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# Qualified Privilege from Defamation: Cracking the Absolute Corporate Shell in DOJ Investigations

*Joseph Egozi*<sup>†</sup>

## I. INTRODUCTION

Imagine Robert Witt, a Shell employee working in Texas who is responsible for approving payments to contractors for one of the world's largest oil companies. Shell's outside counsel interviews him amid a U.S. Department of Justice (DOJ) investigation into a Shell outside contractor who was recently convicted for violating the Foreign Corrupt Practices Act (FCPA). Shell fires Witt and voluntarily reports to the DOJ that he knowingly approved customs bribes for a Shell project in Nigeria. Now, let's suppose Witt is innocent, but Shell incriminated him so it could earn cooperation credit. Until recently, Witt could have sued Shell for defamation because it published false statements about him to the DOJ. However, under a highly anticipated decision by the Texas Supreme Court, *Shell Oil Co. v. Witt*,<sup>1</sup> individuals or entities who make statements to law enforcement in serious contemplation of a judicial proceeding now enjoy absolute—not just qualified—privilege for their defamatory statements.<sup>2</sup> Not only has Witt lost his job, but he could also be prosecuted individually for these alleged FCPA violations.

This *could be* the story of *Shell*. Instead of considering Witt's claim on the merits, however, the court dismissed the action on summary judgment because it found that Shell released its investigative report upon serious threat of DOJ prosecution.<sup>3</sup> As a result, the court avoided uncovering whether Witt was actually

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<sup>1</sup> 464 S.W.3d 650 (Tex. 2015).

<sup>2</sup> *Id.* at 659–60.

<sup>3</sup> *Id.* at 651.

criminally responsible, focusing instead on the quasi-judicial nature of Shell's interaction with the DOJ.<sup>4</sup> To uncover the true facts in cases like *Shell*, the doors of the courthouse must be open to those who may have been wronged and whose reputation may be impugned. Did a disgruntled former employee bring a meritless suit or did a corporate scapegoat sue for essential redress?

Traditionally, courts afford corporations absolute privilege from defamation suits for statements made to law enforcement during "quasi-judicial" proceedings, though there is no consensus on what constitutes "quasi-judicial."<sup>5</sup> Courts universally afford absolute privilege to potentially defamatory statements made during judicial proceedings;<sup>6</sup> absolute privilege is equivalent to immunity from an action because it protects the corporation from liability regardless of the statement's falsity or maliciousness.<sup>7</sup> However, state courts vary markedly in determining what circumstances are sufficiently "quasi-judicial" to warrant such absolute privilege. When an individual or corporation communicates with law enforcement prior to a judicial proceeding, most states afford only a qualified privilege that is lost when abused,<sup>8</sup> such as when the speaker knows the statement to be false or motivated by malice.<sup>9</sup> Other states apply absolute privilege from defamation in these circumstances,<sup>10</sup> such as when Shell made statements to the DOJ prior to its execution of a deferred prosecution agreement (DPA).<sup>11</sup>

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<sup>4</sup> *Id.* at 655.

<sup>5</sup> Piper M. Willhite, *Defamation Law: Privileges from Liability: Distinguishing Quasi-Judicial Proceedings from Proceedings Which Are Preliminary to Judicial Hearings*, 47 OKLA. L. REV. 541, 542 (1994).

<sup>6</sup> RESTATEMENT (SECOND) OF TORTS § 588 (1977) ("A witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as a part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding.").

<sup>7</sup> See W. Keeton et al., *Prosser & Keeton on the Law of Torts*, § 16 at 109 (5th ed. 1984); see, e.g., *Fridovich v. Fridovich*, 598 So. 2d 65, 66 (Fla. 1992) ("[D]efamatory statements made in the course of judicial proceedings are absolutely privileged, and no cause of action for damages will lie, regardless of how false or malicious the statements may be, so long as the statements are relevant to the subject of inquiry.").

<sup>8</sup> See, e.g., *Indiana Nat'l Bank v. Chapman*, 482 N.E.2d 474, 479 (Ind. Ct. App. 1985) (holding that communications made during the course of a law enforcement investigation are qualified privileged).

<sup>9</sup> *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 768 (Tex. 1987).

<sup>10</sup> See, e.g., *McGranahan v. Dahar*, 408 A.2d 121, 128 (N.H. 1979) (adopting the "rule that treats both formal and informal complaints and statements to a prosecuting authority as part of the initial steps in a judicial proceeding [and] entitled to absolute immunity . . .").

<sup>11</sup> *Shell Oil Co. v. Writt*, 464 S.W.3d 650, 652–53 (Tex. 2015). A DPA is essentially "a form of probation which enables a corporation to avoid pleading guilty to a crime or even being indicted. Under such an agreement, the company commits to performing certain agreed-upon measures and refraining from criminal conduct for the duration of the agreement's term, at the end of which if the company has complied with all the terms, the government drops all charges." Andrew

The DOJ corporate prosecution landscape leads to significant pressure on corporations to cooperate through substantial fines for corporate misconduct and the looming fear of suspension, debarment, and other collateral consequences.<sup>12</sup> Prosecutors leverage these fears by demanding, now as a matter of formal DOJ policy, that companies name individual employees responsible for misconduct in order to qualify for cooperation credit.<sup>13</sup> This creates a “catch-22 of corporate cooperation,” which arises when the cooperation necessary to minimize criminal fines also bars a corporation from invoking absolute privilege as a defense to future claims of defamation.<sup>14</sup> One potential solution to this catch-22 is declaring the DOJ a quasi-judicial body as a matter of law.<sup>15</sup> This would guarantee absolute privilege for all potentially defamatory statements made to the DOJ before a judicial proceeding, regardless of who initiated the investigation or the statement’s accuracy.

However, in policing corporations and prioritizing cooperation, the DOJ’s enforcement strategies disregard potentially harmful effects on individual employees’ legal remedies. Absolute privilege leaves an individual plaintiff unemployed and likely blackballed from similar jobs without sufficient means to restore her reputation. This Comment proposes the opposite solution, which the Texas Court of Appeals endorsed in *Shell*.<sup>16</sup> Since the DOJ is not a quasi-judicial body, all

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Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 413, (2007).

<sup>12</sup> See, e.g., Memorandum from Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Justice, on *Individual Accountability for Corporate Wrongdoing*, to All U.S. Att’y’s et al. 5 (Sept. 9, 2015), <http://www.justice.gov/dag/file/769036/download> [<https://perma.cc/8KGY-R8XJ>] [hereinafter “Yates Memo”]; Press Release, U.S. Dep’t of Justice, *Justice Department Recovers \$3.8 Billion from False Claims Act Cases in Fiscal Year 2013, Second Largest Annual Recovery in History, Whistleblower Lawsuits Soar to 752* (Dec. 20, 2013), <http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html> [<https://perma.cc/R4VY-4WVC>]; Jimmy Hoover, *Feds Say Sky-High Fines Show Perks of FCPA Self-Reporting*, LAW360 (Mar. 12, 2015), <http://www.law360.com/articles/631116/feds-say-sky-high-fines-show-perks-of-fcpa-self-reporting> [<https://perma.cc/3VR2-GQ2C>] (“Had the company . . . cooperated with investigations, prosecutors would have sought as little as \$207 million, or 73 percent less.”); F. Joseph Warin et al., *2013 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements—Part 2*, 28 WESTLAW J. WHITE-COLLAR CRIME 2, at \*2 (2014) (“For companies that receive a substantial portion of their business from the federal government, debarment or suspension from federal contracting is among the most potentially damaging of the collateral consequences of indictment or conviction.”).

<sup>13</sup> Gary G. Grindler & Laura K. Bennett, *True Cooperation: DOJ’s “Reshaped Conversation” and Its Consequences*, 30-SUM CRIM. JUST. 32, 34–35 (2015).

<sup>14</sup> Alyssa Ladd, Comment, *The Catch-22 of Corporate Cooperation in Foreign Corrupt Practices Act Investigations*, 51 HOUS. L. REV. 947, 948 (2014).

<sup>15</sup> *Id.* at 975–77.

<sup>16</sup> See *Writt v. Shell Oil Co.*, 409 S.W.3d 59, 61 (Tex. Ct. App. 2013), *rev’d*, 464 S.W.3d 650 (Tex. 2015) (“To extend the absolute privilege to the circumstances of the instant case, where neither Shell nor Writt was a party to an ongoing or proposed judicial or quasi-judicial proceeding at the time that Shell made the complained-of statements, would have the very dangerous effect of

statements made before a formal judicial proceeding should enjoy only qualified privilege from defamation actions. This would keep the courthouse doors ajar, allowing inculpatated employees to sue and recover damages from corporations that made malicious or deliberately false statements to law enforcement.

