

# NATIONAL REVIEW

## Obama's Weaponized Justice Department

**The president's enforcers are penalizing and jailing executives for normal business activities.**

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In the last presidential debate, Governor Chris Christie asserted that the Obama administration was running a “political Justice Department,” basing its prosecutorial decisions on political preferences.

But politicization in the traditional sense — hiring only committed leftists to civil-service jobs, or using the IRS to go after political enemies — is just half the problem. The current DOJ is also using law enforcement to advance President Obama's vision of industrial policy.

Under policies implemented over the last several years, businessmen can be jailed simply for being in the wrong place at the wrong time. The apotheosis of this trend came last month, when Deputy Attorney General Sally Yates issued a memo titled “Individual Accountability for Corporate Wrongdoing.” The Yates memo notes changes to the department's manual for U.S. Attorneys, revising the prosecution of corporate malfeasance in a way that overcomes the difficulty of establishing the culpability of “high-level executives.”

Since 2011, the Justice Department has pursued a line of litigation that expands the “responsible corporate officer” doctrine, whereby corporate officers can be held criminally liable for the actions of their underlings without any knowledge or direct participation. More than 300,000 regulations — not even laws — can trigger criminal sanctions.

Until recently, the typical punishments under this doctrine have been fines or probation, not prison terms — per the two Supreme Court rulings that created it, *United States v. Dotterweich* (1943) and *United States v. Park* (1975). Sending people to prison without their direct participation in or knowledge of a crime raises questions of due process and cruel and unusual punishment.

But forget punishment: Isn't mere prosecution without a knowledge requirement constitutionally dubious? The four justices who dissented in *Dotterweich* noted that “fundamental principle[s] of Anglo-Saxon jurisprudence” were implicated where “guilt is imputed . . . solely on the basis of . . . authority and responsibility as president and general manager of the corporation.” Justice Potter Stewart similarly dissented in *Park*, calling such convictions “wholly alien to fundamental principles of our law.”

Indeed, knowledge and act requirements — what first-year law students learn as *mens rea* and *actus reus* — are an important limitation on prosecutorial power. Without them, businessmen who manage national distribution, for example, can be made criminally liable for non-compliant products without any direct involvement in moving the tainted goods.

The government has rarely been so bold as to push prison sentences under such circumstances — and courts have, until recently, not upheld them. In the 2011 case *United States v. Higgins*, however, a federal district court sentenced a corporate officer to a prison term for running clinical trials of certain medical devices without FDA approval.

*Higgins* wasn't a clear signal that the government could seek prison terms for regulatory violations. The sentencing judge was highly attentive to the sophistication and “manipulat[ive]” means directly employed by the executive — inferring knowledge and bad acts. But Obama's Justice Department saw the case as an invitation to more creative prosecutions.

Most recently, in *United States v. Quality Egg*, federal prosecutors finally managed to jail corporate officers who had no knowledge whatsoever of the violations they were jailed for. In that case, the defendants were the owner and COO of a company that introduced contaminated eggs into the stream of commerce — a strict-liability offense (no knowledge or intent required) under the Food, Drug, and Cosmetic Act.

The defendants pled guilty but maintained that neither they nor their employees knew that the eggs were contaminated, and that they had no direct participation in the sale of bad eggs. The district court relied on *Higgins* and handed them a prison sentence. The case is now before the U.S. Court of Appeals for the Eighth Circuit under the name *United States v. DeCoster*.

In parallel with its expansion of the “responsible corporate officer” doctrine, the Justice Department engaged in Operation Choke Point — a coordinated effort to nudge banks and financial-service providers that do business with industries disfavored by the administration (such as short-term lenders, firearms dealers, and online gambling) into blacklisting such companies, by threatening investigation. The operation ended this year with a settlement in the targeted businesses' favor.

These zealous persecutions make clear why corporations now sit on record cash reserves and are “reluctant to invest in their businesses or hire new workers as uncertainty clouds the future.”

In short, commerce flows best when people don't fear political prosecutions just for trying to grow their businesses. The president famous for saying that "if you've got a business, you didn't build that" has been using his Justice Department in a way that only slows economic activity.

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