Can Congress Authorize Judicial Review of Deferred Prosecution and Nonprosecution Agreements? And Does It Need To?*

Corporate deferred prosecution agreements (DPA) and nonprosecution agreements (NPA) are on the rise. So are their critics. Despite the other options federal prosecutors have for enforcing federal criminal law against corporations, prosecutors continue to rely heavily upon DPAs and NPAs. Federal prosecutors' broad legal discretion—over who gets a deal, what the terms are, and when breach occurs—draws ire from many critics. Some argue that prosecutors negotiate lenient N/DPAs, letting huge corporations and high-level executives off the hook too easily for gross malfeasance. Others argue that prosecutors' unfettered discretion gives them too much negotiating leverage, resulting in harsh and misguided N/DPAs. Both sides advocate subjecting corporate N/DPAs to judicial review.

Congress has looked into judicial review as a solution. The proposed Accountability in Deferred Prosecution Act (ADPA) of 2014 included a provision that required judicial approval of N/DPAs.[1] Prosecutors would submit N/DPAs to federal judges for approval, and the judges would review those N/DPAs for consistency with the guidelines promulgated by the Attorney General and to ensure those N/DPAs are "in the interests of justice."[2]

But as of now, the Judiciary's only potential foothold to review DPAs is the Speedy Trial Act. (Notably, no statutory foothold is currently available to review NPAs.) Under 18 U.S.C. § 3161(h)(2), the seventy-day clock for trial after indictment may be tolled, "with the approval of the court," by a prosecutor who submits a DPA to the court.[3] Most motions to exclude time under § 3161(h)(2) are approved by the court, no hassle. But recently, some district court judges have refused to act as rubber stamps. One has interpreted the "with the approval of the court" clause as a basis for reviewing prosecutors' decision not to pursue charges against individuals or corporations.[4] Two others have interpreted the clause as a basis for reviewing the precise terms of the negotiated settlement with the corporation.[5]

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* I would like to thank Stacy Brainin and Barry McNeil for their invaluable comments. I would also like to thank the members of the *Texas Law Review* for their careful editing and feedback, particularly Brendan Hammond for the title of this Note. All mistakes are mine alone.

1. Accountability in Deferred Prosecution Act of 2014, H.R. 4540, 113th Cong. § 7(a) (2014).

2. *Id.*

3. 18 U.S.C. § 3161(h)(2) (2012).

4. United States v. Fokker Servs. B.V., 79 F. Supp. 3d 160, 165 (D.D.C. 2015), *rev'd* 818 F.3d 733 (D.C. Cir. 2016).

5. United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 28–30 (D.D.C. 2015); United States v. HSBC Bank USA, No. 12–CR–763, 2013 WL 3306161, at *3–5 (E.D.N.Y. July 1, 2013).

The "with the approval of the court" clause, however, has recently been interpreted narrowly by the D.C. Circuit in *United States v. Fokker Services B.V.*[6] In an opinion by Judge Sri Srinivasan, the court interpreted the section against a "backdrop of long-settled understandings about the independence of the Executive with regard to charging decisions."[7] It found that "[n]othing in the statute's terms or structure suggests any intention to subvert those *constitutionally rooted* principles so as to enable the Judiciary to second-guess the Executive's exercise of discretion over the initiation and dismissal of criminal charges."[8] The Act therefore "confers no authority" to withhold approval of a DPA "based on concerns that the government should bring different charges or should charge different defendants."[9]

In this Note I argue that Judge Srinivasan got the law right but, in the process, potentially got the Constitution wrong. The "backdrop of long-settled understandings" he cites is largely a product of *prudential* considerations that lack *constitutional* potency. The constitutionally rooted remainder does not bar Congress from establishing judicially enforceable criteria that prosecutors must follow when determining who to enter into an agreement with, the scope of the agreement, whether breach of the agreement has occurred, and how to enforce an agreement. In short, meaningful judicial oversight of corporate N/DPAs is constitutionally permitted.

My inquiry differs from the bulk of the recent literature. Commentators—largely in response to controversial Obama Administration nonenforcement decisions over immigration,[10] marijuana,[11] and the Affordable Care Act[12]—have addressed the constitutional limits of executive nonenforcement discretion in the absence of a clear congressional command.[13] They generally ask "at what point does a non-enforcement policy cross the line between the executive discretion properly vested in the President and instead become violative of the President's constitutional duty

6. 818 F.3d 733 (D.C. Cir. 2016).

7. *Id.* at 738.

8. *Id.* (emphasis added).

9. *Id.*

10. Memorandum from Sec'y Janet Napolitano, U.S. Dep't of Homeland Sec., to David Aguilar, Acting Comm'r, U.S. Customs & Border Protection et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012).

11. Memorandum from James M. Cole, Deputy Attorney Gen., to U.S. Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013).

12. Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, Dep't of Health & Human Servs., to State Ins. Comm'rs (Nov. 14, 2013).

13. *See, e.g.*, Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEXAS L. REV. 781, 783–85 (2013) (arguing that Obama's immigration nonenforcement decision was unconstitutional); Saikrishna Bangalore Prakash, *The Statutory Nonenforcement Power*, 91 TEXAS L. REV. SEE ALSO 115, 115–17 (2013) (defending Obama's immigration nonenforcement decision as constitutional); Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the Dream Act*, 91 TEXAS L. REV. SEE ALSO 59, 60 (2013) (same).

to 'take care that the laws be faithfully executed[?]'"[14] My question is the inverse: at what point does a congressional command cross the line from a legitimate exercise of Congress's power and encroach upon the Executive's power? While a comprehensive answer is beyond the scope of this Note, my analysis of corporate N/DPAs sheds light on the broader question.

This Note has three Parts. Part I introduces the mechanics of corporate N/DPAs, documents their rise, and reviews the various criticisms of executive[15] nonprosecution discretion[16] in the context of corporate N/DPAs. It then turns to one of the major proposals for corporate N/DPA reform—judicial review. Part II discusses cases analyzing the scope of judicial review of corporate DPAs under the Speedy Trial Act. In Part III, I defend my thesis: Congress *could* constitutionally authorize judicial review of corporate N/DPAs. I then provide a brief conclusion.

I. An Overview of Corporate N/DPAs

A. The Mechanics of N/DPAs

After filing an indictment, instead of pursuing a conviction or dismissing charges, a federal prosecutor may pursue a "middle ground" option—a DPA.[17] The corporation admits incriminating facts and typically pays a negotiated amount of restitution or fines.[18] The corporation may also agree to a set of conditions designed "to promote compliance with applicable law and to prevent recidivism."[19] These conditions can require structural

14. Peter L. Markowitz, *Prosecutorial Discretion at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. (forthcoming 2017) (manuscript at 2) (internal quotations omitted), http://ssrn.com/abstract=2753709 [https://perma.cc/LM4Q-CUYS].

15. I use the term "executive" to describe the entity that wields nonprosecution discretion. Doing so, I am mindful of the clash between those that view all power to implement federal law as flowing from the President and those that contest the idea of a "unitary executive." *Compare* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 544 (1994) (arguing for a unitary Executive), *with* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 4 (1994) (arguing that the Executive is in fact not unitary). I do not take a stand on this voluminous debate.

16. I use the phrase "nonprosecution discretion" instead of prosecutorial discretion. It is a more precise phrase to describe "the discretionary and plenary power *not* to prosecute." *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 925 (6th ed. 2014) (observing that "the power is better described as one of 'nonprosecution' discretion" because "the courts may not compel or mandamus a prosecution," and "[c]onversely, the President's power to affirmatively prosecute can rather easily be thwarted by grand juries and courts; the former may simply refuse to agree to an indictment, and the latter may always throw the case out"). It is not even clear that the Executive retains exclusive authority to bring prosecution. *See* Lessig & Sunstein, *supra* note 15, at 18–20 (observing that original practice involved state and private authority over the decision to bring prosecution).

17. EXEC. OFFICES OF THE U.S. ATTORNEYS, U.S. ATTORNEYS' MANUAL 9-28.200 (2015), https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations [https://perma.cc/HW69-JLL9] [hereinafter U.S. ATTYS' MANUAL].

18. *Id.* at 9-28.1100.

19. *Id.*

reforms, including "hiring additional compliance personnel, governance changes, requirements of periodic reporting and evaluation of compliance, and retention of independent corporate monitors."[20] In exchange, the prosecution agree to drop charges against the corporation at the end of the agreed-upon period. If the corporation fails to comply with the terms of the agreement, the government can prosecute based on the admitted facts.

The time limitations established by the Speedy Trial Act[21] play an important role in the operation of DPAs. DPA negotiation typically occurs before the filing of an indictment.[22] Once DPA terms are agreed upon, the prosecution files an indictment along with a motion for a specific exclusion of time under the Speedy Trial Act. Such a motion is necessary because the filing of an indictment triggers the Speedy Trial Act's seventy-day clock within which the trial must commence.[23] This seventy-day clock then may be tolled for "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant," in order for the defendant to demonstrate his good conduct.[24] Importantly, such arrangement requires "approval of the court."[25] This exemption was crafted to permit prosecutors to utilize DPAs without running afoul of the Speedy Trial Act's seventy-day clock.[26]

NPAs operate in much the same way as DPAs with two major differences, the second difference following from the first.[27] With an NPA, no formal charges are filed. The agreement "is maintained by the parties

20. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 855 (2007). Garrett has documented the rise of DPAs and NPAs with "structural reform" provisions. *Id.* at 856. Structural reform provisions are conditions not aimed at obtaining a conviction but at reforming corporate governance. *Id.* at 855. Garrett's view of how prosecutors deploy N/DPAs has achieved "some consensus among scholars." Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-prosecution Agreements on Corporate Governance: Evidence from 1993–2013*, 70 BUS. LAW. 61, 66 (2014).

21. 18 U.S.C. §§ 3161–3174 (2012).

22. Peter Spivack & Sujit Raman, Essay, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 160 (2008).

23. 18 U.S.C. § 3161(c)(1).

24. *Id.* § 3161(h)(2).

25. *Id.*

26. S. REP. NO. 93-1021, at 36–37 (1974) ("Of course, in the absence of a provision allowing the tolling of the speedy trial time limits, prosecutors would never agree to such diversion programs. Without such a provision the defendant could automatically obtain a dismissal of charges if prosecution were held in abeyance for a period of time in excess of the time limits set out in section 3161 (b) and (c).").

27. *See* Brian Lewis & Steven Woodward, *Corporate Criminal Liability*, 51 AM. CRIM. L. REV. 923, 960 (2014) (explaining that "NPAs work in much the same way [as DPAs], except there are no publically filed charges and no court supervision of compliance with an agreement. The company typically acknowledges wrongdoing, pays a fine, and agrees to comply with any other required conditions and to cooperate with the government's ongoing investigation" (footnotes omitted)).

rather than being filed with a court."[28] Because no indictment is filed, the Speedy Trial Act's clock does not start.[29] There is therefore no need to acquire "approval of the court" in order to finalize an NPA.

