"CONSUMERS SHORTCHANGED? OVERSIGHT OF THE JUSTICE DEPARTMENT'S MORTGAGE LENDING SETTLEMENTS"

TESTIMONY BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW
FEBRUARY 12, 2015

WRITTEN SUBMISSION BY
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Mr. Chairman, Mr. Ranking Member, Members of the Subcommittee:

My name is Paul J. Larkin, Jr. I currently am a Senior Legal Research Fellow at The Heritage Foundation. Most of my career has involved working in the criminal justice system in one capacity of another. For example, I worked at the Department of Justice in the Organized Crime and Racketeering Section of the Criminal Division and in the Office of the Solicitor General. I also was Counsel to the Senate Judiciary Committee when Senator Orrin Hatch was the Chairman. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

Thank you for the opportunity to testify about third-party payment requirements in government settlement agreements. I have previously discussed this issue in a Heritage Foundation paper and in a law review article that were both published last year.[1] My opinion is that third-party payment requirements should not be included in a plea bargain, civil settlement, and nonprosecution or deferred prosecution agreement unless an act of Congress expressly and specifically authorizes the government to impose any such obligation.[2] That is true for several reasons:

First, the Justice Department lacks the statutory authority to hand over government funds to parties of its own choosing. Second, the practice of required third-party contributions is inconsistent with the federal laws that supply financial assistance to the victims of crime. Third, third-party contribution requirements circumvent the constitutional process for appropriating taxpayer dollars. Fourth, this practice denies the public the opportunity to know how public funds are spent and to hold elected officials accountable for their choices because it enables Representatives and Senators to shirk their fiscal responsibilities. Fifth, third-party contribution require-

[1] *See* Paul J. Larkin, Jr., *The Problematic Use of Nonprosecution and Deferred Prosecution Agreements to Benefit Third Parties*, The Heritage Foundation, Legal Memorandum No. 141 (Oct. 23, 2014), http://www.heritage.org/research/reports/2014/10/the-problematic-use-of-nonprosecution-and-deferred-prosecution-agreements-to-benefit-third-parties; Paul J. Larkin, Jr., *Funding Favored Sons and Daughters: Nonprosecution Agreements and "Extraordinary Restitution" in Environmental Criminal Cases*, 47 LOYOLA L.A. L. REV. 1 (2013).

[2] The concerns addressed here are the same whether the disposition is a plea bargain, nonprosecution or deferred prosecution agreement, or a civil settlement, although those concerns are more acute when criminal charges are a reality or a possibility. It is unknown how many of these types of settlements could have been brought as a criminal prosecution, but it is likely that some could have been criminal cases. *See, e.g.*, Bank of America Settlement ¶¶ C.I., at 2 (Aug. 18-20, 2014) ("Bank of America and its subsidiaries originated residential mortgages using inflated appraisals and fraudulently sold those loans to the [government-sponsored enterprises] with misrepresentations as to the loans' quality[.]); id. C.ii (qui tam action alleged that Countrywide and Bank of America "fraudulently sold defective residential mortgage loans originated by Countryside's Consumer Markets Division and later Bank of America to the [government-sponsored enterprises] with misrepresentations as to the loans' quality[.]").

ments are rife with opportunities for political cronyism because they allow the Justice Department to pick-and-choose among private organizations as to which ones will receive federal funds without any guidance from Congress or any oversight by the Judiciary or Appropriations Committees in each chamber. Sixth, third-party contribution requirements are not necessary for plea bargains, civil settlements, and nonprosecution or deferred prosecution agreements to work as a means of disposing of criminal or civil cases.

I. THIRD-PARTY PAYMENT REQUIREMENTS ARE AN EMERGING FEATURE OF GOVERNMENT PLEA OR SETTLEMENT AGREEMENTS

Federal prosecutors enjoy almost unlimited discretion to decide whether to indict or sue a defendant, what charges or claims should be brought, whether to dispose of a case before trial via a plea bargain or civil settlement, and, if so, what the terms of that disposition should be. For all practical purposes, as long as prosecutors do not let impermissible factors such as race or religion influence their decisions, they have the prerogative to decide whether and how to initiate or terminate any particular case.[3]

Plea bargains and settlements are traditional ways to dispose of a case, and the Subcommittee members doubtless are familiar with those processes. Recently, however, a new disposition has emerged: nonprosecution and deferred prosecution agreements (N/DPAs). Before addressing whether third-party contribution requirements are a sound exercise of settlement authority, it may be useful to say a few words about this new dispute resolution mechanism.

Nonprosecution agreements resolve potential criminal charges in a manner that resembles a plea bargain or a civil settlement, but do not involve the entry of a judgment enforceable by a court. Deferred prosecution agreements are similar, but arise only after a charge is filed, a charge that the government is willing to consider dismissing if the defendant satisfactorily performs the terms of an agreement that avoids the need for a trial. The two dispositions also can perhaps be combined into one. That would occur when the government files one charge out of perhaps dozens or more that it could bring.

