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The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of Citizens United

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THE HUMANIZATION OF THE CORPORATE ENTITY: CHANGING VIEWS OF CORPORATE CRIMINAL
LIABILITY IN THE WAKE OF *CITIZENS UNITED*

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INTRODUCTION

Although the recent United States Supreme Court decision in *Citizens United v. Federal Election Commission*¹ clearly controls the First Amendment rights of corporations, the effect of *Citizens United* on corporate criminal liability is less obvious, though equally (if not more) significant. The Court's view that corporations are equal to human beings, at least under the First Amendment's Free Speech Clause,² when combined with the traditional understanding that corporations are considered "persons" under the United States Constitution,³ likely impacts the way that corporations' alleged misdeeds are investigated by the government and the manner in which the government subsequently deals with corporate misconduct, specifically through deferred prosecution agreements and non-prosecution agreements.

In particular, certain provisions that are typically included in deferred and non-prosecution agreements may have to be altered or eliminated from use altogether in the wake of *Citizens United*.⁴ Another result prompted by *Citizens United* could be the implementation of

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¹ 558 U.S. ___, 130 S. Ct. 876, ___ (2010).

² *Id.* at 26 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U. S. 765, 784 (1978)) ("Under the rationale of these precedents, political speech does not lose First Amendment protection 'simply because its source is a corporation.'"); *see also* *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U. S. 1, 8 (1986) (quoting *Bellotti*, 435 U. S. at 783)). (plurality opinion) ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster.").

³ *See* *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) ("The Court does not wish to hear argument . . . [regarding] whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to . . . corporations. We are all of the opinion that it does."); *see also* Susanna K. Ripken, *Corporations Are People Too: A Multi-dimensional Approach to the Corporate Personhood Puzzle*, 15 *FORDHAM J. CORP. & FIN. L.* 97, 116 (2009) (indicating that "the Supreme Court has . . . held that corporations are entitled to various liberty rights under the Constitution"); *see generally* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 *HASTINGS L.J.* 577 (1990) (discussing Supreme Court jurisprudence concerning corporate guarantees under the Bill of Rights).

⁴ *See infra* Part IV.

judicial oversight over deferred and non-prosecution agreements, which would include the submission of all such agreements to federal courts for approval and the provision of an opportunity for a corporation to be heard if the government makes a unilateral claim of breach. Undoubtedly, these changes would greatly alter the landscape of corporate criminal liability in the United States.

Part I of the Article provides an introduction to the concept of corporate criminal liability, with Section A describing the courts' approach, Section B providing an overview of the commentators' approach, and Section C detailing the government's approach—including overall corporate charging and sentencing policy. Part II explores the government's use of deferred prosecution agreements and non-prosecution agreements and courts' and commentators' views on such agreements. Part III examines the Supreme Court's decision in *Citizens United*. Finally, Part IV enumerates the ways in which *Citizens United* potentially affects the above-described approaches to corporate criminal liability and outlines resulting changes with respect to the government's treatment of corporate criminality.

I. CORPORATE CRIMINAL LIABILITY

Below, the Article explores the approaches of courts, commentators, and the government to corporate criminal liability. Additionally, with respect to the government's treatment of corporate criminality, the Article discusses the government's charging policy, its use of deferred prosecution agreements ("DPAs") and non-prosecution agreements ("NPAs"), and the courts' views on such agreements.

A. *Approach of Courts*

Establishing corporate criminal liability is currently a matter of straightforward black letter law: "a corporation is liable for the criminal misdeeds of its agents acting within the actual or apparent scope of their employment or authority if the agents intend, at least in part, to benefit the corporation, even though their actions may be contrary to corporate policy or express

corporate order.”⁵ Because corporations are artificial creations, they can be “held liable for the conduct of their employees only vicariously, through the venerable [tort law] doctrine of *respondeat superior*: ‘Let the master answer.’”⁶

Despite having its roots in tort law, the notion of corporate criminal liability, as courts have applied it, advances both the deterrence and just desert notions of criminal law. For example, in *New York Central & Hudson River Railroad Co. v. United States*,⁷ the Supreme Court of the United States emphasized the need for deterrence of institutional wrongdoing in holding that “to give [corporations] immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectively controlling the subject-matter and correcting the abuses aimed at.”⁸

The decision of the United States Court of Appeals for the Ninth Circuit in *United States v. Hilton Hotels, Corp.*⁹ further explained that the imposition of criminal liability upon corporations is designed to “stimulat[e] a maximum effort by owners and managers to assure

⁵ JULIE R. O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS* 202 (2d ed. 2003) [hereinafter O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME*]; see also *United States v. Park*, 421 U.S. 658, 673-74 (1975) (noting that for a corporate officer to be held accountable for his failure to act on behalf of the corporation, the government must introduce sufficient evidence that would warrant a finding that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance or promptly to correct, the violation complained of, and that he failed to do so); *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493-94 (1909) (indicating that it has been “well established that, in actions for tort, the corporation may be held responsible for damages for the acts of its agent within the scope of his employment” and explaining that a “corporation is held responsible for acts not within the agent’s corporate powers strictly construed, but which the agent has assumed to perform for the corporation when employing the corporate powers actually authorized”).

⁶ Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Corporate Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1563 (1990). The tort law doctrine of *respondeat superior* imposes liability on employers for the conduct of their employees because this is “the most convenient and efficient way of ensuring that persons injured in the course of business enterprises do not go uncompensated.” *Id.* at 1563-64 (citations omitted). Tort law scholars have also suggested that “vicarious liability . . . creates an incentive for management to take precautions to prevent employer accidents.” *Id.* at 1566.

⁷ *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909).

⁸ *Id.* at 495-96 (1909); see also *United States v. Park*, 421 U.S. 658, 672 (1975) (“[I]n providing sanctions which reach and touch the individuals who execute the corporate mission . . . the [Federal Food, Drug, and Cosmetic Act] imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur.”).

⁹ *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972).

adherence by such agents to the requirements of the [law].”¹⁰ The *Hilton* court pointed out that “the strenuous efforts of corporate defendants to avoid conviction . . . strongly suggests that Congress is justified in its judgment that exposure of the corporate entity to potential conviction may provide a substantial spur to corporate action to prevent violations by employees.”¹¹

Courts have also indicated that, in addition to the theory of deterrence, the criminal law notion of just desert supports the imposition of corporate criminal liability. For instance, in *United States v. Park*,¹² the Supreme Court held that a company could be a blameworthy actor deserving of criminal punishment, just like an individual wrongdoer.¹³ This suggestion had been advanced by the Court in previous decisions, where it posited that it “is elementary that such impersonal entities [as corporations and other associations] can be guilty of ‘knowing’ or ‘willful’ violations of regulatory statutes”¹⁴ because, through their structures and internal organization, they encourage or neglect to prevent individual employee wrongdoing.¹⁵

B. Approach of Commentators

Although the doctrine of *respondeat superior* has been extended to the realm of corporate criminal prosecutions because of the widespread belief “that a broad standard is

¹⁰ *Id.* at 1005.

¹¹ *Id.* at 1006 (citations omitted).

¹² *United States v. Park*, 421 U.S. 658 (1975).

¹³ See *id.* at 673 (indicating that corporate entities should be punished for not putting measures into place that would prevent criminal conduct on behalf of their employees).

¹⁴ *United States v. A & P Trucking Co.*, 358 U.S. 121, 125 (1958).

¹⁵ See Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 889 (2007) (citing Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL’Y 833, 852 (2000)) (stating that “corporations, even if they do not possess a human capacity for shame, have discrete identities and expressive potential that renders them capable of suffering moral condemnation, ‘thereby vindicating the proper valuation of persons and goods whose true worth was disparaged by the corporation’s conduct—just as in the case of an individual wrongdoer’”). Thus, as Professor Pamela Bucy suggests, corporations can and should be held criminally liable pursuant to the criminal law theory of just desert when their systems of social structures and internal organizational processes—the corporate “ethos”—encourage or fail to discourage unlawful behavior. See generally Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991).

needed to combat the organizational roots of white collar crime,”¹⁶ there are obvious differences between tort law and criminal law. Thus, there is much debate about whether the theory of vicarious liability is the proper vehicle for the criminalization of corporate conduct. As some commentators have pointed out, “[t]ort law distributes the loss of a harmful occurrence’ but criminal law coerc[es] the actual or potential wrongdoer to compliance with the set standards of society through the threat or applications of sanctions.”¹⁷ Furthermore, “a standard modeled on *respondeat superior* departs from the ‘basic premise of criminal jurisprudence that guilt requires personal fault.’”¹⁸

Despite the tensions surrounding the application of tort law principles to a criminal law concept, a number of scholars have persuasively argued that deterrence principles justify the current expansive doctrines supporting corporate vicarious liability for the actions of corporate agents. For example, Brent Fisse indicates that corporations can be properly characterized as criminally responsible agents because such condemnation is not symbolic, but instead addresses “the fact that people within the organization collectively failed to avoid the offense to which corporate blame attaches.”¹⁹ Moreover, Fisse argues that criminal liability works in the corporate context because corporations, like individuals, can feel stigmatized by the imposition of this form of punishment. While the imposition of criminal sanctions on individuals makes them feel like outcasts, causing them to continue their socially deviant behavior, “corporations

¹⁶ Pitt & Groskaufmanis, *supra* note 6, at 1573. Such a broad standard is necessary, in theory, because white-collar criminal activity arises from “pressures exerted by the corporation, which is more likely to enforce its penalties than the government is to bring criminal prosecutions. Consequently, the most accepted basis for corporate criminal liability is the need to deter misconduct. A corollary to this view is that criminal liability will encourage better supervision of employee conduct.” *Id.*

¹⁷ *Id.* at 1572 (citations omitted).

¹⁸ *Id.* (citations omitted).

¹⁹ Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1149 (1983).

are more likely to react positively to criminal stigma by attempting to repair their images and regain public confidence.”²⁰

Imposing criminal liability on corporations not only serves criminal law’s goal of deterrence, but also furthers its aims of rehabilitation and incapacitation. As Fisse notes, organizational offenders “cannot exert self-control merely by individual self-denial [Instead, their self-denial] must be embodied in corporate policy and backed by appropriate disciplinary measures and . . . procedures.”²¹ Punishment or the threat of punishment, when imposed on corporations, can lead to a number of positive changes, which are not typically evoked from individual offenders, such as the establishment and strengthening of compliance strategies, the catalyzation of internal discipline controls, and the modification of standard operating procedures.²²

Other scholars argue that corporate criminal liability advances the criminal law principle of just desert – the notion that it is morally acceptable to punish blameworthy individuals in proportion to the severity of their crimes.²³ In *Professional Discipline for Law Firms? A Response to Professor Schneyer’s Proposal*, Julie Rose O’Sullivan contends that there are two ways “in which an entity may be deemed ‘responsible’ in a causal sense for its agents’ . . . misconduct. First, [an entity] may fail to put in place organizational policies or practices sufficient to prevent certain types of . . . misconduct. Second, an entity may possess a bad

²⁰ *Id.* at 1154. As Fisse suggests, corporations have monetary as well as nonmonetary goals. Thus, the imposition of purely monetary civil penalties may not deter corporations from committing criminal acts through their employees. In particular, “the value of corporate prestige in modern business suggests the relevance of stigmatization. In addition to the stigmatic potential of conviction and informal publicity in the media, it is conceivable that corporate convictions might be publicized by formal, court-ordered publicity sanctions, thereby increasing the stigma imposed.” *Id.* at 1155.

²¹ *Id.* at 1160.

²² *See id.*

²³ O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME*, *supra* note 5, at 197 (arguing that “corporations can be blameworthy actors upon whom retributive punishment is appropriately imposed”).

‘culture’ or ‘ethos,’ . . . which may . . . [encourage employee wrongdoing].”²⁴ O’Sullivan admits that it is difficult to identify when the corporation as a whole, as opposed to the individuals making up the corporation, “should be identified as the ‘culprit.’”²⁵ However, she argues that this problem can be resolved if corporate liability is only imposed when the corporation’s “culture, policies or procedures [clearly] caused, encouraged, or condoned the misconduct at issue.”²⁶

O’Sullivan also attacks two related objections to the imposition of criminal liability on corporations: the unfairness of penalizing innocent shareholders for the criminal activity of the corporation²⁷ and the undermining of compliance with the criminal law, which will result from the widespread perception that this law punishes innocent individuals “who did not participate in or knowingly condone the [corporate] misconduct.”²⁸ She points out that criminal penalties, when imposed on corporations, “prevent the unjust enrichment of shareholders and other corporate constituencies; any sanctions imposed in excess of the criminal profits obtained are spread among so many shareholders as to be negligible.”²⁹ Moreover, innocent family members of individuals who are held to be criminally liable may suffer to some degree, just like shareholders of corporations upon whom criminal penalties are imposed; “the stigma of criminal conviction does not ‘flow through’ to shareholders,”³⁰ however.

²⁴ Julie Rose O’Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer’s Proposal*, 16 GEO. J. LEGAL ETHICS 1, 28-29 (2002) [hereinafter O’Sullivan, *Professional Discipline*]; see also Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 U. ILL. L. REV. 763, 803 (2000) (“The corporation may not have a soul, but it can be held morally responsible for its actions and its decisionmaking structure.”).

²⁵ O’Sullivan, *Professional Discipline*, supra note 24, at 31.

²⁶ *Id.* at 37.

²⁷ See *id.* at 35-37; see also John C. Coffee, Jr., “No Soul to Damn, No Body to Kick: An Unscandalized Inquiry Into the Problem of Corporate Punishment,” 79 MICH L. REV. 386, 386-87 (1981) (“At first glance, the problem of corporate punishment seems perversely insoluble: moderate fines do not deter, while severe penalties flow through the corporate shell and fall on the relatively blameless.”)

²⁸ O’Sullivan, *Professional Discipline*, supra note 24, at 32.

²⁹ *Id.* at 35.

³⁰ *Id.*

C. *Approach of the Government*

1. Corporate Criminal Charging Policy

Despite the fact that corporations can, in theory, be held criminally liable in a court of law, federal prosecutors make the ultimate decision regarding whether a given company will be indicted and charged for its unlawful activities.

