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## The Public Interest in Corporate Settlements

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BRANDON L. GARRETT

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# THE PUBLIC INTEREST IN CORPORATE SETTLEMENTS

BRANDON L. GARRETT\*

**Abstract:** Corporate settlements are proliferating in form and function. They include consent decrees, corporate integrity agreements, deferred prosecution agreements, non-prosecution agreements, leniency agreements, and plea bargains. Enforcers at the federal and state level enter an array of administrative, civil, and criminal resolutions of enforcement actions against companies. The reach of these settlements is global, and corporate fines have reached new records, with penalties in the hundreds of billions of dollars affecting entire industries and economies. These settlements have not been studied together as a subject, perhaps because they span very different fields, from antitrust to banking, environmental law, health law, and securities regulation. Private settlements, regulatory settlements, and criminal prosecutions each bring with them different statutory and court-made procedures for approval in and out of court. Although judges have occasionally disagreed about the scope of that review, it is understood that judicial review is needed to ensure that the public interest is met. Congress has increasingly enacted statutes calling for public interest review of corporate settlements. Yet when government actors settle with corporations, courts too often presume the public interest and neglect statutory guidelines. In this Article, I explore how standards in disparate areas raise a common question: how should judges assess the public interest when corporations settle with the government? A common field of law, and perhaps more important, equity, governing judicial review of these complex corporate settlements deserves study. In this Article, I argue that common equitable principles govern in the courts, but should be clarified and developed further in judicial rulings, regulations, and statutes, using as their lodestar the equitable concept of the public interest.

## INTRODUCTION

Corporate settlements with the federal government are proliferating in form and function. They include consent decrees, corporate integrity agreements, deferred prosecution agreements (“DPA”), non-prosecution agreements

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(“NPA”), leniency agreements, and plea bargains.<sup>1</sup> Enforcers at the federal and state level now enter an array of administrative, civil, and criminal resolutions of actions against companies. They may be entered and negotiated in parallel, and settled jointly.<sup>2</sup> The reach of corporate settlements is global, with major multinational companies involved, as well as coordination among nations and diplomatic efforts to resolve them.<sup>3</sup> The penalties have reached new records, with annual total penalties in the tens of billions of dollars affecting entire industries and economies.<sup>4</sup> These settlements have not been studied together as a subject, perhaps because they span very different fields, from antitrust to banking, from environmental law to health law, and from anti-money laundering to securities regulation. Private settlements, regulatory settlements, and prosecutions each bring with them varying standards of judicial review and different statutory and judge-made procedures for their approval in and out of court. Generally, though, federal statutes and rules seek to ensure that judges examine whether the public interest is met. Yet, when government actors settle with corporations, often judges presume it is satisfied. In this Article, I explore how standards in disparate areas have converged raising a common question: who stands for the public interest when corporations settle with the government?

The public interest has become far more salient as corporate settlements have attracted criticism from judges, legislators, public interest groups, and scholars. Criticisms include the lack of transparency in federal corporate settlements,<sup>5</sup> the lack of public involvement in the settlements,<sup>6</sup> the lack of indi-

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<sup>1</sup> BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* 13–15 (2014) [hereinafter GARRETT: *TOO BIG TO JAIL*].

<sup>2</sup> *Id.* at 137, 228, 252 (describing the prevalence of parallel civil and criminal litigation). Statutes have promoted such parallel litigation. *See, e.g.*, Securities Act of 1933 § 20(b), 15 U.S.C. § 77t(b) (2012); Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(d). *See generally* Richard M. Strassberg et al., *Navigating Parallel Proceedings*, N.Y.L.J., July 24, 2006, at 9 (discussing courts’ general practice of allowing the government a stay of discovery only sparingly, even though parallel civil and criminal proceedings are underway).

<sup>3</sup> *See generally* Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775 (2011) (discussing the “shift” in increased U.S. prosecutions of foreign companies) [hereinafter Garrett: *Globalized Corporate Prosecutions*].

<sup>4</sup> GARRETT: *TOO BIG TO JAIL*, *supra* note 1, at 5–6 (describing the explosion in the size of corporate criminal fines in federal court over the past decade); *see* PHILIP MATTERA, *GOOD JOBS FIRST, BP AND ITS BRETHREN: IDENTIFYING THE LARGEST VIOLATORS OF ENVIRONMENTAL, HEALTH AND SAFETY LAWS IN THE UNITED STATES* 3, 21–23 (2015) (detailing the rise in environmental, health and safety fines since 2010); Jill Treanor, *Barclays, HSBC, Royal Bank of Scotland ‘at Risk of Further Penalties’*, *THE GUARDIAN* (Nov. 16, 2015, 7:31 PM), <https://www.theguardian.com/business/2015/nov/17/barclays-hsbc-royal-bank-of-scotland-moodys-risk-further-penalties> [<https://perma.cc/3Y78-MT25>] (“Major banks have now set aside \$219 [billion] . . . to pay fines and legal costs since the [2008] financial crisis.”).

<sup>5</sup> *E.g.*, Danielle Douglas, *Senate Bill Targets Corporations That Deduct Settlement Payouts*, *WASH. POST* (Nov. 6, 2013), [https://www.washingtonpost.com/business/economy/lawmakers-introduce-bill-to-stop-corporations-from-deducting-settlements/2013/11/06/5fe1c180-4705-11e3-bf0c-cebf37c6f484\\_story.html?utm\\_term=.7b9c3b241a9c](https://www.washingtonpost.com/business/economy/lawmakers-introduce-bill-to-stop-corporations-from-deducting-settlements/2013/11/06/5fe1c180-4705-11e3-bf0c-cebf37c6f484_story.html?utm_term=.7b9c3b241a9c) [<https://perma.cc/BHV8-D6XD>] (describing proposed Government

vidual accountability,<sup>7</sup> the lack of management accountability, the small size of the fines, and the effectiveness of the agreements.<sup>8</sup> Answers to those concerns, I argue, lie in a common field of equity jurisprudence governing the judicial review of complex corporate settlements.<sup>9</sup> As the Supreme Court has put it, in an oft-repeated formulation: “[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.”<sup>10</sup> In this Article, I argue that common equitable principles should be developed further in the corporate settlement context through judicial rulings, regulations, and statutes—using the concept of public interest as their lodestar.

Traditionally, federal courts have deferentially reviewed settlement agreements between parties, particularly when one party is a government enforcement authority.<sup>11</sup> The settlement terms were often simple and largely confined to payments of fines and penalties or agreements to cease violations. In a remarkable shift, across a range of civil and criminal contexts, the sheer scope of agreements has expanded. Settlements encompass staggering fines in the billions of dollars, and include complex victim restitution funds that must be administered over many years. Settlements elaborate the compliance to be performed, and require that outside monitors implement and oversee quite intricate institutional governance changes within these corporations.<sup>12</sup> In doing so,

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Settlement Transparency and Reform Act, noting that settlements “rarely spell out whether the entire monetary figure should be regarded as punitive” and, therefore, subject to taxes).

<sup>6</sup> *E.g.*, Complaint at 1–2, *Better Mkts., Inc. v. U.S. Dep’t of Justice*, 83 F. Supp. 3d 250 (D.D.C. 2015) (No. 14-190) (challenging \$13 billion JPMorgan settlement as having been negotiated “entirely in secret behind closed doors”).

<sup>7</sup> See *e.g.*, 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/JPC6-YH79>] (discussing the lack of accountability mechanisms that impedes the government’s prosecution of major players behind the 2008 financial crisis).

<sup>8</sup> See, *e.g.*, David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1410–11 (2014); Press Release, Senator Jeff Merkley, Merkley Blasts “Too Big to Jail” Policy for Lawbreaking Banks (Dec. 13, 2012) (on file with author).

<sup>9</sup> The American Law Institute is presently considering draft Principles of Compliance, Governance, and Risk Management for Corporations, Nonprofits, and Other Organizations. See *Principles of the Law, Compliance, Enforcement, and Risk Management for Corporations, Nonprofits, and Other Organizations*, AM. L. INST., <https://www.ali.org/projects/show/compliance-enforcement-and-risk-management-corporations-nonprofits-and-other-organizations/> [<https://perma.cc/6MKG-TWXJ>]. Those principles may include discussion of judicial review and structuring of corporate settlements.

<sup>10</sup> *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 552 (1937).

<sup>11</sup> For description of traditional rules and case law in civil and criminal cases, see *infra* notes 46–260 and accompanying text.

<sup>12</sup> See *infra* notes 46–174 and accompanying text. On the rise in emphasis on compliance, see generally Miriam H. Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 958–75 & nn.48–162 (2009) (providing background information on the origins of corporate compliance and related regulatory frameworks); Kenneth A. Bamberger, *Technologies of Compliance: Risk and Regulation in a Digital Age*, 88 TEX. L. REV. 669 (2010) (discussing the benefits and risks of third-party

not only have private litigants, regulators, and prosecutors in disparate contexts borrowed corporate settlement tools from each other, but perhaps as a result, judges examine complex settlements that increasingly borrow terms, standards, and remedies across areas, ranging from criminal to regulatory to civil. To take one example, federal prosecutors began appointing corporate monitors in criminal settlements in the early 2000s, and soon the Securities and Exchange Commission (“SEC”) began to do so in its civil settlements.<sup>13</sup> Private plaintiffs set up large-scale victim compensation funds, and now prosecutors do so to distribute restitution or forfeiture related to criminal cases.<sup>14</sup> Judges must reckon, in a range of areas, with the same functional problems of how best to hold a corporation accountable for violations and how to use their equitable powers—apart from the power to impose legal remedies such as damages—to supervise implementation of complex enforcement agreements.

Due to the increased prominence of administrative enforcement, the general subject has attracted a wave of new scholarship, much of which has focused on executive power and oversight over agency enforcement, non-enforcement, as well as the availability of Article III judicial review of enforcement and prosecutorial discretion.<sup>15</sup> Article III judicial review, however, is not only informed by Article III norms and underlying statutes and regulations, but also a body of principles concerning ongoing supervision of equitable decrees. Article III invests federal judiciary with equitable power, extended

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software used to assess and manage corporate risk); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007) (discussing the recent rise of “structural reform prosecution” against regulated firms) [hereinafter Garrett: *Structural Reform Prosecution*].

<sup>13</sup> Jennifer O’Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 BROOK. J. CORP. FIN. & COM. L. 89, 89–90 & n.3 (2006).

<sup>14</sup> See GARRETT: TOO BIG TO JAIL, *supra* note 1, at 122–39.

<sup>15</sup> See, e.g., David L. Markell & Robert L. Glicksman, *A Holistic Look at Agency Enforcement*, 93 N.C. L. REV. 1, 5, 10–43 (2014) (proposing a “three-layered conceptual framework” to guide the formation of “administrative agency enforcement and compliance” mechanisms); Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1111–15 (2013) (arguing that the President should adopt a more transparent and coordinated administrative enforcement policy); Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. L. REV. 1569 (2013) (arguing Article III review of private rights is more robust); Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 860–61 (2012) (discussing rationales for administrative enforcement); Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1016 (2001) (discussing the benefits and limitations of out-of-court settlements with respect to protecting the public interest). On deference to administrative agencies more broadly, see generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (discussing the doctrine of nondelegation and its preservation of checks and balances on powers in the U.S government); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996) (describing the *Chevron* doctrine and its particular importance in administrative law, arguing for its usefulness in federal criminal law); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (arguing that administrative bodies outside the judicial branch have a role to play in determining the constitutionality of certain laws); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983) (same).

to federal judges since the Judiciary Act of 1789.<sup>16</sup> Equity is particularly important in corporate settlements, where parties envision judicial supervision and detailed remedies over a period of time.<sup>17</sup> The equitable discretion of Article III judges in public law or institutional reform litigation brought by civil rights plaintiffs often seeking constitutional remedies is developed in an extensive literature.<sup>18</sup> How judges should supervise structural reforms within corporations or to review consent decrees or other forms of settlements outside of the civil rights context, however, is far less developed.

In this Article, I explore the body of equitable law that applies to corporate settlements, and propose functional categories to be used by judges when deciding whether to approve, how to supervise, and how to adjudicate disputes that can arise over the implementation of corporate settlements.<sup>19</sup> Judges have long applied these concepts in some contexts, but have only just begun to apply these principles in others.<sup>20</sup> They may grow in their importance.<sup>21</sup> The implications may also extend to the questions of whether certain types of agency actions to settle cases are reviewable, and what the scope should be of that review.<sup>22</sup> The burgeoning literature on agency *non-enforcement* is beyond the scope of this Article, however.

