NOTE

Getting DPA Review and Rejection Right

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I. INTRODUCTION

The Deferred Prosecution Agreement ("DPA") created an alternative to pursuing a criminal conviction by trial or guilty plea. It was originally used in drug cases to place the focus on rehabilitation and prevent the collateral consequences triggered by a criminal record.[1] Over time, prosecutors began using the DPA in the white-collar crime arena to resolve cases involving corporate entities. The DPA has since become the default for enforcement action against corporate offenders.[2]

Unlike its cousins, the Non-Prosecution Agreement ("NPA") and the Guilty Plea,[3] the DPA exists in a twilight zone of judicial oversight. Other than the Speedy Trial Act, there are no textual hooks for judicial review of the terms or use of a DPA.[4] District courts historically acted as rubber stamps. But as DPAs became more prolific, district court judges started to question their role in the twilight zone.[5] Through this process, grounds for judicial oversight of previously unquestioned executive action began to take shape. Recently, however, those grounds have become more uncertain since the D.C. Circuit was presented with the opportunity to mold an applicable legal standard and declined to do so.

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[1] *See* Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1863 (2005).

[2] Greenblum, *supra* note 1, at 1875.

[3] A NPA does not involve filing criminal charges and is unreviewable. United States v. Fokker Servs. B.V., 79 F. Supp. 3d 160, 165 (D.D.C. 2015) ("The Government, of course, has the clear authority *not* to prosecute a case. Indeed, 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.")[hereinafter *Fokker* I]; A guilty plea is reviewed by the court. *See* 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, 1300 (2014) ("When a defendant enters into a plea bargain, the trial court assumes a substantive gatekeeper role under Rule 11 of the Federal Rules of Criminal Procedure. The court must examine guilty pleas for voluntariness, factual basis, fairness, abuse of discretion, or infringement on the judge's sentencing power. If the plea bargain does not satisfy the requirements of Rule 11, the court cannot accept the defendant's admission of guilt. It is also the case that the court need not accept a plea bargain if it believes that the bargain is too lenient, or otherwise not in the public interest." (internal quotations omitted)).

[4] *See* United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 13 (D.D.C. 2015).

[5] *See* United States v. HSBC Bank USA, No. 12–CR–763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013); *Fokker* I, *supra* note 3, at 164–165; *Saena Tech Corp.*, 140 F. Supp. 3d at 13.

This paper analyzes the nascent legal standard for judicial oversight of DPAs that was artfully sidestepped by the court of appeals. It proposes a legal standard for approving or rejecting a DPA that comports with the appellate court's decision and separation of powers principles, and evaluates the proposed standard's ability to address current criticisms of the DPA. The introduction begins with a brief discussion of the mechanics of a DPA, the use of DPAs in the corporate context, and recent cases displaying changing attitudes in the district courts towards that use.

A. *Deferring Prosecution: The Mechanics and Judicial Approval Under the Speedy Trial Act.*

In a deferred prosecution, a prosecutor brings charges against an individual or corporation by indictment or information, but agrees to drop those charges at a later date if the individual or corporation performs certain obligations specified by that agreement. The DPA halts the prosecution of a case for the intervening period between charging and dismissal in order to provide the defendant with an opportunity to comply with the terms of the agreement.[6] If the defendant is unable to do so and breaches the agreement, the government may resume its prosecution.

In order to enter into a DPA, the government must file the agreement with the court as well as a Motion to Exclude Time so as not to run afoul of the Speedy Trial Act's seventy-day rule—requiring a trial to commence within seventy days of an indictment or criminal information. 18 USC § 3161(h)(2) allows time to be excluded under the statute if "prosecution is deferred by the attorney for the Government pursuant to a written agreement with the defendant, *with the approval of the court*, for the purpose of allowing the defendant to demonstrate his good conduct," (emphasis added).[7] The court must grant this approval to complete the process and finalize the agreement.

The language of § 3161(h)(2) is "silent as to the standard the court should employ when evaluating whether to grant 'approval'" to a DPA,[8] but a senate report on the Speedy Trial Act from the time of its enactment includes guidance that is generally accepted as the rule.[9] According to the report, § 3161(h)(2) was "designed to encourage the current trend among United States attorneys to allow for deferral of prosecution on the

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[6] 18 U.S.C. § 3161 (2012).

[7] *Id.*

[8] *HSBC*, 2013 WL 3306161, at *3.

[9] Brief for Appellee/Appellant at 6–7, United States v. Fokker Servs. B.V., 79 F. Supp. 3d 160 (D.D.C. 2015) (No. 15-3017) [hereinafter Fokker Brief]; United States v. Fokker Servs. B.V., 818 F.3d 733, 744-45 (D.C. Cir. 2016) [hereinafter *Fokker* II]

condition of good behavior," and court approval should be conditioned upon a true purpose of diversion.[10] Therefore, a court must approve a Motion to Exclude Time under the Speedy Trial Act if the "agreement is truly about diversion and not simply a vehicle for fending off a looming trial date."[11]

B. *Evolution of the Corporate DPA*

The DPA was initially used as a tool for handling juvenile drug offenders "without branding them as criminals."[12] But the DPA's ability to achieve criminal resolution without collateral consequences made it extremely useful and highly desirable in the corporate context. The case of Arthur Andersen highlights the DPA's utility, if not necessity, in this area.

In 2001, Arthur Andersen, Enron's accounting firm, came under fire after the Enron scandal erupted. Andersen began destroying documents related to the Enron engagement, which lead to an indictment charging the firm with obstruction of justice.[13] The firm collapsed as a result of the indictment alone, even before the jury handed down a guilty verdict.[14] The firm shut its doors due to client exodus and the impending loss of its license to audit public companies. 28,000 people lost their jobs.[15] Worse yet, the Supreme Court overturned the conviction in 2005.[16]

In the wake of Andersen, collateral consequences were not only a fear but a reality grave enough to prevent prosecutors from pursuing criminal cases against corporate defendants. DPAs provided the solution. In 2003, the Department of Justice ("DOJ") issued a memorandum generally referred to as the "Thompson Memo."[17] The Thompson Memo laid out

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[10] Fokker Brief, *supra* note 9, at 6–7 (quoting S. Rep. No. 93-1021 at 36 (1974))*; see also Saena Tech Corp.*, 140 F. Supp. 3d at 23, 25 (discussing the legislative history of the Speedy Trial Act and Congress's specific intention to involve the court in deferred prosecutions); *Fokker* II, 818 F.3d at 744-45.

[11] Fokker Brief, *supra* note 9, at 44; *see also Saena Tech Corp.*, 140 F. Supp. 3d at 29 ("The Court's approval authority is located within a sentence stating that the agreement must be 'for the purpose of allowing the defendant to demonstrate his good conduct.'…[C]ourt review must be tied to determining whether the agreement satisfies this purpose.").

[12] Greenblum, *supra* note 1, at 1866 (internal quotation omitted).

[13] *See* Golumbic & Lichy, *supra* note 3, at 1306–07.

[14] *Id.* at 1307.

[15] *See* Greenblum, *supra* note 1, at 1888.

