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Robert J. Ridge

Mackenzie A. Baird

THE PENDULUM SWINGS BACK: REVISITING CORPORATE CRIMINALITY AND THE RISE OF DEFERRED PROSECUTION AGREEMENTS

Robert J. Ridge & Mackenzie A. Baird***

In the wake of the economic turmoil touched off by the subprime mortgage fiasco, Congress has been called upon to enact criminal statutes specifically addressing mortgage fraud and predatory lending practices. Any congressional reaction to this latest economic upheaval would be the most recent in a long line of criminal statutes enacted in response to the economic calamity du jour: in the 1980s, as savings and loan associations across the country failed in large numbers, part of Congress's response was to enact the Bank Fraud Statute;[1] in the 1990s, forecasts for rapid increases in Medicare expenditures threatened the solvency of the Medicare Trust Fund, thus prompting Congress to enact the Health Care Fraud Statute;[2] and at the turn of the century, corporate excess gave rise to the Securities Fraud Statute.[3] In each of these instances, Congress heralded the new statute as a device to restore integrity to the marketplace.

At times, it appears that each oscillation of the business cycle breeds a new species of white-collar criminal just begging for a congressional spanking. This Article raises the question of whether Congress's penchant for criminalizing new strains of commercial activity is an effective method of regulating business conduct. This Article will first briefly survey the history of corporate criminal liability and, specifically, the incongruity that arises when prosecutors enforce specific intent statutes against artificial persons. Second, the Article will discuss how those incongruties manifest themselves in prosecutorial uncertainty. Third, it will consider the consequences of enforcement policies on the relationships between and among the sovereign, the corporate employer, and the employee. Finally, this Article will examine the deferred prosecution agreement as a tool for extracting fines from corporate wrongdoers under the threat of criminal prosecution.

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* Robert Ridge is a Partner in the law firm of Thorp Reed & Armstrong, LLP, whose practice focuses on internal investigations and white collar criminal defense.

** Mackenzie Baird is an Associate in the Pittsburgh office of Thorp Reed & Armstrong, LLP.

[1] 18 U.S.C. § 1344 (2000).

[2] 18 U.S.C. § 1347 (2000).

[3] 18 U.S.C. § 1348 (2000).

I. THE ORIGINS OF CORPORATE CRIMINAL LIABILITY

For those attorneys who came to the bar after Watergate and the corporate slush fund scandals of the 1970s, the principle that a corporation can be held legally responsible for the criminal acts of its employees is not very controversial. Indeed, the idea of corporate criminal liability is so well ingrained in our jurisprudence that lawyers of a more recent vintage are surprised to learn that the principle was not a settled doctrine until the turn of the twentieth century[4] and was not a frequently invoked concept until the latter half of the twentieth century.

Historians attribute the emergence of corporate criminal liability to changing economic conditions.[5] In the late 1800s, Congress attached criminal penalties to statutes designed to regulate emerging industrial powers such as railroads, banks, industrialized agriculture, and industrial labor relations. The Sherman Antitrust Act of 1890 transcended specific industries and provided for criminal penalties for violations of its broad prohibitions against anti-competitive behavior. Once established, the direct correlation between the complexity of economic life and the number of criminal statutes designed to regulate economic behavior has never wavered.[6]

The imposition of criminal liability upon a corporation by the Supreme Court in *New York Central & Hudson River Railroad Co. v. United States* signaled a vast departure from the traditional notion that vicarious criminal liability was contrary to the inherent liberalism of American criminal law.[7] At its inception, the rule of corporate criminal liability provided that a corporation is responsible for the illegal acts of its officers, agents, and employees committed within the scope of their employment and for the benefit of the corporation.[8] However, judicial decisions over the course of the twentieth century have expanded the

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[4] *See N.Y. Central & Hudson River R.R. Co. v. U.S.*, 212 U.S. 481 (1909) (holding the corporate defendant could be held responsible for the illegal acts of its employees under the doctrine of *respondeat superior*).

[5] Otto G. Obermaier & Robert G. Morvillo, *White Collar Crime: Business and Regulatory Offenses* vol. 1, § 5.02, 5-4 to 5-9 (L.J. Press 2007).

[6] In the late 1990s, an American Bar Association ("ABA") Task Force, chaired by Former Attorney General Edwin Meese, III, conducted a two-year study on the federalization of criminal law. The report found that highly publicized incidents frequently resulted in calls for congressional responses, even if state law already addressed the misconduct, stating that "[t]he Task Force was told explicitly by more than one source that many of these new federal laws are passed not because federal prosecution of these crimes is necessary but because federal crime legislation in general is thought to be politically popular." Edwin Meese, III, *The Report of the ABA Task Force on the Federalization of Criminal Law* 2 (ABA 1998) (reprinted in 11 Fed. Senten. Rptr. 194 (1999)).

[7] *See* John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 Am. U. L. Rev. 579, 587-92 (2005) (examining seven features: "(1) the *mens rea* requirement, (2) the absence of vicarious criminal liability, (3) the principle of legality, (4) the presumption of innocence, (5) the requirement of proof beyond reasonable doubt, (6) the attorney-client privilege, and (7) the privilege against self-incrimination – [which] reflect the inherent liberalism of American criminal law at the dawn of the twentieth century").

