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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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## ARTICLES

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

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INTRODUCTION .....	1
I. CORPORATE CRIMINAL LIABILITY .....	3
A. <i>Approach of Courts</i> .....	3
B. <i>Approach of Commentators</i> .....	5
C. <i>Approach of the Government</i> .....	7
1. CORPORATE CRIMINAL CHARGING POLICY .....	7
2. CORPORATE CRIMINAL SENTENCING POLICY .....	15
II. DEFERRED- AND NON-PROSECUTION AGREEMENTS .....	18
A. <i>Deferred-Prosecution Agreements</i> .....	19
B. <i>Non-Prosecution Agreements</i> .....	22
C. <i>Courts' Views of the Government's Use of Deferred- and Non-Prosecution Agreements</i> .....	24
D. <i>Commentators' Views of the Government's Use of Deferred- and Non-Prosecution Agreements</i> .....	26
III. <i>CITIZENS UNITED V. FEDERAL ELECTION COMMISSION</i> .....	28
IV. <i>CITIZENS UNITED AND CORPORATE CRIMINAL LIABILITY</i> .....	39
CONCLUSION .....	44

## INTRODUCTION

Although the recent United States Supreme Court decision in *Citizens United v. Federal Election Commission*<sup>1</sup> 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)

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1. 130 S. Ct. 876 (2010).

significant. The Court's view that corporations are equal to human beings, at least under the First Amendment's Free Speech Clause,<sup>2</sup> when combined with the traditional understanding that corporations are considered "persons" under the United States Constitution,<sup>3</sup> 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*.<sup>4</sup> Another result prompted by *Citizens United* could be the implementation of 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 out-

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2. See *id.* at 900 ("Under the rationale of these precedents, political speech does not lose First Amendment protection 'simply because its source is a corporation.'" (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978))); see also *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (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." (quoting *Bellotti*, 435 U. S. at 783)).

3. See *Santa Clara Cnty. v. S. Pac. R.R.*, 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.

lines 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."<sup>5</sup> 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.'"<sup>6</sup>

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*, the Supreme Court of the United States emphasized the need for deterrence of institutional wrong-

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5. JULIE R. O'SULLIVAN, *FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS* 202 (2d ed. 2003); see also *United States v. Park*, 421 U.S. 658, 674–75 (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"); *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 493–94 (1909) (citations omitted) (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 Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1563 (1990) (citation omitted). 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 (citation omitted) (internal quotation marks omitted). Tort-law scholars have also suggested that "employer liability creates an incentive for management to take precautions to prevent employee accidents." *Id.* at 1566.

doing 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 effectually controlling the subject-matter and correcting the abuses aimed at.”<sup>7</sup>

The decision of the United States Court of Appeals for the Ninth Circuit in *United States v. Hilton Hotels Corp.*<sup>8</sup> further explained that the imposition of criminal liability upon corporations is designed to “stimulat[e] a maximum effort by owners and managers to assure adherence by such agents to the requirements of the [law].”<sup>9</sup> 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.”<sup>10</sup>

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*, the Supreme Court held that a company could be a blameworthy actor deserving of criminal punishment, just like an individual wrongdoer.<sup>11</sup> 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”<sup>12</sup> because, through their structures and internal organization, they encourage or neglect to prevent individual employee wrongdoing.<sup>13</sup>

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7. *N.Y. Cent.*, 212 U.S. at 495–96; see also *Park*, 421 U.S. at 672 (“[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.”).

8. 467 F.2d 1000 (9th Cir. 1972).

9. *Id.* at 1005.

10. *Id.* at 1006 (citation omitted).

11. See *Park*, 421 U.S. 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).

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

13. See Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 889–90 (2007) (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.’” (quoting Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL’Y 833, 852 (2000))). 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

### 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 needed to combat the organizational roots of white collar crime,”<sup>14</sup> 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.’”<sup>15</sup> Furthermore, “a standard modeled on *respondeat superior* departs from the ‘basic premise of criminal jurisprudence that guilt requires personal fault.’”<sup>16</sup>

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.”<sup>17</sup> 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 are more likely to react positively to criminal stigma by attempting to repair their images and regain public confidence.”<sup>18</sup>

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generally Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991).

14. 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.* (footnotes omitted).

15. *Id.* at 1572 (citation omitted).

16. *Id.* (citation omitted).

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

18. *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

Imposing criminal liability on corporations not only serves criminal law's goal of deterrence, but also it 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."<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup> Professor 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 "culture" or "ethos," which may . . . [encourage employee wrongdoing]."<sup>22</sup> 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.'"<sup>23</sup> 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."<sup>24</sup>

O'Sullivan also attacks two related objections to the imposition of criminal liability on corporations: the unfairness of penalizing innocent

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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.

19. *Id.* at 1160.

20. *See id.*

21. *See* O'SULLIVAN, *supra* note 5, at 197 (arguing that "corporations can be blameworthy actors upon whom retributive punishment is appropriately imposed").

22. 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); *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) (footnote omitted) ("The corporation may not have a soul, but it can be held morally responsible for its actions and its decisionmaking structure.").

23. O'Sullivan, *supra* note 22, at 31, 39–40.

24. *Id.* at 37.

shareholders for the criminal activity of the corporation<sup>25</sup> 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 . . . .”<sup>26</sup> 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.”<sup>27</sup> 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,”<sup>28</sup> however.

### 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.<sup>29</sup>

Before 1991, the policy of the Department of Justice (“DOJ”) regarding charges for most offenses primarily concerned individuals.<sup>30</sup> 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.”<sup>31</sup> Commentators have suggested that because the Organizational Guidelines “strongly encouraged companies to self-

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25. 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.”).

26. O’Sullivan, *supra* note 22, at 32.

27. *Id.* at 35.

28. *Id.*

29. See U.S. ATTORNEY’S MANUAL § 9-27.110(B) cmt. (2002), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm) (“Under the Federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of Federal criminal law.”).

30. See generally *id.* § 9-27.100 (focusing on charging decisions involving individual offenders, rather than corporations).

31. 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*



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.”<sup>32</sup> 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.”<sup>33</sup>

The first version of a specific corporate charging policy was issued in 1999 by then-Deputy Attorney General Eric Holder.<sup>34</sup> Four years later, then-Deputy Attorney General Larry D. Thompson promulgated a revised set of such guidelines.<sup>35</sup> In light of the troubling nature of sev-

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*Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 593–94 (2004) (providing an overview of the Organizational Guidelines).