Mere months after the *Shell* decision, Deputy Attorney General Sally Yates issued a memorandum to all U.S. Attorneys requiring that corporations name culpable individuals to qualify for cooperation credit.<sup>17</sup> This Comment recommends that the DOJ targets a new problem in *Shell* resulting from these changing priorities in corporate prosecution—courts must balance DOJ incentives to name individuals with an individual’s interest in having her defamation action heard.<sup>18</sup> Since DOJ practices will continue to pressure corporations to cooperate and identify culpable employees, the DOJ should issue guidance documents on conducting responsible corporate investigations free of scapegoating. Similarly, the courts should implement a qualified privilege rule consistent with both the quasi-judicial doctrine and the needs of individual employees. Ultimately, this Comment proposes modifications to the corporate prosecution landscape that balance administrability, fairness for both corporations and individuals, and the DOJ’s primary goal of uncovering the full scope of corporate misconduct.

Part II will highlight the varying circumstances that state courts consider sufficiently quasi-judicial to warrant absolute privilege. Part III will demonstrate that the DOJ’s increasing emphasis on implicating criminally responsible individuals and its leverage in settlement negotiations lead corporations to ignore collateral defamation actions. Employing *Shell* as a case study, Part IV will assess the “quasi-judicial” framework and establish that the DOJ lacks the qualities and safeguards necessary to warrant absolute privilege. Finally, Part V will propose a uniform rule of qualified privilege from defamation. A qualified privilege rule would help corporations navigate compliance; eliminate a perverse timing paradox that rewards delayed cooperation;

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actually discouraging parties from being truthful with law-enforcement agencies and instead encourage them to deflect blame to others without fear of consequence.”)

<sup>17</sup> Yates Memo, *supra* note 12, at 3–4; see discussion *infra* Part II.A; Amelia Toy Rudolph, *The Yates Memo and the Ethical and Strategic Challenges It Presents for White Collar Defense Attorneys*, in *MANAGING WHITE COLLAR LEGAL ISSUES: LEADING LAWYERS ON UNDERSTANDING CLIENT EXPECTATIONS, CONDUCTING INTERNAL INVESTIGATIONS, AND ANALYZING THE IMPACT OF RECENT CASES* 74 (Aspatore ed., 2016) (“[T]he Yates Memo appears to depart from recent DOJ policy, with the potential to pit corporate employer and individual employees against one another in ways that may undermine the goals the DOJ was attempting to achieve and that certainly will raise the degree of difficulty for white collar defense attorneys attempting to represent both corporate and individual interests in an investigation.”).

<sup>18</sup> See *Shell*, 464 S.W.3d at 655.

and, most importantly, protect victims of malicious defamation that lack legal recourse under the *Shell* absolute privilege rule.

## II. SURVEYING DEFAMATORY PRIVILEGE ACROSS STATES

During a preliminary DOJ investigation, a corporation can be liable to an employee for defamation when it communicates false incriminating information to the DOJ. Defamation, which includes libel and slander suits, is a written or oral communication that tends to “harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”<sup>19</sup> The three affirmative defenses to defamation are truth,<sup>20</sup> privilege,<sup>21</sup> and consent.<sup>22</sup> When a corporation faces both a defamation action initiated by an employee and a DOJ investigation, however, the only realistic defense is privilege.<sup>23</sup> Therefore, a corporation’s defense to an employee’s defamation action is limited to one of two classes of privilege: absolute and qualified.<sup>24</sup> Both are based on public policy considerations, which balance “the good to be accomplished by the free and open exchange of information over the harm which may result from a falsehood.”<sup>25</sup>

Absolute privilege is reserved for statements made during the course of a “judicial proceeding” or in contemplation of a judicial proceeding and cannot be defeated by proof of malicious intent.<sup>26</sup> It also extends to legislative and quasi-judicial proceedings,<sup>27</sup> such as administrative<sup>28</sup> and other like proceedings “of a judicial nature before a competent court or before a tribunal or officer clothed with judicial or quasi-judicial powers.”<sup>29</sup>

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<sup>19</sup> RESTATEMENT (SECOND) OF TORTS § 559 (1977).

<sup>20</sup> *Id.* at § 581A (“One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true.”).

<sup>21</sup> *See id.* at Five 25 2 B Intro. Note (commenting that the law justifies certain “privileges” because of the policy that “the ends to be gained by permitting defamatory statements” outweigh “the harm that may be done to the reputation of others”).

<sup>22</sup> *Id.* at § 583.

<sup>23</sup> Ladd, *supra* note 14, at 970–71. If a corporation pursued the truth defense, it would have to admit that its own employee was criminally responsible, thereby jeopardizing its pursuit of a favorable settlement. It is also doubtful that a corporation would have the individual’s consent to defame. *See* RESTATEMENT (SECOND) OF TORTS § 583 cmt. c (requiring affirmative consent and stating that a mere indifference to defamatory publications does not constitute consent).

<sup>24</sup> *See* RESTATEMENT (SECOND) OF TORTS §§ 583–612.

<sup>25</sup> *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 768 (Tex. 1987).

<sup>26</sup> RESTATEMENT (SECOND) OF TORTS §§ 587–88.

<sup>27</sup> *Hurlbut*, 749 S.W.2d at 768.

<sup>28</sup> *Bergman v. Hupy*, 221 N.W.2d 898, 900 (Wis. 1974).

<sup>29</sup> 53 C.J.S., Libel and Slander; Injurious Falsehood § 104(b), p. 169.

Qualified privilege, meanwhile, is reserved for instances where “(a) there is information that affects a sufficiently important public interest, and (b) the public interest requires the communication of the defamatory matter to a public officer or a private citizen who is authorized or privileged to take action if the defamatory matter is true.”<sup>30</sup> Qualified privilege can be defeated with a showing of actual malice,<sup>31</sup> or if the defamer failed to act in the public interest and knew the statements to be untrue.<sup>32</sup>

When assessing defamation actions, states vary widely in the circumstances they deem sufficiently quasi-judicial to warrant absolute versus qualified privilege. A minority of states afford absolute privilege to communication with law enforcement during a preliminary investigation, as in pre-indictment.<sup>33</sup> This includes cases where the corporation or individual volunteered the allegedly defamatory statement to law enforcement,<sup>34</sup> and those in which law enforcement solicited the communication.<sup>35</sup> This broader view of “quasi-judicial” is designed to “encourage the utmost freedom of communication between citizens and public authorities.”<sup>36</sup> However, affording corporations absolute privilege irrespective of the disclosure’s timing or circumstances essentially prioritizes freedom of any communication, privileging even false and malicious statements.

Conversely, most states protect communication to law enforcement during a preliminary investigation with only qualified privilege.<sup>37</sup> This

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<sup>30</sup> RESTATEMENT (SECOND) OF TORTS § 598.

<sup>31</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (defining a statement made with “‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”).

<sup>32</sup> See RESTATEMENT (SECOND) OF TORTS §§ 599–603; see also *Hurlbut*, 749 S.W.2d at 768.

<sup>33</sup> See *Gen. Elec. Co. v. Sargent*, 916 F.2d 1119, 1125–27 (6th Cir. 1990) (applying Kentucky law); *Borg v. Boas*, 231 F.2d 788, 794 (9th Cir. 1956); *Jacobs v. Adelson*, 325 P.3d 1282, 1285 (Nev. 2014); *Hagberg v. California Fed. Bank FSB*, 81 P.3d 244, 251 (Cal. 2004); *Correllas v. Viveiros*, 572 N.E.2d 7, 11 (Mass. 1991); *Starnes v. Int’l Harvester Co.*, 539 N.E.2d 1372, 1375 (Ill. App. Ct. 1989), *rev’d* on other grounds; *Bryson v. News Am. Publications, Inc.*, 672 N.E.2d 1207 (Ill. 1996); *Cutts v. Am. United Life Ins. Co.*, 505 So. 2d 1211, 1215 (Ala. 1987); *McGranahan v. Dahar*, 408 A.2d 121, 128 (N.H. 1979); *Shinglemeyer v. Wright*, 82 N.W. 887, 890 (Mich. 1900).

<sup>34</sup> See, e.g., *O’Shea v. Gen. Tel. Co.*, 238 Cal. Rptr. 715, 720 (Cal. Dist. Ct. App. 1987) (“Even unsolicited communications from citizens to governmental agencies have been held protected by the absolute privilege of Civil Code section 47, subdivision 2.”).

<sup>35</sup> See, e.g., *Cutts*, 505 So. 2d at 1215 (holding that insurance company is absolutely privileged from defamation over letter to district attorney).

<sup>36</sup> *O’Shea*, 238 Cal. Rptr. at 720; see also *Correllas*, 572 N.E.2d at 11 (favoring absolute privilege because “any final judgment may depend largely on the testimony of the party or witness, and full disclosure . . . should not be hampered by fear of an action for defamation.”).

