



Justice Department's enforcement policies make change for the worse

BY RENA STEINZOR, OPINION CONTRIBUTOR — 02/21/18 12:30 PM EST
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Attorney General Jeff Sessions has wasted little time portraying himself as the prosecutor-in-chief of street — as opposed to white collar — crime, [rejecting](#) this month even a broadly bipartisan effort to reduce sentences for nonviolent crime supported by a coalition that spans the Koch brothers and the NAACP.

Civil enforcement has also fallen off, as documented in [investigative reporting](#) by The New York Times and others. Both trends will almost certainly continue given the more subtle sabotage of corporate enforcement implemented in a series of largely overlooked policy changes announced by memoranda and speech.

The campaign began last June, when Sessions wrote a [memorandum](#) to U.S. attorneys and DOJ senior managers instructing them not to enter into any settlements that provide for a "payment or loan to any non-governmental entity." His targets were the nonprofit groups enlisted to provide counseling of consumers in foreclosure under multi-billion dollar civil settlements with the nation's biggest banks. A small portion of the huge sums collected by these consent decrees was devoted to this grassroots work by legal aid attorneys and homeowner counseling groups.

Bank executives didn't articulate objections to this funding. But retiring House Judiciary Chairman Bob Goodlatte (R-Va.) claims that such payments amount to a "[slush fund](#)" accumulated by the Obama

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administration to pay off its cronies on the left. The House has fretted over legislation to address the issue and passed the "[Stop Settlement Slush Funds Act](#)."

Also implicated in the Sessions policy change were the [supplemental environmental projects](#) embraced by successive, bipartisan generations of EPA and DOJ attorneys in settlements with polluting companies. Such agreements fund work to mitigate the harm to the environment and public health inflicted by the violations. As just one recent example, an Obama-era [settlement](#) with Harley-Davidson would have committed \$3 million to a program run by the American Lung Association to pay for the change-out of dirty wood stoves in the Northeast with much cleaner models. The settlement was withdrawn because of the Sessions policy.

Harley-Davidson committed offenses remarkably similar to the notorious [cheat devices installed in diesel cars by Volkswagen](#) when it sold "[super tuners](#)" to its customers. These ingenious mechanisms improved a motorcycle's performance, in the process emitting more pollution than Harley-Davidson certified to EPA. The wood stove program was designed to reduce roughly the same type and amount of pollution, in effect compensating for the adverse health effects caused by the rigged bikes.

Is the American Lung Association a crony improperly benefitting from a slush fund? The organization, composed of doctors and other public health professionals, surely is single-minded about its mission to reduce pulmonary disease. But somehow the balance between eliminating the costs of a worthwhile program to mitigate violations of a corporate wrongdoer and punishing medical professionals worried about their patients' wheezing seems quite uneven.

The bottom line? If financial institutions or manufacturing companies engage in practices that hurt individual customers, the Sessions DOJ will apparently only provide restitution to the victims if the corporation agrees to undertake the task of sending money to thousands individual victims. It will reject other services to the community that would address the malfeasance. If victims cannot be identified, lawbreakers will skate free.

In November 2017, Deputy Attorney General Rod Rosenstein [told](#) a group of industry executives that DOJ would not indict companies that voluntarily came forward to report violations of the Foreign Corrupt Practices Act. Although he preserved "a measure of prosecutorial discretion," his announcement was clearly intended to eliminate an Obama-era policy that required companies to come forward to share information about their employees' illegal activities without receiving such assurances.

On January 25, 2018, departing Associate Attorney General Rachel Brand [instructed](#) U.S. attorneys and senior managers to cease the use of guidance documents as the basis for any "affirmative civil enforcement." Guidance documents are typically issued at the behest of regulated industries seeking clarification of regulations. They do not have the force of law themselves, but they are useful in illustrating that a defendant had ample notice of how the agency interprets the law. Leading corporate law firms were quick to share the good news with their clients.

One [wrote](#) that the Brand memo would help with enforcement of the False Claims Act; another [extolled](#) its effects on enforcement actions in the "highly regulated health care industry."

Of necessity, street crime will always be the primary responsibility of state and local governments. Sessions's militancy about it appears to have more to do political opportunism than his responsibilities as the nation's top law enforcer. Enforcement of federal environmental, consumer protection, and health and safety laws is at the heart of his job, but unfortunately, he does not seem all that interested in doing it.

Rena Steinzor is the Edward M. Robertson professor at University of Maryland Carey Law School and a member scholar at the [Center for Progressive Reform](#).

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