High-profile controversies have erupted over judicial review of government settlements with corporations, as these agreements have expanded in their ambition and their public significance.<sup>23</sup> Fines and corporate prosecutions have exploded as have the detailed terms seeking to hold companies accountable, and federal administrative agencies can similarly claim record settlements

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<sup>16</sup> See U.S. CONST. art. III, § 2, cl. 1 (“The judicial power shall extend to all cases, in law and equity . . . .”); Judiciary Act of 1789, ch. 20, §§ 1–35, 1 Stat. 73, 73–93.

<sup>17</sup> See *infra* notes 261–273 and accompanying text.

<sup>18</sup> See, e.g., William Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 641–49 (1982).

<sup>19</sup> Several scholars have examined whether prosecutorial discretion itself is “inequitable” or unjust; instead my focus is on equitable relief obtained in enforcement. See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1660–62 (2010); Hadar Aviram & Daniel L. Portman, *Inequitable Enforcement: Introducing the Concept of Equity Into Constitutional Review of Law Enforcement*, 61 HASTINGS L.J. 413, 415–19 (2009); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 789–805 (1999).

<sup>20</sup> See *infra* notes 260–272 and accompanying text.

<sup>21</sup> I have recommended that such principles be applied in judicial review of criminal prosecution agreements in scholarly work, and as an amicus making recommendations to the court in a case involving the question of what standard should be used when deciding whether to approve a DPA with a corporation. See *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 19 (D.D.C. 2015).

<sup>22</sup> See, e.g., Aziz Z. Huq, *Enforcing (But Not Defending) ‘Unconstitutional’ Laws*, 98 VA. L. REV. 1001, 1007 (2012) (discussing “enforcement-litigation gaps” and positing that the kind of constitutional issue at bar should affect how these gaps are addressed); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 666–69 (1985) (discussing “judicial review of agency inaction” as a “necessary safeguard”).

<sup>23</sup> See *infra* notes 46–260 and accompanying text.

and an increased focus on ongoing supervision of corporate violators.<sup>24</sup> Federal judges seeking to protect the public interest in corporate settlements have been reversed in significant cases where appellate judges counselled greater deference to government enforcers.<sup>25</sup>

Perhaps the best-known example among recent judicial rulings regarding such a corporate agreement was by Federal District Judge Jed Rakoff in *SEC v. Citigroup Global Markets (Citigroup I)*, who found insufficient an SEC settlement with Citigroup.<sup>26</sup> Judge Rakoff focused on several defects, including lack of accountability of officers or employees, the small fine, and the lack of an admission of wrongdoing or employee accountability, noting that

before a court may employ its injunctive and contempt powers in support of an administrative settlement, it is required, even after giving substantial deference to the views of the administrative agency, to be satisfied that it is not being used as a tool to enforce an agreement that is unfair, unreasonable, inadequate, or in contravention of the public interest.<sup>27</sup>

The Second Circuit, in *SEC v. Citigroup Global Markets (Citigroup II)*, responded with a reversal, disagreeing in part with that emphasis on the public interest, and holding: “[t]he primary focus of the inquiry . . . should be on ensuring the consent decree is procedurally proper.”<sup>28</sup>

That judicial interchange was no isolated occurrence. Similar rulings can be found across a spectrum of different types of civil and criminal enforcement agreements, as judges grapple with what degree of deference should apply to the initial approval and then the supervision of corporate settlements, that contain not just terms regarding fines, but other reputational and governance related terms.<sup>29</sup> Judge Richard J. Leon of the U.S. District Court for the Federal District of Columbia recently rejected a DPA with a company for foreign bribery, “looking at the DPA in its totality,” and noting that not only were “no individuals . . . being prosecuted for their conduct at issue here” but also “a number of the employees who were directly involved in the transactions are being

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<sup>24</sup> See *infra* notes 46–260 and accompanying text.

<sup>25</sup> *Infra* notes 130–139 and accompanying text.

<sup>26</sup> *SEC v. Citigroup Glob. Mkts. (Citigroup I), Inc.*, 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011), *rev'd and vacated*, 752 F.3d 285 (2d Cir. 2014).

<sup>27</sup> *Id.*

<sup>28</sup> *SEC v. Citigroup Glob. Mkts., Inc. (Citigroup II)*, 752 F.3d 285, 295 (2d Cir. 2014). For a discussion of the *Citigroup II* opinion, see generally Michael C. Macchiarola, “Hallowed by History, but not by Reason,”: *Judge Rakoff's Critique of the Securities and Exchange Commission's Consent Judgment Practice*, 16 CUNY L. REV. 51 (2012).

<sup>29</sup> See Dorothy Shapiro, *Lessons From SEC v. Citigroup: The Optimal Scope for Judicial Review of Agency Consent Decrees*, 15 J. BUS. & SEC. L. 63, 67 (2014) (describing “an overall trend, at least at the district court level, toward more judicial scrutiny over proposed settlements and agency consent decrees”).

allowed to remain with the company.”<sup>30</sup> In a similar pattern, the D.C. Circuit, in its much anticipated ruling in *United States v. Fokker Services, B.V. (Fokker III)*, reversed Judge Leon and strongly emphasized the discretion of the government to enter into DPAs.<sup>31</sup> Similarly, Judge John Gleeson of the U.S. District Court for the Eastern District of New York, raising “public interest” concerns with a criminal deferred prosecution with the Hong Kong & Shanghai Banking Corporation (“HSBC”) over money laundering-related violations asserted a supervisory power to oversee and receive monitors reports in the case.<sup>32</sup> The judge’s separate decision in *United States v. HSBC Bank USA (HSBC II)* to make a redacted monitor report public was reversed on appeal by the Second Circuit.<sup>33</sup>

Although each case involved a different civil or criminal setting, the considerations that each judge invoked bear a close familial resemblance—they look to the “public interest.” That public interest is not synonymous with what the government decides to do in a case. Instead, judges inquire into whether a settlement in fact reflects the public interest. Equitable power is limited by a set of standards for the use of injunctive orders to bind litigants in the future.<sup>34</sup> The longstanding and traditional standards for injunctive relief include four factors, including the balance of the injuries suffered by each side and the public interest.<sup>35</sup> But what do those broad standards mean for corporations entering complex settlements, where the plaintiff is the federal or a state government, which presumably has highly-informed views of what is in the public interest, as opposed to a private plaintiff bringing a civil suit? Settlements are unquestionably important tools for the government, to obtain favorable terms and avoid costly litigation with corporations.<sup>36</sup> Yet, corporate agreements are complex and can affect many sets of parties, including the public. What does the “public interest” mean in the context of, for example, public companies or

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<sup>30</sup> *United States v. Fokker Servs. B.V. (Fokker I)*, 79 F. Supp. 3d 160, 164, 166–67 (D.D.C. 2015), *vacated and remanded*, 818 F.3d 733 (D.C. Cir. 2016).

<sup>31</sup> *United States v. Fokker Servs. B.V. (Fokker III)*, 818 F.3d 733, 750–51 (D.C. Cir. 2016).

<sup>32</sup> *United States v. HSBC Bank USA, N.A. (HSBC I)*, No. 12-CR-763, 2013 WL 3306161, at \*5–6, 11 (E.D.N.Y. July 1, 2013), *rev’d*, 863 F.3d 125 (2d Cir. 2017).

<sup>33</sup> *United States v. HSBC Bank USA, N.A. (HSBC IV)*, 863 F.3d 125, 142 (2d Cir. 2017). This author wrote an amicus brief in that appeal. *Id.* at 137.

<sup>34</sup> See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (outlining “four-factor test” judges should apply before granting injunctive relief).

<sup>35</sup> *Id.*

<sup>36</sup> See Robert Khuzami, Dir., Sec. & Exch. Comm’n Enf’t Div., Testimony Before the U.S. House of Representatives Committee on Financial Services: Examining the Settlement Practices of U.S. Financial Regulators (May 17, 2012) (on file with author). For the argument that judges should differentially ratify such consent judgments, see generally Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1014&context=uc1f> [<https://perma.cc/N6Q3-B5G3>]. For an economic argument that more searching review is sometimes justified, see generally Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55 (1999).

regulated industries, or where crimes were committed, with identifiable victims? And what if the settlement, despite having been negotiated by prosecutors or regulators, appears to neglect the public interest in important respects? There is still more reason why the seemingly disparate categories of civil and criminal corporate settlements are converging over time. Some settlements involve parallel negotiation and settlement of actions by civil, criminal, and private litigants. Although a civil settlement may not involve punitive fines, the parallel criminal case may include those fines, and although the criminal case may not require ongoing supervision, the agreement with regulators may call for such oversight. Thus, judges must consider not only the settlement before them, but also the terms of related settlements that may be before different courts, or handled internally by a regulatory agency.

In Part I of this Article, I summarize the areas, criminal and civil, in which Article III judges review corporate settlements and what law currently governs each type of settlement.<sup>37</sup> In a range of disparate areas, as discussed, judges have developed tools for reviewing complex settlements.

In Part II of this Article, I focus on how case law has developed responses to the following factors that raise issues common to organizational settlements: (1) reasonableness of any fines or other punitive measures; (2) adequacy of any compliance-related safeguards; (3) presence or use of independent corporate monitors to supervise compliance; (4) cooperation with authorities in any ongoing investigations; (5) the public interest as reflected in the substantive law giving rise to the settlement, including the presence or lack of requirements unrelated to the violation at issue; (6) potential collateral consequences of the agreement; (7) the interests of victims and third parties more generally, including participation interests and the appropriateness of compensation or restitution to any victims; (8) government interests, including those reflected in the substantive law, and the effect of the agreement on other enforcers or regulators; (9) the effect of the period of delay on statutes of limitations or other interests; (10) the public interest in information concerning the underlying conduct.<sup>38</sup> This is not an exclusive list of what might affect the public interest in an organizational settlement, but these are commonly raised factors. I explore how such considerations operate in the settings in which corporate settlements are negotiated. I argue that deference is due to enforcers that must consider the public interest in the first instance. Less judicial deference, however, is due when settlements are reached in a relatively more informal manner, outside of procedural and substantive guides in legislation or regulations. Thus,

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<sup>37</sup> See *infra* notes 43–260 and accompanying text.

<sup>38</sup> See *infra* notes 261–335 and accompanying text. These factors were suggested by the author as *amicus* in the context of a DPA. *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 31 (D.D.C. 2015) (noting “the factors the *amicus* provided could be useful guideposts” as to the question whether an agreement “is truly about permitting a defendant to demonstrate reform”).

judicial consideration of the public interest is far more important for a DPA negotiated largely out of court, than if it was a plea agreement entered in court.

The judicial review described involves consideration of the public interest, an equitable inquiry. In Part III, I turn to proposals to improve the public interest review of corporate settlements, and not just through judicial review, but through internal regulatory measures.<sup>39</sup> Congress has enacted legislation to accomplish this goal and more has been proposed; no doubt further legislation will be considered in the future.<sup>40</sup> The Department of Justice (“DOJ”) has pushed for more consistency in its process for charging corporations, both civilly and criminally.<sup>41</sup> Those internal regulatory changes, however, have not left any consideration for the public interest. Indeed, internal guidelines have been adopted, but they lack notice as well as comment or participation by the public. Settlements reached using such mechanisms should receive less deferential judicial review than settlements reached using formal statutory or regulatory means. Despite statutes and judicial review designed to ensure public interest review and involvement of the public, high profile parties still enter into corporate settlements without meaningful participation of victims or public interest groups. In this Article, I conclude that no matter what the mechanism, one feature of judicial review under equitable power must remain central to efforts to improve corporate settlements: a careful consideration of the public interest.<sup>42</sup>

## I. JUDICIAL REVIEW OF CORPORATE SETTLEMENTS

The public interest matters when prosecutors seek approval of settlements of both civil and criminal cases brought against corporations, but unevenly, depending on the posture of the settlement. Such agreements contain terms that can be resolved at the time of judgment, like the payment of a fine or compensation to victims, but also terms that may require ongoing supervision, like implementation of a compliance program, or engaging in community service as a condition of probation. The question is: what standards of review apply to detailed agreements that call for such injunctive or equitable remedies and ongoing judicial oversight of corporations? Such a question implicates the equitable powers of a judge, and yet there is a tension between that power to supervise an injunction issuing from the court and an agreement, in the nature of a contract between the litigants. Although the government may bring an enforcement action in the name of the public, the public is not a party. The public or interested groups, may seek to intervene, however, and even if they do not, equitable standards call on judges to inquire into the public interest or possible

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<sup>39</sup> See *infra* notes 336–353 and accompanying text.