[16] *Id.*

[17] Memorandum from Larry D. Thompson, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Components, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) (available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

factors for consideration before prosecuting a corporation and "explicitly opened the door to the use of deferred prosecution agreements."[18]

DPAs have been of particular value to prosecutors pursuing economic sanctions cases. Economic and trade sanctions are administered and enforced by the Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury in the interest of national security.[19] Sanctions regimes have historically been in place against a number of countries including North Korea, Iran, Sudan, and Cuba.[20] Sanctions can prevent countries from accessing the U.S. financial system by prohibiting processing or initiating payments to or on behalf of sanctioned entities in U.S. dollars.[21] They can also halt trade with sanctioned parties by prohibiting the exportation of "goods, technology, or services from the United States or any U.S. person" to a sanctioned entity.[22] Those who violate these prohibitions may be prosecuted under the International Emergency Economic Powers Act ("IEEPA") and the Trading with the Enemy Act ("TWEA").[23]

Corporations and financial institutions caught in prosecutors' crosshairs for violations of OFAC sanctions face colossal collateral consequences that all but prohibit indictment.[24] DPAs allow prosecutors to work around these collateral consequences. As a result, they quickly became the favored tool for resolution in sanctions cases.[25] From 2009–

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[18] Greenblum, *supra* note 1, at 1875 (quoting Alan Vinegrad, *Deferred Prosecution of Corporations*, 230 N.Y.L.J. 72 (Oct. 9, 2003)).

[19] Sanctions are "based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States." *Terrorism and Financial Intelligence*, Office of Foreign Assets Control, https://www.treasury.gov/
about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx.

[20] *Sanctions Programs and Country Information*, Office of Foreign Assets Control, https://www.treasury.gov/resourcecenter/sanctions/Programs/Pages/Programs.aspx.

[21] OFFICE OF FOREIGN ASSETS CONTROL, WHAT YOU NEED TO KNOW ABOUT U.S. ECONOMIC SANCTIONS: AN OVERVIEW OF O.F.A.C. REGULATIONS INVOLVING SANCTIONS AGAINST IRAN (2012) [hereinafter REGULATIONS INVOLVING SANCTIONS AGAINST IRAN].

[22] *Fokker* I, 79 F. Supp. 3d 160,162 (D.D.C. 2015); *see also* REGULATIONS INVOLVING SANCTIONS AGAINST IRAN, *supra* note 21.

[23] Press Release, Dep't of Justice, BNP Paribas Sentenced for Conspiring to Violate the International Emergency Economic Powers Act and the Trading with the Enemy Act (May 1, 2015).

[24] The most obvious collateral consequence is massive job loss. Corporations may fold due to reputational damage and client exodus or they may literally be put out of business by a regulator's decision to revoke a charter as a result of indictment. *See, e.g.*, Golumbic & Lichy, *supra* note 3, at 1338 n. 289; Greenblum, *supra* note 1, at 1875.

[25] *See* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 855 (2007).

2012, the government entered into six DPAs with banks for violations of U.S. sanctions, totaling over $2.4 billion in forfeiture.[26]

C. *The Tide Begins to Turn*

Up until 2012, a district court judge never questioned whether a DPA before the court warranted approval.[27] Courts approved DPAs automatically.[28] But three cases changed that: *United States v. HSBC Bank USA*, *United States v. Fokker Services B.V.*, and *United States v. Saena Tech Corporation*.[29]

In *United States v. HSBC Bank USA*, Judge Gleeson, United States District Court Judge for the Eastern District of New York, published a memorandum with his ruling approving the HSBC DPA.[30] Judge Gleeson began by stating that courts may only reject DPAs under the Speedy Trial Act if the parties are "collud[ing] to circumvent the speedy trial clock."[31] But his opinion made clear that judicial review does not stop there. Judge Gleeson made an important distinction, noting: "the exclusion of delay during the deferral of prosecution is not synonymous with approving the deferral of prosecution itself."[32] Rejecting the assumption that courts have no power to "consider the latter question," Judge Gleeson asserted that the court "has authority to approve or reject [a] DPA pursuant to its supervisory power."[33]

The court's supervisory power "permits federal courts to supervise 'the administration of criminal justice.'"[34] Judges Gleeson, Leon, and Sullivan all state that these powers would permit the court to reject a DPA in "circumstances in which a deferred prosecution agreement, or the

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[26] Press Release, N.Y. Cnty Dist. Attorney's Office, District Attorney Vance Announces $375 Million Settlement with HSBC Bank (Dec. 11, 2012). The government has since entered into agreements with Commerzbank and Credit Agricole. *See* Press Release, Dep't of Justice, Commerzbank AG Admits to Sanctions and Bank Secrecy Violations, Agrees to Forfeit $563 Million and Pay $79 Million Fine (Mar. 12, 2015); Press Release, Dep't of Justice, Crédit Agricole Corporate and Investment Bank Admits to Sanctions Violations, Agrees to Forfeit $312 Million (Oct. 20, 2015).

[27] Garrett, *supra* note 25, at 922 ("Every judge approving a deferred prosecution agreement has done so without any published rulings or modifications to the agreement.").

[28] *See* United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 24 (D.D.C. 2015).

[29] United States v. HSBC Bank USA, No. 12–CR–763, 2013 WL 3306161 at *4 (E.D.N.Y. July 1, 2013); *Fokker* I, 79 F. Supp. 3d 160, 165 (D.D.C. 2015); *Saena Tech*, 140 F. Supp. 3d 11, 46.

[30] *HSBC*, 2013 WL 3306161.

[31] *Id.* at *3.

[32] *Id.*

[33] *Id.* at *3–4; *see also* Golumbic & Lichy, *supra* note 3, at 1325–26 ("Prior to this time, the uniformly-held view had been that only the Speedy Trial Act governed a district court's review of a DPA.").

[34] United States v. HSBC, 2013 WL 3306161, at *4 (quoting United States v. Payner, 447 U.S. 727, 735 n.7 (1980) (quoting McNabb v. United States, 318 U.S. 332, 340 (1943))).

implementation of such an agreement, so transgresses the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the court."[35] Judge Leon attempted to define that boundary in *United States v. Fokker Services*, the first and only case where a district court judge rejected a DPA pursuant to the supervisory power. On appeal, the D.C. Circuit reversed relying on the language of the Speedy Trial Act while ignoring the supervisory power. The result ensures uncertainty and inaction among district judges who continue to face questions of whether certain exercises of prosecutorial discretion should be lent "judicial imprimatur"[36] without a guiding legal standard. No other Circuit has confronted the issue.[37]

This article will propose a legal standard and standard of deference[38] for judicial review of DPAs. It will begin by analyzing the district court's ruling in *Fokker Services* and the D.C. Circuit's opinion vacating that order. It will then offer a critique of the supervisory power-based approach in the district court decision before proposing a legal standard and standard of deference that account for the problems therein. Finally, the paper will evaluate the proposed legal standard more generally by considering its utility in addressing current criticisms of the DPA.

II. *UNITED STATES V. FOKKER SERVICES B.V.* AND THE COURT'S POWER TO REJECT A DPA

A. *The District Court's Articulation of a Legal Standard under the Supervisory Power.*

In *United States v. Fokker Services B.V.*, Judge Richard Leon, United States District Court Judge for the District of Columbia, rejected a DPA between the U.S. government and Fokker Services B.V. ("Fokker Service s") pursuant to the court's supervisory power. The court held the agreement was so "grossly disproportionate" to the defendant's conduct

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[35] *Id.* at *6; *Fokker* I, *supra* note 3, at 165 ("One of the purposes of the Court's supervisory powers, of course, is to protect the integrity of the judicial process."); *Saena Tech Corp.*, 140 F. Supp. 3d at 19 ("[T]he Court can envision an especially unfair or lenient agreement as transgressing these bounds and therefore justifying rejection, independent of a court's review under the Speedy Trial Act.").