<sup>37</sup> See *Lyons v. Midwest Glazing, L.L.C.*, 235 F. Supp. 2d 1030, 1046 (N.D. Iowa 2002); *Kahermanes v. Marchese*, 361 F. Supp. 168, 172 (E.D. Pa. 1973); *Marsh v. Commercial & Sav. Bank*, 265 F. Supp. 614, 621 (W.D. Va. 1967); *Gallo v. Barile*, 935 A.2d 103, 111 (Conn. 2007); *DeLong v. Yu Enter., Inc.*, 47 P.3d 8, 12 (Or. 2002); *Caldor, Inc. v. Bowden*, 625 A.2d 959, 969 (Md. 1993); *Fridovich v. Fridovich*, 598 So. 2d 65, 69 (Fla. 1992); *Kissell v. Dunn*, 793 F. Supp. 389, 393

approach also includes cases where communication was completely voluntary,<sup>38</sup> and those where law enforcement solicited the communication.<sup>39</sup> The Florida Supreme Court defended qualified privilege in such cases because absolute privilege unnecessarily protects those who make “intentionally false and malicious defamatory statements to the police.”<sup>40</sup> Similarly, the Oregon Supreme Court discussed that “a citizen making an informal statement to police should not enjoy blanket immunity from an action; instead, such statements should receive protection only if they were made in good faith, to discourage an abuse of the privilege.”<sup>41</sup> Wisconsin even distinguishes privilege by recipient, reserving absolute privilege for statements to prosecutors, and qualified privilege for statements to police officers.<sup>42</sup> A qualified privilege rule properly exempts false or malicious communication, but is subject to criticism for potential chilling effects on communication and cooperation with law enforcement. As discussed below, the incentives for corporate cooperation are high enough where potential chilling effects are practically nonexistent.<sup>43</sup>

### III. WHAT MAKES DOJ CRIMINAL PROSECUTION UNIQUE? NAMING NAMES

Privilege from defamation is a growing problem for corporations under DOJ investigation because of the DOJ's increasing emphasis on naming names to receive cooperation credit, as well as a substantial negotiation power imbalance that leaves corporations with practically zero leverage.

#### A. The Paradox of Naming Names

The DOJ's increasing pressure on corporations to name names results in a balancing act between earning cooperation credit and avoiding subsequent employee defamation actions. The trend towards naming individual employees grew in 2008 when the DOJ updated its “Principles of Federal Prosecution of Business Organizations” to reward

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(D.R.I. 1992); *Toker v. Pollak*, 376 N.E.2d 163, 167 (N.Y. 1978); *Bienvenu v. Angelle*, 223 So. 2d 140, 144 (La. 1969); *Indiana Nat'l Bank v. Chapman*, 482 N.E.2d 474, 479 (Ind. Ct. App. 1985); *Dijkstra v. Westerink*, 401 A.2d 1118, 1120 (N.J. Super. Ct. App. Div. 1979); *Hardaway v. Sherman Enter., Inc.*, 210 S.E.2d 363, 364 (Ga. Ct. App. 1974); *Davenport v. Armstead*, 255 S.W.2d 132, 134–36 (Mo. Ct. App. 1952).

<sup>38</sup> See *Gallo*, 935 A.2d at 111.

<sup>39</sup> See *Indiana Nat'l Bank*, 482 N.E.2d at 479.

<sup>40</sup> *Fridovich*, 598 So. 2d at 69.

<sup>41</sup> *DeLong*, 47 P.3d at 12.

<sup>42</sup> See *Bergman v. Hupy*, 221 N.W.2d 898, 901 (Wis. 1974).

<sup>43</sup> See discussion *infra* Part V.A.



“timely and voluntary disclosure of wrongdoing and [a] willingness to cooperate in the investigation of [the corporation’s] agents.”<sup>44</sup> Recent speeches by senior DOJ officials suggest that “true cooperation”—securing evidence of individual culpability—is the single most important factor in the DOJ’s decision on whether to bring criminal charges or offer a better deal.<sup>45</sup> DOJ Principal Deputy Assistant Attorney General Marshall L. Miller stressed the importance of demonstrating “extensive efforts to secure evidence of individual culpability” to prosecutors when seeking full cooperation credit.<sup>46</sup> Similarly, Assistant Attorney General Leslie Caldwell remarked in a recent speech that disclosing the corporation’s misconduct is insufficient. “True cooperation,” she explained, “requires identifying the individuals actually responsible for the misconduct—be they executives or others—and the provision of *all* available facts relating to that misconduct.”<sup>47</sup> Finally, in the Yates Memo, the DOJ made clear that it no longer simply suggests corporations name culpable individuals; it *requires* names if a company wants to be eligible for cooperation credit.<sup>48</sup>

The DOJ focuses on individual wrongdoing to identify the full scope of corporate misconduct.<sup>49</sup> Because “a corporation only acts through individuals,” the DOJ considers investigating individual conduct “the most efficient and effective way to determine the facts and the extent of any corporate misconduct.”<sup>50</sup> Uncovering culpable individuals is also likely to lead to others with knowledge of the misconduct, thereby providing the full picture of criminality at any level of the organization.<sup>51</sup> Maximizing the likelihood that the final

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<sup>44</sup> U.S. ATTORNEYS’ MANUAL § 9-28.300(A)(4) Factors to Be Considered (2008); *see also* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2010) (establishing cooperation as a mitigating factor).

<sup>45</sup> Grindler & Bennett, *supra* note 13, at 34–35.

<sup>46</sup> Marshall L. Miller, Principal Deputy Assistant Attorney Gen., Criminal Div., Remarks at the Global Investigation Review Program (Sept. 17, 2014) (transcript available at <http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller> [<https://perma.cc/Q9K3-PVBY>]).

<sup>47</sup> Leslie R. Caldwell, Assistant Attorney Gen. for the Criminal Div., Remarks at New York University Law School’s Program on Corporate Compliance and Enforcement (Apr. 17, 2015), <http://1.usa.gov/1UUMtGx> [<https://perma.cc/T9CQ-ERB7>] (emphasis added). For a large company like Shell with global operations, note that identifying all available facts is a massive undertaking. *See Shell Oil Co. v. Witt*, 464 S.W.3d 650, 656 (Tex. 2015).

<sup>48</sup> *See* Yates Memo, *supra* note 12, at 3.

<sup>49</sup> U.S. ATTORNEYS’ MANUAL § 9-28.010 Foundational Principles of Corporate Prosecution (2015).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

resolution includes individual charges and not just corporate charges also serves to promote public confidence in the justice system.<sup>52</sup>

With the DOJ's emphasis on individual culpability, corporations face a balancing act between massive and potentially crippling fines,<sup>53</sup> and cooperation with the DOJ that exposes the corporation to defamation actions brought by inculpatated employees.<sup>54</sup> The more a company proactively cooperates, the more likely it is that a court will find statements made before a judicial proceeding protected by qualified, as opposed to absolute, privilege. This dilemma was apparent as Shell seriously contemplated facing prosecution under the FCPA before furnishing its allegedly defamatory report to the DOJ.<sup>55</sup> The court reasoned that when Shell provided its report, it was under DOJ investigation and "acted with serious contemplation of the possibility that it might be prosecuted."<sup>56</sup> Thus, the court followed the Second Restatement of Torts § 588 to afford Shell absolute privilege "when the communication has some relation to a proceeding that is actually contemplated in good faith and under serious consideration by the witness or a possible party to the proceeding."<sup>57</sup>

The DOJ could argue that corporate prosecution is no different from the prosecution of organized crime, gangs, and other criminal organizations, in that naming other members is a prerequisite to cooperation credit. However, corporate prosecution is unique—if a corporation names an employee responsible for criminal conduct, respondeat superior exposes the corporation to immediate legal risk. Questions inevitably arise about the extent to which supervisors at the corporation approved the misconduct. By contrast, if a gang-member is prosecuted, a court will not necessarily tie that individual's conduct to the criminal organization without evidence of a conspiracy or RICO violations.<sup>58</sup>

## B. DOJ Corporate Coercion's Incentives to Defame

Corporations are also likely to feel coerced into naming culpable individuals because of a substantial negotiation power imbalance

<sup>52</sup> *Id.*

<sup>53</sup> *See, e.g.*, Press Release, *supra* note 12; Hoover, *supra* note 12.

<sup>54</sup> Ladd, *supra* note 14, at 948.

<sup>55</sup> *See* Shell Oil Co. v. Witt, 464 S.W.3d 650, 656 (Tex. 2015).

<sup>56</sup> *Id.* at 660.

<sup>57</sup> RESTATEMENT (SECOND) OF TORTS § 588 cmt. E (1977).