Ever since the Arthur Andersen case[4] ended in 2005 with everyone being a loser—Arthur Andersen, its innocent employees, and the government—the federal government has regularly disposed of corporate criminal prosecutions through N/DPAs. N/DPAs may or may not be reasonable ways to dispose of criminal charges or civil claims. They have become quite controversial;[5] they raise several troublesome public policy issues; and, some highly learned and respected

[3] *See, e.g.*, United States v. Armstrong, 517 U.S. 456 (1996) (discussing the proof necessary to establish that a charge was brought due to invidious discrimination); Rinaldi v. United States, 434 U.S. 22, 30 (1977) (stating that, when the government seeks to dismiss an indictment or information, '[t]he salient issue . . . is not whether the decision to maintain the federal prosecution was made in bad faith but rather whether the Government's later efforts to terminate the prosecution were similarly tainted with impropriety."); SEC v. Citigroup Global Markets, Inc., 752 F.3d 285 (2d Cir. 2014) (applying a similar standard to determine whether the SEC and a private party should be allowed to dispose of a civil case via a consent decree; "the proper standard for reviewing a proposed consent judgment involving an enforcement agency requires that the district court determine whether the proposed consent decree is fair and reasonable, with the additional requirement that the 'public interest would not be disserved.'" (citation omitted)).

[4] *See* Arthur Andersen LLP v. United States, 544 U.S. 696 (2005).

[5] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD

authorities, such as Professor Richard Epstein, have leveled persuasive criticisms of using them to dispose of criminal cases.[6] One often-voiced criticism is that N/DPAs allow the government

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EVALUATE EFFECTIVENESS (Dec. 2009), *available at* http://www.gao.gov/assets/300/299781.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-260T, CORPORATE CRIME: PROSECUTORS ADHERED TO GUIDANCE IN SELECTING MONITORS FOR DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS, BUT DOJ COULD BETTER COMMUNICATE ITS ROLE IN RESOLVING CONFLICTS (Nov 19, 2009), *available at* http://www.gao.gov/assets/130/123772.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-636T, CORPORATE CRIME: PRELIMINARY OBSERVATIONS ON DOJ'S USE AND OVERSIGHT OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS (2009), *available at* http://www.gao.gov/assets/130/122853.pdf; BRANDON GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014); John C. Coffee, Jr., *Deferred Prosecution: Has It Gone Too Far?*, NAT'L L.J., July 25, 2005, at 13; James R. Copland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*, *in* CIVIL JUSTICE REPORT 2012 (Ctr. For Legal Policy at the Manhattan Inst., 2012); Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 52–57 (Anthony S. Barkow & Rachel E. Barkow eds., 2011); Richard A. Epstein, Op-Ed., *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14; Benjamin S. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863 (2005); Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713 (2007); Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45, 45 (2006).

Professor Epstein and other commentators have criticized the government's use of N/DPAs to evade accountability. *See* Epstein, *supra*; Larkin, *supra* note 1, at 5 & nn.5-6 (collecting authorities). A similar problem also exists in the administrative process, where the government seeks to use informal regulatory devices, rather than the APA rulemaking process. The legality of an agency's use of informal actions to escape APA accountability, however, is beyond the scope of this hearing. For discussions of that problem, see, *e.g.*, Jerry Brito, *"Agency Threats" and the Rule of Law: An Offer You Can't Refuse*, 37 HARV. J. L. & PUB. POL'Y 553 (2014); Henry N. Butler & Nathaniel J. Harris, *Sue, Settle and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 HARV. J. L. & PUB. POL'Y 579 (2014); John D. Graham & James W. Broughel, *Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act*, 1 HARV. J. L. & PUB. POL'Y: FEDERALIST 30 (2014); John D. Graham & Cory R. Liu, *Regulatory and Quasi-Regulatory Activity Without OMB and Benefit-Cost Review*, 37 HARV. J. L. & PUB. POL'Y 425 (2014); Nina A. Mendelson & Jonathan B. Wiener, *Responses to Agency Avoidance of OIRA*, 37 HARV. J. L. & PUB. POL'Y 447 (2014); Stuart Shapiro, *Agency Oversight as "Whac-a-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 HARV. J. L. & PUB. POL'Y 523 (2014).

[6] In an article published in 2014 by the Heritage Foundation, Professor Richard Epstein argued that the government's unregulated discretion to dispose of cases without a trial or plea agreement—that is, without any involvement of the federal judiciary—leads to various untoward results in white-collar cases involving large corporations. *See* Richard A. Epstein, *The Dangerous Incentive Structures of Nonprosecution and Deferred Prosecution Agreements*, THE HERITAGE FOUNDATION LEGAL MEMO NO. 129 (June 26, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/LM129.pdf. A major problem is that N/DPAs severely skew the incentives that each party has to let a jury (or judge) decide the merits of the government's claims at a trial. The collateral consequences that a corporation can suffer from simply being convicted of a crime, or in some instances perhaps just being charged—for example, increased costs in the capital markets, the inability to contract with the federal government, or the suspension of professional licenses—often may exceed whatever monetary penalty that a court could impose on the corporation after conviction. The result is that the N/DPA process effectively inverts the incentive structure otherwise envisioned by the criminal justice system. Using N/DPAs to resolve a potential criminal case front-loads all

to create a new paradigm of corporate governance—a form of "regulation by litigation"—that enables the government to use settlements as a means of obtaining supervisory authority over a corporation that no statute and no regulation authorizes and that a federal district court could not award to the government were a corporate defendant tried and found guilty.[7] One issue that is especially problematic is the one that this committee has decided to address: namely, the requirement that an actual or potential criminal or civil defendant pay money to a third party who could not be deemed a "victim" under the federal laws granting crime victims the opportunity for restitution.