B. The Rise of Corporate N/DPAs

In spite of the other options federal prosecutors have for enforcing the criminal law against corporations—pursuing a conviction, obtaining a plea bargain—prosecutors have continually relied upon DPAs and NPAs.[30] A recent review of Department of Justice (DOJ) policy observes that "[d]espite substantial judicial and public scrutiny, [NPAs] and [DPAs] have retained their prominence as vehicles to resolve complicated corporate investigations."[31] This trend is expected to continue, especially after *Fokker Services*.[32] To put the rise of N/DPAs in perspective, in the twelve years preceding 2004, the DOJ entered just twenty-six.[33] In 2015 alone, it entered

28. Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., Selection and Use of Monitors in Deferred Prosecution Agreements and Non-prosecution Agreements with Corporations n.2 (Mar. 7, 2008), https://www.justice.gov/usam/criminal-resource-manual-163-selection-and-use-monitors [https://perma.cc/94SE-T3VF].

29. 18 U.S.C. § 3161(c)(1).

30. GIBSON DUNN, 2016 MID-YEAR UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS (NPAS) AND DEFERRED PROSECUTION AGREEMENTS (DPAS) 1 (July 6, 2016), http://www.gibsondunn.com/publications/documents/2016-Mid-Year-Update-Corporate-NPA-and-DPA.pdf [https://perma.cc/22XJ-ZU9T]; *see also id.* at 2 (observing that "[i]n the first half of 2016, DOJ and the SEC have collectively entered into eleven corporate NPAs and DPAs, of which nine were NPAs and two were DPAs"). The Gibson Dunn 2016 Mid-Year Update does acknowledge that "the number of NPAs and DPAs entered into year-to-date are at their lowest since 2010, when there were also eleven agreements released by July 6." *Id.* But the report also acknowledges that the "data, however, is not necessarily predictive of a slow year: in 2010, the second half of the year more than compensated for the slow start, and 2010 ultimately yielded forty corporate agreements; it is entirely possible that the same may happen in 2016." *Id.* Notably, NPAs and DPAs have "been used in virtually all areas of corporate criminal wrongdoing including antitrust, fraud, domestic bribery, tax evasion, environmental violations as well as foreign corruption cases." Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 537 (2015).

31. GIBSON DUNN, *supra* note 30, at 1.

32. *Id.*

33. David M. Uhlmann, *Prosecution Deferred, Justice Denied*, N.Y. TIMES (Dec. 13, 2013), http://www.nytimes.com/2013/12/14/opinion/prosecution-deferred-justice-denied.html [https://perma.cc/RHJ6-4WGH].

100.[34] The annual monetary recovery for N/DPAs has exceeded $1 billion every year since 2009, topping out at $9 billion in 2012.[35]

Prosecutors are not just extracting lots of money from corporations. They are also extracting significant nonmonetary concessions. Recent empirical research comparing N/DPAs to plea agreements shows that N/DPAs contain on average more provisions relating to governance and legal process.[36] This empirical research helps corroborate anecdotal evidence that prosecutors use N/DPAs as a scalpel to help reform corporate governance, rather than as a hatchet to punish corporate wrongdoing.

N/DPAs' attractiveness is, in part, a product of the undesirability of corporate convictions. Corporate convictions bring with them the risk of catastrophic collateral consequences. The conviction and eventual acquittal of now-deceased accounting powerhouse Arthur Andersen is a stark example. The initial filing of a criminal indictment against Arthur Andersen was alone sufficient to kill the firm and destroy 28,000 jobs.[37] Arthur Andersen's eventual acquittal did nothing to save the firm from ruin, but did embarrass the government.[38] The DOJ's prosecutorial guidelines recognize that pursuing a corporate conviction can result in large collateral consequences, far exceeding the appropriate punishment to rectify and deter wrongdoing.[39] The guidelines urge prosecutors to account for the substantial

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34. GIBSON DUNN, *supra* note 30, at 2. However, 2015 may have been an outlier due to the DOJ Tax Division's decision to enter into a significant number of NPAs pursuant to the Swiss Banks Program. *Id.* Even accounting for the effects of this unique program, which drew to a close at the end of 2015, the DOJ entered into 25 NPAs and DPAs that were unrelated to the DOJ Tax Swiss Banks Program in 2015. GIBSON DUNN, 2015 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS (NPAS) AND DEFERRED PROSECUTION AGREEMENTS (DPAS) 3 (2016), http://www.gibsondunn.com/publications/documents/2015-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.pdf [https://perma.cc/68XW-GVDH].

35. GIBSON DUNN, *supra* note 30, at 3.

36. Alexander & Cohen, *supra* note 30, at 541–42.

37. Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 107–09 (2006). The conviction of Arthur Andersen is the most repeatedly invoked example of the corporate death penalty, but other examples exist. *See, e.g.*, *The Criminalisation of American Business*, ECONOMIST (Aug. 28, 2014), http://www.economist.com/news/leaders/21614138-companies-must-be-punished-when-they-do-wrong-legal-system-has-become-extortion [https://perma.cc/KE8A-YNHS] (Drexel Burnham Lambert and E.F. Hutton). One commentator, however, contends that the corporate death penalty is in fact a myth. 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, 800, 802 (2013). Markoff finds no empirical basis for the corporate death penalty, *id.* at 827, and concludes that the benefits of N/DPAs can be acquired by utilizing convictions to secure corporate-compliance programs. *Id.* at 830; *see also* Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 FLA. L. REV. 1, 21 (2014) ("[E]mpirical evidence accumulated since Andersen demonstrates that corporations and other businesses rarely collapse from indictments or face other serious collateral consequences.").

38. Scott Cohn, *Indictments Can Kill a Company*, CNBC (July 25, 2013), http://www.cnbc.com/id/100913974 [https://perma.cc/B9DU-B98J].

39. U.S. ATTYS' MANUAL, *supra* note 17, at 9-28.1100.

consequences to "a corporation's employees, investors, pensioners, and customers," many of whom may not be culpable for the offense.[40]

Another reason that federal prosecutors use N/DPAs is the DOJ's increased focus on prosecuting employees for their wrongdoing.[41] By using the threat of criminal conviction as leverage against companies, prosecutors can acquire large concessions that can help the government's case against corporate employees.

C. Prosecutorial Discretion Under Attack

As federal prosecutors have increasingly relied on corporate N/DPAs, the ranks of their critics have swelled. These criticisms are not uniform.[42] Section I(C)(1) outlines one attack on N/DPAs, namely that the broad scope of prosecutorial discretion that they afford facilitates the imposition of unfair and oppressive conditions on corporations. Section I(C)(2) provides an opposing viewpoint. Advocates of this view argue that prosecutors invoke their discretion when using N/DPAs to avoid giving corporations their just deserts. Where the sides share a common ground is one proposed solution—judicial review. Section I(C)(3) outlines this position.

1. The Abuse Critique.—This group of critics argues that prosecutors' unfettered discretion results in unfair and counterproductive N/DPAs. Prosecutors are too heavy-handed, using N/DPAs to bully corporations.[43]

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40. *Id.* While corporate plea deals do not have the same magnitude of collateral consequences as indictments or convictions, they are not devoid of secondary effects. A corporation that enters a formal plea faces collateral costs such as debarment from government contracting. Alexander & Cohen, *supra* note 30, at 539, 544–45.

41. *See* U.S. ATTYS' MANUAL, *supra* note 17, at 9-28.210 (explaining that "[p]rosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation . . . . Provable individual culpability should be pursued . . . even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation . . . ."). The Yates Memorandum is the most recent sign of the DOJ's intent. *See* Memorandum from Sally Quillian Yates, Dep. Attorney Gen., Individual Accountability for Corporate Wrongdoing 1 (Sept. 9, 2015), http://www.justice.gov/dag/file/769036/download [https://perma.cc/93U6-CXCY] ("One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing."). Some argue that the Yates Memorandum merely "codifies and reinforces a long-standing trend of focus on individuals." GIBSON DUNN, *supra* note 34, at 5; *see also* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 329–32 (2007) (observing that prosecutors' focus on their conviction rate, the heightened vulnerability of individual employees after Sarbanes–Oxley, and the increased reluctance by prosecutors to allow collateral consequences have all led prosecutors to "[f]ocus on employee targets"). Not everyone, however, is convinced that the DOJ is diligently seeking individual prosecutions for corporate wrongdoing. *See* GIBSON DUNN, *supra* note 34, at 4–5 (noting that several high profile DPAs following on the heels of the Yates Memorandum have been criticized for not taking action against culpable individuals).

42. *See* Kaal & Lacine, *supra* note 20, at 64–65 (observing that "N/DPAs remain controversial" and outlining the two critiques).

43. *See* Garrett, *supra* note 20, at 855–56.

Corporations face overwhelming pressure to cut a deal. Corporate conviction risks numerous collateral consequences,[44] adverse publicity,[45] and total collapse.[46] Relative to convictions of natural persons, corporate convictions are relatively easy to obtain.[47] Even if a corporation has a robust corporate-compliance program, due to the size and complexity of the regulatory apparatus, violations are inevitable.[48] This leverage makes the negotiation one-sided[49] and allows prosecutors to extract large concessions, including: monetary sanctions equivalent to what the defendant would have paid if convicted,[50] structural reforms to the corporation,[51] and sanctions

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44. Such collateral consequences include debarment from government contracting and revocation of professional licenses. Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1885–86 (2005).

45. *Id.* at 1886 (explaining that for corporate defendants, the possibility of negative publicity is so detrimental that "it has even been proposed as a penalty in and of itself"); Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1467 (2007) (citing "corporate vulnerability to bad publicity" as a factor enabling prosecutorial abuse).

46. Ainslie, *supra* note 37, at 107–09; Greenblum, *supra* note 44, at 1887–88 (outlining the saga of Arthur Andersen).

47. Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 73–74 (2007); Paulsen, *supra* note 45, at 1467 (citing the "expansive nature of vicarious liability law" as a potential avenue of prosecutorial abuse).

48. *See A Mammoth Guilt Trip*, ECONOMIST (Aug. 28, 2014), http://www.economist.com/news/briefing/21614101-corporate-america-finding-it-ever-harder-stay-right-side-law-mammoth-guilt [https://perma.cc/M62T-EPD8] (observing that due to the high number of statutes carrying criminal penalties (300,000) and the cost of compliance, "even the most diligent company may not escape censure"). Indeed, Larry Thompson, a former deputy attorney general, has said that "[n]o matter how gold-plated your corporate compliance efforts, no matter how upstanding your workforce, no matter how hard one tries, large corporations today are walking targets for criminal liability." *Id.*

49. As Reilly writes: "The ultimate negotiation between prosecutor and accused can sometimes be unfair to the point where any 'bargaining' taking place is merely illusory. This is because, in many instances, the government has too much power, too much leverage, and too much discretion in presenting, negotiating, and implementing DPAs and NPAs." Peter Reilly, *Negotiating Bribery: Toward Increased Transparency, Consistency, and Fairness in Pretrial Bargaining Under the Foreign Corrupt Practices Act*, 10 HASTINGS BUS. L.J. 347, 349 (2014); *see also* Ainslie, *supra* note 37, at 107–09 (observing that corporations face overwhelming pressure to cut deals due to the corporate death penalty); Griffin, *supra* note 41, at 327–30 (2007) ("Because virtually no company will risk indictment, prosecutors have come to expect compliance with every government demand."); Peter J. Henning, *The Organizational Guidelines: R.I.P.?*, 116 YALE L.J. POCKET PART 312 (2007), http://yalelawjournal.org/forum/the-organizational-guidelines-rip [https://perma.cc/MU5L-PKCV] ("Few companies are willing to risk an indictment, much less a criminal trial . . . . And alternatives do exist: deferred and non-prosecution agreements offer corporations the chance to avoid an indictment altogether."); Paulsen, *supra* note 45, at 1457 ("Since corporations cannot run the risk of going to trial, their choice to accept a deferred prosecution agreement is not really a choice at all.").