32. Finder, *supra* note 31, at 114 (footnote omitted).

33. *Id.*

34. See Memorandum from Eric H. Holder, Jr., Deputy Attorney Gen., Dep’t of Justice, to All Component Heads & U.S. Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html>. 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 Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 DEPAUL L. REV. 295, 297 (2008) (noting that for purposes of the Holder Memo waiver of attorney-client privilege and work-product protections were factors prosecutors should consider in deciding whether to criminally charge a corporation).

35. See Memorandum from Larry D. Thompson, Deputy Attorney Gen., Dep’t of Justice, to Heads of Dep’t Components & U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm). 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) (“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]. 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. The Thompson Memo, however applie[d] 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

eral charging factors contained in the Thompson Memo, particularly its suggestion that a corporation would need to waive its attorney-client and work-product privileges<sup>36</sup> in order to demonstrate that it was complying with the government's investigation, then-Deputy Attorney General Paul J. McNulty<sup>37</sup> amended the Thompson Memo and its immediate successor, the McCallum Memo,<sup>38</sup> in 2006.<sup>39</sup>

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performance in the government's investigation.'" (citing Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, 37 INST. ON SEC. REG. 815, 820 (2005))).

36. The classic test used to determine whether attorney-client privilege applies to certain communications or documents considers whether

(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.

Under Seal v. United States (*In re Grand Jury Subpoena: Under Seal*), 415 F.3d 333, 338 n.3 (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, 396 (1981) (holding that in the corporate context, whether attorney-client privilege applies should be determined on a case-by-case basis and that this privilege may apply to non-senior employees who do not have any control over the operation of the corporation). The Court in *Upjohn Co. v. United States* 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." 449 U.S. at 400 (citation omitted).

37. Paul McNulty announced his resignation from the post of Deputy Attorney General in May 2007. See Michele 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. Morford, who had been serving as the interim U.S. attorney in Nashville, Tennessee, to be the acting Deputy Attorney General. See Dan Eggen, *Morford 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, at A4, <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*, ASSOCIATED PRESS, Mar. 12, 2009, available at [http://www.usatoday.com/news/washington/2009-03-12-ogden\\_N.htm](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, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/21/AR2010052103388.html>.

38. See Memorandum from Robert D. McCallum, Jr., Acting Deputy Attorney Gen., Dep't of Justice, 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>.

39. 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

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."<sup>40</sup>

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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 privileges, the government then presume[d] that the company [wa]s 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) (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, which 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 threatenin[ing] their right to a fair trial." *United States v. Stein*, 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008). 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" but with the administration of justice. *Id.* at 381.

40. Memorandum from Paul J. McNulty, Deputy Att'y Gen., Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys, Principles of Federal Prosecution of Business Organizations 8, available at [http://www.usdoj.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf). 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.

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’).”<sup>41</sup> 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 first to 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.”<sup>42</sup> 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.”<sup>43</sup>

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 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.”<sup>44</sup>

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.’”<sup>45</sup> 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

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41. *Id.*

42. *Id.*

43. *Id.* at 10.

44. *Id.* at 11.

45. *Id.* at 7 (citation omitted). 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. CRIM. 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.

to mention a conviction, can be deadly for a corporation.<sup>46</sup>

A memorandum<sup>47</sup> issued by then-Deputy Attorney General Mark R. Filip<sup>48</sup> in 2008 is the latest “iteration of the Principles of Federal Prosecution of Business Organizations . . . .”<sup>49</sup> 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 attorneys’ fees or providing counsel to employees, officers or directors under indictment.”<sup>50</sup> Prosecutors also may not request that a “corporation refrain from taking such action.”<sup>51</sup> Second, the Filip Memo alters the procedure for requesting and assessing privilege waivers;<sup>52</sup> it mandates that a corporation receive credit for cooperation if it discloses the “relevant facts”<sup>53</sup> concerning the misconduct and not if it waives attorney-client or work-product privilege.<sup>54</sup> 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.<sup>55</sup> Moreover, the

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46. See Wray & Hur, *supra* note 45, 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, Editorial, *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.”).

47. See Memorandum from Mark Filip, Deputy Attorney Gen., Dep’t of Justice, to Heads of Dep’t Components & U.S. Att’ys, Principles of Federal Prosecutions of Business Organizations (Aug. 28, 2008) [hereinafter Filip Memo], available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>.

48. See *supra* note 37.

49. Brandon L. Garrett, *Corporate Confessions*, 30 CARDOZO L. REV. 917, 928 (2008).

50. Filip Memo, *supra* note 47, at 13.

51. *Id.*

52. 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.* (quoting Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong. § 2(b) (2006)).

53. Filip Memo, *supra* note 47, at 10.

54. See *id.* at 8–9.

55. See *id.* at 9 (“[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

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.”<sup>56</sup>

Nevertheless, commentators have questioned whether the Filip Memo “goes far enough.”<sup>57</sup> For example, the desired “relevant facts” may ultimately include attorney work product or attorney-client communications.<sup>58</sup> “[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—i.e., revealing attorney-client communications. Thus, under the Filip Memo, . . . corporations [may] still need to waive privilege . . . to provide the facts and receive cooperation credit.”<sup>59</sup> 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,”<sup>60</sup> 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.”<sup>61</sup>

Moreover, the Filip Memo suggests that corporations can “conduct internal investigations in a manner that will not confer attorney-client

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E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 919 (2009) (alteration in original) (citation 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.’”).

56. Filip Memo, *supra* note 47, at 14.

57. 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 47, at 10 n.3. (“If the interviews [with corporate personnel in conjunction with an internal investigation] are conducted by counsel for the corporation, certain notes and memoranda generated from the interviews may be subject, at least in part, to the protections of attorney-client privilege and/or attorney work-product. [Although notes or memoranda generated by such interviews may be immune from production], [t]o earn [cooperation] credit, however, 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.”).

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

59. Stein & Levine, *supra* note 57.

60. *Id.*; *see also supra* notes 41–42 and accompanying text (describing Category I information as it is referenced in the McNulty Memo).

