

## CHANGING LANDSCAPE FOR POST-CONVICTION COLLATERAL CONSEQUENCES

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Showtime recently debuted the new hedge fund, insider-trading drama “Billions” (rest assured, this article contains no spoilers), with Paul Giamatti starring as the U.S. Attorney for the Southern District of New York. In the final minutes of the pilot episode, after news breaks of a tragic incident involving the office, Giamatti dramatically cautions a hushed room of prosecutors that what they do has consequences—intended and unintended. Now, regardless of your taste for melodramatic, small-screen cinema, Giamatti’s words offer an important reminder.

Jail. Prison. Parole. Supervised release. Probation. Fines. Restitution. These are the direct and most obvious consequences of a criminal conviction. But simultaneously with a conviction, less obvious, collateral consequences begin to materialize, and their crippling effects linger long after sentences are served. For individuals, the collateral consequences of a conviction include voting disenfranchisement, restrictions on welfare and food stamp eligibility, barriers to employment and education, ineligibility for bank loans and other financial assistance, travel limitations, and compromised immigration status. Individuals can be banned from their professional and/or vocational fields. Corporations are subject to suspension and debarment, disqualifying them from federal contracting and grant eligibility. Federal agencies like the U.S. Securities and Exchange Commission (“SEC”), Federal Deposit Insurance Corporation, and the Department of Health and Human Services can bring “exclusion” proceedings—depending on the agency, these proceedings are often administrative hearings with low burdens of proof—against corporations and their officers to temporarily or permanently block them from doing business with the agency.

The country’s high incarceration rates and criminal justice reform are hot political and social topics, and collateral consequences are at the forefront of the debate. Prosecuting agencies have been criticized by judges, politicians, journalists, and the public for going after non-violent offenders—often the socio-economically disadvantaged and minorities who have the most to lose—while letting individuals behind the largest white-collar prosecutions get off without being subject to the debilitating collateral consequences of a conviction. This article summarizes some of these criticisms, discusses potential changes in prosecution trends, and describes a few developments in collateral consequences that may affect white-collar defendants.

### **COLLATERAL CONSEQUENCES DEFINED**

Collateral consequences are the official and unofficial sanctions and restrictions that persons convicted of crimes face separate and apart from any sentence imposed by a court.

With regard to official sanctions, some regulatory collateral consequences have public safety purposes—such as prohibiting those convicted of violent crimes from holding certain jobs and possessing firearms, and protecting children and the elderly from individuals with histories of abuse—while others are related to the particular crime, including registration requirements for sex offenders and restricted drivers’ licenses for those convicted of serious traffic offenses. But

many official collateral consequences apply across the board to any individual convicted of a crime, regardless of any relationship to the crime, the lapse of time since the conviction, and consideration of individualized rehabilitation. The American Bar Association (“ABA”) manages a searchable, online database—the National Inventory of Collateral Consequences of Conviction—that catalogues all collateral consequences found in each United States jurisdiction’s code of laws and regulations.<sup>2</sup> Currently, the ABA database catalogues over 47,000 collateral consequences, not including the innumerable unofficial collateral consequences that affect individuals convicted of crimes and their families alike. These unofficial consequences, which often stem from the social stigma of a conviction, are imposed by private actors. Reputations are tarnished, especially in today’s Internet age when information is readily available online forever. Marriages and parent-child relationships are ruined. Employers do not want to hire and landlords do not want to rent to people with a criminal record. And banks are quick to de-risk, refusing to open, and even closing, accounts of individuals and corporations perceived as “high risk.” The list can go on and on.

While collateral consequences are not new, they have become more problematic in the last few decades. They are more numerous and severe, they affect more people, and they are harder to mitigate, resulting in millions of Americans who live their post-conviction lives in a “legal limbo” because they committed a crime at one point in their past.<sup>3</sup> With restricted opportunities to support themselves and serve as productive members of society, many individuals with convictions are indefinitely punished for their crimes with no real opportunity to rehabilitate themselves.