50. Greenblum, *supra* note 44, at 1889–90; *see also id.* at 1889 (observing that "prosecutors could potentially impose excessive monetary sanctions against corporate deferees" because the sentencing guidelines do not bind prosecutors in setting the terms of corporate N/DPAs).

51. Garrett, *supra* note 20, at 855. Through structural reform provisions, prosecutors effectively take over core corporate management functions. *Id.* This can be disastrous. Prosecutors

unrelated to the accused wrongdoing.[52] Resolving cases though N/DPA contributes to a "legal fog" surrounding corporate legal obligations because cases do not go to trial and judges do not write opinions.[53] As a result of this,

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lack business experience and may inadvertently harm shareholder interests. *Id.*; *see also* Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 62, 63 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (arguing that prosecutors lack both the experience in business and the industry-specific knowledge to make reliable decisions). *But see* 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, 1043–44, 1052–53 (2006) (arguing that a specific example of a structural reform provision helped enhance corporate accountability).

52. John C. Coffee, Jr., *Deferred Prosecution: Has it Gone Too Far?*, NAT'L L.J., July 25, 2005, at 13, 13. In recent years, the DOJ has significantly cut back on the type of conditions that can be imposed on corporations under DPAs. For a time, federal prosecutors could and did impose obligations upon corporations unrelated to the accused wrongdoing. *See* Greenblum, *supra* note 44, at 1893–94 (documenting a particularly flagrant imposition of unrelated obligations by the DOJ). In an egregious example of prosecutorial abuse, "Bristol Myers-Squibb was required to endow a chair in business ethics at Seton Hall University Law School, the U.S. Attorney's alma mater, while Operations Management International contributed one million dollars to endow a chair in environmental studies at the U.S. Coast Guard Academy." F. Joseph Warin & Andrew S. Boutros, *Response: Deferred Prosecution Agreements: A View From the Trenches and a Proposal for Reform*, 93 VA. L. REV. IN BRIEF 121, 124 (2007). In addition to unrelated conditions, the DOJ imposed self-limitations on the use of attorney–client and work product waivers. Memorandum from Mark Filip, Deputy Attorney Gen., on the Principles of Federal Prosecution of Business Organizations, to the Heads of Dep't Components U.S. Attorneys 8 (Aug. 28, 2008); U.S. ATTYS' MANUAL, *supra* note 17, at 9-28.1500(b) ("[C]ooperation is not measured by the waiver of attorney-client privilege and work product protection, but rather is measured, as a threshold issue, by the disclosure of facts about individual misconduct, as well as other considerations identified herein . . . ."). But concerns still linger. *See* Rachel Delaney, *Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements*, 93 MARQ. L. REV. 875, 903–04 (2009) (advocating legislation because DOJ guidelines can be changed and do not provide corporations with legal remedies).

53. *A Mammoth Guilt Trip*, *supra* note 48; *see also The Criminalisation of American Business*, *supra* note 37 ("Since the cases never go to court, precedent is not established, so it is unclear what exactly is illegal. That enables future shakedowns, but hurts the rule of law and imposes enormous costs."). Reilly writes in the context of the Foreign Corrupt Practices Act (FCPA):

> The primary way jurisprudence (meaning precedents, legal opinions, and foundational principles and theories pursuant to a particular statute or area of the law) is developed is through litigation trials, jury verdicts, and appellate court decisions. That is not happening with the FCPA because cases are generally not going to trial but are instead being resolved mostly through DPAs and NPAs.

Reilly, *supra* note 49, at 358. As Garrett notes in the broader context:

> Scholars have observed that courts rarely ensure that underlying substantive criminal statutes are interpreted narrowly or that vagueness is eliminated, in part due to separation of powers deference. Congress continues to pass an increasing number of broad, ill-defined statutes. Where courts do not narrow the meaning of such statutes, prosecutors fix their meaning in practice, so that in effect the legislature has delegated common law crime-making authority to prosecutors.

Garrett, *supra* note 20, at 933–34 (footnotes omitted).

federal prosecutors have been able to attain large concessions from corporations for conduct that no court has held to be a violation of law.[54]

Further, once an N/DPA is formed, the corporation's troubles do not end. Once the corporation has spilled the beans and can no longer plausibly proclaim their innocence, prosecutors have incredible leverage to demand fundamental changes to the corporation.[55] This power is the "sword of Damocles" above the corporation's head.[56] In most N/DPAs, the prosecutor will have the power to unilaterally declare breach of the deal, making their interpretation of the conditions final.[57]

2. The Leniency Critique.—Another groups of critics has argued that prosecutors' unreviewable discretion when shaping corporate N/DPAs has allowed them to be far too lenient to corporations. These critics accuse federal prosecutors of being swayed by the power of corporations.[58]

This group balks at sweetheart deals following massive corporate wrongdoing. They typically claim that the negotiated fines are too small for the scale of the corporation's malfeasance, the conditions are too weak for the massive task of reforming corporate culture, or culpable individuals are allowed to walk away. For example, HSBC, a massive international bank that was involved in "nearly a trillion dollars' worth of money laundering, much of it from drug trafficking,"[59] entered into a DPA in 2012 where it

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54. *See* Bharara, *supra* note 47, at 73–75 (analyzing the externalities that implicate legal rules with respect to corporations). Such a state of affairs has its roots in the mismatch between manager incentives and shareholder interest. *The Criminalisation of American Business*, *supra* note 37 ("For their managers, the threat of personal criminal charges is career-ending ruin. Unsurprisingly, it is easier to empty their shareholders' wallets. To anyone who asks, 'Surely these big firms wouldn't pay out if they knew they were innocent?', the answer is: oddly enough, they might.").

55. *See* Greenblum, *supra* note 44, at 1884–85 (describing the strength of prosecutors' power once corporations sign a deferral agreement).

56. *Id.* at 1884.

57. *Id.*

58. *See* BRANDON L. GARRETT, TOO BIG TO JAIL 1 (2014) (referring to a corporate prosecution as a battle between David and Goliath where the United States is David). Russell Mokhiber, Editor, Corp. Crime Reporter, Address at the National Press Club, Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements (Dec. 28, 2005), http://www.corporatecrimereporter.com/deferredreport.htm [https://perma.cc/MK3J-T5SC] (arguing that DPAs lack the same stigmatic effect that accompanies a conviction and thus cannot attain the same deterrence value); 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/6ZQ3-2CUS]. *But see* Henning, *supra* note 49 (arguing that N/DPAs, despite being largely nonpunitive in nature, can reform corporate culture by reducing the risk of corporate crime without causing severe business consequences for the company); Cortney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 451–52 (2010) (defending the expansion of NPAs and DPAs on the ground that they elicit cooperation by corporations and lower the cost of investigation for the government).

59. Uhlmann, *supra* note 33.

agreed to pay "about $1.9 billion and beef up its compliance measures."[60] Other examples of perceived leniency abound: the DPA with JPMorgan Chase over its role in the Madoff Ponzi scheme;[61] an NPA with Massey, the owner of a mine who concealed over 300 safety violations from government inspectors, resulting in a mine disaster in 2010 which left twenty-nine dead;[62] a $667 million DPA with Standard Chartered Bank, a London-based conglomerate accused of hiding 60,000 secret transactions in Iranian funds worth $250 billion;[63] and a $900 million DPA with General Motors regarding its failure to disclose conduct which "affirmatively misled consumers" about a "potentially lethal safety defect" where no individuals were criminally charged.[64] For these critics, these deals demonstrate that federal prosecutors will avoid sparring with large corporations.[65] The fact that "not a single high-level executive has been successfully prosecuted in connection with the recent financial crisis" further suggests that the DOJ isn't putting the screws to the worst offenders.[66]

These commentators argue that the DOJ should let civil enforcers cope with the small fish. This would free up resources to pursue convictions against truly egregious violators.[67] Animating this critique is a concern that N/DPAs lack the same stigmatic effect that accompanies a conviction and thus cannot attain the same deterrence value.[68] The N/DPA "middle ground" should be abandoned, and prosecutors should only seek conviction or decline

60. Peter J. Henning, *In Bank Settlements, Fines but No Accountability*, N.Y. TIMES: DEALBOOK (Dec. 12, 2012), http://dealbook.nytimes.com/2012/12/12/in-bank-settlements-big-fines-but-no-accountability [https://perma.cc/NL35-L5T7].

61. Uhlmann, *supra* note 33.

62. *Id.*

63. Kristie Xian, Note, *The Price of Justice: Deferred Prosecution Agreements in the Context of Iranian Sanctions*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 631, 631–33 (2014).

64. General Motors Company—Deferred Prosecution Agreement, No. 1:15-cv-07342 (S.D.N.Y.), ECF No. 1–1 at 3, 34–35.

65. *See, e.g.*, David M. Uhlmann, *Deferred Prosecution and Non-prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1324 (2013) (arguing that the DOJ "nearly always fares at least as well as it would have with a corporate prosecution and without investing the investigative, prosecutorial, or judicial resources that might be needed in a corporate prosecution").

66. Rakoff, *supra* note 58.

67. *See* Uhlmann, *supra* note 65, at 1343 (arguing that "[i]f a particular violation does not warrant criminal enforcement . . . the government can and should use civil or administrative enforcement to impose penalties and any corrective actions").

68. *Id.* at 1302; Mokhiber, *supra* note 58. *But see* Larry A. Breuer, Assistant Attorney Gen., U.S. Dep't of Justice, Address at the New York City Bar Association (Sept. 13, 2002), https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association [https://perma.cc/764R-YGTY] (arguing that "a DPA has the same punitive, deterrent, and rehabilitative effect as a guilty plea"); Christie & Hanna, *supra* note 51, at 1043, 1059 (arguing that N/DPAs have deterrence value because they give prosecutors options unavailable in criminal prosecutions).

to prosecute.[69] A key part of this critique rests on new empirical evidence that the corporate death penalty is, in fact, a myth.[70] In the absence of severe collateral consequences, the benefits of N/DPAs can be acquired through convictions to secure corporate-compliance programs.[71]

3. Proposals for N/DPA Reform.—Corporate N/DPAs are under attack from multiple directions, but existing statutes do not allow courts to reign in alleged abuses. Despite disagreements over the goals of reform, both sides do find some common ground—that the Judiciary should have more than a pro forma role in negotiation and implementation of N/DPAs.[72]

Congress has looked into modifying the Speedy Trial Act to expand judicial review of N/DPAs.[73] The proposed Accountability in Deferred Prosecution Act (ADPA) of 2014 included a provision that required judicial approval of N/DPAs.[74] The ADPA requires the Attorney General to promulgate public guidelines delineating when federal prosecutors should enter into N/DPAs with corporate entities.[75] Those guidelines direct prosecutors on a variety of areas: whether an independent monitor is warranted, what terms and conditions are appropriate, which methods for

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69. *See* Uhlmann, *supra* note 65, at 1302 (asserting that N/DPAs may only be necessary for "less serious violations where there are no civil or administrative remedies or perhaps in the rare situation where prosecutors can demonstrate that a criminal conviction would cause unacceptable harm to innocent third parties").