61. Stein & Levine, *supra* note 57.

privilege on the results of an investigation,”<sup>62</sup> by, for example, using non-attorney personnel to collect employee or other witness statements.<sup>63</sup> Such a proposition ignores 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.<sup>64</sup>

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.”<sup>65</sup> Because both cooperation and remediation affect the corporate charging decision, the significance of this prohibition is dubious.<sup>66</sup> Further, although this Memo prohibits the government from taking into account whether a corporation entered into a joint-defense agreement,<sup>67</sup> it nevertheless suggests that corporations should avoid entering into such agreements if they would prevent them from disclosing relevant facts to the government.<sup>68</sup>

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 nonbinding, thereby providing only suggested guidelines for prosecutors.<sup>69</sup>

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62. *Id.*

63. See Filip Memo, *supra* note 47, at 10.

64. See Stein & Levine, *supra* note 57.

65. *Id.*; see Filip Memo, *supra* note 47, at 16–17 (stating that the three factors to be used by prosecutors in evaluating a corporation’s remedial efforts are employee discipline—“whether the corporation appropriately disciplined wrongdoers, once those employees are identified by the corporation as culpable for the misconduct”—restitution, and reform).

66. See Stein & Levine, *supra* note 57.

67. See Filip Memo, *supra* note 47, at 12 (“[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.”).

68. See Stein & Levine, *supra* note 57 (“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.”).

69. See *id.* To that end, although the Attorney-Client Privilege Protection Act of 2006 “died” following the issuance of the Filip Memo, *supra* note 47, 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 Protection Act of 2009 Is Introduced in the Senate (S.445)*, FEDERAL EVIDENCE REVIEW (Feb. 23, 2009), <http://federal>

## 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.<sup>70</sup>

As a result of the Supreme Court's decision in *United States v. Booker*,<sup>71</sup> 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.<sup>72</sup>

Corporate criminal sentencing originated with the Organizational Guidelines, which were promulgated in 1991.<sup>73</sup> 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."<sup>74</sup> A compliance and ethics program is considered to be effective by the government only if the organization "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."<sup>75</sup> Factors included in the evaluation of the effectiveness of a compliance and ethics 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."<sup>76</sup>

The Organizational Guidelines also stress the need for timely and thorough cooperation as a prerequisite for the imposition of a more leni-

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evidence.com/blog/2009/february/attorney-client-privilege-protection-act-2009-introduced-senate-s-445.

70. See generally Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697 (2002) (providing a thorough overview of the development and application of the Organizational Sentencing Guidelines).

71. 543 U.S. 220, 259 (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 35, 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).

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



ent sentence. Timely cooperation begins “essentially at the same time as the organization is officially notified of a criminal investigation.”<sup>77</sup> 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.”<sup>78</sup>

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.<sup>79</sup> 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.<sup>80</sup>

On January 21, 2010, the United States Sentencing Commission issued proposed amendments to the Guidelines (including the Organizational Guidelines).<sup>81</sup> With respect to corporations, these amendments pertain to effective compliance programs, conditions of probation, and extra credit for compliance programs.<sup>82</sup> 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 nec-

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

78. *Id.*

79. See Griffin, *supra* note 35, 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, § 307, 116 Stat. 745, 784 (2002).

80. See Griffin, *supra* note 35, at 318 (citing U.S. SENTENCING GUIDELINES MANUAL §§ 8D1.1(a)(3), 8D1.4(c)(1) (2004)).

81. See U.S. SENTENCING GUIDELINES MANUAL (Proposed Amendments to the Sentencing Guidelines 2010), available at [http://www.usc.gov/2010guid/20100121\\_Reader\\_Friendly\\_Proposed\\_Amendments.pdf](http://www.usc.gov/2010guid/20100121_Reader_Friendly_Proposed_Amendments.pdf). “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, Ill.), Feb. 2010, at 1 [hereinafter *Sentencing of Corporations*].

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

essary to ensure the program is more effective.”<sup>83</sup> 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.”<sup>84</sup> 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, the proposed amendments 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.”<sup>85</sup>

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 fifty employees and did not have an effective compliance program in place.<sup>86</sup> Pursuant to a 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.<sup>87</sup> 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.”<sup>88</sup>

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)

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83. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 cmt. n.6 (Proposed Amendments to the Sentencing Guidelines 2010).

84. *Id.*

85. *Id.* § 8B.21 cmt. n.3.

86. See Cristie L. Ford & David W. Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 686–87 (2009).

87. See *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. n.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. n.1.

submission to “a reasonable number of regular or unannounced examinations of facilities subject to probation supervision.”<sup>89</sup> 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.”<sup>90</sup>

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 available if “high-level personnel” “participated in, condoned, or w[ere] willfully ignorant of the offense.”<sup>91</sup> 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[.]<sup>92</sup>

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.<sup>93</sup>

## II. DEFERRED- AND NON-PROSECUTION AGREEMENTS

The use of deferred- and non-prosecution agreements has been on the rise in the corporate context,<sup>94</sup> 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,

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89. *Id.* § 8D1.4(b) (Proposed Amendments to the Sentencing Guidelines 2010).

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

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

92. *Id.* § 8D1.4 issue for cmt. (Proposed Amendments to the Sentencing Guidelines 2010).

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.”).

a corporate need to contain possible civil litigation resulting from prosecution, or nothing more than an increased flexing of prosecutorial power.”<sup>95</sup> Below, the Article discusses the differences and similarities between 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.<sup>96</sup> The filing of formal charges typically coincides with the suspension of the application of the Speedy Trial Act<sup>97</sup> and the tolling of the statute of limitations.<sup>98</sup>

DPAs, like NPAs, impose a variety of conditions and requirements on corporations.<sup>99</sup> 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 . . . .”<sup>100</sup> 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.”<sup>101</sup> 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.<sup>102</sup> Moreover, along with providing for corporate fines and penalties, DPAs (and NPAs)

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95. *Id.* at 5.

96. See Wray & Hur, *supra* note 45, at 1104.

97. See Griffin, *supra* note 35, at 322; see also 18 U.S.C. § 3161(h)(2) (2006) (stating that the speedy trial requirement does not pertain to periods of delay “during which prosecution is deferred” pursuant to an agreement between the parties).

98. See Griffin, *supra* note 35, at 322.

99. See Erik Paulsen, Note, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1439–43 (2007) (listing the potential conditions and requirements that DPAs and NPAs could impose on organizations).