Before 1991, the Department of Justice's ("DOJ") policy regarding charges for most offenses primarily concerned individuals.³¹ In 1991, this policy was indirectly supplemented "with a new chapter [of the U.S. Sentencing Guidelines] titled 'Sentencing of Organizations' ('Organizational Guidelines'). These Organizational Guidelines [mainly] served as a guide for federal judges sentencing entities[, but] also [they] emphasized corporate cooperation as a condition for leniency in the sentencing process."³² Commentators have suggested that because the Organizational Guidelines "strongly encouraged companies to self-report and timely cooperate with appropriate governmental authorities in order to earn leniency, federal prosecutors became emboldened into asking for waivers of privilege and work product underlying the findings of internal investigations."³³ However, "[e]ven though disclosure of internal investigation findings became more commonplace after the advent of the Organizational Guidelines, corporations were not generally coerced into waiver except by the most aggressive prosecutors."³⁴

³¹ See generally U.S. ATTORNEY'S MANUAL § 9-27.000 (2002), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm (focusing on charging decisions involving individual offenders, rather than corporations).

³² Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 114 (2003) (citing U.S. SENTENCING GUIDELINES MANUAL ch. 8 (2002)); see also Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 593-94 (2004) (providing an overview of the Organizational Guidelines).

³³ Finder, *supra* note 32 (citation omitted).

³⁴ *Id.*

The first version of a specific corporate charging policy was issued in 1999 by then-Deputy Attorney General Eric Holder.³⁵ Four years later, then-Deputy Attorney General Larry Thompson promulgated a revised set of such guidelines.³⁶ In light of the troubling nature of several charging factors contained in the Thompson Memo, particularly its suggestion that a corporation would need to waive its attorney-client and work product privileges³⁷ in order to

³⁵ See Memorandum from Deputy Att’y Gen. Eric H. Holder to All Component Heads & U. S. Attorneys, Bringing Criminal Charges Against Corps. (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html>, reprinted in 66 CRIM. L. REP. 189 (1999) [hereinafter Holder Memo]. Although the so-called “Holder Memo” was intended to further a uniform application of the principles of corporate prosecution, it contemplated waivers of work-product and attorney-client privilege as a precondition for the government’s declination to charge the corporation. See *id.*; see also Daniel C. Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 DEPAUL L. REV. 295, 297 (2008).

³⁶ See Memorandum from Deputy Att’y Gen. Larry D. Thompson to Heads of Dep’t Components & U.S. Attorneys, Principles of Fed. Prosecution of Bus. Orgs. (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm, reprinted in 72 CRIM. L. REP. (BNA) 481 (2003) [hereinafter Thompson Memo]. The charging factors listed in the Thompson Memo include: (1) “the nature and seriousness of the offense;” (2) “the pervasiveness of wrongdoing within the corporation;” (3) “the corporation’s history of similar conduct;” (4) “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection;” (5) “the existence and adequacy of the corporation’s compliance program;” (6) “the corporation’s remedial actions;” (7) “collateral consequences;” (8) “the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance;” and (9) “the adequacy of remedies such as civil or regulatory enforcement actions.” *Id.*; see also Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 898 (2005) (stating, in reference to the Thompson Memo, that “the Department of Justice (“DOJ”) has adopted guidelines that seem to make waiver of the attorney-client privilege and work product protection a prerequisite for being deemed ‘cooperative,’ a significant designation that carries with it the prospect for more favorable penal treatment.”); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 320-21 (2007) (citing Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, in 2 37TH ANNUAL INSTITUTE ON SECURITIES REGULATION 815, 820 (PLI Corp. Law & Practice, Course Handbook Series No. B-1517, 2005)) (explaining that “[a] small but significant change between the two Memo[s] affect[ed] the mandatory nature of the considerations, the necessity of waiver, and the use of [deferred prosecution agreements],” as the Holder Memo “did not instruct prosecutors to reason backward from every crime committed in the corporate context to consider whether charges might be brought against corporations,” while the Thompson Memo applied to “all federal prosecutions of corporations;” as a result, “prosecutors automatically invoke[d] the Thompson Memo[] criteria at the outset of every investigation and immediately start[ed] ‘grading’ a company on its performance in the government’s investigation”).

³⁷ The classic test to determine whether attorney-client privilege applies to certain communications or documents is: “(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.” In re Grand Jury Subpoena, 415 F.3d 333, 339 (4th Cir. 2005) (quoting *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982)); see also *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981) (holding that in the corporate context, whether attorney-client privilege applies should be determined on a case by case basis; this privilege may apply to non-senior employees who do not have any control over the operation of the corporation). *Upjohn* also articulated the standard for evaluating work product privilege, indicating that “the court [must] protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.” *Id.* at 400 (citations omitted).

demonstrate that it was complying with the government's investigation, then-Deputy Attorney General Paul J. McNulty³⁸ amended the Thompson Memo, and its immediate successor, the McCallum Memo,³⁹ in 2006.⁴⁰

³⁸ Paul McNulty announced his resignation from the post of Deputy Attorney General in May 2007. See Michelle Norris & Ari Shapiro, *Deputy U.S. Attorney General McNulty Resigns*, NPR, May 14, 2007, <http://www.npr.org/templates/story/story.php?storyId=10179855>. President George W. Bush then appointed Craig S. Monford, who had been serving as the interim U.S. attorney in Nashville, Tennessee, to be the acting Deputy Attorney General. See Dan Eggen, *Monford Named to No. 2 Spot at Justice Dept.*, WASH. POST, July 19, 2007, at A3. Nearly a year later, on March 3, 2008, Mark R. Filip, a federal district court judge from Chicago, Illinois, formally replaced McNulty as deputy attorney general. Dan Eggen, *Senate Confirms New No. 2 for Justice Dept.*, WASH. POST, Mar. 4, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/03/AR2008030302033.html>. David W. Ogden was confirmed by the Senate as Filip's replacement on March 12, 2009, *Senate Confirms Ogden as Deputy Attorney General*, USA TODAY, Mar. 12, 2009, http://www.usatoday.com/news/washington/2009-03-12-ogden_N.htm. Ogden left the post in February 2010 and the position has been filled by Gary G. Grindler pending the confirmation of James M. Cole. See Jerry Markon & Anne E. Kornblut, *James Cole Nominated for No. 2 Job at Justice Department*, WASH. POST, May 22, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/21/AR2010052103388.html>.

³⁹ See Memorandum from Acting Deputy Att'y Gen. Robert D. McCallum, Jr. to Heads of Dep't Components & U.S. Attorneys, Waiver of Corporate Attorney-Client and Work Product Protection (Oct. 21, 2005), available at <http://www.corporatecrimereporter.com/documents/AttorneyClientWaiverMemo.pdf> [hereinafter McCallum Memo].

⁴⁰ The Thompson and McNulty Memos were criticized by a number of commentators, including both practitioners and judges. As Stanley S. Arkin and Howard J. Kaplan contended, "[t]he government's growing emphasis on 'cooperation' in connection with criminal and regulatory investigations of . . . corporate fraud" [erodes] individual rights and legitimate employment expectations, and . . . fundamentally alter[s] the traditional relationships among a corporation's various constituencies, including its employees, counsel, and board of directors." Stanley S. Arkin & Howard J. Kaplan, *Coerced Cooperation Policy Threatens Employee Rights*, N.Y.L.J., May 11, 2005, at 3. Arkin and Kaplan explained that, pursuant to the Thompson Memo, the government would frequently demand "that companies under investigation waive their attorney-client privilege. If a company refuse[d] to waive its privilege, the government then presume[d] that the company is not cooperating with the investigation (a real threat, given the dire consequences that could flow from such a determination)." *Id.* Moreover, "[t]he government's aggressive enforcement policies also encourage[d] companies to disadvantage accused or even potential subjects of an investigation . . . in an effort to demonstrate cooperation with the government." *Id.* at 8. As a result, companies would "no longer support [or indemnify] employees who [were] accused of wrongdoing, regardless of what the facts may [have] ultimately show[n]." *Id.* Cf. Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1661 (2007) [hereinafter Buell, *Criminal Procedure*] (proposing a more nuanced understanding of the disfavoring of indemnification, noting that "[i]t is not unreasonable for an executive branch agency to take the position . . . that firms serious about encouraging legal compliance do not provide their employees with limitless assets to fund their defenses in cases of clear criminal wrongdoing" and suggesting that "[w]hile there might be substantial disagreement about what kind and degree of indemnification are socially desirable, and about the most effective shape of legal rules, there is general agreement that indemnification can affect deterrence and that its blanket use is likely to be problematic").

It was on this basis that Judge Lewis A. Kaplan of the United States District Court for the Southern District of New York criticized the Thompson Memo. The issue before Judge Kaplan was a lawsuit brought by former employees of KPMG, one of the world's largest accounting firms, who argued that "KPMG ha[d] refused to advance defense costs to which [the] defendants [were] entitled because the government pressured KPMG to cut them off [so that KPMG would appear to be more fully cooperating with the government]. . . ., thus violat[ing] [the employees'] rights and threaten[ing] their right to a fair trial." *United States v. Stein*, 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006). Judge Kaplan ultimately agreed with the defendants, holding that the government's conduct with respect to the issue of indemnification, which was based on the directives of the Thompson Memo, "violated the Fifth and Sixth Amendments to the Constitution." *Id.* at 382. Furthermore, Judge Kaplan reminded the government that its "proper concern [was] not with obtaining convictions," *id.* at 381, but with the administration of justice.

The McNulty Memo forged several revolutionary changes in the area of corporate charging decisions. Although it left intact the Thompson Memo's nine factors that prosecutors must consider in deciding whether or not to impose criminal charges on a corporation, the McNulty Memo nonetheless stated that "[p]rosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations."⁴¹

Even if such a legitimate need did exist, the McNulty Memo instructed prosecutors to "first request purely factual information, which may or may not be privileged, relating to the underlying misconduct ('Category I')." ⁴² If prosecutors determined that they would have to ask a corporation to waive attorney-client or work product protections to obtain Category I information, however, they were obligated to first receive "written authorization from the United States Attorney, who must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying the request."⁴³ Furthermore, if prosecutors required corporations to reveal attorney-client communications or non-factual attorney work product (Category II) in addition to purely factual information (Category I), they would first need to "obtain written authorization from the Deputy Attorney General."⁴⁴

In addition to ensuring that prosecutors did not insist that corporations waive their attorney-client and work product protections to demonstrate cooperation, the McNulty Memo also altered the Thompson Memo's presumption that the companies that indemnify their

⁴¹ Memorandum from Deputy Att'y Gen. Paul J. McNulty to Heads of Dep't Components & U.S. Attorneys, Principles of Fed. Prosecution of Bus. Orgs., http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf [hereinafter McNulty Memo]. Whether prosecutors have a legitimate need for a given corporation's privileged information depends upon: "(1) the likelihood and degree to which the privileged information will benefit the government's investigation; (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver; (3) the completeness of the voluntary disclosure already provided; and (4) the collateral consequences to a corporation of a waiver." *Id.* at 9.

⁴² *Id.* at 9.

⁴³ *Id.*

⁴⁴ *Id.* at 10.

employees or advance them legal fees are not complying with government investigations. Indeed, the McNulty Memo expressly dictated that “[p]rosecutors . . . should not take into account whether [an entity] is advancing attorneys’ fees to employees or agents under investigation and indictment.”⁴⁵

The McNulty Memo, however, did not change the Thompson Memo’s position that prosecutors should enter into DPAs and NPAs “in exchange for cooperation when a corporation’s ‘timely [compliance] appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.’”⁴⁶ The Justice Department’s focus on such agreements reflected the fact that going to trial is an expensive proposition both for the government and for business entities. Furthermore, even an indictment, not to mention a conviction, can be deadly for a corporation.⁴⁷

A memorandum⁴⁸ issued by then-Deputy Attorney General Mark R. Filip⁴⁹ in 2008 is the latest “iteration of the Principles of Federal Prosecution of Business Organizations.”⁵⁰ The Filip Memo clarifies two significant aspects of previous corporate charging policy. First, it states that “prosecutors should not take into account whether a corporation is advancing or reimbursing

⁴⁵ *Id.* at 11.

⁴⁶ McNulty Memo, *supra* note 41, at 7. Such alternative agreements, “which are less punitive and entail reduced collateral harm, give prosecutors far more flexibility to strike the proper balance between punishing and deterring criminal conduct on the one hand and encouraging and rewarding voluntary disclosures and cooperation on the other.” Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: the Thompson Memo in Theory and Practice*, 43 AM. CR. L. REV. 1095, 1104 (2006). In addition, the use of these agreements results in quick resolutions of “business crimes” and “in a rise in the levels of genuine cooperation and self-reporting from companies.” *Id.* at 1138.

⁴⁷ See Wray & Hur, *supra* note 46, at 1097 (“Because indictment often amounts to a virtual death sentence for business entities, a corporate prosecution provides the government an [opportunity for effective deterrence].”); see also Richard A. Epstein, Commentary, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14 (“[S]imply filing an indictment triggers huge collateral repercussions sufficient to drive the firm out of business, as teams of state and federal regulators are now duty-bound to suspend the licenses and permits under which the corporation does business A conviction carries at most a million-dollar fine, but simple indictment . . . imposes multibillion-dollar losses.”).

⁴⁸ See U.S. Dept. of Justice, Principles of Federal Prosecution of Business Organizations, Title 9, Chapter 9-28.000, available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf> [hereinafter Filip Memo].

⁴⁹ See *supra* note 38.

⁵⁰ Brandon L. Garrett, *Corporate Confessions*, 30 CARDOZO L. REV. 917, 928 (2008) [hereinafter Garrett, *Corporate Confessions*].

attorneys' fees or providing counsel to employees, officers or directors under indictment.”⁵¹ Prosecutors also may not request that a “corporation refrain from taking such action.”⁵² Second, the Filip Memo alters the procedure for requesting and assessing privilege waivers;⁵³ it mandates that a corporation receive credit for cooperation if it discloses the “relevant facts”⁵⁴ concerning the misconduct and not if it waives attorney-client or work-product privilege.⁵⁵ To this end, the Filip Memo prohibits prosecutors from requesting waivers of “core” attorney-client communications or work product (which would include the Category II information referred to by the McNulty Memo) and bars prosecutors from granting credit for cooperation to corporations that do waive privilege with respect to this information.⁵⁶ Moreover, the Filip Memo encourages counsel for corporations who believe that prosecutors are violating these prohibitions to “raise their concerns with supervisors, including the appropriate United States Attorney or Assistant Attorney General.”⁵⁷

⁵¹ *Id.* (citing Filip Memo, *supra* note 48, at t 9-28.730).

⁵² *Id.* (citing Filip Memo, *supra* note 48, at t 9-28.730).

