but the flexibility isn’t free. The cost is that the announcement lacks binding effect. And if it becomes the basis for final agency action later, the agency must (likely in an adjudicative setting) provide a deliberated-upon justification for it, subject to judicial review. Elliott likens the agency’s choice to “the television commercial in which the automobile repairman intones ominously ‘pay me now, or pay me later.’”<sup>118</sup> In the “ordinary” case, then, the legislative rule doctrine preserves *both* publicly informed deliberation and administrative flexibility.

The “pay now or pay later” theory of the legislative rule doctrine logic does not apply, however, in cases involving announcements that direct the agency’s exercise of its prosecutorial discretion.<sup>119</sup> Agencies (generally speaking) do not need to justify prosecutorial decisions, either via reasoned internal decisions or on judicial review.<sup>120</sup> As a result, agencies need not “pay later”—in the form of judicial review—when they apply binding enforcement policies issued without notice and comment in a particular action. Because courts will not entertain claims that the agency should not have commenced an

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<sup>115</sup> See, e.g., *Iowa League of Cities v. EPA*, 711 F.3d 844, 854 (8th Cir. 2013) (challenging letters that allegedly “set forth new regulatory requirements with respect to water treatment processes at municipally owned sewer systems”); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 379-80 (D.C. Cir. 2002) (challenging a “guidance” document concerning the disposal of polychlorinated biphenyls); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1017-20 (D.C. Cir. 2000) (challenging a “guidance” document alleged to impose new requirements on states regarding their Clean Water Act operating permit programs).

<sup>116</sup> See Gersen, *supra* note 71, at 1713-18 (discussing the purposes behind the APA).

<sup>117</sup> E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1491 (1992).

<sup>118</sup> *Id.*

<sup>119</sup> See Franklin, *supra* note 71, at 308-19 (discussing shortcomings of courts distinguishing between “legislative” rules and “nonlegislative” rules, including in the enforcement context).

<sup>120</sup> See *Heckler v. Chaney*, 470 U.S. 821, 828-35 (1985) (holding that the FDA’s decision not to pursue enforcement actions was not subject to review under the APA); see also Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1131-32 (2016) (“Most aspects of agency enforcement policy generally escape judicial review. A decision not to enforce is presumptively unreviewable under *Heckler v. Chaney*, as is an agency’s decision not to monitor those it is charged with regulating.” (footnotes omitted)).

enforcement proceeding, the decision to forego notice and comment is effectively costless.

One might respond to the disconnect between the theory underlying the legislative rule doctrine and agency policies that govern prosecutorial discretion in one of two ways. First, one might conclude that for these policies, flexibility ought to trump publicly informed deliberation. On this view, agencies should be free to promulgate any enforcement policy without notice and comment.

Second, and I think more justifiably, one might recognize that publicly informed deliberation is valuable in formulating enforcement policies, just as it is with policies that regulate primary conduct. Notice-and-comment rulemaking is conventionally understood as having both technocratic and democratic justifications.<sup>121</sup> Neither justification turns on whether a rule regulates primary conduct or enforcement.

But how far does this go? Notice-and-comment rulemaking is expensive,<sup>122</sup> yet agencies must make enforcement decisions across a vast array of areas, and these decisions cannot be left to the unfettered discretion of line officials.<sup>123</sup> A stopping point appears essential.

We have already seen where the D.C. Circuit draws the line. The cases described in Part II—in particular *Chamber of Commerce* and *Civil Aeronautics Board*—reveal that when it comes to agency directives on how to apply prosecutorial discretion, the boundary between legislative rules and statements of policy is the difference between rules (in the non-APA sense) and standards.

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<sup>121</sup> See Gersen, *supra* note 71, at 1714 (“Notice and comment rulemaking both generates information and produces policy resulting from the participation of interested parties; that is, notice and comment rulemaking serves both technocratic and democratic aims.”); see also Franklin, *supra* note 71, at 305 (“The use of nonlegislative rules comes at a serious cost from the standpoint of participation, because it enables agencies to make major policy decisions without observing the formal processes that Congress crafted to facilitate meaningful public input, commentary, and objection.”); Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 735 (2007) (“[I]ncreased public participation in agency decisionmaking is more democratic and increase the legitimacy of agency decisions and public trust in the agencies.” (footnote omitted)); Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1343 (2011) (“An agency’s public proposal of a rule and acceptance of public comment prior to issuing the final rule can help us view the agency decision as democratic and thus essentially self-legitimizing.”).

<sup>122</sup> See Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1493 (2012) (noting that “[m]any scholars have long maintained that the process of issuing rules through the use of the notice and comment procedure described in § 553 of the Administrative Procedure Act has become ‘ossified,’ meaning “that it takes a long time and an extensive commitment of agency resources to use the notice and comment process to issue a rule” (footnote omitted)).

<sup>123</sup> See 1 PIERCE, JR., *supra* note 80, §§ 6.2–6.3 (arguing that a major problem in administrative law is unconstrained agency discretion and that agencies should limit their discretion, along with that of their employees); see also Brief of Administrative Law Scholars, *supra* note 77, at 10–11 (arguing that agency pronouncements curtailing the discretion of lower-level officials “is crucial to facilitating the agency secretary’s constitutionally grounded duty to supervise and effectively delegate responsibilities” to these officials, and is also necessary to promote “agency accountability”).