[8] *N.Y. Central*, 212 U.S. 481; *see also U.S. v. Jorgensen*, 144 F.3d 550, 560 (8th Cir. 1998).

breadth of this rule far beyond that set forth in *New York Central*. As one commentator has observed:

> [I]n the present day, the basic rule of respondeat superior announced in *New York Central*, combined with the doctrine of collective knowledge,[9] has come to mean the following: A corporation is criminally liable even if the criminal conduct is undertaken without the knowledge of top management; the criminal activity was performed by a low level employee; the primary purpose was to benefit only the miscreant employee; there was no actual benefit to the corporation; the criminal acts were performed in direct violation of instructions from the company; there is a rigorous compliance program in place; no single individual had the requisite intent or knowledge sufficient to violate the law; it is never possible to identify the actual employee or agent responsible for the crime; or the offending employees are all acquitted of the same offense.[10]

Thus, the current state of criminal corporate liability deems a corporation culpable, even absent any criminal intent or act on the part of the corporation. Despite this obvious erosion of the theoretical underpinnings of criminal law, courts have declined to rein in the ever-expanding doctrine, often relying on the need to "facilitate the identification and punishment of elusive corporate wrongdoers."[11]

As the breadth of the judicial doctrine grew, so did congressional efforts to police dishonest conduct. From the early 1900s through the present, Congress has adopted criminal statutes in response to crises in industries such as securities, banking, health care, and criminal statutes that target environmental abuses across the industrial spectrum. It is presently estimated that there are over 4,000 criminal statutes in the federal system

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[9] Pursuant to the "collective knowledge" doctrine, a corporation may be attributed the aggregate knowledge of several employees, even though no single employee possesses the knowledge or intent to commit the crime. *See U.S. v. Bank of New Eng.*, 821 F.2d 844, 855 (1st Cir. 1987) (upholding an instruction that the defendant bank could be found to have the requisite guilty knowledge of one or more of its employees or the "aggregate knowledge of all its employees").

[10] Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 Am. Crim. L. Rev. 53, 64-65 (2007) (citing inter alia *U.S. v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972) ("[L]iability may attach without proof that the conduct was within the agent's actual authority, and even though it may have been contrary to express instructions."); *Stand. Oil Co. v. U.S.*, 307 F.2d 120, 127 (5th Cir. 1962) (finding that "the corporation may be criminally bound by the acts of subordinates, even menial, employees"); *U.S. v. Am. Radiator & Stand. Sanitary Corp.*, 433 F.2d 174, 204 (3d Cir. 1970) (holding the employee need not act with the exclusive purpose of benefiting the corporation), *cert. denied*, 401 U.S. 94 (1971); *U.S. v. Automated Med. Laboratories, Inc.*, 770 F.2d 399, 407 (4th Cir. 1985) (holding a corporation need not receive an actual benefit); *U.S. v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983) (holding a corporation may be held criminally responsible for antitrust violations committed by its employees even if such acts were against corporate policy or express instructions)).

[11] *Id.* at 59.

and equally as many regulatory requirements or proscriptions that carry criminal sanctions.[12] Often these criminal statutes have created offenses of broad scope, or with reduced *mens rea* requirements, or that simply criminalize conduct making it more difficult for the government to prosecute other substantive offenses.[13]

There are three important conclusions that one can draw after analyzing the relationship between economic expansion and the expansion of criminal law: first, emerging or hyperactive economic markets spawn an endless variety of schemes designed to permit the perpetrators more than their fair share of the expanding economic pie; second, business crimes are invariably *malum prohibitum*, i.e., the prohibited activity is not intuitively criminal but rendered so as a reflection of legislative will; and finally, legislatures are largely reactive in passing criminal statutes that regulate activity in emerging or hyperactive markets. In most cases, Congress passed laws prohibiting some variant of business conduct in response to either serious economic losses suffered by a segment of the population or the amassing of great wealth by a segment of the population.

II. ADDRESSING THE UNCERTAINTY: THE PRINCIPLES OF FEDERAL PROSECUTION

Congress, of course, does not enforce the criminal laws it passes. Instead, the Department of Justice, FBI, SEC, and other agencies are charged with the just and fair enforcement of federal criminal laws. Prosecution of individuals under traditional criminal laws is, in many respects, a straightforward proposition. Once a violation of a criminal statute is identified, prosecutors employ an array of acceptable investigatory techniques, usually within constitutional parameters, to amass evidence sufficient to obtain a conviction. Until sentencing, prosecutors give little thought to the consequences of the prosecution on the economic markets, shareholders, business innovation, and innocent employees. The prosecution of a corporation, on the other hand, is an altogether different proposition. As the country discovered with the demise of the accounting firm Arthur Andersen, artificial entities can be devastated by a criminal prosecution. All too often, the consequences of the criminal prosecution of an artificial entity are borne by the innocent men and women the entity employs. Accordingly, prosecutors must consider the impact of their prosecution of an artificial entity on employees, creditors, and financial markets. The recent history of Justice Department policy in the context of

[12] *See* Dick Thornburgh, Former U.S. Atty. Gen., Keynote Speech, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes* (Geo. U.L. Ctr., D.C., Mar. 15, 2007), in 44 Am. Crim. L. Rev. 1279, 1281 (2007).

[13] Hasnas, *supra* n. 7, at 601.

policing corporate criminal conduct reflects a Department that is struggling with this enormous responsibility.

Although the federal government was first imparted with the authority to prosecute corporations in the early 1900s, the methods employed to carry out that authority were largely left to develop within the U.S. Attorney's Offices and the enforcement agencies. Not surprisingly, the organic development of enforcement practices led to a lack of uniformity with respect to the investigation and indictment of corporations among the ninety-four U.S. Attorney's Offices and six divisions of Main Justice. To address this continuing lack of uniformity, in recent years the Department of Justice has published a series of memoranda designed to guide its prosecutors in developing a more uniform approach to corporate conduct and to inform the defense bar and the general public about factors that Department of Justice prosecutors may take into consideration when making charging decisions.