⁵³ Indeed, the Filip Memo, in arguably softening the government’s stance on corporate privilege waivers, is viewed to be responding to legislation introduced on December 7, 2006 by Senator Arlen Specter and written in conjunction with the ABA, the National Association of Criminal Defense Lawyers, the ACLU, the Association of Corporate Counsel, and the U.S. Chamber of Commerce on December 7, 2006. *See* Robert J. Anello, *Preserving the Corporate Attorney-Client Privilege: Here and Abroad*, 27 PENN ST. INT’L L. REV. 291, 296 (2008). The purpose of this legislation, which was primarily directed at the Thompson Memo, was to place on each government agency “clear and practical limits designed to preserve the attorney-client privilege.” *Id.* (citing Attorney-Client Privilege Protection Act of 2006, H.R. 3013, 109th Cong. § 2(b) (2006)).

⁵⁴ Filip Memo, *supra* note 48, at 9-28.720.

⁵⁵ *See id.* at 9-28.710.

⁵⁶ *See id.* (“[W]hile a corporation remains free to convey non-factual or ‘core’ attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so.”); *see also* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 919 (2009) (citations omitted) (indicating that in replacing the McNulty Memo with the Filip Memo, the DOJ “provided the powerful white collar defense interests with still further concessions, explicitly emphasizing that ‘[e]ligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product’ and that ‘prosecutors should not ask for such waivers.’”).

⁵⁷ *Id.* at 9-28.760.

Nevertheless, commentators have questioned whether the Filip Memo “goes far enough.”⁵⁸ For example, the desired “relevant facts” may ultimately include attorney work product or attorney-client communications.⁵⁹ “[I]n many instances, such as where different witnesses have provided contradictory accounts, any discussion of the ‘facts’ will involve disclosing what the various witnesses said[], revealing attorney-client communications. Thus, under the Filip Memo, . . . corporations [may] still need to waive privilege . . . to provide the facts and receive cooperation credit.”⁶⁰ Additionally, the Filip Memo “may actually lessen the procedural protections that the McNulty Memo offered over a prosecutor’s ability to obtain ‘Category I’ information,”⁶¹ as, under the Filip Memo, “no approvals are required for a prosecutor to seek factual material even where its provision may require a privilege waiver.”⁶²

Moreover, the Filip Memo suggests that corporations can conduct internal investigations “in a manner that will not confer attorney-client privilege on the results of an investigation,”⁶³ by, for example, using non-attorney personnel to collect employee or other witness statements.⁶⁴ Such a proposition ignores the fact that lawyers are much more effective than non-lawyers in

⁵⁸ Mark J. Stein & Joshua A. Levine, *The Filip Memorandum: Does It Go Far Enough?*, N.Y.L.J., Sept. 11, 2008, available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202424426861> (“The thrust of the Filip Memo is that DOJ simply wants the facts The obvious problem is that the “facts” uncovered in an internal investigation are actually an attorney’s distillation of numerous interviews and documents and therefore work product.”); see also Filip Memo, *supra* note 48, at 9-28.720 n.3 (noting that when interviews proceeding in conjunction with an internal investigation are conducted by counsel for the corporation, the corporation need not produce “protected notes or memoranda generated by the lawyers’ interviews;” to earn cooperation credit, the corporation “does need to produce, and prosecutors may request, relevant factual information—including relevant factual information acquired through those interviews . . . —as well as relevant non-privileged evidence such as accounting and business records and emails between non-attorney employees or agents”).

⁵⁹ Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 971 (2009).

⁶⁰ Stein & Levine, *supra* note 58.

⁶¹ *Id.*; see also *supra* notes 42-43 and accompanying text (describing Category I information, as it is referenced in the McNulty Memo).

⁶² Stein & Levine, *supra* note 58.

⁶³ *Id.*

⁶⁴ Filip Memo, *supra* note 48, at 9-28.720(a).

undertaking internal investigations, determining whether any violations of law have taken place, and evaluating potential remedial measures.⁶⁵

While the Filip Memo clarifies the government's stance with respect to corporations' waiver of attorney-client and work product protections and indemnification of employees, other aspects of this Memo are less definitive. For example, despite the fact that the Filip Memo states that prosecutors cannot take into consideration "a company's retention or discipline of culpable employees as a factor affecting cooperation credit, it allows the government to continue to consider retention or discipline as a factor affecting remediation."⁶⁶ Because both cooperation and remediation affect the corporate charging decision, the significance of this prohibition is dubious.⁶⁷ Further, although this Memo prohibits the government from taking into account whether a corporation entered into a joint defense agreement,⁶⁸ it nevertheless suggests that corporations should avoid entering into such agreements if they would prevent them from disclosing relevant facts to the government.⁶⁹

General objections to the Filip Memo, which can also be directed to the Memos that preceded it, include the fact that it controls the actions of the DOJ, and not of the SEC or the other regulatory bodies and the fact that it is non-binding, thereby providing only suggested guidelines for prosecutors.⁷⁰

⁶⁵ Stein & Levine, *supra* note 58.

⁶⁶ *Id.*; see also Filip Memo, *supra* note 48, at 9-28.900 (stating that one of the three factors to be used by prosecutors in evaluating a corporation's remedial efforts is employee discipline: "whether the corporation appropriately disciplined wrongdoers, once those employees are identified by the corporation as culpable for the misconduct;" the other two factors are restitution and reform).

⁶⁷ See Stein & Levine, *supra* note 58.

⁶⁸ See Filip Memo, *supra* note 48, at 9-28.730 ("[T]he mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements.").

⁶⁹ See Stein & Levine, *supra* note 58 ("Accordingly, [under the Filip Memo,] companies will either continue to be penalized for entering into joint defense agreements or attempt to negotiate one-sided agreements that permit full disclosure by the company while providing little protection to the individual employees who join the agreement.").

⁷⁰ See *id.* To that end, although the Attorney-Client Privilege Protection Act of 2006 "died" following the issuance of the Filip Memo, *supra* note 53, Senator Specter introduced a 2009 version of this legislation because the Filip Memo's guidelines "could be modified by the [DOJ] and failed to carry the force of law." Attorney-Client Privilege

2. Corporate Criminal Sentencing Policy

If a federal prosecutor decides to indict and charge a corporation for its allegedly criminal activities, and if the corporation is ultimately convicted on the charges filed against it, the corporation's punishment or sentence will be determined largely in accordance with corporate criminal sentencing policy—specifically the Organizational Guidelines.

As a result of the Supreme Court's decision in *United States v. Booker*,⁷¹ the United States Sentencing Guidelines (the "Guidelines") are considered to be advisory and not mandatory. Nevertheless, the Guidelines, including the Organizational Guidelines, still influence individual and corporate sentencing to a great extent.⁷²

Corporate criminal sentencing originated with the Organizational Guidelines, which were promulgated in 1991.⁷³ Pursuant to the Organizational Guidelines, corporations facing criminal investigations can lower their level of culpability, thereby reducing their potential fines, "if they maintain 'effective compliance and ethics programs' to prevent and detect violations of law, cooperate fully in ongoing investigations, self-report, and accept responsibility."⁷⁴ A compliance and ethics program is considered to be effective by the government only if it "exercise[s] due diligence to prevent and detect criminal conduct" and "otherwise promote[s] an organizational culture that encourages ethical conduct and a commitment to compliance with the law."⁷⁵ Factors included in the evaluation of the effectiveness of a compliance and ethics

Protection Act of 2009 is Introduced in the Senate (S.445), <http://federalevidence.com/blog/2009/february/attorney-client-privilege-protection-act-2009-introduced-senate-s-445> (last visited Feb. 18, 2010).

⁷¹ 543 U.S. 220, 261 (2005).

⁷² See Frank O. Bowman, III, *The Year of Jubilee . . . Or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 Hous. L. Rev. 279, 319 (2006) ("If the *Booker* regime of advisory Guidelines is not displaced by legislation, it seems reasonable to predict that the Guidelines will remain the predominant factor in determining individual sentences for years to come.").

⁷³ See Griffin, *supra* note 36, at 317 (citing U.S. SENTENCING GUIDELINES MANUAL ch. 8 (1991)).

⁷⁴ *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (2004)).

⁷⁵ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a) (2004).

program are “the organization’s history of violations and the existence and sufficiency of its efforts to prevent, police, discover, report, and help punish wrongdoing by its employees.”⁷⁶

The Organizational Guidelines also stress the need for timely and thorough cooperation as a prerequisite for the imposition of a more lenient sentence. Timely cooperation begins “essentially at the same time as the organization is officially notified of a criminal investigation.”⁷⁷ Thorough cooperation constitutes “the disclosure of all pertinent information known by the organization,” such as that “sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.”⁷⁸

Under the Organizational Guidelines, a corporation that is being sentenced would begin with five culpability points; this figure can be increased by up to five points if the position of the offender in the organization is sufficiently high, by up to two points for a previous criminal, civil, or administrative adjudication, and by up to three points if there was obstruction of justice with respect to the investigation or prosecution of the offense.⁷⁹ Additionally, a company that has more than fifty employees and that does not have an effective compliance or ethics program pursuant to the Organizational Guidelines must develop such a program and is subject to probation and continuing court supervision until it does so.⁸⁰

On January 21, 2010, the United States Sentencing Commission issued proposed amendments to the Guidelines (including the Organizational Guidelines).⁸¹ With respect to

⁷⁶ Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 487 (2006) [hereinafter Buell, *Blaming Function*].

⁷⁷ U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 cmt. 12 (2004).

⁷⁸ *Id.*

⁷⁹ See Griffin, *supra* note 36, at 318 (citing U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(a)-(e) (2004)). The Sarbanes-Oxley Act also imposes some related cooperation obligations on attorneys. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

⁸⁰ See Griffin, *supra* note 36, at 318 (citing U.S. SENTENCING GUIDELINES MANUAL §§ 8D1.1(a)(3), 8D1.4(c)(1) (2004)).

⁸¹ See U.S. SENTENCING COMM’M, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES (2010), http://www.ussc.gov/2010guid/20100121_Reader_Friendly_Proposed_Amendments.pdf [hereinafter PROPOSED

corporations, these amendments pertain to effective compliance programs, conditions of probation, and extra credit for compliance programs.⁸² First, the proposed amendments add new commentary regarding the actions that a corporation should take after detecting criminal conduct. This commentary states that organizations should (1) “take reasonable steps to provide restitution and otherwise remedy the harm resulting from the criminal conduct” and (2) “assess the compliance and ethics program and make modifications necessary to ensure the program is more effective.”⁸³ Further explaining the “assessment” requirement, the proposed commentary states that “[t]he organization may take the additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications.”⁸⁴ Such a monitor would thus potentially have to be retained prior to the initiation of the criminal investigation into the corporation’s conduct.

Moreover, the proposed amendments now indicate that document retention policies must be implemented as part of an effective compliance program. Indeed, they require that “[b]oth high-level personnel and substantial authority personnel . . . be aware of the organization’s document retention policies and conform any such policy to meet the goals of an effective compliance program under the guidelines and to reduce the risk of liability under the law.”⁸⁵

Second, the proposed amendments contemplate the addition of new conditions of probation for organizations. Under the 1991 Organizational Guidelines, courts would impose probation if an organization had more than 50 employees and did not have an effective

AMENDMENTS]. “The Sentencing Commission is accepting written public comments on the proposed amendments through March 22, 2010, and will hold a public hearing on the proposed amendments in the future. Historically, most proposed amendments have been implemented.” *U.S. Sentencing Commission Proposes Changes Regarding Sentencing of Corporations*, KIRKLAND ALERT (Kirkland & Ellis LLP, Chicago, IL), Feb. 2010, at 1 [hereinafter *Sentencing of Corporations*].

⁸² See *Sentencing of Corporations*, *supra* note 81, at 1-3.

⁸³ PROPOSED AMENDMENTS, *supra* note 81, at 37.

⁸⁴ *Id.*

⁸⁵ *Id.*

compliance program in place.⁸⁶ Pursuant to the probation order, courts could require a corporation to submit reports regarding its progress in implementing an effective compliance program and appoint a special probation officer to oversee the corporation's compliance.⁸⁷ The revised 2004 Organizational Guidelines state that even if an organization does have a compliance program in place, a court shall order a term of probation if "such sentence is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct"⁸⁸

Some of the new conditions of probation for an organization set out in the proposed amendments include: (1) enhanced reporting requirements to the court regarding compliance and the organization's financial status; (2) appointment of an independent corporate monitor; and (3) submission to "a reasonable number of regular or unannounced examinations of facilities subject to probation supervision."⁸⁹ Although terms of probation reflecting these "new" conditions are typically sought by the government at sentencing or during plea negotiations, "[t]he inclusion of these specific terms of probation in the [Organizational] Guidelines could make it more difficult for a corporate defendant to argue against a sentence that includes a monitor or to resist potentially onerous inspection and reporting conditions."⁹⁰

Finally, the proposed amendments consider the alteration of the current policy that the reduction in a corporation's fine for having an effective compliance and ethics program is not

⁸⁶ Cristie L. Ford & David W. Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 686-87 (2009) (citations omitted) [hereinafter Ford & Hess, *Corporate Monitorships*].

⁸⁷ *Id.* at 687.

⁸⁸ U.S. SENTENCING GUIDELINES MANUAL § 8D1.1(a)(6) (2004). The organization may also be required to develop an effective compliance and ethics program. *Id.* § 8D1.4(c)(1). In assessing "the efficacy of a compliance and ethics program submitted by the organization, the court may employ appropriate experts who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment of the proposed program." *Id.* § 8D1.4 cmt. 1. If the organization repeatedly violates the terms of probation, the Organizational Guidelines specifically allow the court to appoint a special master or trustee to ensure compliance with the court orders. *Id.* § 8F1.1 cmt. 1.

⁸⁹ PROPOSED AMENDMENTS, *supra* note 81, at 34-35.

⁹⁰ *Sentencing of Corporations*, *supra* note 81, at 2-3.

available if “high-level personnel” “participated in, condoned, or w[ere] willfully ignorant of the offense.”⁹¹ The proposed amendments request comments regarding whether the Sentencing Commission should amend this policy to permit an organization to receive the reduction for having an effective compliance program even when high-level personnel are involved in the offense if “(A) the individual(s) with operational responsibility for compliance in the organization have direct reporting authority to the board . . .; (B) the compliance program was successful in detecting the offense prior to discovery or reasonable likelihood of discovery outside of the organization; and (C) the organization promptly reported the violation to the appropriate authorities?”⁹² If the Sentencing Commission were to effectuate this change, corporations would have a strong incentive to “self-report criminal conduct of high-level executives” and to alter its reporting structure to ensure that it provides for direct reporting.”⁹³

II. DEFERRED AND NON-PROSECUTION AGREEMENTS

The use of deferred and non-prosecution agreements has been on the rise in the corporate context,⁹⁴ likely due to some combination of (or all of) the following factors: changes in corporate charging decisions forged by the Thompson Memo, an “increased emphasis on curtailing corporate fraud in the post-Enron world, a desire to avoid collateral consequences of prosecution such as seen in the *Arthur Andersen, LLP* case, a corporate need to contain possible civil litigation resulting from prosecution, or nothing more than an increased flexing of prosecutorial power.”⁹⁵ Below, the Article discusses the differences and similarities between

⁹¹ U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f)(1)(3)(A) (2004).