[36] *Fokker* I, *supra* note 3, at 165.

[37] *Saena Tech Corp.*, 140 F. Supp. 3d at 29.

[38] This paper discusses the legal standard as well as something I term the standard of deference. It is equivalent to the concept of standard of review, but here it indicates the degree of deference the district court must show the executive branch, rather than the degree of deference an appellate court must give to the trial court or factfinder.

that ruling otherwise would compromise the "integrity" of the judicial proceeding.[39]

Fokker Services is a Dutch aerospace services company that provides logistical support, technical services, component repair, and aircraft maintenance to owners and operators of aircraft.[40] On June 5, 2014, the United States filed a criminal information charging Fokker Services with "one count of Conspiracy to Unlawfully Export U.S.-Origin Goods and Services to Iran, Sudan, and Burma," in violation of IEEPA.[41] From 2005–2010, Fokker Services engaged in a scheme to "evade U.S. sanctions," initiating 1,153 shipments of aircraft parts "with a U.S. nexus to customers in Iran, Sudan, or Burma."[42] Fokker Services knew these shipments were illegal and deliberately violated U.S. sanctions and export laws by withholding or providing false aircraft tail numbers to U.S. companies, lying about the country of origin or destination of parts, and deleting reference to Iran on documents sent to U.S. companies.[43] Fokker Services' gross revenue from the scheme totaled approximately $21 million.[44]

The DOJ opened an investigation into Fokker Services in June 2010 after the company self-reported possible violations of OFAC sanctions.[45] After Fokker Services conducted its own internal investigation and cooperated with the U.S. authorities in their investigation, the parties entered into a DPA. Fokker Services admitted wrongdoing and agreed to forfeit $10.5 million and implement compliance programs. In return, the government agreed to dismiss the case after eighteen months if Fokker Services complied with all terms in the agreement.[46] It is this agreement, and an attendant motion to exclude time under the Speedy Trial Act that Judge Leon considered and rejected.

Refusing to act as a "rubber stamp" in *Fokker Services*, Judge Leon inquired upon what grounds a court should grant or withhold its approval of a DPA. Both parties before the court argued that the court's role was simply to approve the settlement unless: "(a) the defendant did not enter into the agreement willingly and knowingly, or (b) the agreement was

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[39] *Fokker* I, *supra* note 3, at 165–67.

[40] *Id.* at 161.

[41] *Id.*; Press Release, Dep't of Justice, Fokker Services B.V. Agrees to Forfeit $10.5 Million for Illegal Transactions with Iranian, Sudanese, and Burmese Entities-Company will Pay Additional $10.5 Million in Parallel Civil Settlement (June 5, 2014).

[42] *Id.*

[43] *Id.*

[44] *Fokker* I, *supra* note 3, at 163; Press Release, Dep't of Justice, *supra* note 41.

[45] Press Release, Dep't of Justice, *supra* note 41.

[46] *Fokker* I, *supra* note 3, at 164.

designed solely to circumvent Speedy Trial Act limits."[47] The parties argued correctly that a court may reject a DPA for running afoul of the Speedy Trial Act, but Judge Leon flatly rejected the parties' assertion that it is the *only* ground upon which a court can withhold approval. Instead, Judge Leon agreed with Judge Gleeson that courts have the power not only to question whether time should be excluded under the Speedy Trial Act but also whether the court should approve the deferral of prosecution pursuant to the supervisory power.[48]

The supervisory power "permits federal courts to supervise the administration of criminal justice among the parties before the bar,"[49] and protect "the integrity of the judicial process."[50] This power includes the duty "not to lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety."[51] From these principles, Judge Leon distilled a legal standard: a court considering a DPA must determine whether "the integrity of judicial proceedings would be compromised by giving the Court's stamp of approval to either overly-lenient prosecutorial action, or overly-zealous prosecutorial conduct."[52] With this new test in hand, Judge Leon examined the Fokker Services agreement in its totality and concluded that the DPA was overly lenient because the defendant's conduct was grossly disproportionate to the settlement.[53]

The judge considered the following facts highly relevant in his assessment of the defendant's conduct: (1) Fokker Services engaged in willful criminal conduct over a five-year period, (2) the conduct was "orchestrated at the highest levels of the company," (3) the scheme brought in $21 million in revenue, and (4) the conduct was a deliberate violation of laws aimed at protecting U.S. national security.[54] The judge then analyzed the agreement to determine how adequately the terms addressed the described conduct. Here, the judge considered the fact that the government did not require the company to pay "a penny more than the $21 million"

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[47] *Id.* (internal citation omitted); *see also HSBC*, 2013 WL 3306161, at *3 ("18 U.S.C. § 3161(h)(2) appears to instruct courts to consider whether a deferred prosecution agreement is truly about diversion and not simply a vehicle for fending off a looming trial date."); S. Rep. No. 93-1021, at 37 (1974).

[48] *HSBC*, 2013 WL 3306161, at *3–4.

[49] *Payner*, 447 U.S. 727 at 735 n.7.

[50] *Fokker* I, *supra* note 3, at 165 (citing *Payner*, 447 U.S. at 735–36 n.8).

[51] *Id.* (quoting *HSBC*, 2013 WL 3306161, at *6).

[52] *Id.* at 166; Judge Gleeson utilized a more general inquiry in *HSBC*, considering whether there was any impropriety or lawlessness in the agreement that "implicates the integrity of the Court." *HSBC*, 2013 WL 3306161, at *7.

[53] *Fokker* I, *supra* note 3, at 167.

[54] *Id.* at 166.

earned in the illegal scheme, nor did the government charge a single individual in connection with the scheme. And instead of appointing an independent monitor to track Fokker Service's conduct for the eighteen-month deferral period, the government allowed the company to self-report its compliance with the agreement.[55] Judge Leon found these terms ineffectual in light of the defendant's conduct. He explained:

> [i]n my judgment, it would undermine the public's confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time and for the benefit of one of our country's worst enemies.[56]

B. *Reversal and Refusal to Clarify a Standard*

Both parties appealed the district court order to the Court of Appeals for the D.C. Circuit. The D.C. Circuit vacated and remanded the case, holding that the Speedy Trial Act "confers no authority in a court to withhold exclusion of time pursuant to a DPA based on concerns that the government should bring different charges or should charge different defendants."[57] The opinion is laced with separation of powers principles that circumscribe judicial power but devoid of those embedded in the supervisory power that allow the judiciary to protect itself in the balance between the branches.

