


2016

## More Than Just a Potted Plant: A Court's Authority to Review Deferred Prosecution Agreements Under the Speedy Trial Act and Under Its Inherent Supervisory Power

Mary Miller

*University of Michigan Law School*

Follow this and additional works at: <http://repository.law.umich.edu/mlr>

 Part of the [Courts Commons](#), [Criminal Procedure Commons](#), [Legislation Commons](#), and the [President/Executive Department Commons](#)

---

### Recommended Citation

Mary Miller, *More Than Just a Potted Plant: A Court's Authority to Review Deferred Prosecution Agreements Under the Speedy Trial Act and Under Its Inherent Supervisory Power*, 115 MICH. L. REV. 135 (2016).

Available at: <http://repository.law.umich.edu/mlr/vol115/iss1/4>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## NOTE

### MORE THAN JUST A POTTED PLANT: A COURT'S AUTHORITY TO REVIEW DEFERRED PROSECUTION AGREEMENTS UNDER THE SPEEDY TRIAL ACT AND UNDER ITS INHERENT SUPERVISORY POWER

Mary Miller\*

*In the last decade, the Department of Justice has increasingly relied on pretrial diversion agreements as a means of resolving corporate criminal cases short of prosecution. These pretrial diversion agreements—non-prosecution and deferred prosecution agreements—include substantive terms that a company must abide by for the duration of the agreement in order to avoid prosecution. When entering a deferred prosecution agreement, the Department of Justice files charges against the defendant corporation as well as an agreement outlining the variety of terms with which the company must comply. This delay in prosecution is permitted under the Speedy Trial Act, which provides an exception to the general requirement that prosecution commence seventy days after charges are filed for delays intended to allow a defendant to demonstrate “good conduct.” Until very recently, these agreements were accepted and approved by courts without question. In 2013, however, over the objection of the Department of Justice, a district court scrutinized a deferral and, in 2015, a second district court rejected a deferral because the terms of the agreement were, in its view, much too lenient. The 2015 rejection has raised questions about the proper roles of courts and prosecutors in resolving criminal cases. In particular, judicial review of deferred prosecution agreements might improperly interfere with the Executive’s discretion in deciding whether to prosecute a criminal defendant, thereby violating separation-of-power principles. This Note argues, however, that judicial review is appropriate and constitutionally permissible. First, review authority is appropriate because Congress has granted the courts that review authority under a proper reading of the Speedy Trial Act. Additionally, the congressional grant of review authority is bolstered by the inherent supervisory power of courts to ensure the fair administration of criminal justice.*

---

\* J.D., May 2016, University of Michigan Law School. I would like to thank University of Michigan Law School Professors Rebecca Eisenberg, Nina Mendelson, and David Uhlmann, the University of Michigan Law School Student Scholarship Workshop, and Matthew Sappington for constructive feedback throughout this project. I would also like to thank Erin Chapman, Andrea Scanlan, Sachi Schuricht, Julie Siegel, Danielle Kalil-McLane, Matt Wallace and the *Michigan Law Review* Notes Office for insightful comments and excellent editing. I will be clerking for Judge Richard J. Leon of the District Court for the District of Columbia for the 2019–2020 term. All views are my own and all errors are my own.

INTRODUCTION .....	136
I. BENEFITS AND CRITICISMS OF THE INCREASED USE OF NON-PROSECUTION AGREEMENTS AND DEFERRED PROSECUTION AGREEMENTS BY THE U.S. DEPARTMENT OF JUSTICE.....	140
II. JUDICIAL REVIEW OF DEFERRED PROSECUTION AGREEMENTS...	145
A. United States v. HSBC Bank U.S.A., N.A. ....	145
B. United States v. Fokker Services B.V.....	148
C. United States v. Saena Tech Corporation .....	151
III. SOURCES OF AUTHORITY TO REVIEW AND REJECT DPAs .....	152
A. <i>The Speedy Trial Act</i> .....	153
B. <i>The Supervisory Power</i> .....	156
1. Assertions of Courts' Supervisory Power .....	156
2. The Supervisory Authority in the DPA Context .....	160
IV. EXECUTIVE POWER AND PROSECUTORIAL DISCRETION .....	162
A. <i>Executive Authority by Other Means: Discretionary Power to Initiate or Decline to Bring Charges</i> .....	163
B. <i>Prosecutorial Discretion Does Not Extend to DPAs</i> .....	165
V. A STANDARD OF REVIEW.....	169
CONCLUSION .....	170

#### INTRODUCTION

In resolving allegations of corporate wrongdoing, the Department of Justice (“DOJ”) has a variety of tools at its disposal. These tools include indictment, negotiated plea agreements, non-prosecution agreements (“NPAs”), deferred prosecution agreements (“DPAs”), reliance on separate civil resolution, and declining to prosecute altogether.<sup>1</sup> In the past decade, federal prosecutors have increasingly relied on NPAs and DPAs,<sup>2</sup> employing them as a way of exacting punishment in the form of monetary penalties or the institution of mandatory compliance measures for corporate wrongdoing, while avoiding the collateral consequences of conviction for innocent third parties such as shareholders and employees.<sup>3</sup> In a deferred prosecution,

1. Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co.*, 43 AM. CRIM. L. REV. 1043, 1043 (2006).

2. Cindy R. Alexander & Mark A. Cohen, *Trends in the Use of Non-Prosecution, Deferred Prosecution, and Plea Agreements in the Settlement of Alleged Corporate Criminal Wrongdoing*, L. & ECON. CTR. GEO. MASON U. SCH. L. ix (April 2015), [http://masonlec.org/site/rte\\_uploads/files/Full%20Report%20-%20SOCI%20NPA-DPA,%20April%202015\(1\).pdf](http://masonlec.org/site/rte_uploads/files/Full%20Report%20-%20SOCI%20NPA-DPA,%20April%202015(1).pdf) [https://perma.cc/V5WD-6QBW] (providing empirical evidence that NPA and DPA use has grown substantially since 2003).

3. F. Joseph Warin et al., *2013 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements (Part 1)*, WESTLAW J. WHITE-COLLAR CRIME, April 2014, at 1 [hereinafter *2013 Year-End Update*]; see also Memorandum from Deputy Att’y Gen. Mark Filip to Heads of Dep’t Components & U.S. Att’ys on Principles of Fed. Prosecution of Bus. Orgs. § 9-28.720(a) (Aug. 28, 2008) [hereinafter *Memorandum from Mark Filip*], available at <https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf> [https://perma.cc/Y5TZ-TM5L] (explaining how individuals and corporations can conduct internal investigations to potentially avoid indictment).

the prosecutor files charges with the relevant court, where they remain on the court's docket until the end of the contemplated term of the agreement, at which point the Government dismisses the charges.<sup>4</sup> In a non-prosecution, the Government and the corporation agree that the Government will not file charges against the corporation if the corporation complies with the specified terms of the agreement.<sup>5</sup>

The use of NPAs and DPAs has exploded in recent years.<sup>6</sup> From 2000 to 2004, the DOJ entered into an average of approximately four NPA or DPA agreements per year.<sup>7</sup> Since 2006, it averaged twenty agreements per year.<sup>8</sup> In the first half of 2015, the DOJ entered into twenty-eight agreements, exceeding the total number of DOJ agreements reached in 2013.<sup>9</sup> The significant increase of agreements has also led to a significant increase in monetary penalties collected by the DOJ from corporate defendants because such agreements often also require that the corporation pay a specific fine to the DOJ. In 2001, the DOJ recovered \$0.9 billion in NPA and DPA fines; in the first half of 2015, it recovered \$4.2 billion.<sup>10</sup>

Federal prosecutors have relied upon the Speedy Trial Act and its “good conduct” exclusion when entering into DPAs with corporate defendants. The Speedy Trial Act requires that after a defendant has been charged with committing an offense, trial “commence within seventy days from the filing date . . . of the . . . indictment.”<sup>11</sup> The Act allows for court-approved delays in computing the time within which the trial must commence, including any period of delay during which the Government defers prosecution, “for the

---

4. Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1800 (2015); see also Remarks of Assistant Att’y Gen. Leslie R. Caldwell at the New York University Center on the Administration of Criminal Law’s Seventh Annual Conference on Regulatory Offenses and Criminal Law (Apr. 14, 2015) [hereinafter Remarks of Leslie R. Caldwell], <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-center> [https://perma.cc/B32H-72XP].

5. Garrett, *supra* note 4, at 1800.

6. From 2001 to 2014, prosecutors reached 306 DPAs and NPAs with corporations. Garrett, *supra* note 4, at 1802 (citing Brandon L. Garrett & Jon Ashley, *Federal Organizational Prosecution Agreements*, U. VA. SCH. OF L., [http://lib.law.virginia.edu/Garrett/prosecution\\_agreements/home.suphp](http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suphp) [https://perma.cc/SNK7-MZHT]). I have offered statistics for both NPAs and DPAs, despite the fact that this Note is concerned primarily with DPAs, because the literature combines both types of pretrial diversion agreements together when reporting statistics.

7. *2013 Year-End Update*, *supra* note 3, at 1.

8. *2015 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, GIBSON, DUNN & CRUTCHER LLP 1–2 (July 8, 2015) [hereinafter *2015 Mid-Year Update*], <http://www.gibsondunn.com/publications/pages/2015-Mid-Year-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx> [https://perma.cc/X5JB-R59M]. The DOJ entered thirty-nine agreements in 2007 and another thirty-nine in 2010. *Id.* at 2.

9. *Id.* at 1–2. The DOJ reached five DPAs and twenty-three NPAs in the first half of 2015. *Id.* at 1. The SEC entered into one DPA in the first half of 2015. *Id.*

10. *Id.* at 2. In 2012, the DOJ recovered \$9.0 billion; in 2013, \$2.9 billion; and in 2014, \$5.1 billion. *Id.*

11. 18 U.S.C. § 3161(c)(1) (2012).

purpose of allowing the defendant to demonstrate his good conduct.”<sup>12</sup> The exclusion was originally intended to provide a more lenient alternative to prosecution for nonviolent, low-level offenses.<sup>13</sup> With DPAs, the Government sets a period of delay during which a corporate defendant must demonstrate good conduct by complying with the terms of the DPA.<sup>14</sup> These terms often include the payment of fines, monitoring, and the creating or improving of existing compliance programs.<sup>15</sup> At the end of this time period, the Government dismisses the charges, so long as the defendant has complied with the terms.<sup>16</sup>

Until recently there was no case law interpreting the “good conduct” provision and little judicial scrutiny of the resulting agreements, despite the Government’s widespread reliance on this exclusion.<sup>17</sup> In July 2013, however, a district court concluded it had the power to exercise its supervisory authority in accepting or rejecting a DPA.<sup>18</sup> It eventually approved the DPA at issue but challenged the notion that courts were no more than “potted plant[s]” in DPA implementation.<sup>19</sup> For the first time, a court offered an

---

12. *Id.* § 3161(h)(2). Other periods of delay allowed under the Act include “[a]ny period of delay resulting from other proceedings concerning the defendant,” *id.* § 3161(h)(1), “[a]ny period of delay resulting from the absence or unavailability of the defendant or an essential witness,” *id.* § 3161(h)(3)(A), and “[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial,” *id.* § 3161(h)(4).

13. See Garrett, *supra* note 4, at 1842 (citing H.R. REP. NO. 93–1508, at 1 (1974); then citing S. REP. NO. 93–1021, at 36–37 (1974)).

14. Ellis W. Martin, *Deferred Prosecution Agreements: “Too Big to Jail” and the Potential of Judicial Oversight Combined with Congressional Legislation*, 18 N.C. BANKING INST. 457, 463 (2014).

15. *Id.* at 463–64.

16. *Id.* at 461 n.33.

17. See Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 922 (2007).

18. *United States v. HSBC Bank USA, N.A.*, No. 12–CR–763, 2013 WL 3306161, at \*6 (E.D.N.Y. July 1, 2013); see also Steven E. Fagell et al., *The HSBC DPA—Approved, but at What Cost?*, LAW360 (July 8, 2013, 3:09 PM) [hereinafter *The HSBC DPA*], <http://www.law360.com/articles/455621/the-hsbc-dpa-approved-but-at-what-cost> [https://perma.cc/3VX7-S86J]. It is worth noting, however, that two district courts had already rejected settlement agreements between companies and the Securities and Exchange Commission prior to Judge Gleeson’s ruling. See, e.g., *SEC v. Citigroup Glob. Mkts. Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011), *vacated and remanded*, 752 F.3d 285 (2d Cir. 2014); see also Tom Schoenberg & Andrew Zajac, *IBM Judge Questions SEC on Foreign Bribe Settlement*, BLOOMBERG (Dec. 21, 2012, 9:49 AM), <http://www.bloomberg.com/news/articles/2012-12-20/ibm-judge-questions-sec-posture-on-foreign-bribe-settlement-1-> [https://perma.cc/3UPA-5RVE]. One district court’s order was vacated by the court of appeals, *Citigroup*, 752 F.3d 285, while the other district court ultimately accepted the settlement. Tom Schoenberg, *IBM Judge OKs Foreign Bribe Settlement Two Years Later*, BLOOMBERG (July 26, 2013, 12:01 AM), <http://www.bloomberg.com/news/articles/2013-07-25/ibm-judge-approves-10-million-foreign-bribe-settlement-with-sec> [https://perma.cc/XTD8-MD44].