<sup>40</sup> See *infra* notes 336–340 and accompanying text.

<sup>41</sup> See *infra* notes 342–349 and accompanying text.

<sup>42</sup> See *infra* notes 354–358 and accompanying text.

harms to the public or third parties.<sup>43</sup> The role of the public interest in corporate settlements has long been disputed, and I describe how in criminal and in civil cases, judges have sought to engage in public interest analysis, but sometimes judges and appellate courts have tried to cabin that role and defer more broadly to government preferences and policies. That issue—what role public interest consideration should play—has been increasingly raised in the context of complex corporate settlements that pose more difficult issues for judges than standard criminal agreements.

In both the criminal and civil context, judicial disputes have advanced our understanding of the equitable role of judges in such cases. This Part begins with an analysis of the role the public interest plays in criminal cases, focusing on disputes over the role of judges in DPAs, but also highlighting the longstanding role of the public interest when approving plea agreements with corporations.<sup>44</sup> Second, this Part focuses on civil cases, in which consent decrees non-controversially require analysis of the public interest, but where disputes have arisen regarding how closely the public interest should be scrutinized, and where legislation has attempted to strengthen judicial review of public interest considerations.<sup>45</sup>

### *A. Corporate Prosecution Agreements*

In general, prosecutors enjoy enormous discretion in choosing where and how to bring criminal prosecutions, as they should. The Supreme Court has held, whether correct or not, that the discretion of prosecutors can only be constitutionally challenged under “demanding” standards for showing invidious selective prosecution.<sup>46</sup> Criminal cases, however, if settled in court, face certain prescribed judicial review.<sup>47</sup> Plea bargains, as this Article later describes, must be approved by a judge, because they involve a final judgment of conviction entered in court.<sup>48</sup> Judges have long considered the public interest when deciding whether to approve and how to supervise plea bargains by corporations.<sup>49</sup> A judge must also approve other agreements between prosecutors and corporations, particularly DPAs, in order to exempt them from the Speedy Trial Act and rules that would normally apply in a case proceeding to judgment.<sup>50</sup>

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<sup>43</sup> See *infra* notes 252–253 and accompanying text.

<sup>44</sup> See *infra* notes 46–174 and accompanying text.

<sup>45</sup> See *infra* notes 175–260 and accompanying text.

<sup>46</sup> *United States v. Armstrong*, 517 U.S. 456, 463–64 (1996).

<sup>47</sup> See *Santobello v. New York*, 404 U.S. 257, 261–62 (1971) (requiring a sentencing judge to “develop, *on the record*, the factual basis for the plea”).

<sup>48</sup> See *id.*

<sup>49</sup> See *infra* notes 94–168 and accompanying text.

<sup>50</sup> See *infra* notes 99–105 and accompanying text.

In such settings, the role of the public interest is unsettled, but I argue in this Section that the same types of public interest considerations should apply.

Criminal agreements between corporations and prosecutors have grown in complexity and their importance over the last two decades, particularly in federal courts, but also in state courts. I have detailed the use of various types of corporate prosecution agreements in a book entitled *Too Big to Jail: How Prosecutors Compromise with Corporations*, and in several prior law review articles.<sup>51</sup> Those developments have made the role of judges all the more urgent in corporate criminal settlements. The focus here is on the judicial and legal standards governing the formation of such agreements and the review and supervision of them.

### 1. Plea Agreements

Many criminal cases in the United States are today resolved through plea bargains and not a conviction after a trial.<sup>52</sup> A judge must approve a plea agreement, but the role of a judge is distinct when the defendant is not an individual, but rather an organization. Now, judicial review of plea agreements is highly deferential in general, and the same is true if the plea agreement is with a corporation. Judges have emphasized that they do not have a duty to approve a plea agreement entered between the parties; as the U.S. Supreme Court emphasized in the 1971 case, *Santobello v. New York*, there is no absolute right to have a plea agreement accepted by the court and a court may exercise sound judicial discretion in considering whether to accept it or not.<sup>53</sup> The provisions of Rule 11 of the Federal Rules of Criminal Procedure (“FRCP”) reflect that view, including procedures for advising the defendant and developing the factual basis and voluntariness of the plea on the record and standards for plea agreement approval, which provide the court with discretion whether to accept, reject, or defer a decision on a plea.<sup>54</sup> Thus, “[t]he plea agreement procedure

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<sup>51</sup> A number of my prior works also focus on the subject of corporate prosecutions. See Brandon L. Garrett, *Collaborative Organizational Prosecution*, in PROSECUTORS IN THE BOARDROOM 154–76 (Anthony S. Barkow & Rachel E. Barkow eds., 2011); Garrett, *Globalized Corporate Prosecutions*, *supra* note 3; Brandon L. Garrett, *Corporate Confessions*, 30 CARDOZO L. REV. 917 (2008) [hereinafter Garrett, *Corporate Confessions*]; Garrett, *Structural Reform Prosecution*, *supra* note 12.

<sup>52</sup> *Criminal Cases*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases> [<https://perma.cc/32DS-CAAM>] (“More than 90 percent of defendants plead guilty rather than go to trial.”); see also Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent on Plea Bargaining*, THE ATLANTIC (May 2, 2017), <https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/> [<https://perma.cc/88EA-J595>]; Debra Cassens Weiss, *Criminal Trials Have Become So Scarce That Federal Judge Had Only One in His 4 Years on the Bench*, ABA J. (Aug. 11, 2016, 7:45 AM), [http://www.abajournal.com/news/article/criminal\\_trials\\_become\\_so\\_scarce\\_that\\_federal\\_judge\\_had\\_only\\_one\\_in\\_his\\_fou/](http://www.abajournal.com/news/article/criminal_trials_become_so_scarce_that_federal_judge_had_only_one_in_his_fou/) [<https://perma.cc/8WY4-56V3>].

<sup>53</sup> *Santobello*, 404 U.S. at 262; see also, e.g., *In re Yielding*, 599 F.2d 251, 252–53 (8th Cir. 1979) (citing FRCP 11 as granting courts “the right to accept or reject . . . plea bargains”).

<sup>54</sup> FED. R. CRIM. P. 11(b), (c)(3)(A).

does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge.”<sup>55</sup>

The public interest is an integral part of what a judge may consider when deciding whether to approve a plea agreement.<sup>56</sup> Judges are more constrained when a prosecutor seeks to dismiss charges entirely under FRCP 48, which may be done with “leave of court,” but where courts have stated that dismissal is a central element of prosecutorial discretion.<sup>57</sup> Judges are highly reluctant to substitute their view of the public interest for that of the prosecutor in the context of a motion to dismiss criminal charges—to warrant such action, the prosecutor’s dismissal must be in bad faith or “clearly contrary to manifest public interest.”<sup>58</sup> Occasionally judges have done so, however, including in corporate cases. For example, in *United States v. N.V. Nederlandsche Combinatie Voor Chemische Industrie*, an antitrust case, the judge rejected a deal to drop charges against an employee in exchange for the corporate employer’s guilty plea because it went against the public interest.<sup>59</sup> The case was of “the greatest public significance,” and the conspiracy involved an “essential lifesaving drug” and the “public weal.”<sup>60</sup>

The role the public interest plays is stronger when a conviction is sought in the form of a plea bargain requiring judge approval.<sup>61</sup> In a criminal trial, the public, through participation of lay jurors, conducts fact-finding and reaches a verdict. By entering a plea, the defendant waives the right to a jury trial and agrees to receive a conviction. However, the role of the public interest does not end due to that agreement between the parties. Federal judges have broad dis-

<sup>55</sup> *Id.* R. 11(e) Notes of Advisory Committee on 1974 Amendments; *Santobello*, 404 U.S. at 262 (“A court may reject a plea in exercise of sound judicial discretion.”).

<sup>56</sup> *See* FED. R. CRIM. P. 11(e) Notes of Advisory Committee on 1974 Amendments; *Santobello*, 404 U.S. at 262.

<sup>57</sup> FED. R. CRIM. P. 48(a); *Rinaldi v. United States*, 434 U.S. 22, 29–30 & n.15, 34 (1977) (per curiam). Thus, the D.C. Circuit had held that a judge could not substitute their view of the public interest for that of the prosecutor in the context of a motion to dismiss. *United States v. Ammidown*, 497 F.2d 615, 620 (D.C. Cir. 1973).

<sup>58</sup> *United States v. Gonzalez*, 58 F.3d 459, 463–64 (9th Cir. 1995); *see also* *United States v. Hamm*, 659 F.2d 624, 631 (5th Cir. 1981) (“As long as it is not apparent that the prosecutor was motivated by considerations clearly contrary to the public interest, his motion must be granted.”); *United States v. Bean*, 564 F.2d 700, 704 (5th Cir. 1977) (“[T]he standard for review of refusal of plea bargains should be closer to the standards for review of sentencing than for review of a dismissal which does not involve a plea bargain under Rule 48(a).”).

<sup>59</sup> *United States v. N.V. Nederlandsche Combinatie Voor Chemische Industrie*, 75 F.R.D. 473, 474–75 (S.D.N.Y. 1977).

<sup>60</sup> *Nederlandsche*, 75 F.R.D. at 474.

<sup>61</sup> *See* *United States v. Harris*, 679 F.3d 1179, 1182 (9th Cir. 2012) (stating that a judge may reject a plea agreement that is “too lenient or otherwise not in the public interest”); Nancy J. King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 133–34 (1999) (positing that negotiated plea agreements do not, inherently, conform with the public interest in all cases).

cretion to reject plea agreements.<sup>62</sup> FRCP 11 does not define the discretion of a judge to accept or reject a plea bargain.<sup>63</sup> Cases, however, have developed what considerations may apply, including whether the plea was knowing and voluntary, whether proper procedures were followed, whether any third party rights are implicated, whether the agreement is too lenient, and whether the “public interest” is affected.<sup>64</sup>

It is not a common occurrence that a judge rejects a plea. As scholars have noted, “[r]ecitations of the need to consider the ‘public interest’ appear repeatedly and with maddeningly little explanation in cases considering the acceptance or rejection of negotiated settlements.”<sup>65</sup> Judges have long possessed and exercised discretion, for example, to reject pleas that are overly lenient.<sup>66</sup> Judges may generally reject plea agreements “when the district court believes that bargain is too lenient, or otherwise not in the public interest.”<sup>67</sup> Other factors that the court may consider include whether the anticipated sentence would be appropriate.<sup>68</sup> Judges also ask whether plea agreements harm the judge’s sentencing authority unduly, and judges have raised questions about whether waivers of rights to appeal or certain waivers of constitutional rights, like to effective assistance of counsel, implicate public interest concerns.<sup>69</sup> In other cases, judges ask whether a plea involves abuse of prosecutorial authority or discretion, or might undermine public confidence in the criminal justice system.<sup>70</sup>

The role of a judge in reviewing a plea agreement is deferential. The prosecutor represents the public interest in enforcing criminal laws, and judges may not second-guess the larger policies or priorities of the government or the decision to prosecute a particular defendant. As the Supreme Court has put it, a range of factors, such as “the Government’s enforcement priorities . . . are not

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<sup>62</sup> See *United States v. Maddox*, 48 F.3d 555, 558 (D.C. Cir. 1995) (holding that Supreme Court precedent firmly established that judges may reject pleas at their discretion); *Ammidown*, 497 F.2d at 622 (holding a judge can exercise “reasoned exercise of discretion” to reject a plea agreement, so long as that exercise of discretion is not “arbitrary”).

<sup>63</sup> See FED. R. CRIM. P. 11.

<sup>64</sup> *Harris*, 679 F.3d at 1182 (stating that judge may reject plea agreement that is “too lenient or otherwise not in the public interest”); see *King*, *supra* note 61, at 134–35.

<sup>65</sup> *King*, *supra* note 61, at 134.

<sup>66</sup> See Sarah N. Welling, *Victim Participation in Plea Bargaining*, 65 WASH. U. L.Q. 301, 332–34 (1987).

<sup>67</sup> *United States v. Carrigan*, 778 F.2d 1454, 1462 (10th Cir. 1985) (quoting *United States v. Miller*, 722 F.2d 562, 563 (9th Cir. 1983)).

<sup>68</sup> See, e.g., *In re Morgan*, 506 F.3d 705, 711–12 (9th Cir. 2007) (court must make an “individualized assessment” of the plea agreement); *United States v. Smith*, 417 F.3d 483, 487 (5th Cir. 2005) (“A district court may properly reject a plea agreement based on the court’s belief that the defendant would receive too light of a sentence.”).