⁹² PROPOSED AMENDMENTS, *supra* note 81, at 41.

⁹³ *Sentencing of Corporations*, *supra* note 81, at 3.

⁹⁴ See Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L. J. 1, 4 (2007) (“Recently, prosecutors have been routinely using deferred prosecution agreements in the corporate context.”).

⁹⁵ *Id.* at 5.

DPAs and NPAs, as well as their use, and examines courts' and commentators' views on such agreements.

A. Deferred Prosecution Agreements

Deferred prosecution agreements typically require prosecutors to file criminal charges against a corporation while agreeing that these charges will be dismissed within approximately one or two years, unless the company breaches any of the terms of the agreement.⁹⁶ The filing of formal charges typically coincides with the suspension of the application of the Speedy Trial Act⁹⁷ and the tolling of the statute of limitations.⁹⁸

DPAs, like NPAs, impose a variety of conditions and requirements on corporations.⁹⁹ A majority of DPAs, as well as NPAs, call for the corporation to cooperate “with the government in its investigation of culpable individuals . . . [and] accept[] . . . responsibility by acknowledging the acts of its employees.”¹⁰⁰ Such agreements also require the business entity to take on “prospective internal reforms including effective compliance programs and independent monitors, retrospective review of particular financial transactions, and punitive measures, including penalties, restitution and surrender of ill-gotten financial gains.”¹⁰¹ The monetary penalties imposed pursuant to DPAs (and NPAs) vary greatly, ranging from no penalty at all to those numbering in the hundreds or thousands of millions of dollars.¹⁰² Moreover, along with

⁹⁶ See Wray & Hur, *supra* note 46, at 1104.

⁹⁷ See Griffin, *supra* note 36, at 322; see also 18 U.S.C. § 3161(h)(2) (2000) (stating that the speedy trial requirement does not pertain to periods of delay “during which prosecution is deferred” pursuant to an agreement between parties).

⁹⁸ Griffin, *supra* note 36, at 322

⁹⁹ See Erik Paulsen, Comment, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. Rev. 1434, 1439 (2007) (listing the potential conditions and requirements that DPAs and NPAs could impose on organizations).

¹⁰⁰ Wray & Hur, *supra* note 46, at 1104.

¹⁰¹ *Id.*; see also Griffin, *supra* note 36, at 322 (“Companies will often be required to engage the services of a monitor or examiner during the diversion period to review and report on compliance efforts.”).

¹⁰² Commentators have argued that while the “DOJ has, on average, pursued substantial cases involving relatively large costs,” it does not appear “to rely on fines for deterrence, but rather on civil remedies such as restitution, disgorgement, and civil compensation, with a small proportion of payment as fines. In so doing, the agreements

providing for corporate fines and penalties, DPAs (and NPAs) “may require companies to disgorge any gains from the misconduct that ha[ve] not and will not be paid as restitution or by way of other remedial measures.”¹⁰³ Finally, most DPAs (and NPAs) contain provisions “prohibiting the company f[rom] making any statement that contradicts the facts as laid out in the agreement [] and . . . giving DOJ sole discretion to determine whether the agreement has been breached by the company.”¹⁰⁴

A number of corporations have signed DPAs with the government within the last several years in lieu of facing criminal charges for their allegedly unlawful conduct.¹⁰⁵ For example, pursuant to its DPA, Computer Associates International, Inc. (“Computer Associates”), a New York based software producer, admitted that it committed accounting fraud and inflated earning reports, agreed to pay \$225 million in restitution to its shareholders, waived attorney-client privilege, added independent directors to its Board of Directors, consented to furthering corporate governance reforms, and hired a compliance monitor in exchange for the government’s deferral of prosecution for eighteen months.¹⁰⁶ Computer Associates also

comport with the Guidelines’ emphasis on providing restitution to victims.” Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 900 (2007) [hereinafter Garrett, *Structural Reform*]; see also U.S. SENTENCING GUIDELINES MANUAL § 8B1.1 (2005); cf. 18 U.S.C. § 3572(b) (2000) (“[T]he court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.”).

In 2009, however, the government tended to impose much higher financial penalties on corporations than had previously been seen. See Gibson Dunn—2009 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements, <http://www.gibsondunn.com/publications/pages/2009YearEndUpdateCorpDeferredProsecutionAgreements.aspx> (last visited Mar. 2, 2010) [hereinafter Year-End Update]. In 2008, the largest monetary penalty “was \$75 million against Milberg Weiss. In 2009, however, there were five DPAs or NPAs with penalties greater than \$75 million—UBS, \$780 million; Credit Suisse, \$268 million; Lloyds TSB, \$175 million; Party Gaming, \$105 million; and WellCare, \$80 million.” *Id.* Indeed, “the \$780 million penalty assessed against UBS for tax fraud is almost three times more than the total penalties assessed in *all* DPAs and NPAs during 2008.” *Id.*

¹⁰³ Wray & Hur, *supra* note 46, at 1105.

¹⁰⁴ Year-End Update, *supra* note 102.

¹⁰⁵ From 2000 to 2009, the DOJ entered into 131 DPAs and NPAs with corporate entities. See *id.* The number of DPAs and NPAs was negligible until 2003 and did not enter the double-digits until 2004. See *id.* In 2009, the DOJ entered into eighteen DPAs and NPAs, only one less than in 2008, but twenty-one less than in 2007. See *id.*

¹⁰⁶ See Wray & Hur, *supra* note 46, at 1140 (citing Deferred Prosecution Agreement ¶¶ 2-5, 12, 14, 19-23, United States v. Computer Assocs. Int’l, Inc., Cr. No. 04-837 (E.D.N.Y. Sept. 22, 2004) [hereinafter Computer Associates DPA]).

undertook a number of organizational reforms and agreed that it would not “make any public statement . . . contradicting its acceptance of responsibility or the allegations set forth in the [deferred prosecution agreement].”¹⁰⁷

Other high-profile companies such as Bristol-Meyers Squibb¹⁰⁸ and PNC Bank¹⁰⁹ have also signed DPAs to avoid being prosecuted by the government.¹¹⁰ Depending on the severity of the alleged wrongdoing, some DPAs have imposed quite restrictive, and at times innovative demands upon corporations, particularly in comparison to the Computer Associates Deferred Prosecution agreement.¹¹¹

For instance, in the DPA between WorldCom, Inc. and the State of Oklahoma,¹¹² WorldCom agreed to “pay \$750 million in restitution to the Company’s former shareholders”¹¹³ and to appoint an “entirely new” CEO, CFO, General Counsel, and Board of Directors.¹¹⁴ Roger Williams Medical Center (“RWMC”), in its DPA with the United States Attorney’s Office for the District of Rhode Island, stipulated that it would “provide \$4,000,000 worth of free and uncompensated medical care to the Rhode Island public over the next two years at a rate of

¹⁰⁷ Computer Associates DPA, *supra* note 106, ¶ 27.

¹⁰⁸ See *generally* Deferred Prosecution Agreement, United States v. Bristol-Myers Squibb Co. (D. N.J. June 13, 2005), <http://www.corporatecrimereporter.com/documents/bsm.pdf> (setting out the terms of the Bristol-Meyers Squibb deferred prosecution agreement with the government) [hereinafter Bristol-Meyers Squibb DPA].

¹⁰⁹ See *generally* Deferred Prosecution Agreement, United States v. PNC ICLC Corp., No. 2:03-mj-00187-ARH-ALL (W.D. Pa. July 29, 2003).

¹¹⁰ See Wray & Hur, *supra* note 46, at 1139-1141 (describing the deferred prosecution agreements signed by a number of high-profile corporations).

¹¹¹ It appears, however, that this practice may have come to an end after the DOJ released guidelines barring the “practice of extraordinary restitution,” which includes monetary donations to uninjured third-parties. See Year-End Update, *supra* note 102.

¹¹² See Barnaby J. Feder & Kurt Eichenwald, *A State Pursues WorldCom: Effects Seen on U.S. Case*, N.Y. TIMES, Aug. 28, 2003, at C1 (stating that “Oklahoma charged [WorldCom] and six of its former executives, including Bernard J. Ebbers, WorldCom’s longtime chief executive, with 15 felony violations of the state’s securities laws” and explaining that “[e]ach of the 15 counts in Oklahoma’s complaint is tied to financial reports WorldCom made to the S.E.C., starting in fall 2000. The complaint said that the misrepresentation of WorldCom’s finances induced Oklahoma’s pension funds to buy WorldCom stocks and bonds WorldCom’s subsequent collapse cost the funds \$64 million”).

¹¹³ Deferred Prosecution Agreement at 1, *In re WorldCom, Inc. Securities Litigation*, No. 02 CIV 3288 DLC, 03 CIV 1785 (S.D.N.Y. Mar. 12, 2004) [hereinafter WorldCom DPA].

¹¹⁴ See *id.*

\$2,000,000 per year. This annual free and uncompensated medical care [would] be over and above that care which RWMC [was] required to provide by law”¹¹⁵ Several other corporations have agreed to donate funds to specific causes or non-profit organizations pursuant to their DPAs.¹¹⁶ Finally, at least two corporations have consented to sponsoring professorships in subject areas relating to their allegedly wrongful conduct. Bristol-Meyers Squibb agreed to endow the chair in ethics at Seton Hall Law School¹¹⁷ and Operations Management International, Inc. agreed to fund a chair in environmental studies at the United States Coast Guard Academy.¹¹⁸

B. Non-Prosecution Agreements

Non-prosecution agreements, though usually encompassing many of the attributes of deferred prosecution agreements, do not involve the formal filing of criminal charges by the prosecutor against the corporation.¹¹⁹ Although NPAs “allow the company to avoid any potential collateral consequences associated with the mere fact that the company has been charged with a

¹¹⁵ Deferred Prosecution Agreement ¶ 12, *United States v. Urciuoli*, 470 F. Supp. 2d 109 (D.R.I. 2007) (CR No. 06-02-T), http://lawprofessors.typepad.com/whitecollarcrime_blog/files/roger_williams_deferred_sentence_agreement.pdf.

¹¹⁶ See Lawrence D. Funder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice’s Corporate Charging Policies*, 51 ST. LOUIS U. L. J. 1, 20 (2006) (referencing the requirement that FirstEnergy Nuclear Operating Company, which was accused of violating certain environmental law provisions, donate over \$1 million dollars to “Habitat for Humanity to build energy efficient homes” and donate funds “to the University of Toledo to be used to develop energy efficient technologies” pursuant to its DPA); see also Deferred Prosecution Agreement at 8, *United States v. Operations Mgmt. Int’l, Inc.* (D. Conn. Feb. 2006), <http://www.corporatecrimereporter.com/documents/OMIAgreement.doc> (last visited Mar. 3, 2010) [hereinafter *Operations Management International DPA*] (stipulating that the corporation donate “\$1 million to the Greater New Haven Water Pollution Control Authority (WPCA), New Haven, Connecticut, to fund one or more of specific facility and environmental improvement projects and to the Long Island Sound Fund and/or Study, if funds remain available”).

¹¹⁷ See Bristol-Meyers Squibb DPA, *supra* note 108, ¶ 20. The agreement provided that Bristol-Meyers Squibb “shall endow a chair at Seton Hall University School of Law dedicated to the teaching of business ethics and corporate governance,” and that an individual employed in this position shall conduct “one or more seminars per year on business ethics and corporate governance at Seton Hall University School of Law that members of [Bristol-Meyers Squibb’s] executive and management staff, along representatives of the executives and management staffs of other companies in New Jersey area, may attend.” *Id.*

¹¹⁸ See *Operations Management International DPA*, *supra* note 116.

¹¹⁹ See Wray & Hur, *supra* note 46, at 1105; see also Year-End Update, *supra* note 102 (explaining that the major difference between a DPA and an NPA “is whether a criminal information is filed in a federal court. With a corporate DPA, the information . . . [and] the DPA itself[] are filed with and must be approved by a federal district court,” while “NPAs are typically between the corporation and the government and nothing is filed or approved by a court”).

crime, . . . they still require public acceptance of responsibility, restitution, and surrender of ill-gotten gains, full cooperation, and implementation of remedial measures.”¹²⁰ In addition, as is true of DPAs, the government reserves the right to prosecute the business entity if it fails to comply with any part of its NPA.¹²¹

Major corporations such as Adelphia Communications Corporation,¹²² the Bank of New York (“BNY”),¹²³ and Merrill Lynch¹²⁴ have entered into NPAs with the government.¹²⁵ In its NPA, for example, BNY accepted responsibility for the misconduct of its employees, who “(a) aided and abetted the fraudulent activities of RW Professional Leasing Services Corp. (“PLS”) by executing sham escrow agreements . . . ; and (b) willfully failed to . . . file a Suspicious Activity Report (“SAR”) . . . and failed to notify law enforcement authorities of suspicious activities relating to PLS and the escrow agreements.”¹²⁶

The measures that BNY was required to take pursuant to its NPA in order to avoid being criminally charged by the government closely resemble those typically included in DPAs.¹²⁷ BNY had to disclose all information relevant to the government’s investigation of its conduct.¹²⁸

¹²⁰ Wray & Hur, *supra* note 46, at 1105.

¹²¹ *See id.*

¹²² *See* Press Release, U.S. Attorney’s Office for the S. Dist. of N.Y., Government Receives Over \$530 Million for Victims in Adelphia Fraud/Forfeiture Action (Feb. 23, 2007), <http://www.usdoj.gov/usao/nys/pressreleases/February07/adelphiaforfeiturepr.pdf> (providing the terms of the government’s NPA with Adelphia Communications Corporation).

¹²³ Non-Prosecution Agreement, United States v. Bank of New York (Nov. 4, 2005), <http://www.secinfo.com/d9cw.z74.c.htm> [hereinafter BNY NPA].