II. THIRD-PARTY PAYMENT REQUIREMENTS ARE AN UNAUTHORIZED CONDITION ON THE DISPOSITION OF A CRIMINAL CASE

Federal law limits the sentencing authority of a federal court to whatever penalties are affirmatively authorized by law. In 1916 in *Ex parte United States*,[8] the Supreme Court of the United States held that a federal district court has only whatever sentencing authority Congress has granted the court by statute, regardless of how reasonable a newly-invented disposition may be. In that case, rather than impose the mandatory sentence dictated by statute, the federal trial judge decided to place the defendant on probation, which then had recently become a novel way to sentence a convicted defendant. Allowing a court to craft its own sanctions, the Court concluded, would authorize the court to disregard the legislative judgment as to what penalties are appropriate for a crime, authority that Article I of the Constitution vests in Congress.[9]

The ruling in *Ex parte United States* is instructive here because no act of Congress authorizes the government to require the payment of money to third-parties to dispose of a criminal or civil case, regardless of whether the government or the defendant decides who should receive those funds and how much the gift should be. To start with, these payments are not "fines."[10] A

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of the costs to the corporation because the charge itself can serve as a death sentence, as prosecutors know. *See* Larkin, *supra* note 1, at 18 & n.47. Indeed, ever since the Arthur Anderson case the government and corporate defendants have avoided trials, albeit for very different reasons. Corporate defendants fear being charged or convicted because either one can amount to a "corporate death sentence." The government wishes to avoid a trial because the government is limited in the relief that it can obtain after conviction to only those penalties authorized by Congress. *See Ex parte* United States, 242 U.S. 27, 42-43 (1916); Larkin, *supra* note 1, at 27-28. The government may find those penalties inadequate, however, because they do not permit it to engage in "regulation by prosecution"—the practice by which the government seeks to alter the conduct of a business without going through the Article I lawmaking process or the notice-and-comment process. *See supra* note 5.

[7] *See*, *e.g.*, Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 858 (2007) ("[S]tructural reform is a new goal for federal criminal law."); Peter J. Henning, *The Organizational Guidelines: R.I.P.?*, 116 YALE L.J. POCKET PART 312, 315 (2007), http://yalelawjournal.org/images/pdfs/528.pdf ("The purpose of corporate prosecutions is not to punish but instead to change corporate cultures through agreements that deal directly with internal governance. While it is questionable whether the government has the expertise to tell corporations how best to govern themselves, the focus on how businesses will operate in the future is now a central feature of corporate criminal investigations.").

[8] 242 U.S. 27 (1916).

[9] *Id*. at 42-43.

[10] *See* Larkin, *supra* note 1, at 35-36.

fine is a penalty paid by a convicted offender to the federal government. An N/DPA or a settlement substitutes for a conviction, and compulsory charitable contributions go to third parties, not the federal treasury. Compulsory charitable contributions also are not restitution.[11] Federal courts lack inherent authority to award restitution, and the relevant statutes limit restitution to cases tried to a conviction.[12]

A corporation cannot be imprisoned, so the principal concern of any corporation under a criminal or civil investigation is the optimal dollar-and-cents resolution of the matter. If the cost of agreeing to a N/DPA or settlement is less than the cost of being charged or sued and convicted (discounted by the strength of the defendant's proof of its innocence), which is usually the case, the corporation will agree to whatever the government offers in order to make the entire problem go away. What a corporation is concerned with is the amount of whatever check it has to write, not the name of the payee. A dollar paid to Peter costs as much (or as little) as a dollar paid to Paul.[13] The result is two-fold: the corporation is indifferent as to the recipient of a payment, and the Justice Department has unfettered discretion to decide who will receive that money. That combination can pose a real problem, which has largely gone unnoticed.

Ordinarily, the Department would deposit into the U.S. Treasury whatever checks it receives to resolve a case, which enables Congress to later specify the purposes for which it can be spent. Instead, the Department has occasionally required corporations to contribute to different charitable organizations of the government's (or, as here, the corporation's) choosing.[14] The practice of identifying third-party recipients of monies that a corporation pays out in an N/DPA or settlement is tantamount to dispensing taxpayer funds to whatever particular recipient the Justice Department (or its designee) selects. That practice raises important public policy issues that neither Congress nor the federal courts has yet addressed.[15]

III. THIRD-PARTY PAYMENT REQUIREMENTS ARE OBJECTIONABLE ON SEVERAL PUBLIC POLICY GROUNDS

The government and a defendant could find third-party contribution requirements mutually valuable. Requiring a target to make a charitable contribution enables the government to evade statutory limitations on the amount of fines that could be imposed if the prosecution believes that the statutory cap provides an insufficient penalty.[16] The government may find that such conditions have considerable public relations value, particularly in the community benefitting from them. A corporate target also might jump at the opportunity to engage in a charitable endeavor. The requirement may enable a senior corporate officer to make a corporate contribution to a preferred charity that the board of directors would never approve. Moreover, the contribution may have important public relations value for the corporation as well. In the short run, to be sure, a

[11] *See id*. at 135-36.

[12] *See id*.

[13] The rule would be different if the corporation could claim a tax deduction for making a D/NPA payment, but the government often requires a corporation to waive any such claim. *See id*. at 8.