A. Holder Memorandum, June 16, 1999

The first such memorandum, issued in 1999 by then-Deputy Attorney General Eric Holder, was entitled "Federal Prosecution of Corporations" and set forth a number of factors a prosecutor should consider before charging a corporation suspected of wrongdoing: (1) the nature and seriousness of the offense, (2) the pervasiveness of the wrongdoing, (3) the corporation's history of similar conduct, (4) the corporation's timely and voluntary disclosure of wrongdoing and willingness to cooperate with the government's investigation, (5) the existence and adequacy of a compliance program, (6) the corporation's efforts at remediation, (7) the potential for collateral consequences to third parties, and (8) the adequacy of civil or regulatory remedies.[14]

In gauging the fourth factor, voluntary disclosure and cooperation, the Holder Memorandum instructed prosecutors to consider "the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges."[15] Additionally, prosecutors could consider "whether the corporation appears to be protecting its culpable employees and agents . . . either through the advancing of attorneys' fees, through retaining the employees without sanction for their misconduct, or through

[14] *See* Memo. from Eric H. Holder, Jr., Dep. Atty. Gen., to All Component Heads & U.S. Attys., *Federal Prosecution of Corporations* § II.A (June 16, 1999) (available at http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html) [hereinafter Holder Memo.].

[15] *Id.* at § VI.A.

providing information to the employees about the government's investigation."[16]

Although it was expressly advisory and nonbinding,[17] the memorandum effectively established a policy of encouraging waiver of the attorney-client privilege and work product immunity in exchange for possible favorable treatment by prosecutors.[18]

B. Thompson Memorandum, January 20, 2003

Responding to public demands for further corporate accountability following Enron, WorldCom, Adelphia, and other corporate scandals, the Department of Justice announced a revision of these corporate charging guidelines in January 2003.[19] The "Principles of Federal Prosecution of Business Organizations," issued by then-Deputy Attorney General Larry Thompson, retained the general principles and commentary enunciated in the Holder Memorandum but increased the Department's emphasis on, and scrutiny of, the authenticity of the corporation's cooperation.[20]

Like the Holder Memorandum, the Thompson Memorandum instructed prosecutors to evaluate the extent of corporate cooperation in making charging decisions. However, the Thompson Memorandum added the additional requirement that prosecutors evaluate "whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation."[21] According to the Memorandum, examples of such disingenuous conduct include overly expansive representation of employees by the corporation and giving "inappropriate directions to employees or their counsel, such as directions not to cooperate" with the investigation or not to submit to interviews by prosecutors.[22]

However, the most important change to Department of Justice charging policies brought about by the Thompson Memorandum was that

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[16] *Id.* at § VI.B.

[17] *See id.* at Intro. ("I believe these factors provide a useful framework in which prosecutors can analyze their cases and provide a common vocabulary for them to discuss their decision with fellow prosecutors, supervisors, and defense counsel. The factors are, however, not outcome-determinative and are only guidelines.").

[18] Robert A. Del Giorno, *Corporate Counsel as Government's Agent: The Holder Memorandum and Sarbanes-Oxley Section 307*, 7 The Champion 22 (Aug. 2003) (available at http://www.nacdl.org/public.nsf/698c98dd101a846085256eb400500c01/62e85840cdedc3d985256e540074c19a?OpenDocument&Highlight=0,giorno).

[19] *See* Memo. from Larry D. Thompson, Dep. Atty. Gen., to Heads of Dept. Components & U.S. Attys., *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003) (available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm) [hereinafter Thompson Memo.].

[20] Sean R. Berry, *Revised Principles of Federal Prosecutions of Business Organizations: An Overview*, 51 U.S. Attys.' Bull. 5 (Nov. 2003) (available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5106.pdf).

[21] Thompson Memo., *supra* n. 19, at § VI.B.

[22] *Id.*

the principles set forth therein were binding on prosecutors.[23] Indeed, it was the binding nature of the policies, and their heavy-handed application by prosecutors, that compelled a federal judge to declare parts of the Memorandum unconstitutional in *United States v. Stein*.[24]

The *Stein* decision arose from the 2004 investigation and indictment of numerous KPMG employees for marketing allegedly illegal tax shelters. In accordance with the Thompson Memorandum, KPMG agreed to cooperate with the government's investigation and refused to advance legal fees to any employee charged with criminal wrongdoing. The court found that the Thompson Memorandum itself, combined with the government's application of it in the case, exerted unconstitutional pressure on KPMG to decline to follow its long-standing policy of paying its employees' attorneys' fees.[25] Consistent with this finding, the court held that the government interfered with the employees' Fifth Amendment right to a fair proceeding and Sixth Amendment right to counsel.[26] For many members of the defense bar, the *Stein* decision marked the first judicial confirmation that line prosecutors were extending the principles enunciated in the Thompson Memorandum beyond their constitutional limits.

C. McNulty Memorandum, December 12, 2006

In contrast to the Thompson and Holder Memoranda, the most recent directive, referred to as the McNulty Memorandum, seemingly represents a retrenchment of policy as it relates to corporate prosecutions.[27] Indeed, the McNulty Memorandum was announced in response to the *Stein* decision and growing criticism that the Thompson Memorandum had substantially undermined the corporate attorney-client privilege.

