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RESPONSE

DEFERRED PROSECUTION AGREEMENTS: A VIEW FROM THE TRENCHES AND A PROPOSAL FOR REFORM

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DEFERRED and nonprosecution agreements are the Department of Justice's ("DOJ") new weapons of choice for "reforming" corporations.¹ Rather than risk the severe collateral consequences that accompany an indictment and conviction,² companies now are offered the opportunity to cooperate, pay massive fines, commit to elaborate undertakings, and remain under probation-like supervision for some period of time in exchange for an ultimate dismissal of criminal charges. In this novel and rapidly evolving legal area, Professor Brandon Garrett has identified difficult, cutting-edge problems and posed thorny questions.³

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¹ Deferred prosecution agreements and nonprosecution agreements are referred to in practice as "DPAs" and "NPAs." For purposes of this Essay, for ease of reference, and unless otherwise noted, they will be referred to collectively as "DPAs." These agreements are also sometimes referred to as pretrial diversion agreements.

² The classic example is the indictment and conviction of the accounting firm of Arthur Andersen in 2002. Nearly 28,000 jobs were lost before the accounting firm's "Pyrrhic victory" in the Supreme Court. See Linda Greenhouse, *The Andersen Decision: The Overview; Justices Reject Auditor Verdict in Enron Scandal*, N.Y. Times, June 1, 2005, at A1.

³ This essay is a response to Brandon L. Garrett, *Structural Reform Prosecution*, 93 Va. L. Rev. 853 (2007).

Some of Garrett's observations are undoubtedly correct. He is right that judicial review of DPAs is a pipedream and will remain limited during the negotiation and performance stages of these agreements.⁴ This is so, of course, not only because DOJ will be reluctant to surrender its discretion to a neutral third party decision-maker but also because these agreements are necessarily creatures of compromise, an area in which courts generally do not play with an active or heavy hand except when a breach is claimed. And by stressing that DOJ "has never defined how its prosecutors measure compliance" with the terms of DPAs, Garrett has highlighted an exceedingly critical piece of the problem.⁵

But while Garrett proposes creative ways of thinking about DPAs and hints at some of the difficulties these agreements have spawned for companies, he fails to offer his own, specific, practical proposal for reform. This is a significant oversight, since the addition of DPAs to DOJ's playbook has caused real and consequential economic, reputational, and (at times) life-changing harm to companies.

Moreover, the availability and utility of DPAs has been called into greater question because DOJ has failed to provide guidelines to prosecutors on when to employ a guilty plea, DPA, or NPA. As a result, companies, shareholders, and employees suffer from much needless and painful uncertainty. Moreover, defense counsel (including the authors) are finding it increasingly difficult to provide cogent advice and a roadmap of next steps to corporations. Quick, clear guidance by DOJ is urgently needed to reduce the confusion of the current system and ensure that similarly situated companies are treated similarly. This Essay urges such guidance.

Imagine two companies under criminal investigation by DOJ for securities fraud. Imagine further that the first business overstated its oil and gas reserves by about twenty-three percent, or 4.47 bil-

⁴ Id. at 924, 925 ("Applying such deferential review, a court would likely reject only a highly atypical, egregiously nonconforming agreement and would routinely approve the rest without hesitation. . . . Courts are also unlikely to play any role during the implementation of structural reform agreements."). Although 18 U.S.C. § 3161(h)(2) refers to "the approval of the court," many DPAs are not court-filed, rendering this statutory provision of no utility to many companies. In any event, as Garrett acknowledges, "[e]very judge approving a deferred prosecution agreement has done so without any published rulings or modifications to the agreement." Id. at 922.