<sup>69</sup> See, e.g., *United States v. Perez*, 46 F. Supp. 2d 59, 60–62 & n.3 (D. Mass. 1999).

<sup>70</sup> Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 49 SMU L. REV. 567, 572–73 (1996).

readily susceptible to the kind of analysis the courts are competent to undertake.”<sup>71</sup> There may be public interests in having public jury trials, for example, but judges understand that plea bargaining, by its very nature, forecloses a trial.<sup>72</sup>

The public interest considerations that apply when a judge is exercising discretion in the context of a corporate plea are quite distinct. Plea agreements involving organizations raise issues that individual plea agreements do not, such as enforcement priorities, third parties, regulators, ongoing supervision, and the separate Organizational Sentencing Guidelines.<sup>73</sup> As a result, courts have conducted individualized assessments in corporate plea agreements in the past.<sup>74</sup> In doing so, they have considered fairness, reasonableness, and the public interest broadly, as well as a set of more specific factors that implicate those broad public interest concerns.<sup>75</sup> Specific concerns include rights of victims, adequacy of compliance, accountability for individual violators, and other considerations.

In conducting individualized assessments, courts have been willing and able to articulate public interest concerns. For example, a federal court has rejected, as contrary to the “public interest,” a corporate plea agreement presented in a binding form that the judge felt unduly restricted his ability to impose a sentence.<sup>76</sup> Another corporate plea agreement was delayed while the court considered objections by victims, but it was eventually approved after changes were made as consistent with the public interest.<sup>77</sup> The U.S. Court of Appeals for the Tenth Circuit approved a district court’s rejection of a plea agreement due to the fact that the corporation would have paid a fine but immunity would

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<sup>71</sup> *Wayte v. United States*, 470 U.S. 598, 607 (1985).

<sup>72</sup> For the broader argument that plea bargaining itself harms the public interest, see, for example, Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 *YALE L.J.* 1979, 1979 (1992) (“[P]lea bargaining seriously impairs the public interest in effective punishment of crime and in accurate separation of the guilty from the innocent.”).

<sup>73</sup> *Infra* notes 231, 275–281, 341–348 and accompanying text.

<sup>74</sup> *Infra* notes 110–112 and accompanying text.

<sup>75</sup> *Infra* notes 275–332 and accompanying text.

<sup>76</sup> Jef Feeley & Janelle Lawrence, *Orthofix Medicare Probe Settlement Rejected Again by Judge*, *BLOOMBERG BUSINESSWEEK* (Dec. 13, 2012, 5:49 PM), <https://www.bloomberglaw.com> (select “Browse All Content”; then select “News Search” under the “News” tab; then search title “Orthofix Medicare Probe Settlement Rejected Again by Judge”).

<sup>77</sup> Jef Feeley & Janelle Lawrence, *Merck Unit’s Plea over Vioxx Investigation Accepted by Judge*, *BLOOMBERG BUSINESSWEEK* (Apr. 19, 2012, 4:58 PM), <https://www.bloomberglaw.com> (on homepage, select “Browse All Content”; then select “News Search” under the “News” tab; then search title “Merck Unit’s Plea over Vioxx Investigation Accepted by Judge”); see *United States v. Merck Sharp & Dohme Corp.*, No. 1:11-cr-10384-PBS (D. Mass. Nov. 22, 2011).

have been given to a culpable individual.<sup>78</sup> Judges have offered that plea agreements may be revised, or the judge will reject it.<sup>79</sup>

In reviewing corporate plea agreements, judges have asked about the relationship between the entity and its officers or employees.<sup>80</sup> Judges have rejected as contrary to the public interest corporate plea agreements that involved immunity or non-prosecution of the relevant corporate officers or employees.<sup>81</sup> As one district court put it, “[p]ublic confidence in the administration of justice will be eroded if it is perceived that . . . an individual who operates illegally through a corporation can escape prosecution altogether and retain the fruits of his ill-gotten gains by having the corporation ‘take the rap.’”<sup>82</sup>

An additional public interest consideration for courts has been the presence of accountability in the form of probation supervision.<sup>83</sup> In a case in which victims intervened and objected, a federal court rejected a proposed “binding” plea agreement, noting “the public’s interest in accountability,” and stating the parties could submit a new agreement with probation and compliance requirements.<sup>84</sup> One year later, the court accepted a revised plea agreement, which, unlike the initial version, provided for three years of supervised probation.<sup>85</sup> This type of judicial review has been strengthened by the U.S. Sentencing Commission’s 2004 amendments stating that even a corporation with a compliance program “shall” receive a term of probation at sentencing “if such sentence is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct.”<sup>86</sup>

Judicial review of plea bargains is not completely unfettered but it is not purely deferential either. The judicial review of corporate plea agreements

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<sup>78</sup> *Carrigan*, 778 F.2d at 1462; see also *United States v. Freedberg*, 724 F. Supp. 851, 853–54 (D. Utah 1989).

<sup>79</sup> *United States v. Farabee*, No. 2:07-cr-00160 (D. Ariz. Feb. 14, 2007); Criminal Minutes—Plea Hearing, *Farabee*, No. 2:07-cr-00160; *United States v. Buffalo Valley*, No. 2:98-cr-0000 (D. Wyo. Jan. 8, 1998).

<sup>80</sup> See *Freedberg*, 724 F. Supp. at 853–54 & n.2.

<sup>81</sup> *Id.* at 853; *Carrigan*, 778 F.2d at 1462.

<sup>82</sup> *Freedberg*, 724 F. Supp. at 853 & n.2.

<sup>83</sup> See *United States v. Guidant LLC*, 708 F. Supp. 2d 903, 917, 921–22 (D. Minn. 2010).

<sup>84</sup> *Id.*

<sup>85</sup> Bloomberg News, *Judge Accepts Guilty Plea by Guidant*, N.Y. TIMES (Jan. 13, 2011), <http://www.nytimes.com/2011/01/14/business/14device.html> [<https://perma.cc/M5EN-M9BQ>]; Associated Press, *Judge Adds Probation to Guidant Plea Deal*, CBS: MINN. (Jan. 12, 2011, 1:27 PM), <http://minnesota.cbslocal.com/2011/01/12/guidant-to-appear-in-federal-court-for-sentencing-2/> [<https://perma.cc/U598-2FYR>].

<sup>86</sup> U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 8D1.1(a)(6) (Nov. 2004). The commentary section adds that not only may special conditions of probation include the development of a compliance program, but “[t]o assess the efficacy of a compliance and ethics program submitted by the organization, the court may employ appropriate experts who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment of the proposed program.” *Id.* § 8D1.4 cmt. 1.

flows both ways, and judicial review can also importantly protect the rights of criminal defendants.<sup>87</sup> In corporate cases, courts may reject plea agreements that unduly limit the rights of a defendant.<sup>88</sup> For example, courts have rejected agreements that would require waiver of appeal rights.<sup>89</sup> Although judges may not second-guess enforcement priorities, judges have insisted upon meaningful supervision in the form of probation and they have raised questions when employees were not prosecuted.<sup>90</sup> Additional questions can be raised regarding the severity of the sentence and other features of detailed corporate plea agreements, such as appellate waivers. The role of a judge to review a corporate plea agreement to assess whether it comports with the public interest is narrow and deferential, but important.

## 2. Deferred Prosecution Agreements

Over the past fifteen years, federal prosecutors have dramatically transformed corporate prosecutions by relying, in some of the most substantial cases, on a new mechanism: the DPA.<sup>91</sup> A deferred prosecution is filed with the court and remains on the judge's docket until the term of deferral is completed and the case is dismissed.<sup>92</sup> An NPA is an agreement to not file a criminal case at all.<sup>93</sup> Unlike a plea agreement, which results in a criminal conviction, deferred and non-prosecution do not create any criminal record for the corporate defendant. The use of deferred and NPAs in organizational prosecutions has become quite common over the past decade, and not only in the low-level or misdemeanor cases that Congress had in mind when it permitted a judge to defer a prosecution under the Speedy Trial Act, but also in some of the largest-scale corporate prosecutions ever seen in this country.<sup>94</sup> There have now been over 300 deferred or non-prosecution agreements with corporate organizations.<sup>95</sup> Over two-thirds were with public companies, one-fifth were Fortune 500, and one-fifth were Global 500 firms.<sup>96</sup> Some of the well-known companies that have entered such agreements include: AIG, America Online, Bar-

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<sup>87</sup> See, e.g., *United States v. Forest Pharm., Inc.*, No. 1:10-cr-10294 (D. Mass. Sept. 15, 2010); *United States v. Biovail Pharm., Inc.*, No. 1:08-cr-10124-NG (D. Mass. May 19, 2008).

<sup>88</sup> *Forest Pharm.*, No. 1:10-cr-10294; *Biovail Pharm.*, No. 1:08-cr-10124-NG.

<sup>89</sup> *Forest Pharm.*, No. 1:10-cr-10294; *Biovail Pharm.*, No. 1:08-cr-10124-NG.

<sup>90</sup> See *SEC v. Citigroup Glob. Mkts. (Citigroup I), Inc.*, 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011), *rev'd and vacated*, 752 F.3d 285 (2d Cir. 2014); *Guidant*, 708 F. Supp. 2d at 921–22.

<sup>91</sup> GARRETT: TOO BIG TO JAIL, *supra* note 1, at 45–80.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 7; see *Corporate Prosecution Registry: Data & Documents*, U. VA. SCH. L. LIBR., <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/browse/browse.html> [<https://perma.cc/BPG3-2ALT>] (last updated Oct. 10, 2017).

<sup>96</sup> GARRETT: TOO BIG TO JAIL, *supra* note 1, at 45–80.

clays, Boeing, Bristol-Myers Squibb, CVS Pharmacy, General Electric, GlaxoSmithKline, HealthSouth, JPMorgan, Johnson & Johnson, Merrill Lynch & Co., Monsanto, and Sears.<sup>97</sup>

The public interest is implicated by both the approval and supervision of DPAs by federal judges. Judges have only just begun to assert such a role; early on, judges typically approved corporate DPAs without conducting any meaningful review.<sup>98</sup> However, the applicable section of the Speedy Trial Act, Section 3161(h)(2), refers to tolling time for “[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.”<sup>99</sup> The requirement that a deferred prosecution proceed only upon “the approval of the court,” makes the discretion of the court clear.<sup>100</sup> In agreeing to defer prosecution, a corporate defendant is agreeing to waive its Speedy Trial Act rights. A judge must ensure such a waiver is appropriately demanded and obtained. Further, a judge must ensure that a case remaining on the docket is being properly handled—in light of the specific language of the Speedy Trial Act stating that the purpose is to allow the defendant “to demonstrate his good conduct.”<sup>101</sup> Thus, judicial approval and supervision is called for by the text of the Act.

In my view, any doubt over the meaning of such provisions should be read in favor of judicial discretion. Other provisions of the Speedy Trial Act do not require court approval, while still others limit discretion, for example, by providing factors to be considered when deciding whether to grant a continuance, or by supplying standards for whether a type of delay is reasonable.<sup>102</sup> The provisions of the Act were generally intended to “strengthen[] the supervision over persons released pending trial.”<sup>103</sup> The Report of the Senate Judiciary Committee on the Speedy Trial Act briefly discussed how several U.S. Attorney’s offices had been experimenting with diversion programs, noting a Congressional desire to “encourage” that “current trend,” and concluding that the diversion provision “assures that the court will be involved in the decision to divert and that the procedure will not be used by prosecutors and defense

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<sup>97</sup> *Id.* at 47–48.

<sup>98</sup> *See id.*

<sup>99</sup> 18 U.S.C. § 3161(h)(2) (2012).

<sup>100</sup> *Id.*

<sup>101</sup> *See id.*

<sup>102</sup> *See, e.g., id.* § 3161(h)(1) (providing a series of eight situations in which periods of delay “shall be excluded,” for example, set out in subsections (A)–(H)). *But see id.* § 3161(h)(6) (permitting a “reasonable period of delay” when a defendant and codefendant are joined for trial, and the codefendant’s time has not run); *id.* § 3161(h)(7) (permitting a judge to decide whether the “best interest of the public and the defendant” support granting a continuance based on “the ends of justice”).