The circuit court framed the issue as a question of the district court's authority to withhold its approval of a DPA under the Speedy Trial Act. The opinion begins by stating that the Speedy Trial Act's consideration for "approval of the court" must be understood "against the background of settled constitutional understandings under which authority over criminal charging decisions resides fundamentally with the Executive," therefore "there is no ground for reading that provision to confer free-ranging authority in district courts to scrutinize the prosecution's discretionary charging decisions."[58] The Act's grant of power is limited to authorizing a judicial determination that exclusion is sought not to "evade speedy trial

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[55] *Id.*
[56] *Id.* at 167.
[57] *Fokker* II, *supra* note 9, at 738.
[58] *Id.* at 741.

time limits," but to serve "the bona fide purpose of confirming a defendant's good conduct and compliance with law."[59]

The court stressed that Executive responsibility over criminal charging decisions is bundled up with the core Executive duty to ensure that the laws are faithfully executed.[60] In this area, "judicial authority is … at its most limited."[61] The judiciary's lack of competence to evaluate exercises of prosecutorial discretion[62] and the risk of "systemic costs"[63] from judicial interference, including "chill[ing] law enforcement" activity, mandate a presumption that prosecutors "have properly discharged their official duties" absent "clear evidence to the contrary."[64] Therefore, the "approval" requirement in the Speedy Trial Act does not "empower the district court to disapprove the DPA based on the court's view that the prosecution had been too lenient."[65]

To bolster the point, the opinion analogizes filing a motion to exclude time under the Speedy Trial Act to dismissing charges against a criminal defendant under Rule 48(a) of the Federal Rules of Civil Procedure. The language of the federal rule is similar to that of the Speedy Trial Act; Rule 48(a) "requires a prosecutor to obtain 'leave of court'" before he may dismiss the charges.[66] The court notes that notwithstanding this language, the decision to dismiss charges is "squarely within the ken of prosecutorial discretion."[67] The "leave of court" requirement is meant only to protect a defendant "against prosecutorial harassment"—nothing more.[68]

The circuit court further points to the court's role in accepting civil consent decrees. The Tunney Act "calls for a district court to enter a proposed antitrust consent decree if 'in the public interest,'"[69] a standard the court had the occasion to address in *United States v. Microsoft Corp.* There, the court held that "the public interest standard did not empower the district judge to reject the remedies sought in the consent decree merely because he believed other remedies were preferable."[70] The "public

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[59] *Id.* at 745.

[60] *Id.* at 741 (quoting Cmty. For Creative Non-Violence v. Pierce, 786 F.2d 1199, 1201 (D.C. Cir. 1986)).

[61] *Id.* at 741 (quoting *Pierce*, 786 F.2d at 1201).

[62] *Id.* at 741.

[63] *Fokker* II, *supra* note 9, at 741 (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)).

[64] *Id.* at 741 (quoting United States v. Armstrong, 517 U.S. 456, 465 (1996).

[65] *Id.* at 741.

[66] *Id.* at 742.

[67] *Id.*

[68] *Id.* (quoting Rinaldi v. United States, 434 U.S. 22, 29 n.15 (1977).

[69] *Fokker* II, *supra* note 9, at 742 (quoting 15 U.S.C. § 16 (2012)).

[70] *Id.* at 742–43 (quoting United States v. Microsoft Corp., 56 F.3d 1448, 1460 (D.C. Cir. 1995) (internal quotation marks omitted)).

interest" language simply acknowledges that a district court can refuse to accept a proposed consent decree "that, on its face and even after government explanation, appears to make a mockery of judicial power."[71]

The court stated that neither the "leave of court" language in Rule 48(a) nor the "public interest" language in the Tunney Act authorized an expansion of judicial power into the realm of charging decisions—a core Executive power.[72] The functionally equivalent "approval of the court" language in the Speedy Trial Act, then, could not be read to confer "broader authority…to scrutinize prosecutorial charging choices."[73] Thus the district court "significantly overstepped its authority" in rejecting a DPA "based on a belief that the prosecution had been unduly lenient."[74]

The D.C. Circuit undoubtedly reached the right result but ducked the real issue. Judge Leon's Memorandum Opinion did not hold that the Speedy Trial Act empowers courts to deny exclusion of time because a DPA is too lenient. Rather, he posited that the supervisory power obliged him to reject a DPA when necessary to preserve the integrity of the court. The circuit court did not reject the notion that a district judge is empowered to counter executive action when faced with a threat to judicial integrity.[75] However, it refused to answer the question: when is a district court authorized to draw that line? By leaving the issue unresolved, the upshot is an opinion that encourages automatic approval of DPAs and greater imbalance in our system of separated powers.

The following section looks critically at the legal standard articulated and applied by the district court in *Fokker Services*. The inquiry serves to establish the boundaries of a workable legal standard for judicial review of a DPA under the supervisory power. Part II proposes a standard that remedies the harms identified in the district court's approach while tracking the D.C. Circuit's description of permissible judicial review of prosecutorial discretion. It explores how the standard would be applied in practice and specifically to the Fokker Services DPA. Part III considers how the proposed standard responds to current criticisms of the DPA.

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[71] *Microsoft*, 56 F.3d at 1462.

[72] *Fokker* II, *supra* note 9, at 743.

[73] *Id.*

[74] *Id.* at 747.

[75] *Id.* at 742–43 ("To be sure, a district judge is not obliged to accept a proposed decree that on its face and even after government explanation, appears to make a mockery of judicial power." (internal quotations omitted)). Judge Srinivasan also acknowledged that a district court may even review charging decisions where necessary to guard against "prosecutorial harassment." *Id.* at 742–43.

C. *The District Court Standard Offends the Separation of Powers.*

Judicial review of prosecutorial discretion is a fault line in the separation of powers framework. It is the judiciary's duty to "supervise 'the administration of criminal justice,'"[76] and the executive's responsibility to "decide whether or not to prosecute"[77] and "how aggressively to prosecute."[78] But it is also the court's responsibility to ensure that "the waters of justice are not polluted."[79] The judiciary generally does not concern itself with "law enforcement practices except in so far as courts themselves become instruments of law enforcement."[80] When the executive branch chooses to use a DPA, it implicates the court in a pending criminal case.[81] A DPA thus places the executive and judicial branches in a precarious balance, where the judiciary, tasked with protecting its integrity, is in danger of intruding on a core function of the executive.

In *Fokker Services*, Judge Leon articulated a test that looks for overly lenient or overly zealous prosecutorial conduct.[82] A test that considers whether a DPA is overly lenient or overly zealous is not in itself a violation of separation of powers principles. Because lawlessness and impropriety are the touchstones for exercising the supervisory power,[83] a court can properly consider factors such as leniency or zealousness under the impropriety prong. The court may ask whether the prosecutor's decision is in line with precedent and, if it is not, whether is so far beyond the bounds of precedent that it threatens the integrity of the court. But a test that can reasonably be interpreted as a subjective one teeters on the edge of an unconstitutional intrusion into the executive branch by inviting the court to substitute its judgment for that of the executive.[84]

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[76] United States v. Payner, 447 U.S. 727, 735 n.7 (1980).

[77] United States v. HSBC, No. 12–CR–763, 2013 WL 3306161, at *7 (E.D.N.Y. July 1, 2013) (citing United States v. Bonnet-Grullon, 212 F.3d 692, 701 (2d Cir. 2000)).

[78] *HSBC*, 2013 WL 3306161 at *8 (quoting John Gleeson, *Sentence Bargaining Under the Guidelines*, 8 Fed. Sent'g Rep. 314, 315 (1996)).

[79] Mesarosh v. United States, 352 U.S. 1, 14 (1956).

[80] McNabb v. United States, 318 U.S. 332, 347 (1943).

[81] *HSBC*, 2013 WL 3306161 at *5.

[82] *Fokker* I, *supra* note 3, at 166, rev'd *Fokker* II, *supra* note 9.

[83] *HSBC*, 2013 WL 3306161 at *6.

[84] Decisions of when to prosecute, who to prosecute, how aggressively to prosecute, and what charges to bring are left entirely to the executive. *See* Fokker Brief, *supra* note 9, at 25–26; United States v. Saena Tech Corp., 2015 WL 6406266 at *14 (D.D.C. 2015) ("[T]he courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."). Judicial second guessing of these decisions "intrudes too far into the executive function." *In re* Vasquez-Ramirez, 443 F.3d 692, 698 (9th Cir. 2006).