⁵ Id. at 930.

lion barrels. The second company, which specializes in pharmaceuticals, “stuffed” its wholesalers with products over and above the amount warranted by demand in order to inflate its sales and earnings. These comparable crimes should trigger parallel punishments, but they do not. The first company escapes prosecution altogether, while the second succumbs to a DPA mandating a \$300 million fine, a two-year monitoring program, and numerous other serious concessions. The verdicts on the companies’ fates come down within two weeks of each other and from U.S. Attorney’s offices a stone’s throw apart. But in substance, the resolutions are worlds apart. The companies described above are Shell Oil and Bristol Myers-Squibb, two of the country’s most recognized corporate citizens.⁶

Their tales of disparate treatment are hardly remarkable.⁷ In the gas misreporting cases that emerged from the California energy crisis of 2001 to 2002, the Williams Power Company, was forced into a DPA, while Aquila, Inc., Duke Energy, El Paso Corp., and numerous other gas companies were not prosecuted at all.⁸ Similarly, prosecutors aggressively pursued MCI and Adelphia after they entered bankruptcy while leaving Enron, perhaps the greatest of all antagonists, alone.

“The deeper problem,” Columbia Law School Professor John Coffee argues, “lies in the danger that power corrupts and that prosecutors are starting to possess something close to absolute

⁶ See Bloomberg News, U.S. Won’t Prosecute Shell Over Reserves, N.Y. Times, June 30, 2005, at C11; *Deferred Prosecution Agreement, United States v. Bristol-Myers Squibb Co.*, No. 2:05-mj-06076 (D.N.J. June 15, 2005) [hereinafter *Bristol-Myers Squibb DPA*], available at <http://www.usdoj.gov/usao/nj/press/files/pdf/deferredpros.pdf>.

⁷ See F. Joseph Warin & Peter Jaffe, *Rolling The Dice In Corporate Fraud Prosecutions*, 33 Litig., Spring 2007.

⁸ See Press Release, U.S. Dep’t of Justice, Williams Power Company, Inc., To Pay \$50 Million Penalty To Resolve Criminal Allegations (Feb. 22, 2006), available at http://www.usdoj.gov/opa/pr/2006/February/06_crm_094.html; Press Release, Aquila Agrees To \$75,975 Settlement On Western Energy Market Manipulation, Reaffirms That It Acted Properly (Aug. 29, 2003), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=78213&p=irol-newsArticle&ID=444401&highlight=>; Bloomberg News, Company News; Duke Energy Settles California Energy Crisis Charges, N.Y. Times, Sept. 16, 2004, at C4; Associated Press, U.S. Accepts Settlement of El Paso Lawsuits, N.Y. Times, Nov. 14, 2003, at C5.

power.”⁹ But the issue here is not one of public corruption; instead, the lack of oversight over the unbridled discretion of the ninety-three U.S. Attorney components plus DOJ headquarters produces bizarre corporate criminal resolutions and DPA terms, including terms that are seemingly unrelated to the company’s wrongdoing. In oft-cited examples, Bristol Myers-Squibb was required to endow a chair in business ethics at Seton Hall University Law School, the U.S. Attorney’s alma mater, while Operations Management International contributed one million dollars to endow a chair in environmental studies at the U.S. Coast Guard Academy.¹⁰

Making matters worse, more cooperation—even extraordinary cooperation—does not mean lenient or more lenient treatment. In practice, companies are told to cooperate “or else.” But what corporations receive for their cooperation is only revealed after the fact, meaning that corporations must move forward with nothing more than a gentleman’s handshake that they will be appropriately rewarded for their open and frank dealings with the government. But time and experience have shown that things work out well for some—but not all—participants in this decentralized process. So, for example, in the Shell case DOJ declined to prosecute because Shell:

- “[F]ully cooperated with the government’s investigation” and self-reported the violations;
- Swiftly settled “an enforcement action by the United States Securities and Exchange Commission” for \$120 million; and
- Promised “to take substantial remedial actions to enhance the accuracy of its reserves reporting and compliance.”¹¹

But only six months earlier, DOJ took an entirely different posture with Monsanto Corporation, which was under investigation for attempting to bribe an Indonesian official but which also had complied with precisely those factors. Yet Monsanto received an intru-

⁹ John C. Coffee Jr., *Deferred Prosecution: Has it gone too far?*, Nat’l L.J., July 25, 2005, at 13.

¹⁰ See *Bristol-Myers Squibb DPA*, supra note 4; *Deferred Prosecution Agreement, United States v. Operations Mgmt. Int’l, Inc.*, No. 3:06-cr-00017 (D. Conn. Feb. 8, 2006), available at <http://www.usdoj.gov/usao/ct/Documents/OMI%20Agreement.doc>.