In the revised "Principles of Federal Prosecution," (the "Principles") then-Deputy Attorney General Paul McNulty endeavors to scale back some aspects of the Thompson Memorandum by requiring prosecutors to obtain senior supervisory approval before making a demand that the corporation waive the attorney-client privilege and work-product doctrine. The procedural mechanism set forth by McNulty divides privileged information into two categories: Category I information, which includes "purely factual information, which may or may not be privileged, relating to the underlying

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[23] Stephanie Martz, *Report from the Front Lines: The Thompson Memo and the KPMG Tax Shelter Case*, 10 Wall St. Law. 5 (Aug. 2006).

[24] 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006).

[25] *Id.* at 352-53.

[26] *Id.* at 369; *see also* Martz, *supra* n. 23, at 1.

[27] *See* Memo. from Paul J. McNulty, Dep. Atty. Gen., to All Component Heads & U.S. Attys., *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006) (available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf) [hereinafter McNulty Memo.].

conduct," and Category II information, which includes "attorney-client communications or non-factual attorney work product."[28]

Prior to requesting either category of privileged information, the prosecutor must first show a "legitimate need" by evaluating four factors set forth in the Memorandum. Once a legitimate need has been established, the prosecutor must obtain written authorization from the U.S. Attorney before making a Category I request. As in the previous directives, prosecutors may take a corporation's response to Category I information requests into account when making their charging decisions. Only if the Category I information "provides an incomplete basis to conduct a thorough investigation" may the U.S. Attorney request Category II information.[29] Additionally, written authorization by the Deputy Attorney General must be obtained prior to making such a request. Notably, the Memorandum instructs prosecutors not to consider a corporation's compliance with Category II information requests in deciding whether to seek an indictment.[30]

Additionally, the McNulty Memorandum curtails portions of the Thompson Memorandum that penalized corporations electing to pay legal fees for employees under investigation. Under the McNulty Memorandum, payments will generally not be viewed as evidence of a lack of cooperation.[31] However, it should be noted that the McNulty Memorandum allows the advancement of legal fees to be taken into account "when the totality of the circumstances show that it was intended to impede a criminal investigation."[32]

Notably, the McNulty Memorandum does not revamp the nine factors that prosecutors must consider in determining whether to indict; it does not change the mandatory consideration of these factors; and it does not change the significant emphasis placed on cooperation.[33] Because requests for waivers are not prohibited and prosecutors may still consider a corporation's willingness to waive in making a charging decision, commentators have predicted that the modest revisions made by the McNulty Memorandum will not alter the "culture of waiver" firmly established by the Holder and Thompson Memoranda.[34]

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[28] *Id.* at § VII.B.2.
[29] *Id.*
[30] *Id.*
[31] *Id.* at § VII.B.3.
[32] *Id.* at § VII.B.3 n. 3.
[33] Bharara, *supra* n. 10, at 86.
[34] *Id.* at 92. The author argues that under the McNulty Memorandum "privilege waivers may still be sought; refusals may still militate in favor of indictment; and purportedly voluntary waivers may always be considered favorably in the indictment decision." *Id.* at 85; *see also* Alexandria A.E. Shapiro & Robert J. Malionek, *'Value of Cooperation': McNulty Memo Impact on DOJ*, 236 N.Y. L.J. (Dec. 27, 2006) (available at http://www.lw.com/upload/pubContent/_pdf/pub1745_1.pdf) (noting that "if

Read in succession, the Holder/Thompson/McNulty trilogy reveals a Department of Justice that is not quite at peace with its expanding role as a regulator of business conduct. Clearly, at its leadership levels, the Department is sensitive to its role in striking the delicate balance between regulating business behavior and impeding legitimate business innovation. Yet, despite the more accommodating tone of the McNulty Memorandum, intimidating sentencing regimes and oppressive litigation costs make contesting criminal charges an extremely high-risk proposition. Accordingly, in today's enforcement environment, even well-financed and capable defense counsel capitulate to a prosecutor's demands rather than assume the risks of trial. Thus, in some respects, directives like the McNulty Memorandum take on greater significance because the only meaningful checks on an individual prosecutor's discretion are the rules the government sets for itself.

III. CONSEQUENCES OF THE JUSTICE DEPARTMENT'S ENFORCEMENT POLICIES

While not directly contrary to the liberal features of traditional criminal law, the Principles, in conjunction with the U.S. Sentencing Guidelines, have created a powerful incentive for targeted corporations to cooperate.[35] Given the breadth of the judicially created corporate criminal liability doctrine, the conviction of a corporation following indictment is all but a foregone conclusion. Thus, any corporation wishing to avoid criminal liability must avoid indictment at all costs. As a result, a culture of cooperation has arisen wherein business entities are willing to compromise their rights under traditional criminal law, as well as the rights of their employees, in exchange for lenience. Despite the revisions made in 2006, the thrust of the Principles of Federal Prosecution remains the same: corporations must fully cooperate with the government and disclose all wrongdoing if they wish to avoid indictment. This fundamental truth has a profound impact on the relationship between the sovereign, the corporation, and its employees.

Pursuant to the revisions made by the McNulty Memorandum, prosecutors may no longer seek privilege waivers at the outset of an investigation and must obtain supervisory approval before seeking a waiver.

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corporations often elect to waive, even absent a request, in order to gain more credit, the policy's stated purpose will be undermined").