#### **RECOGNITION OF COLLATERAL CONSEQUENCES ON CORPORATIONS**

In 1999, then Deputy Attorney General Eric Holder circulated a memorandum to federal prosecuting agencies entitled “Bringing Criminal Charges Against Corporations.”<sup>4</sup> The memorandum urged prosecutors to consider, among other things, the “collateral consequences” of a conviction in determining whether to charge a corporation with a criminal offense. The memorandum explained that prosecutors should take into account potential consequences for the corporation’s officers, directors, employees, and shareholders who may have been unaware of and unable to prevent the criminal conduct, as well as the non-penal sanctions for corporations, including suspension and debarment from eligibility for government contracts or federally funded programs.<sup>5</sup> The memorandum also previewed the practice of deferred prosecution—the now-common alternative to prosecution—when a prosecutor agrees to a resolution short of a criminal conviction in exchange for the defendant’s agreement to meet certain requirements (including fines, corporate reforms, and cooperation), after which charges are dismissed.<sup>6</sup>

Over fifteen years later, many have used his 1999 memorandum to criticize Attorney General Holder during his subsequent tenure as Attorney General, claiming that he set the stage for the Department of Justice’s reluctance to pursue white collar cases and perceived attitude that because of the collateral consequences of a corporate conviction, the institutions (and the individuals behind them) that were “too big to fail” were also “too big to jail.”

#### **JUDICIAL CRITICISM OF WHITE COLLAR PROSECUTION TRENDS**

U.S. District Judge Jed S. Rakoff (S.D.N.Y.)—who has a reputation for refusing to rubber-stamp regulatory and criminal corporate settlements—has been one of the most vocal critics about the lack of prosecutions against those responsible for the financial crisis beginning in 2008. In February 2010, Judge Rakoff reluctantly approved a \$150 million settlement between the SEC and Bank of America, decrying the settlement as “half-baked justice” in light of allegations that the bank lied to its investors regarding details of its Merrill Lynch takeover and plans to pay out millions in employee bonuses. He condemned the SEC for neither resolving the actual harm to investors nor holding the responsible bad actors accountable.<sup>7</sup> The Bank of America approval came after Judge Rakoff rejected a smaller settlement in 2009, which he called “neither fair, nor reasonable, nor adequate” and failing to “comport with the most elementary notions of justice and morality.”<sup>8</sup>

In November 2011, Judge Rakoff rejected a \$95 million proposed SEC settlement with Citigroup involving the latter’s sale of mortgage-backed securities that caused investors to lose almost \$700 million, while the bank enjoyed nearly \$160 million in profits.<sup>9</sup> Judge Rakoff criticized that the settlement had an insufficient factual basis and called Citigroup “a recidivist” for having previously settled SEC fraud cases without ever having admitted or denied the allegations and never agreeing to follow the law in the future.<sup>10</sup> “An application of judicial power that does not rest on facts is worse than mindless, it is inherently dangerous. . . . [I]n any case like this that touches on the transparency of financial markets whose gyrations have so depressed our economy and debilitated our lives, there is an overriding public interest in knowing the truth.”<sup>11</sup> (The Second Circuit reversed and remanded Judge Rakoff’s order, holding that requiring the SEC to establish the “truth” of the allegations as a condition for approving consent decrees and withholding approval of consent decrees on the belief that the SEC failed to bring proper charges constitute abuses of discretion.<sup>12</sup>)

In January 2014, Judge Rakoff penned an editorial in *New York Review of Books*, asking rhetorically who was to blame for the Great Recession.<sup>13</sup> Was it simply the result of negligence “of an imprudent but innocent failure to maintain adequate reserves for a rainy day? Or was it the result, at least in part, of fraudulent practices, of dubious mortgages portrayed as sound risks and packaged into even more esoteric financial instruments, the fundamental weaknesses of which were intentionally obscured?”<sup>14</sup> Judge Rakoff opined that if the financial crisis was “the product of intentional fraud, [then] the failure to prosecute those responsible must be judged one of the more egregious failures of the criminal justice system in many years.”<sup>15</sup> (Judge Rakoff did note in his editorial that “[e]very case is different,” and he asserts “no opinion about whether criminal fraud was committed in any given instance.”<sup>16</sup>)