19. *HSBC Bank*, 2013 WL 3306161, at \*5. The idea that courts are more than just potted plants suggests that courts can do more than sit by and do very little. In *United States v. Fokker Services, B.V.*, the district court made a similar characterization, noting that it was more than just a “rubber stamp” for these agreements. 79 F. Supp. 3d 160, 164 (D.D.C. 2015), *vacated*

explanation of its role in considering such agreements, thereby raising important questions about the source and scope of courts' authority and the implications of courts' involvement in what many consider to be prosecutorial charging decisions.<sup>20</sup>

Two years later, another district court not only asserted its review authority over DPAs but also rejected the agreement before it, concluding that courts can reject DPAs when the terms are "grossly disproportionate" to the alleged illegal conduct.<sup>21</sup> In denying the parties' joint-consent motion for exclusion of time under the Speedy Trial Act,<sup>22</sup> the court reasoned that "it would undermine the public's confidence in the administration of justice and promote disrespect for the law" for a defendant to be "prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time."<sup>23</sup> The court concluded that the terms of the agreement were far too disproportionate for the underlying criminal conduct and rejected the agreement.<sup>24</sup> The Government appealed the district court's order, and on April 5, 2016, the D.C. Circuit vacated and remanded the case.<sup>25</sup>

Finally, in October 2015, a third district court concluded it had "the authority to assess the reasonableness of a [DPA] and to decline to approve agreements that are not genuinely designed to reform a defendant's conduct."<sup>26</sup> It ultimately approved both of the DPAs before it but explained that the Speedy Trial Act grants courts the authority to review such agreements for "fairness and adequacy" to the extent that such review confirms that the agreement's purpose is to reform defendant conduct.<sup>27</sup> It also found that the supervisory power of courts permits rejection of a DPA in certain instances.<sup>28</sup>

---

*and remanded*, No. 15–3016, 2016 WL 1319266 (D.C. Cir. Apr. 5, 2016). The Government and defendant Fokker Services appealed the district court's denial in March 2015, and the Court of Appeals for the District of Columbia heard oral arguments on September 11, 2015. *See* Transcript of Oral Argument, *Fokker*, No. 15–3016 (D.C. Cir. Sept. 11, 2015).

20. *See The HSBC DPA*, *supra* note 18.

21. *Fokker*, 79 F. Supp. 3d at 167.

22. This motion would allow the trial to commence after the 70-day maximum mandated by the Speedy Trial Act. 18 U.S.C. § 3161(c)(1) (2012).

23. *Fokker*, 79 F. Supp. 3d at 167.

24. *Id.* Judge Leon also concluded that the agreement was not an "appropriate exercise of prosecutorial discretion." *Id.* As discussed *infra* in Section IV, prosecutorial discretion is generally not reviewable by courts, and so perhaps the stronger argument for judicial rejection relates to the court's conclusions regarding whether the agreement served the interests of justice.

25. *United States v. Fokker Servs. B.V.*, No. 15–3016, 2016 WL 1319266 (D.C. Cir. Apr. 5, 2016).

26. *United States v. Saena Tech Corp.*, No. 1:14–CR–00066, 2015 WL 6406266, at \*1 (D.D.C. Oct. 21, 2015).

27. *Id.* at \*16.

28. *Id.* at \*17.

After examining the source and scope of the court's authority to review and accept or reject DPAs, this Note contends that the district courts correctly asserted review authority over the agreements at issue and that the D.C. Circuit erred in reaching the opposite conclusion. Part I discusses the benefits and criticisms of the DOJ's use of NPAs and DPAs. Part II describes the three recent district court rulings as well as the court of appeals decision concerning DPAs specifically. Part III evaluates the congressional grant of review authority under the Speedy Trial Act and the contours and limits of the supervisory authority of courts in reviewing DPAs for fairness. Part IV contends that, although judicial oversight raises important concerns—including possible violations of separation-of-powers principles and principles of prosecutorial discretion—such oversight is constitutionally permissible. Part V proposes that courts should review DPAs for substantive fairness, absent additional direction from Congress.

I. BENEFITS AND CRITICISMS OF THE INCREASED USE OF  
NON-PROSECUTION AGREEMENTS AND DEFERRED PROSECUTION  
AGREEMENTS BY THE U.S. DEPARTMENT OF JUSTICE

Federal prosecutors increasingly rely on NPAs and DPAs in the corporate context,<sup>29</sup> and from a prosecutor's perspective, there are many benefits to doing so. NPAs and DPAs might punish a corporation more effectively and efficiently than a criminal conviction.<sup>30</sup> The agreements also allow prosecutors to implement a variety of reforms within the corporation.<sup>31</sup> Prosecutors can impose reporting requirements, improvements to compliance programs and policies, and a variety of remedial measures, including significant fines.<sup>32</sup> Prosecutors can also appoint a monitor to oversee the corporation's activities for the term of the agreement.<sup>33</sup> Additionally, prosecutors are often able to avoid imposing the significant adverse collateral consequences of a corporate criminal conviction on innocent third parties, such as shareholders or employees.<sup>34</sup> NPAs and DPAs are thus "an important middle ground" between declining to prosecute and obtaining a corporate conviction.<sup>35</sup> Furthermore, when the DOJ chooses to use an NPA or DPA in the

---

29. See *supra* notes 2–10 and accompanying text.

30. See Remarks of Leslie R. Caldwell, *supra* note 4.

31. Garrett, *supra* note 17, at 861.

32. Remarks of Leslie R. Caldwell, *supra* note 4. For example, in 2015, the DOJ entered into a DPA with Deutsche Bank AG, which included a \$2.369 billion fine. *2015 Mid-Year Update*, *supra* note 8, at 2. In 2014, the DOJ entered into a DPA with Toyota, which resulted in \$1.2 billion in recovery. Garrett, *supra* note 4, at 1797.

33. Remarks by Leslie R. Caldwell, *supra* note 4.

34. Memorandum from Mark Filip, *supra* note 3, at 8. Consider, for example, the effect of Arthur Andersen's corporate criminal conviction for obstruction of justice in 2002. After conviction, the "Big-Five" accounting firm went out of business and 28,000 employees lost their jobs. Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 273 (2008).

35. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9–28.200 cmt. (2015).

corporate context, it saves time and money that it would otherwise spend on a trial.<sup>36</sup> The DOJ can preserve resources and pursue other prosecutions where a criminal trial and conviction are necessary to achieve the same degree of deterrence and punishment. Nonetheless, despite the variety of benefits conferred by such pretrial diversion agreements, many commentators have criticized the DOJ's increased use of them.

Some criticize the increased use of such agreements insofar as they inadequately punish corporate defendants and allow corporations to avoid criminal liability. For example, U.S. District Judge Jed S. Rakoff has argued that the internal compliance measures accompanying NPAs and DPAs are “often little more than window-dressing.”<sup>37</sup> Other commentators have raised doubts about whether the collateral harm to shareholders and employees, often referred to as the corporate death penalty, is a real concern in the majority of DPA cases.<sup>38</sup> Some have suggested that such agreements allow companies to “bear the risk” of legally questionable business practices if they think they can “cut a deal to defer their prosecution indefinitely.”<sup>39</sup> For example, Senator Elizabeth Warren has sharply criticized the DOJ's pursuit of such agreements as an end run around justice and meaningful punishment for large, powerful corporations—“get-out-of-jail-free-cards for the biggest corporations in the world.”<sup>40</sup>

Others criticize the use of NPAs and DPAs because such agreements allow the DOJ to exact too much punishment from corporations without having to demonstrate guilt at trial. Gibson Dunn, a law firm that often

---

36. See David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1303 (2013) (noting the “need to conserve prosecutorial and judicial resources”).

37. Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions> [<https://perma.cc/3EJW-JH74>]. Judge Rakoff's critical view is rooted in the more general criticism that in order to actually deter crime, prosecutors should go after individuals in corporations rather than corporations themselves. *Id.* (stating that prosecutors have increasingly prosecuted companies to try to “transform ‘corporate cultures,’” but that “this approach has led to some lax and dubious behavior on the part of prosecutors, with deleterious results”).

38. Uhlmann, *supra* note 36, at 1321 (citing Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797 (2013)); see also Martin, *supra* note 14, at 469 (“Excluding Arthur Andersen, no company indicted between 2001-2010 went out of business following a conviction.”).

39. Eric Lichtblau, *In Justice Shift, Corporate Deals Replace Trials*, N.Y. TIMES, Apr. 9, 2008, at A18; see also David M. Uhlmann, *Justice Falls Short in G.M. Case*, N.Y. TIMES, Sept. 20, 2015, at SR.5 (describing the DPA reached with General Motors over the ignition switch failure as the latest example of the DOJ's willingness to dismiss charges for egregious criminal conduct).

40. Senator Elizabeth Warren, *The Unfinished Business of Financial Reform: Remarks at the Levy Institute's 24th Annual Hyman P. Minsky Conference* (Apr. 15, 2015) (unpublished manuscript), [http://www.warren.senate.gov/files/documents/Unfinished\\_Business\\_20150415.pdf](http://www.warren.senate.gov/files/documents/Unfinished_Business_20150415.pdf) [<https://perma.cc/T5LP-A8GD>].



represents corporations negotiating NPAs and DPAs, rejects Senator Warren's characterization as an oversimplification of the dynamic between corporations and federal prosecutors.<sup>41</sup> In the firm's view, such agreements impose not only a fine but also "rigorous compliance program reforms and tighter accounting and internal control measures," appointment of an outside monitor to ensure compliance, self-investigation and reporting requirements, support for any ongoing investigation by the DOJ, changes to corporate board composition, and prohibitions on operations in certain markets.<sup>42</sup> By requiring much more than a fine, such agreements might get corporations out of jail, but they are certainly not free.

According to Gibson Dunn, these requirements are not necessarily more lenient than a guilty plea or a conviction.<sup>43</sup> Corporations are on the hook for the duration of the agreement and a prosecutor has unlimited ability to conclude that the corporation has failed to comply with the agreement's terms, revoke the agreement, and prosecute anyway.<sup>44</sup> For instance, the DPA reached with HSBC Bank provided that:

If, during the Term of this [DPA], the [DOJ] determines, *in its sole discretion*, that the HSBC Parties have . . . breached the [DPA], the HSBC Parties shall thereafter be subject to prosecution for any federal criminal violation of which the [DOJ] has knowledge, including the charges in the information . . . .<sup>45</sup>

Additionally, "[a]ny such prosecution may be premised on information provided by the HSBC Parties[.]"<sup>46</sup> meaning the Government can rely on any facts admitted by the corporation as part of the DPA. The agreement also notes that such a prosecution would not be barred by the expiration of the applicable statute of limitations.<sup>47</sup>

---

41. 2015 Mid-Year Update, *supra* note 8, at 4–5.

42. *Id.* at 4.

43. *See id.*

44. *See, e.g.*, Deferred Prosecution Agreement at ¶ 16, United States v. HSBC Bank USA, N.A., No. 12–CR–763, 2013 WL 3306161 (E.D.N.Y. Dec. 11, 2012) (No. 12–763) 2012 WL 6120512 [hereinafter HSBC DPA]; *see also* Remarks by Leslie R. Caldwell, *supra* note 4 ("Where we enter into DPAs, a criminal information is filed with the court and prosecution of the information is deferred for the time of the agreement. Where a company fails to live up to the terms of its agreement, an information is already filed, and we can tear up the agreement and prosecute based on the admitted statement of facts. That's a powerful incentive to live up to the terms of the agreements.").

45. HSBC DPA, *supra* note 44, at ¶ 16 (emphasis added).

46. *Id.* This means that the DOJ is able to use all the facts stipulated as accurate by HSBC in the "Statement of Facts" attached to the DPA. That document included, among other admissions, descriptions of HSBC's "[f]ailure to obtain or maintain due diligence," "[f]ailure to adequately monitor over \$200 trillion in wire transfers between 2006 and 2009," and "[f]ailure to adequately monitor billions of dollars in purchases of physical U.S. dollars . . . between July 2006 and July 2009." Attachment A to Deferred Prosecution Agreement at ¶ 10, United States v. HSBC Bank USA, N.A., No. 12–CR–763, 2013 WL 3306161 (E.D.N.Y. Dec. 11, 2012) (No. 12–763) 2012 WL 6120512.