[35] *U.S. Sentencing Guidelines Manual* § 8C2.5 (2007). The Guidelines provide, in part, for the restitution of victims and the imposition of large fines and probation for corporations convicted of a federal crime. The amount of the fine imposed is determined by the corporations' "culpability score," which could be minimized if corporations "prior to an imminent threat of disclosure or government investigation" and "within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct." *Id.* at § 8C2.5(g)(1).

However, these protective mechanisms provide no real defense against the evisceration of the corporate privilege. Prosecutors may still seek a waiver of Category I information, which the Department acknowledges may contain privileged information, and failure to accede may result in an indictment. Moreover, obtaining Category II information requires nothing more than an internal determination that such information would provide a fuller "basis to conduct a thorough investigation."[36] Even with these prophylactic measures, corporations are likely to waive the privilege absent an explicit request from the government, knowing that such waiver will result in cooperation credit and, as a practical matter, assertion of the privilege may influence the prosecutor's charging decision.

Another pernicious side effect of the Justice Department's emphasis on corporate cooperation is the adversarial relationship it promotes between employer and employee. While corporations ostensibly conduct internal investigations to assist decisionmakers in their decision-making endeavors, most senior executives and board members must rely upon factual information obtained from subordinates. Employees will be obligated to cooperate with the corporation throughout the internal investigation, including submitting to witness interviews and issuing statements. Employees can neither refuse to cooperate nor invoke their Fifth Amendment rights as they might if questioned directly by law enforcement.

When such information is subsequently provided to the government, whether as part of a Category I request or a "voluntary" waiver by the corporation, prosecutors are given access to information that would otherwise be protected by an employee's Fifth Amendment right against self-incrimination. Thus, corporate cooperation may have the ultimate effect of circumventing the constitutional rights of the individual employees, enabling the Department of Justice, through the use of the employer, to extract information from employees indirectly that it could not extract by direct measures. Indeed, the Principles were crafted to achieve this precise result.[37]

Perhaps, the greater concern is ethical in nature: is it appropriate for a corporation to sacrifice the rights of its employees to save itself? Pursuant to the McNulty Memorandum, a corporation may coerce its employees to cooperate with the government investigation and will have every incentive to terminate those employees who are perceived as uncooperative. So long as the corporation does not deny a preexisting indemnification obligation, the corporation may fire or sanction employees suspected of wrongdoing. Regulatory exclusions of individuals from further employment in regulated

[36] McNulty Memo., *supra* n. 27, at § VII.B.2.

[37] *See* Thompson Memo., *supra* n. 19, at § VI.B (stating that waivers of the attorney-client privilege "permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements").

industries is not uncommon. In those cases, however, the employee is aware that she is being excluded, and she typically receives the notice and hearing that are the linchpins of due process guarantees. Conventional wisdom holds, conversely, that when the Justice Department operates through a target corporation to obtain information from individual employees under the threat of termination, the employee's constitutional rights are not affected, at least theoretically. Yet, some criminal defense lawyers insist that prosecutors are calling for the termination of individual employees as a corollary to the corporations' cooperation, thereby achieving the exclusion of an employee without the traditional due process guarantees that would govern regulatory termination or exclusion.[38]

Finally, the Department's enforcement procedures have the ultimate effect of shifting investigatory responsibility to the corporation. Unhindered by constitutional safeguards and emboldened by the law of at-will employment, many entities are willing to sacrifice the individual rights of employees to satisfy the government's demands for cooperation. Thus, by providing an incentive to the corporation to conduct its own investigation and identify culpable parties, the government alleviates itself of its traditional investigative role.

IV. THE DEFERRED PROSECUTION AGREEMENT: AN OPPORTUNITY TO RESTORE EQUILIBRIUM IN THE PROSECUTIONS OF CORPORATIONS

Perhaps in recognition of the theoretical and practical problems involved in the criminal prosecution of corporations, prosecutors are seeking alternatives to the traditionally binary decision concerning whether to charge a corporate target. One alternative that is rapidly gaining traction among prosecutors is the Deferred Prosecution Agreement ("DPA"). Although DPAs have been used in cases involving individual defendants since the late 1960s, and the first corporate DPA dates back to 1994, the popularity of the DPA has skyrocketed in recent years, resulting in a record number of agreements in 2007.[39] This dramatic rise in DPAs is generally attributed to the disastrous prosecution of Arthur Andersen earlier this decade and a

[38] *See* Robert S. Litt, *Corporate Employees Need Protection from Overzealous Prosecutors*, 15 Bus. Crimes Bull. 1 (Dec. 2007) (available at http://www.arnoldporter.com/resources/documents/Arnold%20&%20Porter%20LLP.Corporate%20Employees%20Need%20Protection%20from%20Overzealous%20Prosecutors.Business%20Crimes%20Bulletin.December%202007.pdf).

[39] Greg Hargreaves, *Plausible Deniability: Five Companies Strike Prosecution Deals Even as They Maintain Their Innocence*, Corp. Couns. 15, 16 chart (Jan. 2008) (available at http://www.corpcounsel-digital.com/corpcounsel/sample/?u1=K99955) (reporting that between January 2007 and November 19, 2007, prosecutors announced thirty-one new deferred prosecution or non-prosecution agreements, totaling more than all those in 2005 and 2006 combined).

passing reference in the Thompson Memorandum to the possibility of "pretrial diversion" in connection with corporate investigations.[40]

In most cases, a DPA requires a potential defendant to agree to comply with government-prescribed conditions for a fixed period of time. In exchange for compliance, the government agrees not to charge the corporation or to dismiss the charges at the termination of the agreement. Most DPAs contain the following common conditions:

- The defendant waives the statute of limitations;
- The defendant admits to sufficient facts to ensure conviction should it fail to comply with the terms of the DPA;
- The defendant agrees to voluntarily waive the attorney-client privilege and the work-product doctrine and to voluntarily disclose to the government the results of its internal investigation;
- The defendant agrees to cooperate with ongoing investigations being conducted by the Department of Justice or other federal agencies;
- The defendant terminates or disciplines culpable employees, regardless of rank within the corporate hierarchy; and
- The defendant agrees to undertake remedial compliance measures.