<sup>58</sup> Mafiosos and gang-members tend not to incorporate, exposing themselves to more collective prosecution than RICO would allow. *See* Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968.

between the DOJ and corporations under investigation.<sup>59</sup> Professor Richard Epstein likened pre-trial corporate negotiations with the DOJ to “the confessions of a Stalinist purge trial, as battered corporations recant their past sins and submit to punishments wildly in excess of any underlying offense.”<sup>60</sup> Hyperbolic? Yes, but this sentiment results from corporations’ need to devote vast resources to compliance seeking a favorable deferred or non-prosecution agreement.<sup>61</sup> Otherwise, the consequences of a corporate indictment could be lethal.<sup>62</sup>

Comparing Shell’s exposure in Witt’s defamation action to the probable fine decrease in its DPA, defaming an employee might have been the financially advisable strategy. Shell’s self-investigation cost over \$10 million, spanned eighteen months, involved both inside and outside counsel in addition to forensic consultants, and recommended disciplinary actions for staff members, including terminating Witt’s employment.<sup>63</sup> Ultimately, the DOJ filed an information charging Shell with FCPA violations, executed a DPA, and fined Shell \$30 million along with other sanctions.<sup>64</sup> Adding the costs of defending a defamation action in an absolute privilege jurisdiction until summary judgment, Shell’s potentially defamatory strategy likely cost the company no more than \$50 million.<sup>65</sup> By comparison, had Shell refused to cooperate and subjected itself to a later defamation action, Shell

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<sup>59</sup> See Matt Senko, *Prosecutorial Overreaching in Deferred Prosecution Agreements*, 19 S. CAL. INTERDISC. L.J. 163, 163–64 (2009) (“[B]ecause of the draconian consequences of indictment, which often include the downfall of an entire business, corporate entities have little practical choice when faced with either indictment or accepting a DPA. Hence, the government has enormous leverage in negotiating terms of DPAs, which has resulted in prosecutorial overreaching and deals which are unfair for corporate entities.”); see also Peter Reilly, *Negotiating Bribery: Toward Increased Transparency, Consistency, and Fairness in Pretrial Bargaining Under the Foreign Corrupt Practices Act*, 10 HASTINGS BUS. L.J. 347, 377–83 (2014).

<sup>60</sup> Richard A. Epstein, Op-Ed., *The Deferred Prosecution Racket*, WALL ST. J. (Nov. 28, 2006), <http://www.wsj.com/articles/SB116468395737834160> [<https://perma.cc/P9KD-XUCE>]; see also Weissman with Newman, *supra* note 11, at 426–27 & n.51 (“[A] corporation has little choice but to accede to the government’s demands. Indeed, it is now a commonplace position among the white-collar community post-Enron—amongst both defense and prosecution—that corporate defense consists largely of being an arm of the prosecutor.”).

<sup>61</sup> See Pamela H. Bucy, *Trends in Corporate Criminal Prosecutions*, 44 AM. CRIM. L. REV. 1287, 1288–89 (2007).

<sup>62</sup> See, e.g., Jonathan N. Rosen, *In-House Counsel and the Government’s War on Corporate Fraud*, CRIM. JUST at 5, 6 (Fall 2010) (“An indictment will effectively end an organization’s ability to seek government contracts; it will inevitably harm the company’s reputation among its customers; and invariably, it will curtail the company’s ability to do business until the matter is resolved.”); Weissman with Newman, *supra* note 11, at 425–27 (discussing public perception of corporate indictments following the failure of Arthur Anderson LLP post-Enron and its refusal to accept a DPA).

<sup>63</sup> *Shell Oil Co. v. Witt*, 464 S.W.3d 650, 656 (Tex. 2015).

<sup>64</sup> *Id.* at 652.

<sup>65</sup> This estimate assumes, for the purposes of analyzing future incentives, that the case would not proceed to the Texas Supreme Court and hike lawyers’ fees once there is clear precedent on the issue.

could have faced a fine comparable to that of past FCPA corporate prosecutions exceeding one hundred million dollars.<sup>66</sup>

This calculus demonstrates that a corporation will typically cooperate with the DOJ whether or not it defames its employees. With this in mind, a privilege rule should incentivize corporations to cooperate truthfully. In a qualified privilege regime, Shell's actions would expose them to an additional \$1.5 million in alleged damages for Witt's lost income, an unspecified amount for damages to reputation, and punitive damages.<sup>67</sup> While compensatory damages in this case might not seem to alter Shell's cost-benefit analysis, if a case proceeds to trial and actual malice is uncovered, a court or jury may at least levy sufficient punitive damages to deter corporations from adversely responding to DOJ pressure by defaming employees in the future.

Although scholars such as Epstein are troubled by the DOJ's coercion of corporations into settlement agreements, this practice of highly incentivizing cooperations allows the DOJ to effectively enforce laws far beyond their resource capacity. The DOJ effectively deputizes company counsel as “[a]gents of the [f]ederal [g]overnment”: the company conducts the investigation, elicits Fifth Amendment waivers from its employees, waives attorney-client and work-product privilege, terminates culpable employees, and reports back to the DOJ with their findings seeking a favorable settlement.<sup>68</sup> White collar defense attorney N. Richard Janis finds this dynamic not only troubling, but one that stems from prosecutorial laziness.<sup>69</sup> While there are certainly issues with the lack of judicial oversight in the deferred prosecution landscape,<sup>70</sup> the DOJ's tactics—far less lazy than resourceful—are better viewed as a response to the post-Enron-scandal reality that the federal government cannot root out white-collar crime on its own.

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<sup>66</sup> See, e.g., Gibson Dunn, *2014 Year-End FCPA Update* 3 (2015), <http://www.gibsondunn.com/publications/documents/2014-Year-End-FCPA-Update.pdf> [<https://perma.cc/N9PA-Q6Y8>] (calculating a \$156,610,000 average total value of monetary resolutions in 2014 corporate FCPA enforcement actions between the DOJ and SEC); Hoover, *supra* note 12, (“Had the company . . . cooperated with investigations, prosecutors would have sought as little as \$207 million, or 73 percent less.”).

<sup>67</sup> *Robert Witt v. Shell Oil Co.*, No. 2009-65221, 2010 WL 6556736 (Tex. Dist. Dec. 3, 2010).

<sup>68</sup> N. Richard Janis, *Deputizing Company Counsel as Agents of the Federal Government*, CATO INST. 11–12 (2008), [http://object.cato.org/sites/cato.org/files/pubs/pdf/janis\\_deputizing.pdf](http://object.cato.org/sites/cato.org/files/pubs/pdf/janis_deputizing.pdf) [<https://perma.cc/RJ8E-V2PM>]; see Rosen, *supra* note 62, at 6 (outlining the hazards of company counsel “increasingly deputized in law-enforcement activity”).

<sup>69</sup> Janis, *supra* note 68, at 11.

<sup>70</sup> See Rosen, *supra* note 62, at 7 (“[B]ecause a DPA is not usually enforced under court supervision, the prosecutor has virtually absolute discretion to decree whether a company did cooperate and, if the prosecutor thinks it did not, to prosecute the company at the end of the investigation anyway.”); see generally Reilly, *supra* note 59 (noting the disturbing lack of FCPA jurisprudence and guidance for corporations to effectively navigate the FCPA and prevent criminal conduct).

Corporations must believe that reporting misconduct is more prudent than burying it or misrepresenting self-disclosure to the DOJ.

By incentivizing corporations to adopt more responsible investigatory techniques and cooperate earlier in the process, the DOJ can improve enforcement and protect vulnerable employees. Thus, rather than taking steps that might inhibit the DOJ's ability to police corporations, the DOJ should welcome a default qualified privilege rule and promulgate guidance documents on responsible internal investigations to incentivize more truthful cooperation.

#### IV. THE DEPARTMENT OF JUSTICE IS NOT A QUASI-JUDICIAL BODY

No case law or scholarship up to this point has given full attention to the argument that the DOJ is not a quasi-judicial body. One student comment from 2014 argues the alternative:<sup>71</sup> that designating the DOJ a quasi-judicial body and affording absolute privilege to corporate statements made to the DOJ during a preliminary investigation would solve the “catch-22 of corporate cooperation.”<sup>72</sup> However, the DOJ is not quasi-judicial when considering the six quasi-judicial factors below. The DOJ also lacks the necessary safeguards to prevent abuse of defamatory privilege. Thus, any statements to DOJ prosecutors during a preliminary investigation should only enjoy qualified privilege from defamation actions.

##### A. Features of a Quasi-Judicial Body

Jurisdictions vary widely in their standard for quasi-judicial bodies.<sup>73</sup> In *Rainier's Dairies v. Raritan Valley Farms, Inc.*,<sup>74</sup> the New Jersey Supreme Court found a proceeding before the Director of the Milk Industry quasi-judicial because the director had the power to “fix prices . . . , promulgate rules and regulations, and investigate alleged

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<sup>71</sup> Ladd, *supra* note 14, at 975–77.

<sup>72</sup> *Id.* at 948 (“The Catch-22 of corporate cooperation arises when the cooperation that reduces criminal fines also prevents the corporation from invoking the affirmative defense of privilege against future claims of defamation.”).

<sup>73</sup> *Cf. Borg v. Boas*, 231 F.2d 788, 794 (9th Cir. 1956) (construing Idaho law to apply absolute immunity to “information given to a prosecutor by a private person for the purpose of initiating a prosecution”), and *McGranahan v. Dahar*, 408 A.2d 121, 128 (N.H. 1979), with *Bienvenu v. Angelle*, 223 So. 2d 140, 144 (La. 1969) (holding that defamatory statements published in the course of investigative work are not quasi-judicial in nature and are therefore afforded only a qualified privilege), and *Marsh v. Commercial & Sav. Bank*, 265 F. Supp. 614, 621 (W.D. Va. 1967) (holding that witnesses’ statements to police officers preliminary to a proposed judicial proceeding were qualified privileged).