[14] *See id*. at 7.

[15] *See id*. at 29-47.

[16] *See, e.g.*, Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 125 (1982).

corporation will want to reduce publicity and put the entire matter behind it, but a corporation may put a different spin on a nonprosecution agreement in the long run. Once the dust settles from the criminal investigation and memories dim, a corporation could attempt to portray itself favorably as having contributed to a recognized charity—of course, without mentioning the event triggering that contribution.

That being said, third-party contribution requirements are objectionable on several grounds. Those flaws outweigh any benefits that they may have.

First, the Justice Department lacks the statutory authority to hand over government funds to parties of its own choosing. Any sum that the government demands that a corporation hand over to a private party is money that the corporation would otherwise pay into the federal treasury, which would help underwrite the general costs of running the government. The result is a give-away of federal funds, a give-away that burdens taxpayers by requiring them to make up for the amount given to favored recipients.

Second, the practice of required third-party contributions is inconsistent with the federal laws that supply financial assistance to the victims of crime. There are several federal statutes addressing the needs of victims of crime: e.g., the Victim and Witness Protection Act of 1982,[17] the Victims of Crime Act of 1984,[18] the Mandatory Victims Restitution Act of 1996,[19] and the Crime Victims Rights Act of 2004.[20] The 1984 act provides that, with certain exceptions—not applicable to housing settlements—"all fines that are collected from persons convicted" of federal crimes "shall be deposited" into "a separate account" to be known as the Crime Victims Fund[.]"[21] Congress has also directed that the Crime Victim Funds "shall be available only for" a few specific purposes: (1) child abuse prevention and treatment grants; (2) the victim assistance programs that exist at the Federal Bureau of Investigation, at the Department of Justice, and in the U.S. Attorney's Offices,[22] programs that provide services for crime victims "through victim coordinators, victims' specialists, and victims' advocates"; (3) the training of state victim crime compensation program personnel; (4) evaluation, training, and technical assistance for "eligible crime victim assistance programs"; (5) "a Victim Notification System"; or (6) an antiterrorism

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[17] Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified, as amended, at 18 U.S.C. § 3663 (2006)).

[18] Pub. L. No. 98-473, Tit. II, § 1402, 98 Stat. 2170 (codified, as amended, at 42 U.S.C. §§ 10601-10608 (2012)) .

[19] Pub. L. No. 104-132, 110 Stat. 1227 (codified as 18 U.S.C. §§ 3556, 3663–64 (2006)).

[20] Pub. L. No. 108-405, 118 Stat. 2260 (2004), enacted as § 2 of the Justice for All Act of 2004 (codified, as amended, at 18 U.S.C. § 3771 (2006)).

[21] 42 U.S.C. §§ 10601(a) & (b)(1). The exceptions relate to matters such as fines available to the Secretary of the Treasury pursuant to the Endangered Species Act or the Lacey Act, and fines paid into the railroad unemployment insurance account, the Postal Service Fund, the navigable waters revolving fund, and the county public schools funds pursuant to various federal laws. *Id*. § 10601(b)(1)(A) & (B).

For the convenience of the Members, I have reprinted the text of 42 U.S.C. §§ 10601 in Appendix B below.

[22] *See*, *e.g.*, FBI, VICTIM ASSISTANCE, http://www.fbi.gov/stats-services/victim_assistance; DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE FOR VICTIMS OF CRIME, http://ojp.gov/ovc/; DEP'T OF JUSTICE, OFFICES OF THE UNITED STATES ATTORNEYS, VICTIMS RIGHTS & SERVICES, http://www.justice.gov/usao/priority-areas/victims-rights-services.

emergency reserve for the victims of 9/11.[23] Those laws demonstrate that Congress sought to limit payments to *actual, proven victims of crimes*, not to individuals or organizations that may have suffered some harm from unproved crimes or from civil wrongs, and certainly not to parties who have suffered no harm themselves.

Third, third-party contribution requirements circumvent the constitutional process for appropriating taxpayer dollars. The Constitution and federal law speak to how federal money can be disbursed, and the teaching of those authorities is that it is Congress's prerogative to decide who should receive taxpayers' dollars. The Constitution bars the government from spending unappropriated funds[24] and the Anti-Deficiency Act[25] prohibits the government from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding . . . an appropriation" or relevant fund.[26] Those provisions are not merely hyper-technical accounting requirements. On the contrary, they reflect a basic allocation of federal decisionmaking authority regarding the proper expenditure of the public's tax dollars. Congress does not give the President a lump sum allowance that he can spend as he sees fit. Instead, in the annual appropriations bills Congress specifies in detail exactly who can receive appropriated funds, how much money each one may be paid, and for what purposes that money can be used. Third-party contribution requirements enable the Executive Branch to perform an end run around Congress's paramount role in the federal appropriations process.

Fourth, this practice denies the public the opportunity to know how public funds are spent and to hold elected officials accountable for their choices by enabling Representatives and Senators to shirk their responsibility. The Constitution and federal code ensure that the Executive Branch cannot spend money without the prior approval of Congress, which requires every Member to cast a ballot for the annual appropriations bills. Those provisions ensure that each voter can know what every Member does with the public's tax dollars and can use that information every two or six years to decide whether to "throw the bums out." By letting the Executive Branch make decisions that the Constitution envisions only Congress should make, the members of Congress who allow this practice to continue are simply avoiding their responsibility to take a public position identifying the proper recipients of the electorate's tax dollars in the hope that the voters will not hold accountable Senators and Representatives at the polls for any funding decisions that the public dislikes. Accordingly, third-party contribution requirements allow legislators to escape political responsibility by denying the public valuable information that it needs to make an informed decision at the polls.