47. HSBC DPA, *supra* note 44, at ¶ 16. More specifically, the DPA provides that any prosecution not time-barred by the statute of limitations at the time of the signing of the DPA

Reaching an NPA or DPA with a corporation allows the Government to avoid proving its case at trial. It allows the DOJ to push the bounds of what constitutes criminal liability, because courts have not scrutinized the DOJ's interpretations of the applicable statutes.<sup>48</sup> Furthermore, because alleged wrongdoing is not tried in court, the Government has more flexibility to reach agreements with different corporate defendants for similar conduct; it is not bound by its past positions on criminal wrongdoing in the same way it would be if it actually prosecuted.<sup>49</sup>

Thus far, this Note, like much of the scholarship on the subject, has discussed NPAs and DPAs together. Although this Note contends that judicial review of DPAs is proper and constitutionally permissible, it does not suggest that similar judicial review of NPAs is appropriate. One criticism of judicial review of DPAs is that the Government can simply pursue more NPAs in response, thereby avoiding judicial review and continuing to divert possible prosecutions from courts. If the result is the same—unreviewable, out-of-court agreements between the Government and corporate defendants—perhaps judicial review of DPAs fails to adequately address the problems underlying both types of agreements. However, although there are a number of similarities between NPAs and DPAs, several important legal and practical differences between them warrant judicial review of DPAs but not necessarily of NPAs.

NPAs and DPAs share a number of similarities. Both involve negotiations between corporate defendants and the Government, both outline substantive terms that corporations must comply with in order to avoid

---

can be brought against HSBC, upon breach of the DPA, between the time of the signing and expiration of the term of the DPA plus one year, despite the fact that the statute of limitations would otherwise have expired. *Id.* Furthermore, the DOJ is also able to *extend* the term of a DPA for what it considers, again in its sole discretion, to be violations of the agreement. *Id.* at ¶ 3. Although it often chooses to extend rather than rescind agreements entirely, the DOJ has, in at least one instance, thrown out an NPA for breach and pursued a guilty plea. Press Release, Dep't of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), <https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas> [<https://perma.cc/XWG7-ABFW>]. In that instance, the DOJ concluded that UBS had violated its NPA. *Id.* As a result, UBS pled guilty to a one-count felony charge of wire fraud and paid a criminal penalty of \$203 million. *Id.*

48. See, e.g., Lauren Giudice, Note, *Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement*, 91 B.U. L. REV. 347, 366 (2011) ("Prosecutors . . . enjoy a significant amount of discretion when negotiating and creating pre-trial diversion agreements, which may make it difficult for corporations to know what to expect ex ante."). Many commentators have pressed this criticism particularly as it relates to the DOJ's enforcement of the Foreign Corrupt Practices Act (the "FCPA"), a statute enacted in 1977 to criminalize the payment of bribes to foreign officials by corporations or individuals seeking business opportunities. See, e.g., Barry J. Pollack & Laura Billings, *After 30 Years of the FCPA, Will Courts Finally Get into the Act?*, CHAMPION, Sept.–Oct. 2010, at 34. Prosecutors have primarily pursued NPAs and DPAs for enforcement, and very few cases have been brought to trial in the thirty years the FCPA has been on the books. *Id.* This allows the DOJ, as well as the SEC, "wide latitude to apply their interpretation of the FCPA" without case law limiting the scope of such interpretations. *Id.*

49. See Erik Paulsen, Note, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1460 (2007).

prosecution, and both raise similar concerns about the bargaining power of the parties involved and whether the Government's tactical use of the agreements metes out justice fairly.<sup>50</sup> Some argue large corporations come out the winners, because they can write a check to the Government and continue on without a conviction.<sup>51</sup> Others argue the Government benefits because corporations are basically forced to accept its terms in order to avoid prosecution, and are sufficiently threatened by the potential economic harm of an indictment that they will agree to anything.<sup>52</sup> And so, the big picture questions—such as whether we want the Government coming to terms with corporations behind closed doors, largely without judicial or public scrutiny, and whether we want alleged corporate criminals to be able to pay their way out of prosecution so long as they promise not to do it again—might be similar for both NPAs and DPAs.

Nevertheless, NPAs and DPAs differ significantly in legal and practical respects and should be considered separately when evaluating the permissibility of judicial review. Firstly, DPAs involve the filing of charges with a court; no such charges are filed with NPAs.<sup>53</sup> The filing of charges with a court is significant to the defendant, the public, and the court itself. It suggests a level of societal condemnation<sup>54</sup> that is absent when the Government enters into an NPA, where no charges are filed.<sup>55</sup> Furthermore, the Government's decision not to prosecute (i.e., not to bring charges) is clearly outside the scope of judicial review.<sup>56</sup> Secondly, DPAs allow the Government to press

---

50. See *supra* text accompanying notes 30–40.

51. See *supra* note 39 and accompanying text.

52. See, e.g., Paulsen, *supra* note 49, at 1436.

53. See *supra* text accompanying notes 4–5.

54. See, e.g., Uhlmann, *supra* note 36, at 1300 (“The failure to prosecute [the corporate defendant] sent a terrible message about how our society views corporate misconduct and sowed doubts about the Justice Department’s commitment to address corporate crime.”); David M. Uhlmann, *For 29 Dead Miners, No Justice*, N.Y. TIMES, Dec. 10, 2011, at A24 (noting that NPAs and DPAs “create the appearance that justice can be bought”). Although Professor Uhlmann argues that both NPAs and DPAs do not provide the necessary societal condemnation, this Note contends that the filing of charges makes a difference.

55. Of course, DPAs, if complied with by corporations, ultimately result in the dismissal of charges. Nevertheless, some amount of public condemnation still attaches, even if that condemnation is less than that which attaches to a conviction.

56. See *infra* Section IV.A. See also *United States v. Nixon*, 418 U.S. 683, 693 (1974), *superseded by statute*, FED. R. EVID. 104(a) (“[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . .” (internal citations omitted)); *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161, at \*6 (E.D.N.Y. July 1, 2013) (“Even a formal, written agreement . . . often referred to as a ‘non-prosecution agreement,’ is not the business of the courts.”); Garrett, *supra* note 17, at 922 (explaining that this prosecutorial discretion is for the most part unreviewable, unless prosecutors make charging decisions based on invidious characteristics). Nevertheless, the Government, in appealing the district court’s rejection of its DPA in *United States v. Fokker Services B.V.*, 79 F. Supp. 3d 160 (D.D.C. 2015), *vacated and remanded*, No. 15–3016, 2016 WL 1319266 (D.C. Cir. Apr. 5, 2016), posited a similar argument with regards to the deferral of prosecution, asserting that it is within the broad scope of prosecutorial power to decide

pause on the applicable statute of limitations for the underlying offense<sup>57</sup> since a court excuses the delay of prosecution for the filed charges under the Speedy Trial Act.<sup>58</sup> To the extent we worry that these types of pretrial agreements create due process problems for corporate defendants, NPAs pose less of a concern because the statute of limitations clock is running for the duration of the agreement.<sup>59</sup> The Government gets less when it pursues an NPA rather than a DPA: it does not generate the public condemnation achieved by filing charges, and it is limited by statutes of limitations. And because the Government gets less with NPAs, the DOJ might not in fact pursue them as a means of avoiding the judicial review that would accompany DPAs. The DOJ might instead decide to pursue more prosecutions in order to avoid the perception that certain companies are “too big to jail.”<sup>60</sup>

## II. JUDICIAL REVIEW OF DEFERRED PROSECUTION AGREEMENTS

The significant increase in the use of DPAs by federal prosecutors has resulted in “heightened judicial scrutiny” of those agreements,<sup>61</sup> but the source of authority for such scrutiny remains unclear. In 2013 and 2015, three district courts asserted their authority to review DPAs, relying on the Speedy Trial Act and the inherent supervisory power of courts. All of these courts evaluated the substantive terms of the proposed DPAs and considered how acceptance of the agreements at issue would affect the integrity of the court as well as the public interest. Part II examines those district court orders asserting judicial review authority over DPAs.

### A. United States v. HSBC Bank U.S.A., N.A.

In *United States v. HSBC Bank USA, N.A.*, the district court considered a proposed DPA for charges against HSBC for violations of the Bank Secrecy Act, the International Emergency Economic Powers Act, and the Trading with the Enemy Act.<sup>62</sup> HSBC had failed to implement an effective anti-money laundering program in connection with suspicious transactions from Mexico.<sup>63</sup> Due to that failure and the contemporaneous failure of one of the Bank’s Mexican customers to properly implement its own anti-money laundering policies, Mexican and Colombian drug traffickers “launder[ed] at least \$881 million in drug-trafficking proceeds through HSBC Bank USA undetected.”<sup>64</sup> The Government filed charges against

---

whether to defer prosecution, not just the decision whether to prosecute at all. *See infra* Section II.B.

57. *See, e.g.*, HSBC DPA, *supra* note 44.

58. 18 U.S.C. § 3161(h)(2) (2012).

59. *See, e.g.*, HSBC DPA, *supra* note 44, at ¶ 16.

60. This phrase is borrowed from BRANDON L. GARRETT, *TOO BIG TO JAIL* (2014).

61. *2013 Year-End Update*, *supra* note 3, at 1.

62. No. 12–CR–763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).

63. *HSBC Bank*, 2013 WL 3306161, at \*8.

64. *Id.*

HSBC as well as a DPA and a Corporate Compliance Monitor agreement, “requesting that the Court hold the case in abeyance for five years.”<sup>65</sup>

The proposed DPA included a variety of substantive terms. It required that HSBC replace several individuals in leadership positions, such as its chief executive officer, general counsel, and chief compliance officer, and mandated that HSBC reorganize its anti-money laundering department to increase its status within the company.<sup>66</sup> It required the placement of a corporate compliance monitor to supervise HSBC’s remedial measures and ongoing compliance with a variety of statutes for the duration of the agreement.<sup>67</sup> The agreement contemplated that the monitor would report to the DOJ on a regular basis and make “recommendations” to HSBC regarding procedures with which HSBC was required to comply.<sup>68</sup> Finally, the DPA required that HSBC pay \$1.256 billion in fines and admit to criminal wrongdoing.<sup>69</sup>

Although the court initially evaluated its authority to accept or reject the DPA under the same authorities as those which grant a court authority to accept or reject a plea agreement,<sup>70</sup> it later concluded that framework was not applicable because the parties were not actually entering into a plea agreement.<sup>71</sup> It ultimately approved the DPA pursuant to its supervisory power, placing the case in abeyance for five years under the Speedy Trial Act.<sup>72</sup> The court noted that it would continue to exercise its supervisory power over the DPA’s implementation and asked the Government to file quarterly reports with the court while the case was pending.<sup>73</sup>

---

65. *Id.* at \*1.

66. *See id.* at \*10.

67. *Id.*

68. *Id.*

69. *Id.* at \*11.

70. *Id.* at \*1. Courts have authority to accept or reject plea agreements pursuant to Federal Rule of Criminal Procedure 11(c)(1)(A) and United States Sentencing Guidelines § 6B1.2. Rule 11 states that “[a]n attorney for the government and the defendant’s attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement.” FED. R. CRIM. P. 11(c)(1). Under the Guidelines Manual, a court “may accept” a plea agreement reached under Rule 11—including the dismissal of any charges or an agreement not to pursue potential charges—if the court concludes that “the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.” U.S. SENTENCING GUIDELINES MANUAL § 6B1.2(a) (U.S. SENTENCING COMM’N 2011).

71. *HSBC Bank*, 2013 WL 3306161, at \*2. The court asked the parties to brief whether the DPA “adequately reflects the seriousness of the offense behavior and why accepting the DPA would yield a result consistent with the goals of our federal sentencing scheme.” *Id.* at \*1. On a plain textual reading of Federal Rule of Criminal Procedure 11(c)(1), the parties had not reached a plea agreement, over which the Rule would govern. *Id.* at \*2. Similarly, the court remarked that section 6B1.2 of the Guidelines Manual sets forth “[p]olicy statements governing the acceptance of plea agreements under Rule 11(c),” and because “the parties have . . . no[t] entered a plea agreement . . . [the Guideline] is similarly inapplicable.” *Id.* at \*2 n.4 (first two alterations in original).

72. *Id.* at \*1.