To ensure adherence to remedial compliance measures, many DPAs call for the appointment of an Independent Monitor. The Independent Monitor is typically jointly selected by the prosecution and the defendant. The Monitor's oversight is guided by specific terms of reference and she usually submits a work plan prior to commencing her oversight. Common provisions of DPAs that call for a Monitor include:

- Some certification that the Monitor is independent and will remain so for the life of the agreement;
- A description of the qualifications essential to the appointment of the Monitor;
- Assurances that communications between the Monitor and the defendant will not be subject to the attorney-client

[40] Thompson Memo., *supra* n. 19, at § VI.B ("In some circumstances, therefore, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government's investigation.").

privilege or work-product doctrine, or, alternatively, that the defendant waives any such privilege;

- A requirement that the Monitor report periodically to the Board of Directors and the Department of Justice;
- A requirement that the Monitor will be responsible for monitoring a newly developed compliance plan; and
- A provision calling for the role of the Independent Monitor to survive, in some form, any merger or reformation of the corporate form.

While corporate defendants often consider themselves fortunate to avoid prosecution by entering into a DPA and accepting the imposition of an Independent Monitor, such agreements are not without costs. Aside from the considerable expense associated with retaining a Monitor, hidden efficiency costs might include delays attributable to awaiting the Independent Monitor's approval of corporate activities and the stifling of innovation.

Moreover, as DPAs and Independent Monitors become more prevalent, the defense bar has begun to wonder whether the DPA has become a default position for prosecutors investigating corporate behavior. While the Thompson Memorandum acknowledged the applicability of deferred prosecutions to the corporate defendant, it made no reference to the factors relevant to the grant of one vis-à-vis those for a declination of prosecution.[41] As such, there has been mounting criticism regarding the lack of uniformity and consistency in the use of DPAs to resolve corporate investigations.[42] Consistent with the old adage "be careful what you wish for, you may just get it," one must wonder whether prosecutors are opting for DPAs in cases that they cannot prove and in which they should not charge the corporate defendant.

Because DPAs were not initially designed for use in corporate fraud investigations, there is limited authority guiding prosecutors on the proper application of these agreements to corporations.[43] Moreover, DPAs are merely a contract between the government and the corporation; they are negotiated and agreed to without judicial oversight. Thus, the restitution payments and monetary penalties set therein may be determined without

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[41] E. Joseph Warin & Peter E. Jaffee, *The Deferred Prosecution Jigsaw Puzzle: A Modest Proposal for Reform*, 19 Andrews Litig. Rptr. 1, 2, 2 n. 12 (Sept. 2005) (available at http://media.gibsondunn.com/fstore/documents/pubs/WarinJaffeWCCDeferredPros0905.pdf).

[42] *See e.g. id.*

[43] *See generally* Eugene Illovsky, *Corporate Deferred Prosecution Agreements: The Brewing Debate*, 21 ABA Crim. Just. Mag. 36 (Summer 2006) (available at http://www.abanet.org/crimjust/cjmag/21-2/corporatedeferred.pdf) (noting that DPAs developed as part of the Department's Pretrial Diversion Program to resolve minor criminal cases against non-violent, first-time offenders).

regard to constraints imposed by statutory maximums, sentencing guidelines, and restitution provisions.[44] These factors open the door for potential prosecutorial misconduct and abuse of the negotiation process. As such, DPAs have been widely criticized for providing prosecutors with a "preferred vehicle for extracting large monetary payments from corporations."[45]

Additionally, the Department has come under fire for recent agreements that impose restrictions and obligations upon the corporation that have no apparent nexus with the alleged misconduct. For example, as a condition of its agreement with the U.S. Attorney for the District of New Jersey, Bristol-Myers Squibb was required to endow a chair of corporate ethics at Seton Hall University School of Law, which incidentally, was the alma mater of the prosecuting U.S. Attorney. This practice of incorporating self-serving and extraneous conditions has been sharply criticized for "cheapen[ing] public respect for the criminal justice system by creating the perception that negotiations are unprincipled" and is but one of several bases for the recent movement to regulate the negotiation of these agreements.[46]

Criticism regarding the Department's use of DPAs to resolve corporate investigations culminated in the fall of 2007 when Christopher Christie, the U.S. Attorney for New Jersey, announced a $311 million settlement agreement with the leading manufacturers of knee and hip replacements, thus ending a two-year investigation for Medicare fraud.[47] Pursuant to their DPAs with the government, four companies targeted by the investigation—Zimmer Holdings, Inc., DePuy Orthopaedics Inc., Biomet, Inc., and Smith & Nephew PLC—will pay fines up to $170 million and employ a Monitor, selected by Christie, to oversee corporate governance reforms.[48] The most controversial outcome of these agreements is the appointment of Christie's former boss, and former Attorney General, John Ashcroft, as the Federal Monitor for Zimmer Holdings. According to documents filed with the SEC, Ashcroft and his consulting firm stand to

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[44] Joan McPhee, *Deferred Prosecution Agreements: Ray of Hope of Guilty Plea by Another Name?* Inside Litig. 26 (Winter 2006) (available at http://www.ropesgray.com/files/Publication/a6d348fd-f6fd-4f4a-b38b-bd6de98836b7/Presentation/PublicationAttachment/4d1fdc14-3bcf-463a-b2b0-76204fc7f316/Article_Winter_2006_Deferred_Prosecution_Agreements_McPhee.pdf).