70. Markoff, *supra* note 37, at 827. But see Ainslie, *supra* note 37, at 117–19, for a defense of the corporate death penalty theory.

71. Markoff, *supra* note 37, at 830.

72. *See e.g.*, Court E. Golumbic & Albert D. Lichy, *The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy*, 65 HASTINGS L.J. 1293, 1342–44 (2014) (defending meaningful judicial review as a means to avoid the perception that some companies are "too big to jail"); Greenblum, *supra* note 44, at 1901 (noting that judicial involvement can protect "parties whose interests may be unnecessarily compromised by the prosecutor's unilateral imposition of the deferral terms"); Alex B. Heller, *Corporate Death Penalty: Prosecutorial Discretion and the Indictment of SAC Capital*, 22 GEO. MASON L. REV. 763, 798 (2015) (arguing that judicial review can help alleviate prosecutor's "abuse of leverage and undue pressure"); Reilly, *supra* note 49, at 392 (advocating judicial review as a remedy for unbalanced negotiation leverage and as a means to protect employee and shareholder interests). But not all commentators believe that judicial review is necessary or wise. Uhlmann advocates that the DOJ should engage in internal reforms of its DPA decision-making process. Uhlmann, *supra* note 65, at 1341. Bharara argues that attempts to restrict prosecutorial discretion are fruitless; prosecutors will simply find new, creative ways to avoid judicial oversight. Bharara, *supra* note 47, at 56. Rather than attempt to restrict prosecutorial discretion, he advocates changing the underlying substantive law to make attachment of corporate criminal liability more difficult. *Id.* at 113. Bourjaily advocates wholesale abolition of corporate DPAs. Gordon Bourjaily, *DPA DOA: How and Why Congress Should Bar the Use of Deferred and Non-prosecution Agreements in Corporate Criminal Prosecutions*, 52 HARV. J. LEGIS. 543, 544 (2015).

73. Bills have been proposed before multiple Congresses. Accountability in Deferred Prosecution Act of 2014, H.R. 4540, 113th Cong. § 7 (2014); Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong. § 7 (2009); Accountability in Deferred Prosecution Act 2008, H.R. 6492, 110th Cong. § 7 (2008).

74. H.R. 4540 § 7(a).

75. *Id.* § 4(a).

determining breach are appropriate, how long should the agreement last, and what constitutes cooperation.[76] N/DPAs would only be approved by a court if they are "consistent with the guidelines for such agreements and . . . in the interests of justice."[77]

This proposed reform raises a key question: Can Congress authorize judicial review of corporate N/DPAs without running afoul of the Executive's constitutional authority regarding nonprosecution? Some do not think so.[78] I disagree. But before I dive into that question, I review existing case law addressing judicial review of corporate DPAs under the Speedy Trial Act.

II. Existing Case Law on Judicial Review of Corporate DPAs

District courts rarely reject or modify proposed DPAs.[79] They typically approve of the DPA without any published ruling.[80] This section discusses three cases where the district court took a more active role in reviewing the proposed DPA. It also discusses in depth the D.C. Circuit opinion in *Fokker Services*. There, the appellate court rebuked the district court's expansive understanding of its role under the Speedy Trial Act.

A. United States v. Fokker Services B.V. *(D.D.C.)*

Fokker Services, a Dutch aerospace services provider, found itself in some hot water when the U.S. government discovered it was exporting American aircraft parts, technology, and services to the Iranian military.[81] From 2005 to 2010, Fokker Services sent aircraft from its Iranian, Sudanese, and Burmese customers to the United States for service and repair.[82] U.S. sanctions on these three countries prohibits this sort of transaction without preapproval.[83] Fokker Services exports were not preapproved.[84] Instead, to avoid detection, Fokker Services concealed its customers' affiliation with sanctioned countries from the U.S. government and U.S. businesses.[85]

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76. *Id.* § 4(b).

77. *Id.* § 7(a).

78. Michael Patrick Wilt, *Who Watches the Watchmen? Accountability in Federal Corporate Criminal Prosecution Agreements*, 43 AM. J. CRIM. L. 61, 68 (2015) ("The lack of an effective judicial oversight system is a serious problem with the current prosecution agreement method. Judicial oversight is unlikely to occur without a congressional law requiring the DOJ to submit its agreements for judicial review. However, whether such a law would even be constitutional is an open question." (footnote omitted)).

79. Reilly, *supra* note 49, at 393.

80. Garrett, *supra* note 20, at 922.

81. United States v. Fokker Servs. B.V., 79 F. Supp. 3d 160 (D.D.C. 2015), *rev'd*, 818 F.3d 733 (D.C. Cir. 2016).

82. *Id.* at 162 & n.2.

83. *Id.* at 161–62.

84. *Id.* at 162.

85. *Id.*

Fokker Services' management was aware of U.S. export laws and its own subterfuge, yet it continued the illegal dealings.[86]

But in 2010, Fokker Services changed its ways. It disclosed its transactions to U.S. regulators, hired an outside law firm to conduct internal investigations, and began to cooperate with U.S. law enforcement and regulatory authorities.[87] It stopped servicing sanctioned-country customers' aircraft to the extent such services violated U.S. law.[88] It fired its president, demoted other personnel, and trained its employees in U.S. export-control laws.[89] It adopted a new compliance program and changed its service contracts to indicate that it will not engage in any exportation or re-exportation in violation of U.S. law.[90] Finally, it cut ties with banks in the sanctioned countries and closed its Iranian office.[91]

In 2014, the U.S. government filed an information, charging Fokker Services with conspiracy to unlawfully export U.S.-origin goods and services to Iran, Sudan, and Burma.[92] On the same day, the government filed a DPA with the court.[93] In the DPA, Fokker Services agreed to admit responsibility, pay $10.5 million, cooperate with U.S. authorities, continue its new compliance program, and comply with U.S. export laws.[94] The U.S. agreed to not prosecute Fokker Services, and, after eighteen months, dismiss its charges.[95] Finally, the government moved to exclude time under the Speedy Trial Act.[96]

The district court denied the motion.[97] The court, quoting the Speedy Trial Act, concluded that § 3161(h)(2)'s "plain language" calls for court approval before granting a motion to exclude time.[98] Section 3161(h)(2) excludes "[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."[99] Judge Leon then set about determining when a district court should withhold approval.[100]

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86. *Id.* at 162–63.
87. *Id.* at 163.
88. *Id.*
89. *Id.*
90. *Id.* at 163–64.
91. *Id.* at 164.
92. *Id.* at 161.
93. *Id.* at 163.
94. *Id.* at 164.
95. *Id.*
96. *Id.* at 163.
97. *Id.* at 161.
98. *Id.* at 164.
99. 18 U.S.C. § 3161(h)(2) (2012) (emphasis added).
100. *Fokker Servs. B.V.*, 79 F. Supp. 3d at 164.

The court settled on an analysis heavily reliant on the doctrine of supervisory power.[101] Federal judges possess supervisory power "to protect the integrity of the judicial process."[102] Pursuant to its supervisory power, the court has not only the authority but the "responsibility" to deny "legal redress in appropriate situations in order to maintain respect for the law and private confidence in the administration of justice."[103]

The parties' proposed DPA implicated the "integrity of the judicial process" in two ways. First, through their motion to exclude time, the parties were effectively asking for the court's blessing of the DPA.[104] Second, by leaving the charges on the court's docket, the court would be serving "as the leverage over the head of the company."[105]

Tailoring his supervisory-power analysis to the situation at hand, Judge Leon acknowledged the Executive's plenary authority to refuse to prosecute a case and to dismiss existing charges.[106] Indeed, he accepted that "this Court would have no role here if the Government had chosen not to charge Fokker Services with any criminal conduct—even if such a decision was the result of a non-prosecution agreement."[107] But Judge Leon nevertheless concluded that such plenary authority was not implicated in this case.[108] The government had charged Fokker Services.[109] The charges were still on the court's docket, and would remain there for at least eighteen months.[110]

Having considered the government's plenary-authority argument, the court turned to whether approving the DPA would compromise the "integrity of the judicial process." Judge Leon found the proposed penalties and conditions anemic relative to Fokker Services' wrongdoing.[111] Fokker Services would only pay $10.5 million in fines even though it collected $21 million in revenue from its illegal transactions.[112] No employees would be prosecuted, and many employees involved in the illegal transactions would keep their jobs.[113] No independent monitor would be installed and no periodic reports would be required after the eighteen-month period.[114]

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101. *Id.* at 165.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 167.
112. *Id.* at 166.
113. *Id.*
114. *Id.*

This was beyond the pale for Judge Leon. Given the length of Fokker Services' wrongdoing and the fact that their conduct was for the benefit of "one of our country's worst enemies," Judge Leon refused to lend his judicial imprimatur to the DPA.[115] He concluded that doing so would "undermine the public's confidence in the administration of justice and promote disrespect for the law."[116]

B. United States v. Fokker Services B.V. *(D.C. Cir.)*

The government petitioned for a writ of mandamus, seeking vacatur of the district court's denial of the motion to exclude time.[117] The D.C. Circuit granted the requested relief.[118] Judge Srinivasan, writing for the court, concluded that the Speedy Trial Act's "with the approval of the court" language did not grant to the district court the authority to withhold approval based on who the government charges and what they are charged with.[119]

The court began its construction of the Speedy Trial Act by looking to the Constitution. It observed that the "Executive's primacy in criminal charging decisions is long settled."[120] To support this, it cited three sources of the Executive's power in this domain: the text of Article II,[121] separation-of-powers principles,[122] and prudential considerations.[123] The court did not precisely state which of these sources gives rise to the Executive's power to negotiate and enter into DPAs. Rather, it concluded that these settled principles broadly "counsel against interpreting statutes and rules in a manner that would impinge on the Executive's constitutionally rooted primacy over criminal charging decisions."[124]

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115. *Id.* at 167.

116. *Id.*

117. United States v. Fokker Servs. B.V., 818 F.3d 733, 738 (D.C. Cir. 2016).

118. *Id.*

119. *Id.*

120. *Id.* at 741.

121. *Id.* ("That authority stems from the Constitution's delegation of 'take Care' duties, and the pardon power to the Executive Branch." (citations omitted)).

122. *See id.* ("Decisions to initiate charges, or to dismiss charges once brought, 'lie[ ] at the core of the Executive's duty to see to the faithful execution of the laws.'" (quoting Cmty. for Creative Non-Violence v. Pierce, 786 F.2d 1199, 1201 (D.C. Cir. 1986))). The Court also cited *In re Aiken County*, a decision that expressly cites separation-of-powers as one of the origins of the Executive's nonprosecution discretion. 725 F.3d 255, 264 (D.C. Cir. 2013) ("The Executive's broad prosecutorial discretion and pardon powers illustrate a key point of the Constitution's separation of powers.").