To be sure, leaving appropriations decisions to members of Congress hardly guarantees that personal biases will play no role in how public funds are spent. No one is that gullible. But the public has the opportunity to hold Representatives and Senators accountable at the polls for their decisions, an opportunity that they lack whenever career lawyers or political appointees at the Justice Department—to say nothing of private parties—decide which organizations will benefit from an N/DPA or settlement. The public deserves the opportunity to hold the government

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[23] 42 U.S.C. §§ 10601(d)(2), (3), (4) & (5).

[24] *See* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .").

[25] Pub. L. No. 97-258, 96 Stat. 923 (1982) (codified at 31 U.S.C. § 1341 (2006)).

[26] 31 U.S.C. § 1341(a)(1)(A) (2006).

accountable for its taxing and spending decisions. Returning that decision to Congress whenever the Justice Department uses such an agreement would be a big step in the right direction.

Fifth, third-party contribution requirements are rife with opportunities for political cronyism. They allow the Justice Department to pick-and-choose among private organizations as to which ones will receive federal funds without any guidance from Congress or any oversight by the Judiciary or Appropriations Committees in each chamber. The entirely discretionary nature of this process can easily lead to favoring one charity or organization over another on entirely subjective grounds. The parties who benefit from the government's disbursement of N/DPA funds may be organizations who should receive federal funds because they improve the lot of the citizenry in various ways. But why should a housing rights organization, for example, receive money that could just as easily go to a school that trains dogs to serve as companions to the blind and as the interface between them and the world? There is no guarantee that the payments a corporation makes to a third-party that it selects or that is chosen by the government will go to the actual victims of a housing fraud scheme, while the payments made to an organization that trains seeing-eye dogs will doubtless directly benefit people obviously less fortunate than most. A reasonable argument can be made that any number of other charitable organizations equally deserves the same opportunity to assist people in need of better food, drinking water, health care, education, access to public transportation, housing, and so forth.

The decision how to disburse federal funds, and whether any of those funds should be given directly to private organizations, should not be made through a process that shrouds how those decisions are made and permits individual decisionmakers to rely on personal biases and predilections. The Justice Department's actions may or may not be defensible under the law, but they certainly do not give the appearance of having been made in a just manner or ensuring a just result. The Justice Department's N/DPA and settlement practices justify the inference that the federal government is extorting settlements from businesses in order to transfer funds to cronies that the Administration could never persuade Congress to appropriate for them.[27]

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When deciding whether third-party payment requirements are a sound public policy, it is worthwhile to perform this exercise: Flip the facts of these settlements on their head. Assume that Bank of America and Citigroup settled a lawsuit with the government and would *receive* money to settle the case. Then, ask yourself this question: May the CEO of either bank tell the government to pay millions of dollars to the CEO's or the Department's favorite charity instead of making the check out to Bank of America and Citigroup? No, he may not. That would be a violation of the CEO's fiduciary duty to his company and would be tantamount to theft. In all likelihood, the Justice Department would even take that position. If so, if a corporate CEO cannot give away money that the corporation receives in a settlement agreement, then the Department should not be able to give away funds that it receives in a plea or settlement agreement.

[27] It should be noted that lawyers in Democratic and Republican Administrations have been equally guilty of following this practice. For example, during the George W. Bush Administration, the United States Attorney's Office for the District of New Jersey, which was then headed by Chris Christie, negotiated a nonprosecution agreement with Bristol-Myers Squibb in which the company agreed, among other things, to make a $5 million gift to Seton Hall University's law school—Christie's alma mater—in order to avoid prosecution for securities fraud.

The rules that apply to private parties should also apply to the government. Sauce for the goose should be sauce for the gander.[28]

IV. THE THIRD-PARTY PAYMENT REQUIREMENTS IN THE HOUSING SETTLEMENT CASES ARE EXAMPLES OF THE PROBLEMS THESE CONDITIONS POSE

The housing settlements were controversial when inked because there was a decided ideology to many of the groups who have benefitted from the Justice Department's largesse. According to Investor's Business Daily, "[r]adical Democrat activist groups stand to collect millions from Attorney General Eric Holder's record $17 billion deal to settle alleged mortgage abuse charges against Bank of America. [¶] Buried in the fine print of the deal, which includes $7 billion in soft-dollar consumer relief, are a raft of political payoffs to Obama constituency groups. In effect, the government has ordered the nation's largest bank to create a massive slush fund for Democrat special interests."[29] Investor's Business Daily offered the following examples:

> According to the list provided by Justice, [housing activist groups approved by HUD] include some of the most radical bank shakedown organizations in the country, including:
>
> • La Raza, which pressures banks to expand their credit box to qualify more low-income Latino immigrants for home loans;
>
> • National Community Reinvestment Coalition, Washington's most aggressive lobbyist for the disastrous Community Reinvestment Act;
>
> • Neighborhood Assistance Corporation of America, whose director calls himself a "bank terrorist;"
>
> • Operation Hope, a South Central Los Angeles group that's pressuring banks to make "dignity mortgages" for deadbeats.
>
> Worse, one group eligible for BofA slush funds is a spin-off of Acorn Housing's branch in New York. [¶] It's now rebranded as Mutual Housing Association of New York, or MHANY. HUD lists MHANY's contact as Ismene Speliotis, who previously served as New York director of Acorn Housing.[30]

That is not all. The settlement stipulates that any money remaining after four years should be disposed of as follows:

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[28] *See* Paul J. Larkin, Jr., Public *Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 786-90 (2013).