<sup>103</sup> H.R. REP. NO. 93-1508, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7401, 7401.

counsel to avoid the speedy trial time limits.”<sup>104</sup> Such text, describing the need for the court to be “involved in the decision to divert,” together with the explicit requirement that a judge approve a deferral, clarifies a judge’s authority to review and approve such an agreement.<sup>105</sup> Thus, the initial discretion over whether to approve a DPA is necessarily combined with the substantive review of that agreement and is joined with ongoing supervision of such a case.

Such agreements typically focus on not just criminal fines, forfeiture, restitution, or community service payments, but also on what I have termed “structural reforms” reminiscent of institutional reform in public law litigation.<sup>106</sup> These provisions can include detailed compliance programs, such as the hiring of additional compliance personnel, governance changes, and requirements of periodic reporting and evaluation of compliance. Some agreements require the retention of independent corporate monitors. Some agreements (very few) call for the court to select or approve the independent monitors. Still additional consequences include parallel settlements and terms requiring compliance with civil regulators, or settlements with private plaintiffs. Standard agreements require cooperation in investigations of individual employees; the agreements may impact those employees, including if the firm agrees to waive attorney client or work product privilege. These agreements typically last for just two to three years.<sup>107</sup> The agreements may be negotiated with multiple parties, including prosecutors from multiple offices, a range of regulators, and attorneys representing victims;<sup>108</sup> some involve foreign governments and their prosecutors and regulators. The agreements may also implicate the criminal procedure rights of individual criminal defendants.<sup>109</sup>

Courts have routinely conducted individualized assessments of DPAs with corporations as part of their decision of whether to approve such agreements.<sup>110</sup> In doing so, courts have remained deferential, as with any settlement reached between parties at arms-length, but they have nevertheless considered the public interest, reasonableness, fairness, equity, and other factors, in deciding whether to approve such an agreement. To be sure, corporate DPAs are a fairly recent phenomenon, and the vast bulk of these agreements have been approved, sometimes after hearings, but often without hearings or written decisions. Yet some courts have issued written decisions explaining the standards applied, particularly in recent years as the practice has become more estab-

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<sup>104</sup> S. REP. NO. 93-1021, at 36–37 (1974).

<sup>105</sup> *Id.* at 37.

<sup>106</sup> See Garrett: *Structural Reform Prosecution*, *supra* note 12.

<sup>107</sup> For an overview, see GARRETT: TOO BIG TO JAIL, *supra* note 1, at 45–81.

<sup>108</sup> *Id.*

<sup>109</sup> *United States v. Stein*, 541 F.3d 130, 136 (2d Cir. 2008); *United States v. Stein*, 435 F. Supp. 2d 330, 382 (S.D.N.Y. 2006).

<sup>110</sup> See, e.g., *United States v. WakeMed*, No. 5:12-CR-398-BO, 2013 WL 501784 (E.D.N.C. Feb. 8, 2013) (permitting deferral of prosecution in accordance with the DPA).

lished.<sup>111</sup> Those courts have approved the agreements as drafted after conducting such review.<sup>112</sup> As will be described, such standards are consistent with ensuring that an agreement serves to provide a meaningful opportunity for the defendant to assure the government of its good conduct.

In reviewing DPAs, courts have considered if the agreement reflects the seriousness of the charge, but also take into account other parties and employees who may be affected by these actions. For example, after conducting two hearings, the Eastern District Court of North Carolina in 2013 in *United States v. WakeMed* found that “after weighing the seriousness of defendant’s offense against the potential harm to innocent parties that could result should this prosecution go forward, the [c]ourt has determined that a deferred prosecution is appropriate in this matter.”<sup>113</sup> The court examined the “equities,” and conducted what amounted to a fairness and reasonableness review.<sup>114</sup> The court concluded the government had demonstrated that “the conduct at issue was serious and in need of being addressed by criminal process,” but that the agreement provided for sufficient fines, cooperation, and monitoring.<sup>115</sup> The court also considered the need to protect WakeMed’s patients, as well as “the protection of defendant’s employees and healthcare providers who are blameless but who would suffer severe consequences should defendant be convicted and debarred as a Medicare and Medicaid provider.”<sup>116</sup> The court held that, because “[t]he parties having agreed to periodic review of the status of this matter by the [c]ourt, any reports made relating to defendant’s compliance with the agreement shall be filed with the [c]ourt for its review.”<sup>117</sup> This court indicated that it was taking many factors into consideration in its review of the corporate prosecution agreement.

Courts have also noted in their review of DPAs that the agreements are opportunities to hold corporations accountable for their actions during the deferred period. Judge Royce C. Lamberth of the U.S. District Court of the District of Columbia, in approving a DPA with Credit Suisse, made the following finding:

this [c]ourt hereby finds that the period of delay as set forth in Paragraph 5 of the written Deferred Prosecution Agreement is for the purpose of allowing Defendant Credit Suisse AG to demonstrate its

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<sup>111</sup> See *WakeMed*, No. 5:12-CR-398-BO, 2013 WL 501784, at \*2.

<sup>112</sup> See *id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at \*1.

<sup>116</sup> *Id.* at \*2.

<sup>117</sup> *Id.*

good conduct and implement its remedial measures. Accordingly, this [c]ourt approves the written Deferred Prosecution Agreement.<sup>118</sup>

Judge John Gleeson, in the most detailed opinion that has addressed the subject to date, concluded that the judge's role under section 3161(h)(2) is not simply to assure that the parties have not colluded to toll the speedy trial clock: "approving the exclusion of delay during the deferral of prosecution is not synonymous with approving the deferral of prosecution itself."<sup>119</sup> Judge Gleeson noted that "the Speedy Trial Act is silent" as to the standard for deciding whether to approve a DPA.<sup>120</sup> As described in the Government's Supplemental Brief, Judge Gleeson emphasized, apart from the language of the Speedy Trial Act, the supervisory authority of the court as a basis for the court's active involvement.<sup>121</sup> In doing so, Judge Gleeson proceeded to examine the terms of the HSBC agreement and, in the process, found the fines, compliance provisions, and other terms to be appropriate.<sup>122</sup> Yet, Judge Gleeson found one feature lacking: the court was not to be kept apprised of the agreement's implementation.<sup>123</sup> The judge, therefore, ordered the parties to file quarterly reports describing "all significant developments," resolving any "doubts about whether a development is significant . . . in favor of inclusion."<sup>124</sup>

Most corporations that plead guilty are placed on probation; in contrast, a DPA avoids formal probation supervision. To provide for analogous accountability, as in the *WakeMed* and *HSBC* cases, perhaps, the judges asked that the parties provide monitoring and compliance reports to the court.<sup>125</sup> Other federal courts have been less fulsome in explaining their approvals: "[p]ursuant to Title 18 of the United States Code, Section 3161(h)(2) and (8), the ends of justice served by granting the continuance outweigh the best interest of the public and [the company] in a speedy trial."<sup>126</sup>

<sup>118</sup> United States v. Credit Suisse AG, No. 09–352, 2009 WL 4894467, at \*1 (D.D.C. Dec. 16, 2009).

<sup>119</sup> United States v. HSBC Bank USA, N.A. (*HSBC I*), No. 12-CR-763, 2013 WL 3306161, at \*3 (E.D.N.Y. July 1, 2013), *rev'd*, 863 F.3d 125 (2d Cir. 2017).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at \*3–4, 11.

<sup>122</sup> *Id.* at \*2–7.

<sup>123</sup> *Id.* at \*7, 10–11.

<sup>124</sup> *Id.* at \*11.

<sup>125</sup> *Id.*; see United States v. HSBC Bank USA, N.A. (*HSBC II*), No. 12-CR-763 (JG), 2016 WL 347670, at \*1 (E.D.N.Y. Jan. 28, 2016), *rev'd*, 863 F.3d 125 (2d Cir. 2017); *WakeMed*, No. 5:12-CR-398-BO, 2013 WL 501784, at \*2.

<sup>126</sup> United States v. Wright Med. Tech., Inc., No. 10–8233 (MF), 2010 WL 6606785, at \*1 (D.N.J. Sept. 30, 2010); United States v. Zimmer, No. 07-8130 (MCA), 2007 WL 2964252, at \*1 (D.N.J. Sept. 28, 2007); United States v. Biomet Orthopedics, No. 07-8133 (MCA), 2007 WL 2964201, at \*1 (D.N.J. Sept. 28, 2007). Section 3161(h)(7) permits a continuance "if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7) (2012). In his ruling in *HSBC I*, Judge Gleeson specifically disagreed that this broad "ends-of-justice"

Federal District Judge Emmett Sullivan, the first to set out criteria for deciding whether to accept or reject a DPA, has suggested that nine factors could provide “useful guideposts” when evaluating whether a DPA is truly “designed to secure a defendant’s reformation” or whether the terms are “so vague and minimal as to render them a sham.”<sup>127</sup> That standard itself is limited and deferential, but it touches on a range of factors that might accomplish the goal of “permitting a defendant to demonstrate reform” when that defendant is a corporation. Those nine factors include:

- (1) reasonableness of any fines or other punitive measures;
- (2) compliance-related safeguards;
- (3) independent corporate monitors to supervise compliance;
- (4) cooperation with authorities in ongoing investigations;
- (5) the lack of unrelated requirements that might require judicial intervention;
- (6) potential collateral consequences of the agreement;
- (7) the appropriateness of restitution to any victims;
- (8) the effect of the agreement on other regulators; and
- (9) the effect of the period of delay on statutes of limitations or other interests.<sup>128</sup>

Reviewing the two DPAs before him, Judge Sullivan concluded that the agreements satisfied the standard of review.<sup>129</sup> I develop how courts can use such factors, which I believe are quite useful, in Part III of this Article.

Without setting out such a framework, Federal Judge Richard Leon rejected a DPA with a company called Fokker Services, finding the fines and compliance measures weak, an unacceptable absence of any compliance monitor or requirement that the defendant submit compliance reports, and further, no accompanying individual prosecutions of defendants.<sup>130</sup> Judge Leon was the first judge to outright reject a DPA, by “looking at the DPA in its totality,” and noting that not only were “no individuals . . . being prosecuted for their conduct at issue here,” but also “a number of the employees who were directly involved in the transactions are being allowed to remain with the company.”<sup>131</sup> Do any factors deserve special weight, or is this standard a totality of the circumstances inquiry?

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standard contained in 3161(h)(7) applies in the more specific circumstances of a 3161(h)(2) deferred prosecution. *United States v. HSBC Bank USA, N.A. (HSBC I)*, No. 12-CR-763, 2013 WL 3306161, at \*2–3 (E.D.N.Y. July 1, 2013), *rev’d*, 863 F.3d 125 (2d Cir. 2017) (citing *Zednar v. United States*, 547 U.S. 489, 497–99 (2006)).

<sup>127</sup> *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 31 (D.D.C. 2015). The “guidepost factors” adopted by the court were suggested to the court by this author as an amicus.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 31, 46.

<sup>130</sup> *United States v. Fokker Servs. B.V. (Fokker I)*, 79 F. Supp. 3d 160, 164, 166–67 (D.D.C. 2015), *vacated and remanded*, 818 F.3d 733 (D.C. Cir. 2016).

<sup>131</sup> *Id.*

The D.C. Circuit, in its much anticipated 2016 ruling in *Fokker III*, reversed Judge Leon.<sup>132</sup> The D.C. Circuit noted that the purpose of section 3161(h)(2) was to “assure that the DPA in fact is geared to enabling the defendant to demonstrate compliance with the law . . . .”<sup>133</sup> That much is accurate. I argue that the D.C. Circuit erred when it ruled that a judge may not review in any detail the substance of the DPA.<sup>134</sup> I argue that the judge must conduct substantive and procedural review of a DPA to answer the question of whether a DPA is in fact geared to enable a defendant to demonstrate compliance and whether the defendant’s waiver of rights is voluntary and warranted. Further, as I develop, a judge must ask very different questions when asking whether a corporate defendant is being adequately required to demonstrate compliance.

The D.C. Circuit reasoned that the government’s decision to seek a DPA is like a dismissal under FRCP 48, rather than a decision governed by the text of the Speedy Trial Act in which the placement of a case on a judge’s docket for an extended period of time is subject to its “good conduct” and the approval of a judge.<sup>135</sup> The D.C. Circuit emphasized throughout that entering a DPA is like a decision to dismiss charges entirely, citing to inapposite authority that the Executive Branch has “long-settled primacy over charging” and that a judge may not second-guess “charging decisions.”<sup>136</sup> No charging decision was in question, however, but rather the content of an agreement to defer prosecution.<sup>137</sup> The Speedy Trial Act quite specifically treats entering a DPA differently than a charging or dismissal decision, because it is a settlement waiving rights and entered in court—one that implicates the judge in many of the same ways as a plea bargain.<sup>138</sup> In contrast, a judge would have no role or reason to object if a prosecutor decided to dismiss charges entirely under Rule 48. The defendant is not waiving rights if charges are dismissed entirely.