¹²⁴ *See generally* Letter from U.S. Dep’t of Justice to Robert S. Morvillo, Esq. & Charles Stillman, Esq. (Sept. 17, 2003), [http://www.nacdl.org/public.nsf/whitecollar/wc_DPA/\\$FILE/Merrill_Lynch_Agreement.pdf](http://www.nacdl.org/public.nsf/whitecollar/wc_DPA/$FILE/Merrill_Lynch_Agreement.pdf) [hereinafter Merrill Lynch NPA] (setting out the terms of the Merrill Lynch non-prosecution agreement) [hereinafter Merrill Lynch NPA].

¹²⁵ *See* Wray & Hur, *supra* note 46, at 1142 (surveying several corporations’ non-prosecution agreements with the government).

¹²⁶ BNY NPA, *supra* note 123, ¶ 1.

¹²⁷ It is likely that BNY’s high level of cooperation with the government’s investigation and its willingness to acknowledge wrongdoing, combined with the fact that a seemingly isolated subset of employees was engaged in the unlawful conduct, led to this agreement being an NPA, as opposed to a DPA.

¹²⁸ BNY NPA, *supra* note 123, ¶ 7.

Additionally, BNY agreed to “pay a total of twelve million dollars . . . into a fund established to make restitution to any banking institutions that suffered losses in reliance on BNY Escrow Agreements,”¹²⁹ forfeit its rights to twenty-six million dollars in illegal profits,¹³⁰ undertake a number of remedial measures with respect to its procedures of reporting suspicious banking activities, and retain an independent examiner who would ensure BNY’s compliance with the agreement for a period of three years.¹³¹

Similarly, Merrill Lynch, in its NPA with the DOJ, agreed to truthfully disclose any information it had with respect to the potentially criminal actions of its employees,¹³² to accept responsibility for these actions,¹³³ and to adopt and implement new procedures “relating to the integrity of client and counterparty¹³⁴ financial statements and year-end transactions.”¹³⁵

Although corporations such as BNY sign NPAs specifically to stay in business and to avoid a nearly certain demise,¹³⁶ some NPAs have effectively put the given corporation out of

¹²⁹ *Id.* ¶ 8.

¹³⁰ *Id.* ¶ 9.

¹³¹ *Id.* ¶ 10-12.

¹³² See Merrill Lynch NPA *supra* note 124, ¶¶ 1 n.1, 4 (specifically singling out “a) Merrill’s temporary “purchase” from Enron of Nigerian Power barges . . . and subsequent sale of the barges; and b) offsetting energy trades involving back-to-back options . . .”).

¹³³ See *id.* ¶ 7.

¹³⁴ According to the Merrill Lynch NPA, this term refers to “any U.S. corporation that is registered under the Securities Exchange Act of 1934, any domestic or foreign affiliate of such corporation, any entity directly or indirectly controlled by such corporation, and any special entity set up by such corporation.” *Id.* Ex. A at 5.

¹³⁵ *Id.* ¶ 8.

¹³⁶ See Edward Iwata, *Debate Heats Up on Justice’s Deferred Prosecution Deals*, USA TODAY, May 31, 2006, http://www.usatoday.com/money/companies/regulation/2006-05-30-justice-usat_x.htm (“Even if a company doesn’t go under or face an indictment, the threat of prosecution can hobble a business A potential trial drains money and resources. Morale among employees suffers, and many look for new jobs. The business must deal with the stigma of criminal charges and face the full legal firepower of the government. That’s why nearly all businesses facing potential charges yield to prosecutors.”); Michael R. Sklaire & Joshua G. Berman, *Deferred Prosecution Agreements: What is the Cost of Staying in Business?*, LEGAL OPINION LETTER (Wash. Legal Found., Washington D.C.), June 3, 2005, at 1, available at <http://www.wlf.org/upload/060305LOLSklaire.pdf> (“In the post-Andersen era, the advantages of deferred prosecution to a corporation that wishes to stay in business are obvious. Many companies will enter into what may seem an onerous deal in order to avoid the stigma of a highly publicized indictment and the penalties that may follow a felony conviction, and to use the agreement as a mechanism to sell reforms to the board of directors.”).

business. For example, the demanding requirements of its NPA caused the Dallas-based law firm of Jenkins & Gilchrist to close all of its offices and to terminate its practice in the field of law.¹³⁷ Such occurrences, however, are generally limited to relatively small corporations, which have committed an extensive number of high-cost violations; otherwise, corporations' attraction to DPAs and NPAs would not be so strong.¹³⁸

C. Courts' Views of the Government's Use of Deferred and Non-Prosecution Agreements

Although the U.S. Code suggests that DPAs and NPAs should be filed with and approved by a court,¹³⁹ many such agreements are not submitted to courts at all.¹⁴⁰ Moreover, despite frequent criticism by scholars regarding the use of these agreements,¹⁴¹ courts have been nearly unanimous in their acceptance of DPAs and NPAs.¹⁴²

¹³⁷ See Press Release, U.S. Attorney's Office for the S. Dist. of N.Y., U.S. Enters Non-Prosecution Agreement With Jenkins & Gilchrist in Connection With its Fraudulent Tax Shelter Activity at 1-2 (Mar. 29, 2007), <http://www.usdoj.gov/usao/nys/pressreleases/March07/jenkins&gilchristnppr.pdf> (“[Jenkins & Gilchrist] was once a thriving firm with over 600 attorneys and offices across the nation. Approximately two-thirds of those attorneys left, and its revenues declined sharply, as Government scrutiny of the firm's tax shelter practices intensified The firm has advised the Office that . . . it will be closing the last of its offices—its flagship office in Dallas—at the end of the month, and that J&G will no longer engage in the practice of law.”).

¹³⁸ Indeed, the number of NPAs has been rising steadily over the past several years. In 2009, fifty percent of the prosecution agreements entered into by corporations and the DOJ were NPAs, as compared to thirty-two percent in 2008. See Year-End Update, *supra* note 102. This increase could be attributed to the more desirable nature of NPAs or reflect the fact that “more companies are self-reporting suspected violations, . . . [as it appears] that DOJ is more likely to grant an NPA to a company that self discloses.” *Id.*

¹³⁹ 18 U.S.C. § 3161(h)(2) (stating that the time to file an indictment is tolled during “[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, *with the approval of the court*, for the purpose of allowing the defendant to demonstrate his good conduct”) (emphasis added). But see Garrett, *Structural Reform*, *supra* note 102, at 922 (noting that there is no case law or commentary interpreting this provision).

¹⁴⁰ See F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View From the Trenches and a Proposal for Reform*, 93 VA. L. REV. IN BRIEF 121, 122 n.4 (2007), <http://www.virginialawreview.org/inbrief/2007/06/18/warin.pdf>.

¹⁴¹ See John C. Coffee, *Deferred Prosecution: Has It Gone Too Far?*, NAT'L L. J., July 25, 2005, at 13 (arguing that concessions made by corporations in signing DPAs and NPAs and the invasive nature of federal “cooperation” required from corporations in accordance with these agreements raises the question of whether the practice of pre-trial diversion has “gone too far”); Russell Mokhiber & Robert Weissman, *Multiple Corporate Personality Disorder: The 10 Worst Corporations of 2003*, THE MULTINATIONAL MONITOR, Dec. 2003, <http://www.multinationalmonitor.org/mm2003/03december/deco3corp1.html> (contending that “immunity agreements, known as deferred prosecution agreements, or pre-trial diversion, were previously reserved for minor street crimes . . . they were never intended for major corporate crimes” and suggesting that only “flesh and blood human beings,” and not corporations, should be held responsible for their “crimes and misdeeds”).

¹⁴² See Garrett, *Structural Reform*, *supra* note 102, at 922 (“Every judge approving a deferred prosecution agreement has done so without any published rulings or modifications to the agreement.”). Further, “[c]ourts have not

At least one federal district court judge has held, however, that the DPA between the government and KPMG LLP, a major accounting firm, violated the Fifth and Sixth Amendment rights of certain employees, whom KPMG refused to indemnify pursuant to the Thompson Memo's directives in the hopes of demonstrating its compliance with the government's investigation.¹⁴³ Given the recent alterations of corporate charging policy by the DOJ through documents such as the McNulty Memo, which eliminated the troubling aspects of the charging policy advanced by the Thompson Memo, particularly negating the Thompson Memo's stance that corporations that do not waive attorney-client and work product privileges and that indemnify their employees are not cooperating with the government,¹⁴⁴ such a litigation outcome¹⁴⁵ is not likely to occur frequently.

In addition, recent decisions have suggested that some courts are even willing to accept the government's implementation of the now-disfavored Thompson Memo. For example, in *United States v. Rosen*,¹⁴⁶ the United States District Court for the Eastern District of Virginia held that the government's reliance on the Thompson Memo "to pressure defendants' employer, the American Israel Public Affairs Committee (AIPAC), to terminate defendants from their jobs

intervened at the approval stage during which the parties negotiate and agree on the terms of a structural reform prosecution agreement. . . . None have suggested how judges can review such charging decisions." *Id.*

¹⁴³ See *United States v. Stein*, 435 F. Supp. 2d 330, 382 (S.D.N.Y. 2006) ("[S]o much of the Thompson Memorandum and the activities of the USAO as threatened to take into account, in deciding whether to indict KPMG, whether KPMG would advance attorneys' fees to present or former employees in the event they were indicted for activities undertaken in the course of their employment interfered with the rights of such employees to a fair trial and to the effective assistance of counsel and therefore violated the Fifth and Sixth Amendments to the Constitution."); see also *supra* note 40 and accompanying text (describing Judge Kaplan's holding that the DPA between KPMG and the government violated the defendant employees' rights and his concerns with the Thompson Memo).

¹⁴⁴ Moreover, the McNulty Memo expressly provided safeguards to ensure that prosecutors do not abuse their power and continue to require corporations to waive attorney-client and work product privileges and to abstain from indemnifying their employees. See *supra* notes 41-44 and accompanying text (providing an overview of these safeguards). These measures have been preserved, to some extent, in the subsequent iterations of corporate charging policies issued by the DOJ. See *supra* notes 48-70 and accompanying text (describing the corporate charging policies following in the wake of the McNulty Memo).

¹⁴⁵ Meaning that a decision that the government's DPA or NPA with a particular entity will be overturned by the court because it violates the rights of the corporation or of its employees.

¹⁴⁶ *United States v. Rosen*, 487 F. Supp. 2d 721 (E.D. Va. 2007).

and to cease advancing defendants' attorneys' fees for their defense in this case"¹⁴⁷ did not violate the defendants' "constitutional rights under the Fifth and Sixth Amendments by depriving them of both due process of law and the right to counsel."¹⁴⁸ This court did state that the result it reached was not "an endorsement of the Thompson Memorandum policy directive with respect to an organization's payment or advancement of attorney fees for employees who are targets or subjects of criminal investigations. Indeed, that policy is unquestionably obnoxious in general and is fraught with the risk of constitutional harm in specific cases."¹⁴⁹ It ultimately held, however, that because it is a defendant's right to retain counsel of choice, no relief was warranted, "as no prejudice to the defense resulted from the government's interference with defendants' right to have AIPAC pay their attorneys."¹⁵⁰

D. Commentators' Views of the Government's Use of Deferred and Non-Prosecution Agreements

Commentators generally express concern regarding the government's use of DPAs and NPAs. One significant and frequently raised issue is the bargaining imbalance between corporations and the government. Many scholars argue that "prosecutors abuse their powerful bargaining position" in forcing organizations to agree to "overly intrusive—and in some cases arguably arbitrary—terms."¹⁵¹

Another concern relates to the implementation of compliance programs that meet the demands of the government. Some contend that these programs are too costly and require the

¹⁴⁷ *Id.* at 722-23.

¹⁴⁸ *Id.* at 723.

¹⁴⁹ *Id.* at 737.

¹⁵⁰ *Id.*

¹⁵¹ David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT'L L. J. 307, 310 (2008) (citing Joan McPhee, *Deferred Prosecution Agreements: Ray of Hope or Guilty Plea by Another Name?*, THE CHAMPION, Sept./Oct. 2006, at 12, 14) [hereinafter Hess & Ford, *Corporate Corruption*]; see also Garrett, *Structural Reform*, *supra* note 102, at 918 (contemplating possible abuses in the terms and the implementation of DPAs and NPAs); Paulsen, *supra* note 99, at 1436 (arguing that "the government holds all the cards in negotiations over" DPAs and NPAs and that "[a]s long as the threat of prosecution lingers over a company, the corporation is compelled to agree to the prosecutor's terms, vesting nearly absolute power in the government's hands. Unable to risk a potential indictment, the corporation is thus left at the mercy of the prosecutor").

use of “corporate monitors without clearly defined powers as to who can take actions adverse to shareholder interests.”¹⁵² Further, DPAs and NPAs, specifically the monetary fines imposed pursuant to these agreements, are imperfect tools for effecting wide-spread cultural or institutional change within a corporation¹⁵³ and for instilling a sense of responsibility and of the importance of self-regulation.¹⁵⁴

On the other side of the spectrum, some have argued that DPAs and NPAs result in “crime without conviction” because the penalties they impose on organizations are not severe enough.¹⁵⁵ Generally, corporations signing DPAs and NPAs are able to survive and rebuild, which would be virtually impossible if they were indicted by the government. In this sense, corporations do not feel the full force of their wrongful conduct.

It does appear that DPAs and NPAs are the DOJ’s tools of choice for imposing liability on corporations.¹⁵⁶ To that end, several solutions have been proposed in an effort to address concerns relating to the drafting and implementation of DPAs and NPAs. While one generally disfavored solution is completely changing the law of corporate criminal liability,¹⁵⁷ commentators have also made proposals that can be divided into two categories: (1): having

¹⁵² Hess & Ford, *Corporate Corruption*, *supra* note 151 (citing Jennifer O’Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 BROOK. J. CORP. FIN. & COM. L. 89, 102-206 (2006)).

¹⁵³ *Id.* at 311 (citing Cristie L. Ford, *Toward a New Model for Securities Law Enforcement*, 57 ADMIN. L. REV. 757, 766–74 (2005)).

¹⁵⁴ *See id.*

¹⁵⁵ *See id.* at 310; *see also* Garrett, *Structural Reform*, *supra* note 102, at 856 (citing Letter from Ralph Nader & Robert Weissman to Alberto Gonzales, Attorney Gen. (June 5, 2006), posted at Multinational Monitor Editor’s Blog, <http://multinationalmonitor.org/editorsblog/index.php?/archives/26-The-Boeing-DOJ-Debate.html> (July 6, 2006, 15:34 EST)) (noting that critics of the DOJ strategy with respect to DPAs and NPAs “with a different perspective, such as Ralph Nader, called failures to convict organizations a ‘shocking’ and ‘systematic derogation’ of the DOJ’s duty to seek justice”).