<sup>74</sup> 117 A.2d 889, 894 (N.J. 1955).

violations thereof” through formal and informal hearings.<sup>75</sup> Several jurisdictions adopt a more coherent quasi-judicial test that considers the following factors:

- (1) the power to exercise judgment and discretion;
- (2) the power to hear and determine or to ascertain facts and decide;
- (3) the power to make binding orders and judgments;
- (4) the power to affect the personal or property rights of private persons;
- (5) the power to examine witnesses, to compel the attendance of witnesses, and to hear the litigation of issues on a hearing; and
- (6) the power to enforce decisions or impose penalties.<sup>76</sup>

A governmental body need not satisfy all six factors to be considered quasi-judicial.<sup>77</sup> Subject to minor differences in the quasi-judicial nature of DPAs and non-prosecution agreements (NPAs),<sup>78</sup> the DOJ fails to satisfy any of the six factors identified above.

#### 1. The DOJ's discretion is administrative, not quasi-judicial.

Proponents of the DOJ's quasi-judicial status argue that the DOJ exercises discretion in deciding whether to file charges.<sup>79</sup> However, to determine whether this discretion is quasi-judicial, one must analyze the type of discretion involved. All governmental bodies, many of them hardly quasi-judicial, exercise discretion in one form or another, but judicial discretion is distinct. Professor Sir William Wade explained this distinction between “judicial discretions,” which “conform to a norm, however indefinable, and which are accordingly liable to review

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<sup>75</sup> *Id.* at 892.

<sup>76</sup> *See, e.g.,* *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 994–95 (5th Cir. 1999) (holding that the National Transportation Safety Board is quasi-judicial); *Kocontes v. McQuaid*, 778 N.W.2d 410, 420 (Neb. 2010) (holding that the Nebraska Board of Pardons is quasi-judicial); *Craig v. Stafford Const., Inc.*, 856 A.2d 372, 381 (Conn. 2004) (holding that the internal affairs division of the Hartford police department is quasi-judicial).

<sup>77</sup> *See Shanks*, 169 F.3d at 994.

<sup>78</sup> *See* Allen R. Brooks, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL'Y 137, 149–54 (2010) (summarizing the modern use and functionality of DPAs and NPAs: “The prosecutor will file formal charges with a court before entering into a DPA with a defendant. With NPAs, defendants may escape formal charges, subject to the corporation's adequate performance under the terms of its NPA.”).

<sup>79</sup> *See* Ladd, *supra* note 14, at 976.

on appeal,” and “administrative powers,” where the discretion is one of policy, incapable of being invalidated as a matter of law by a higher authority.<sup>80</sup>

When the DOJ reaches a DPA with a corporation as it did in *Shell*, it does not exercise judicial discretion supporting quasi-judicial status. Instead, the DOJ exercises an administrative power. Rather than prosecuting the case and leaving the liability question to judicial discretion, the DOJ concludes that the value of cooperation, the corporation’s future financial viability, and institutional compliance brought about by a DPA outweigh the corporation’s violation of the law.<sup>81</sup> In deciding whether to file charges, the DOJ exercises this administrative discretion by weighing various public interest factors outlined in the U.S. Attorneys’ Manual, “Principles of Federal Prosecution of Business Organizations.”<sup>82</sup> Conversely, in interpreting the law once the DOJ files charges, the court exercises a judicial discretion reviewable on appeal.

Although DPAs are subject to court approval, such exercises of the DOJ’s administrative discretion are rarely challenged. The court must approve all DPAs to comply with the Speedy Trial Act.<sup>83</sup> The court could theoretically scrutinize these agreements to ensure a factual basis for the crime or rule out valid defenses relevant to the alleged conduct.<sup>84</sup> Yet, nearly every DPA negotiated with a U.S. corporation has been rubber stamped by the court without judicial modification.<sup>85</sup> The few judges that have conducted hearings before approving a corporate DPA have struggled to assert a consistent or effective oversight role.<sup>86</sup> Practitioners question whether it is even the court’s role under the Speedy Trial Act’s approval provision to determine

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<sup>80</sup> H.W.R. Wade, “Quasi-Judicial” and Its Background, 10 CAMBRIDGE L.J. 216, 224 (1949).

<sup>81</sup> The Principles of Federal Prosecution of Business Organizations authorize DOJ prosecutors, “under appropriate circumstances,” to use NPAs and DPAs to “help restore the integrity of a company’s operations and preserve the financial viability of a corporation that has engaged in criminal conduct” while still “preserving the government’s ability to prosecute a recalcitrant corporation that materially breaches the agreement.” U.S. ATTORNEYS’ MANUAL § 9-28.100(B) Collateral Consequences (2008).

<sup>82</sup> *Id.* at § 9-28.000 (“In exercising [prosecutorial] discretion, prosecutors should consider the following statements of principles that summarize the considerations they should weigh and the practices they should follow in discharging their prosecutorial responsibilities.”).

<sup>83</sup> See 18 U.S.C. § 3161(h)(2) (2000).

<sup>84</sup> Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 936 (2010).

<sup>85</sup> Reilly, *supra* note 59, at 393; see also Koehler, *supra* note 84, at 936; Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 14 (2007-2008) (“Deferred and non-prosecution agreements often occur without judicial oversight or participation. . . . Even in the rare case that has court participation, it is usually a mere formality of the document being filed in the court.”).

<sup>86</sup> See Douglas Gillison, *HSBC Judge, Reluctant to Bless Settlement, Explores Court’s Role*, GLOBAL INVESTIGATIONS REV. (Mar. 29, 2013), <http://globalinvestigationsreview.com/article/1021997/hsbc-judge-reluctant-bless-settlement-explores-courts-role> [<https://perma.cc/NU3U-46L2>].

whether a DPA is in the public interest.<sup>87</sup> Thus, in practice, this policy discretion is vested in the DOJ; unlike judicial discretion, it does not conform to any sort of legally reviewable norm. NPAs are an even stronger example of the DOJ's administrative power because they are not filed with the court and are therefore shielded from judicial approval or scrutiny.<sup>88</sup>

Beyond negotiation of DPAs and NPAs, the DOJ's decision whether to file charges is also an exercise of administrative power. When the DOJ declines to file charges altogether, courts consistently reject Administrative Procedure Act challenges to these decisions as judicially unreviewable.<sup>89</sup> In DOJ-prosecuted cases, proponents of the DOJ's quasi-judicial status can argue that the decision to file charges is quasi-judicial because it is effectively reviewed on appeal when the court or jury hears the case. However, the court or jury's role in such cases is to determine guilt, not to review the DOJ's decision to seek an indictment. Thus, even the DOJ's decision whether to file charges is administrative under Professor Wade's framework.

## 2. The DOJ lacks power to hear facts and issues in litigation.

The power to "hear" facts and issues in litigation, considered in the second and fifth factors,<sup>90</sup> suggests some sort of adversarial proceeding beyond the DOJ's mere prosecutorial decisions to interview witnesses, collect evidence, and bring charges. This power to hear facts and issues invokes an important safeguard of quasi-judicial proceedings that justifies affording greater privilege: due process.<sup>91</sup> While the level of due process required is less for quasi-judicial hearings,<sup>92</sup> in general, due process requires that parties have an opportunity to be heard, with notice of the hearing, before an impartial body; parties should also be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the body acts.<sup>93</sup> When Shell released its report to the DOJ, Witt had no venue or hearing to challenge the potentially defamatory statements. He could not cross-examine witnesses' statements in the report. Nor could he challenge the hearsay upon hearsay built into the proffer to the DOJ that likely preceded Shell's

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<sup>87</sup> *Id.*

<sup>88</sup> Koehler, *supra* note 84, at 935.

<sup>89</sup> Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 977 (2009).

<sup>90</sup> *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 994 (5th Cir. 1999).

<sup>91</sup> *Jennings v. Dade Cty.*, 589 So. 2d 1337, 1340 (Fla. Dist. Ct. App. 1991).

<sup>92</sup> *Id.* (citing *Goss v. Lopez*, 419 U.S. 565 (1975); *Hadley v. Dep't of Admin.*, 411 So. 2d 184 (Fla. 1982)).

<sup>93</sup> Henry J. Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267, 1279-83 (1975).



DPA.<sup>94</sup> Moreover, unlike settlement negotiations that resulted in Shell's DPA,<sup>95</sup> during a plea bargain hearing the court asks whether the corporation understands the rights being waived and ensures that there is a voluntary, intelligent, and knowing approval of the agreement.<sup>96</sup>

Discussing the elements of a fair hearing, Judge Friendly recognized that "the further the tribunal is removed from the agency and thus from any suspicion of bias, the less may be the need for other procedural safeguards."<sup>97</sup> The DOJ, however, cannot possibly conduct a hearing as a tribunal when acting through its prosecutorial function. Were the DOJ acting through one of its internal quasi-judicial agencies,<sup>98</sup> it would be equally limited under the Administrative Procedure Act from simultaneously fulfilling a prosecutorial and judicial role.<sup>99</sup>

### 3. The DOJ has only limited power to make binding judgments.

The DOJ can only bind judgments in the context of an NPA.<sup>100</sup> If the DOJ negotiates a DPA with a corporation, the DOJ can have no binding effect on the courts, which ultimately approve or reject the final agreement.<sup>101</sup> As discussed above,<sup>102</sup> the DOJ exercises all of the policy discretion in crafting DPAs, but lacks the judicial power to bind parties to the agreements because they require court approval.<sup>103</sup> The DOJ divisions responsible for bringing corporate criminal charges, including

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<sup>94</sup> See Kenneth C. Pickering, *The Risks and Benefits of Proffer Agreements in Parallel Proceedings*, AMERICAN BAR ASSOCIATION (Apr. 4, 2012), <http://apps.americanbar.org/litigation/committees/criminal/email/winter2012/winter2012-0402-risks-benefits-proffer-agreements-parallel-proceedings.html> [<https://perma.cc/52FK-HKKC>] ("A proffer is almost always required for government investigators to evaluate whether to recommend entering into a cooperation agreement, or a deferred or non-prosecution agreement."); *United States v. Thevis*, 84 F.R.D. 57, 67 & n.10 (N.D. Ga. 1979), *superseded by statute*, FED.R.EVID. 804(b)(6), *as recognized in United States v. Zlatogur*, 271 F.3d 1025 (11th Cir. 2001) ("In effect, this proffered statement presents a double hearsay problem under Rule 806, since the actual proffer is hearsay under Rule 804(b)(5) containing more traditional hearsay within it.").