In what can be viewed as a response to the criticism surrounding the government’s failure to prosecute individuals responsible for corporate crimes, in September 2015, Deputy Attorney General Sally Yates released official Department of Justice guidance intended to promote holding individuals accountable for corporate wrongdoing “to the extent it is practicable to do so.”<sup>17</sup> The Yates memorandum sets forth six steps to achieve this goal. Five of the six steps emphasize individual liability, including the following: in order to get cooperation credit, corporations must provide all relevant facts relating to the individuals responsible for the misconduct; investigations should focus on individuals from the inception of the investigation; and absent extraordinary circumstances, culpable individuals will not be released from liability when a matter is resolved with the corporation.<sup>18</sup> Unlike the 1999 Holder memorandum, the

Yates memorandum does not include any direction for prosecuting agencies to consider the collateral consequences of an individual criminal conviction. The Yates memorandum states that the six steps reflect policy shifts, but it does not identify which steps change current policy.<sup>19</sup> Only six months off the press, it is too soon to tell how and when we will see the effects of these proclaimed policy changes.

## **JUDICIAL CRITICISM ON IMPACT OF COLLATERAL CONSEQUENCES ON INDIVIDUALS**

*U.S. District Judge Emmet G. Sullivan (D.D.C.).* One of the latest influential figures to criticize the disparity in prosecutions between corporate and common criminals—and the resulting inequality in collateral consequences—is U.S. District Judge Emmet G. Sullivan (D.D.C.). In October 2015, Judge Sullivan approved deferred prosecution agreements against government contracting corporations charged with bribing and paying gratuities to public officials.<sup>20</sup> He took the opportunity to write an 84-page order—even though a short and straightforward order would have sufficed—to address the inequalities in collateral consequences and to call to action prosecuting agencies to use their prosecutorial discretion to give individuals the same leniency as corporations.

Judge Sullivan described successful projects from the 1960s and 1970s designed to rehabilitate individuals charged with certain non-violent offenses—programs after which the Speedy Trial Act’s deferred prosecution provision was modeled—by providing employment services, counseling, and recidivism prevention programs.<sup>21</sup> Despite the congressional intent behind the Speedy Trial Act—to encourage ongoing deferred prosecution practices on the condition that defendants participate in a rehabilitation programs—deferred-prosecution agreements are more commonly given to corporations (for a fee, of course) than non-violent individuals in need of rehabilitation.<sup>22</sup> If used as Congress intended, Judge Sullivan opined, deferred-prosecution agreements “could be a viable means to achieve reforms in our criminal justice system.”<sup>23</sup> Judge Sullivan pointed to the Yates memorandum as an opportunity to respond to the criticism surrounding the practice of failing to prosecute individuals responsible for corporate crimes.<sup>24</sup> But just a week after announcing the Yates memorandum, in what Judge Sullivan described as a “shocking example of potentially culpable individuals not being criminally charged,” the Department of Justice announced its deferred-prosecution agreement with General Motors regarding its failure to disclose a potentially lethal safety defect that misled consumers and resulted in numerous deaths.<sup>25</sup> Judge Sullivan noted that “[d]espite the fact that the reprehensible conduct of its employees resulted in the deaths of many people, the agreement merely imposes on GM an independent monitor to review and assess policies, practices, and procedures relating to GM’s safety-related public statements, sharing of engineering data, and recall processes plus the payment of a \$900 million fine.”<sup>26</sup> Judge Sullivan explained his disappointment that the government is not using deferred-prosecution agreements or other similar tools to provide the same opportunity to individual defendants to demonstrate their rehabilitation without triggering the devastating collateral consequences of a criminal conviction:

The Court recognizes that prosecutors are confronted regularly with difficult questions of how to exercise their discretion. . . . The Court is, however, extremely dismayed that despite all of the focus on providing tools for prosecutors to reduce over-incarceration, attack the root causes of crime, and mitigate where possible the collateral consequences

of criminal convictions, deferred-prosecutions agreements for individuals and other similar tools have gone largely unmentioned.<sup>27</sup>

*United States District Judge John Gleeson (E.D.N.Y.).* In May 2015, U.S. District Judge John Gleeson (E.D.N.Y.) granted a motion to expunge a prior conviction of a woman over whose case he presided more than a decade earlier.<sup>28</sup> Jane Doe was an immigrant single mother of four children. In 1997—a time when she was earning an average monthly income of \$783—Doe agreed to be involved in an automobile insurance fraud scheme and received \$2,500 for a claim related to a fabricated injury. In 2001, Doe was convicted of one count of healthcare fraud for her involvement in the scheme. Following her conviction, Doe had no additional contact with the criminal justice system. She needed to work to support her family and detested being on public assistance. Yet in the 13 years since she was sentenced, Doe’s conviction was “increasingly insurmountable barrier to her ability to work.”<sup>29</sup> Doe was hired on many occasions for many different jobs only to be fired after the employer learned of her prior conviction in routine background checks. Judge Gleeson chronicled the “wide-ranging effects” of a criminal conviction, which often “impose additional burdens on people who have served their sentences” without any increase in public safety, and held that the public is better served when “people with criminal convictions are able to participate as productive members of society by working and paying taxes.”<sup>30</sup> In granting Doe’s motion, Judge Gleeson explained: “Doe is one of 65 million Americans who have a criminal record and suffer the adverse consequences that result from such a record. Her case highlights the need to take a fresh look at policies that shut people out from the social, economic, and educational opportunities they desperately need in order to reenter society successfully.”<sup>31</sup>

## DEVELOPMENTS IN COLLATERAL CONSEQUENCES

### *PUBLIC DEBATE ON COLLATERAL CONSEQUENCES OF CONVICTIONS*

Echoing Judge Sullivan’s concerns, recent public debate has focused on the over-incarceration of individuals for nonviolent crimes on the local, state, and national levels. Beginning in 2010, then Attorney General Holder issued one of his many instructions to federal prosecutors to reserve charges with severe mandatory minimums only in the most serious cases<sup>32</sup> and to refrain from filing such charges simply to “leverage” a plea.<sup>33</sup> In April 2014, the Department of Justice announced a federal clemency initiative, encouraging qualified federal prisoners to petition to have their sentences commuted or reduced,<sup>34</sup> and the Obama administration is processing and approving clemency petitions at historically high rates.<sup>35</sup> In November 2015—as part of a series of steps aimed at encouraging reentry and rehabilitation of those recently released from prison—President Obama announced his plans for executive action to “ban the box,” prohibiting federal employers from asking job applicants about their criminal histories at the beginning of the application process (although employers can require an applicant to disclose prior criminal history before finalizing a hiring decision).<sup>36</sup> Civil rights advocates have lobbied the White House to enact “ban the box” and related measures because including these questions on job applications often disqualifies people with criminal records from gaining employment after prison when they are otherwise qualified and deserving of employment. Most recently, in his 2016 State of the Union Speech, President Obama put the issue front and center, calling in the first 90 seconds of his speech for bipartisan criminal justice reform and then later

talking about a future America in which an individual who has “served his time” can truly experience a second chance at life.<sup>37</sup>

### *INCREASING COLLATERAL CONSEQUENCES FOR WHITE COLLAR DEFENDANTS*

In the midst of national efforts to decrease collateral consequences affecting low-level offenders, there has been an increasing set of collateral consequences that are likely to affect potential white collar defendants. Here are a few examples.