100. Wray & Hur, *supra* note 45, at 1104.

101. *Id.*; see also Griffin, *supra* note 35, at 322 (citation omitted) (“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 comport with the Guidelines’ emphasis on providing restitution to victims.” Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 900 (2007); see also U.S. SENTENCING GUIDELINES MANUAL § 8B1.1 (2004); cf. 18 U.S.C. § 3572(b) (2006) (“[T]he court shall impose a fine or other monetary penalty only to

“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.”<sup>103</sup> 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.”<sup>104</sup>

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.<sup>105</sup> 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.<sup>106</sup> Computer Associates also 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].”<sup>107</sup>

Other high-profile companies such as Bristol-Myers Squibb<sup>108</sup> and

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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 *2009 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements*, GIBSON DUNN (Jan. 7, 2010), <http://www.gibsondunn.com/publications/pages/2009YearEndUpdateCorpDeferredProsecutionAYearEndUp.aspx> [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 45, 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. *Id.* The number of DPAs and NPAs was negligible until 2003 and did not enter the double-digits until 2004. *Id.* In 2009, the DOJ entered into eighteen DPAs and NPAs, only one fewer than in 2008, but twenty-one fewer than in 2007. *Id.*

106. See Wray & Hur, *supra* note 45, at 1140 (citing Deferred Prosecution Agreement ¶¶ 2–5, 12, 14, 19–23, *United States v. Computer Assocs. Int’l, Inc.*, Cr. No. 04-837 (ILG) (E.D.N.Y. Sept. 22, 2004) [hereinafter *Computer Associates DPA*], available at <http://f11.findlaw.com/news.findlaw.com/wsj/docs/ca/usca904defpagr.pdf>).

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 15, 2005) [hereinafter *Bristol-Meyers Squibb DPA*], available at <http://www>.

PNC Bank<sup>109</sup> have also signed DPAs to avoid being prosecuted by the government.<sup>110</sup> 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.<sup>111</sup>

For instance, in the DPA between WorldCom, Inc. and the State of Oklahoma,<sup>112</sup> WorldCom agreed to “pay \$750 million in restitution to the Company’s former shareholders”<sup>113</sup> and to appoint an “entirely new” CEO, CFO, General Counsel, and Board of Directors.<sup>114</sup> 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 \$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 . . . .”<sup>115</sup> Several other corporations have agreed to donate funds to specific causes or non-profit organizations pursuant to their DPAs.<sup>116</sup> Finally, at least two corporations have consented to spon-

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justice.gov/usao/nj/press/files/pdf/deferredpros.pdf (setting out the terms of the Bristol-Meyers Squibb deferred-prosecution agreement with the government).

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), available at <http://www.law.virginia.edu/pdf/faculty/garrett/pnciclc.pdf>.

110. See Wray & Hur, *supra* note 45, at 1138–41 (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, <http://www.nytimes.com/2003/08/28/business/a-state-pursues-worldcom-effects-seen-on-us-case.html> (“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. . . . Each 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. Sec Litig.*, No. 02 CIV 3288 (DLC), 03 CIV 1785 (DLC) (S.D.N.Y. Mar. 12, 2004), available at [http://www.corporatecrimereporter.com/documents/mciok\\_000.pdf](http://www.corporatecrimereporter.com/documents/mciok_000.pdf).

114. *Id.*

115. *Deferred Prosecution Agreement* ¶ 12, *United States v. Roger Williams Med. Ctr.*, No. 06-02-T (D.R.I. Feb. 2007) [hereinafter *Roger Williams DPA*], available at [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/files/roger\\_williams\\_deferred\\_sentence\\_agreement.pdf](http://lawprofessors.typepad.com/whitecollarcrime_blog/files/roger_williams_deferred_sentence_agreement.pdf).

116. See *Deferred Prosecution Agreement at 8 app. A* ¶ 2, *United States v. Operations Mgmt. Int’l, Inc.* (D. Conn. Feb. 2006) [hereinafter *Operations Management DPA*], available at <http://www.justice.gov/usao/ct/Documents/OMI%20Agreement.doc> (stipulating that the corporation donate “\$1 million to the Greater New Haven Water Pollution Control Authority . . . 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”); see also Lawrence D. Finder & Ryan D.

soring professorships in subject areas relating to their allegedly wrongful conduct. Bristol-Meyers Squibb agreed to endow the chair in ethics at Seton Hall Law School<sup>117</sup> and Operations Management International, Inc. agreed to fund a chair in environmental studies at the United States Coast Guard Academy.<sup>118</sup>

### 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.<sup>119</sup> Although NPAs “allow the company to avoid any potential collateral consequences associated with the mere fact that the company has been charged with a crime, . . . they still require public acceptance of responsibility, restitution and surrender of ill-gotten gains, full cooperation, and implementation of remedial measures.”<sup>120</sup> 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.<sup>121</sup>

Major corporations, such as Adelphia Communications Corporation,<sup>122</sup> the Bank of New York (“BNY”),<sup>123</sup> and Merrill Lynch,<sup>124</sup> have

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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 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).

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 with representatives of the executives and management staffs of other companies in the New Jersey area, may attend.” *Id.*

118. See Operations Management DPA, *supra* note 116, at 8 app. A ¶ 1.

119. See Wray & Hur, *supra* note 45, at 1105; see also *Year-End Update*, *supra* note 102 (“[T]he emerging 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. . . . NPAs are typically between the corporation and the government and nothing is filed or approved by a court.”).

120. Wray & Hur, *supra* note 45, at 1105 (citation omitted).

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), available at <http://www.usdoj.gov/usao/nys/pressreleases/February07/adelphiaforfeiturepr.pdf> (providing the terms of the government’s NPA with Adelphia Communications Corporation).

123. See Non-Prosecution Agreement Between the Bank of New York and the U.S. Attorney’s Offices for the Eastern and Southern Districts of New York, *United States v. Bank of N.Y.* (E.D.N.Y. & S.D.N.Y. Nov. 4, 2005) [hereinafter BNY NPA], available at <http://www.secinfo.com/d9cw.z74.c.htm>.