73. *Id.*

The Speedy Trial Act allows for the exclusion of time with approval of the court, “for the purpose of allowing the defendant to demonstrate his good conduct.”<sup>74</sup> The statute itself does not define “good conduct,” but corporations entering into such agreements seem to accept that “good conduct” is whatever the DOJ determines it to be—monitoring, reporting requirements, improvements to compliance, and more.<sup>75</sup> The Act also does not provide a standard of review for granting or rejecting a speedy trial waiver; it just states that the exclusion of time requires court approval.<sup>76</sup> Relying on the report of the Senate Judiciary Committee, the court concluded that the requirement of court approval was intended to prevent the parties from “collud[ing] to circumvent the speedy trial clock.”<sup>77</sup> In other words, the statute allows courts to evaluate whether the DPA is really about demonstrating good conduct or rather a ploy on the part of both parties to stave off an impending trial.<sup>78</sup> Despite concluding that this agreement was clearly about diversion, the court reasoned that approving the delay meant approving the content of the DPA itself.<sup>79</sup> In order to accept the delay as proper under the exception contemplated by the Act, the court had to look at the substantive terms of the DPA.<sup>80</sup> Otherwise, its approval would be meaningless. After evaluating these substantive measures, some of which it considered to be “extraordinary,” the court approved the DPA.<sup>81</sup>

The court relied upon the “supervisory power” that “permits federal courts to supervise ‘the administration of criminal justice’ among the parties before the bar” to evaluate its power to approve or reject the DPA itself.<sup>82</sup> As

---

74. 18 U.S.C. § 3161(h)(2) (2012). The Government and HSBC both argued that the Speedy Trial Act supplied the applicable legal standard for the court because it contemplates “Court[ ] approval for the exclusion of time.” *HSBC Bank*, 2013 WL 3306161, at \*2 (internal quotation marks omitted). The defendant refers to the statutory language as providing a “standard.” *Id.* The Government refers to the statutory grant as a grant of authority, which is more accurate because the statute does not provide substantive guidance for courts in reviewing delays based on this exception to the speedy trial requirement. *Id.*

75. For instance, in accepting a DPA between the DOJ and the Union Bank of California, the District Court for the Southern District of California noted the defendant’s willingness to “acknowledge responsibility . . . continue its cooperation with the United State[s] . . . [and] demonstrate its future good conduct and compliance in all material aspects with the Bank Secrecy Act [which it was charged with violating] . . . including, but not limited to, the remedial actions specified in [the DPA].” Deferred Prosecution Agreement at \*3, *United States v. Union Bank of California, N.A.*, No. 07–CR–2566–W, 2007 WL 2906807 (S.D. Cal. Sept. 18, 2007). There might be reasons, however, to challenge the widespread acceptance of the different types of terms included in DPAs as methods for demonstrating “good conduct.” The statutory language is itself ambiguous; the Speedy Trial Act does not provide examples or any kind of limitations on what might count as a demonstration of such conduct.

76. § 3161(h)(2).

77. *HSBC Bank*, 2013 WL 3306161, at \*3.

78. *Id.*

79. *Id.*

80. *See id.* at \*7, \*10–11.

81. *Id.* at \*11.

82. *Id.* at \*4 (quoting *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980), and *McNabb v. United States*, 318 U.S. 332, 340 (1943)).

the court noted, this power is traditionally exercised at the request of a party before the court, such as a defendant making a claim of impropriety on the part of the Government.<sup>83</sup> In this case, neither party raised such a claim and application of the supervisory power was, in the court's view, novel.<sup>84</sup> According to the court, "[o]ne of the primary purposes of the supervisory power is to protect the integrity of judicial proceedings."<sup>85</sup> And although, as the court noted, the Government has "absolute discretion" in deciding not to prosecute and "near-absolute power" under Rule 48(a) to "extinguish" a case it has already brought,<sup>86</sup> such discretion was unavailable here because the Government pursued neither option, but rather sought to "implicate the Court in the[ ] resolution."<sup>87</sup> Therefore, because the parties had placed a criminal matter on the court's docket, the court was able to exercise its authority over the DPA.<sup>88</sup>

The decision in *HSBC Bank* provides a framework for evaluating judicial review of DPAs but does not make clear whether a court needs only the Speedy Trial Act or only its inherent supervisory power or both to review and approve or reject a DPA. Although the statutory grant of judicial review is enough to enable courts to assess DPAs, the lack of a clear standard for review within the statute itself is problematic: courts need some basis for asserting substantive review, especially where, as here, separation-of-powers concerns are implicated. The supervisory power provides that basis, and past invocations of the power provide guidance as to how it should be wielded by courts in the DPA context. Furthermore, there is good reason to conclude that Congress did not intend the Speedy Trial Act to conflict with, or undermine in any significant way, the long history of courts' supervisory power in the administration of criminal justice. If Congress had such an intent, it would have articulated it more plainly. Therefore, courts can rely on their inherent supervisory power to formulate an appropriate standard for such review, absent additional congressional action providing substantive guidance.

#### B. *United States v. Fokker Services B.V.*

In *United States v. Fokker Services B.V.*,<sup>89</sup> the district court conducted an analysis similar to that performed by the *HSBC Bank* court, asserting its

---

83. *Id.* at \*6.

84. *Id.* As will be discussed *infra* in Section IV.B, exercise of the supervisory power here might not in fact be as novel as the court suggests.

85. *Id.* at \*4.

86. *Id.* at \*5. The court went on to quote *United States v. Pimentel*, 932 F.2d 1029, 1033 n.5 (2d Cir. 1991), where the Second Circuit stated that "[a] court is generally required to grant a prosecutor's Rule 48(a) motion unless dismissal is 'clearly contrary to manifest public interest.'" *HSBC Bank*, 2013 WL 3306161, at \*5.

87. *HSBC Bank*, 2013 WL 3306161, at \*5.

88. *Id.*

89. 79 F. Supp. 3d 160 (D.D.C. 2015), *vacated and remanded*, No. 15-3016, 2016 WL 1319266 (D.C. Cir. Apr. 5, 2016).

authority to review the proposed DPA pursuant to the Speedy Trial Act and the court's supervisory power. The *Fokker* court ultimately rejected the DPA because it did not punish the corporate defendant sufficiently.<sup>90</sup> The Government had charged Fokker Services with "Conspiracy to Unlawfully Export U.S.-Origin Goods and Services to Iran, Sudan and Burma."<sup>91</sup> The parties filed a joint motion for exclusion of time under the Speedy Trial Act, in conjunction with a DPA.<sup>92</sup> In February 2015, the district court denied the motion, concluding that accepting it would "undermine the public's confidence in the administration of justice" and would "promote disrespect for the law" if a defendant was "prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time and for the benefit of one of our country's worst enemies."<sup>93</sup> Fokker Services was charged with violating and evading export laws for five years "for the benefit, largely, of Iran and its military during the post-9/11 world," bringing in \$21 million in revenue from the illegal transactions.<sup>94</sup> The DPA, however, contemplated dismissal of the charges if Fokker Services paid a fine of \$10.5 million, cooperated with the Government, implemented a compliance program, and complied with U.S. export laws for 18 months.<sup>95</sup> Although Fokker Services owed \$10.5 million in fines to other agencies, it would not have been required to pay anything more than the \$21 million it gained in revenue from the illegal conduct.<sup>96</sup> The DPA did not call for the prosecution of any responsible individuals, it allowed a number of employees directly involved to remain at the company, and it did not require an independent monitor or any reports to the court or the Government to verify compliance.<sup>97</sup>

The court addressed similar questions to those raised and analyzed by the *HSBC Bank* court. The parties again relied upon the exclusion under the Speedy Trial Act for good conduct on the part of the defendant<sup>98</sup> and, in seeking the court approval required under the statutory exclusion, maintained that the role of the court was extremely limited.<sup>99</sup> In rejecting these limits on its authority, the court pointed to the same inherent "supervisory power" described in *HSBC Bank*.<sup>100</sup> It reasoned that the purpose of the

---

90. *Fokker*, 79 F. Supp. 3d at 167.

91. *Id.* at 161.

92. *Id.*

93. *Id.* at 167. Fokker Services, for a period of five years from 2005 to 2011, exported aircraft parts, technology, and services to sanctioned countries Iran, Sudan, and Burma without obtaining a license. *Id.* at 162–63. Gross revenue from the illegal shipments totaled \$21 million. *Id.* at 163.

94. *Id.* at 166.

95. *Id.* at 164.

96. *Id.* at 166.

97. *Id.*

98. *Id.* at 164 (citing 18 U.S.C. § 3161(h)(2) (2012)).

99. *Id.*

100. *Id.* at 165.



court's supervisory power was to "protect the integrity of the judicial process"<sup>101</sup> and to ensure that "the courts do not lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety."<sup>102</sup> By keeping the case on the docket, rather than not bringing charges or dismissing the case altogether, the Government was essentially asking the court to "serve as a rubber stamp"<sup>103</sup> and "lend its judicial imprimatur to their DPA."<sup>104</sup> The court noted that the parties sought to use its judicial authority in the future should the defendant not comply with the terms of the agreement and reasoned that the parties were essentially asking the court to "serve as the leverage over the head of the company."<sup>105</sup> The court determined that it had to consider the public as well as the defendant in preserving the court's integrity.<sup>106</sup> It concluded that approving the lenient DPA would call into question the integrity of judicial proceedings in the same way "overly-zealous prosecutorial conduct" would.<sup>107</sup>

The Government appealed and on April 5, 2016, the D.C. Circuit vacated the district court's order and remanded the case.<sup>108</sup> The Court of Appeals held that the Speedy Trial Act "confers no authority in a court to withhold exclusion of time pursuant to a DPA based on concerns that the government should bring different charges or should charge different defendants."<sup>109</sup> It relied upon the "long-settled understandings about the independence of the Executive" in making charging decisions and concluded that, in passing the Speedy Trial Act, Congress did not intend to disrupt that history.<sup>110</sup> Contrary to the conclusion reached by the D.C. Circuit, this Note contends that the Speedy Trial Act *does* grant courts the authority to review DPAs and that such authority is also supported by courts' general supervisory power.

---

101. *Id.*

102. *Id.* (quoting *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161, at \*6 (E.D.N.Y. July 1, 2013)).

103. *Id.* at 164 (citations omitted). The court explained that this "rubber stamp" function did not apply in two situations: where there was an indication that the defendant did not enter into the agreement "willingly and knowingly," and where it appeared that that agreement was specifically designed to "circumvent the Speedy Trial Act limits." *Id.*

104. *Id.* at 165.

105. *Id.*

106. *Id.* at 166.

107. *Id.*

108. *United States v. Fokker Servs. B.V.*, No. 15-3016, 2016 WL 1319266, at \*1-2 (D.C. Cir. Apr. 5, 2016).

109. *Id.* at \*1.

110. *Id.*

## C. United States v. Saena Tech Corporation

In *United States v. Saena Tech Corp.*,<sup>111</sup> the district court approved the DPA at issue, but asserted review authority over the agreement pursuant to the Speedy Trial Act and the court's supervisory power. The Government charged Saena Tech, a South Korea-based subcontractor for federal government contractors, with bribery of a public official because Saena Tech had made payments totaling \$280,000 to a federal government employee in order to obtain and retain certain government subcontracts.<sup>112</sup> Shortly after filing charges against Saena Tech, the Government filed a joint motion for exclusion of time under the Speedy Trial Act and for approval of its contemplated DPA with the defendant.<sup>113</sup> The DPA imposed a fine of \$500,000 and required implementation of a compliance program as well as cooperation from the defendant in ongoing investigations.<sup>114</sup> It included a "Statement of Facts," in which Saena Tech admitted the underlying facts and agreed that those admitted facts could be used against it if the Government pursued prosecution in the future.<sup>115</sup> The agreement also gave the Government "sole discretion" to determine whether the defendant had breached the agreement such that subsequent prosecution was warranted.<sup>116</sup> Finally, the DPA provided that the statute of limitations for the underlying offense would be tolled for the duration of the agreement.<sup>117</sup>

The district court first turned to the statutory grant of judicial review contained in the Speedy Trial Act, concluding that the legislative history "demonstrates that Court involvement" was "specifically intended by Congress when it passed [the Act.]"<sup>118</sup> It ultimately concluded that its review authority under the Speedy Trial Act was tied to the underlying purpose of the Act itself and was thus "limited to assessing whether the agreement is truly about diversion."<sup>119</sup> It found that approval of a DPA should be granted "when the agreement is intended to hold prosecution in abeyance while a defendant demonstrates good conduct."<sup>120</sup> It determined, furthermore, that such limited authority involved review of the "fairness and adequacy of an agreement," to the extent that such review revealed whether the agreement

---

111. No. 1:14-CR-00066, 2015 WL 6406266 (D.D.C. Oct. 21, 2015). The district court consolidated two cases, both involving charges of bribery of a public official. Because the underlying facts are substantially similar and the court's legal analysis is the same, *Saena Tech Corp.*, 2015 WL 6406266, at \*21, only *Saena Tech* is discussed here.

112. *Id.* at \*3. As the district court noted, the amount of money the defendant earned from the obtained subcontracts was "unclear." *Id.*

113. *Id.* at \*4.

114. *Id.* at \*4-5.

115. *Id.* at \*4.

116. *Id.*

117. *Id.*

118. *Id.* at \*12. The court described the development of the provision contemplating court approval, as discussed *infra* in Section III.A.

119. *Id.* at \*16.