*So-called fraud registries.* In most counties, residents can check local online sex registries to see if convicted sex offenders are living in their neighborhoods. In Utah, residents will soon have access to the first-ever state-run registry for convicted white collar criminals.<sup>38</sup> In March 2015, the Utah legislature passed a bill to establish the registry to combat the state’s high susceptibility to affinity fraud, the targets of which are often vulnerable members of the Church of Jesus Christ of Latter-day Saints. “[Utah] is sadly known for its high level of financial vulnerability to affinity fraud. . . . Utah’s unique personal interweavings and close relationships offer a rich environment for predatory behavior and financial crimes in our state,” said Utah Attorney General Sean Reyes, in a press release the week the bill passed.<sup>39</sup>

According to the bill, the Utah attorney general’s office will operate the online registry, which will include offenders’ names, aliases, photographs, physical descriptions, and convictions. Crimes requiring registration include second-degree felony counts of securities fraud, theft by deception, unlawful dealing of property by a fiduciary, insurance fraud, mortgage fraud, communications fraud, and money laundering. In some cases, the bill applies retroactively to convictions occurring as far back as 2006, and certain convictions will require the offender’s information to remain on the registry for life.

Criminal defense lawyers in Utah have spoken out against the registry, calling it overly broad, especially with respect to communications fraud charges that can include a wide range of business interactions.

*Immigration consequences beyond Padilla.* In *Padilla v. Kentucky*,<sup>40</sup> the United States Supreme Court made immigration collateral consequences especially visible. Extending prior decisions on criminal defendants’ Sixth Amendment right to counsel, the Supreme Court held that criminal defense attorneys must advise non-citizen clients about the deportation risks of a guilty plea. Counsel’s obligations with respect to immigration consequences are broad: (1) when the law is unambiguous, attorneys must advise their criminal clients that deportation “will” result from a conviction; (2) when immigration consequences are unclear or uncertain, attorneys must advise that deportation “may” occur; and (3) attorneys must give their clients some advice about deportation. Counsel are not permitted to remain silent about potential immigration issues.

But beyond *Padilla* and the risk of deportation, there is the risk of denaturalization—the stripping of citizenship. 8 U.S.C. § 1451(a) provides that denaturalization may be commenced if the citizen’s naturalization was (1) illegally procured, or (2) procured by concealment of a material fact or by willful misrepresentation. One way for the government to establish illegal procurement is by proving that during the statutory period of residency prior to naturalization (typically five years), the applicant lacked good moral character, which can include the

committing of “unlawful acts that adversely reflect upon the applicant’s moral character.” 8 C.F.R. § 316.10(b)(3)(iii). In the white collar context, unlawful acts adversely reflecting on moral character can include any crime involving intent to commit fraud or intent to commit theft involving the permanent deprivation of another’s property.

Denaturalization is on the rise nationally and globally.<sup>41</sup> In the United States, the government has been pursuing denaturalization in cases when, after naturalization, a criminal defendant enters into a guilty plea, the factual basis for which includes conduct (sometimes even non-criminal conduct) that occurred prior to the defendant’s naturalization. The denaturalization statute contains no statute of limitations, and the government is pursuing these cases even when a plea agreement includes a promise by prosecutors not to subject the defendant to further prosecution.<sup>42</sup>

***Pitfalls for healthcare providers.*** Healthcare fraud is a priority for prosecuting agencies, and it is one of the most common white-collar prosecutions in federal court. White-collar defendants in healthcare cases face significant collateral consequences that affect their ability to participate in the healthcare field.

For a healthcare professional, “exclusion” from participation in federal and state healthcare programs, such as Medicare and Medicaid, is likely the most serious collateral consequence of a conviction. Healthcare exclusion proceedings are administrative actions initiated by the U.S. Department of Health & Human Services, Office of the Inspector General. Certain healthcare crimes—including Medicare or Medicaid fraud or patient abuse or neglect—require mandatory exclusion. For other crimes—such as misdemeanor convictions related to controlled substances and unlawful kickback arrangements—exclusion proceedings are discretionary.<sup>43</sup> Exclusion has the practical effect of prohibiting an individual from being employed in any capacity by any healthcare provider that receives reimbursement from a government health care program.