The D.C. Circuit has generally treated the judiciary as not “competent to undertake” an inquiry into the substance of a DPA.<sup>139</sup> Yet, as discussed in the

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<sup>132</sup> United States v. Fokker Servs. B.V. (*Fokker III*), 818 F.3d 733, 750–51 (D.C. Cir 2016).

<sup>133</sup> *Id.* at 744.

<sup>134</sup> An excellent recent student Note and Case Comment have agreed with my views. See Mary Miller, Note, *More Than Just a Potted Plant: A Court’s Authority to Review Deferred Prosecution Agreements Under the Speedy Trial Act and Under Its Inherent Supervisory Power*, 115 MICH. L. REV. 135 (2016) (discussing generally judicial review and the benefits and drawbacks of NPAs and DPAs); Case Comment, *D.C. Circuit Holds That Courts May Not Reject Deferred Prosecution Agreements Based on the Inadequacy of Charging Decisions or Agreement Conditions*, 130 HARV. L. REV. 1048 (2017) (discussing *Fokker III*).

<sup>135</sup> *Fokker III*, 818 F.3d at 743.

<sup>136</sup> *Id.* at 737, 741–43, 745, 747.

<sup>137</sup> *Id.* at 737.

<sup>138</sup> See 18 U.S.C. § 3161(h)(2) (2012).

<sup>139</sup> United States v. Fokker Servs. B.V. (*Fokker III*), 818 F.3d 733, 741 (D.C. Cir 2016) (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

prior section, judges conduct the very same inquiry when deciding whether to approve plea agreements with corporations.<sup>140</sup> A DPA is far more like a plea agreement than a bare decision whether or not to pursue charges under FRCP 48. As one scholar has described, “[l]ike plea agreements, DPAs include sanctioning or punishing language, which a charging document would not contain,” and “because courts have the authority to review plea agreements, they should likewise have the authority to review DPAs.”<sup>141</sup>

The D.C. Circuit erred in its assessment of DPAs in their relation to victims’ compensation. The Crime Victims’ Rights Act (“CVRA”), as amended after the *Fokker* case was litigated, makes clear that in a DPA a judge must assure any victims are notified and proper restitution is provided.<sup>142</sup> The *Fokker III* court did not address such situations that implicate the public interest or the rights of victims in its opinion.<sup>143</sup> Nevertheless, the CVRA makes clear Congressional intent that judges carefully review proposed DPAs, inform victims, and ensure that the terms of the agreement adequately compensate victims.<sup>144</sup> The D.C. Circuit’s suggestion that judges lack authority to review the substance of DPAs in any depth was legally incorrect. As will be discussed in the next section, the D.C. Circuit was also wrong to suggest there is any separation of powers or constitutional reason to interpret the Speedy Trial Act in a manner to maximize prosecutorial discretion. Review of consent decrees in a range of contexts requires judges to assess the “public interest” when deciding to grant them; it is part of the federal judge’s role and it does not raise any constitutional concerns.

One limitation of judicial review of DPAs with corporations is quite clear: not all subjects permit judicial scrutiny. A court would be particularly deferential in reviewing the decision *whether* to offer pre-trial diversion to a defendant. The D.C. Circuit opinion permits very little review of that decision. That ruling jibes with rulings in which courts have long held that a defendant cannot claim any right to obtain a deferred prosecution settlement, as all judges who have considered the question have quite emphatically stated.<sup>145</sup> As described, however, the terms of the agreement itself may raise a range of fairness and reasonableness-related concerns. Judges should, as Judge Sullivan did in *Saena Tech*, strongly defer to the choices made when negotiating such complex

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<sup>140</sup> See *supra* notes 52–90 and accompanying text.

<sup>141</sup> Miller, *supra* note 134, at 165.

<sup>142</sup> Crime Victims’ Rights Act, 18 U.S.C. § 3771(a)(9) (2012 & Supp. III 2015).

<sup>143</sup> See *Fokker III*, 818 F.3d at 737–51.

<sup>144</sup> See 18 U.S.C. § 3771(a)(9).

<sup>145</sup> See, e.g., *United States v. Richardson*, 856 F.2d 644, 647 (4th Cir. 1988) (“A defendant has no right to be placed in pretrial diversion. The decision . . . is one entrusted to the United States Attorney.”); *United States v. Hicks*, 693 F.2d 32, 34 n.1 (5th Cir. 1982) (“Since pretrial diversion is a program administered by the Justice Department, considerations of separation of powers and prosecutorial discretion might mandate an even more limited standard of review.”).

agreements, absent unusual evidence that the agreement is a “sham.”<sup>146</sup> Judge Leon concluded that the agreement before his court was an utter failure and not in good faith without applying *Chevron* deference, instead, applying his own, later rejected, “totality” test.<sup>147</sup>

The Second Circuit’s 2017 ruling in *United States v. HSBC Bank USA (HSBC IV)*—in which an HSBC mortgage customer from Pennsylvania asked the district judge to order disclosure of the 1,000-page report by the corporate monitor appointed pursuant to the DPA—reversed the district judge’s decision to disclose the document in redacted form as a public document.<sup>148</sup> In *HSBC I*, a prosecution of the bank for billions of dollars’ worth of money-laundering and sanctions related violations that resulted in “the largest penalty in any [Bank Secrecy Act] prosecution to date,”<sup>149</sup> the bank received a DPA. The agreement received high-profile criticism, including on Capitol Hill.<sup>150</sup> In approving the agreement, Federal District Judge John Gleeson noted this “heavy public criticism,” but approved it, while ordering the five-year corporate monitor supply summaries of the ongoing implementation of a new compliance program to the court.<sup>151</sup> The reports were not positive: the monitor apparently reported “significant concerns about the pace of . . . progress” in compliance and new possible violations, as has the company.<sup>152</sup>

In response to the request by a member of the public, Judge Gleeson decided to release the 2016 monitors report, in a redacted form.<sup>153</sup> HSBC, joined

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<sup>146</sup> *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 31 (D.D.C. 2015).

<sup>147</sup> *United States v. Fokker Servs. B.V. (Fokker I)*, 79 F. Supp. 3d 160, 164, 166–67 (D.D.C. 2015), *vacated and remanded*, 818 F.3d 733 (D.C. Cir. 2016).

<sup>148</sup> *United States v. HSBC Bank USA, N.A. (HSBC IV)*, 863 F.3d 125, 142 (2d Cir. 2017).

<sup>149</sup> Press Release, Dep’t of Justice Office of Pub. Affairs, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012) (on file with DOJ); see Ben Protes & Jessica Silver-Greenberg, *HSBC to Pay 1.92 billion to Settle Charges of Money Laundering*, N.Y. TIMES (Dec. 10, 2012, 4:10 PM), <https://dealbook.nytimes.com/2012/12/10/hsbc-said-to-near-1-9-billion-settlement-over-money-laundering/> [<https://perma.cc/29TD-9W94>].

<sup>150</sup> Press Release, Senator Charles Grassley, Justice Department’s Failure to Prosecute Criminal Behavior in HSBC Scandal Is Inexcusable (Dec. 13, 2012) (on file with author); Press Release, Senator Jeff Merkley, *supra* note 8.

<sup>151</sup> *United States v. HSBC Bank USA, N.A. (HSBC I)*, No. 12-CR-763, 2013 WL 3306161, at \*7, 11 (E.D.N.Y. July 1, 2013), *rev’d*, 863 F.3d 125 (2d Cir. 2017); Deferred Prosecution Agreement at B1–B11, *United States v. HSBC Bank USA, N.A.*, 2013 WL 3306161 (E.D.N.Y. Dec. 11, 2012) (No. 1:12-CR-763) (detailing the requirements of the monitor’s report in Attachment B).

<sup>152</sup> *HSBC Holdings PLC: Annual Financial Report*, LONDON STOCK EXCH. (Mar. 18, 2016, 4:40 PM), <http://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/HSBA/12744438.html> [<https://perma.cc/PC2J-RKUF>]; see Greg Farrell, *HSBC Falls Short on Compliance, Monitor Said to Report*, MONEY WEB (Mar. 30, 2015, 12:04 AM), <https://www.moneyweb.co.za/news/international/hsbc-falls-short-on-compliance-monitor-said-to-report/> [<https://perma.cc/CL6F-2PL9>].

<sup>153</sup> *United States v. HSBC Bank USA, N.A. (HSBC II)*, No. 12-CR-763 (JG), 2016 WL 347670, at \*1 (E.D.N.Y. Jan. 28, 2016), *rev’d*, 863 F.3d 125 (2d Cir. 2017).

by the government, then appealed the ruling. I view such reports as of enormous public interest, and should note that I argued in an amicus brief that for that reason and based on the Speedy Trial Act itself, the district judge acted well within his discretion to order that the monitor's report be made public.<sup>154</sup> I maintained that "there is a public interest in knowing if the monitorship is accomplishing the ends of justice contemplated by the DPA" and described how the Speedy Trial Act supports judicial review and supervision of the implementation of DPAs, as does standard practice in a range of civil and criminal settings.<sup>155</sup>

The Second Circuit did address many of those arguments, and the panel largely rejected them. Indeed, the panel included language that went beyond the circumstances concerning disclosure of a corporate monitor's report and stated that judges have "no freestanding supervisory power" to review and approve such agreements or ensure compliance with them.<sup>156</sup> Judge Gleeson, in approving the DPA, emphasized the "heavy public criticism" of the deal's lenient treatment of the bank, which avoided a conviction, and its employees, none of whom were prosecuted.<sup>157</sup> In ordering that the monitor's reports be disclosed, the judge said it was "appropriate and desirable for the public to be interested and informed now in the progress of the arrangement between DOJ and HSBC that the government chose to make the centerpiece of a federal criminal case . . . ."<sup>158</sup> That reasoning—in part depending on a First Amendment question whether the monitor's report was a judicial document—and that constitutional question are not ones I address here.<sup>159</sup>

In response, the Second Circuit panel never squarely addressed the question of the public interest. Like the D.C. Circuit, the Second Circuit relied upon inapposite cases concerning a prosecutor's charging discretion, and used the same troubling reasoning that statutes like the Speedy Trial Act should be interpreted to maximize prosecutorial discretion.<sup>160</sup> The panel interpreted the discretion that the Speedy Trial Act conveys as a bar on a judge evaluating the merits of a DPA before approving it.<sup>161</sup> The panel, however, did note that the monitor's report might become a judicial document subject to public disclosure if disputes later made the document relevant to judicial decision making. The

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<sup>154</sup> 18 U.S.C. § 3161(h) (2012); Brief of Amicus Curiae Professor Brandon L. Garrett in Support of Appellee at 20, *United States v. HSBC Bank USA, N.A. (HSBC IV)*, 863 F.3d 125 (2d Cir. Oct. 27, 2016) [hereinafter Garrett: Amicus Brief].

<sup>155</sup> Garrett: Amicus Brief, *supra* note 154, at 20.

<sup>156</sup> *HSBC IV*, 863 F.3d at 135–37.

<sup>157</sup> *HSBC II*, 2016 WL 347670, at \*5.

<sup>158</sup> *Id.*

<sup>159</sup> See *HSBC IV*, 863 F.3d at 129, 134–35.

<sup>160</sup> *Id.* at 137.

<sup>161</sup> *Id.* at 138.

panel also noted that if any misconduct came to the court's attention, its supervisory power would justify monitoring the implementation of the agreement.<sup>162</sup>

The Second Circuit should have also looked more carefully at the purposes of and authority for judicial supervision of criminal matters. That panel suggested that authority to review the merits of a DPA would go so far as to “re-jigger the historical allocation of authority between the courts and the Executive.”<sup>163</sup> The panel cited no historical support for the proposition that federal judges must approve agreements without reviewing their substance, however. The panel did not acknowledge the large body of evidence concerning the routine and standard disclosure of monitor reports in a wide range of prosecution settings; it is not as if shrouding a monitorship in secrecy is somehow an important part of the prosecutorial role (indeed the monitor is defined as independent of the prosecution and the corporate defendant).<sup>164</sup> Moreover, the Speedy Trial Act, like the provisions of FRCP 11, including the procedures for advising the defendant and developing the factual basis and voluntariness of the plea on the record set out in FRCP 11(b), each call for substantive review.<sup>165</sup> In the case of a plea and in the case of a DPA, judges have a common need to inquire into a series of subjects. For example, defendants must be informed of the consequences of waiving their Speedy Trial Act rights, just as they must be informed of the significance of a waiver of rights when pleading guilty.