¹⁵⁶ *See* Finder & McConnell, *supra* note 116, at 3 (“Absent pervasive, endemic criminal activity within the organization, both sides have learned that these agreements serve as a valuable tool that prosecutors may use to avoid the collateral consequences that occurred in Andersen and to focus instead on individual wrongdoers.”).

¹⁵⁷ Paulsen, *supra* note 99, at 1436-1437.

prosecutors voluntarily constrain their own discretion in organizational cases; and (2) having “judges narrow federal organizational criminal law.”¹⁵⁸

Examples of the first category proposals include channeling decisions related to DPAs and NPAs “through a formal approval process at the DOJ in Washington, D.C.” rather than allowing individual federal prosecutors to make decisions regarding these agreements¹⁵⁹ and requiring the government to retain an independent monitor having direct obligations to the government agency.¹⁶⁰ Second category proposals include permitting judges to vitiate DPA or NPA “provisions that attempt to contract around judicial review and encroach on prosecutorial discretion,”¹⁶¹ to act as fiduciaries for “constituencies otherwise unrepresented in the corporate deferral process and potentially vulnerable to negative externalities,”¹⁶² to take the place of independent civil monitors in supervising organizational compliance with the conditions of DPAs and NPAs,¹⁶³ or to provide pre-indictment hearings to afford organizations due process if the DOJ takes advantage of a DPA or NPA provision allowing it to “unilaterally assert a breach, terminate the agreement, and then pursue a criminal prosecution of the [relevant] organization.”¹⁶⁴

¹⁵⁸ Garrett, *Structural Reform*, *supra* note 102, at 931.

¹⁵⁹ Paulsen, *supra* note 99, at 1437.

¹⁶⁰ Hess & Ford, *Corporate Corruption*, *supra* note 151, at 312. This monitor’s role would include auditing “corporate efforts to implement or improve compliance programs and internal controls, as well as . . . ensur[ing] their effectiveness through changes in an organization’s software.” *Id.* at 340; *see also* Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1720-26 (2007).

¹⁶¹ Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred?: Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1900 (2005).

¹⁶² *Id.* at 1901. In this capacity, judges would protect “parties whose interests may be unnecessarily compromised by the prosecutor’s unilateral imposition of the deferral terms. [Specifically, judges] would look out for the employees whose jobs or attorney-client confidences are jeopardized and for the investors who bear much of the brunt of penalties and obligations imposed on the corporation.” *Id.*

¹⁶³ *See* Garrett, *Structural Reform*, *supra* note 102, at 926-27.

¹⁶⁴ *Id.* at 928; *cf.* United States v. Meyer, 157 F.3d 1067, 1076-77 (7th Cir. 1998) (recommending the use of pre-indictment hearings); United States v. Miller, 406 F.3d 323, 334 (5th Cir. 2005) (“In the context of non-prosecution agreements the government is prevented by due process considerations from unilaterally determining that a defendant is in breach and nullifying the agreement.”); United States v. Castaneda, 162 F.3d 832, 835-36 (5th Cir. 1998) (requiring a showing of “material breach” prior to allowing the government to prosecute a defendant with whom it had a deferred prosecution agreement); United States v. Ataya, 864 F.2d 1324, 1330 n.9 (7th Cir. 1988) (“A

III. *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*

Citizens United has a lengthy and convoluted history. Originally, the case was brought by Citizens United, a “grassroots advocacy organization,”¹⁶⁵ against the Federal Election Commission (“FEC”) in December 2007. The organization argued, in connection with its anticipated release via video on-demand of a “hard-hitting political documentary, *Hillary: The Movie* (“*Hillary*”),”¹⁶⁶ that the First Amendment protects issue-oriented television advertisements and, as a result, these advertisements should not be subject to the disclosure requirements promulgated by the Bipartisan Campaign Reform Act of 2002 (“BCRA”),¹⁶⁷ otherwise known as the McCain-Feingold campaign finance law.¹⁶⁸

Specifically, Citizen United’s lawsuit implicated those sections of the BCRA that prohibit the airing of television advertisements prior to elections that mention the name of a federal candidate (otherwise known as “electioneering communications”).¹⁶⁹ Citizens United contended that the BCRA’s requirements that groups put disclaimers on such ads¹⁷⁰ and file reports

pre-indictment hearing would help prevent overreaching by prosecutors . . . in the drafting of ambiguous plea agreements”); *United States v. Verrusio*, 803 F.2d 885, 888 (7th Cir. 1986) (concluding that the preferred procedure, “absent exigent circumstances,” is for the government to seek a hearing pre-indictment to seek relief from an agreement).

¹⁶⁵ Press Release, Citizens United, New Court Battle With FEC Over Hillary Clinton (Dec. 14, 2007), <http://www.citizensunited.org/PRESS.ASPX?ENTRYID=9966133>.

¹⁶⁶ *Id.*

¹⁶⁷ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified at 2 U.S.C. §§ 431-455 (2006)).

¹⁶⁸ Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 758 n. 136 (2009).

¹⁶⁹ 2 U.S.C. § 434(f)(3)(A)(i) (West 2009). In *McConnell v. FEC*, 540 U.S. 93, 103 (2003), the Supreme Court found the electioneering communications provision not to be unconstitutionally vague and upheld it. In *FEC v. Wisconsin Right to Life, Inc.*, however, the Court retreated from *McConnell* and held that the BCRA’s electioneering communication ban could not be applied to any ad unless it was “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” 551 U.S. 449, 127 S. Ct. 2652, 2667 (2007).

¹⁷⁰ See 2 U.S.C. § 441d(d)(2)-(3) (West 2009) (stating that in advertisements not authorized by a candidate or her political committee, the statement “___ is responsible for the content of this advertising” must be spoken during the advertisement and must appear in text on-screen for at least four seconds during the advertisement and requiring that such advertisements must include the name, address, and phone number or web address of the organization sponsoring the advertisement; this provision is also known as Section 311).

containing information about the ads, including their contributors,¹⁷¹ are unconstitutional as they apply to *Hillary: The Movie* and its accompanying advertisements.¹⁷² Additionally, it claimed that the BCRA provision prohibiting corporations and unions from funding electioneering communications out of their general treasury funds unless the communications are made to its stockholders or members, to get out the vote, or to solicit donations for a segregated corporate fund for political purposes,¹⁷³ violates the First Amendment as it applies to *Hillary*.¹⁷⁴

The United States District Court for the District of Columbia declined to grant declaratory and injunctive relief to Citizens United, holding, in a 2008 opinion, that Citizens United could not prevail “in the face of *McConnell’s* ruling that the disclosure and disclaimer provisions are constitutional and that the restriction on corporate speech advocating the defeat of a candidate does not violate the First Amendment.”¹⁷⁵ Approximately six months later, the court granted summary judgment to the FEC,¹⁷⁶ concluding that the BCRA’s disclosure and disclaimer requirements and prohibition of the video on-demand distribution of *Hillary* were constitutional.¹⁷⁷

¹⁷¹ See 2 U.S.C. §§ 434(f)(1), (2)(F) (West 2009); 11 C.F.R. § 104.20(c)(9) (requiring that any corporation spending more than \$10,000 in a calendar year to produce or air electioneering communications file a report with the FEC that includes—among other things—the names and addresses of anyone who contributed \$1,000 or more in aggregate to the corporation for the purpose of furthering electioneering communications; this provision is also known as Section 201).

¹⁷² See *Citizens United v. FEC (Citizens United I)*, 530 F. Supp. 2d 274, 277 (D.D.C. 2008).

¹⁷³ 2 U.S.C. § 441b(b)(2) (West 2009). This provision does not bar electioneering communications paid for out of a segregated fund that receives donations only from stockholders, executives, and their families. 2 U.S.C. §§ 441b(b)(2)(C), (b)(4)(A). Any electioneering communication that is not prohibited by this provision is subject to the disclosure requirements of § 201 and the disclaimer requirements of § 311. See *supra* note 171.

¹⁷⁴ See *Citizens United I*, 530 F. Supp. 2d at 277.

¹⁷⁵ *Id.* at 282.

¹⁷⁶ *Citizens United v. FEC (Citizens United II)*, No. 07-2240, 2008 WL 2788753, at *1 (D.D.C. July 18, 2008).

¹⁷⁷ See *id.* (relying on the holding in *Citizens United I*).

Citizens United appealed directly to the Supreme Court pursuant to a special provision of the BCRA.¹⁷⁸ The Court noted probable jurisdiction.¹⁷⁹ The case was initially argued on March 24, 2009.¹⁸⁰ Subsequently, the Court asked the parties to file supplemental briefs addressing whether the Court should overrule either or both *McConnell* and *Austin v. Michigan State Chamber of Commerce*,¹⁸¹ on which *McConnell* relied and which upheld the constitutionality of 2 U. S. C. §441b.¹⁸² The case was reargued on September 9, 2009.¹⁸³

The Supreme Court, with Justice Anthony Kennedy writing for the majority, held that “[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”¹⁸⁴ As a result, the Court expressly overturned *Austin*’s holding that “political speech may be banned based on the speaker’s corporate identity.”¹⁸⁵

Before considering whether it should overrule *Austin*, thereby holding that § 441b violates the First Amendment, the Court focused on whether it could resolve the case on narrower grounds by determining that § 441b did not apply to *Hillary*.¹⁸⁶ Citizens United had advanced four reasons in support of this argument. First, it contended that *Hillary* was not an “electioneering communication” because not it was not “publicly distributed,” as “a single video-on-demand transmission is sent only to a requesting cable converter box and each separate transmission, in most instances, will be seen by just one household—not [by] 50,000 or more

¹⁷⁸ See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 81, 113–14 (giving the Supreme Court authority to hear direct appeals in disputes arising under the BCRA).

¹⁷⁹ 555 U. S. ____ (2008).

¹⁸⁰ *Citizens United v. FEC (Citizens United III)*, 558 U.S. ____ (2010).

¹⁸¹ 494 U.S. 652 (1990).

¹⁸² See 557 U. S. ____ (2009).

¹⁸³ *Id.*

¹⁸⁴ *Citizens United III*, 558 U.S. ____, 130 S. Ct. 876, ____ (2010).

¹⁸⁵ *Id.*

¹⁸⁶ See *id.* at ____.

persons.”¹⁸⁷ Second, Citizens United argued that §441b was inapplicable in this case because *Hillary* was not the “functional equivalent of express advocacy,” as would be required to constitute an “electioneering communication” by the tests articulated in *Wisconsin Right to Life* and *McConnell*.¹⁸⁸ Third, Citizens United stated “that §441b should be invalidated as applied to movies shown through video-on-demand” because “this delivery system has a lower risk of distorting the political process than do television ads.”¹⁸⁹ Finally, Citizens United asked the Court “to carve out an exception to §441b’s expenditure ban for nonprofit corporate political speech funded overwhelmingly by individuals.”¹⁹⁰

The *Citizens United* Court rejected all of these arguments, however, concluding that it could not “resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment.”¹⁹¹ Thus, the Court was compelled to consider “the continuing effect of the speech suppression upheld in *Austin*.”¹⁹²

In doing so, the Court first determined that § 441b is a ban on speech. As it restricts the amount of money a person or group can spend on political communication, the statute “necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”¹⁹³

Laws that burden political speech are strictly scrutinized, meaning that the government must prove that the speech restriction “furthers a compelling interest and is narrowly tailored to

¹⁸⁷ See *id.* at ____.

¹⁸⁸ *Id.* at _____. *McConnell* held that §441b(b)(2)’s definition of an “electioneering communication” was facially constitutional insofar as it restricted speech that was “the functional equivalent of express advocacy” for or against a specific candidate. *McConnell v. FEC*, 540 U.S. 93, 206 (2003). According to *Wisconsin Right to Life*, the functional-equivalent test is objective: “a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-470 (2007).

¹⁸⁹ *Id.* at ____.

¹⁹⁰ *Id.* at ____.

¹⁹¹ *Id.* at ____.

¹⁹² *Id.* at ____.

¹⁹³ *Id.* at ____ (citing *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam)).

achieve that interest.”¹⁹⁴ The First Amendment prohibits attempts to disfavor certain subjects or viewpoints (content-based restrictions)¹⁹⁵ and restrictions distinguishing among different speakers, allowing speech by some, but not by others.¹⁹⁶ Although it acknowledged that it “ha[d] upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, [the Court noted that] these rulings were based on an interest in allowing governmental entities to perform their functions.”¹⁹⁷ As the “corporate independent expenditures at issue in [*Citizens United*], . . . would not interfere with governmental functions,” the Court deemed these rulings to be inapplicable.¹⁹⁸ Thus, the Court found “no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.”¹⁹⁹

The Court then focused specifically on the First Amendment rights of corporations, observing that corporations are protected by the First Amendment²⁰⁰ and that this protection has been “extended by explicit holdings to the context of political speech.”²⁰¹

¹⁹⁴ *Wisconsin Right to Life, Inc.*, 551 U.S. at 464.

¹⁹⁵ See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813-14 (2000) (holding that if a statute “regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative” and concluding that “even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative”).

¹⁹⁶ See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (“We . . . find no support . . . for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property.”).

¹⁹⁷ *Citizens United III*, 558 U.S. at ____; see, e.g., *Bethel School Dist. No. 403 v. Fraser*, 478 U. S. 675, 683 (1986) (protecting the “function of public school education”); *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U. S. 119, 129 (1977) (furthering “the legitimate penological objectives of the corrections system”) (internal quotation marks omitted); *Parker v. Levy*, 417 U. S. 733, 759 (1974) (ensuring “the capacity of the Government to discharge its [military] responsibilities”) (internal quotation marks omitted); *Civil Service Comm’n v. Letter Carriers*, 413 U. S. 548, 557 (1973) (“[F]ederal service should depend upon meritorious performance rather than political service.”).

¹⁹⁸ *Citizens United III*, 558 U.S. at ____.

¹⁹⁹ *Id.* at ____.

²⁰⁰ *Id.* at ____ (citations omitted).

²⁰¹ *Id.* at ____ (citations omitted); see also *Pac. Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion) (quoting *Bellotti*, 435 U. S. at 783) (“The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.”); *Bellotti*, 435 U.S. at 784 (holding that political speech does not lose First Amendment protection “simply because its source is a corporation”).