<sup>95</sup> See *Shell Oil Co. v. Witt*, 464 S.W.3d 650, 652 (Tex. 2015).

<sup>96</sup> Zierdt & Podgor, *supra* note 85, at 14–15.

<sup>97</sup> Friendly, *supra* note 93, at 1279.

<sup>98</sup> See *infra* Part IV.A.3.

<sup>99</sup> 5 U.S.C. § 554(d)(2).

<sup>100</sup> See Ralph F. Hall, *Deferred Prosecution and Non-Prosecution Agreements*, in PUNISHING CORPORATE CRIME: LEGAL PENALTIES FOR CRIMINAL AND REGULATORY VIOLATIONS 119, 124 (James T. O'Reilly et al. eds., 2009) (describing an NPA as a formal agreement between the government and the corporation releasing the corporation from liability).

<sup>101</sup> Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 922 (2007) ("[C]ourts must review deferred prosecution agreements and approve any deferral."); see, e.g., *United States v. Alcatel-Lucent France, SA*, 688 F.3d 1301, 1304 (11th Cir. 2012).

<sup>102</sup> See discussion, *supra* Part IV.A.1

<sup>103</sup> See 18 U.S.C. § 3161(h)(2).

the U.S. Attorneys' offices,<sup>104</sup> are merely prosecutorial agencies dependent on the judiciary to produce binding judgments. By contrast, each of the agencies within the DOJ considered by courts to fulfill quasi-judicial functions are all formal tribunals with far less restraint from courts, save appellate review, such as the Executive Office of Immigration Review,<sup>105</sup> the U.S. Board of Immigration Appeals,<sup>106</sup> the Foreign Claims Settlement Commission,<sup>107</sup> and the Appeals Council of the Department of Health, Education and Welfare,<sup>108</sup> among others.

The *Shell* court claimed to follow *Clemens v. McNamee*<sup>109</sup> when finding the DOJ's preliminary investigation sufficiently quasi-judicial to warrant absolute privilege;<sup>110</sup> however, the court in *Clemens* noted that, in order to receive absolute privilege, statements must be made to "an agency whose findings need not be approved or ratified by another agency."<sup>111</sup> The court had to approve the DOJ's findings in *Shell*, disclosed in a DPA.<sup>112</sup> Nonetheless, the court erroneously granted absolute privilege to *Shell*'s statements.

#### 4. The DOJ fails the remaining three quasi-judicial factors.

The fourth factor, "power to affect the personal or property rights of private persons,"<sup>113</sup> also depends on whether the DOJ executes a DPA or NPA with the corporation. The DPA court approval requirement inhibits the DOJ's ability to affect personal or property rights in a quasi-judicial manner; a corporation's fine amount, which affects its property rights, is included in the DPA and therefore subject to court approval.<sup>114</sup> An NPA, by contrast, can require a corporation to pay a fine without court approval.<sup>115</sup> Recently, the DOJ has exercised

<sup>104</sup> The DOJ and its respective United States Attorneys' offices are responsible for investigating violations of federal law and litigating cases where the government is an interested party. 28 U.S.C. § 516.

<sup>105</sup> See David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After Chevron*, 59 ADMIN. L. REV. 479, 485 n.27 (2007).

<sup>106</sup> See Edward L. Carter & Brad Clark, "Membership in A Particular Social Group": *International Journalists and U.S. Asylum Law*, 12 COMM. L. & POL'Y 279 (2007).

<sup>107</sup> See Megan E. Haas, *Tierra Sin Dueños: The Effect of Cuba's Foreign Investment Scheme on United States' Certified Property Claims*, 15 TEX. HISP. J. L. & POL'Y 93, 105 & n.96 (2009).

<sup>108</sup> See David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 14 (1975).

<sup>109</sup> 608 F. Supp. 2d 811, 824 (S.D. Tex. 2009).

<sup>110</sup> See *Shell Oil Co. v. Witt*, 464 S.W.3d 650, 658 (Tex. 2015).

<sup>111</sup> *Clemens*, 608 F. Supp. 2d at 823–24 (citing *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 994 (5th Cir.1999)).

<sup>112</sup> *Shell*, 464 S.W.3d at 652.

<sup>113</sup> *Shanks*, 169 F.3d at 994.

<sup>114</sup> See 18 U.S.C. § 3161(h)(2) (2000).

<sup>115</sup> See Brooks, *supra* note 78, at 154 (describing common elements of DPAs and NPAs:

more NPAs than DPAs,<sup>116</sup> suggesting a stronger power to affect property rights. Nonetheless, this is likely insufficient to outweigh the DOJ's failing of the other quasi-judicial factors.

The DOJ fails the witness elements of the fifth factor as well. The DOJ has the power to examine witnesses, both before and during a judicial proceeding, but cannot compel their attendance. At the grand jury and trial stage, the DOJ can obtain a subpoena from the court to compel a witness,<sup>117</sup> demonstrating that the DOJ cannot act alone. Although Shell was “practically speaking, compelled to undertake its internal investigation and report its findings to the DOJ,”<sup>118</sup> in reality, Shell ultimately disclosed its report voluntarily. It was in Shell's best interest to cooperate, but Shell could have refused to meet with DOJ prosecutors, discuss facts of the case, or provide evidence of employee misconduct prior to the DOJ's FCPA charges.

Lastly, as even proponents of the DOJ's quasi-judicial status concede, the sixth factor—power to enforce decisions and impose penalties—is a judicial function reserved to the courts, not to the prosecutors that advocate before the courts.<sup>119</sup>

Therefore, the DOJ fails to satisfy any of the six quasi-judicial factors in the DPA context. Even as two factors may favor the DOJ's quasi-judicial status in NPA negotiations, the majority weigh against quasi-judicial status.

## B. Vital Safeguards in Quasi-Judicial Proceedings

In addition to meeting the aforementioned minimum requirements of due process, quasi-judicial proceedings confer absolute privilege because they possess additional safeguards to prevent abuse.<sup>120</sup> A witness communicating under oath, and therefore subject to perjury charges, is far less likely to deliberately or maliciously defame someone

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“Monetary consequences in the form of a fine, restitution, and/or forfeiture of financial gains resulting from the alleged misconduct often accompany DPAs and NPAs.”)

<sup>116</sup> Gibson Dunn, *2015 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)* 1 (2016), <http://www.gibsondunn.com/publications/documents/2015-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.pdf> [<https://perma.cc/LJ7W-3DAB>] (“In 2015, DOJ and the SEC cumulatively entered into an eye-popping 100 corporate NPAs and DPAs, of which 87 were NPAs and 13 were DPAs. Of these, DOJ entered into all but one.”).

<sup>117</sup> FED. R. CRIM. P. 17.

<sup>118</sup> *Shell*, 464 S.W.3d at 658.

<sup>119</sup> Ladd, *supra* note 14, at 976.

<sup>120</sup> *See, e.g., Siskind v. Friedberg*, No. SAG-10-CV-1011, 2012 WL 1243085, at \*3 (D. Md. Apr. 10, 2012) (holding that because the defamatory statements were not made under oath, absolute privilege is inappropriate); *Cooksey v. Stewart*, 938 So. 2d 1206, 1210 (La. Ct. App. 2006) (“[C]ommunications made in judicial or quasi-judicial proceedings carry an absolute privilege . . . offered in such proceedings so that the witness, who is bound by his oath to tell the truth, may speak freely without fear of civil suit for damages for defamation.”) (citation omitted).

than an unfettered witness. Consequently, in response to arguments over potential abuse of absolute privilege, the *Shell* court responded that abuse is “limited because the speaker will generally still be subject to the risk of criminal prosecution for perjury or obstruction of justice.”<sup>121</sup>

However, the preliminary DOJ investigation in *Shell* lacked sufficient safeguards to prevent abuse. The court did not specify whether *Shell* disclosed the report under oath; given that *Shell* communicated voluntarily with the DOJ prior to the filing of information, perjury would likely be inapplicable to statements later deemed deliberately false pertaining to Writt’s performance.