Additionally, case law and standards for plea agreement approval can inform the standard for the approval of DPAs, where under FRCP 11, the court has discretion whether to accept or reject the plea, or defer a decision.<sup>166</sup> The factors cited by Judge Sullivan, for example, mirror (and were in part drawn from) the factors that have arisen in cases in which judges have considered corporate plea agreements.<sup>167</sup> As one student argues—and I agree—“the fact that judicial review of plea agreements is not unfettered does not mean that no such review exists: courts can review plea agreements and DPAs without passing judgment on the charging decisions themselves.”<sup>168</sup>

To be sure, judges could be more explicitly empowered to conduct substantive review of corporate agreements by statute, to ensure that prosecutors do pursue the public interest when they settle with corporations. Concurring separately in the Second Circuit ruling in *HSBC IV*, Judge Rosemary Pooler wrote that, as I have described, the relevant provisions of the Speedy Trial Act were clearly written with individual diversion in mind and not large corpora-

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<sup>162</sup> *Id.* at 137.

<sup>163</sup> *Id.* at 138.

<sup>164</sup> Garrett: Amicus Brief, *supra* note 154, at 16–19.

<sup>165</sup> See 18 U.S.C. § 3161(h) (2012); FED. R. CRIM. P. 11(b).

<sup>166</sup> FED. R. CRIM. P. 11(c)(3)(A).

<sup>167</sup> See *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 31 (D.D.C. 2015).

<sup>168</sup> Miller, *supra* note 134, at 167.

tions, and called upon Congress to enact legislation along the lines of legislation introduced to formalize judicial review over DPAs.<sup>169</sup> In my view, the Second Circuit was incorrect. There is nothing vague about the language of the Speedy Trial Act. The language of the current Speedy Trial Act already provides authority to substantively review such agreements, just as they would if it were a plea agreement.<sup>170</sup> Case law can and should cement the standards for judicial review, and judges have begun to do so already. As will be described later, in a range of regulatory areas, the procedures developed by courts or set out in statutes are designed precisely to accomplish that goal: to introduce broader public interest consideration when important settlements are negotiated with companies, but to clearly define the relevant factors and standards.

### 3. Non-Prosecution Agreements

In some instances, government enforcers can avoid judicial review entirely. They can decline to bring a case at all, but in doing so, they do not obtain a remedy. As an alternative, government enforcers can rely on NPAs with an organization. A non-prosecution is not filed with a judge and, therefore, cannot be reviewed by a judge; such an agreement states that prosecutors will not file if the corporation complies with its terms.<sup>171</sup> Antitrust immunity agreements also fall into this category. Although distinct from a declination, such an agreement cannot implicate supervisory authority of a court because nothing is filed in court and the court is not asked to approve it.<sup>172</sup> Perhaps a company could sue to enforce an NPA as a contract if they argued that prosecutors failed to uphold their end of the bargain. For instance, in an antitrust case in the Third Circuit Court of Appeals, the court ultimately held that a company could bring a due process challenge to a prosecutor's declaration that the company was in breach of its settlement.<sup>173</sup> The Third Circuit held also, however, that the judge had no power to enjoin, before the indictment, the criminal charges that prose-

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<sup>169</sup> *United States v. HSBC Bank USA, N.A. (HSBC IV)*, 863 F.3d 125, 142–44 (2d Cir. 2017) (Pooler, J., concurring).

<sup>170</sup> *See* 18 U.S.C. § 3161(h).

<sup>171</sup> *See* 15 U.S.C. § 16(e) (2012). *See generally* Note, *The ITT Dividend: Reform of Department of Justice Consent Decrees Procedures*, 73 COLUM. L. REV. 594 (1973) (discussing critiques of consent decrees for excluding third party interests in settlements and their general lack of transparency, and proposing avenues for reform) [hereinafter *ITT Dividend*].

<sup>172</sup> The General Accountability Office has criticized the lack of criteria for deciding whether a company receives a deferred or a non-prosecution agreement. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-636T, CORPORATE CRIME: PRELIMINARY OBSERVATIONS ON DOJ'S USE AND OVERSIGHT OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS 4, 9, 11, (2009) (noting that prosecutors frequently consider non-objective factors, such as a "company's cooperation with the investigation, the collateral consequences of a criminal prosecution, and any remedial measures [a] company had taken," when deciding whether or not to pursue a DPA or NPA).

<sup>173</sup> *Stolt-Nielson, S.A. v. United States*, 442 F.3d 177, 187 (3d Cir. 2006).

cutors were bringing in response to the alleged breach.<sup>174</sup> These NPAs, therefore, enable corporate settlements to escape judicial review entirely.

### B. Civil Regulatory Agreements

Corporate settlements also often involve agreements with federal administrative agencies outside of criminal prosecutions. A wide range of federal administrative agencies settle the vast majority of their enforcement actions using civil consent decrees.<sup>175</sup> Indeed, in some contexts, like under certain environmental statutes, cases must be settled using consent decrees, as opposed to out-of-court settlements.<sup>176</sup> Consent decrees are settlement agreements, much like contracts, but they are approved by a court, so that they involve judicial review. The agency can secure fines and impose conditions on an organization, and the text of the agreement can also set a template for conduct by other members of industry.<sup>177</sup>

Although consent decrees may accomplish regulatory objectives, administrative agencies must permit public notice and participation rights when engaging in regulation or issuing orders. The rules are less clear, however, when these administrative agencies engage in enforcement. The Administrative Procedure Act (“APA”) protects interests of affected members of the public when agencies engage in rulemaking, including the requirement that notice and an opportunity to comment be afforded, as well as other procedures.<sup>178</sup> The purpose of these rules is to permit public participation, as well as provide information access and an opportunity for deliberation.<sup>179</sup> The APA provides for judicial review of agency decision-making, using a range of standards of review.<sup>180</sup> Other statutes supplement that judicial review, such as the Hobbs Judicial Review Act, which grants a right to intervene in actions before federal

<sup>174</sup> *Id.* For a discussion of the case, see Garrett: *Structural Reform Prosecution*, *supra* note 12, at 929–30.

<sup>175</sup> Kristi Smith, *Who’s Suing Whom: A Comparison of Government and Citizen Suit Environmental Actions Brought Under EPA-Administered Statutes, 1995–2000*, 29 COLUM. J. ENVTL. L. 359, 387 (2004); see *SEC v. Citigroup Glob. Mkts., Inc.*, 673 F.3d 158, 167 (2d Cir. 2012).

<sup>176</sup> See generally Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL F. 327, <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1023&context=uclf> [https://perma.cc/8Y75-HDP9] (discussing how limiting “the range of commitments the government may offer” in settlements can restrict the full effect of consent decrees that have played a key role in environmental policy).

<sup>177</sup> See *infra* notes 221–241 and accompanying text.

<sup>178</sup> Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2012 & Supps. II 2014, IV 2016).

<sup>179</sup> TOM C. CLARKE, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 26 (1947); Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 CHI.-KENT L. REV. 953, 962 (1997); Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 755–56 (1996).

<sup>180</sup> 5 U.S.C. § 706 (2012). Regarding the complexity of these standards of review, see, for example, David Zaring, *Rule by Reasonableness*, 63 ADMIN. L. REV. 525, 530 (2011).

agencies, providing that “[c]ommunities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order.”<sup>181</sup>

If agencies fail to comport with the requisite notice and comment procedural provisions, then the courts may invalidate their rulemaking.<sup>182</sup> If they do comply, courts will employ deferential scrutiny to their legal interpretations, even if statutes are ambiguous, under the *Chevron* doctrine.<sup>183</sup> Some scholars worry that the procedural requirements of the APA are unwieldy and give agencies incentives to act informally outside that process, such as by issuing interpretive rules or guidance that is not binding like a regulation.<sup>184</sup> Another way agencies can act outside the rulemaking process is through enforcement actions, which can be used to ensure that non-compliant actors are held accountable, but which can also set an informal precedent for accountability under regulatory schemes.

The same rules do not apply when agencies act through enforcement and not through rulemaking or orders. In general, enforcement discretion is not reviewable, and agencies have broad discretion regarding regulation-enforcement and regulatory targets.<sup>185</sup> A decision not to enforce is not reviewable under the doctrine of *Heckler v. Chaney*.<sup>186</sup> Nor are agency plans for conducting enforcement or monitoring,<sup>187</sup> or decisions on how to allocate enforcement funds.<sup>188</sup>

When an agency does enter into civil settlements and seeks judicial ratification of the settlement through a consent decree, judges have a responsibility to review that settlement, but often this role is undefined. In some areas, legislation has defined that judicial rule, as with judicial review of agency rulemaking, but the courts have been mixed in their interpretation of those provisions, as I develop in the sections that follow.

<sup>181</sup> 28 U.S.C. § 2348 (2012).

<sup>182</sup> See, e.g., *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1142–43 (D.C. Cir. 1995); *Am. Water Works Ass’n v. EPA*, 40 F.3d 1266, 1274–75 (D.C. Cir. 1994).

<sup>183</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–45 (1984); see, e.g., Peter L. Strauss, “Deference” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143, 1145 (2012) (regarding the complexity of doctrines of judicial review of agencies); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 153 (2010).

<sup>184</sup> JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 9–25 (1990). See generally Connor Raso, *Agency Avoidance of the Rulemaking Process*, 67 ADMIN. L. REV. 65 (2015) (comparing scholars’ views on addressing agency compliance with statutory rulemaking procedure); Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621 (1994) (discussing the role of judicial review in the “ossification” of rulemaking, and proposing ways to ameliorate the process).

<sup>185</sup> Rachel Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1130 (2016).

<sup>186</sup> *Heckler v. Chaney*, 470 U.S. 821, 832–33 (1985).

<sup>187</sup> *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64, 67 (2004).

<sup>188</sup> *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993).

## 1. Administrative Settlements

Outside of prosecution of corporations in court, administrative agencies may pursue civil remedies against companies using internal administrative proceedings before administrative law judges.<sup>189</sup> The SEC can, for example, pursue administrative settlements with corporations, and the Dodd-Frank Act provides the SEC with greater ability to do so.<sup>190</sup> There are not strong guidelines regarding when a case must be brought internally versus in court, a topic that has resulted in a range of criticism and proposals for reforms.<sup>191</sup> Judicial review of such settlements is normally not permitted or provided for in the agreements themselves.

Now, when agencies conduct enforcement actions using internal administrative enforcement proceedings, and a final decision results, findings of fact receive “substantial evidence” deference,<sup>192</sup> and the final decisions in such proceedings cannot be reversed on appeal unless they are “arbitrary, capricious, [or] an abuse of discretion.”<sup>193</sup> In general, for such discretionary decisions, review is to be highly deferential and a court is not to “substitute its judgment” for that of the agency.<sup>194</sup> Yet when administrative matters settle, there is no final judgment to appeal. The APA itself does not address such situations, and such settlements have been found not to constitute rulemaking, and therefore do not call for notice and comment to the public, absent some other statute.<sup>195</sup> The D.C. Circuit, the only federal court of appeals to address this question, has concluded that such administrative settlements are tantamount to

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<sup>189</sup> See 15 U.S.C. § 77h-1(a) (2012); Securities Exchange Act of 1934 § 21C(a), 15 U.S.C. § 78u-3(a). The SEC can also order disgorgement of profits. 15 U.S.C. §§ 77h-1(e), 78u-2(e); Bennett Rawicki, *The Dodd-Frank Act and SEC Enforcement—The Significant Expansions and Remaining Limitations on the SEC’s Enforcement Scope and Arsenal*, 41 SEC. REG. L.J. 35, 42 (2013).

<sup>190</sup> See 15 U.S.C. §§ 77h-1(a), (e), 78u-2(e), 3(a); Rawicki, *supra* note 189.