[29] Editorial, "Holder Cut Left-Wing Groups In on $17 Bill BofA Deal," Investor's Business Daily, IBD.com, Aug. 27, 2014, http://news.investors.com/ibd-editorials/082714-715046-holders-bank-of-america-settlement-includes-payoffs-to-democrat-groups.htm?p=full. The settlement agreement with Bank of America resolves one pending case and numerous other investigations that the Justice Department has pursued into alleged mortgage fraud that have not resulted in criminal charges or civil complaints. *See* Bank of America Settlement Agreement (signed Aug. 18-20, 2014), http://www.justice.gov/iso/opa/resources/9622014821111642417595.pdf.

[30] *Id.*

> If there are leftover funds in four years, the settlement stipulates the money will go to Interest on Lawyers' Trust Account (IOLTA), which provides legal aid for the poor and supports left-wing causes, and NeighborWorks of America, which provides affordable housing and funds a national network of left-wing community organizers operating in the mold of Acorn.
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> In fact, in 2008 and 2009, NeighborWorks awarded a whopping $25 million to Acorn Housing.
>
> In 2011 alone, NeighborWorks shelled out $35 million in "affordable housing grants" to 115 such groups, according to its website. Recipients included the radical Affordable Housing Alliance, which pressures banks to make high-risk loans in low-income neighborhoods and which happens to be the former employer of HUD's chief "fair housing" enforcer.[31]

The Justice Department acknowledges that the settlement agreements require that "donations" be paid to third parties.[32] The Department also appears to confess that those third parties are not victims of the banks' wrongdoing. As the Department noted in its January 6, 2015, letter to Chairmen Goodlatte and Hensarling, "the consumer relief provisions in the Bank of America and Citigroup settlements" require those banks to make "donations to certain categories of community development funds, legal aid organizations, and housing counseling agencies[.]"[33] The Department, however, does not identify any express statutory authority to disburse federal funds to private parties. Instead, the government defends those requirements on the ground that they are reasonable because the amount at issue is "a much smaller commitment" than what the banks must pay to the federal government, because the "donations are calibrated to provide assistance to those consumers and communities most in need of help," and because "the banks are responsible for choosing specific recipients of consumer relief funds."[34] Those defenses are unpersuasive, however, for several reasons

First, no policy argument can substitute for statutory authority. If the government does not need statutory authority to disburse to private parties a "small[]" portion of the money that it receives in a settlement, then it may disburse a "larger" portion of those receipts. Indeed, under the government's theory it could give third parties the entire *$8.2 billion check* that is to be paid to the Department of Justice.[35] The Department's argument that its action is reasonable in fact stands as a powerful argument for requiring the government to have statutory authority to give away money that otherwise would be paid into the federal treasury. Otherwise, there is no nonarbitrary way to draw a line between a "reasonable" and an "unreasonable" give-away of money that belongs to the public.

Second, federal law seeks to ensure that the victims of crime receive some compensation for the losses that they have suffered due to the crimes for which a defendant stands convicted.

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[31] *Id*.

[32] *See* Letter from Peter J. Kadzik, Ass't Att'y Gen'l, to Bob Goodlatte, Chairman, H. Comm. on the Judiciary, & Jeb Hensarling, Chairman, H. Comm. on Financial Servs. 1-3 (Jan. 6, 2015).

[33] *Id*. at 2-3.

[34] *Id*. at 1-2.

[35] *Id*. at 5.

Here, however, there was no conviction, and no judicial finding that the private recipients were "victims" of a crime. Even the government does not claim that all of the recipients are victims of the banks' unlawful conduct. The government only says that the recipients are "those consumers and communities most in need of help." Deciding which consumers and communities need financial help is inherently a legislative function. Under Article I of the Constitution, Congress, not the Executive Branch, has the prerogative to create the "law" establishing a financial assistance program and defining the eligibility requirements. If Congress believes that the taxpayers should fund some third-party organizations, then Congress can appropriate federal money for that purpose.

Third, it is immaterial that the Justice Department has delegated to the settling banks the ability to select the particular recipients of their donations. The banks have agreed to settle the claims in lieu of defending themselves at trial and to pay money for that privilege. It is the Justice Department's authority that is at issue, not the banks'. The Department's decision to permit the banks to name the payees does not change the fact that the Department is permitting the banks to give away funds that otherwise would be deposited into the treasury. If the Department could not write those third parties a check after the money had been paid into the treasury, the Department should not be able to enter into an agreement with the banks that has the same effect. Any mature system of law treats a sham transaction as null and void. That characterization is applicable here.