Even if exclusion is avoided, a healthcare-related conviction can result in Medicare or Medicaid terminating an individual’s provider agreement, which in turn can result in termination of billing privileges. Healthcare professionals will also likely face steep civil fines, loss of hospital staff privileges, emergency suspension or revocation of their professional licenses, and bank-initiated defaults on loans for medical office space or equipment (potentially requiring a physician’s practice to file for bankruptcy to avoid foreclosure). Separately, the individual could have exposure in collateral civil lawsuits, such as state and federal false claims act suits and state drug dealer liability suits (giving a wide range of potential plaintiffs standing to sue for the knowing distribution or knowing participation in the chain of distribution of an “illegal drug” that was actually used by the drug user).

## **DEFENSE LAWYERS: TIPS ON PROTECTING YOUR CLIENTS**

***Resources.*** Consult some of the many resources available to help defense lawyers navigate complexities of collateral consequences. The ABA database should be a first-stop resource for quickly locating relevant collateral consequences at issue in a given case. Identifying them for your clients at the outset allows clients to consider collateral consequences as part of their criminal proceedings from the beginning of their case. Other helpful resources

include the National Association of Criminal Defense Lawyers' recent publication of *Collateral Consequences of Criminal Convictions: Law, Policy, and Practice*,<sup>44</sup> which offers a comprehensive roadmap for post-conviction issues, and the Collateral Consequences Resource Center,<sup>45</sup> a non-profit organization that provides up-to-date news and commentary on current developments in judicial decisions, legislation, and initiatives.

***Expungement and Sealing.*** Become familiar with the expungement and sealing laws of your jurisdiction.<sup>46</sup> This is particularly important in light of new federal interest in helping individuals with criminal records overcome barriers to reentry and rehabilitation through clearing their records. In November 2015, President Obama signed an executive order establishing a National Clean Slate Clearinghouse and authorizing technical assistance to legal aid programs and public defender offices “to build capacity for legal services needed to help with record-cleaning, expungement, and related civil legal services.”<sup>47</sup>

***Alternative Conviction and Sentencing Programs.*** Advocate for alternative conviction and sentencing options. In addition to deferred- and non-prosecution agreements, which are underutilized for individuals, many jurisdictions have pilot programs for alternative sentencing and conviction for non-violent offenders. For example, the Conviction and Sentence Alternatives (“CASA”) program in the Central District of California allows non-violent federal defendants in Southern California an opportunity to complete an intensive supervision program aimed at addressing the underlying causes of the criminal conduct, and graduates of the program are often able to avoid jail time and/or have the charges against them dismissed.<sup>48</sup>

## CONCLUSION

Collateral consequences are far-reaching and seemingly never ending. Fortunately, they are getting much-needed attention in the political and social debate of criminal justice reform. This attention is an opportunity for legislatures and prosecuting agencies at federal, state, and local levels to re-evaluate the tens of thousands of statutory and regulatory collateral consequences to ensure they serve legitimate public safety rationales. It is also a chance to continue public efforts to combat the many unofficial collateral consequences that often thwart individuals' chances to rehabilitate and reenter society. In the meantime, judges, prosecutors, and defense lawyers alike can help serve the justice system by staying apprised of collateral consequences implicated in a given criminal case and considering those consequences during the pendency of a criminal prosecution.

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<sup>2</sup> AMERICAN BAR ASSOCIATION NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, <http://www.abacollateralconsequences.org/>.

<sup>3</sup> *Id.* at <http://www.abacollateralconsequences.org/description/>.

<sup>4</sup> See Memorandum from Eric Holder, Deputy Attorney General, to All Component Heads and United States Attorneys (June 16, 1999), *available at* <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF>.

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<sup>5</sup> *Id.* at 3, 9.

<sup>6</sup> *Id.* at 9-10.

<sup>7</sup> *S.E.C. v. Bank of Am. Corp.*, No. 09 CIV. 6829 (JSR), 2010 WL 624581, at \*5-6 (S.D.N.Y. Feb. 22, 2010).