Austin, according to the Court, was the first decision out of a long line of cases²⁰² that upheld “a direct restriction on the independent expenditure of funds for political speech”²⁰³ In *Austin*, the Michigan Chamber of Commerce sought to use general treasury funds to place an advertisement supporting a specific candidate for the Michigan House of Representatives in a local newspaper.²⁰⁴ Michigan law, however, prohibited corporations from making contributions and independent expenditures in connection with elections for state office.²⁰⁵ A violation of the law was punishable as a felony.²⁰⁶ The Court upheld this law, distinguishing *Buckley* and *Bellotti*, by finding a compelling governmental interest in preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”²⁰⁷

In *Citizens United*, the government acknowledged the so-called antidistortion rationale used in *Austin*, but primarily argued that two other compelling interests supported *Austin*’s holding that corporate expenditure restrictions are constitutional: “an anticorruption interest[,] and a shareholder-protection interest.”²⁰⁸ The Court considered the three arguments in turn. First, it determined that *Austin*’s antidistortion interest could not support §441b because it was inconsistent with the First Amendment protection extended to corporate political speech by

²⁰² See *Bellotti*, 435 U. S. at 783; *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam)) (“A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”).

²⁰³ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 695 (1990) (Kennedy, J., dissenting).

²⁰⁴ See *id.* at 656.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 660; see also Nathaniel Persily, *Contested Concepts in Campaign Finance*, 6 U. PA. J. CONST. L. 118, 120 (2003) (“[T]he [*Austin*] Court has recognized a special corruption danger arising when corporate directors, unlike an individual or leader of a political association, contribute money from people (namely, shareholders) who do not support the candidate receiving the contribution.”).

²⁰⁸ *Citizens United III*, 558 U.S. at ____ (internal citations omitted).

Buckley and *Bellotti*²⁰⁹ and because its application would “produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations”²¹⁰ and disadvantage smaller and non-profit corporations rather than punishing “amassed wealth.”²¹¹

Second, the Court concluded that an anticorruption interest could not support §441b. It pointed out that although the *Buckley* Court deemed this interest “sufficiently important” to allow limits on contributions, it did not extend that reasoning to expenditure limits.²¹² Further, when *Buckley* examined an expenditure ban, it found “that the governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify [the ban] on independent expenditures.”²¹³ The *Citizens United* Court emphasized that the “appearance of influence or access . . . will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.”²¹⁴ It also cautioned that although it had to “give weight to attempts by Congress to seek to dispel either the appearance or the reality” electoral official corruption, Congress’s remedies must still comply with the First Amendment: “An outright ban

²⁰⁹ See *id.* at ____

²¹⁰ *Id.*

²¹¹ *Id.* at _____. The result of upholding §441b “is that smaller or nonprofit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government.” *Id.* Thus, “[e]ven if §441b’s expenditure ban were constitutional, wealthy corporations could still lobby elected officials, although smaller corporations may not have the resources to do so.” *Id.* Furthermore, “wealthy individuals and unincorporated associations can spend unlimited amounts on independent expenditures. Yet certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech.” *Id.* (internal citations omitted).

²¹² *Buckley*, 424 U.S. at 25.

²¹³ *Id.* at 45. “When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.” *Citizens United III*, 558 U.S. at ____; see also *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (“The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.”); *Buckley*, 424 at 27 (“To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.”).

²¹⁴ *Citizens United III*, 558 U.S. at ____.

on corporate political speech during the critical preelection period is not a permissible remedy.”²¹⁵

Third, the *Citizens United* Court rejected the applicability of the shareholder protection interest, as this interest would allow the government to ban the political speech of media corporations—an impermissible result in the Court’s opinion.²¹⁶ The Court further found that most abuse could be corrected by shareholders through the use of “procedures of corporate democracy.”²¹⁷ Moreover, the Court noted that §441b is “both underinclusive and overinclusive”²¹⁸ with respect to protecting shareholder interest. The statute is underinclusive because “[a] dissenting shareholder’s interests would be implicated by speech in any media at any time,” not merely by speech in certain media made “within 30 or 60 days before an election.”²¹⁹ It is overinclusive because it pertains to all types of corporations, even those that have single shareholders or no shareholders at all.²²⁰

After concluding that §441b violated the First Amendment, the *Citizens United* Court held that it was compelled to overturn *Austin*, as no sufficiently compelling governmental interest justified suppression of political speech on the basis of the speaker’s (nonprofit or for-profit) corporate identity.²²¹ The Court noted that *Austin* was not well reasoned because that opinion “abandoned First Amendment principles . . . by relying on language in some of our precedents that traces back to the *Automobile Workers* Court’s flawed historical account of

²¹⁵ *Id.* at ____.

²¹⁶ *See supra* note 210 and accompanying text.

²¹⁷ *Bellotti*, 435 U. S. at 794.

²¹⁸ *Citizens United III*, 558 U.S. at ____.

²¹⁹ *Id.* at ____.

²²⁰ *See id.*

²²¹ *See id.* at _____. The Court also overruled “the part of *McConnell* that upheld BCRA §203’s extension of §441b’s restrictions on corporate independent expenditures” because the “*McConnell* Court relied on the antidistortion interest recognized in *Austin* to uphold a greater restriction on speech than the restriction upheld in *Austin*.” *Id.* at ____ (citations omitted).

campaign finance laws.”²²² In the opinion of the *Citizens United* Court, *Austin*’s holding had also been “undermined by experience since its announcement,” as speakers have found countless ways to get around campaign finance laws.²²³ Technological changes, such as the internet, blogs, and social networks, may now also permit citizens to obtain significant information about political candidates and issues; banning such speech would be problematic under the First Amendment.²²⁴ Finally, no serious reliance interests were at stake, counseling against adherence to the principle of *stare decisis* in this case.²²⁵

Given the overturning of *Austin*, the Court held that §441b’s restrictions on corporate independent expenditures were invalid and could not be applied to *Hillary*.²²⁶

In concluding the opinion, the Court resolved the question of whether BCRA’s disclaimer and disclosure provisions were constitutional, as they were applied to *Hillary* and the three accompanying advertisements.²²⁷ The Court stated that these requirements²²⁸ are subjected to “exacting scrutiny,” which requires a “substantial relation” between the disclosure requirement and a “sufficiently important” governmental interest.²²⁹ A governmental interest in “provid[ing]the electorate with information” about the sources of election-related spending is sufficiently important.²³⁰ Because *Hillary* and the ads for *Hillary* “referred to then-Senator

²²² *Id.* at ____.

²²³ *Id.* at ____.

²²⁴ *See id.* at ____ (“Internet sources, such as blogs and social networking Web sites[] [may soon] provide citizens with . . . information about political candidates and issues. Yet, §441b would seem to ban a blog post expressly advocating the election or defeat of a candidate if that blog were created with corporate funds.”).

²²⁵ *See id.* at ____ . The Court reasoned that “reliance interests are important considerations in property and contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions. Here, though, parties have been prevented from acting—corporations have been banned from making independent expenditures.” *Id.* (citing *Payne v. Tennessee*, 501 U. S. 808, 828 (1991)).

²²⁶ *See id.* at ____.

²²⁷ *See id.* at ____.

²²⁸ *See supra* note 170-171 (describing these requirements in detail).

²²⁹ *Citizens United III*, 558 U.S. at ____ (citing *Buckley*, 424 U.S. at 64, 66) (internal quotation marks omitted).

²³⁰ *Buckley*, 424 U.S. at 66.

Clinton by name shortly before a primary and contained pejorative references to her candidacy,” the Court held that the required disclaimers and disclosures were constitutional, as they did not chill speech or expression and they provided the electorate with information about the person or group sponsoring *Hillary*.²³¹

Justices Roberts and Alito concurred in the Court’s majority opinion, writing separately to address the principles of judicial restraint and *stare decisis* implicated by *Citizens United*.²³² Justices Scalia, Alito, and Thomas (in part) joined the opinion of the Court and wrote separately to answer a concern regarding the original understanding of the First Amendment that was raised by the dissent.²³³

Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor, disagreed with the majority in several respects. Before attacking the decision on the merits, Stevens stated that the question of § 441b’s constitutionality was not properly presented to the Court and, as a result, the Court should not have addressed this issue.²³⁴ He also argued that the case could have been resolved on narrower grounds; the Court could have held, for example, that § 441b did not apply to *Hillary* because it did not constitute an “electioneering communication” (because it was a feature-length film distributed through video-on-demand).²³⁵ Moreover, Stevens contended that the Court’s decision to overturn *Austin* and parts of *McConnell* was not accord with the

²³¹ *Citizens United III*, 558 U.S. at ___ (citations omitted). The disclaimer and disclosure requirements would be unconstitutional as applied to an organization if there were a reasonable probability that its members would face threats, harassment, or reprisals if their names were disclosed. *See McConnell*, 540 U. S. at 198.

²³² *See Citizens United III*, 558 U.S. at ___ (Roberts, C.J., concurring).

²³³ *See Citizens United III*, 558 U.S. at ___ (Scalia, J., concurring). Justice Thomas wrote a separate concurrence in which he disagreed with the majority’s conclusion that the disclaimer and disclosure requirements were constitutional as applied to *Hillary* and the advertisements for *Hillary*. *See id.* at ___ (Thomas, J., concurring).

²³⁴ *See id.* at ___ (Stevens, J., dissenting).

²³⁵ *See id.* at ___.

principles of *stare decisis*, as “[t]he only relevant thing that has changed since *Austin* and *McConnell* is the composition of th[e] Court.”²³⁶

Turning to the merits of the *Citizens United* majority opinion, Justice Stevens stated that the three claims upon which the opinion rested were wrong.²³⁷ First, he contended that neither *Austin* nor *McConnell* “held or implied that corporations may be silenced,” thereby “banning” corporate political speech.²³⁸ Instead, § 441b targeted a “class of communications that is especially likely to corrupt the political process, that is at least one degree removed from the views of individual citizens, and that may not even reflect the views of those who pay for it.”²³⁹ Second, Stevens argued that the holding in *Bellotti* was far narrower than the majority implied, and that there was no justification for the majority’s conclusion that the government cannot restrict political speech based on the speaker’s identity.²⁴⁰ Third, Stevens posited that it was the majority’s opinion, and not *Austin* and *McConnell*, that constituted “a radical departure from what has been settled First Amendment law.”²⁴¹

In support of his third argument, Justice Stevens suggested that the Framers did not have corporations in mind when they enshrined the right to free speech in the First Amendment, as business corporations were not seen as having the ability to exercise their speech rights “given that ‘at the time, the legitimacy of every corporate activity was thought to rest entirely in a concession of the sovereign.’”²⁴² He also pointed out that *Austin*’s holding and

²³⁶ *Id.* at ____.

²³⁷ *See id.* at _____. These claims were that (1) “*Austin* and *McConnell* have ‘banned’ corporate speech;” (2) “the First Amendment precludes regulatory distinctions based on speaker identity, including the speaker’s identity as a corporation;” and (3) “*Austin* and *McConnell* were radical outliers in our First Amendment tradition and our campaign finance jurisprudence.” *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *See id.* at ____.

²⁴¹ *Id.* at ____.

²⁴² *Id.* at ____ (citing David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 HASTINGS CONST. L. Q. 541, 578 (1991)); cf. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

reasoning had been repeatedly affirmed in the twenty years that had passed since this decision was handed down.²⁴³ In this regard, Stevens argued that the majority improperly relied on *Buckley* and *Bellotti* because both of these cases focused on statutory provisions that differed from those involved in *Citizens United*.²⁴⁴ Finally, Stevens examined the interests at stake in *Citizens United*, contending that the governmental interest in preventing corruption or the appearance of corruption was not limited to *quid pro quo* corruption.²⁴⁵

Justice Stevens also separately emphasized the correctness of *Austin* based on the fact that the statute implicated in that case (as well as the provisions involved in *Citizens United*), imposed “only a limited burden on First Amendment freedoms not only because they target a narrow subset of expenditures and leave untouched the broader ‘public dialogue,’ but also because they leave untouched the speech of natural persons.”²⁴⁶ In doing so, Stevens emphasized the differences between corporations and human beings:

²⁴³ See *Citizens United III*, 558 U.S. at ___ (Stevens, J., dissenting).

²⁴⁴ See *id.* at ___.

²⁴⁵ See *id.* at ___. In support of this point, Stevens reasoned that

[c]orruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one’s behalf. Corruption operates along a spectrum, and the majority’s apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics. It certainly does not accord with the record Congress developed in passing BCRA, a record that stands as a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other’s backs—and which amply supported Congress’ determination to target a limited set of especially destructive practices.

Id. at ___. Stevens argued that *Buckley*’s language and the BCRA record supported this reasoning. See *id.* at ___; see also *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam) (“Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption.”); *McConnell v. FEC*, 251 F. Supp. 2d 176, 622-623 (D.D.C. 2003) (per curiam) (“The record powerfully demonstrates that electioneering communications paid for with the general treasury funds of labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting.”).

Further, later in his dissent, Stevens also argued in support of the shareholder protection interest, as it was articulated in *Austin*, stating that this interest “bolsters the conclusion that restrictions on corporate electioneering can serve both speakers’ and listeners’ interests, as well as the anticorruption interest. And it supplies yet another reason why corporate expenditures merit less protection than individual expenditures.” *Citizens United III*, 558 U.S. at ___ (Stevens, J., dissenting).

²⁴⁶ See *Citizens United III*, 558 U.S. at ___ (Stevens, J., dissenting) (citations omitted).

Unlike natural persons, corporations have “limited liability” for their owners and managers, “perpetual life,” separation of ownership and control, “and favorable treatment of the accumulation and distribution of assets . . . that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’ investments.

It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their “personhood” often serves as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established.²⁴⁷

Moreover, Stevens noted that the ways in which corporations are structured permit them to dominate the electioneering realm, potentially chilling non-corporate participation in democratic governance due to the perception that those with the most money control election and policy outcomes.²⁴⁸

IV. *CITIZENS UNITED* AND CORPORATE CRIMINAL LIABILITY

The implicit suggestion of the *Citizens United* majority that corporations have the same rights as natural persons, at least under the First Amendment’s Free Speech Clause,²⁴⁹ particularly when contrasted with Justice Stevens’s vigorous dissent, which raised concerns regarding this view, suggests that the manner in which corporate criminal liability is currently addressed is at the very least problematic, if not unconstitutional.