123. *Fokker Servs. B.V.*, 818 F.3d at 741. ("The decision whether to prosecute turns on factors such as 'the strength of the case, the prosecution's general deterrence value, the [g]overnment's enforcement priorities, and the case's relationship to the [g]overnment's overall enforcement plan.' The Executive routinely undertakes those assessments and is well equipped to do so. By contrast, the Judiciary, as the Supreme Court has explained, generally is not 'competent to undertake' that sort of inquiry." (citations omitted)).

124. *Id.* at 742.

Next, the court analyzed a rule and a statute containing analogous language to the Speedy Trial Act's "with the approval of the court" clause.[125] The D.C. Circuit had previously interpreted both narrowly to avoid impinging the Executive's constitutional authority.[126]

The court first examined Rule 48(a) of the Federal Rules of Criminal Procedure. The rule requires a prosecutor to obtain "leave of court" before dismissing charges against a criminal defendant.[127] A broad reading of the rule would allow a court to deny leave based on its assessment that the defendant should stand trial or that the remaining charges fail to address the gravity of the wrongdoing.[128] The Supreme Court has rejected this reading.[129] Rather, it has held that approval should be withheld only to protect the defendant from prosecutorial harassment—i.e., when the "[g]overnment moves to dismiss an indictment over the defendant's objection."[130]

The court then turned to the Tunney Act. The Tunney Act, which directs district courts to enter a proposed antitrust consent decree if it is "in the public interest,"[131] has been interpreted narrowly.[132] Again, driven by concerns that an expansive understanding of the court's power would raise constitutional questions, courts have narrowed the scope of district courts' power to review consent decrees.[133]

In sum, the court concluded that if "leave of court" and "public interest" should be interpreted narrowly to avoid letting courts second-guess charging decisions, then so should the Speedy Trial Act's "with the approval of the court" language.[134]

The court then proceeded to its major move—characterizing DPAs as charging decisions.[135] To establish this, the court analogized DPAs to the paradigmatic charging decision—decisions to dismiss charges.[136] It observed two similarities. First, like decisions to dismiss charges, "the decision to seek dismissal pursuant to a DPA . . . ultimately stems from a conclusion that additional prosecution or punishment would not serve the public interest."[137] Second, the same prudential considerations surrounding "the prosecution's initiation and dismissal of charges equally applies to review of the

125. *Id.*
126. *Id.*
127. FED. R. CRIM. P. 48(a).
128. *Fokker Servs. B.V.*, 818 F.3d at 742.
129. *Id.*
130. *Id.* (quoting Rinaldi v. United States, 434 U.S. 22, 29 n.15 (1977)).
131. *Id.* (quoting 15 U.S.C. § 16(e) (2012)).
132. *Id.* at 742–43.
133. *Id.* at 743.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*

prosecution's decision to pursue a DPA and the choices reflected in the agreement's terms."[138] "As with conventional charging decisions, a DPA's provisions manifest the Executive's consideration of factors such as the strength of the government's evidence, the deterrence value of a prosecution, and the enforcement priorities of an agency, subjects that are ill-suited to substantial judicial oversight."[139]

The court then analyzed the Speedy Trial Act's text and history to determine whether either dictates a contrary conclusion. Neither did.[140] The text of § 3161(h)(2) ties the language of "approval of the court" to the DPA's "purpose of allowing the defendant to demonstrate his good conduct."[141] The legislation's history corroborates this interpretation.[142] Accordingly, the district court's focus should be on whether the DPA is geared toward establishing compliance with the law and is not merely a pretext to evade the Speedy Trial Act's time constraints.[143]

The court then turned to the argument that district courts have the same leeway to review DPAs as they do over proposed plea agreements under Rule 11 of the Federal Rules of Criminal Procedure. The court rejected this argument.[144] In doing so, it relied upon a distinction between charging power and sentencing power.[145] Under Rule 11, district courts retain some discretion to review proposed plea deals.[146] This discretion is not unfettered. A court may not reject a plea deal based on a mere disagreement with a prosecutor's underlying charging decisions.[147] But district courts do retain the authority to reject deals because they are too harsh or too lenient.[148] Judges may review plea bargains because plea bargains implicate sentencing

138. *Id.* at 744 (internal citations omitted).

139. *Id.*

140. *Id.* at 744–45.

141. *Id.* at 744 (quoting 18 U.S.C. § 3161(h)(2) (2012)).

142. *Id.* at 745.

143. *Id.* at 744.

144. *Id.* at 745.

145. *Id.* at 746.

146. *Id.* at 745.

147. *Id.* (citing United States v. Maddox, 48 F.3d 555, 556 (D.C. Cir. 1995), and United States v. Ammidown, 497 F.2d 615, 622 (D.C. Cir. 1973)).

148. *See Ammidown*, 497 F.2d at 622 ("The requirement of judicial approval entitles the judge to obtain and evaluate the prosecutor's reasons. That much, indeed, was proposed by the Advisory Committee, and the Supreme Court's amendment obviously did not curtail the proposed authority of the judge. The judge may withhold approval if he finds that the prosecutor has failed to give consideration to factors that must be given consideration in the public interest, factors such as the deterrent aspects of the criminal law. However, trial judges are not free to withhold approval of guilty pleas on this basis merely because their conception of the public interest differs from that of the prosecuting attorney. The question is not what the judge would do if he were the prosecuting attorney, but whether he can say that the action of the prosecuting attorney is such a departure from sound prosecutorial principle as to mark it an abuse of prosecutorial discretion.").

power.[149] The parties enter the plea bargain so that the court can exercise its coercive power over the defendant—by entering a judgment of conviction and sentencing him or her.[150] In contrast, DPAs do not implicate the court's sentencing powers.[151] The judge takes no formal judicial action imposing or adopting the DPA's terms, and the district court enters no judgment of conviction.[152] DPAs do not implicate sentencing power, and therefore judges may not review them.[153]

Finally, the D.C. Circuit concluded that the district court improperly reviewed the DPA for whether it brought charges against the right people or sought the right remedies.[154] Rather, "the court should have confined its inquiry to examining whether the DPA served the purpose of allowing Fokker to demonstrate its good conduct."[155]

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Turning away from the Fokker Services saga, two other district courts have considered the breadth of district courts' authority under the Speedy Trial Act to review the terms of DPAs. Both have held that the Speedy Trial Act affords the Judiciary a larger role than the D.C. Circuit found in *Fokker Services*. But in neither case did the district court withhold approval of the DPA. I address both below.

C. United States v. Saena Tech Corp.[156]

In *United States v. Saena Tech Corp.*, the district court considered and ultimately approved two DPAs—one for Saena Tech and another for Intelligent Decisions.[157] Both companies were charged with public bribery.[158] Both DPAs deferred prosecution for two years in exchange for payment of fines and enactment of compliance measures.[159] The government did not seek criminal prosecution of any employees based on Saena Tech's bribery.[160] In contrast, the government charged and obtained guilty pleas

149. *See Fokker Servs. B.V.*, 818 F.3d at 746.
150. *See id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 747.
156. 140 F. Supp. 3d 11 (D.D.C. 2015).
157. *Id.* at 13.
158. *Id.* at 14.
159. *Id.*
160. *Id.*

from two employees of Intelligent Decisions in connection with the crime covered by the DPA.[161]

Judge Sullivan first considered the legislative history of § 3161(h)(2).[162] He concluded that "[t]he legislative history . . . demonstrates that Court involvement in the deferral of a prosecution was specifically intended by Congress when it passed this legislation."[163]

The court then observed that its interpretation of the Speedy Trial Act must account for the Executive's primacy in charging decisions.[164] The court recognized three sources of this primacy: text,[165] structure,[166] and prudence.[167]

Returning to § 3161(h)(2), the court concluded that "its authority under the Speedy Trial Act is limited to assessing whether the agreement is truly about diversion"—i.e., whether "the agreement is intended to hold prosecution in abeyance while a defendant demonstrates good conduct."[168] The court rejected the amicus's argument that "the Court should fashion its own standards for approving or rejecting an agreement on a case-by-case basis, looking to standards provided for court oversight of other types of agreements."[169] Nevertheless, the court emphasized the agreement's "fairness and adequacy" is still relevant under this limited standard.[170] The court hypothesized that an agreement void of any punitive or deterrence-based measures could not be designed to reform the defendant and accordingly should be rejected.[171] A DPA which contained only "vague" or "sham" conditions would face a similar fate.[172]

Considering the two DPAs before it, the court found that both contained "most of the hallmarks of an agreement that is designed to reform a

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161. *Id.*

162. *Id.* at 22–23.

163. *Id.* at 25.

164. *Id.* at 27.

165. *Id.* at 28 ("Not only is the Judicial Branch ill-suited to review prosecutorial decisions—given the complex factors involved—but judicial intervention would also undermine the Executive Branch's ability to 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. art. II, § 3)).

166. *Id.* at 27 ("Review of a Deferred-Prosecution Agreement Must Recognize the Expertise of Prosecutors and the *Separation-of-Powers* Concerns Inherent in Judicial Review of Charging Decisions." (emphasis added)); *id.* at 28 ("Furthermore, 'a district judge must be careful not to exceed his or her constitutional role.' The judiciary is separated from the prosecutorial function 'keep[ing] the courts as neutral arbiters in the criminal law generally.' 'When a judge assumes the power to prosecute, the number [of branches] shrinks to two.'" (internal citations omitted)).

167. *Id.* at 28 ("[T]he decision to prosecute is 'particularly ill-suited to judicial review.'" (quoting Wayte v. United States, 470 U.S. 598, 607 (1985))).

168. *Id.* at 30.

169. *Id.*

170. *Id.* at 31.