¹¹ Press Release, U.S. Attorney, S. Dist. N.Y., *U.S. Decides Not To Prosecute Shell*, (June 29, 2005), available at <http://www.royaldutchshellgroup.com/2006%20docs/US%20Justice%20Department%20decision%20on%20Shell.pdf>.

sive DPA, while Shell was ushered out the door with a stern warning.¹²

It is ironic that the same DOJ that tolerates such randomness in the application of pretrial diversions also emphasizes exacting consistency in the U.S. Sentencing Guidelines and vigilantly appeals sentences that deviate from the Guidelines range.¹³ Although federal courts are admonished to treat similarly situated defendants equally, federal prosecutors are empowered with enormous discretion to construct DPAs by picking and choosing at random from a smorgasbord of various terms and conditions.¹⁴

If the problem is unfettered discretion, then the solution is to create standards that clarify and circumscribe that discretion. To this end, Garrett innocently offers in passing that “over time” some “remedial law” might “develop a clarity not found in the underlying . . . law, providing a set of best practices and notice to all

¹² Deferred Prosecution Agreement, *United States v. Monsanto Co.*, No. 1:05-cr-00008 (D.D.C. Jan 6, 2005), available at <http://www.usdoj.gov/dag/cftf/chargingdocs/monsantoagreement.pdf>.

¹³ See Memorandum from James B. Comey, Deputy Attorney General, United States Department of Justice, to All Federal Prosecutors 2 (Jan. 28, 2005), available at http://www.virginialawreview.org/inbrief/2007/06/18/booker_memo.pdf (“[I]n any case in which the sentence imposed is below what the United States believes is the appropriate Sentencing Guidelines range (except uncontested departures pursuant to the Guidelines, with supervisory approval), federal prosecutors must oppose the sentence and ensure that the record is sufficiently developed to place the United States in the best position possible on appeal.”).

¹⁴ Garrett sees consistency among the terms of post-Thompson Memorandum DPAs. See Garrett, *supra* note 3, at 894. But his empirical analysis is necessarily incomplete, since he omits at least eleven DPAs and ten NPAs that were entered into after the issuance of the Thompson Memorandum (and seventeen DPAs if pre-January 2003 DPAs are included). The omitted DPAs include agreements, to mention only a few, between DOJ and ABT Associates Inc., Hypo-und Vereinsbank AG, InterMune, Inc., and Schnitzer Steel Industries. See Information, *United States v. Abt Assocs., Inc.*, No. 1:06-cr-10426 (D. Mass. Dec. 29, 2006), available at http://www.virginialawreview.org/inbrief/2007/06/18/abt_agmt.pdf; HVB — Deferred Prosecution Agreement, Feb. 13, 2006, http://www.virginialawreview.org/inbrief/2007/06/18/hvb_agmt.pdf; Deferred Prosecution Agreement, *United States v. Intermune, Inc.*, No. 1:06-cr-0707 (N.D. Cal. Oct. 26, 2006), http://www.virginialawreview.org/inbrief/2007/06/18/intermune_agmt.pdf; Schnitzer Steel Industries, Inc., Deferred Prosecution Agreement (Oct. 16, 2006), available at http://www.virginialawreview.org/inbrief/2007/06/18/schnitzer_agmt.pdf. Moreover, the authors have provided legal advice regarding DPAs that have never been publicized. Some of these DPAs are asymmetric to the data collected by Garrett.

sides.”¹⁵ Garrett suggests that this process may take “decades” and even then, in a defeatist-like mindset, questions altogether whether “a clear body of remedies in the area of organizational crime can occur.”¹⁶ He also suggests that companies are free to engage the political process by lobbying for changes at DOJ.¹⁷

But these laissez-faire proposals lack passion and a basic appreciation for the fact that companies cannot wait for “decades” to receive guidance. This is not an academic question; Garrett’s proposals do not strike with the surgical precision that is needed under current circumstances. The prime point of this Essay boils down to this: Guidance on the availability and appropriateness of pretrial diversion agreements is needed now, and such guidance must come from DOJ, not from the courts. Regrettably, DOJ has been unhelpfully silent on this issue. Current DOJ guidance focuses only on the threshold discretionary question of whether a business organization should be indicted at all.¹⁸ There has been absolutely no guidance, however, on the second discretionary question of whether a case should be resolved through the vehicle of a guilty plea, a DPA, or an NPA. There also exists a lacuna of guidance about appropriate terms to be included in DPAs.