120. *Id.*

was truly aimed at reforming defendant conduct.<sup>121</sup> Accordingly, the court concluded it had more review authority than the “largely administrative authority contemplated by the government,”<sup>122</sup> but less than plenary review.<sup>123</sup> The court found that the contemplated DPA was more than mere “window-dressing” and that it therefore should not be rejected under the Speedy Trial Act.<sup>124</sup>

The district court also recognized that it had authority to review the DPA pursuant to its supervisory power because the parties had asked it to “place its formal imprimatur on the agreement[ ], to hold open [a] federal case[ ], and to make various findings with respect to the Speedy Trial Act.”<sup>125</sup> Nevertheless, the court concluded review under this authority was similarly limited and that rejection of an agreement was proper only if “a court’s integrity might truly be imperiled.”<sup>126</sup> Because the agreement at issue did not involve “unlawful or untoward collusion,” the supervisory power did not warrant its denial.<sup>127</sup>

### III. SOURCES OF AUTHORITY TO REVIEW AND REJECT DPAs

Courts have authority to review DPAs by way of a congressional grant of review authority under the Speedy Trial Act. The statute plainly contemplates district court involvement and review in the delay of trial for demonstration of good conduct by the defendant.<sup>128</sup> To the extent that the statute fails to provide substantive guidance as to the proper standard a court should apply in approving or rejecting a DPA, the courts’ authority to review for fairness is supported by its general supervisory power to “supervise ‘the administration of criminal justice’ among the parties before the bar.”<sup>129</sup>

---

121. *Id.*

122. *Id.* The court referenced nine factors proposed by *amicus* to evaluate DPAs:

(1) reasonableness of any fines or other punitive measures; (2) compliance-related safeguards; (3) independent corporate monitors to supervise compliance; (4) cooperation with authorities in ongoing investigations; (5) the lack of unrelated requirements that might require judicial intervention; (6) potential collateral consequences of the agreement; (7) the appropriateness of restitution to any victims; (8) the effect of the agreement on other regulators; and (9) the effect of the period of delay on statutes of limitations or other interests[ ].

*Id.* The court went on to note, citing *Fokker*, that an agreement containing some of those elements might still be ineffective. *Id.*

123. *Id.* at \*15.

124. *See id.* at \*21.

125. *Id.* at \*18.

126. *Id.* at \*19.

127. *Id.* at \*21.

128. *See* 18 U.S.C. § 3161 (2012).

129. *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980) (quoting *McNabb v. United States*, 318 U.S. 332, 340 (1943)).

A. *The Speedy Trial Act*

In asserting review authority over DPAs, the *HSBC Bank, Fokker*, and *Saena Tech* courts initially turned to the statutory grant of power in the Speedy Trial Act, enacted by Congress in 1974.<sup>130</sup> The statutory text provides that “the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment.”<sup>131</sup> The Act specifically enumerates periods of delay that must be excluded from the seventy-day maximum,<sup>132</sup> including “[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, *with the approval of the court*, for the purpose of allowing the defendant to demonstrate his good conduct.”<sup>133</sup>

In reversing the *Fokker* district court’s ruling, the D.C. Circuit concluded that there was “no ground” for reading the Act’s “approval of the court” language as “confer[ring] free-ranging authority in district courts to scrutinize the prosecution’s discretionary charging decisions.”<sup>134</sup> Instead, because the executive branch has authority to initiate charges against criminal defendants and to select what charges to bring against those defendants, it concluded that the district court erred in rejecting the DPA.<sup>135</sup> As discussed *infra*, however, some type of judicial review of DPAs does not impermissibly interfere with charging decisions, because such review evaluates the punitive effects of those decisions rather than the decisions themselves.

In its appeal of the *Fokker* district court’s rejection of the DPA, the Government argued that “approval of the court” applies only to an assessment of whether the agreement is “for the purpose of allowing the defendant to demonstrate his good conduct,”<sup>136</sup> because “with approval of the court” modifies that subsequent term and not the preceding phrase, which states that “prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant.”<sup>137</sup>

---

130. § 3161; *see also* *United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160, 164 (D.D.C. 2015), *vacated and remanded*, No. 15–3016, 2016 WL 1319266 (D.C. Cir. Apr. 5, 2016); *United States v. HSBC Bank USA, N.A.*, No. 12–CR–763, 2013 WL 3306161, at \*2–3 (E.D.N.Y. July 1, 2013).

131. § 3161(c)(1).

132. *Id.* § 3161(h).

133. *Id.* § 3161(h)(2) (emphasis added).

134. *United States v. Fokker Servs. B.V.*, No. 15–3016, 2016 WL 1319266, at \*4 (D.C. Cir. Apr. 5, 2016).

135. *Id.* at \*4–10.

136. Opening Brief for the United States at 40, *United States v. Fokker Servs. B.V.*, No. 15–3016, 2016 WL 1319266 (D.C. Cir. Apr. 5, 2016) (No. 15–3016), 2015 WL 4480884 (quoting § 3161(h)(2)).

137. Brief of Court-Appointed Amicus Curiae in Support of Order Below at 26, *Fokker*, 2016 WL 1319266 (No. 15–3016), 2015 WL 4062296 (quoting § 3161(h)(2)). Essentially, the Government argued that courts can “ensure that the government and defendant have entered

The proper textual reading of the Act, however, provides for a broader conception of court approval, one supported by the legislative history of the Act. As the court-appointed amicus argued in its appeal brief to the D.C. Circuit in the *Fokker* case, the Government's interpretation is incorrect "[a]s a matter of English grammar."<sup>138</sup> It explained:

A simple example establishes the point. Consider the following statement: "I can take the car, with my parents' approval, for purposes of picking up groceries." A person making that statement is not saying that his parents' discretion is *solely* limited to determining whether his subjective purpose is to pick up groceries. Rather, he means that he is allowed to take the car in order to pick up groceries, as long as his parents also approve. Section 3161(h)(2) is no different: time is excluded if the Government defers prosecution in order to allow a defendant to demonstrate good behavior, as long as the court also approves.<sup>139</sup>

On its face, the exception plainly contemplates a judicial role in deciding whether to exclude delays for deferral of prosecution based on defendants' good conduct. And the legislative history confirms that textual reading. The Senate Report, in explaining the exception, noted that it "assures that the court will be involved in the decision to divert and that the procedure will not be used by prosecutors and defense counsel to avoid the speedy trial time limits."<sup>140</sup> Indeed, in an early version of the bill, the exception did not include the words "with the approval of the court."<sup>141</sup> During the 1971 Senate Hearings on the statute, one senator argued that because deferrals have "some of the elements of a plea bargain and result in pro tanto waiver of the defendant's right to a speedy trial, approval by the court on the record is a wise and necessary safeguard."<sup>142</sup> Of course, the "approval of the court" language was added.<sup>143</sup>

The legislative history also suggests that the purpose of this judicial role was to protect and preserve the societal interest in reducing crime and recidivism.<sup>144</sup> The Act was also intended to protect individual defendants, ensuring swift resolution of criminal charges to "prevent undue and oppressive

---

into the DPA for an appropriate 'purpose,' rather than to evade Speedy Trial Act time limitations," but more intrusive review of the agreement itself is not authorized. Opening Brief for the United States, *supra* note 136, at 40.

138. Brief of Court-Appointed Amicus Curiae in Support of Order Below, *supra* note 137, at 26.

139. *Id.* at 27.

140. S. REP. NO. 93-1021, at 37 (1974).

141. ANTHONY PARTRIDGE, FED. JUDICIAL CTR., LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974, at 116 (1980).

142. *Id.*

143. 18 U.S.C. § 3161(h)(2) (2012).

144. H.R. REP. NO. 93-1508, at 8 (1974), as reprinted in 1974 U.S.C.C.A.N. 7401-02 ("The purpose of this bill is to assist in reducing crime and the danger of recidivism by requiring speedy trials . . ."); *id.* at 15 ("The Committee believes that the right to a speedy trial belongs not only to the defendant, but to society as well."); see also J. Andrew Read, Comment, *Open-Ended Continuances: An End Run Around the Speedy Trial Act*, 5 GEO. MASON L. REV. 733, 739

pretrial incarceration,” reduce the likelihood of lost memories or the disappearance of witnesses, and “minimize the anxiety and suspicion aroused by public accusation.”<sup>145</sup> But, as the Senate Report explained, because the Act is also protective of a societal right, “a defendant ought not be permitted to waive rights that are not his or hers alone to relinquish.”<sup>146</sup>

The understanding that the purpose of the Speedy Trial Act was to protect societal rights was not limited to Congress. In subsequent interpretations of other provisions of the Act, the Supreme Court concluded that it was intended to provide for judicial consideration of possible delays in order to protect and promote the public interest. In *Zedner v. United States*, where the Court considered whether a defendant could waive application of the Act and accept a continuance, the Court concluded that the Act was not just designed for individual defendants but was intended to “serve the public interest” by minimizing “defendants’ opportunity to commit crimes while on pretrial release and preventing extended pretrial delay from impairing the deterrent effect of punishment.”<sup>147</sup> The Court ultimately denied exclusion of the delay despite the defendant’s consent, because “the Act was designed with the public interest firmly in mind.”<sup>148</sup>

The Speedy Trial Act functions to protect more than just the defendant’s right to a speedy trial; it also serves as a safeguard for the public interest in criminal justice. This additional purpose can provide guidance about the proper role of the judiciary in reviewing delays pursuant to a DPA. It certainly gives weight to the argument that judicial review of DPAs between the Government and corporate defendants is necessary to ensure the public is protected from undue delays. It might suggest that judicial review is necessary to protect the public from improper leniency in punishment, similar to the type of review in other areas where criminal charges are resolved, such as plea agreements and withdrawn charges.<sup>149</sup>

Perhaps this public interest is already sufficiently advanced and preserved by prosecutors, who are tasked not only with building cases against criminal defendants, but also with pursuing fair and just outcomes.<sup>150</sup> Why

---

(1997) (describing Congress’s intent “not only to quantify an individual’s right to a speedy trial” but to increase deterrence and reduce recidivism).

145. *Speedy Trial Act of 1974: Hearings Before the Subcomm. on Crime of the H.R. Comm. on the Judiciary*, 93rd Cong. 3 (1974) (statement of Rep. John Conyers, Jr., Chairman of the Subcomm. on Crime Hearings on Speedy Trial Legislation).

146. S. REP. NO. 96-212, at 29 (1979).

147. 547 U.S. 489, 501 (2006).

148. *Zedner*, 547 U.S. at 501. The Court pointed to another exception within § 3161(h) which requires a district court to find “that the ends of justice served [by the delay] . . . outweigh the *best interest of the public* and the defendant *in a speedy trial*” before excluding a delay resulting from a continuance. *Id.* (quoting § 3161(h)(8)(A)).

149. See *infra* notes 214–221 and accompanying text.

150. Courts have stated that a prosecutor’s aim is to protect the public interest in criminal justice. For example, in *Berger v. United States*, 295 U.S. 78, 88 (1935), the Court noted that the U.S. Attorney represents “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all” and emphasized that a prosecutor’s interest is not necessarily in winning but in ensuring that justice is done.

should we conclude that it is for the judiciary to protect the public interest in speedy trials and fair DPAs? Or, if the judiciary has a role to play in protecting the public interest, why is substantive review of DPAs the proper means for it to do so? Furthermore, even if we were to conclude that the judiciary is the proper institution to protect the public interest and that substantive review of DPAs is the appropriate means, is it constitutional for courts to engage in such review? This Note confronts these questions in Part IV. First, it turns to the other source of authority identified by district courts in reviewing DPAs—their supervisory power.

### B. *The Supervisory Power*

Although the Speedy Trial Act itself provides a specific and sufficient grant of statutory authority to courts to review DPAs, the broader supervisory power, identified by the *HSBC Bank*, *Fokker*, and *Saena Tech* courts, bolsters that review authority and provides helpful guidance in articulating a proper standard of review for the future. In particular, it provides courts with the authority to protect and promote the public interest in just outcomes and speedy resolutions of criminal trials. Section III.B.1 explores the source of this authority and examines three different areas where federal courts have asserted it: court administration, sanctions, and the administration of criminal justice. Although the first two areas are useful in understanding how the supervisory power works and interacts with congressional action, the third is the most important in the context of DPAs. Section III.B.2 turns to the scope of the supervisory power and defends courts' reliance on it in reviewing DPAs.