124. See generally Letter from Leslie R. Caldwell, Dir., Enron Task Force, Dep’t of Justice, to

entered into NPAs with the government.<sup>125</sup> 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 . . . .”<sup>126</sup>

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.<sup>127</sup> BNY had to disclose all information relevant to the government’s investigation of its conduct.<sup>128</sup> 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,”<sup>129</sup> forfeit its rights to \$26 million in illegal profits,<sup>130</sup> 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.<sup>131</sup>

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,<sup>132</sup> to accept responsibility for these actions,<sup>133</sup> and to adopt and implement new “procedures relating to the integrity of client and counterparty<sup>134</sup> financial statements and year-end

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Robert S. Morvillo, Esq., Morvillo, Abramowitz, Grand, Iason & Silberberg, and Charles Stillman, Esq., Stillman & Friedman (Sept. 17, 2003) [hereinafter Merrill Lynch NPA], available at [http://www.nacdl.org/public.nsf/whitecollar/DPAs\\_and\\_NPAs/\\$FILE/Merrill\\_Lynch\\_Agreement.pdf.pdf](http://www.nacdl.org/public.nsf/whitecollar/DPAs_and_NPAs/$FILE/Merrill_Lynch_Agreement.pdf.pdf) (setting out the terms of the Merrill Lynch non-prosecution agreement).

125. See Wray & Hur, *supra* note 45, at 1142–43 (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. See BNY NPA, *supra* note 123, ¶ 7.

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.* ¶ 2.

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.* exhibit A at 5.



transactions . . . .”<sup>135</sup>

Although corporations such as BNY sign NPAs specifically to stay in business and to avoid a nearly certain demise,<sup>136</sup> some NPAs have effectively put corporations out of 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.<sup>137</sup> 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.<sup>138</sup>

### 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,<sup>139</sup> many such agreements are not

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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](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.”); see also Michael R. Sklaire & Joshua G. Berman, *Deferred Prosecution Agreements: What Is the Cost of Staying in Business?*, LEGAL OPINION LETTER (Wash. Legal Found., Wash. 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.”).

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 1–2 (Mar. 29, 2007), available at <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 could 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. See 18 U.S.C. § 3161(h)(2) (2006) (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*

submitted to courts at all.<sup>140</sup> Moreover, despite frequent criticism by scholars regarding the use of these agreements,<sup>141</sup> courts have been nearly unanimous in their acceptance of DPAs and NPAs.<sup>142</sup>

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.<sup>143</sup> Such a litigation outcome<sup>144</sup> is not likely to occur frequently, however, in light of the DOJ's recent alterations of corporate charging policy. For example, the McNulty Memo 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.<sup>145</sup>

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see Garrett, *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).

141. See John C. Coffee Jr., *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*, MULTINATIONAL MONITOR (Dec. 2003), <http://www.multinationalmonitor.org/mm2003/03december/dec03corp1.html> (contending that deferred-prosecution agreements "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, *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 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 39 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. 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.

145. 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 40–43 and accompanying text (providing an overview of these safeguards). These measures have been

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*,<sup>146</sup> 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 and to cease advancing defendants' attorneys' fees for their defense in this case"<sup>147</sup> 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."<sup>148</sup> 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."<sup>149</sup> 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."<sup>150</sup>

#### 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."<sup>151</sup>

Another concern relates to the implementation of compliance pro-

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preserved, to some extent, in the subsequent iterations of corporate-charging policies issued by the DOJ. See *supra* notes 47–69 and accompanying text (describing the corporate-charging policies following in the wake of the McNulty Memo).

146. 487 F. Supp. 2d 721 (E.D. Va. 2007).

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?*, CHAMPION, Sept./Oct. 2006, at 12, 14); see also Garrett, *supra* note 102, at 918 (contemplating possible abuses in the terms and the implementation of DPAs and NPAs); Paulsen, *supra* note 99, at 1436 ("[T]he government holds all the cards in negotiations over [DPAs and NPAs]. As long as the threat of prosecution lingers over a company, the corporation is compelled to agree to the

grams that meet the demands of the government. Some contend that these programs are too costly and require the use of "corporate monitors without clearly defined powers as to who can take actions adverse to shareholder interests."<sup>152</sup> Further, DPAs and NPAs, specifically the monetary fines imposed pursuant to these agreements, are imperfect tools for effecting widespread cultural or institutional change within a corporation<sup>153</sup> and for instilling a sense of responsibility and of the importance of self-regulation.<sup>154</sup>

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.<sup>155</sup> 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.<sup>156</sup> 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,<sup>157</sup> commentators have also made proposals that can be divided into two categories: (1) having "prosecutors voluntarily constrain their own discretion" in organizational cases; and (2) having "judges narrow federal organizational criminal law."<sup>158</sup>

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

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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.").

152. Hess & Ford, *supra* note 151, at 310 (citing Jennifer O'Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 BROOK. J. CORP. FIN. & COM. L. 89, 102-06 (2006)).

153. *See id.* at 311 (citing Cristie L. Ford, *Toward a New Model for Securities Law Enforcement*, 57 ADMIN. L. REV. 757, 769-74 (2005)).

154. *See id.*

155. *See id.* at 310 (citation omitted); *see also* Garrett, *supra* note 102, at 856 (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" (quoting Letter from Ralph Nader & Robert Weissman to Alberto Gonzales, Attorney Gen. (June 5, 2006), <http://multinationalmonitor.org/editorsblog/index.php?/archives/26-The-Boeing-DOJ-Debate.html>)).

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. *See* Paulsen, *supra* note 99, at 1436-37.

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

prosecutors to make decisions regarding these agreements<sup>159</sup> and requiring the government to retain an independent monitor having direct obligations to the government agency.<sup>160</sup> Second category proposals include permitting judges to vitiate DPA or NPA “provisions that attempt to contract around judicial review and encroach on prosecutorial discretion,”<sup>161</sup> “to act as fiduciaries for constituencies otherwise unrepresented in the corporate deferral process and potentially vulnerable to negative externalities,”<sup>162</sup> to take the place of independent civil monitors in supervising organizational compliance with the conditions of DPAs and NPAs,<sup>163</sup> 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.”<sup>164</sup>

### 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,”<sup>165</sup> against the Federal Election Commission (“FEC”) in December 2007. The organization argued, in connection with its anticipated

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

160. See Hess & Ford, *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 (citation omitted); 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, *supra* note 102, at 926–27.

164. *Id.* at 928; cf. *United States v. Miller*, 406 F.3d 323, 334 (5th Cir. 2005) (citation omitted) (“[I]n 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. Meyer*, 157 F.3d 1067, 1076–77 (7th Cir. 1998) (recommending the use of pre-indictment hearings); *United States v. Ataya*, 864 F.2d 1324, 1330 n.9 (7th Cir. 1988) (“A pre-indictment hearing would help prevent precisely the sort of 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, CU Files Suit over Limits for Issue Ads (Dec. 14, 2007), <http://www.citizensunited.org/PRESS.ASPX?ENTRYID=9966133>.

release via video on-demand of a “hard-hitting political documentary, *Hillary: The Movie* (‘Hillary’),”<sup>166</sup> 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”),<sup>167</sup> otherwise known as the McCain-Feingold campaign finance law.<sup>168</sup>

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”).<sup>169</sup> Citizens United contended that the BCRA’s requirements that groups put disclaimers on such ads<sup>170</sup> and file reports containing information about the ads, including their contributors,<sup>171</sup> are unconstitutional as they apply to *Hillary* and its accompanying advertisements.<sup>172</sup> 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 pur-

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166. *Id.*

167. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified at 2 U.S.C. §§ 431–55 (2006)).