171. *Id.*

172. *Id.*

company's conduct."[173] Both contained substantial fines.[174] Both included a corporate-compliance program.[175] The court was not perturbed by the lack of independent monitors given both companies' small size and their appointment of outside counsel to serve as monitor.[176] Accordingly, the court approved the government's motion for an exclusion of time.[177]

D. United States v. HSBC Bank USA[178]

In *United States v. HSBC Bank USA*, the district court reviewed and ultimately approved a proffered DPA.[179] But pursuant to the court's supervisory power, Judge Gleeson concluded that the court's approval was "subject to a continued monitoring of [the DPA's] execution and implementation."[180]

In 2012, the U.S. government charged HSBC Bank USA with violations of the Bank Secrecy Act.[181] HSBC had failed to implement an effective anti-money laundering program, allowing drug traffickers to launder at least $881 million in drug trafficking proceeds through the bank.[182] The information also charged HSBC Bank's holding company with willfully facilitating transactions that circumvented U.S. sanctions.[183] Along with the information, the government filed a DPA, a statement of facts outlining the HSBC defendants' wrongdoing, a corporate-compliance monitor agreement, and a letter requesting that the Court hold the case in abeyance for five years in accordance with the DPA and to exclude time under the Speedy Trial Act.[184]

The court observed the Judiciary's supervisory power exists for the court to ensure that it does not "lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety."[185] By filing the DPA with the court and requesting for a time extension, the parties "asked the Court to lend precisely such a judicial imprimatur."[186]

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173. *Id.* at 37.
174. *Id.* at 35–37.
175. *Id.*
176. *Id.*
177. *Id.* at 46–47.
178. No. 12–CR–763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).
179. *Id.* at *1.
180. *Id.* at *7.
181. *Id.* at *1.
182. *Id.* at *1, *8.
183. *Id.* at *1.
184. *Id.*
185. *Id.* at *6.
186. *Id.*

The Court then laid out both concrete and hypothetical examples of when it may be forced to intervene "to protect the integrity of the Court"[187]: when corporate-cooperation requirements violate a company's attorney–client privilege and work-product protections, or its employees' Fifth or Sixth Amendment rights; when a remediation is an "offer to fund an endowed chair at the United States Attorney's alma mater"; or when a replacement monitor's "only qualification for the position is that he or she is an intimate acquaintance of the prosecutor."[188] Accordingly, to protect itself, the court directed the government to file quarterly reports for the five years that the case would remain pending.[189]

* * *

Having considered the existing case law addressing the Judiciary's authority to review DPAs, the stage is now set for me to defend my thesis.

III. Congress Can Constitutionally Subject Corporate N/DPAs to Meaningful Judicial Review

Meaningful judicial review of corporate N/DPAs is constitutionally permitted. Specifically, Congress could establish, or require the Attorney General to establish, judicially reviewable criteria that prosecutors must follow when determining whether to enter into a corporate N/DPA, the terms of a corporate N/DPA, and whether the corporation is complying with those terms. The rest of this Note defends this proposition.

Executive nonprosecution discretion emanates from three sources: (1) the text of Article II, (2) separation-of-powers principles, and (3) prudential considerations. In turn, the source of discretion determines how far Congress may go in regulating an executive decision before hitting the constitutional third rail. Textually grounded discretion is off limits. Prudentially derived discretion may be reined in if Congress makes its intent to do so clear. The proper analysis for separation-of-powers questions is sharply contested. Two modes of analysis exist: formalist or functionalist. I defend, in this context, a functionalist approach.

Using this tripartite configuration, I argue that prosecutors do not exercise authority constitutionally protected by the text of Article II when fashioning corporate N/DPAs. Rather, the discretion is largely a product of prudential considerations with a constitutional remainder informed by separation-of-powers principles. This constitutional remainder does not proscribe a statute like the ADPA. A statute like the ADPA would not

187. *Id.*
188. *Id.*
189. *Id.* at *1.

threaten the effective balance of power between the branches. In fact, such a statute would rebalance a system thrown off-kilter. Corporate N/DPAs allow the Executive to usurp core judicial functions—guilt adjudication and sentencing. Accordingly, judicial review is a necessary check on a system that now aggrandizes power in the Executive.

A functionalist approach to this particular separation-of-powers question is warranted.[190] A formalist separation-of-powers analysis in this context elevates form over substance. A formalist analysis turns on labels. The formalist would label all N/DPAs unreviewable "charging decisions" simply because they look like decisions to decline prosecution or drop charges. This ignores the very nature of the decisions being made. For the corporate defendant, the phase when investigation is ongoing but before charges are brought is the guilt-adjudication and sentencing phase. The penalties just for getting hit with an indictment are so severe that few corporations can risk having their day in court. Due to this incredible trial penalty, many questions of corporate criminal law remain unsettled. Negotiations therefore do not operate against a backdrop of precedent that courts (and juries) had some role in shaping.

In short, reliance on a formalist approach flies in the face of separation-of-powers' purpose: stopping a single branch from being the sole arbiter of an entity's destiny. In fact, because corporate N/DPAs are negotiated against a backdrop the other branches have little role in shaping, the Executive has become the sole arbiter of an entire class's fate.

Before diving in, I must clarify the scope of my argument. I agree with the D.C. Circuit in *Fokker Services* that under the current statutory regime, Congress has not authorized meaningful judicial review of corporate DPAs. (The Speedy Trial Act does not reach NPAs.) The D.C. Circuit in *Fokker Services* correctly held that the Speedy Trial Act as it currently stands "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."[191] The court's interpretation correctly accounts for prudential considerations counseling against robust judicial review absent congressionally provided criteria. Resting its decision

190. This argument builds off of Rachel Barkow's influential article, *Separation of Powers and the Criminal Law*. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006). In it, Barkow argues for a formalist approach to separation of powers in the context of criminal law to preserve judicial authority. *Id.* at 994–97. I flip and reverse her argument. It is precisely because the Executive's invocation of nonprosecution discretion in the context of corporate DPAs has the effect of usurping judicial power over guilt and sentencing that a functionalist approach is needed.

191. United States v. Fokker Servs. B.V., 818 F.3d 733, 738 (D.C. Cir. 2016). Instead, according to the D.C. Circuit, courts should confine their "inquiry to examining whether the DPA served the purpose of allowing [the defendant] to demonstrate its good conduct" and should not consider whether the "prosecution ha[s] been unduly lenient in its charging decisions and in the conditions agreed to in the DPA." *Id.* at 747.

on its interpretation of the Speedy Trial Act, the D.C. Circuit did not answer the question of whether Congress had the power to authorize judicial review of N/DPA.

Congress has this power. But to exercise it, Congress must speak clearly.[192] A "clear statement rule"—where the Executive's nonprosecution discretion would be circumscribed only if Congress expresses a clear intent—would give adequate weight to important prudential considerations that militate in favor of broad executive nonprosecution power.[193]

My argument in this section is divided into several subparts. In subpart III(A), I set forth the three origins of executive nonprosecution discretion—text, structure, and prudence. I then discuss the implications of determining the origin of a particular exercise of nonprosecution discretion. Finally, I argue that congressional authorization of meaningful judicial review of corporate N/DPAs implicates only separation-of-powers principles and prudential considerations. In subpart III(B), I argue that under a functionalist separation-of-power analysis, judicial review of corporate DPAs is constitutional. I then defend this functionalist approach. In subpart III(C), I reconcile my argument with extant case law.

A. The Origins of Executive Nonprosecution Discretion: Text, Structure, and Prudence

Courts and commentators have struggled to identify the origin of the Executive's nonprosecution discretion.[194] That is because there is not one origin but three: the text of Article II, separation-of-powers principles, and judicially constructed prudential doctrines.

1. Text.—Three clauses in the Constitution provide potential textual origins for executive nonprosecutorial discretion: the Take Care Clause,[195]

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192. *Cf.* United States v. Batchelder, 442 U.S. 114, 122 (1979) ("[T]he maxim that statutes should be construed to avoid constitutional questions . . . is appropriate only when [an alternative interpretation] is fairly possible from the language of the statute." (internal quotations omitted)).

193. While clear statement rules are most commonly conceived of as a federalism-protecting canon of interpretation, they can also extend to other "traditionally sensitive areas." United States v. Bass, 404 U.S. 336, 349 (1971) (noting that "the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision").

194. *See* Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 3 (2009) ("The origins of prosecutorial discretion in the federal criminal justice system are poorly understood.").

195. U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed . . . ."). While read most naturally as a duty, a compelling case can be made that the original meaning of the clause delegated a power to the Executive. *See* Stephanie A.J. Dangel, *Is Prosecution a Core Executive Function?* Morrison v. Olson *and the Framers' Intent*, 99 YALE L.J. 1069, 1077–78 (1990) (duty). *But see* Delahunty & Yoo, *supra* note 13, at 800 n.104 (both duty and power).

the Vesting Clause,[196] and the Pardon Power Clause.[197] Tracking down and regurgitating the voluminous case law and commentary on these three clauses would be a daunting task and not particularly helpful for addressing my problem. While the Take Care Clause reads naturally as imposing a duty upon the President to enforce legislation to its full extent,[198] some commentators have argued that it should be read as a grant of power.[199] Maddeningly, key case law points in opposite directions over whether the Constitution's text renders executive nonenforcement decisions unreviewable.[200]

Cutting through the confusion, Professor Price aptly observes that the "Constitution by its terms obligates the President to 'take Care that the Laws be faithfully executed.'" The real action concerns the other two origins—structure and prudence.[201] Still, "courts confront very real practical and

196. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."). It remains unclear whether criminal prosecution is an "executive Power." *Compare* Morrison v. Olson, 487 U.S. 654, 704–05 (1988) (Scalia, J., dissenting) (positing that prosecutorial functions are the exclusive province of the Executive), *with* Dangel, *supra* note 195, at 1070 (arguing that prosecutorial functions were not traditionally within the exclusive province of the Executive).

197. U.S. CONST. art. II, § 2 ("The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."); *see generally In re* Aiken Cnty., 725 F.3d 255, 262 (D.C. Cir. 2013) (citing all three clauses as the sources of nonprosecution discretion).

198. Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 282 (1989).

199. Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 539 (2005). In the context of the Vesting Clause, the Supreme Court has not clarified whether the Clause vests additional powers in the President, or whether it is purely redundant. *Compare* Myers v. United States, 272 U.S. 52, 117–18 (1926) (vests additional powers), *with* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–88 (1952) (confers only powers enumerated in Article II).

200. Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571, 1572 (2016).

201. As Price writes:

> [C]ourts confront very real practical and institutional challenges in ensuring faithful execution of prohibitory statutes by enforcement officials. To begin with, directly compelling an enforcement suit in any particular case would raise acute separation-of-powers concerns, as it would collapse the constitutional separation of judicial and executive power and compromise the court's neutrality in adjudicating the resulting lawsuit. Beyond this particular formal problem, moreover, insofar as enforcement officials must pick and choose between cases because they cannot do everything, courts will rarely have objective benchmarks for assessing whether enforcement agencies are focusing on the right priorities, or indeed whether they are genuinely doing their best at all. The upshot is that exercise of executive nonenforcement authority, like certain other core executive functions, is effectively a political question, in the peculiar sense of the "political question doctrine"—it is an area where institutional limitations on courts place a gap between what executive officials ideally should do and what courts will require from them.

Id. at 1573–74 (footnotes omitted).

institutional challenges in ensuring faithful execution of prohibitory statutes by enforcement officials."[202]

2. Structure.—Moving away from the Constitution's text, another potential source of nonprosecution discretion is the Constitution's structure—specifically, the separation-of-powers principles it espouses. While not expressly stated in the Constitution, the principle of separation of powers is impliedly established by the Constitution's creation of three separate branches of government—the Legislature, Executive, and Judiciary—each with distinct powers and duties. The founding generation viewed separation as an essential mechanism to protect liberty and as a crucial bulwark against tyranny.[203]

Strong textual and historical evidence exists that the framers intended all three branches to participate in the process of criminal prosecutions.[204] Congress must prospectively criminalize conduct,[205] the Executive must decide to prosecute,[206] and the Judiciary must agree to convict and sentence.[207] Forcing all three branches to participate lessens the risk that a single tyrannical branch can use the criminal law to eliminate its enemies or a disfavored local majority.