#### 1. Assertions of Courts' Supervisory Power

The federal courts have long exercised powers not expressly granted in the Constitution or through an act of Congress. These “inherent powers” are “those which ‘cannot be dispensed with . . . because they are necessary to the exercise of all others.’”<sup>151</sup> They “consist of all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective.”<sup>152</sup> Although the scope of a court's inherent authority is contested among

---

151. Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 738 (2001) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)). In the civil context, inherent authority has been defined as “the authority of a trial court . . . to control and direct the conduct of civil litigation without any express authorization in a constitution, statute, or written rule of court.” Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1805 (1995). The authority “flows from the powers possessed by a court simply because it is a court; it is an authority that inheres in the very nature of a judicial body and requires no grant of power other than that which creates the court and gives it jurisdiction.” *Id.*

152. Meador, *supra* note 151, at 1808 (quoting *Bankers Tr. Co. v. Braten*, 420 N.Y.S.2d 584, 589 (N.Y. Sup. Ct. 1979)). These inherent powers “exist because the court exists.” *Id.* This inherent authority is derived from English common law courts, which possessed the authority

courts and commentators, few, if any, question its existence.<sup>153</sup> Indeed, courts have relied upon these powers to act in a variety of different ways and in a variety of different contexts, many of which do not appear essential.<sup>154</sup>

To understand the particular type of inherent authority proposed in the context of DPAs—and why this authority presents questions related to constitutional structure—it is necessary to first explain the variety of contexts in which federal courts have exercised this authority. Generally, courts have exercised this inherent power in three different areas: court administration, sanctions, and the administration of criminal justice.<sup>155</sup>

With regard to court administration, courts are generally able to “ensure the orderly, expeditious, and efficient administration of justice.”<sup>156</sup> Judges can consolidate cases involving common questions of law and fact,<sup>157</sup> decide the order in which certain cases will be heard, set the time for different hearings and trials, and determine whether to grant continuances, recesses and stays.<sup>158</sup> In many ways, the courts’ need to invoke their inherent authority in court administration has been obviated as Congress has passed a number of procedural rules expressly granting, and indeed expanding, the courts’ power to manage litigation. Such legislation includes rules requiring the early submission of a case management plan, attendance at pretrial conferences, and supervision of discovery.<sup>159</sup> Judges, moreover, have claimed even broader managerial powers, such as the power to dismiss cases because their dockets are too full, to force parties to settle, and to require summary jury trials.<sup>160</sup> Courts have also protected their independent authority to take administrative action, even when such action is in tension with congressional directions. In *Link v. Wabash Railroad Co.*, the Court concluded that federal courts possess inherent authority to dismiss a case sua sponte for want of prosecution<sup>161</sup> despite Federal Rule of Civil Procedure 41(b), which provides that a defendant may move for a dismissal “for failure of the plaintiff to

---

to control parties appearing before them and to ensure that the judicial process was not abused. *Id.* at 1805–06.

153. *Id.* at 1806.

154. Pushaw, *supra* note 151, at 738.

155. For an in-depth discussion of these three different categories of inherent power, see *id.* at 760–82.

156. *Id.* at 760.

157. Meador, *supra* note 151, at 1807–08; Pushaw, *supra* note 151, at 760. Meador explains that this “discretionary authority” to consolidate is viewed “as an inseparable aspect of the powers possessed by common-law and equity courts.” Meador, *supra* note 151, at 1807. Congress has since authorized such consolidation authority in the Federal Rules of Civil Procedure. *Id.* at 1807–08.

158. Pushaw, *supra* note 151, at 760–61.

159. *Id.* at 762–63. For the argument that this more “activist” judicial management is in conflict with and undermines our traditional adversarial system, see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

160. Pushaw, *supra* note 151, at 763–64 (citing Meador, *supra* note 151, at 1805–11; and then citing Resnik, *supra* note 159, at 396).

161. 370 U.S. 626, 630–32 (1962).



prosecute.”<sup>162</sup> The Court concluded that Rule 41(b) did not “abrogate the power of courts, acting on their own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief.”<sup>163</sup>

Courts have also exercised their inherent supervisory power when imposing sanctions as a means to protect the judicial process by controlling and managing the individuals appearing before them.<sup>164</sup> In addition to this inherent authority to sanction, Congress has enacted a variety of statutes and rules designed not only to ratify judges’ sanctioning power but also to provide courts with substantive guidance to prevent judicial abuse.<sup>165</sup> Despite such legislation, courts continue to act based on their inherent authority rather than simply relying on legislative grants.<sup>166</sup> In *Chambers v. NASCO, Inc.*, the Court concluded that the federal statutes and rules related to the courts’ sanctioning power did not “displace[ ] the inherent power” of courts to supplement legislative action.<sup>167</sup> In that case, the Court imposed attorneys’ fees as a sanction,<sup>168</sup> contrary to the general American rule that each party is responsible for paying its own attorneys’ fees. The Court explained, “[t]hese other mechanisms, taken alone or together, are not substitutes for the inherent power . . . . At the very least, the inherent power must continue to exist to fill in the interstices.”<sup>169</sup>

---

162. Pushaw, *supra* note 151, at 761 (quoting FED. R. CIV. P. 41(b)). Indeed, in an earlier case, *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207 (1958), the Court concluded that the Rule limited dismissals to defendants’ motions.

163. *Link*, 370 U.S. at 630. Pushaw argues that the majority improperly ignored the fact that interpreting procedural laws as *not* restricting the inherent powers of a court could “frustrate Congress’s will and infringe the Due Process rights of the plaintiff.” Pushaw, *supra* note 151, at 761. Pushaw also points to *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), where the Court determined that federal trial judges could use *forum non conveniens* to dismiss cases properly brought in their jurisdictions if they thought it was more appropriate for another court to hear the case. Pushaw, *supra* note 151, at 761. Congress later ratified the ruling by passing 28 U.S.C. § 1404(a) (2012). Even that statute does not provide judges with the power to dismiss suits if they conclude that a foreign or state tribunal is more appropriate, but federal judges have done so anyway. Pushaw, *supra* note 151, at 761–62, 762 n.119.

164. Pushaw, *supra* note 151, at 764–65 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991)).

165. Pushaw lists the variety of statutes and rules relating to the judicial-sanctioning power. *See id.* at 765. They include federal statutes granting district judges the power to fine or imprison for contempt, 18 U.S.C. § 401 (2012), and to assess attorneys’ fees against any attorney who “multiplies the proceedings . . . unreasonably and vexatiously,” *id.* § 1927, as well as Federal Rules allowing judges to sanction parties who file groundless pleadings and motions, FED. R. CIV. P. 11, disobey pretrial orders, FED. R. CIV. P. 16(f), subpoenas, FED. R. CIV. P. 45(g), or attach an affidavit in a summary judgment motion in bad faith, FED. R. CIV. P. 56(h).

166. Pushaw, *supra* note 151, at 766.

167. 501 U.S. 32, 46 (1991).

168. *Chambers*, 501 U.S. at 35.

169. *Id.* at 46. Relying on its reasoning in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630–32 (1962), the Court concluded that “the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct.” *Chambers*, 501 U.S. at 49. Dissenting

Finally, the federal courts assert inherent authority in a variety of contexts related to the administration of criminal justice.<sup>170</sup> As the district court recognized in *HSBC Bank*, the courts have used this power substantively—overturning convictions secured using improper evidence<sup>171</sup>—and also procedurally—as a means of “fashion[ing] ‘civilized standards of procedure and evidence’ applicable to federal criminal proceedings.”<sup>172</sup> For instance, in *Ballard v. United States*, the Supreme Court concluded that the “purposeful and systematic exclusion” of women from juries conflicted with the “scheme of jury selection” adopted by Congress,<sup>173</sup> even though the disqualifications prohibited by Congress did not include one based on juror sex.<sup>174</sup> The Court concluded that the congressional scheme was committed to empaneling juries that are representative of the community, and it exercised its “power of supervision over the administration of justice” to reverse the conviction imposed by the lower court.<sup>175</sup> The Court determined that representative juries were necessary to the fair administration of criminal justice and exercised its supervisory power to complete the task started by Congress.

In *McNabb v. United States*, the Court again exercised its supervisory power beyond that authorized by specific congressional legislation.<sup>176</sup> The lower court had convicted the defendant based on confession evidence obtained during two days of continuous questioning without friends or counsel present.<sup>177</sup> The Supreme Court overturned the convictions and reasoned that while there was no legislation specifically governing the collection of evidence by federal law enforcement officers from persons in custody, “a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under

---

Justice Kennedy took issue with this determination, explaining that inherent powers “are the exception, not the rule” and that assertion of that power must be “necessary to preserve the authority of the court.” *Id.* at 64 (Kennedy, J., dissenting). “[A]t the very least a court need not exercise inherent power if Congress has provided a mechanism to achieve the same end.” *Id.*

170. See *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980) (quoting *McNabb v. United States*, 318 U.S. 332, 340 (1943)) (“The supervisory power . . . permits federal courts to supervise ‘the administration of criminal justice’ among the parties before the bar.”).

171. See, e.g., *McNabb v. United States*, 318 U.S. 332, 345 (1943).

172. *United States v. HSBC Bank USA, N.A.*, No. 12–CR–763, 2013 WL 3306161, at \*4 (E.D.N.Y. July 1, 2013) (quoting *McNabb*, 318 U.S. at 340).

173. 329 U.S. 187, 193 (1946).

174. *Ballard*, 329 U.S. at 191. It also noted that Congress allowed a number of specific exemptions from jury service “so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district.” *Id.* (quoting 28 U.S.C. § 413 (2012)).

175. *Id.* at 191–93.

176. 318 U.S. at 345.

177. *Id.* The Court also described a federal law requiring that an arresting officer take the defendant before a judicial officer for a hearing, commitment, or taking bail for trial. *Id.* at 342. The officers in *McNabb* failed to do so before questioning the defendants. *Id.* at 344–45. Although the statute was relevant to the Court as it related to congressional policy on federal criminal procedure, its decision to overturn the convictions was premised on the “effective administration of criminal justice.” *Id.* at 347.

the circumstances revealed here.”<sup>178</sup> In reaching its conclusion, the Court noted that the “administration of criminal justice hardly requires disregard of fair procedures imposed by law”<sup>179</sup> and found that admitting the confessions would improperly enlist the court in “willful disobedience of [the] law.”<sup>180</sup>

The Court has exercised its supervisory authority rather broadly in the administration of criminal justice. It has used that authority to ensure that procedures used either during criminal trials or during the collection of evidence comport with basic conceptions of fairness, and it has used that authority to provide a remedy when such basic fairness is violated. Moreover, the Court has done so by inferring from apparent congressional intent—as was the case in *Ballard*—and by expanding on congressional directives—as was the case in *McCarthy v. United States*. In the DPA context, Congress has authorized some types of judicial review through the Speedy Trial Act; therefore, ensuring basic fairness for a corporate defendant seems well within the supervisory power of courts.

## 2. The Supervisory Authority in the DPA Context

The *Fokker*, *HSBC Bank*, and *Saena Tech* courts referenced the cases discussed above in support of their assertion of supervisory power in the DPA context. However, the specific contours of the supervisory power are not entirely clear from the case law. Courts can exercise their supervisory power when it is abundantly clear that justice is being circumvented. But again, it is difficult to find a clear explanation of when such circumvention occurs because the Court has exercised the supervisory power in such a wide variety of contexts.<sup>181</sup> The Supreme Court’s conclusory analysis of the power, especially in the criminal justice context, provides little guidance as to its scope. In fact, lower courts rarely exercise the supervisory power, and the Supreme Court has rejected their attempts to do so outside of restricted circumstances.<sup>182</sup> When courts do exercise the supervisory power, it is often when a

---

178. *Id.*

179. *Id.*

180. *Id.* at 345. The Court has also relied on its supervisory power to come up with a remedy for a district court’s failure to comply with a federal rule of procedure, despite the fact that the rule itself did not provide that remedy. In *McCarthy v. United States*, 394 U.S. 459, 463, 472 (1969), the Supreme Court concluded that the district judge, in accepting the defendant’s plea, did not comply with Federal Rule of Criminal Procedure 11 and reversed the judgment of conviction. In so holding, the Court explained that its decision about the proper remedy for noncompliance with Rule 11 was “based solely upon [its] construction of Rule 11” and was “made pursuant to [its] supervisory power.” *Id.* at 463–64. In this way, the Court relied on a congressional directive, Rule 11, but used its supervisory power to allow the defendant to plead again.

181. See *supra* Section III.B.1.

182. For instance, in *United States v. Payner*, 447 U.S. 727, 735 (1980), the Court held that the supervisory power “does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court.” In light of the Court’s Fourth Amendment decisions, the district court erred in concluding

defendant seeks redress for some impropriety committed by the Government.<sup>183</sup> In the DPA context, however, defendants sign on to the agreements and are not alleging any such impropriety.<sup>184</sup>

Reliance on the supervisory power in the DPA context is nevertheless permissible because of the Speedy Trial Act: courts can rely on the baseline review authority granted in the Act and can also exercise their supervisory power to effectuate its purposes. Specifically, courts can review DPAs for substantive fairness in order to protect the defendant *and* the public. The Supreme Court has allowed lower courts to use the supervisory power when the impropriety is clear, such as when due process is violated, and perhaps when Congress has provided some indication of the proper outcome—for example, by creating a “scheme” for representative juries.<sup>185</sup> Such a supervisory role by courts, however, might not be appropriate when it conflicts with established jurisprudence or lacks some concrete congressional directive, such as federal rules or statutes.<sup>186</sup> In the case of DPAs and judicial review of delay periods under the Speedy Trial Act, it is clear Congress intended some type of judicial review.<sup>187</sup> Although courts would be on much stronger ground had Congress provided a substantive review standard, the supervisory authority suggests courts can fill in these statutory gaps, absent and until other congressional action. Indeed, the statutory language indicates that the exercise of the supervisory power is in line with previous interpretations of the power by the Supreme Court.