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

169. See 2 U.S.C. § 434(f)(3)(A)(i) (2006) (defining “electioneering communication”). In *McConnell v. FEC*, 540 U.S. 93, 194 (2003), overruled by *Citizens United v. FEC*, 130 S. Ct. 876 (2010), the Supreme Court found the electioneering communications provision not to be unconstitutionally vague and upheld it. In *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 470 (2007), 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.”

170. See 2 U.S.C. § 441d(d)(2) (2006). Section 441d(d)(2) specifies 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 and appear in text on-screen for at least four seconds during the advertisements not authorized by a candidate or her political committee. *Id.* This provision is also known as section 311. See *Citizens United v. FEC (Citizens United III)*, 130 S. Ct. 876, 913–14 (2010).

171. These reporting requirements mandate that any corporation spending more than \$10,000 in a calendar year to produce or air electioneering communications must file a report with the FEC which includes the names and addresses of anyone who contributed \$1000 or more in aggregate to the corporation for the purpose of furthering electioneering communications. See 2 U.S.C. §§ 434(f)(1), (f)(2)(F) (2006); 11 C.F.R. § 104.20(c)(9) (2009).

172. See *Citizens United v. FEC (Citizens United I)*, 530 F. Supp. 2d 274, 277 (D.D.C.), *prob. juris. deferred* by 552 U.S. 1240, *appeal dismissed* by 552 U.S. 1278 (2008).

poses,<sup>173</sup> violates the First Amendment as it applies to *Hillary*.<sup>174</sup>

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 . . . .”<sup>175</sup> Approximately six months later, the court granted summary judgment to the FEC,<sup>176</sup> concluding that the BCRA’s disclosure and disclaimer requirements and prohibition of the video on-demand distribution of *Hillary* were constitutional.<sup>177</sup>

Citizens United appealed directly to the Supreme Court pursuant to a special provision of the BCRA.<sup>178</sup> The Court noted probable jurisdiction.<sup>179</sup> The case was initially argued on March 24, 2009.<sup>180</sup> 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*,<sup>181</sup> on which *McConnell* relied and which upheld the constitutionality of 2 U.S.C. §441b.<sup>182</sup> The case was reargued on September 9, 2009.<sup>183</sup>

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.”<sup>184</sup> As a result, the Court expressly overturned *Austin*’s holding that “political speech may be banned based

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173. See 2 U.S.C. § 441b(b)(2) (2006), *invalidated by Citizens United III*, 130 S. Ct. 876 (2010). This provision does not bar electioneering communications paid for out of a segregated fund that receives donations only from stockholders, executives, and their families. See *id.* § 441b(b)(2)(A)–(C)(i), (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* notes 171–72.

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 (ARR, RCL, RWR), at \*1 (D.D.C.), *prob. juris. noted*, 129 S. Ct. 594 (2008), *aff’d in part, rev’d in part*, 130 S. Ct. 876 (2010).

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

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

179. See *Citizens United III*, 130 S. Ct. at 888 (citation omitted).

180. See *id.*

181. 494 U.S. 652 (1990), *overruled by Citizens United III*, 130 S. Ct. 876 (2010).

182. See *Citizens United III*, 130 S. Ct. at 888.

183. See *id.*

184. *Id.* at 886.

on the speaker's corporate identity."<sup>185</sup>

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*.<sup>186</sup> 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 persons."<sup>187</sup> 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*.<sup>188</sup> 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."<sup>189</sup> 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."<sup>190</sup>

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."<sup>191</sup> Thus, the Court was compelled to consider "the continuing effect of the speech suppression upheld in *Austin*."<sup>192</sup>

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

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185. *Id.*

186. *See id.* at 888.

187. *Id.* at 888–89.

188. *Id.* at 889. *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, 469–70 (2007).

189. *Citizens United III*, 130 S. Ct. at 890.

190. *Id.* at 891.

191. *Id.* at 892.

192. *Id.*



their exploration, and the size of the audience reached.”<sup>193</sup>

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 achieve that interest.”<sup>194</sup> The First Amendment prohibits attempts to disfavor certain subjects or viewpoints (content-based restrictions)<sup>195</sup> and restrictions distinguishing among different speakers, allowing speech by some, but not by others.<sup>196</sup> Although it acknowledged that it had “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.”<sup>197</sup> As the “corporate independent expenditures at issue in [*Citizens United*] . . . would not interfere with governmental functions,” the Court deemed these rulings to be inapplicable.<sup>198</sup> 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.”<sup>199</sup>

The Court then focused specifically on the First Amendment rights of corporations, observing that corporations are protected by the First Amendment<sup>200</sup> and that this protection has been “extended by explicit holdings to the context of political speech.”<sup>201</sup>

193. *Id.* at 898 (internal quotation marks omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam)).

194. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007).

195. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813–14 (2000) (citations omitted) (“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. . . . [E]ven 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 Bos. 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*, 130 S. Ct. at 899; *see, e.g., Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (protecting the “function of public school education”); *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 129 (1977) (internal quotation marks and citation omitted) (furthering “the legitimate penological objectives of the corrections system”); *Parker v. Levy*, 417 U.S. 733, 759 (1974) (citation omitted) (ensuring “the capacity of the Government to discharge its [military] responsibilities”); *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 557 (1973) (“[F]ederal service should depend upon meritorious performance rather than political service . . .”).

198. *Citizens United III*, 130 S. Ct. at 899.

199. *Id.*

200. *See id.* at 889–900.