Judge Leon's application of the test violates separation of powers principles in two steps. First, instead of eliminating the one possible interpretation of the standard laden with separation of powers concerns, he selected that interpretation. Second, the Judge engaged in the inquiry as he would a legal question under *de novo* review—asking how he would have handled the case—instead of approaching the question considering only whether the prosecutor abused his discretion. Looking only within the four corners of the agreement, Judge Leon determined that the government's handling of the case was overly lenient. The Judge expressed outrage over the fact that no individuals were prosecuted as a result of the scheme, that no independent monitor would report on the company's compliance, that the forfeiture did not exceed gross revenue, and that the five-year conspiracy operated to benefit Iran in a "post-9/11 world."[85] The judge proceeded to outline the approach he would have taken: "[s]urely one would expect, at minimum, a fine that exceeded the amount of revenue generated, a probationary period longer than 18 months, and a monitor trusted by the Court to verify for it and the Government both that this rogue company truly is on the path to complete compliance."[86] Not once did the judge ask how other economic sanctions cases involving a benefit to Iran and resolved by DPA have been handled in a "post-9/11 world." Nor did the Judge look to whether the expectations he expounded upon are at all in line with DOJ practice. Notwithstanding, Judge Leon declared that the "agreement does not constitute an appropriate exercise of prosecutorial discretion."[87]

Such a ruling goes beyond asserting a muscular role for the courts. It disrupts the equilibrium between the branches created and ensured by the separation of powers framework. This equilibrium is of vital importance particularly in the realm of criminal law, because a key safeguard of liberty is the principle "that no one can be convicted of a crime without the concurrence of all three branches."[88] When a judge seizes control of the power to prosecute, "the number of branches involved in the criminal process shrinks to two."[89]

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[85] *Fokker* I, *supra* note 3, at 167.

[86] *Id.*

[87] *Id.*

[88] Fokker Brief, *supra* note 9, at 28, (quoting *In re United States*, 345 F.3d 450, 454 (7th Cir. 2003)).

[89] *Id.*

III. A PROPOSED LEGAL STANDARD FOR JUDICIAL REVIEW OF A DPA

A legal standard that accounts for separation of powers concerns is as follows: the court may reject an agreement if it is unlawful, violative of rights, or otherwise so inconsistent with precedent that it raises questions of similar consequence to equal protection questions.

The court's authority to question a DPA stems from its supervisory power[90] and is limited by the constitutional principle of separation of powers.[91] The supervisory power is broadly defined as the court's authority to supervise "the administration of criminal justice."[92] It extends to providing substantive remedies for violations of a criminal defendant's rights,[93] "deter[ring] illegal conduct,"[94] and protecting "the integrity of the judicial process."[95] In *United States v. Gatto*, the court explained that "[j]udicial integrity is rarely threatened significantly when executive action does not violate the Constitution, a federal statute, or procedural rule."[96] Thus, the court's authority to reject an agreement encompasses instances of (1) unlawfulness, (2) violations of recognized rights, and (3) threats to the integrity of the court equivalent to a violation of the constitution.[97] If the court were to act without one of these conditions being present, it would be "invading the executive sphere rather than protecting itself from invasion."[98]

The first and second conditions are self-defining and roughly equal to the conditions identified in *Gatto*. The *Gatto* conditions—violations of the constitution, federal statues, or rules of procedure—are useful yardsticks but not a complete definition of a threat to judicial integrity.[99] In order to

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[90] United States v. HSBC, 2013 WL 3306161 at *3 (E.D.N.Y. 2013). The Speedy Trial Act is a separate and narrower source of authority for judicial review of a DPA or motion to exclude time. The Act's grant of authority is limited and straightforward: its permission extends only to ensuring that a DPA is entered into for the legitimate purpose of diversion, and not for the illegitimate purpose of fending off a fast approaching trial date. United States v. Saena Tech Corp., 2015 WL 6406266 at *16 (D.D.C. 2015).

[91] United States v. Gatto, 763 F.2d 1040, 1046 (9th Cir. 1985).

[92] *HSBC*, 2013 WL 3306161 at *4 (quoting United States v. Payner, 447 U.S. 727, 735 n.7 (1980)).

[93] *HSBC*, 2013 WL 3306161 at *4 (citing McNabb v. United States, 318 U.S. 332, 345 (1943)).

[94] Fokker Brief, *supra* note 9, at 47.

[95] *Fokker* I, *supra* note 3, at 165 (quoting *Payner*, 447 U.S. at 735-36 n.8), rev'd, *Fokker* II, *supra* note 9.

[96] *Gatto*, 763 F.2d at 1046.

[97] *See id.*

[98] *Id.*

[99] In *Gatto*, the opinion uses language that leaves open the possibility of including conditions other than those enumerated under the judicial integrity prong. *Gatto*, 763 F.2d at 1046 ("Judicial integrity is *rarely* threatened *significantly* when executive action does not violate the Constitution, a federal statute, or a procedural rule." (emphasis added)). This statement begs two questions: 1) must the threat to judicial integrity be significant in order for the court to protect itself pursuant to its supervisory

give the third condition meaning it must be more broadly defined: a threat to judicial integrity is executive action similar in consequence to a constitutional violation. For example, where an agreement treats an individual defendant so divergently from another, similarly situated defendants without reason, such discriminatory treatment falls under the third condition and allows courts to provide relief.[100] Thus the test requires a judge scrutinizing a DPA to examine the agreement within the broader context of other DPAs involving similarly situated defendants and to look for instances where the DPA falls so far outside this body of precedent as to raise questions of a similar consequence to equal protection questions. A definition of a threat to judicial integrity that incorporates precedent builds in the "principle that a reviewing court should not disturb an enforcement decision where it 'would have no meaningful standard against which to judge the agency's exercise of discretion.'"[101] The court can apply this test to question the executive's decision to impose certain terms in a DPA and to question the executive's decision to use a DPA to resolve a case. At the same time, the proposed test respects and reflects the D.C. Circuit's admonition that courts must refrain from interfering with prosecutorial decisions absent "clear evidence" that prosecutors acted improperly in "discharg[ing] their official duties."[102]

A. *Applying the Proposed Legal Standard to Economic Sanction Cases*

The test is readily applicable to economic sanction cases because of the current state of criminal prosecution, relying heavily upon resolution by DPA. DPAs are important tools of prosecution and have an established use in this area. Since 2009, the DOJ, in partnership with the Manhattan District Attorney's Office, has been actively investigating and resolving economic sanctions cases, almost exclusively by DPA.[103] These cases

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power, and 2) in the rare circumstance where there *is* a significant threat to judicial integrity due to executive action that does *not* rise to the level of violation of the constitution, federal statute or procedural rule, how can the court react without upsetting the separation of powers?

[100] This interpretation is consistent the D.C. Circuit's statement that courts are not barred from interfering with charging decisions when necessary "to protect a defendant against prosecutorial harassment." *Fokker* II, *supra* note 9, at 742.

[101] Fokker Brief, *supra* note 9, at 39 (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985)).

[102] *Fokker* II, *supra* note 9, at 741.

[103] Six banks have entered into DPAs for illegal conduct in violation of economic sanctions: Lloyds TSB Bank and Credit Suisse AG both entered into DPAs in 2009, Barclays entered into a DPA in 2010, and ING, Standard Chartered, and HSBC entered into DPAs in 2012. *See, e.g.*, Press Release, Dep't. of Justice, BNP Paribas Bank Pleads Guilty, Pays $8.83 Billion in Penalties for Illegal Transactions (June 30, 2014).

create a line of precedent that shows how the executive branch handles and punishes certain conduct. Additionally, the DPA is no longer the only game in town. Diversity in the method chosen for resolving economic sanctions cases allows us to examine how the legal standard works in practice, testing both the terms and use of the DPA.

