

Sally Yates's Legacy of Injustice at the Department of Justice

In 2015 she signed a memo that makes a potential criminal of every CEO. Time to tear it up.

By

Howard Root

Feb. 16, 2017 7:11 pm ET

I quit. Friday I walk away from the company I started 20 years ago and grew into 650 U.S. employees and \$1 billion in sales of over 100 new medical devices. I didn't quit because I'm old—I'm 56—or want to play golf. The reason I sold my company and ended a career I loved is to avoid the risk of

being criminally prosecuted under the federal government's "responsible corporate officer" doctrine for the second time.

In 2010 federal prosecutors latched onto a false accusation of "off-label" promotion made by a disgruntled former employee. Armed with a joke of a grand-jury system, they parlayed that into a criminal indictment of me and my company, Vascular Solutions. To pressure us to settle, prosecutors interviewed and threatened more than 100 employees and customers, a slog that required my company to hire 121 lawyers at a cost of \$25 million.

The "crime" for which they indicted me was a few salespersons' words about our Vari-Lase Short Kit. Prosecutors claimed that my company's salespeople told physicians the kit should be used to treat perforator rather than saphenous varicose veins. The prosecutors continued to pursue the case even though their own experts admitted that the kit was FDA-cleared to treat all varicose veins, that it never harmed a patient, and that it constituted 0.1% of our sales. Federal prosecutors told our attorneys they had "invested their blood, sweat and tears" and needed "a body" in return. That body was me.

Fortunately, my company had the money to fight back. Our day in court finally came in February 2016. The four-week trial ended with not-guilty verdicts on all charges, without our calling a single witness in our defense. Following the trial, one juror emailed me: “What the federal government did to you, your company and your employees is nothing short of criminal.”

Why did the prosecutors take this path? To comply with their marching orders, detailed in a five-page Justice Department memo written in 2015 by then-Deputy Attorney General Sally Yates. According to the [Yates Memo](#), prosecutors must “focus on individual wrongdoing from the very beginning” of every corporate investigation and “fully leverage” resources to identify individuals for prosecution. Instead of a balanced approach to justice, the Yates Memo advocates an obsession with individual criminal prosecutions in order to recover “as much money as possible.”

The strategy works. In 2016 Justice boasted that it obtained \$4.7 billion in “recoveries,” with a precisely calculated 610% return on investment in its “fight” against health-care fraud.

The Yates Memo reasoned that aggressively prosecuting individuals in every corporate investigation “promotes the

public's confidence in our justice system." In 1940 then-Attorney General Robert H. Jackson provided wiser counsel. "With the law books filled with a great assortment of crimes," he lectured a room full of U.S. attorneys, "a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone." That, Jackson stated, is where the "greatest danger" of a prosecutor lies. A prosecutor who acts from base motives and arrogance, he warned, is "one of the worst" forces in our society.

What was arguably true then is irrefutable today. With a total of more than 4,500 federal criminal laws and more than 3,000 new federal regulations promulgated in 2015 alone, every business in America violates multiple federal rules every year. Even if the number of federal regulations could be reduced by 75%, no corporation can ensure perfect compliance.

All that is needed to indict a health-care executive under the Yates Memo is an officer who possesses the "authority and responsibility" to either "prevent or correct" a violation. With every health-care CEO in America possessing that "authority," more regulations on the books naturally lead to more prosecutions.

I'm not alone in this experience. Two other health-care CEOs went through similar criminal trials in 2016. And by my count more than 50% of publicly traded American medical-device companies are stuck in at least one criminal investigation, with the CEO always the main target. That isn't justice, it's persecution.

Sally Yates is gone from the Justice Department, but the same arrogance that resulted in her choosing insubordination over resignation regarding the president's immigration order applies to the Yates Memo. President Trump, in the interest of justice you fired Sally Yates. Now it's time to tear up the Yates Memo.

Howard Root is the recently retired CEO of Vascular Solutions, Inc., a Minnesota medical device company, and author of "Cardiac Arrest: Five Heart-Stopping Years as a CEO on the Feds' Hit-List."

Appeared in the February 17, 2017, print edition.