DOJ should fill both gorges. DOJ headquarters should issue clear guidance to its litigation sections and the ninety-three U.S. Attorney’s Offices with the aim of leading to consistency in the offering of pretrial diversion agreements. These guidelines should specify generally that:

- If a company fulfills the terms of the Thompson Memorandum, and the wrongdoing does not permeate the upper levels of company management, federal prosecutors should exercise their discretion to not bring charges against the company. Under this

¹⁵ Garrett, *supra* note 3, at 934.

¹⁶ *Id.*

¹⁷ *Id.* at 935.

¹⁸ See Memorandum from Larry D. Thompson, Deputy Attorney General, to the Heads of Dep’t Components, U.S. Attorneys (Jan. 20, 2003), http://www.usdoj.gov/dag/cftf/business_organizations.pdf [hereinafter Thompson Memo] (identifying nine factors prosecutors should consider when deciding whether to prosecute a company); Paul J. McNulty, Deputy Attorney General, to Heads of Dep’t Components, U.S. Attorneys, http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf [hereinafter McNulty Memo] (limiting prosecutors’ ability to demand waiver of attorney-client and work product protections).

paradigm, culpable individuals should not escape prosecution, but be rigorously pursued.

- If wrongdoing exists at the upper levels of management, albeit on a more isolated basis, but the company complies with the Thompson Memorandum, and—most importantly—fully cooperates with prosecutors (and perhaps even self-discloses its wrongdoing), prosecutors should offer a nonprosecution agreement. Again, blameworthy individuals should still be subject to criminal punishment.
- If DOJ has reason to believe that significant corporate undertakings and remedial measures are necessary to rehabilitate a company, and where wrongdoing was not isolated (although not rampant either), the company should be offered a DPA.
- If a company is dominated by a culture of corruption and criminal malfeasance directed by C-suite employees or commits a material breach of the terms of a DPA, federal prosecutors may bring criminal charges.¹⁹

Yet identifying which prosecutorial instrument should be used in resolving criminal investigations is only the first step, albeit an absolutely critical one. The next step must be for DOJ to add uniformity to the terms and conditions of DPAs. That is, prosecutors should draw from a standard bill of fare; these guidelines should prescribe (just to name a few) the fine amounts, the duration of DPAs, the appropriateness of staggered payment provisions, the need for independent monitors, and, as Garrett points out,²⁰ the triggering mechanism for breach and who determines that question. DOJ also should prohibit conditions that lack any relationship to the company's criminal acts. Essentially, then, pretrial diversion guidance should resemble the Sentencing Guidelines, except, of course, in that its application should be at the *pre-indictment* charging stage.

One need not look far to determine how these pretrial diversion guidelines should be created. The U.S. Sentencing Commission could serve as the model. The Commission is composed of seven members appointed by the President and confirmed by the Senate.

¹⁹ See Warin & Jaffe, *supra* note 7.

²⁰ See Garrett, *supra* note 3, at 919.

It is charged with “avoiding unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct.”²¹

DOJ should similarly create a balanced task force charged with issuing standards and avoiding “unwarranted disparity” among the terms of DPAs. This Essay’s senior author has advocated standards for DPAs for a decade.²² Such a task force should be populated by prosecutors, leading practitioners, business interests, representatives from the American Bar Association, leaders of the Chamber of Commerce, and the Business Roundtable. Its mandate would be the same as that of the Sentencing Commission: to ensure that like cases are treated alike.

Finally, DOJ should surrender to the courts at the pre-indictment stage the determination of whether a corporation has materially breached the terms of a DPA. Indeed, at least two DPAs already bar DOJ from launching a prosecution until a district judge finds a violation.²³ The U.S. Court of Appeals for the Seventh Circuit has already subscribed to the wisdom and fairness of this process. As that court has reasoned: “a judicial determination prior to reindictment imposes a *de minimis* inconvenience on the government,” since there is no dispute that, post-indictment, only courts can speak to whether a material breach has occurred.²⁴ By submitting to such a process, DOJ would further assure companies that they would not lose forever the bargained-for exchange of pretrial diversion agreements.