In the broader range of separation-of-powers cases, two main interpretive strategies exist—formalism and functionalism.[208]

Formalism is characterized by brightline rules.[209] The court first categorizes an action as an exercise of legislative, executive, or judicial

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202. *Id.* at 1573.

203. In his defense of the federal Constitution, James Madison wrote that the "accumulation of all powers, legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

204. Barkow, *supra* note 190, at 1017 ("Under the scheme established by the Constitution, each branch must agree before criminal power can be exercised against an individual.").

205. Federal judges are barred from creating their own crimes. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812).

206. Well actually, maybe not. Literature exists positing that "at the time of the Framing and for some time thereafter, state and *private* prosecutors initiated prosecutions, and prosecutors were often associated with the judicial branch." Barkow, *supra* note 190, at 1003 n.63 (emphasis added). But the literature also reflects that during the framing period, prosecutors retained absolute discretion over *nolle prosequi*, or the power to drop charges, even if they had been filed by another actor. Krent, *supra* note 198, at 296.

207. The Bill of Attainder Clause, the prohibition on ex post facto laws, and limits on Congress's authority to suspend the writ of habeas corpus all work as "express limits on the legislative exercise of judicial power." Barkow, *supra* note 190, at 1013. But also before conviction, a person is entitled to judicial process. U.S. CONST. art. III, § 2, cl. 3 (jury trial right); *id.* amend. VI, cl. 1 (speedy and public trial right).

208. Barkow, *supra* note 190, at 997. Aziz Huq and Jon Michaels have ably criticized the formalism–functionalism division in their recent article, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 355 (2016).

209. Barkow, *supra* note 190, at 997.

power.[210] The court then checks to see if the proper actor exercised the power.[211] Accordingly, a formalist would contend:

- Congress cannot delegate to itself the power of a one-house veto over an Attorney General's decision to allow a deportable alien to stay in the United States. Such a veto is an exercise of legislative power, and legislative power can only be exercised according to the bicameralism and presentment requirements of Article I.[212]
- Congress cannot delegate rulemaking authority to private parties no matter how carefully it specifies an intelligible principle. Article I assigns legislative authority to Congress, and private parties are not Congress.[213]
- Congress cannot give bankruptcy courts the power to decide all matters "related to" a bankruptcy case. The adjudication of "state-created private rights" is for Article III courts, and bankruptcy courts are not Article III courts.[214]
- Congress cannot recognize a foreign state because that is the "exclusive prerogative of the Executive."[215]

And so on.[216] No room in this analysis exists for considerations of whether the law in question promotes a "workable government."[217]

Functionalism, in contrast, is concerned with whether the arrived-at balance of power results in a workable government. It is characterized by standards and balancing. "[F]unctional analysis . . . allows some mixing of power among the branches so long as one branch does not aggrandize its power at the expense of another or otherwise impede a branch from performing its core responsibilities."[218] Accordingly, a functionalist would contend:

- Congress can insulate a special prosecutor from removal by the Attorney General absent good cause because doing so would

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210. *Id.*

211. *Id.*

212. INS v. Chadha, 462 U.S. 919, 959 (1983).

213. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935); *see also* Dep't of Transp. v. Ass'n of Am. R.R.s., 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) ("Congress 'cannot delegate regulatory authority to a private entity.'" (quoting Ass'n of Am. R.R.s. v. Dep't of Transp., 721 F.3d 666, 670 (D.C. Cir. 2013))).

214. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 65–76 (1982) (plurality opinion).

215. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2089, 2094 (2015).

216. *See* Clinton v. City of New York, 524 U.S. 417 (1998); Bowsher v. Synar, 478 U.S. 714 (1986); Barkow, *supra* note 190, at 998 (characterizing the majority opinions in *Bowsher* and *Clinton* as formalist).

217. Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276 (1991).

218. Barkow, *supra* note 190, at 1000.

not sufficiently "impede the President's ability to perform his constitutional duty."[219]

- Congress can delegate authority to establish sentencing laws to an independent commission housed in the Judiciary.[220]

The functionalist focuses on the "practical consequences" of the delegation and not "the label[] of an activity."[221]

3. Prudence.—Finally, executive nonprosecution discretion may have prudential origins. Prudential considerations that favor broad discretion range from skepticism of the Judiciary's institutional competence,[222] concerns about chilling swift executive action,[223] and inertia from long-standing traditions of prosecutorial discretion.[224] These prudential reasons for not second-guessing the Executive give rise to a strong, but ultimately rebuttable, background presumption for interpreting statutes. Congress must speak clearly if it wishes to overcome these prudential doctrines.[225]

To summarize, here are the stakes involved in classifying the origin of a particular exercise of nonprosecution discretion: A nonprosecution decision authorized by the Constitution's text is absolutely immune from congressional encroachment (provided that an external restraint on nonprosecution discretion does not exist).[226] The constitutionality of a congressional regulation on nonprosecution discretion derived from separation-of-powers principles is assessed using either a formalist or

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219. Morrison v. Olson, 487 U.S. 654, 691 (1988).

220. *See* Barkow, *supra* note 190, at 1005–06.

221. Mistretta v. United States, 488 U.S. 361, 393 (1989).

222. The Supreme Court has observed that the decision to prosecute turns on 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." Wayte v. United States, 470 U.S. 598, 607 (1985). The Executive routinely undertakes those assessments. *Id.* The Judiciary does not, and indeed "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought." Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967).

223. United States v. Armstrong, 517 U.S. 456, 465 (1996) (quoting *Wayte*, 470 U.S. at 607).

224. *See, e.g.*, United States v. Cox, 342 F.2d 167, 170–71 (5th Cir. 1965) (citing *nolle prosequi* as a long-standing tradition to justify interpreting a statute to preserve U.S. Attorneys' discretion to file and sign indictments).

225. *See, e.g.*, Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 381 (2d Cir. 1973) ("The mandatory nature of the word 'required' as it appears in [42 U.S.C.] § 1987 is insufficient to evince a broad Congressional purpose to bar exercise of executive discretion in the prosecution of federal civil rights crimes. . . . Nor do we find the legislative history of § 1987 persuasive of an intent by Congress to depart so significantly from the normal assumption of executive discretion."); *cf.* Heckler v. Chaney, 470 U.S. 821, 831–33 (1985) (noting that the relative competence of agencies and courts gives rise to a rebuttable presumption that agency nonenforcement action is unreviewable).

226. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) (suggesting that separate constitutional provisions restrain prosecutorial discretion); *see also Wayte*, 470 U.S. at 608 (holding that the Equal Protection Clause bars prosecution motivated by an improper discriminatory purpose).

functionalist analysis. Prudential doctrines may be overwhelmed if Congress speaks clearly enough. Courts use these prudential doctrines to infer congressional intent. If that intent is clear and points in the direction of eliminating executive discretion, the courts will follow Congress's command.

With this, I turn now to my main argument.

B. Judicial Review of Corporate DPAs Is Constitutional Under a Functionalist Separation-of-Power Analysis

This subsection presents two arguments: First, a functionalist approach to separation-of-powers disputes would afford Congress leeway in creating judicially reviewable criteria for the Executive to follow when crafting N/DPAs. Second, in this context, a functionalist approach is warranted.

The current use of N/DPAs by prosecutors, unchecked by congressionally authorized judicial review, threatens the framers' three-branch-participation model at both a granular and systemic level. Due to the broad criminal code and prosecutors' negotiation leverage, the use of N/DPAs means that corporate defendants only receive process from prosecutors.[227] For a corporation, the investigatory and negotiation phases, when the Executive calls the shots, are the guilt-adjudication and sentencing phases. That is the corporation's only meaningful opportunity to establish its innocence or plea for leniency. Corporations risk economic obliteration over an indictment, never mind conviction at trial.[228] In fact, the results of the overweening negotiation leverage are so perverse that corporations will sometimes accept an N/DPA that mandates restitution of an amount equivalent to or greater than a possible sentencing amount.[229]

This is not only harming particular corporations' liberty—it's creating systemic deficiencies. The incredible trial penalty and the drive to settle that it generates, means that questions of corporate criminal law remain unsettled.[230] Investigations over corporate wrongdoing and negotiations over correct penalties no longer operate against a backdrop of precedent that courts and juries had some role in shaping. Instead, past negotiated settlements serve as the precedent prosecutors and corporations rely upon. Federal prosecutors, as a result, can obtain N/DPAs from corporations for conduct that no court has held to be illegal.[231]

In sum, N/DPAs threaten to usurp the Judiciary's core functions—guilt adjudication and sentencing—not just on a defendant-by-defendant basis, but systemically. Looking at the other side of the balance of power,

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227. *Cf.* Barkow, *supra* note 190, at 1024.
228. *See supra* note 46 and accompanying text.
229. *See supra* note 50 and accompanying text.
230. *See supra* note 53 and accompanying text.
231. *See supra* note 54 and accompanying text.

congressional authorization of judicial review would not meaningfully curtail executive involvement in corporate prosecutions. Federal prosecutors would retain their absolute discretion over whether to indict and what to charge. They would also retain key negotiating tools. They could negotiate plea bargains with corporations and continue using N/DPAs—subject to deferential review by federal judges. While judicial review may slightly blunt those tools, the core of executive nonprosecution discretion would not be compromised.

This is all well and good, but why use a functionalist approach here? Why not rely on Judge Srinivasan's categorization of DPAs as charging decisions? Recall that the court in *Fokker Services* labeled DPAs charging decisions due to their similarity with decisions to dismiss charges. According to the court, the two are similar in two ways: First, the decision to utilize a DPA, like a decision to dismiss charges, "stems from a conclusion that additional prosecution or punishment would not serve the public interest." Second, the same prudential considerations counseling against judicial review of decisions to dismiss also counsel against judicial review of DPAs.[232]

This formalist approach relies heavily on the fit of its criteria. And therein lies the problem. The court's two criteria are overinclusive. They scoop up executive actions few would characterize as off limits from judicial review. Plea bargains, which historically have required judicial approval and implicate the Judiciary's sentencing powers, satisfy those same two criteria—they may stem from a prosecutor's desire to be lenient and raise similar competence concerns. Same goes for civil enforcement actions. The Supreme Court has indicated that judicial review of agency nonenforcement in the civil context may be permissible if Congress speaks clearly enough.[233] Yet that type of nonenforcement decision satisfies the same two criteria—agencies may decline to enforce based on the belief that leniency may serve the public interest, and courts may lack the competence to review such decisions.

But the formalist approach faces a larger problem here. The labeling approach generally does a good job at policing the borders between the branches. What it fails to do is rectify the problems that arise when one branch's exercise of its power renders another branch impotent. This is exactly the problem here—not the traditional problem that one branch is playing with another's toys. Instead, one branch is being shut out of the playpen altogether.

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232. *See supra* notes 135–39 and accompanying text.

233. *See* Heckler v. Chaney, 470 U.S. 821, 833 (1985) ("Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue.").

Robust precedent exists for the use of a functionalist accommodation.[234] Take the rise of the administrative state. Following a battle with FDR and the democratic Congress, the Court eventually blessed the New Deal compromise between those concerned that the aggregation of power of the Executive would undermine liberty and those that wanted to promote government efficiency.[235] "Instead of relying on separated powers as the primary means of protection against government abuse," those concerned with the tyrannical effect of concentrated power "proposed other checks on state power," namely judicial review through the Administrative Procedure Act.[236] These checks allowed the blending of executive, judicial, and legislative power in regulatory agencies.[237] A similar compromise could be struck over N/DPAs.