Moreover, prosecuting an obstruction of justice charge is both challenging and an unlikely safeguard. The prosecutor must prove the statement’s falsity,<sup>122</sup> a task that even the DOJ concedes is best reserved for the corporation,<sup>123</sup> and prove that the defendant acted with intent.<sup>124</sup> The DOJ might not even have an interest in pursuing an obstruction of justice charge because in this context, prosecution essentially devotes taxpayer dollars to bringing a criminal case in place of the defamation victim’s civil suit. The DOJ may try to use an obstruction of justice charge as a strategic maneuver to compel cooperation,<sup>125</sup> but again this is unlikely if the DOJ is unable to prove the statement’s falsity or the defendant’s intent. This safeguard’s deterrent effect also depends largely on the DOJ communicating the threat of prosecution for obstruction before soliciting testimony. Otherwise, corporations are equally likely to defame employees without fear that the DOJ will hold them accountable for false statements.

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<sup>121</sup> *Shell*, 464 S.W. 3d at 655; see Pickering, *supra* note 94 (“If the government views your client as not having met this standard [of forthrightness], your client may join the long list of would-be cooperators who instead faced prosecution for obstruction of justice under 18 U.S.C., § 1001.”).

<sup>122</sup> 18 U.S.C. § 1505 (2004) (prohibiting “[o]bstruction of proceedings before departments, agencies, and committees”: “Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so. . . . Shall be fined . . . imprisoned not more than 5 years or . . . both.”).

<sup>123</sup> See U.S. ATTORNEYS’ MANUAL § 9-28.700(B) The Value of Cooperation (2008) (“In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. . . . Accordingly, a corporation’s cooperation may be critical in identifying potentially relevant actors and locating relevant evidence.”).

<sup>124</sup> 18 U.S.C. § 1505.

<sup>125</sup> Emil J. Bove III, *Institutional Factors Bearing on Criminal Charging Decisions in Complex Regulatory Environments*, 45 AM. CRIM. L. REV. 1347, 1367 (2008).

In relying on the absolute privilege holding in *Clemens*, the *Shell* court disregarded the significance of safeguards to the court's holding. The *Clemens* court afforded the defendant absolute privilege from defamation after several government agents conducting an investigation told the defendant that they would reconsider his status as a witness, instead of a prosecution target, if he failed to cooperate.<sup>126</sup> Similarly, the DOJ targeted Shell in its investigation, and had Shell not cooperated fully, the court found it likely that Shell would have faced a substantially greater punishment.<sup>127</sup> However, the *Clemens* court noted the presence of safeguards absent in the facts of *Shell*: the lead prosecutor warned the defendant that if he lied, he could be subject to federal prosecution.<sup>128</sup> The *Shell* court made no indication that the DOJ had warned Shell of possible repercussions to falsely incriminating an employee.<sup>129</sup> Practitioners may argue that the potential repercussions of lying to a federal prosecutor are apparent, and attorneys' credibility perhaps is staked on effective investigations and honest advocacy. However, this threat of obstruction or losing cooperation credit is not necessarily high enough in each situation to effectively deter misconduct, especially when the payoff for naming names is so high.<sup>130</sup> Nor is it necessarily true that an attorney advocating before a prosecutor is a repeat player concerned with reputational integrity. Thus, the DOJ's lack of safeguards against abuse of defamatory privilege further demonstrates that the DOJ is not a quasi-judicial body.

#### V. A BRIGHT-LINE QUALIFIED PRIVILEGE RULE FOR DOJ INVESTIGATIONS

Applying qualified privilege from defamation to all statements made to the DOJ before a formal judicial proceeding would help corporations navigate compliance; eliminate a perverse timing paradox that rewards delayed cooperation; and most importantly, protect victims of malicious defamation who are without legal recourse under the *Shell* absolute privilege rule.

##### A. Simplifying Corporate Compliance

Applying qualified privilege from defamation to all statements made to the DOJ before a formal judicial proceeding would help

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<sup>126</sup> *Clemens v. McNamee*, 608 F. Supp. 2d 811, 824 (S.D. Tex. 2009).

<sup>127</sup> *Shell Oil Co. v. Writt*, 464 S.W. 3d 650, 659 (Tex. 2015).

<sup>128</sup> *Clemens*, 608 F. Supp. 2d at 824.

<sup>129</sup> See generally *Shell*, 464 S.W.3d 650.

<sup>130</sup> See discussion, *supra* Part III.B.

corporations simplify cooperation with the DOJ. Corporate compliance officers must sift through a patchwork of laws from different states, courts, and regulators.<sup>131</sup> With growing regulations and DOJ prioritization of effective compliance programs,<sup>132</sup> corporate compliance costs have ballooned.<sup>133</sup> Thus, a bright-line privilege rule is particularly attractive for cases like *Shell* where corporations must defend against federal law violations and disparate state laws governing defamation. A qualified privilege rule would put corporations on notice that maliciously defamatory statements provided to the DOJ would be subject to liability, reconciling potentially contradictory state laws. This benefit to administrability is present regardless of whether the rule is absolute or qualified privilege, but it is important nonetheless to note the advantages of a bright-line rule.

Federalism, Justice Brandeis' famous celebration of states as laboratories of democracy,<sup>134</sup> may be invoked to argue for state variation in defamation law. However, this state split on defamatory privilege is not one of careful statutory interpretation or purposeful tailoring of law to the needs of different states. State courts, confronting the same facts and common law governing whether a preliminary investigation is sufficiently "quasi-judicial," weighed the policy ramifications on both sides, and reached contradictory conclusions.<sup>135</sup> Thus, from the employee perspective, a corporation's headquarters location arbitrarily determines her ability to sue for defamation.

Proponents of an absolute privilege rule can argue that the benefit to administrability is outweighed by the higher litigation costs for corporations forced to fend off a defamation action on top of potential DOJ prosecution.<sup>136</sup> Without the benefit of absolute privilege, it will be more difficult for corporations to successfully dismiss claims that allege malice. However, this is a false dichotomy that can be addressed through more responsible internal investigations. In reports to the DOJ, counsel should avoid drawing conclusions when possible and instead merely lay out the facts gathered through internal

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<sup>131</sup> Miriam H. Baer, *Corporate Policing and Corporate Governance: What Can We Learn from Hewlett-Packard's Pretexting Scandal?*, 77 U. CIN. L. REV. 523, 564 n.198 (2008).

<sup>132</sup> Corporate Legal Compliance Handbook § 1.04 (2013), 2013 WL 6846847 (concluding that "[t]he combination of the Caremark decision, the Sarbanes-Oxley Act, and the revised Sentencing Guidelines now make it more than just a good idea for a corporate board to ensure that its company has an effective compliance program").

<sup>133</sup> See Maurice E. Stucke, *In Search of Effective Ethics & Compliance Programs*, 39 J. CORP. L. 769, 770 n.3 (2014).

<sup>134</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>135</sup> See *supra* Part I.

<sup>136</sup> See Devin M. Ehrlich, Aurora Cassirer, & Scott B. Feldman, *Truth and Consequences? How to Avoid Employee Claims of Defamation*, 24 No. 8 ACC Docket 36, 38 (2006).

investigation.<sup>137</sup> Alternatively, when in doubt, corporations should provide both innocent and culpable explanations of an employee's conduct.

Moreover, the DOJ should promulgate guidance documents for conducting effective *and* responsible investigations. Such direction would acknowledge the collateral litigation risks to corporations seeking cooperation credit and help streamline best practices. For example, corporations can adopt numerous strategies to avoid potential defamation claims when investigating employee misconduct:

- (1) Limit disclosure of the complaint and underlying circumstances to those who have a "need to know."
- (2) When conducting a witness interview, explain that the purpose of the investigation is to investigate allegations: No determination made, no conclusions reached.
- (3) Limit the persons with knowledge of the interview, including when the interview was conducted, who conducted it, and what was said. Not each and every supervisor or managerial employee needs to know about the investigation and interview.
- (4) Remind witnesses and interviewers to maintain confidentiality.
- (5) Make sure that those conducting the interviews or otherwise involved in the investigation refrain from pejorative descriptions of the complaining employee, anyone accused by the complaining employee, and underlying circumstances.
- (6) Employers may want to create a standard form for the documenting of witness interviews in order to ensure uniformity with respect to the information obtained.<sup>138</sup>

Following these guidelines cannot prevent the occasional disgruntled employee from retaliating with a frivolous defamation action. Nonetheless, the lower probability of liability promoted by judicious cooperation should significantly lower a litigious employee's incentive to sue and potential payout. Even when plaintiffs bring meritless defamation actions under a qualified privilege regime, they

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<sup>137</sup> Benedict P. Kuehne, *Protecting the Privilege in the Corporate Setting: Conducting and Defending Internal Corporate Investigations*, 9 ST. THOMAS L. REV. 651, 682 (1997).

<sup>138</sup> Ehrlich, *supra* note 136, at 45.

still have to meet the high burden of proving the company's malice in order to overcome the privilege.