201. *Id.* at 900; *see also Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion) (“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.” (quoting *Bellotti*, 435 U.S. at 783)); *Bellotti*, 435 U.S. at 784 (holding that

According to the Court, *Austin* was the first decision out of a long line of cases<sup>202</sup> that upheld “a direct restriction on the independent expenditure of funds for political speech . . . .”<sup>203</sup> 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.<sup>204</sup> Michigan law, however, prohibited corporations from making contributions and independent expenditures in connection with elections for state office.<sup>205</sup> A violation of the law was punishable as a felony.<sup>206</sup> The Court upheld this law, distinguishing *Buckley v. Valeo* and *First National Bank of Boston v. 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.”<sup>207</sup>

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.”<sup>208</sup> 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 *Buckley* and *Bellotti*<sup>209</sup> and because its application would “produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations”<sup>210</sup> and disadvantage smaller and non-

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political speech does not lose First Amendment protection “simply because its source is a corporation”).

202. See *Citizens United III*, 130 S. Ct. at 903; see also *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. *Citizens United III*, 130 S. Ct. at 903 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 695 (1990) (Kennedy, J., dissenting)).

204. See *id.*

205. See *id.*

206. See *id.*

207. *Id.* (quoting *Austin*, 494 U.S. 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*, 130 S. Ct. at 903 (citations omitted).

209. See *id.* at 904.

210. *Id.* at 905.

profit corporations rather than punishing "amassed wealth."<sup>211</sup>

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.<sup>212</sup> 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."<sup>213</sup> 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."<sup>214</sup> It also cautioned that although it had to "give weight to attempts by Congress to seek to dispel either the appearance or the reality" of electoral official corruption, Congress's remedies must still comply with the First Amendment: "An outright ban on corporate political speech during the critical preelection period is not a permissible remedy."<sup>215</sup>

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.<sup>216</sup> The Court further found that most abuse could be corrected by shareholders through the use of "procedures of corporate democracy."<sup>217</sup> Moreover, the Court noted that § 441b is

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211. *Id.* at 907. 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.* at 908. 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.* (citations omitted).

212. *Id.* at 908 (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam)).

213. *Id.* (alteration in original) (quoting *Buckley*, 424 U.S. at 45) (internal quotation marks omitted). "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." *Id.* at 909; see also *FEC v. Nat'l Conservative Political Action Comm'n.*, 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors."); *Buckley*, 424 U.S. at 26–27 ("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*, 130 S. Ct. at 910 (citation omitted).

215. *Id.* at 911.

216. See *supra* note 210 and accompanying text.

217. *Citizens United III*, 130 S. Ct. at 911 (internal quotation marks omitted) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)).

“both underinclusive and overinclusive”<sup>218</sup> with respect to protecting shareholder interests. 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.”<sup>219</sup> It is overinclusive because it pertains to all types of corporations, even those that have single shareholders or no shareholders at all.<sup>220</sup>

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.<sup>221</sup> 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 campaign finance laws.”<sup>222</sup> 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.<sup>223</sup> 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.<sup>224</sup> Finally, no serious reliance interests were at stake, counseling against adherence to the principle of stare decisis in this case.<sup>225</sup> 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*.<sup>226</sup>

In concluding the opinion, the Court resolved the question of

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218. *Id.* at 911.

219. *Id.*

220. *See id.*

221. *See id.* at 913. 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.*

222. *Id.* at 912.

223. *Id.*

224. *See id.* at 912–13 (“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.* 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 913.

whether BCRA's disclaimer and disclosure provisions were constitutional as they were applied to *Hillary* and the three accompanying advertisements.<sup>227</sup> The Court stated that these requirements<sup>228</sup> are subjected to "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."<sup>229</sup> A governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending is sufficiently important.<sup>230</sup> Because *Hillary* and the ads for *Hillary* "referred to then-Senator 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*.<sup>231</sup>

Chief Justice Roberts and Justice Alito concurred in the Court's majority opinion, writing separately to address the principles of judicial restraint and *stare decisis* implicated by *Citizens United*.<sup>232</sup> 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.<sup>233</sup>

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.<sup>234</sup> 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" (due to the fact that it was a feature-length film distributed through video-on-demand).<sup>235</sup> Moreover, Stevens contended that the Court's decision to

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227. *See id.* at 913–16.

228. *See supra* notes 170–71 (describing these requirements in detail).

229. *Citizens United III*, 130 S. Ct. at 914 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976)).

230. *Id.* (alteration in original).

231. *See id.* at 915. 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." *Id.* at 916 (citing *McConnell v. FEC*, 540 U.S. 93, 198 (2003)).

232. *See id.* at 917 (Roberts, C.J., concurring).

233. *See id.* at 925 (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 982 (Thomas, J., concurring in part, dissenting in part).

234. *See id.* at 931 (Stevens, J., concurring in part, dissenting in part).

235. *See id.* at 937.

overturn *Austin* and parts of *McConnell* was not in accord with the principles of *stare decisis*, as “[t]he only relevant thing that has changed since *Austin* and *McConnell* is the composition of th[e] Court.”<sup>236</sup>

Turning to the merits of the *Citizens United* majority opinion, Justice Stevens stated that the three claims upon which the opinion rested were wrong.<sup>237</sup> First, he contended that “neither *Austin* nor *McConnell* held or implied that corporations may be silenced,” thereby “banning” corporate political speech.<sup>238</sup> 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.”<sup>239</sup> 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.<sup>240</sup> 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.”<sup>241</sup>

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.’”<sup>242</sup> He also pointed out that the Court’s holding and reasoning in *Austin* had been repeatedly affirmed in the twenty years that had passed since this decision was handed down.<sup>243</sup> 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*.<sup>244</sup> Finally, Stevens examined the interests at stake in *Citizens United*, contending that the governmental interest in preventing corrup-

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236. *Id.* at 942.

237. *See id.* 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.* at 944–45.

239. *Id.* at 945.

240. *See id.*

241. *Id.* at 948.

242. *Id.* at 950 (quoting David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 HASTINGS CONST. L.Q. 541, 578 (1991)); *cf.* *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

243. *See Citizens United III*, 130 S. Ct. at 956 (Stevens, J., concurring in part, dissenting in part).

244. *See id.* at 957.

tion or the appearance of corruption was not limited to *quid pro quo* corruption.<sup>245</sup>

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.”<sup>246</sup> In doing so, Stevens emphasized the differences between corporations and human beings:

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.”<sup>247</sup>

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

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245. *See id.* at 961. 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.* Stevens argued that *Buckley*’s language and the BCRA record supported this reasoning. *See id.* at 964–65; *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, 622–23 (D.D.C.) (per curiam) (Kollar-Kottelly, J., concurring in part, dissenting in part) (“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.”), *aff’d in part, rev’d in part*, 540 U.S. 93 (2003), *overruled by Citizens United III*, 130 S. Ct. 876 (2010).