Prosecutors overwhelmingly use deferred and non-prosecution agreements in remedying corporate misconduct.²⁵⁰ DPAs and NPAs impose relatively standard conditions on corporations.²⁵¹ As described above, the following are the most typical conditions included in DPAs and NPAs: (1) cooperation with the government; (2) acceptance of responsibility; (3) undertaking of internal reforms including the implementation of prospective effective

²⁴⁷ *Id.* at ___ (citations omitted).

²⁴⁸ *See id.* at ___.

²⁴⁹ *See id.* at ___ (citing *First Nat’l Bank of Boston v. Bellotti*, 435 U. S. 765, 776 (1978) (“The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”).

²⁵⁰ *See supra* note 94 and accompanying text.

²⁵¹ *See supra* notes 99-104, 119-121 and accompanying text.

compliance programs and the use of independent monitors; (4) retrospective review of particular financial transactions, and punitive measures, including penalties, restitution and surrender of ill-gotten financial gains; (5) agreement to refrain from making any statement that contradicts the facts as laid out in the relevant agreement; and (6) allowing that the government has the sole discretion to determine whether the corporation has breached the agreement in question. Many of these conditions could not be imposed on a natural person who is facing criminal indictment.

For example, if an individual agreed to the first typical provision mandating cooperation with the government, she would be waiving her Fifth Amendment right against self-incrimination and her Sixth Amendment right to trial by jury.²⁵² A corporation, however, does not have the right to remain silent because it is not a “natural person.”²⁵³ Additionally, the Supreme Court has not yet decided whether corporations have the jury trial right.²⁵⁴ If Justice Steven’s view that the *Citizens United* majority equates corporations and natural persons is taken to its inevitable conclusion, the Court may have to rethink its position (or lack thereof) regarding the Fifth and Sixth Amendment rights of corporations. As a result, conditions forcing corporations to waive these rights may no longer be included in DPAs and NPAs.

²⁵² See Andrew Gilman, Note, *The Attorney-Client Privilege Protection Act: The Prospect of Congressional Intervention Into the Department of Justice’s Corporate Charging Policy*, 35 *FORDHAM URB. L. J.* 1075, 1077 (2009).

²⁵³ See *Doe v. United States*, 487 U.S. 201, 206 (1988) (“There also is no question that the foreign banks cannot invoke the Fifth Amendment in declining to produce the documents; the privilege does not extend to such artificial entities.”); *Braswell v. United States*, 487 U.S. 99, 102 (1988) (“[P]etitioner asserts no self-incrimination claim on behalf of the corporations; it is well established that such artificial entities are not protected by the Fifth Amendment.”); *Comcast of L.A., Inc. v. Top End Int’l, Inc.*, No. CV 032213 JFWRCX, 2003 WL 22251149, at *3 (C.D. Cal. July 2, 2003) (“[T]he privilege against self-incrimination only protects natural persons, not artificial entities such as corporations.”).

²⁵⁴ See F. Joseph Warin & Michael D. Bopp, *Corporations, Criminal Contempt, and the Constitution: Do Corporations Have a Sixth Amendment Right to Trial by Jury in Criminal Contempt Actions and, if so, Under What Circumstances?*, 1 *COLUM. BUS. L. REV.* 1, 13 (1997) (noting that three federal courts of appeals have held that corporations are protected by the Sixth Amendment, but that the Supreme Court has not directly resolved this issue); see also V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 *HARV. L. REV.* 1477, 1518 (1996)(concluding that “[t]he Sixth Amendment right to a jury trial may, arguably, be available to corporate defendants”). But see Alan Adlestein, *A Corporation’s Right to a Jury Trial Under the Sixth Amendment*, 27 *U.C. DAVIS L. REV.* 375, 449 (1994)(stating “that a corporation does not have a right to a jury trial under the Sixth Amendment”).

Similarly, the second typical requirement included in DPAs and NPAs, acceptance of responsibility, could implicate Fifth Amendment concerns. In accepting responsibility, an organization provides the government with “detailed admissions . . . of [its] wrongdoing,”²⁵⁵ effectively offering up a confession. Under current Supreme Court case law, “corporate persons, which lack any state of mind, lack Fifth Amendment privilege.”²⁵⁶ Thus, the acceptance of responsibility condition is currently constitutional, although it may not be in the future if the Supreme Court explicitly adopts the view advanced by *Citizens United* that corporations are comparable to natural persons with respect to the constitutional rights they possess.

Finally, the sixth typical condition included in DPAs and NPAs, that the government has the sole discretion to determine whether the corporation has breached the agreement in question, could invoke due process issues. Pursuant to the Fifth and Fourteenth Amendments, federal and state governments may not deprive any person “of life, liberty, or property without due process of the law.”²⁵⁷ Due process, in this context, includes the opportunity for a meaningful hearing²⁵⁸ in front of an impartial decision maker.²⁵⁹

In fact, as was previously noted, several courts have held, in cases involving NPAs signed by individuals (as opposed to corporations), that unilateral determinations of breach made without the benefit of judicial involvement contravene the principle of due process.²⁶⁰ Indeed, one court has concluded that “[i]n the context of non-prosecution agreements the government is

²⁵⁵ See Garrett, *Corporate Confessions*, *supra* note 50, at 926.

²⁵⁶ *Id.* at 918.

²⁵⁷ U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

²⁵⁸ See *e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970).

²⁵⁹ See *e.g.*, *Gibson v. Berryhill*, 411 U.S. 564 (1973) (holding that it is a violation of due process for a decision maker to be able to gain personally from their decision).

²⁶⁰ See *supra* note 164 and accompanying text.

prevented by due process considerations from unilaterally determining that a defendant is in breach and nullifying the agreement.”²⁶¹

It is true that if DPAs and NPAs are analogized to plea bargaining agreements, the first two constitutional concerns mentioned above may appear to be unfounded. After all, plea bargains induce individuals to waive their Fifth and Sixth Amendment rights and yet plea-bargaining has been held to be constitutional²⁶² and plea-bargains are routinely accepted by federal and state courts.²⁶³ To be accepted by a court, however, a plea-bargain must satisfy certain requirements. For example, administrative conveniences should not trump an individual’s fundamental liberties.²⁶⁴ The plea bargain must also not be the product of threat or coercion, and it must be entered into knowingly, voluntarily, and intelligently.²⁶⁵

The Supreme Court has held, in effect, that assistance of counsel is “a proxy for voluntariness in pleading, effectively establishing that a counseled plea is presumptively valid.”²⁶⁶ In the absence of counsel, a plea bargain would likely not be voluntary if it was obtained through “threats or violence . . . [,] any direct or implied promises, however slight, [or through] the exertion of any improper influence.”²⁶⁷ Furthermore, pursuant to the “intelligence” requirement, the plea is to be made with “sufficient awareness of the relevant circumstances and

²⁶¹ *United States v. Meyer*, 157 F.3d 1067, 1076 (7th Cir. 1998).

²⁶² *See Brady v. United States*, 397 U.S. 742, 753 (1970) (holding that it is “not unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the [S]tate . . .”). *But see* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1033-34 (2006) (arguing that the rise of plea bargaining implicates separation of powers concerns).

²⁶³ *See* Catherine Greene Burnett, *Of Crime, Punishment, Community and an Accused’s Responsibility to Plead Guilty: A Response to Gerard Bradley*, 40 S. TEX. L. REV. 281, 291 (1999) (“[P]lea bargaining has demonstrated itself to be a necessary component, without which our criminal justice system would collapse of its own weight.”).

²⁶⁴ *See Bruton v. United States*, 391 U.S. 123, 135 (1968).

²⁶⁵ *Brady*, 397 U.S. at 747 (citing *Boykin v. Alabama*, 395 U.S. 238,242 (1969)); *see also* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist’s Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2018 (2000) (describing the requirements of a constitutional plea-bargain).

²⁶⁶ *Blank*, *supra* note 265, at 2019; *see also Brady*, 397 U.S. at 754-55.

²⁶⁷ *Bram v. United States*, 168 U.S. 532, 542-53 (1897).

likely consequences.”²⁶⁸ In this respect, an individual entering into a plea agreement without the assistance of counsel must possess “an understanding of the law in relation to the facts.”²⁶⁹ Additionally, in order for a trial judge to accept such a plea, the record must reflect “an affirmative showing that it was intelligent and voluntary,”²⁷⁰ as “[i]gnorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.”²⁷¹ If the individual is represented by counsel, however, even a flawed understanding of the facts and circumstances of the case is sufficient provided that the decision to plead is “based on [counsel’s] reasonably competent advice.”²⁷²

Particularly in light of the Filip Memo and the proposed changes to the Organizational Guidelines, corporations may not have the benefit (or at least the full benefit) of counsel in agreeing to DPAs or NPAs. Although the Filip Memo states that corporations need not waive attorney-client privilege in order to demonstrate cooperation, corporations are still required to provide the government with “relevant facts,” which may ultimately include attorney work product or attorney-client communications.²⁷³ Prosecutors also need not seek approval prior to demanding and obtaining this information.²⁷⁴ Additionally, the Filip Memo suggests that corporations use non-attorney personnel to conduct internal investigations, despite the fact that lawyers are much more effective than non-lawyers in undertaking internal investigations, determining whether any violations of law have taken place, and evaluating potential remedial measures.²⁷⁵

²⁶⁸ *Brady*, 397 U.S. at 748.

²⁶⁹ *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

²⁷⁰ *Boykin v. United States*, 395 U.S. 238, 242 (1969).

²⁷¹ *Id.* at 242-43.

²⁷² *McMann v. Richardson*, 397 U.S. 759, 770 (1970).

²⁷³ *See supra* note 60 and accompanying text.

²⁷⁴ *See supra* notes 61-62 and accompanying text.

²⁷⁵ *See supra* notes 63-65 and accompanying text.

Moreover, under the proposed amendments to the Organizational Guidelines, the cooperation requirement may effectively be triggered before the government initiates any investigation into a corporation's potentially criminal activities.²⁷⁶ As a result, the corporation may have little or no understanding of the charges against it even while it begins to undertake measures in order to cooperate with the government, such as hiring an independent monitor to oversee modifications to the corporation's compliance and ethics program.

Thus, even if DPAs and NPAs are compared to plea bargains, constitutional concerns regarding the requirements of these agreements are not lessened given the comparative absence of advice of counsel. Additionally, unlike plea-bargains, DPAs and NPAs are not submitted to a judge for approval, thereby depriving corporations of any semblance of "judicial review" of the agreement. Finally, the third constitutional concern relating to DPAs and NPAs—that provisions allowing for the government's unilateral determination of breach could violate corporations' due process rights under the Fifth and Fourteenth Amendments—is not lessened even if DPAs and NPAs are compared to plea bargains.

The notion that corporations should be treated like persons under the Constitution is not new.²⁷⁷ And the majority's opinion in *Citizens United* further substantiates the idea that corporations should be afforded the same rights as natural persons;²⁷⁸ although corporate

²⁷⁶ See *supra* notes 81-84 and accompanying text.

²⁷⁷ See Larry E. Ribstein, *Corporate Political Speech*, 49 WASH. & LEE L. REV. 109, 123 (1992) (stating that corporations have "the legal attributes of a 'person'"); see also *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) ("The Court does not wish to hear argument . . . [regarding] whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to . . . corporations. We are all of the opinion that it does."); *First Nat'l Bank of Boston v. Bellotti*, 435 U. S. 765, 780 (1978)) (holding that artificial persons are protected from denial of 'liberty,' which includes their First Amendment rights).

²⁷⁸ Prior to *Citizens United*, a corporation had been held to possess most of the same constitutional rights as natural persons. See, e.g., *Bellotti*, 435 U.S. at 784 (holding that a corporation has the First Amendment right of free speech); *Hale v. Henkel*, 201 U.S. 43 (1906) (concluding that the Fourth Amendment protection against unreasonable searches and seizures applies to corporations); *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1888) (noting that a corporation is entitled to due process of law under the Fifth and Fourteenth Amendments); *Santa Clara County*, 118 U.S. at 416 (stating that a corporation is entitled to equal protection of the law under the Fourteenth Amendment).

personhood is a convenient legal fiction, “this is still a fiction that we embrace to facilitate protection of the rights of individuals.”²⁷⁹

In view of this understanding, the government’s current treatment of corporate criminality and specifically its use of DPAs and NPAs is highly problematic. Specifically, provisions of DPAs and NPAs that mandate corporations’ cooperation with the government and acceptance of responsibility and give the government the sole discretion of determining whether the DPA or NPA has been breached may have to be altered or eliminated from use altogether in the wake of *Citizens United*, lest they be declared unconstitutional.

Judicial oversight over DPAs and NPAs may also have to be implemented to remedy some issues relating to the problematic provisions of these agreements and to bring some fairness into the DPA and NPA agreement process. Although the submission of every DPA and NPA to a court for approval²⁸⁰ may seem burdensome, courts review and approve untold numbers of plea bargains on a daily basis. Reviewing the DPAs and NPAs of a relatively small number of corporations that are facing indictment would not add greatly to courts’ current criminal case loads, but it would likely lessen prosecutor overreaching and eliminate many (if not all) constitutional concerns bound up with DPAs and NPAs. Courts need not involve themselves with the day-to-day implementation of these agreements, but could limit their intervention to instances where the government declares a unilateral breach of the DPA or NPA. In such cases, courts could provide corporations with an opportunity to be heard on this point and make a final and binding finding on the issue of breach, thereby affording corporations due process under the Fifth and Fourteenth Amendments.

CONCLUSION

²⁷⁹ ProfessorBrainbridge.com, <http://www.professorbainbridge.com/professorbainbridgecom/2010/01/citizens-united-corporate-personhood-and-nexus-of-contracts-theory.html> (Jan. 21, 2010, 15:30 EST); see generally Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95 (1995).

²⁸⁰ In a manner that would be similar to the submission of a plea bargain for a court’s review.

The effect of the Supreme Court's recent decision in *Citizens United* reaches beyond the realm of the First Amendment. Viewed in light of the Court's traditional understanding that corporations are considered to be "persons" under the Constitution, the majority's suggestion in *Citizens United* that corporations are equal to human beings, at least under the First Amendment's Free Speech Clause, likely affects the way that corporations' alleged criminal conduct is investigated by the government and the manner in which the government addresses corporate misconduct. Specifically, a number of standard conditions currently included in deferred prosecution agreements and non-prosecution agreements may have to be altered or eliminated altogether in response to the humanization of the corporate entity following *Citizens United*. Further, the element of judicial oversight may also have to be introduced to bring some fairness into the DPA and NPA agreement process. Without question, these changes would greatly alter the landscape of corporate criminal liability in the United States.