Agencies can provide enforcement guidance without notice and comment, provided that the policy comes in the form of standards. To reduce enforcement policy to concrete rules, however, agencies must comply with the APA requirements for informal rulemaking.

The question is whether the rules–standards distinction is useful here. I think it is, because it presents agencies with another “pay now or pay later” choice. Consider an agency leader who must decide whether to announce an enforcement standard—i.e., “line officials should consider the following five factors in deciding whether to commence an enforcement action”—or an enforcement rule—i.e., “line officials may commence enforcement only if *X* is true.” For (at least) two reasons, a rule will often be advantageous to the leader. First, a standard pushes residual decisionmaking power down to the line official, away from the politically accountable agency leader. Unless an agency is filled with line officers who are perfect agents of the leadership (a null set of agencies), this is to the leader’s detriment. Second, and relatedly, enforcement rules are more likely to generate consistent practices than standards. If the agency leader wishes to effect a meaningful change in agency enforcement practices, or simply if she values consistency, a rule will often be more attractive than a standard.

So understood, in prosecutorial discretion cases, the legislative rule doctrine harnesses agency leaders’ affinity for rules over standards while preserving agency flexibility. In effect, it incentivizes agencies to undertake notice-and-comment rulemaking when they craft enforcement policies. At the same time, it recognizes that agencies must provide enforcement guidance quickly and cheaply in many cases. It affords them that option too, but at a cost—they can do so only via standards. Understood in this way, the purpose of the legislative rule doctrine in prosecutorial discretion cases is to force the agency to internalize (in a rough sense) the social opportunity cost of foregone notice and comment. The benefits of proceeding without notice and comment will often still outweigh the costs, but the comparison is fairer.

#### CONCLUSION

This Essay has argued that the Yates Memo—the Department of Justice’s principal response to critics of its performance following the financial crisis—is likely unlawful as a matter of administrative law, and that this result would be normatively justified. I conclude by briefly considering some broader implications of the Memo’s likely unlawfulness.

We live in an era of “prosecutorial administration” of the federal criminal justice system.<sup>124</sup> “[F]ederal prosecutors,” Rachel Barkow observes, “hold the reins of power in individual federal criminal cases,” possessing an “almost unlimited and unreviewable power to select the charges that will be brought against defendants.”<sup>125</sup> This is largely an implication of plea bargaining’s dominance.<sup>126</sup> Because the vast majority of criminal convictions result from guilty pleas, not trials, a prosecutor’s selection of charges and punishment is the main event in a criminal case.<sup>127</sup> In making those decisions, moreover, prosecutors face few legal constraints.<sup>128</sup>

Prosecutorial administration makes it easy for participants in the federal criminal justice system to overlook that the Department of Justice is, at the end of the day, an administrative agency, subject to many of the ordinary requirements of administrative law. Judicial invalidation of the Yates Memo would serve as a reminder that administrative law can sometimes impose constraints in an otherwise unconstrained environment.

Likewise, in scholarship, administrative procedure has been mined for instructive analogies to criminal procedure. Thus, Richard Bierschbach and Stephanos Bibas advocate a notice-and-comment protocol to regulate criminal sentencing,<sup>129</sup> and Rachel Barkow proposes a separation-of-functions requirement for prosecutors responsible for adjudicating and prosecutors responsible for enforcement.<sup>130</sup> These proposals, and others like them, are enormously valuable. But we should take care not to lose sight of ways in which administrative

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<sup>124</sup> See generally Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271 (2013).

<sup>125</sup> *Id.* at 272.

<sup>126</sup> See William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 557-58 (2016) (explaining how plea bargaining “concentrates power in the hands of prosecutors”).

<sup>127</sup> See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2121-23 (1998) (arguing that a “Martian anthropologist, sent to observe criminal justice in an urban federal district court, but lacking access to our textbooks” would conclude that the “substantive evaluation of the evidence and assessment of the defendant’s responsibility is not made in court at all, but within the executive branch, in the office of the prosecutor”).

<sup>128</sup> Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 512 (1975) (“In most American states, public prosecutors are locally elected officials with surprisingly great and virtually uncontrolled authority . . . . While the federal prosecutorial arm is centralized, hierarchical subordination is negligible by continental standards.”); Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 2 (2009) (“Prosecutorial discretion is a central component of the federal criminal justice system. Prosecutors decide which cases to pursue and plea bargains to accept, determining the fates of the vast majority of criminal defendants who choose not to stand trial. Prosecutors’ decisions are generally not, however, subject to judicial review.” (footnote omitted)).

<sup>129</sup> See generally Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1 (2012).

<sup>130</sup> See generally Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009).

law—of its own force and not as an analogy—applies to the federal criminal justice system. The Yates Memo’s probable unlawfulness is one.

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Preferred Citation: William Ortman, *The Yates Memo Versus Administrative Law*, 165 U. PA. L. REV. ONLINE 191 (2017), <http://www.pennlawreview.com/online/165-U-Pa-L-Rev-Online-191.pdf>.