<sup>8</sup> *S.E.C. v. Bank of Am. Corp.*, 653 F. Supp. 2d 507, 509 (S.D.N.Y. 2009).

<sup>9</sup> *S.E.C. v. Citigroup Glob. Markets Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011), *vacated and remanded*, 752 F.3d 285 (2d Cir. 2014).

<sup>10</sup> *Id.* at 334.

<sup>11</sup> *Id.* at 335.

<sup>12</sup> *S.E.C. v. Citigroup Glob. Markets Inc.*, 752 F.3d 285 (2d Cir. 2014).

<sup>13</sup> Jed. S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, THE N.Y. REVIEW OF BOOKS, Jan. 9, 2014, <http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; *see also* Marty Robbins, reply by Jed S. Rakoff, *Why Have Top Executives Escaped Prosecution?*, THE N.Y. REVIEW OF BOOKS, Apr. 4, 2014, <http://www.nybooks.com/articles/2014/04/03/why-have-top-executives-escaped-prosecution/>.

<sup>16</sup> *Id.*

<sup>17</sup> *See* Memorandum from Sally Quillian Yates, Deputy Attorney General, to Assistant Attorneys Gen., Dir. of Fed. Bureau of Investigation and the Exec. Office for U.S. Trs., at U.S. Attorneys (Sept. 9, 2015), *available at* <http://www.justice.gov/dag/file/769036/download>.

<sup>18</sup> *Id.* at 2-3.

<sup>19</sup> *Id.* at 2.

<sup>20</sup> *United States v. Saena Tech Corp.*, No. CR 14-211 (EGS), -- F. Supp. 3d --, 2015 WL 6406266 (D.D.C. Oct. 21, 2015). A copy of this opinion is included with the electronic version of this article as **Attachment 1**.

<sup>21</sup> *Id.* at \*22-24.

<sup>22</sup> *Id.* at \*24.

<sup>23</sup> *Id.* at \*2.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at \*25.

<sup>26</sup> *Id.* (internal quotation marks omitted).

<sup>27</sup> *Id.* at \*25, 28-29; *see also* Jed S. Rakoff, *Justice Deferred Is Justice Denied*, THE N.Y. REVIEW OF BOOKS, Feb. 19, 2015, <http://www.nybooks.com/articles/2015/02/19/justice-deferred-justice-denied/> (citing the three Pfizer deferred-prosecution agreements in 2002, 2007, and 2009 as an example of the ineffectiveness of such agreements).

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<sup>28</sup> *Doe v. United States*, 110 F. Supp. 3d 448, 2015 WL 2452613 (E.D.N.Y. 2015) (appeal pending). A copy of this opinion is included with the electronic version of this article as **Attachment 2**.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at \*4 (internal citation and quotation omitted).

<sup>31</sup> *Id.* at \*6. *But see Stephenson v. United States*, -- F. Supp. 3d --, 2015 WL 5884810, at \*3–7 (E.D.N.Y. Oct. 7, 2015) (denying without prejudice Ms. Stephenson’s application to expunge a 22-year-old bank fraud conviction because she was employed and her ability to become a licensed nurse was realistic in light of applicable law prohibiting discrimination on the basis of criminal history, but nonetheless calling on all three branches of government to take action to better ensure that persons who have paid their “debt to society” are truly given a second chance).

<sup>32</sup> Memorandum from Eric Holder, Attorney General, to all Federal Prosecutors Re: Department Policy on Charging and Sentencing (May 19, 2010), *available at* <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf>.

<sup>33</sup> *See* Memorandum from Eric Holder, Attorney General, to All Heads of Department of Justice Components and United States Attorneys Re: Federal Prosecution Priorities (August 12, 2013), Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (August 12, 2013), Consideration of Collateral Consequences in Rulemaking (August 12, 2013), and Retroactive Application of Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (August 29, 2013), *available at* <http://www.justice.gov/ag/attorney-generals-smart-crime-initiative>.