[45] *Id.* at 28 ("By way of example, Bristol-Myers Squibb Co. paid $300 million and KPMG $456 million as part of their respective deferred prosecution agreements."); *see also* Illovsky, *supra* n. 43.

[46] Warin & Jaffee, *supra* n. 41, at 4.

[47] Dept. of Justice, *Press Release: Five Companies in Hip and Knee Replacement Industry Avoid Prosecution by Agreeing to Compliance Rules and Monitoring*, http://www.usdoj.gov/usao/nj/press/files/pdffiles/hips0927.rel.pdf (Sept. 27, 2007).

[48] *Id.* Notably, the four agreements are curiously lacking any admission of wrongdoing on the part of the companies. While each DPA contains an identical statement that the company "acknowledges responsibility for its behavior," the attached civil settlements state that each company "denies that it engaged in any wrongdoing and specifically denies that any of the payments, services, or remuneration were illegal, improper, or resulted in any false or fraudulent claims." Hargreaves, *supra* n. 39, at 15.

collect fees in excess of $52 million over the course of the eighteen-month period of monitoring.[49]

Congressmen from the State of New Jersey have responded to the public outcry generated by the agreement with Zimmer Holdings. In a letter to U.S. Attorney Christie, Congressman Frank Pallone Jr. criticized the "unfettered discretion" given to U.S. Attorneys investigating corporate targets, noting that such discretion to frame the agreement and its terms invites "favoritism, politic interference, and back room dealing."[50] Similarly, Congressman Bill Pascrell Jr. has called on the U.S. House Judiciary Committee[51] and Attorney General Michael Mukasey[52] to examine the current state of DPAs and has recommended that the Department require guidelines on DPAs; restore judicial oversight of the agreements; remove the power to select Federal Monitors from the U.S. Attorneys; and require full disclosure of DPAs and any contracts for Federal Monitors.[53] Chairmen for the Senate and House Judiciary Committees have indicated that hearings on this issue are forthcoming and have requested that the Justice Department fully disclose all information regarding corporate DPAs reached after January 2003.[54]

Reports that the Justice Department was quietly conducting an internal policy review regarding monitorships began to surface in January 2008.[55] Although the Department disputed that the monitoring agreement between Zimmer Holdings and the Ashcroft Group prompted the inquiry,[56]

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[49] Zimmer Holdings, Inc., *Form 8-K*, http://files.shareholder.com/downloads/ZMH/213954979x0xS950137%2D07%2D16322/1136869/filing.pdf (Oct. 31, 2007).

[50] Ltr. from Frank Pallone, Jr., U.S. Rep., to Christopher J. Christie, U.S. Atty., *Concerns with Federal Monitors & Deferred Prosecution Agreements* (Nov. 21, 2007) (available at http://langevin.house.gov/list/press/nj06_pallone/pr_christieletter_112107.html).

[51] Ltr. from Bill Pascrell, Jr., U.S. Rep., to John Conyers, Jr., Chairman, U.S. House Comm. on the Jud., & Linda Sanchez, Chairwoman, U.S. House Comm. on the Jud., *Call to Examine Deferred Prosecution Agreements* (Nov. 26, 2007) (available at http://www.pascrell.house.gov/issues2.cfm?id=12817).

[52] Ltr. from Bill Pascrell, Jr., U.S. Rep., to Michael B. Mukasey, Atty. Gen., U.S. Dept. of Justice, *Concern with Deferred Prosecution Agreements* (Dec. 17, 2007) (available at http://www.pascrell.house.gov/pdf/ACF77C0.pdf).

[53] Bill Pascrell, Jr., *Statement of Principles on Deferred Prosecution Agreements*, http://www.pascrell.house.gov/pdf/ACF77C7.pdf (Dec. 17, 2007).

[54] Ltr. from John Conyers, Jr., U.S. Rep., et al., to The Honorable Michael B. Mukasey, Atty. Gen., U.S. Dept. of Justice, *The Department of Justice Policy on Deferred Prosecution Agreements* (Jan. 10, 2008) (available at http://www.pascrell.house.gov/pdf/Michael%20Mukasey%20(1-10).pdf); Ltr. from Patrick Leahy, Chairman, U.S. Sen. Comm. on the Jud., to The Honorable Michael B. Mukasey, Atty. Gen., U.S. Dept. of Justice, *Award of No-bid Contracts for Monitoring Compliance for Out-of-Court Criminal Case Settlements* (Jan. 10, 2008) (available at http://leahy.senate.gov/press/200801/011008PJLtoMukaseydojcontracts.pdf) (requesting information regarding contracts awarded to independent monitors since 2001).

[55] *See* Philip Shenon, *Ashcroft Deal Brings Scrutiny in Justice Dept.*, 157 N.Y. Times A1 (Jan. 10, 2008).