C. Existing Case Law Is Consistent with My Thesis

A future court reviewing the constitutionality of the ADPA of 2020 may uphold the statute without overruling any major cases. In this section, I answer two arguments that could be raised against my thesis: First, that there is on-point case law precluding judicial review of all executive nonprosecution decisions. Second, that existing case law holds that executive nonprosecution discretion is at its zenith in all criminal cases.

The Court has not squarely held that the Executive retains plenary nonprosecution discretion in criminal cases. The case most frequently cited for this proposition, *United States v. Nixon*,[238] used broad but unnecessary language when describing nonprosecution discretion—"the Executive Branch has *exclusive* authority and *absolute* discretion to decide whether to

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234. Barkow appears to have foreshadowed the crux of my argument. She proposed that separation-of-powers questions in criminal cases could be viewed as similar to administrative law cases:

> Just as in the administrative law context, some blending of powers would be permitted to allow the federal government to respond more readily to criminal matters. At the same time, and again following the administrative law model, other checks should take the place of the constitutional separation of powers to ensure that the government does not abuse its power.

Barkow, *supra* note 190, at 992. Barkow, however, does not endorse this approach. She notes that Congress has not moved to put various "other checks" in place. Also, she notes that in the criminal context "state power is at its apex . . . and the consequences of abuse are so high—an individual could lose his or her liberty or even life"—such that efficiency concerns must give way. *Id.* Accordingly, this favors a strict formalist approach that sacrifices the efficiency gains from blending power in order to preserve liberty. I think this analysis is correct, but in the context of N/DPAs, the solution should be different. I agree that if legislation to rebalance power amongst the branches is not forthcoming, a functionalist compromise makes little sense. But in this Note I argue that such a functionalist compromise is appropriate where Congress authorizes the Judiciary to review N/DPAs.

235. *Id.* at 991.

236. *Id.*

237. *Id.*

238. 418 U.S. 683 (1974).

prosecute a case."[239] The Court's ultimate holding—that the Executive could not decide what documents to disclose without first revoking regulations which delegated the power to pursue criminal convictions to the Special Prosecutor[240]—did not rely upon such an expansive conception of the criminal nonprosecution power. The Court, rather, assumed without deciding that the Executive retained absolute control over the decision to prosecute and nevertheless held that the Executive could not withhold documents from the Special Prosecutor without first changing executive regulations.[241]

The Court in *Nixon* supported its broad formulation of the Executive's nonprosecution discretion with two influential cases: The *Confiscation Cases*[242] and *United States v. Cox*.[243] Neither squarely holds that the criminal nonprosecution power is constitutionally grounded.

In the *Confiscation Cases*, the Court expressed the opinion that nonprosecution discretion may be restricted by Congress.[244] The Court went so far as to say that Congress could take away the power, including perhaps even the power of *nolle prosequi*—the power to drop criminal charges—through legislation.[245]

The Fifth Circuit in *Cox* did not squarely rule on the constitutional question. While the court did state that "constitutional separation of powers" doctrine prevents interference by courts with the "free exercise of the discretionary powers" by U.S. Attorneys "in their control over criminal prosecutions,"[246] the posture of this case (and many others like it) limits the potency of this language. In *Cox*, the court used separation of powers in a similar way as the D.C. Circuit in *Fokker Services*: as a mechanism of interpreting ambiguous congressional commands.[247] The Fifth Circuit interpreted the Federal Rules of Criminal Procedure to comport with such background principles and did not strike down a precise congressional

239. *Id.* at 693 (emphasis added).

240. *Id.* at 696.

241. *Id.*

242. 74 U.S. (7 Wall.) 454 (1868).

243. 342 F.2d 167 (5th Cir. 1965).

244. *Confiscation Cases*, 74 U.S. (7 Wall.) at 457 (holding that the district attorney's power not to prosecute can be limited by acts of Congress).

245. *Id.* ("Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney, and even after they are entered in court, they are so far under his control that he may enter a *nolle prosequi* at any time before the jury is empanelled for the trial of the case, *except in cases where it is otherwise provided in some act of Congress*." (emphasis added)). This reading comports with a view of prosecutorial discretion as merely a product of the Judiciary Act of 1789. *See* Johnathan Keim, *Prosecutorial Discretion, Part One: Indisputably There, But Disputably from Where?*, NAT'L REV. (Aug. 26, 2014), http://www.nationalreview.com/bench-memos/386374/prosecutorial-discretion-part-one-indisputably-there-disputably-where-jonathan [https://perma.cc/CC3J-3TZA] (discussing the possible constitutional and statutory origins of prosecutorial discretion).

246. *Cox*, 342 F.2d at 171.

247. *Id.*

command for courts to review prosecutors' decisions.[248] The holding, therefore, cannot go so far as to state what the Constitution means, but rather what Congress meant when it promulgated the rule.

This raises an important point. Caution is called for before concluding that an interpretation of statute or rule is necessarily unconstitutional simply because a court has avoided it through the constitutional-doubt canon. The canon "militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality."[249] Indeed, almost every case that addresses executive nonprosecution and separation-of-power principles is interpreting a statute and not the Constitution.[250]

More importantly, the result in *Cox* is reconcilable with a functionalist approach to separation-of-powers. In *Cox*, the Fifth Circuit overturned the district court's holding that the grand jury could compel a U.S. Attorney to draft and sign an indictment.[251] Such an encroachment on executive nonprosecution discretion would be impermissible under a functionalist approach. Compelling the prosecutor to bring charges and try a case would eliminate the Executive's capacity to meaningfully participate in criminal prosecution.

Turning to the second argument, some precedent appears to indicate that executive nonprosecution discretion in the criminal context is plenary.[252] In contrast, the Supreme Court and lower courts are more willing to accept congressional intervention in executive nonprosecution discretion in the civil context than in the criminal context.[253] Courts uncritically assume that executive nonprosecutorial discretion over criminal cases is plenary and engage in a more flexible analysis for civil law cases. A court considering

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248. *Id.* at 172.

249. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 247–48 (2012) (citing Crowell v. Benson, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.")).

250. *See, e.g.*, United States v. Fokker Servs. B.V., 818 F.3d 733, 738 (D.C. Cir. 2016) (Speedy Trial Act); Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 381 (2d Cir. 1973) (42 U.S.C. § 1987).

251. *Cox*, 342 F.2d at 170–71.

252. *See, e.g.*, *Fokker Servs. B.V.*, 818 F.3d at 744 ("Executive independence is assumed to be even more pronounced in the context of criminal charging decisions than in the context of civil enforcement decisions.").

253. Heckler v. Chaney, 470 U.S. 821, 833 (1985) ("Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue."); Dunlop v. Bachowski, 421 U.S. 560, 566–68 (1975) (holding as constitutional a congressional mandate of agency action if the Secretary of Labor finds probable cause of a violation that will likely impact the outcome of a union election); Cook v. FDA, 733 F.3d 1, 7–10 (D.C. Cir. 2013) (interpreting a statute to deny the FDA discretion to decline to initiate enforcement actions regarding the importation of certain drugs).

the constitutionality of a statute authorizing judicial review of corporate DPAs could distinguish past case law that appears to utilize criminal exceptionalism by observing that such statements in dicta do not apply to the "upside-down world" of corporate DPAs.[254]

The force animating the apparent criminal–civil divide is not the building the government lawyer prosecuting the case works in. Rather, underlying the divide is a deep concern over physical-liberty preservation, a value corporate criminal prosecution definitionally does not threaten.

Executive nonprosecution discretion is at its zenith when it is used to protect physical-liberty interests, regardless of whether the matter arises in a criminal or administrative context. While judicial doctrine appears at first glance to comport with the criminal–administrative distinction, existing case law, history, and structure all indicate that the liberty–property distinction is correct. Courts have suggested in a variety of civil contexts that Congress may directly limit the agency's enforcement discretion. All these cases, however, arose in a context "where the enforcement proceedings would not result in the deprivation of physical liberty."[255] This bias in favor of physical-liberty protection is expressed by Due Process jurisprudence[256] and is recognized in numerous places in the Constitution where it erects hurdles and safeguards against government action that threatens a deprivation of physical liberty.[257]

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254. *Cf. Stranger Things: Chapter Eight: The Upside Down* (Netflix 2016). My argument builds upon Markowitz's forthcoming article, *Prosecutorial Discretion Power at its Zenith*. Markowitz argues that "[h]istorical practice, the constitutional text and structure, and participatory democratic theory" show that the Executive's nonprosecution discretion "is at its zenith when individuals' physical liberty is at stake." Markowitz, *supra* note 14 (manuscript at 5). Markowitz, like many other commentators, uses this argument to find the limits of executive nonprosecution discretion outside the criminal context. *Id.* (manuscript at 11–12, 46–48). He assumes that executive nonprosecution discretion in the criminal context is plenary. *Id.* (manuscript at 46). I've argued that because physical-liberty interests are not implicated by corporate prosecutions, nonprosecution in the corporate context should not be exclusively reserved to the Executive.

255. Markowitz, *supra* note 14 (manuscript at 51).

256. *See id.* (manuscript at 38) (observing that "while the Constitution secures many varieties of liberty, a review of the Due Process jurisprudence demonstrates that not all liberty interests receive the same level of protection. The Constitution reserves the greatest process protections for those at risk of losing their physical liberty."); *see also* Turner v. Rogers, 564 U.S. 431, 445 (2011) (characterizing the deprivation of physical liberty as "the core of the liberty protected by the Due Process Clause" (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)); Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (plurality opinion) (recognizing physical liberty as "the most elemental of liberty interests"); *In re* Winship, 397 U.S. 358, 363–64 (1970) (observing that physical liberty is an "interest of immense importance" and "transcending value").

257. *See* Markowitz, *supra* note 14 (manuscript at 40) (citing the Suspension Clause, the Bill of Attainder Clause, the Pardon Clause, and a "host of additional protections against unwarranted liberty deprivations in criminal proceedings" such as the right to grand jury, protection against double jeopardy, right against self-incrimination, right to a speedy trial, right to trial by jury, right to confront witnesses, and the right to counsel).

IV. Conclusion

The only potential foothold for judicial review of DPAs, the Speedy Trial Act, has been correctly interpreted to lack much bite. That does not mean that meaningful judicial review of N/DPAs is constitutionally precluded. Congressionally imposed restraints on executive nonprosecution discretion is constitutionally tolerable in this area. In fact, absent congressional intervention, executive nonprosecutorial discretion over N/DPAs threatens to usurp the Judiciary's guilt-adjudication and sentencing authority. Deferential but meaningful judicial review of N/DPAs would bring the Judiciary off the sidelines while preserving executive nonprosecution discretion. Congressionally authorized judicial review of N/DPAs may very well be a usurpation of the Executive's power. But even if it is, Congress would only be giving back to the Judiciary what the Executive stole.

—*Alexander A. Zendeh*