Perhaps these problems could be overlooked if the amounts at issue here were trivial, if what we were concerned with was tantamount to a proverbial cup of coffee. But the amounts involved here are considerable. The agreements contemplate that the banks may potentially pay millions to various private organizations. Taxpayers would not find that amount of money trivial.

V. POTENTIAL REMEDIES FOR THESE PROBLEMS

The best remedy for this problem is to deny the Justice Department the opportunity to make any discretionary disbursement decisions. Congress could by statute require that any and all funds paid by an individual or a corporation in connection with a plea bargain, a N/DPA, or settlement of any type must be deposited into the federal treasury, where they will be paid out as part of the ordinary appropriations process. The Executive Branch can always encourage Congress to fund particular organizations with the money received through a deferred or nonprosecution agreement, even if it wishes that money to be paid to a friend, but that approach will force the executive to make its cronyism clear and will force each Member of the House and Senate to state publicly whether to endorse or reject the administration's request in the same way that those chambers make all other appropriations decisions. That approach will return the disbursement process to its rightful place in government and will help educate the public about how its tax dollars are spent.

Another remedy, which can be required in addition to the one mentioned above, is to enlist the aid of Federal Magistrate Judges to review these settlements to ensure that any third-party payments go only to actual victims of any alleged wrongdoing. At present, this process is largely left to the parties to negotiate a workable agreement without any serious judicial oversight in the case of a deferred prosecution agreement or any supervision at all when a nonprosecution agreement is used. In the case of a deferred prosecution agreement, the government already has filed

a charge in federal court, so a district court judge must approve the government's decision to dismiss an indictment or information. Judicial review, however, is quite limited in that setting.[36]

For all practical purposes, as long as the government has not sought to dismiss the prosecution for an illegitimate reason—for instance, the prosecutor was bribed to "deep six" the case—the district court must go along with the government's request.[37] By contrast, whenever the government seeks to enter into a nonprosecution agreement, no charges have been or will be filed, so no district court judge may be able to review the agreement's terms.[38] Given the Article III "Case or Controversy" requirement, it may not be possible to enlist a federal district court to review such an agreement.[39] Congress could entrust that responsibility, however, to a Magistrate Judge, who is not an Article III officer.[40] This proposal ensures that a second, neutral pair of eyes reviews every nonprosecution agreement and ensures that only the victims of any possible crimes benefit from any N/DPA third-party payments.

Finally, Congress could decide to deduct from the Justice Department appropriations an amount equal to any money that has already been disbursed and cannot be recovered.

CONCLUSION

Plea agreements and settlements are often used to resolve corporate criminal and civil cases. N/DPAs are increasingly becoming another alternative to trial. All three dispositions may contain third-party payment requirements. Those requirements raise several important public policy issues, however, and deserve to be subjected to Congressional oversight and regulation. The practice of forcing a corporation to make contributions to third parties designated in any such agreement enables Justice Department lawyers to disburse to third parties of their own choosing, or perhaps of the defendant's, money that properly should be paid into the federal treasury. Only elected federal officials should make appropriations decisions. Congress should prohibit this practice altogether, and it should require that a Magistrate Judge review the appropriateness of every agreement in order to ensure that government lawyers use this disbursement authority only to compensate proven victims of criminal wrongdoing, not the Administration's cronies.

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[36] *See* Fed. R. Crim. P. 48(a) ("The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent.").

[37] *See supra* note 3.

[38] Federal judges can be tasked with the performance of duties other than adjudicating cases and controversies. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 384-408 (1989) (Article III judges can voluntarily serve as members of the U.S. Sentencing Commission). The Supreme Court, however, may find that supervising the administration of N/DPAs too closely resembles the process of supervising the parties' duties under a consent decree for an Article III judge to undertake that task.

[39] *See, e.g.*, Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) (Article III courts cannot issue advisory opinions).

[40] *Compare, e.g.*, U.S. CONST. art. III, § 1 (Article III judges serve during "good Behaviour"), *with* Federal Magistrate's Act, 28 U.S.C. § 631 (2012) (full-time magistrates serve an eight-year term; part-time magistrates, a four-year term).

APPENDIX A

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APPENDIX B

42 U.S.C.A. § 10601

§ 10601. Crime Victims Fund

(a) Establishment

There is created in the Treasury a separate account to be known as the Crime Victims Fund (hereinafter in this chapter referred to as the "Fund").

(b) Fines deposited in Fund; penalties; forfeited appearance bonds

Except as limited by subsection (c) of this section, there shall be deposited in the Fund--

(1) all fines that are collected from persons convicted of offenses against the United States except--

(A) fines available for use by the Secretary of the Treasury pursuant to--

(i) section 11(d) of the Endangered Species Act (16 U.S.C. 1540(d)); and

(ii) section 6(d) of the Lacey Act Amendments of 1981 (16 U.S.C. 3375(d)); and

(B) fines to be paid into--

(i) the railroad unemployment insurance account pursuant to the Railroad Unemployment Insurance Act (45 U.S.C. 351 et seq.);

(ii) the Postal Service Fund pursuant to sections 2601(a)(2) and 2003 of Title 39 and for the purposes set forth in section 404(a)(7) of Title 39;

(iii) the navigable waters revolving fund pursuant to section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321); and

(iv) county public school funds pursuant to section 3613 of Title 18;

(2) penalty assessments collected under section 3013 of Title 18;

(3) the proceeds of forfeited appearance bonds, bail bonds, and collateral collected under section 3146 of Title 18;

(4) any money ordered to be paid into the Fund under section 3671(c)(2) of Title 18; and

(5) any gifts, bequests, or donations to the Fund from private entities or individuals, which the Director is hereby authorized to accept for deposit into the Fund, except that the Director is not hereby authorized to accept any such gift, bequest, or donation that--

(A) attaches conditions inconsistent with applicable laws or regulations; or

(B) is conditioned upon or would require the expenditure of appropriated funds that are not available to the Office for Victims of Crime.