The 2014 guilty plea from BNP Paribas makes clear that collateral consequences can be avoided and cases can be resolved outside of a DPA. Against this new backdrop, prosecutors' use of DPAs must be understood in a more nuanced manner. The DPA is not a device of mere convenience but, due to the large body of precedent that has built up in this area, has evolved into an expression of a certain level of culpability. Guilty pleas, DPAs, and NPAs fall on a spectrum.; the prosecutor's choice of which device to use is a discretionary decision that will involve consideration of multiple factors—one of which is the defendant's culpability compared with prior, similarly situated defendants.

Judges have the capacity to analyze both the use and the content of a DPA using precedent as a meaningful standard against which to measure the prosecutor's exercise of discretion. Judges perform a similar task when evaluating guilty pleas or making sentencing decisions. But unlike those areas where judicial authority stems from statute, in the realm of DPAs, the judicial authority stems from the supervisory power limited by the separation of powers framework. This narrower grant of authority requires greater deference to the executive branch before upsetting an enforcement decision. Courts should apply a standard of deference equivalent to the abuse of discretion standard of review when considering whether a decision lies so far outside precedent as to upset judicial integrity if let stand. Here, the court should ask if there is no factor present that could lead a reasonable prosecutor to resolve a case in the manner chosen. The weight given to any such factor may not be reviewed *de novo*; the court must respect the weight assigned to factors by the executive branch. Applying this degree of deference will preserve both the court's ability to protect itself, and the executive branch from intrusion.

B. *Applying the Proposed Legal Standard and Standard of Deference to United States v. Fokker Services B.V.*

If the proposed legal standard were applied to the Fokker Services DPA on remand, then the court must approve the agreement unless it is unlawful, a violation of recognized rights, or an egregious departure from precedent similar in consequence to a constitutional violation. There are no allegations that the agreement is unlawful or otherwise violative of recognized rights. Nor is there a constitutional issue within the four corners of the agreement. Thus the court can only reject the DPA if the content of the agreement or the use of a DPA as the mechanism for prosecution is so

misaligned with precedent that it raises quasi-constitutional questions. The court must apply the proper standard of deference, looking only for abuse of discretion, when making this determination.

The court may not reject the Fokker Services DPA for its content because the terms of the agreement are perfectly in line with the terms of other DPAs resolving economic sanction cases. The requirements of the Fokker Services DPA are as follows: (1) forfeiture equal to the gross revenue from illegal conduct; (2) cooperation with the U.S. government; (3) new compliance programs; and (4) demonstration of good conduct and compliance with U.S. sanctions and export laws over an eighteen-month period.[104] Regarding forfeiture, the DOJ was well within its right to impose a penalty equal to the amount of illegal proceeds. The prosecutor did not abuse his discretion considering DOJ policy and practice.[105] All banks that have entered into DPAs for violations of economic sanctions have paid in forfeiture amounts roughly equal to or less than the amount involved in the violative conduct. It is rare for a bank to pay more.[106] Standard Chartered "moved more than $200 million through the U.S. financial system primarily on behalf of Iranian and Sudanese clients" and paid $227 million in forfeiture.[107] ING Bank paid $619 million for moving "billions of dollars through the U.S. financial system on behalf of Cuban and Iranian clients in violation of U.S. sanctions."[108] And HSBC paid a $375 million penalty for moving "hundreds of millions of dollars through the U.S. financial system on behalf of Iranian, Burmese, Sudanese, Libyan, and other clients in violation of U.S. sanctions."[109]

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[104] *Fokker* I, *supra* note 3.

[105] *See* Garrett, *supra* note 25, at 881 ("[T]he DOJ does not chiefly seek punitive fines in its settlements and emphasizes instead restitution to compensate victims.").

[106] *See* Press Release, Manhattan DA, DA Vance Announces $342 Million Settlement With Commerzbank (Mar. 12, 2015) ("Included in the $342 million criminal settlement amount is an unprecedented fine of approximately $80 million specifically addressing Commerzbank's conduct with respect to its involvement in handling payments on behalf of IRISL after it was designated as an SDN by OFAC pursuant to the NPWMD program on September 10, 2008. Because Commerzbank processed approximately $40 million in illegal payments on behalf of IRISL after its designation as an SDN, Commerzbank has agreed to forfeiture and a criminal fine in the amount of three times the value of those transactions – approximately $120 million in total.").

[107] Press Release, Manhattan DA, Standard Chartered Bank Reaches $327 Million Settlement For Illegal Transactions (Dec. 10, 2012); *see also* Deferred Prosecution Agreement at 2, United States v. Standard Chartered Bank, No. 12–CR–262 (D.D.C. Dec. 10, 2012).

[108] Press Release, Manhattan DA, District Attorney Vance Announces $619 Million Settlement with ING Bank (June 12, 2012); *see also* Information at 22, United States v. ING Bank, N.V., NO. 12-CR-136, 2012 WL 12302810, *4 (D.D.C. June 12, 2012).

[109] Press Release, Manhattan DA, District Attorney Vance Announces $375 Million Settlement with HSBC Bank (Dec. 11, 2012); *See also* Statement of Facts at 21, United States v. HSBC Bank USA, No. 12–CR–763, 2013 WL 3306161 (E.D.N.Y. Dec. 11, 2012.

With respect to the second, third, and fourth requirements, all DPAs in this area require continued cooperation, heightened compliance mechanisms, and law-abiding conduct measured over a set period of time—typically two years.[110] Some require independent monitors while others do not.[111] DPAs that do require an independent monitor place the burden on the defendant firm to pay for it.[112] In *Fokker Services*, the decision to allow self-reporting over a monitor could reasonably be motivated by a concern for the financial health of the firm and would not constitute leniency rising to the level of abuse of prosecutorial discretion. Applying the standard of deference, the court must find the decision to defer prosecution for eighteen months rather than the typical twenty-four months to be not so great a difference as to constitute an abuse of discretion.

The choice to resolve the case via DPA is also perfectly in line with precedent and may not be rejected by the court pursuant to its supervisory power. Economic sanctions cases are typically resolved by DPA. The most notable departure from this practice is the BNP Paribas case. BNP Paribas pled guilty to violating economic sanctions in June 2014 and paid $8.9 billion in criminal penalties. Both the guilty plea and size of the forfeiture were unprecedented in this area, but then, so too was the conduct involved. The volume of payments BNP processed for sanctioned entities surpassed that in all other cases and was a key factor in prosecutors' decision to take a DPA off the table. Another important factor was the character of e-mail evidence. Sanctions cases typically utilize e-mail evidence, the character of which can vary widely and point to different levels of culpability. For example, the OFAC settlement with Standard Chartered quotes e-mails that are dull yet concerning, "[s]ome [legal and compliance] teams are entirely unfamiliar with sanctions."[113] In HSBC, some e-mails pointed to intent: "we have found a solution to processing your payments…the key is to

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[110] *See, e.g.*, Deferred Prosecution Agreement at 3, United States v. Standard Chartered Bank, No. 12 Cr. 262 (D.D.C. Dec. 10, 2012). *But see* Deferred Prosecution Agreement, at 3 United States v. HSBC Bank USA, No. 12–CR–763, 2012 WL 6120512 (E.D.N.Y. Dec. 11, 2012) (deferring prosecution for five years).