<sup>34</sup> Clemency Initiative, U.S. DEPARTMENT OF JUSTICE (April 23, 2014), <http://www.justice.gov/pardon/new-clemency-initiative>.

<sup>35</sup> Peter Baker, *Obama Plans Broader Use of Clemency to Free Nonviolent Drug Offenders*, N.Y. TIMES (July 3, 2015), [http://www.nytimes.com/2015/07/04/us/obama-plans-broader-use-of-clemency-to-free-nonviolent-drug-offenders.html?\\_r=0](http://www.nytimes.com/2015/07/04/us/obama-plans-broader-use-of-clemency-to-free-nonviolent-drug-offenders.html?_r=0); *see also* Jesse McKinley and James C. McKinley Jr., *Cuomo Moves to Pardon Former Youthful Offenders*, N.Y. TIMES (December 20, 2015), <http://www.nytimes.com/2015/12/21/nyregion/cuomo-moves-to-pardon-former-youthful-offenders.html?smprod=nytcore-iphone&smid=nytcore-iphone-share>; David Garrick, *San Diego expands criminal diversion program to include minor drug offenses*, L.A. TIMES (December 20, 2015), <http://www.latimes.com/local/crime/la-me-sd-diversion-20151221-story.html>.

<sup>36</sup> *FACT SHEET: President Obama Announces New Action to Promote Rehabilitation and Reintegration for the Formerly Incarcerated*, THE WHITE HOUSE (November 2, 2015), <https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation>.

<sup>37</sup> Remarks of President Barack Obama – State of the Union Address As Delivered, THE WHITE HOUSE (January 13, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/12/remarks-president-barack-obama-%E2%80%93-prepared-delivery-state-union-address>.

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<sup>38</sup> Tom Harvey, *Citing high level of fraud in Utah, lawmakers pass white collar crime registry*, THE SALT LAKE TRIBUNE (March 11, 2015), <http://www.sltrib.com/home/2278712-155/citing-high-level-of-fraud-in>.

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

<sup>40</sup> 559 U.S. 356 (2010).

<sup>41</sup> Matt Welch, *Citizenship-stripping on the Rise Worldwide*, REASON.COM (December 31, 2015), <https://reason.com/blog/2015/12/31/citizenship-stripping-on-the-rise-worldw%20>.

<sup>42</sup> Beth Winegarner, *High Court Asked To Reinstate Citizenship After Plea Deal*, LAW360.COM (October 30, 2015), <http://www.law360.com/articles/721537/high-court-asked-to-reinstate-citizenship-after-plea-deal%20-%20cert%20petition%20pending>.

<sup>43</sup> See Exclusions Program, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, OFFICE OF INSPECTOR GENERAL, <http://oig.hhs.gov/exclusions/>.

<sup>44</sup> Collateral Consequences of Criminal Convictions: Law, Policy, and Practice *Offers Roadmap to the Restoration of Rights After Conviction*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (February 21, 2013), <http://www.nacdl.org/News.aspx?id=26526>.

<sup>45</sup> COLLATERAL CONSEQUENCES RESOURCE CENTER, <http://ccresourcecenter.org/about-the-collateral-consequences-resource-center/>.

<sup>46</sup> *50-state guide to expungement and sealing laws*, COLLATERAL CONSEQUENCES RESOURCE CENTER (January 13, 2016), <http://ccresourcecenter.org/2016/01/13/expungement-and-sealing-laws/>.

<sup>47</sup> *FACT SHEET: President Obama Announces New Action to Promote Rehabilitation and Reintegration for the Formerly Incarcerated*, THE WHITE HOUSE (November 2, 2015), <https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation>.

<sup>48</sup> Conviction and Sentence Alternatives Program (CASA), U.S. DEPARTMENT OF JUSTICE, CENTRAL DISTRICT OF CALIFORNIA, PROGRAMS (updated November 9, 2015), <http://www.justice.gov/usao-cdca/conviction-and-sentence-alternatives-program-casa>.