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*, 130 S. Ct. at 979 (Stevens, J., concurring in part, dissenting in part).

246. *Id.* (citation omitted).

247. *Id.* at 971 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658–59 (1990)).

“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.<sup>248</sup>

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.<sup>249</sup>

#### 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<sup>250</sup>—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.<sup>251</sup> DPAs and NPAs impose relatively standard conditions on corporations.<sup>252</sup> 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 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 Amend-

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248. *Id.* at 972.

249. *See id.* at 974.

250. *See id.* at 900 (majority opinion) (“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.’” (citing *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978))).

251. *See supra* note 94 and accompanying text.

252. *See supra* notes 99–104, 119–21 and accompanying text.



ment right to trial by jury.<sup>253</sup> A corporation, however, does not have the right to remain silent because it is not a "natural person."<sup>254</sup> Additionally, the Supreme Court has not yet decided whether corporations have the jury trial right.<sup>255</sup> If Justice Stevens'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.

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,"<sup>256</sup> effectively offering up a confession. Under current Supreme Court case law, "corporate persons, which lack any state of mind, lack Fifth Amendment privilege."<sup>257</sup> 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, fed-

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253. 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).

254. 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."); see also *Braswell v. United States*, 487 U.S. 99, 102 (1988) (citation omitted) ("[I]t 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. CV032213JFWRCX, 2003 WL 22251149, at \*3 (C.D. Cal. July 2, 2003) (citations omitted) ("[T]he privilege against self-incrimination only protects natural persons, not artificial entities such as corporations.").

255. 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 L. 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").

256. Garrett, *supra* note 49, at 926.

257. *Id.* at 918.

eral and state governments may not deprive any person “of life, liberty, or property without due process of the law.”<sup>258</sup> Due process, in this context, includes the opportunity for a meaningful hearing<sup>259</sup> in front of an impartial decision maker.<sup>260</sup>

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.<sup>261</sup> Indeed, one court has concluded that in the context of non-prosecution agreements “[d]ue process prevents the government from unilaterally determining that a defendant breached the . . . agreement.”<sup>262</sup>

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 constitutional<sup>263</sup> and plea bargains are routinely accepted by federal and state courts.<sup>264</sup> 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.<sup>265</sup> The plea bargain must also not be the product of threat or coercion, and it must be entered into knowingly, voluntarily, and intelligently.<sup>266</sup>

The Supreme Court has held, in effect, that assistance of counsel is “a proxy for voluntariness in pleading, effectively establishing that a

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

259. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (holding that due process requires a pre-termination evidentiary hearing before the discontinuation of welfare).

260. See, e.g., *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (holding that it is a violation of due process for a decision-maker to be able to gain personally from his or her decision).

261. See *supra* note 164 and accompanying text.

262. *United States v. Meyer*, 157 F.3d 1067, 1076 (7th Cir. 1998) (internal quotation marks omitted) (quoting *United States v. Verusio*, 803 F.2d 885, 888 (7th Cir. 1986)).

263. 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 state”). But cf. 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).

264. 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.”).

265. See *Bruton v. United States*, 391 U.S. 123, 135 (1968) (quoting *People v. Fisher*, 164 N.E. 336, 341 (N.Y. 1928)).

266. See *Brady*, 397 U.S. at 747; 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).

counseled plea is presumptively valid.”<sup>267</sup> 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. . . .”<sup>268</sup> Furthermore, pursuant to the “intelligence” requirement, the plea is to be made with “sufficient awareness of the relevant circumstances and likely consequences.”<sup>269</sup> 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.”<sup>270</sup> 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,”<sup>271</sup> as “[i]gnorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.”<sup>272</sup> 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 . . . .”<sup>273</sup>

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.<sup>274</sup> Prosecutors also need not seek approval prior to demanding and obtaining this information.<sup>275</sup> 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.<sup>276</sup>

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

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

268. *Bram v. United States*, 168 U.S. 532, 542–43 (1897).

269. *Brady*, 397 U.S. at 748.

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

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

272. *Id.* at 242–43.

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

274. *See supra* note 59 and accompanying text.

275. *See supra* notes 60–61 and accompanying text.

276. *See supra* notes 62–64 and accompanying text.

potentially criminal activities.<sup>277</sup> 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.<sup>278</sup> And the majority's opinion in *Citizens United* further substantiates the idea that corporations should be afforded the same rights as natural persons;<sup>279</sup> although corporate personhood is a convenient legal fiction, "this is still a fiction that we embrace to facilitate protection of the rights of individuals."<sup>280</sup>

In view of this understanding, the government's current treatment of corporate criminality and its use of DPAs and NPAs are highly problematic. Specifically, provisions of DPAs and NPAs that mandate corpo-

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277. See *supra* notes 81–84 and accompanying text.

278. See *Santa Clara Cnty. v. S. Pac. R.R.*, 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 *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978) (holding that artificial persons are protected from denial of "liberty," which includes their First Amendment rights); Larry E. Ribstein, *Corporate Political Speech*, 49 WASH. & LEE L. REV. 109, 123 (1992) (stating that corporations have "the legal attributes of a 'person'").

279. 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, 76 (1906) (concluding that the Fourth Amendment protection against unreasonable searches and seizures applies to corporations); *Minneapolis & St. Louis Ry. v. Beckwith*, 129 U.S. 26, 28 (1889) (noting that a corporation is entitled to due process of law under the Fifth and Fourteenth Amendments); *Santa Clara Cnty.*, 118 U.S. at 396 (stating that a corporation is entitled to equal protection of the law under the Fourteenth Amendment).

280. Stephen M. Bainbridge, *Citizens United, Corporate Personhood, and Nexus of Contracts Theory*, PROFESSORBRAINBRIDGE.COM (Jan. 21, 2010, 3:30 PM) <http://www.professorbainbridge.com/professorbainbridgecom/2010/01/citizens-united-corporate-personhood-and-nexus-of-contracts-theory.html>. See generally Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95, 132 (1995).

rations' 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 approval<sup>281</sup> 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 controlling determination on the issue of breach, thereby affording corporations due process under the Fifth and Fourteenth Amendments.

#### CONCLUSION

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 negotiation process. Without question, these changes would greatly alter the landscape of corporate criminal liability in the United States.

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