The costs of implementing a qualified privilege rule are also mitigated because corporations conducting less thorough investigations may be the most likely proponents of an absolute privilege rule. Many of the practices above are already part and parcel of responsible internal investigations, aimed at protecting work-product and attorney-client privileges.<sup>139</sup> By maintaining these privileges, effective internal investigations limit the scope of potential defamatory material accessed by the government and other actors. This suggests that the costs associated with defending defamation suits in an absolute privilege regime may fall disproportionately on irresponsible or careless corporations that conduct sloppy investigations. In addition to effective investigative practices, if a corporation is still concerned about defending a meritless defamation action from a disgruntled former employee, it can agree to a more favorable severance package that releases the corporation of any liability and prevents disclosure of details regarding the corporation's conduct.

## B. Eliminating the Timing Paradox

Another benefit to a uniform qualified privilege rule is eliminating the perverse timing paradox that disincentivizes self-reporting.<sup>140</sup> The paradox occurs when "a proactive company that brings the violation to the DOJ's attention only receives a qualified privilege, while a company that waits to be discovered by the DOJ and delays cooperation receives an absolute privilege for the same communication."<sup>141</sup> For example, the *Shell* court concluded that Shell seriously considered possible criminal proceedings because the DOJ had already initiated an investigation that led Shell to conduct its own extensive internal investigation.<sup>142</sup> "[W]hen the DOJ's leverage over Shell vis-à-vis the FCPA and its somewhat draconian potential penalties are considered, it is manifest that Shell was, practically speaking, compelled to undertake its internal investigation and report its findings to the DOJ."<sup>143</sup> This supposed compulsion would not have existed had the DOJ not solicited Shell to cooperate, and without the solicitation, the statements would only be protected by qualified privilege.<sup>144</sup> The incentive to hold out on

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<sup>139</sup> See American College of Trial Lawyers, *Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, 46 AM. CRIM. L. REV. 73, 93–99 (2009).

<sup>140</sup> See Ladd, *supra* note 14, at 977–78.

<sup>141</sup> *Id.* at 978.

<sup>142</sup> *Shell Oil Co. v. Witt*, 464 S.W.3d 650, 656 (Tex. 2015).

<sup>143</sup> *Id.* at 658.

<sup>144</sup> See also *5-State Helicopters, Inc. v. Cox*, 146 S.W.3d 254, 257 (Tex. Ct. App. 2004)



self-reporting in hopes of absolute privilege from defamation undermines the Federal Sentencing Guidelines, which prefer that companies voluntarily disclose violations rather than wait for them to be discovered.<sup>145</sup>

Applying qualified privilege from defamation to all statements made during a DOJ investigation would eliminate the timing problem. With uniform defamatory privilege, some might argue that cooperation with the DOJ could be chilled without this greater protection. Yet, criminal prosecution presents massive financial exposure for corporations, with rewards for cooperation far greater for those that self-report.<sup>146</sup> It is unlikely that a corporation would ever hold off on cooperation for fear of defending against a defamation action, frivolous or not. Even without absolute privilege for preliminary investigations, corporations' best strategy would remain early, truthful, and cautious cooperation.

### C. Protecting Victims of Malicious Defamation

A qualified privilege rule also offers essential protections for corporate employees. The more emphasis the DOJ places on naming names, the stronger the corporate temptation is to scapegoat employees.<sup>147</sup> The Texas Court of Appeals in *Shell* noted that extending absolute privilege to such circumstances “would have the very dangerous effect of actually discouraging parties from being truthful with law-enforcement agencies and instead encourage them to deflect blame to others without fear of consequence.”<sup>148</sup> Recent DOJ priorities and activism undoubtedly incentivize cooperation,<sup>149</sup> but courts that

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(asserting that privilege only attaches to proposed and existing judicial and quasi-judicial proceedings).

<sup>145</sup> U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2010).

<sup>146</sup> “Federal prosecutors and the U.S. Sentencing Guidelines ‘place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matter.’” *Shell*, 464 S.W.3d at 659 (citing U.S. Dep’t of Justice & U.S. Securities and Exchange Comm’n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, 54 (2012), <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf> [<https://perma.cc/469M-BBWW>]); see also Hoover, *supra* note 12.

<sup>147</sup> William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643, 657–62 (2002) (noting the unfairness of DOJ’s tradeoff of organizational cooperation for lesser sanctions because it creates incentives for upper management to scapegoat subordinates).

<sup>148</sup> *Writt v. Shell Oil Co.*, 409 S.W.3d 59, 61 (Tex. Ct. App. 2013), *rev’d*, 464 S.W.3d 650 (Tex. 2015).

<sup>149</sup> See Press Release, *U.S. Dep’t of Justice, Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges* (Dec. 22, 2014), <http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery> [<https://perma.cc/3CPM-4S56>] (discussing that in connection with its settlement of FCPA and related charges, Alstom assisted in the prosecution of its own employees).

apply absolute privilege understate the potentially harmful effects this strategic cooperation has on employees. The Florida Supreme Court noted, “[t]he countervailing harm caused by the malicious destruction of another’s reputation by false accusation can have irreparable consequences. We believe the law should provide a remedy in situations such as this.”<sup>150</sup>

What if Shell actually acted with malice towards its former employee Writt? The company spent millions on an investigation with both inside and outside counsel, suggesting a genuine interest in discovering the truth. Similarly, most corporations strive to effectively cooperate with the DOJ and uncover misconduct within the company. However, given the financial incentives companies like Shell receive to name culpable employees, a qualified privilege rule protects against the inevitable bad corporate actor. It is difficult to know with certainty whether the facts relayed in Shell’s report were any more than an effort to scapegoat an innocent employee. As a result of Shell’s absolute privilege, the company left Writt unemployed and without a legal remedy.<sup>151</sup> Herein lies the difficulty in assessing the need for qualified privilege: the actors best positioned to assess whether a statement is deliberately false or malicious are parties to the defamation litigation, and so it is nearly impossible to perfect the balance between frivolous claims and genuine victims harmed by absolute privilege. Nonetheless, courts are best suited to resolve questions of subjective intent, rather than barring defamation actions against cooperating corporations altogether.

Although corporations will typically prefer a rule that grants them greater privileges, it is important to recognize that no individual employee is immune from malicious defamation. A Shell executive likely oversaw the company’s FCPA investigation and Shell eventually implicated Writt, a mid-level employee approving contracts abroad. Instead, what if Shell wanted an excuse to fire an executive? The corporate interest may favor absolute privilege, but employees at any level of the company can be victims of defamation.

The Connecticut Supreme Court articulated the countervailing policy for absolute privilege weighing against individual rights:

[I]n certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. . . . Participants in a judicial process must be able to

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<sup>150</sup> *Fridovich v. Fridovich*, 598 So. 2d 65, 69 (Fla. 1992).

<sup>151</sup> *Shell*, 464 S.W.3d at 651.

testify or otherwise take part without being hampered by fear of defamation suits.<sup>152</sup>

Yet, a more accurate characterization of absolute privilege's impact than not "being hampered by fear" is one of accountability. The administration of corporate prosecution should not automatically take precedence over individual rights. Especially when incentives are aligned to name names, qualified privilege presents a counterbalancing weight ensuring the integrity of corporate cooperation with the DOJ.

## VI. CONCLUSION

All statements made before a formal judicial proceeding should enjoy only qualified privilege from defamation actions. States are far from uniform in their determination of what constitutes a judicial proceeding. This elicits arbitrary treatment of defamatory privilege across states, a problem of growing significance given the DOJ's requirement that corporations inculcate responsible employees. The DOJ, however, is not a quasi-judicial body, as it is subject to various restraints by the courts and possesses few of the due process and vital safeguards necessary to preserve individual rights. Therefore, courts should afford only qualified privilege to statements made to the DOJ before prosecution.

A qualified privilege rule for preliminary DOJ investigations would help corporations facing federal criminal investigations by standardizing state defamation law and simplifying the compliance landscape. In turn, corporations would be further incentivized to self-report misconduct earlier instead of holding out for absolute privilege once targeted by the DOJ. Most importantly, a qualified privilege rule would ensure that law enforcement's efforts to promote cooperation do not ignore victims of malicious defamation by robbing them of a legal remedy.

The Yates Memo recognized that making changes to the corporate prosecution guidelines, like the requirement that corporations name culpable individuals to receive cooperation credit, may present some challenges.<sup>153</sup> The DOJ nevertheless believed the changes will "maximize [its] ability to deter misconduct and to hold those who engage in it accountable."<sup>154</sup> However, DOJ efforts to deter this corporate misconduct disregard a different kind of misconduct—defamation—invited by an absolute privilege rule. In policing

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<sup>152</sup> Hopkins v. O'Connor, 925 A.2d 1030, 1042 (Conn. 2007) (citations omitted).

<sup>153</sup> See Yates Memo, *supra* note 12, at 7.

<sup>154</sup> *Id.*

corporations and prioritizing cooperation, the DOJ's enforcement tactics can leave Writt and other similarly situated employees jobless and stigmatized at the steps of the courthouse—doors shut. Thus, courts should protect corporate statements to the DOJ before a judicial proceeding with qualified privilege and ensure the proper balance between open communication and individual rights.