One might argue that because this authority is not constrained by a specific standard in the statute, courts not only have the unequivocal authority to review DPAs but are in fact entitled to use their complete discretion in evaluating DPAs. According to this reasoning, the statutory grant authorizes courts to assess DPAs without relying on their supervisory power, so they are not restricted by any past interpretations of its proper use. Although this Note contends that the statutory grant in the Speedy Trial Act provides courts with the limited power to substantively review DPAs, there are reasons to question whether courts have such broad power based upon the statutory language alone. In other areas of criminal justice, such as plea

---

that society’s interest in deterring bad-faith conduct by police officers outweighed society’s interest in providing the trier of fact with all the evidence. *Id.* at 736–37. To hold otherwise would be to “confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.” *Id.* at 737.

183. *United States v. HSBC Bank USA, N.A.*, No. 12–CR–763, 2013 WL 3306161, at \*6 (E.D.N.Y. July 1, 2013) (citing *United States v. Johnson*, 221 F.3d 83, 96 (2d Cir. 2000)).

184. *Id.*

185. *See supra* text accompanying notes 173–175.

186. *United States v. Saena Tech Corp.*, No. 1:14–CR–00066, 2015 WL 6406266, at \*18 (D.D.C. Oct. 21, 2015) (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988)) (“Even if exercised in a ‘sensible and efficient’ fashion, it ‘is invalid if it conflicts with constitutional or statutory provisions.’ ”).

187. *See supra* text accompanying notes 140–143.

agreements, courts have exercised caution when involving themselves significantly in negotiations between prosecutors and defendants, and similar considerations apply in the DPA context.<sup>188</sup>

Some might argue that judicial evaluation of the underlying facts leading to an agreement between the defendant and the Government is inappropriate and outside the institutional competence of the courts. It is hard to imagine any other type of practicable review other than all-but-absolute deference to the prosecutor. Such deference, however, is already given to the Government's decisions not to prosecute, like in the case of NPAs. Some might argue that the Speedy Trial Act allows judicial review only to prevent the parties from colluding to circumvent the Act in an attempt to prevent a trial from going forward. But it is not clear how cabining judicial review in this way does any work: DPAs by definition operate to preclude trial. Furthermore, as the district court judges pointed out in *HBSC Bank, Fokker*, and *Saena Tech*, the Government, in requesting a delay, is asking for a judicial "stamp of approval" that carries with it the approval of the judiciary in the eyes of the public.<sup>189</sup> The implications of that approval—and the negative consequences for the courts and criminal justice system should it be given without careful consideration—warrant something more than the deference given to the Government in non-prosecution decisions. Rather, "by placing the DPA on [a c]ourt's radar screen in the form of a pending criminal matter," the parties have "submitted to far more judicial authority."<sup>190</sup> Additionally, DPAs often call for court sanctions if defendants fail to comply with their terms. A court should be able to evaluate a DPA before using its enforcement power to sanction a noncomplying defendant.

The supervisory power allows courts to step in and ensure that justice is properly administered. Courts can exercise this power to expand on congressional directives in order to promote just outcomes. In this context, Congress has already contemplated a judicial role, and the supervisory power operates to fill in the remaining gaps.

#### IV. EXECUTIVE POWER AND PROSECUTORIAL DISCRETION

The fact that Congress granted this power to the courts does not necessarily mean that our constitutional structure and separation-of-powers principles allow it. Part IV addresses possible concerns with such a grant of judicial review authority and argues that judicial review of DPAs does not impermissibly undermine executive power and prosecutorial discretion. Separation-of-powers principles do not require courts to give prosecutors absolute discretion in reaching DPAs with corporate defendants.

---

188. See *infra* Section IV.B.

189. *United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160, 166 (D.D.C. 2015), *vacated and remanded*, No. 15–3016, 2016 WL 1319266 (D.C. Cir. Apr. 5, 2016); see *supra* text accompanying notes 85, 101–104; see also *Saena Tech Corp.*, 2015 WL 6406266, at \*15.

190. *United States v. HSBC Bank USA, N.A.*, No. 12–CR–763, 2013 WL 3306161, at \*7 (E.D.N.Y. July 1, 2013).

To evaluate whether judicial review violates separation-of-powers principles, it is necessary to first assess the extent of executive power in criminal prosecutions. Section IV.A discusses the broad power of prosecutors, as members of the executive branch, to decide whether to bring charges against possible criminal defendants. Section IV.B argues that the wide discretion granted for charging decisions does not apply to decisions to “resolve” criminal cases through DPAs. In the context of DPAs, the executive power is not implicated in the way it would be were a court to second-guess a prosecutor’s decision whether to bring charges; therefore, there is less concern that judicial oversight of DPAs threatens the proper separation of powers.

A. *Executive Authority by Other Means: Discretionary Power to Initiate or Decline to Bring Charges*

Courts have long recognized a broad executive power to decline to prosecute.<sup>191</sup> The decision whether to bring charges, often referred to as “the charging decision,” is considered one of the “most important prosecutorial power[s],”<sup>192</sup> and prosecutors have “exclusive authority and absolute discretion” in deciding whether to prosecute a case.<sup>193</sup> This discretion arises from the President’s constitutional power to “take Care that the Laws be faithfully executed,”<sup>194</sup> a power imputed to federal prosecutors as delegates of the President.<sup>195</sup> The DOJ has created charging guidelines, the U.S. Attorney’s Manual (“USAM”), designed to limit this discretion.<sup>196</sup> In deciding whether to bring or decline to bring charges, the USAM directs federal prosecutors to indict if they “believe[ ] that the person’s conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction.”<sup>197</sup> A prosecutor may decline to charge, however, based on his or her determination that no substantial federal interest is served by prosecution, that the individual is subject to prosecution in another jurisdiction, or that there exists an “adequate non-criminal alternative to prosecution.”<sup>198</sup> In assessing whether any of these factors apply, prosecutors are directed to weigh “all relevant considerations.”<sup>199</sup>

---

191. *E.g.*, *ICC v. Bhd. of Locomotive Eng’rs*, 482 U.S. 270, 283 (1987) (“[I]t is entirely clear that the refusal to prosecute cannot be the subject of judicial review.”).

192. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 *IOWA L. REV.* 393, 408 (2001).

193. *See United States v. Nixon*, 418 U.S. 683, 693 (1974), *superseded by statute*, *FED. R. EVID.* 104(a).

194. U.S. CONST. art. II, § 3; Garrett, *supra* note 17, at 905.

195. Garrett, *supra* note 17, at 905, 905 n.204 (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996)).

196. *Id.* at 905 & n.206.

197. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.220 (2015). It is important to note that the USAM is not law constraining prosecutorial discretion but rather an exercise of that discretion by the Executive in instructing its own agents.

198. *Id.*

199. *Id.* §§ 9-27.230, 9-27.240, 9-27.250.

The USAM guidelines demonstrate that there are various factors a prosecutor must consider when deciding whether to indict. Although these guidelines are internal instructions without the force of law, the Supreme Court has consistently protected this broad, case-by-case conception of prosecutorial discretion.<sup>200</sup> Prosecutors, as part of a federal law enforcement system, should be able to evaluate and analyze a variety of competing concerns and interests as they make charging decisions: they are in the best position to thoughtfully weigh those considerations and come to a well-reasoned decision.<sup>201</sup>

Courts, on the other hand, are ill-equipped to understand and evaluate those considerations. As the Government argued in its appeal to the D.C. Circuit in *Fokker*, “[t]he principle of prosecutorial discretion . . . reflects certain well-recognized limitations on the judicial capacity to review charging decisions.”<sup>202</sup> More specifically, analysis of the relevant factors, such as “the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan” is not the type of analysis courts are competent to undertake.<sup>203</sup> The D.C. Circuit, in its reversal of the *Fokker* district court’s ruling, also recognized that “the Judiciary . . . generally is not ‘competent to undertake’ th[is] sort of inquiry.”<sup>204</sup> Similarly, the district court in *Saena Tech*, in declining to deny the DPA under its supervisory power, noted that it was not the court’s role to “second-guess” prosecutorial decisions.<sup>205</sup>

Judicial and legislative acceptance of prosecutorial discretion in charging decisions, however, does not preclude judicial review of DPAs. The decision to execute a DPA, as well as to choose its terms, goes far beyond the decision of whether or not to bring charges. In the DPA context, charges have already been brought, negating the concern that the judiciary is ill-equipped to decide whether or not charges should be filed.<sup>206</sup> And the terms of a DPA look

---

200. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[T]he decision whether or not to prosecute . . . generally rests entirely in [the prosecutor’s] discretion.”); *United States v. Nixon*, 418 U.S. 683, 693 (1974), *superseded by statute*, FED. R. EVID. 104(a) (“[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . .”).

201. See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) (explaining the variety of factors relevant to the charging decision, such as the Government’s enforcement priorities and its overall enforcement plan).

202. Opening Brief for the United States, *supra* note 136, at 39.

203. *Id.* (quoting *Wayte*, 470 U.S. at 607).

204. *United States v. Fokker Servs. B.V.*, No. 15–3016, 2016 WL 1319266, at \*5 (D.C. Cir. Apr. 5, 2016).

205. *United States v. Saena Tech. Corp.*, No. 1:14–CR–00066, 2015 WL 6406266, at \*21 (D.D.C. Oct. 21, 2015). More specifically, the district court explained that courts should not second-guess charging decisions. *Id.* This Note contends, however, that DPAs and their constituent terms are not charging decisions but rather resemble plea agreements.

206. As was the case in *United States v. Fokker Services B.V.*, 79 F. Supp. 3d 160, 163 (D.D.C. 2015), and *United States v. HSBC Bank USA, N.A.*, No. 12–CR–763, 2013 WL 3306161, at \*1 (E.D.N.Y. July 1, 2013), charges are often filed at the same time as the DPA. The

a lot more like punishment (i.e., sentencing) than a charge. In this way, DPAs are more analogous to plea agreements than indictments. Like plea agreements, DPAs include sanctioning or punishing language, which a charging document would not contain. Therefore, because courts have the authority to review plea agreements, they should likewise have the authority to review DPAs.<sup>207</sup>

#### B. Prosecutorial Discretion Does Not Extend to DPAs

Although there might be reasons to think that this broad prosecutorial discretion to decide whether or not to bring charges applies to the decision whether or not to enter into a DPA, this argument is ultimately unpersuasive. In its appeal of the district court's ruling in *Fokker*, the Government argued that its broad discretion to decide whether and when to initiate criminal cases extends, "by implication," to whether and when to *resolve* criminal cases.<sup>208</sup> Thus, in the Government's view, "[t]he district court's invocation of a 'supervisory power' to review the terms of a DPA for leniency . . . transgresses the foundational principle of prosecutorial discretion."<sup>209</sup> At first glance, this seems logical: if we readily accept that prosecutors need to be insulated in their decisions to bring or decline charges, it might reasonably follow that prosecutors should also have wide latitude in removing cases from the criminal justice system, based on their evaluations of the circumstances at hand. But what the Government seeks is essentially a requirement that district courts accept DPAs seemingly in all instances<sup>210</sup>—a proposition that is more out of step with separation-of-powers principles than is some amount of judicial review. And furthermore, we find judicial review of plea agreements appropriate, and those agreements similarly resolve and remove cases from the criminal justice system.<sup>211</sup>

Broad executive power to decline to prosecute is categorically different from the decision to negotiate a DPA, where charges will be brought and courts will be tasked with enforcing them. Prosecutors cannot have it both ways. If they demand insulation from judicial review of the DPA itself, they cannot also require courts to enforce the unreviewed agreement by hearing

---

D.C. Circuit's reversal of the *Fokker* district court's ruling relies significantly on its characterization of DPAs as "charging determinations." *Fokker*, 2016 WL 1319266, at \*5. This Note disagrees with that characterization.

207. See *infra* Section IV.B.

208. Opening Brief for the United States, *supra* note 136, at 25.

209. *Id.* at 38.

210. It seems that the Government would allow a district court to reject a DPA if it was clear that the Government was entering the agreement not for the purpose of achieving an alternative resolution short of criminal conviction, but rather to avoid a "looming trial date." See *id.* at 56–57. This attempt to make sense of the statutory text providing for "court approval" fails. See *id.* at 55. If the Government enters into a DPA with a defendant corporation, it is bound by that agreement: if the defendant complies with all of its terms, the charges must be dismissed. Therefore, the Government could not put off a trial by entering into a DPA, because DPAs can prevent the Government from going to trial at all.