[111] *See* Deferred Prosecution Agreement at 3, United States v. Standard Chartered Bank, No. 12–CR–262 (D.D.C. Dec. 10, 2012) (deferring prosecution contingent under the condition that the bank "voluntarily self-report its conduct"); Deferred Prosecution Agreement at 7, United States v. HSBC Bank USA, No. 12–CR–763, 2012 WL 6120512 (E.D.N.Y. Dec. 11, 2012) (requiring as a condition of the deferral that the bank "retain an independent compliance monitor").

[112] Deferred Prosecution Agreement at 15, United States v. HSBC Bank USA, No. 12–CR–763, 2012 WL 6120512 (E.D.N.Y. Dec. 11, 2012) (requiring as a condition of the deferral that the bank "*retain* an independent compliance monitor" (emphasis added)).

[113] Settlement Agreement between Office of Foreign Assets Control and Standard Chartered Bank at 4, MUL–607200 (Dec. 10, 2012).

populate field 52…outgoing payment instruction from HSBC will not quote [Iranian bank] as sender – just HSBC London…This then negates the need to quote 'do not mention our name in New York.'"[114] And in BNP the e-mails were downright salacious, "[t]he dirty little secret isn't so secret anymore, oui?"[115]

In *Fokker Services*, prosecutors were well within their discretion to choose to resolve the case by DPA considering a variety of facts, the amount at issue being one of them. The $21 million involved in that case pales in comparison to the $8.9 billion in BNP Paribas. Even if e-mail and other evidence pointed to an extremely high level of culpability, prosecutors would be within their right to choose to use the DPA, weighing amount at issue more heavily than any other factor.[116] As discussed earlier, the task of weighing different factors is uniquely the role of the prosecutor and it would offend separation of powers for courts to second guess the weight assigned to any one factor.

Thus, applying the appropriate legal standard and degree of deference, the court may not reject the DPA in *Fokker Services*; doing so would intrude on the executive branch and erode the separation of powers.

IV. EVALUATING THE PROPOSED LEGAL STANDARD IN LIGHT OF CURRENT CRITICISMS OF THE DPA

The proposed legal standard—whether an agreement is unlawful or a departure from precedent significant enough to constitute an abuse of discretion—articulates a clear role for the courts in reviewing DPAs. But the legal standard and its attendant standard of deference set a very high threshold for rejecting executive action in the interest of separation of powers. Is the threshold so high as to render the courts toothless? Or is the proposed standard capable of addressing some of the criticisms leveled at DPAs for lack of oversight? This section will evaluate how meaningful the standard is in practice by analyzing how well it addresses two main criticisms of the corporate DPA.

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[114] Statement of Facts at 22, United States v. HSBC Bank USA, No. 12–CR–763, 2012 WL 6120512 (E.D.N.Y. Dec. 11, 2012).

[115] Ben Protess & Jessica Silver-Greenberg, *BNP Admits Guilt and Agrees to Pay $8.9 Billion Fine to U.S.*, N.Y. TIMES, July 1, 2014, at B1.

[116] The Factual Statement attached to the Information includes reference to email evidence. The emails clearly show intent to evade sanctions: "we apply the 'what they don't know, won't hurt them,' principle which means we don't provide more information to suppliers than they need." Factual Statement at 12, United States v. Fokker Servs. B.V., 79 F. Supp. 3d 160 (D.D.C. June 5, 2015).

A. *Too Big to Jail*

Perhaps the most prominent criticism leveled at DPAs following the financial crisis is that the tool is used to perpetuate a "too big to jail" policy that shields corporations and financial institutions engaged in wrongdoing from the consequences. The criticism has two strands. The first focuses on the inequity between individual offenders for low level crimes, and large financial institutions for global crimes of epic proportion. The individual will likely be forced to plead guilty or endure a trial, while the financial institution gets to negotiate a sweetheart deal with the government.[117] The second strand is concerned with a class of banks or corporations that have achieved an untouchable status due to their size. Senator Warren explains, "big banks are getting a terrific break, and little banks are just getting smashed."[118] Those advancing this strand of criticism, as well as some within the DOJ, believe the fears of collateral consequences and another Arthur Andersen are overblown.[119]

The proposed legal standard offers no remedy for the first strand of the "too big to jail" criticism because it requires courts to consider only similar, prior cases when analyzing precedent. Courts are not equipped to compare cases involving totally different sets of considerations and factors that have been weighed by the DOJ.[120] But the standard is capable of addressing the second strand of this criticism. The test's focus on precedence means that, by its own doing, the DOJ has effectively undone any special class of untouchable banks. Recent settlements are proof that the skies do not fall and the world as we know it does not end when institutions like BNP Paribas, Citicorp, JPMorgan, Barclays, RBS, and

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[117] Golumbic & Lichy, *supra* note 3, at 1324 ("[W]hen we hear that none of the Wall Street culprits have gone to trial, it contributes to this feeling out here that if you have money, you can get off. If you rob a convenience store, you are going to go to jail. If you rob the Nation, you just get richer, and you pay a fine." (quoting *Who is Too Big to Fail: Are Large Financial Institutions Immune From Federal Prosecution? Hearing Before the Subcomm. On Oversight and Investigations of the H. Comm. On Fin. Servs.*, 113th Cong. 9 (2013) (statement of Congressman Emanuel Cleaver)).

[118] Golumbic & Lichy, *supra* note 3, at 1321–1322 (quoting Mollie Reilly, *Elizabeth Warren Takes on Eric Holder's 'Too Big to Jail' Statement*, HUFFINGTON POST (Mar. 7, 2013), http://www.huffingtonpost.com/2013/03/06/elizabeth-warren-eric-holder_n_2823618.html).

[119] U.S. Attorney for the Southern District of New York, Preet Bharara has voiced his opinion that "after Arthur Andersen, the pendulum has swung too far and needs to swing back a bit," and "the sky does not fall" when major financial institutions are held to account. Preet Bharara, U.S. Attorney, Prepared Remarks at the SIFMA's Compliance and Legal Society Annual Seminar (Mar. 31, 2014) available at https://www.justice.gov/usao-sdny/speech/sifma-s-compliance-and-legal-society-annual-seminar-prepared-remarks-us-attorney.

[120] *See* United States v. Saena Tech Corp., 140 F.Supp.3d 11, 28 (D.D.C. 2015) (stating the judicial branch is "ill-suited to review prosecutorial decisions—given the complex factors involved").

UBS plead guilty.[121] Where future cases involve conduct that matches or surpasses that of prior offenders who pled guilty, courts will have the tools and the power to reject any settlement agreement that is out of line with precedent and overly lenient. The legal standard also addresses the opposite side of the same coin: it protects smaller players from overly harsh agreements. A court may reject an agreement for abuse of discretion where a small offender's conduct matches that of prior, larger offenders but receives a harsher settlement than its larger counterpart.[122]

B. *The Extrajudicial Nature of DPAs Leaves Offenders Vulnerable to Violations of Due Process*

The second criticism leveled at DOJ use of the DPA is that the tool is favored precisely because it is "extra-judicial" in nature[123] and allows "prosecutors to wield unchecked power over vulnerable corporate offenders."[124] The DPA disrupts the classical adversarial relationship and creates a dynamic where "the DOJ can use its leverage to force a company to do what the DOJ wants with little resistance."[125] Greenblum argues due process concerns can be even higher in the corporate context than the juvenile offender context due to the "death penalty" possibility stemming from "adverse publicity and the collateral consequences of a conviction."[126] These consequences create "unique pressure" for corporate offenders to settle "at virtually any price."[127] At bottom, the fear is that prosecutors exert their unbelievable leverage to exact unreasonable terms from corporate offenders who have no choice but to accept.