One need not look beyond FirstEnergy Corp. to see how, in a blink of an eye, DOJ can conclude that the corporation breached

²¹ United States Sentencing Commission, An Overview of the United States Sentencing Commission 1, http://www.ussc.gov/general/USSCoverview_2005.pdf.

²² F. Joseph Warin & Jason C. Schwartz, Deferred Prosecution: The Need for Specialized Guidelines for Corporate Defendants, 23 J. Corp. L. 121 (1997).

²³ See Pretrial Diversion Agreement, United States v. BDO Seidman LLP, No. 3:02-cr-30040 (S.D. Ill. Apr. 12, 2002), available at http://www.virginialawreview.org/inbrief/2007/06/18/bdoseidman_agmt.pdf; Pretrial Diversion Agreement, United States v. Sears Automotive Marketing Svcs., Inc., No. 3:01-cr-30184 (S.D. Ill. Dec. 27, 2001) [hereinafter Sears DPA], available at http://www.virginialawreview.org/inbrief/2007/06/18/sears_pretrial_agmt.pdf.

²⁴ United States v. Ataya, 864 F.2d 1324, 1330 n.9 (7th Cir. 1988). See also United States v. Meyer, 157 F.3d 1067, 1077 (7th Cir. 1998) (“In accordance with due process, [the defendant] was entitled to a judicial determination that he had breached the agreement before being subjected to the risk of conviction.”).

and thereby cause a company to lose all it has labored to achieve through a pretrial diversion agreement. After paying \$28 million under the terms of its DPA, FirstEnergy submitted a \$200 million claim to its insurer, arguing that it was entitled to coverage because it did nothing to intentionally cause corrosion damage at its nuclear plant. Reports have emerged, however, that FirstEnergy's "highly nuanced, legalistic argument" regarding coverage may violate the terms of its DPA.²⁵ FirstEnergy is now left with a Hobson's choice of either surrendering its \$200 million insurance claim or further angering the government.²⁶ One wonders whether FirstEnergy would face such a painful choice were it left to a federal court to decide whether it breached its DPA through submitting its claim for coverage.

As should be obvious, the whole point of a DPA is that companies may not be able to weather the storm of an indictment without it; upon indictment, companies are likely to face fundamental instability, downgrading of creditworthiness, loss of market share, diminution of stock value, market and reputational damage, debarment from certain industries, regulatory proceedings, and class actions. Of course, these concerns are only heighten and multiply when dealing with publicly traded companies.²⁷ Empirical studies have shown that the mere announcement of a criminal investigation triggers a significant drop in a company's stock price.²⁸ Shareholder wealth also takes an exceptionally harsh hit when the government, rather than a private plaintiff, initiates proceedings against a company.²⁹ Without much needed guidance, all companies will be made to wait in the queue of uncertainty, a situation disfavored by investors and the capital markets. Therefore, although a pre-indictment determination is not constitutionally required, it is surely prudent: "A pre-indictment hearing . . . would help to prevent the government from using the threat of criminal prosecution

²⁵ John Mangels, Claim may retrigger criminal probe: FirstEnergy's insurance case contradicts NRC on Davis-Besse, *The Plain Dealer* (Cleveland), June 8, 2007, at C1.

²⁶ *Id.*

²⁷ Although, as the Arthur Andersen indictment readily demonstrates, it is a real problem faced by private firms as well.

²⁸ See, e.g., Cindy R. Alexander, On the Nature of the Reputational Penalty for Corporate Crime, 42 *J.L. & Econ.* 489, 500-01 (1999).

²⁹ Sanjai Bhagat, et al., The Shareholder Wealth Implications of Corporate Lawsuits, 27 *Fin. Mgmt.*, Winter 1998, at 5.