211. See *infra* notes 214–219 and accompanying text.



the case at trial, potentially long after the time frame contemplated by the Speedy Trial Act. And, if a court does deny a proposed DPA, the Government is not *forced* to pursue a criminal conviction—an outcome that might raise a true separation-of-powers concern. Rather, the Government remains free to try the case, negotiate a different DPA, or dismiss.<sup>212</sup>

Some might argue that to serve justice, courts should be able to review specific terms within the agreements and suggest changes and alterations to make the terms acceptable, rather than being constrained to accept or reject the agreements in their entirety. Such review, however, may give rise to real separation-of-powers concerns. By allowing a court to wade into each individual term, such review places a far greater burden on prosecutors to ensure that every piece of an agreement—itsself filled with a variety of compromises between the Government and the defendant—is acceptable to the court, rather than the agreement as a whole. Similar considerations inform the judicial review of plea agreements. More limited review, as suggested by the district courts in *HSBC Bank*, *Fokker*, and *Saena Tech*, ensures that defendants are treated fairly and that the public interest in just criminal resolution is properly vindicated.<sup>213</sup>

In other situations where a prosecutor might pursue resolution of a criminal indictment short of a conviction at trial, such as plea agreements and dismissals of indictments, courts do have power to review and accept or reject the Government's proposals. Under Rule 11 of the Federal Rules of Criminal Procedure,<sup>214</sup> courts exercise review authority over plea agreements and can adjust plea agreements they conclude are too harsh or too lenient.<sup>215</sup> Although courts have historically limited their authority to their "traditional participation in the sentencing process,"<sup>216</sup> they have still exercised that review authority in some capacity.<sup>217</sup> In reviewing plea bargains, judges consider the voluntariness of the plea, possible abuse of discretion on the part of the prosecutor, the fairness of the agreement, the factual basis for the plea,

---

212. Opening Brief for the United States, *supra* note 136, at 65.

213. In *United States v. Saena Tech Corp.*, No. 1:14-CR-00066, 2015 WL 6406266, at \*16, \*21 (D.D.C. Oct. 21, 2015), the court emphasized that its standard of review was limited to determining whether the agreement was "truly about diversion" or whether it involved the court in "unlawful or untoward collusion." It stated however, that a court may review a DPA for "fairness and adequacy" and determine whether its terms are mere "window-dressing." *Id.* Thus, an agreement without punitive measures or compliance requirements "could not be said to be designed to secure a defendant's reformation and should be rejected." *Id.* at \*16. Such review is not plenary, but it seems to be more substantive than the court's language suggests. And although the lower court in *Fokker* and the *Saena Tech* Court engaged in somewhat different analyses of their statutory and supervisory powers, it is hard to imagine a DPA that would fail one court's standard but not the other, in part because each looked at the substantive terms of the agreements.

214. FED. R. CRIM. P. 11.

215. Opening Brief for United States, *supra* note 136, at 46; Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1994 (1992).

216. Opening Brief for United States, *supra* note 136, at 46.

217. See e.g., Garrett, *supra* note 17, at 906 (noting that federal courts "remain highly deferential" when reviewing plea bargains). Daniel S. McConkie has argued that courts should

and any concerns that the plea bargain infringes upon the judge's sentencing power.<sup>218</sup> A judge may also reject a plea agreement when he or she "believes that [the] bargain is too lenient, or otherwise not in the public interest."<sup>219</sup> Should a court reject a plea agreement, the Government is left with the same options as it is when a court rejects a DPA. It can try the case, negotiate a new plea agreement, or dismiss. In its reversal of the district court's order in *Fokker*, the D.C. Circuit stressed that under Rule 11, a court cannot reject a proposed plea agreement because it disagrees with the "underlying charging decisions."<sup>220</sup> But the fact that judicial review of plea agreements is not unfettered does not mean that no such review exists: courts can review plea agreements and DPAs without passing judgment on the charging decisions themselves. Rather, such review can address the implications of the agreement, either through direct sentencing of the defendant (in the case of plea agreements) or through the imposition of often significant penalties on the defendant (in the case of DPAs).<sup>221</sup>

The similarities between plea agreements and DPAs help illustrate why judicial review of DPAs comports with separation-of-powers principles. Plea agreements serve the same purpose as DPAs: they allow prosecutors to "obtain the optimum level of punishment at the least cost."<sup>222</sup> This practice preserves resources, which can be used to pursue other prosecutions where trials and criminal convictions are necessary for deterrence.<sup>223</sup> Plea agreements also illustrate the difference between judicial review of resolutions that are short of criminal trials and conviction and judicial review of charging decisions themselves. Furthermore, plea agreements help demonstrate why this distinction is significant in the DPA context. Assessing the adequacy of punishment, in both plea agreements and DPAs, falls squarely within what we consider the "traditional judicial function."<sup>224</sup> On the other hand, deciding whether to bring charges involves the evaluation of a variety of

---

be *more* involved in the terms of plea agreements, asserting that judges are improperly excluded from the process until the very end. Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 63–64 (2015). This allows prosecutors, motivated by political considerations, to dictate the terms of plea agreements outside the public view. *Id.* at 64.

218. Garrett, *supra* note 17, at 906.

219. *Id.* at 907 (quoting *United States v. Carrigan*, 778 F.2d 1454, 1462 (10th Cir. 1985)).

220. *United States v. Fokker Servs. B.V.*, No. 15–3016, 2016 WL 1319266, at \*9 (D.C. Cir. Apr. 5, 2016).

221. The D.C. Circuit concluded that sentencing through plea agreements is fundamentally and instructively different than the penalties and other conditions imposed through DPAs. *Id.* at \*10. This is incorrect, however, because both plea agreements and DPAs operate to exact punishment on defendants.

222. Schulhofer, *supra* note 215, at 1980.

223. *Id.*

224. *Id.* at 1997.

considerations relating to law enforcement priorities and policies—an evaluation properly conducted by prosecutors.<sup>225</sup>

Plea agreements also illustrate the proper balance between complete prosecutorial discretion at the charging stage and the need for some type of judicial review at the resolution stage. At the charging stage, when prosecutorial discretion is at its zenith, informal pressures still operate on the Government and affect the decision whether to indict.<sup>226</sup> These informal pressures include the opinions and desires of law enforcement, victims, and the public at large.<sup>227</sup> At the resolution stage, prosecutorial discretion is limited by judicial review, in part because it is much more difficult for these informal pressures to serve as a check on prosecutorial conduct.<sup>228</sup> A decision not to charge is much more visible and “much easier to question” than a decision about what sentence to impose in return for a guilty plea.<sup>229</sup> Similarly, a decision not to prosecute is much more visible than a negotiated DPA. When the Government reaches a plea agreement with a defendant, it is more difficult for law enforcement, victims, and the public to evaluate the complicated plea bargain.<sup>230</sup> In the same way, when the Government enters into a DPA with a corporate defendant, it is much harder for those actors to assess whether or not justice has been served, because the agreements are often long, complicated and filled with compromises.<sup>231</sup>

Furthermore, under Rule 48 of the Federal Rules of Criminal Procedure, the Government may “with leave of court” dismiss an indictment.<sup>232</sup> Again, although courts have traditionally exercised their review authority in a limited manner, it is generally accepted that they have that review authority.<sup>233</sup> In fact, as the Government admitted in its brief in *Fokker*, the “leave of court” language has been interpreted to preserve and promote the proper balance between the Executive and the Judiciary in criminal proceedings.<sup>234</sup> The Judiciary ensures that the Executive “does not harass criminal defendants through successive filings” but “defer[s] to the Executive’s determination that criminal charges should not be further pursued.”<sup>235</sup> The D.C. Circuit also recognized that the “leave of court” requirement is meant to

---

225. See *supra* notes 200–201 and accompanying text. Indeed, before the DOJ began pursuing DPAs, it sometimes sought guilty pleas coupled with compliance settlements. Garrett, *supra* note 17, at 907.

226. See Schulhofer, *supra* note 215, at 1997.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 1981–82.

231. See Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1882–94 (2005), for a discussion of the complicated nature of DPAs.

232. FED. R. CRIM. P. 48(a).

233. See, e.g., *United States v. Ammidown*, 497 F.2d 615, 620 (D.C. Cir. 1973).

234. Opening Brief for United States, *supra* note 136, at 45.

235. *Id.*

“protect a defendant against prosecutorial harassment.”<sup>236</sup> It concluded that this “narrow” review does not allow a court to deny a motion to dismiss charges because the court disagrees with what the prosecutor charged or failed to charge.<sup>237</sup> Such a conclusion about Rule 48, however, does not conflict with the view that the Speedy Trial Act similarly provides for a narrow type of judicial review. Judicial review under the Rule and the Act does not impermissibly interfere with prosecutorial charging decisions; both protect the defendant after such executive determinations have been made.

In other contexts, courts have long exercised authority to review resolutions of criminal cases brought before them. Review of DPAs, while not perfectly analogous to these other contexts, does not seem out of step. This comparison significantly mitigates concerns about separations-of-powers principles and Executive discretion.

## V. A STANDARD OF REVIEW

Having examined the sources of judicial authority to review DPAs, addressed possible constitutional concerns relating to the separation of powers, and concluded that courts possess the authority to review DPAs, this Note now turns to the lingering question of the standard under which courts should conduct that review. As noted previously, the text of the Speedy Trial Act does not provide specific criteria in its “approval of the court” requirement. Part V argues that courts should review DPAs for substantive fairness in the same limited manner that courts review plea agreements, relying on their inherent supervisory power to do so.

As discussed in Part III, the inherent supervisory power of courts enables them to impose rules and exact standards, so long as those judicial actions are not in direct conflict with congressional actions or constitutional mandates. In the DPA context, Congress has already provided the courts with a statutory grant of power.<sup>238</sup> To interpret that grant in a manner consistent with congressional intent is entirely appropriate. Furthermore, there is good reason to believe that in enacting the Speedy Trial Act, which plainly had significant implications for the criminal justice system, Congress understood that courts had supervisory power over the administration of criminal justice, which they had exercised in a variety of other contexts to “fill in the interstices” of congressional action.<sup>239</sup> If Congress had intended to disrupt

---

236. *United States v. Fokker Servs. B.V.*, No. 15–3016, 2016 WL 1319266, at \*5 (D.C. Cir. Apr. 5, 2016) (quoting *Rinaldi v. United States*, 434 U.S. 22, 29 n.5 (1977)).

237. *Id.* at \*5–6. The D.C. Circuit has reached a similar conclusion regarding civil consent decrees. The Tunney Act requires a court to “determine that the entry of [any consent] judgment is in the public interest.” 15 U.S.C. § 16(e)(1) (2012). The D.C. Circuit has reversed a district court’s denial of a consent decree for failure to adequately serve the public interest, concluding that the statute did not “authoriz[e] . . . a district judge to assume the role of Attorney General.” *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995). It did accept, however, that a district court could reject a decree that “appears to make a mockery of judicial power.” *Id.*

238. 18 U.S.C. § 3161(h)(2) (2012).

239. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 46–47 (1991).

that power and prevent courts from intervening to ensure basic fairness, it would have done so explicitly. Indeed, if Congress were to decide that a broad standard of judicial review based on substantive fairness is inappropriate, it could take action to undo the courts' interpretive work.

This proposal is also consistent with judicial review in other contexts where courts are granted review authority but are given little guidance as to the proper standard. For instance, Federal Rule of Criminal Procedure 11 authorizes courts to accept or reject plea agreements<sup>240</sup> but provides no criteria for doing so. A number of circuit courts, however, have interpreted such language as providing district courts with broad discretion in rejecting plea agreements.<sup>241</sup> Similar to the judge's role in accepting or rejecting plea agreements, DPAs essentially require an evaluation of whether defendants have been treated fairly and whether the public interest has been properly vindicated by the agreements. Courts perform such evaluations incredibly frequently when they assess plea agreements—there is no reason to conclude that they are not authorized to do so in the DPA context as well.

#### CONCLUSION

The dramatic increase in the DOJ's use of DPAs in corporate cases raises a number of questions about the proper balance between executive, legislative, and judicial authority. This Note has argued that district courts are empowered to substantively review DPAs for fairness, drawing upon the statutory grant of that authority in the Speedy Trial Act and the supervisory power of courts. Such authority does not run afoul of separation-of-powers principles. The Speedy Trial Act provides a congressional grant of review authority to the courts. Although the Act does not itself provide a clear substantive standard, the statutory grant allows courts to invoke the supervisory power to review DPAs for substantive fairness, absent additional congressional guidance.

---

240. FED. R. CRIM. P. 11(c)(4)–(5).

241. See, e.g., *United States v. Harris*, 679 F.3d 1179, 1182 (9th Cir. 2012) (holding that a court can reject a plea agreement if it “believes is too lenient or otherwise not in the public interest”); *United States v. Maddox*, 48 F.3d 555, 558 (D.C. Cir. 1995) (quoting *United States v. Moore*, 916 F.2d 1131, 1136 (6th Cir. 1990), and then quoting *United States v. Ammidown*, 497 F.2d 615, 622 (D.C. Cir. 1973)) (concluding that a district court has broad discretion to reject a plea agreement so long as it provides “reasoned exercise of discretion” and is not “arbitrary”).