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[121] *See* Press Release, Dep't. of Justice, BNP Paribas Bank Pleads Guilty, Pays $8.83 Billion in Penalties for Illegal Transactions (June 30, 2014); Press Release, Dep't. of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015); Preet Bharara, U.S. Attorney, Prepared Remarks at the SIFMA's Compliance and Legal Society Annual Seminar (Mar. 31, 2014) available at https://www.justice.gov/usao-sdny/speech/sifma-s-compliance-and-legal-society-annual-seminar-prepared-remarks-us-attorney.

[122] *Cf.* Wilson Meeks, *Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell an End to Corporate Criminal Liability?* 40 COLUM. J.L. & SOC. PROBS. 77, 109 (2006) ("The disparate treatment of similarly situated offenders presents another potential problem. As mentioned above, the DOJ considers potential collateral damage to innocents when deciding which corporations get DPAs. This incentive, however, may be curtailed when "killing" the corporation will not generate much collateral damage at all. Thus, the system might treat similarly situated offenders differently. That is, corporate offenders with the same culpability level would be treated differently because some are too big to fail, while others are too small to save.").

[123] *Id.* at 106.

[124] Greenblum, *supra* note 1, at 1895.

[125] Meeks, *supra* note 122, at 106–07.

[126] Greenblum, *supra* note 1, at 1895.

[127] *Id.*

Corporate offenders are not quite as vulnerable as Meeks and Greenblum convey. Corporate offenders have two key pieces of leverage to use in negotiations with the government over the terms and form of a settlement agreement: cooperation and access to evidence. First, cooperation enables corporate investigations and prosecutions to take place as the funds and manpower driving the investigations are largely provided by the offender itself. Corporate entities typically conduct their own internal investigation by hiring an outside accounting or auditing firm at a huge expense to comb through a mind numbing quantity of records. The corporate entity also retains a law firm to package this data into presentations given to the government in an effort to show cooperation. The government conducts its own investigation as well but without the cooperation of the institutional offender, it is unclear whether the government would have the resources to mount these kinds of cases.

Second, and relatedly, through cooperation the government can gain access to records it needs to prove its case. In cases involving international institutions, that evidence may be located anywhere in the world. If that evidence is located in a foreign jurisdiction, the government has two options: obtain it through the cooperation of the institution or through a Mutual Legal Assistance Treaty ("MLAT").[128] The latter, which can be thought of as an international court order, depends upon two preconditions: the foreign government must agree to work with the U.S. government on the matter, and the conduct at issue must also be criminal in the foreign jurisdiction. If the offender chooses not to cooperate, and the relevant records are held in a country with different criminal laws and/or privacy laws, the DOJ has no case. However, because the government requires and weighs cooperation heavily when deciding on settlement terms to propose,[129] refusing to cooperate is the nuclear option.

The above discussion hopefully sharpens the criticism: neither party wants to find out what happens when one pushes the other too far in DPA negotiations, but only one of those parties is facing the possibility of a death knell. This is the imbalance that gives prosecutors leverage to dictate the terms of a DPA while free from judicial oversight. The proposed legal standard does provide for judicial review of the terms, but its design does not guarantee protection for the vulnerable corporate defendant. The strength and weakness in the standard is its reliance on precedent. The

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[128] This is a simplified explanation of the government's options. Even if the institution cooperates and agrees to provide records, it must do so in compliance with the relevant laws, including privacy laws, of the jurisdiction in which the records are held.

[129] DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL: PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS, 9-28.000 (2015).

standard instructs courts to review DPAs for terms consist with precedent; any agreement with unduly onerous terms inconsistent with precedent shall not receive the approval of the court. But if the DOJ consistently imposes onerous terms on all corporate offenders, the court would have no power under this test to provide relief. The judiciary is powerless to rectify this deficiency. As Part I argued, any attempt to subjectivize the test would amount to the court substituting its view for that of the prosecutor. Such a result would upset the equilibrium between the branches.

1. The Wisdom of Reform

Only Congress can remedy the weakness in the standard and the judiciary's inability to provide relief for consistently onerous DPA terms. One proposal for reform suggests Congress enact the Accountability in Deferred Prosecution Act ("ADPA") requiring courts to "consider, and render findings of fact with respect to whether the terms of the DPA are fair and reasonable in relation to the acknowledged corporate misconduct."[130] This standard is nearly identical to the one Judge Leon applied in *Fokker Services*. Does it matter that the court is being given permission to engage in this review by Congress? Or, does this level of scrutiny offend the separation of powers regardless of the source from which the standard issues?

This paper proposes that an attempt to remedy the weakness in the proposed legal standard would result in more harm than good. Placing the ultimate discretion in the judiciary rather than the executive is contrary to two of the foundational principles of our government of separated powers: leadership that is responsive to the electorate and effective decision-making. Prosecutors, as part of the executive branch, are accountable in an attenuated yet real way to the electorate. At-will removal of the Attorney General ensures that the president has complete control over the "tone at the top" of the DOJ. Line prosecutors are expected to comply with this tone and overall policies of the Department. If they do not, or if the public disagrees with the DOJ policies, the president will likely feel pressure from an electorate angered by a string of bad precedent created by line assistants. Such pressure and accountability can lead to change inside the DOJ. The same is not true of the judiciary.

The judiciary was designed to be isolated from political pressure and popular opinion.[131] Judges have protections such as life tenure and salary

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[130] Golumbic & Lichy, *supra* note 3, at 1343.
[131] *See* THE FEDERALIST Nos. 78, 79 (Alexander Hamilton).

assurances.[132] There is no redress short of impeachment for a judge haphazardly or inappropriately substituting his view for the prosecutor's view. It is also not clear whether judicial abuse of power in this area would be an impeachable offense, if given direct permission by Congress to engage in subjective analysis.

From an effective decision-making perspective, the subjective determination is better left to the executive branch rather than the judiciary. While the classic decision-making argument for housing certain powers in the executive branch espouses the benefits of the unitary executive, here the benefit actually derives from the hierarchical structure of the DOJ, ensuring oversight. There are a number of people within the Department that are briefed on a proposed settlement before the line assistant is given the go ahead. Additionally, the DOJ has institutional knowledge about how similar cases have been handled in the past. The court does not possess these benefits. Oversight of judicial decisions only occurs after the fact on appeal, at which point, the harm from a bad decision may be irreversible.[133]

The weakness in the legal standard is only implicated if abusive prosecutors create a bad body of precedent over time. Oversight and accountability combine to lessen the chance that such a situation will arise. The alternative, placing the subjective determination in the hands of judges, would produce greater inconsistency across cases due to the lack of oversight and institutional knowledge. But more importantly, doing so would reduce the "number of branches involved in the criminal process" to two.[134] Thus the executive branch is best suited to make the final subjective determination concerning disposition of corporate criminal cases by DPA.

V. CONCLUSION

The judiciary can effectively review prosecutors' exercise of discretion by applying the proposed legal standard and standard of deference. The proposed test acts as a backstop to abuse while preserving and respecting the separation of powers.

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[132] Hamilton, *supra* note 131.

[133] *See, e.g.*, Golumbic & Lichy, *supra* note 3, at 1306–07 (discussing the consequences of the Arthur Andersen indictment).

[134] Fokker Brief, *supra* note 9, (quoting *In re* United States, 345 F.3d 450, 454 (7th Cir. 2003)).