‘to achieve by coercion what it could not achieve through voluntary negotiation.’³⁰

Pretrial diversion agreements have only been used in earnest in the last decade. They have the potential to punish and deter companies without destroying them. But without guidance, what is a positive development could turn into disarray, as has been the case in other areas of the law. The tort system is a prime example of just that phenomenon. As some have argued, the tort system is characterized by an abundance of false positives—“outcomes when defendants are held responsible for a plaintiff’s losses when they should not be”—and false negatives—“outcomes when defendants are not held responsible for plaintiffs’ injuries when they should be.”³¹ Such discrepancies arise from the difficult task of giving meaning to the amorphous concept of “negligence,” which, as another author has argued, takes its shape from whatever personal values different jurors think important.³² In the pre-indictment corporate arena, federal prosecutors similarly operate in this unbounded, ad hoc manner. But when corporate life and security (as opposed to merely the purse) are at stake, the need for guidance and consistency is absolute.

Such lack of rhyme or reason in prosecutorial decisions generates palpable feelings of unfairness on the part of companies that sit across the table from DOJ. Not knowing what to expect when faced with potentially crippling allegations of criminal wrongdoing, companies are increasingly beginning to question the wisdom of coming forward and self-disclosing potential wrongdoing.

Imposing significantly varying penalties and resolutions for criminal offenses that fall within the same genre of wrongdoing offends basic concepts of fairness. Similar cases ought to be treated similarly, whether the defendant is a lone individual or a massive, publicly-traded corporation. Companies should not be required to guess blindly at the results of their cooperation in government-

³⁰ *Meyer*, 157 F.3d at 1077 (quoting *Ataya*, 864 F.2d at 1330 n.9).

³¹ Jeffrey O’Connell & Andrew S. Boutros, *Treating Medical Malpractice Claims Under A Variant Of The Business Judgment Rule*, 77 *Notre Dame L. Rev.* 373, 378–79 (2002).

³² Kenneth S. Abraham, *The Trouble With Negligence*, 54 *Vand. L. Rev.* 1187, 1191 (2001).

steered criminal investigations, nor should their fate rest in the random lot of what prosecutor or office they happen to draw.

The lack of guidance regarding corporate criminal resolutions is also unhealthy for merger and acquisition activities. Under the legal doctrine of “successor liability,” a company that acquires another through a merger or a consolidation inherits the debts and liabilities of the target company.³³ It may make little difference to a prosecutor with a “take no prisoners” attitude that the acquirer inherited the alleged wrongdoing.³⁴ In the successor liability context, therefore, the progeny may pay for the sins of their forbearers. So, for example, an acquirer may inculcate a target company in a superior (if not world class) compliance program that the target company lacked. This, of course, is an exceptionally positive outcome and makes compliance a “race to the top.” Yet in the absence of clarifying guidance, prosecutors may still elect to deliver a boom to the acquirer. This brings to bear with special force the old adage that no good deed goes unpunished. The result is to handicap the competitiveness of the merger and acquisition market as a whole.

Furthermore, with an active merger and acquisition market, corporation size is steadily increasing. The simple reality is that more employees create the potential for more violations of federal law. Breach provisions in DPAs often threaten consequences for any “violations” of law—a wholly unrealistic and nebulous concept that if taken literally could include traffic infractions and minor citations such as improper disposal of trash. Since respondeat superior liability remains a fixed and (at least for the time being) unalterable feature of the legal landscape, companies that enter into pre-trial diversion agreements are walking on eggshells, lest their employees, wittingly or unwittingly, commit serious or minor

³³ See *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988); 15 William Meade Fletcher, *Fletcher Cyclopeda of the Law of Corporations* § 7121 (“In case of merger of one corporation into another, where one of the corporations ceases to exist and the other corporation continues in existence, the latter corporation is liable for the debts, contracts and torts of the former.”)

³⁴ To be sure, whether successor liability includes criminal liability is a matter of some dispute, since it is “the equivalent of creating a non mens-rea, strict liability offense, without criminal intent.” 1 Joel Androphy, *White Collar Crime* § 3:17 (2d ed. 2006).

violations of federal law that unscramble all the potential benefits of a DPA.³⁵

Garrett suggests that due process considerations constitutionally require federal courts to decide whether there is a breach of a DPA irrespective of what the agreement itself may say.³⁶ He opines based on this ground that judicial review may save the day at the back end since a court—not a prosecutor—will decide if a company has breached its DPA and will face criminal charges. To support his position, Garrett points to the decisions of two federal courts of appeals that have held “in the context of non-prosecution agreements [that] the government is prevented by due process considerations from unilaterally determining that a defendant is in breach and nullifying the agreement.”³⁷ This sort of judicial review, however, does not offer sufficient safeguards for companies, nor is it constitutionally required when it matters most.