(c) Retention of sums in Fund; availability for expenditure without fiscal year limitation

Sums deposited in the Fund shall remain in the Fund and be available for expenditure under this chapter for grants under this chapter without fiscal year limitation. Notwithstanding subsection (d)(5) of this section, all sums deposited in the Fund in any fiscal year that are not made

available for obligation by Congress in the subsequent fiscal year shall remain in the Fund for obligation in future fiscal years, without fiscal year limitation.

(d) Availability for judicial branch administrative costs; grant program percentages

The Fund shall be available as follows:

(1) Repealed. Pub. L. 105-119, Title I, § 109(a)(1), Nov. 26, 1997, 111 Stat. 2457

(2)(A) Except as provided in subparagraph (B), the first $10,000,000 deposited in the Fund shall be available for grants under section 10603a of this title.

(B)(i) For any fiscal year for which the amount deposited in the Fund is greater than the amount deposited in the Fund for fiscal year 1998, the $10,000,000 referred to in subparagraph (A) plus an amount equal to 50 percent of the increase in the amount from fiscal year 1998 shall be available for grants under section 10603a of this title.

(ii) Amounts available under this subparagraph for any fiscal year shall not exceed $20,000,000.

(3)(A) Of the sums remaining in the Fund in any particular fiscal year after compliance with paragraph (2), such sums as may be necessary shall be available only for--

(i) the United States Attorneys Offices and the Federal Bureau of Investigation to provide and improve services for the benefit of crime victims in the Federal criminal justice system (as described in 3771 of title 18[1] and section 10607 of this title) through victim coordinators, victims' specialists, and advocates, including for the administrative support of victim coordinators and advocates providing such services; and

(ii) a Victim Notification System.

(B) Amounts made available under subparagraph (A) may not be used for any purpose that is not specified in clause (i) or (ii) of subparagraph (A).

(4) Of the remaining amount to be distributed from the Fund in a particular fiscal year--

(A) 47.5 percent shall be available for grants under section 10602 of this title;

(B) 47.5 percent shall be available for grants under section 10603(a) of this title; and

(C) 5 percent shall be available for grants under section 10603(c) of this title.

(5)(A) In addition to the amounts distributed under paragraphs (2), (3), and (4), the Director may set aside up to $50,000,000 from the amounts transferred to the Fund in response to the airplane hijackings and terrorist acts that occurred on September 11, 2001, as an antiterrorism emergency reserve. The Director may replenish any amounts obligated from such reserve in subsequent fiscal years by setting aside up to 5 percent of the amounts remaining in the Fund in any fiscal year after distributing amounts under paragraphs (2), (3) and (4). Such reserve shall not exceed $50,000,000.

(B) The antiterrorism emergency reserve referred to in subparagraph (A) may be used for supplemental grants under section 10603b of this title and to provide compensation to victims of international terrorism under section 10603c of this title.

(C) Amounts in the antiterrorism emergency reserve established pursuant to subparagraph (A) may be carried over from fiscal year to fiscal year. Notwithstanding subsection (c) of this

section and section 619 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001 (and any similar limitation on Fund obligations in any future Act, unless the same should expressly refer to this section), any such amounts carried over shall not be subject to any limitation on obligations from amounts deposited to or available in the Fund.

(e) Amounts awarded and unspent

Any amount awarded as part of a grant under this chapter that remains unspent at the end of a fiscal year in which the grant is made may be expended for the purpose for which the grant is made at any time during the 3 succeeding fiscal years, at the end of which period, any remaining unobligated sums shall be available for deposit into the emergency reserve fund referred to in subsection (d)(5) of this section at the discretion of the Director. Any remaining unobligated sums shall be returned to the Fund.

(f) "Offenses against the United States" as excluding

As used in this section, the term "offenses against the United States" does not include--

(1) a criminal violation of the Uniform Code of Military Justice (10 U.S.C. 801 et seq.);

(2) an offense against the laws of the District of Columbia; and

(3) an offense triable by an Indian tribal court or Court of Indian Offenses.

(g) Grants for Indian tribes; child abuse cases

(1) The Attorney General shall use 15 percent of the funds available under subsection (d)(2) of this section to make grants for the purpose of assisting Native American Indian tribes in developing, establishing, and operating programs designed to improve--

(A) the handling of child abuse cases, particularly cases of child sexual abuse, in a manner which limits additional trauma to the child victim; and

(B) the investigation and prosecution of cases of child abuse, particularly child sexual abuse.

(2) The Attorney General may use 5 percent of the funds available under subsection (d)(2) of this section (prior to distribution) for grants to Indian tribes to establish child victim assistance programs, as appropriate.

(3) As used in this subsection, the term "tribe"[2] has the meaning given that term in section 450b(b) of Title 25.