[56] Jeff Whelan & John P. Martin, *Congress Takes an Interest in Christie's Ashcroft Hiring*, Star-Ledger (Newark, N.J.) 1 (Jan. 11, 2008) (quoting Justice Department spokesman Peter Carr as stating that the internal inquiry "was not prompted by the actions of any U.S. attorney"); *but see* Shenon, *supra* n. 55 (reporting that Zimmer's disclosure of the agreement with the Ashcroft group prompted the internal inquiry).

allegations of political favoritism attendant to the agreement undoubtedly flavored the tenor of review. In March 2008, the Department released a memorandum that set forth nine principles for drafting provisions pertaining to the use of monitors in connection with DPAs.[57] The principles specifically address the selection of monitors, the scope of their duties, and the duration of the monitoring agreement and place significant emphasis on the need to avoid "potential and actual conflicts of interests" in the selection of monitors.[58] While such guidelines are clearly necessary, it is imperative that the Department establish a uniform policy addressing *all* aspects of deferred prosecutions, beyond those limited to the selection and use of Independent Monitors.

The most obvious reform needed is an official statement from the Justice Department that explicitly sets forth the factors to be considered in deciding to resolve an investigation by DPA, a non-prosecution agreement, or a traditional declination of prosecution. The Principles of Federal Prosecution laid the foundation by identifying factors relevant to a decision to prosecute; however, the explosion of deferred prosecutions in recent years has exposed a gaping hole in the Department's policy. An analysis of recent investigations indicates that corporations satisfying identical cooperation factors have received drastically different treatment, attributable only to the jurisdiction in which the investigations took place.[59] Clearly, the lack of uniformity that the Principles were designed to eliminate persists in the era of deferred prosecutions.

Additionally, the Department must establish clear parameters for DPAs, including limitations on the conditions and sanctions that may be imposed on the targeted corporation. The popularity and efficacy of DPAs is directly attributable to the ability of the parties to tailor each agreement to meet their particular needs; yet, this flexibility has opened the door to prosecutorial overreaching. In drafting guidelines for DPAs, the government must strike a delicate balance to ensure that agreements may be tailored to achieve corporate reform, while guarding against abuse of prosecutorial discretion. As such, obligations and compliance measures imposed by the agreements should have an established nexus with the underlying misconduct and specifically target aspects of the corporate climate that bred wrongdoing. Similarly, monetary fines and penalties

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[57] *See* Memo. from Craig S. Morford, Acting Dep. Atty. Gen., to Heads of Dept. Components & U.S. Attys., *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (Mar. 7, 2008) (available at http://www.usdoj.gov/dag/morford-useofmonitorsmemo-03072008.pdf) [hereinafter Morford Memo.].

[58] *Id.* at § II.1 (calling for the creation of standing or ad hoc committees for the consideration of monitor candidates and stating that "United States Attorneys and Assistant Attorneys General may not make, accept, or veto the selection of monitor candidates unilaterally").

[59] Warin & Jaffee, *supra* n. 41, at 3 (observing that "a similar set of operative cooperation facts may earn a company a drastically different result in the U.S. Attorney's Office for the Southern District of New York than in the Criminal Division of Main Justice").

imposed by DPAs should be calculated in light of the available sanctions under the Sentencing Guidelines. Where Monitors are utilized, further guidelines must be established to ensure efficient and effective implementation of compliance programs. To this end, the selection of Monitors should be expressly limited to persons with expertise in the corporation's particular industry.[60] Lastly, any guidelines regarding DPAs must establish clear and meaningful protections against the subtle compulsion to waive the attorney-client privilege and work-product protection.

Finally, judicial oversight is needed to provide a backstop against abuse of prosecutorial discretion. Such oversight is necessary on two fronts: (1) approval of the final agreement to ensure that the conditions and sanctions are just and (2) determination of a breach of the agreement. Under the current policy, corporations are forced, in advance, to agree to an adjudicatory process beyond the reach of judicial review. Prosecutors may unilaterally declare a breach and, with the assistance of the incriminating statement of facts contained in most DPAs, seek and obtain a conviction. Because the Department is the sole and final arbitrator of a breach, the threat of prosecutorial overreaching exists years beyond the signing of the agreement. Judicial determination of an alleged breach will allow the corporation to implement an effective compliance program, in accordance with the agreement, without rendering it defenseless to excessive demands by the government.

V. CONCLUSION

In the fifth century B.C., the Chinese philosopher Lao-Tzu warned that "the greater the number of laws and enactments, the more thieves and robbers there will be." Over the course of the last thirty years, Congress has ignored Lao-Tzu's prophecy with a vengeance. When it comes to corporate criminal liability, the result of Congress's disregard for Lao-Tzu's warning appears to be a prosecution paradigm that is shifting away from its moorings. The government must assume responsibly for the unintended and detrimental consequences of its prosecution of artificial entities including: the imposition of fines and costs that cripple the corporation's ability to provide economic benefits to employees and communities, the circumvention of individual rights under the guise of corporate internal investigations, and the systematic erosion of the theoretical underpinnings of criminal law. While it may be impractical to reverse the trend toward criminalization, it is not too late to discuss meaningful alternatives.

[60] The Morford Memorandum only requires that the selection process be designed to select "a highly qualified and respected person or entity based on suitability of the assignment and all of the circumstances." Morford Memo., *supra* n. 57, at § II.1.

In the evolution of corporate criminal liability, the emergence of DPAs may signal a more measured approach to enforcement that brings corporate criminal liability back into balance with the traditional purposes behind criminal law. Establishing refined policies governing the use of DPAs is necessary in order to eliminate the opportunity for prosecutors to impose arbitrary and oppressive conditions. Now that the issue of deferred prosecution guidelines is ripe for consideration, perhaps policymakers will give due regard to Lao-Tzu's prophecy.