As to the first point, prosecutorial discretion is at its zenith at the pre-indictment, charging stage. As DOJ’s treatment of Shell and Bristol Myers-Squibb shows, it is at the front end that companies need to know whether DOJ will choose to resolve a case through a guilty plea, DPA, or NPA. In other words, companies need to better understand prospectively what they will receive in return for their cooperation. Limited court review on the issue of breach of agreement at the back end would affect a relatively few number of

³⁵ However, this need not be the case. In fact, at least one agreement wisely limits respondeat superior liability in the event of a breach. Boeing’s settlement with DOJ provides that “conduct by a Boeing employee classified at a level below Executive Management as defined by Boeing’s internal classification structure in place at the time of execution of this Agreement shall not be deemed to constitute conduct by Boeing.” Agreement between the United States Attorneys’ Offices for the Central District of California and the Eastern District of Virginia and The Boeing Company, June 30, 2006, available at http://www.virginialawreview.org/inbrief/2007/06/18/boeing_agmt.pdf. As the authors know from their negotiations with the DOJ, efforts to require a specific intent felony committed by a management employee has been rejected by DOJ.

³⁶ Garrett, *supra* note 3, at 928 (“Despite those stringent terms, federal courts hold that due process prevents the Government from ‘unilaterally determining’ that a defendant breached an agreement not to prosecute and that prosecutors ‘must obtain a judicial determination of the defendant’s breach.’”).

³⁷ *United States v. Miller*, 406 F.3d 323, 334–35 (5th Cir. 2005); see also *United States v. Meyer*, 157 F.3d 1067, 1076 (7th Cir. 1998); *United States v. Castaneda*, 162 F.3d 832, 835–36 (5th Cir. 1998).

cases since a prosecutor has already offered a DPA and has already determined that the corporation has been breached.

Second, Garrett's observation that companies enjoy added safeguards because of constitutionally mandated judicial involvement misses the mark. The cases Garrett cites for this proposition establish only that, as a constitutional baseline, corporate defendants are entitled to *post-indictment* judicial review,³⁸ irrespective of the benefits that would accompany a pre-indictment determination.³⁹ However, as we have already described, the real harm occurs at the charging stage. Therefore, although an Article III determination is welcomed at the breach-of-provision stage,⁴⁰ it does nothing to stop the parade of horrors that befall a company with a criminal charge.

* * *

The present lack of uniformity in the application of federal criminal law to companies should continue no more. For years, companies have self-reported violations, cooperated with government probes, and submitted to reviews by independent monitors. They should have some notion at the beginning of the process of what they will receive in return for their cooperation. DOJ has the obligation to provide the guidance necessary to answer that question.

³⁸ See cases collected in Garrett, *supra* note 3, at 928 n.307.

³⁹ See *Stolt-Nielson, S.A. v. United States*, 442 F.3d 177 (3d Cir. 2006) (holding that a defendant is not constitutionally entitled to pre-indictment judicial relief, nor may a federal court in normal circumstances enjoin the executive branch from filing indictments).

⁴⁰ Garrett suggests that the federal courts of appeals are split on whether courts can prevent an indictment from being issued. See Garrett, *supra* note 3, at 930. However, no such split exists in the federal jurisprudence. To the contrary, "no federal court (including the Seventh Circuit) has held that a pre-indictment determination is constitutionally required." *Stolt-Nielson*, 442 F.3d at 184. Those courts that have commented on the prudence of pre-indictment review have all determined that such review is precatory, not mandatory. See, e.g., *Meyer*, 157 F.3d at 1077 (quoting *United States v. Verrusio*, 803 F.2d 885, 899 n.3 (7th Cir. 1993), for the proposition that "parties could contract for a pre-indictment hearing in the event of a perceived breach"). In practice, this has happened at least once. See *Sears DPA*, *supra* note 23.

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