<sup>191</sup> See David Migoya, *SEC Wants Federal Court of Appeals to Rethink Ruling That Questions Administrative Proceedings*, DENVER POST (Mar. 14, 2017, 8:14 AM), <http://www.denverpost.com/2017/03/14/sec-denver-appeals-court-judges/> [<https://perma.cc/68U9-K7RL>] (“Critics have argued that the SEC conveniently pushes civil cases into its own administrative courts rather than federal circuit courts in part to avoid judicial criticisms about how they prosecute cases, as well as to ensure favorable outcomes.”); Breon Peace et al., *The Future of SEC Administrative Proceedings*, LAW360 (Jan. 4, 2017, 11:20 AM), <https://www.law360.com/articles/876875/the-future-of-sec-administrative-proceedings> [<https://perma.cc/Y3RS-G7ZN>]; see also *Bandimere v. United States SEC*, 844 F.3d 1168, 1176, 1188 (10th Cir. 2016) (holding that SEC Administrative Law Judges are “inferior officers under the Appointments Clause,” and one such judge unconstitutionally presided over an administrative proceeding).

<sup>192</sup> 5 U.S.C. § 706(2)(E) (2012); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

<sup>193</sup> 5 U.S.C. § 706(2)(A).

<sup>194</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–44 (1983).

<sup>195</sup> See *Citizens for a Better Env’t v. Gorsuch*, 718 F.2d 1117, 1136 (D.C. Cir. 1983) (Wilkey, J., dissenting) (“The commitment that occurs through a consent decree takes place, however, without recourse to the public notice requirements of notice and comment rulemaking.”); Rossi, *supra* note 15, at 1016.

decisions not to enforce at all, and are, therefore, presumptively unreviewable.<sup>196</sup> Consistent with the general discussion in this Article, and the discussion of consent decrees in the next section, I instead view any settlement with enforcers as a decision to enforce quite unlike a declination, and therefore presumptively reviewable.<sup>197</sup> The same deferential, but still meaningful, arbitrariness review should occur for administrative settlements as final orders during administrative hearings.

## 2. Regulatory Consent Decrees

Agencies can instead pursue civil remedies in court, and when anticipating that compliance with the settlement will take some time, can enter a consent decree in which the settlement is judicially-supervised over some period of time. Judicial review of consent decrees is well established, including the practice of judges examining the public interest. Courts have debated, however, what the precise scope of that judicial review entails. Supreme Court rulings on such consent decrees describe the role of a court in reviewing a consent decree between a corporation and enforcement officers, as well as between private and public parties generally.<sup>198</sup> A consent decree is a hybrid, where it is not a purely private settlement, but also has aspects of a judicial injunction implicating the equitable power of the court.<sup>199</sup> There are certain similarities with the inquiry in which a court decides whether or not to approve a civil consent decree based on whether it is fair, reasonable, and consistent with the purposes of the laws or regulations, and if injunctive relief is part of the relief, whether the “public interest would not be disserved.”<sup>200</sup> Review of consent decrees is necessarily highly deferential, but a court must consider the public interest and the sources of underlying law.<sup>201</sup>

Courts have recognized their role in substantively reviewing consent agreements before they approve them. As one court has put it, “when the district judge is presented with a proposed consent judgment, he is not merely a

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<sup>196</sup> *Ass’n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1031 (D.C. Cir. 2007).

<sup>197</sup> For an excellent Note developing this argument in detail, see generally Dustin Plotnick, *Agency Settlement Reviewability*, 82 *FORDHAM L. REV.* 1367 (2013).

<sup>198</sup> See *United States v. ITT Cont’l Baking Co.*, 420 U.S. 223, 233–35 & n.8 (1975); *United States v. Armour & Co.*, 402 U.S. 673, 681–83 (1971). These descriptions have also appeared in employment discrimination cases. See, e.g., *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 566–70 (1984) (holding a district court’s modification to a consent decree in an employment race-discrimination case could not be imposed upon the City of Memphis without its consent).

<sup>199</sup> See *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986).

<sup>200</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); see *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984) (“Unless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved.”).

<sup>201</sup> See, e.g., *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (“[A] federal consent decree must . . . further the objectives of the law upon which the complaint was based.”).

‘rubber stamp.’”<sup>202</sup> The Ninth Circuit held that “[u]nless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved.”<sup>203</sup> The D.C. Circuit explains: “prior to approving a consent decree a court must satisfy *itself* of the settlement’s ‘overall fairness to beneficiaries and consistency with the public interest.’”<sup>204</sup> Thus, as the Sixth Circuit has put it, “[f]airness should be evaluated from the standpoint of signatories and nonparties to the decree.”<sup>205</sup>

One court has tried to articulate the bounds of judicial review of a consent decree that goes beyond this “rubber stamp approval.”<sup>206</sup> The Second Circuit recently emphasized in *Citigroup II*: “[t]he primary focus of the inquiry . . . should be on ensuring the consent decree is procedurally proper.”<sup>207</sup> In fact, courts have long emphasized that review of a consent decree should examine the procedural fairness, but also the substantive fairness of a consent decree, including an independent review carefully examining the public interest.<sup>208</sup> The Second Circuit’s ruling, holding that a district court abused its discretion in declining to approve an SEC consent decree, focused on the district court’s findings that the “truth” of certain allegations was not established.<sup>209</sup> The Second Circuit did emphasize that the court must find a “factual basis” for such a decree, a requirement that mirrors the requirement of a factual basis for a plea agreement.<sup>210</sup> The Second Circuit also noted: “[s]crutinizing a proposed consent decree for ‘adequacy’ appears borrowed from the review applied to class action settlements, and strikes us as particularly inapt in the context of a proposed S.E.C. consent decree.”<sup>211</sup> The Second Circuit added:

[b]y the same token, a consent decree does not pose the same concerns regarding adequacy—if there are potential plaintiffs with a private right of action, those plaintiffs are free to bring their own actions. If there is no private right of action, then the S.E.C. is the enti-

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<sup>202</sup> SEC v. Levine, 881 F.2d 1165, 1181 (2d Cir. 1989).

<sup>203</sup> *Randolph*, 736 F.2d at 529.

<sup>204</sup> United States v. Trucking Emp’rs, Inc., 561 F.2d 313, 317 (D.C. Cir. 1977) (quoting United States v. Allegheny Ludlum Indus., 517 F.2d 826, 850 (5th Cir. 1975)) (emphasis added).

<sup>205</sup> United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1435 (6th Cir. 1991) (internal citation and quotation marks omitted).

<sup>206</sup> City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974).

<sup>207</sup> SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup II*), 752 F.3d 285, 295 (2d Cir. 2014).

<sup>208</sup> See *Turtle Island Restoration Network v. Dep’t of Commerce*, 834 F. Supp. 2d 1004, 1017–19 (D. Haw. 2011) (describing procedural and substantive review, and then explaining how “the parties seek to incorporate their settlement into a court order, and because public interests are at stake, the [c]ourt must make an independent and searching inquiry, carefully scrutinizing the proposed consent decree”).

<sup>209</sup> *Citigroup II*, 752 F.3d at 295.

<sup>210</sup> *Id.* at 296.

<sup>211</sup> *Id.* at 294.

ty charged with representing the victims, and is politically liable if it fails to adequately perform its duties.<sup>212</sup>

That ruling limits judicial review, but it does recognize that some judicial review can and should be conducted.

Importantly, the Second Circuit emphasized the continued importance of the public interest.<sup>213</sup> The ruling stated that “the proper standard” asks that the judge “determine whether the proposed consent decree is fair and reasonable” and whether it safeguards the public interest.<sup>214</sup> The Second Circuit explained in *Citigroup II*: “if the S.E.C. prefers to call upon the power of the courts in ordering a consent decree and issuing an injunction, then the S.E.C. must be willing to assure the court that the settlement proposed is fair and reasonable.”<sup>215</sup> Although second-guessing the factual basis for the agreement was not permitted, and the Second Circuit focused on the procedural propriety of the resulting agreement, *Citigroup II* is not as narrow as sometimes supposed.<sup>216</sup> The Second Circuit still emphasized that public interest review is still to be done, including by focusing on the content of the agreement and whether it is “fair and reasonable.”<sup>217</sup> After all, when consent decrees are reviewed, the public interest must be assessed as part of a court approving ongoing equitable remedies.<sup>218</sup> The Second Circuit continually emphasized traditional principles of equity, and on remand asked that the district judge “consider whether the public interest would be disserved” by entry of the proposed decree.<sup>219</sup> Although the Second Circuit’s focus on procedural regulatory was narrow, the public interest role was still set out, and importantly, it is an outlier decision. A range of other federal courts all consistently emphasize the role of a reviewing judge in examining the public interest, including by inquiring into the underlying facts and agency rationales.<sup>220</sup>

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 297.

<sup>216</sup> *See id.* at 294.

<sup>217</sup> *Id.* at 297.

<sup>218</sup> For a ruling in an FTC consent decree, initially not approving the settlement due to public interest concerns with the lack of an admission of liability, see *FTC v. Circa Direct LLC*, No. 11-2172, 2012 WL 2178705, at \*6 (D.N.J. June 13, 2012). The court later approved a revised consent decree. *FTC v. Circa Direct LLC*, No. 11-2172, 2012 WL 3987610, at \*1 (D.N.J. Sept. 11, 2012).

<sup>219</sup> *SEC v. Citigroup Glob. Mkts., Inc. (Citigroup II)*, 752 F.3d 285, 297 (2d Cir. 2014).

<sup>220</sup> For an excellent survey of this case law, see Theodore D. Edwards, Note, *Of Truth, Pragmatism, and Sour Grapes: The Second Circuit’s Decision in SEC v. Citigroup Global Markets*, 65 *DUKE L. J.* 1241, 1278–80 (2016); see also Case Comment, *Securities Regulation—Consent Decrees—Second Circuit Clarifies That a Court’s Review of an SEC Settlement Should Focus on Procedural Propriety*—*SEC v. Citigroup Global Markets, Inc.*, 752 F.3d at 285 (2d Cir. 2014), 128 *HARV. L. REV.* 1288, 1294 (2015).

a. *Tunney Act Settlements*

By statute, Congress may require that the public interest be considered before a judge may approve a settlement.<sup>221</sup> Antitrust settlements are an example. The Tunney Act, a provision of the Antitrust Procedures and Penalties Act, states that a federal judge may enter a proposed antitrust consent decree only if “in the public interest.”<sup>222</sup> The public then has a right to comment on the proposed settlement. The Tunney Act requires that the judge determine whether a consent decree would not only promote “competition in the relevant market or markets,” but also its impact “upon the public generally.”<sup>223</sup> The statute notes that a judge, in order to make an informed “public interest determination,” may hold a hearing with testimony from “Government officials or experts,” or “appoint a special master” or outside experts to provide analysis or evaluations, and permit appearances by “interested persons or agencies,” among the possibilities outlined.<sup>224</sup> The Act was enacted in response to concerns that judges were rubber-stamping agreements, negotiated in secret, with no opportunity for third parties to participate.<sup>225</sup>

These procedures provide an important roadmap for legislation designed to improve the consideration of the public interest in enforcement settlements. The courts, however, have not adequately given meaning to the Tunney Act provisions.<sup>226</sup> The D.C. Circuit has by its own admission, “narrowly” interpreted the Tunney Act’s provisions.<sup>227</sup> In the antitrust litigation of *United States v. Microsoft Corporation*, the district court rejected a civil consent decree proposed by the DOJ.<sup>228</sup> There was much commentary on Federal Judge Stanley Sporkin’s ruling; some accused him of “trying to make himself into the czar of the com-

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<sup>221</sup> 15 U.S.C. § 16(e) (2012).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* § 16(e)(1)(B).

<sup>224</sup> *Id.* § 16(f).

<sup>225</sup> See generally ITT *Dividend*, *supra* note 171, at 603–06 (describing the cases that prompted enactment of the Tunney Act).

<sup>226</sup> See *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997) (discussing, briefly, the “standard for intervention” under the Tunney Act).

<sup>227</sup> *Id.*

<sup>228</sup> *United States v. Microsoft Corp.*, 56 F.3d 1448, 1454 (D.C. Cir. 1995). In *Microsoft*, the DOJ filed a complaint charging Microsoft with “unlawfully maintaining a monopoly of operating systems . . . and unreasonably restraining trade of the same through certain anticompetitive marketing practices.” *Id.* at 1451. When the parties proposed a consent decree, Judge Stanley Sporkin denied the decree as he did not find it was in the public interest, and in doing so reviewed many underlying facts of the complaint. *Id.* at 1454–55.

puter industry,”<sup>229</sup> while others applauded him for exposing “an unenforceable deal that let the government save face while letting Microsoft off the hook.”<sup>230</sup>

The D.C. Circuit reversed, and took the unusual step of reassigning the case to another judge, stating that the “public interest” standard did not “empower[ ]” the judge to reject a consent decree “merely because he believed other remedies were preferable.”<sup>231</sup> In one respect, the ruling was similar to that in *Citigroup II*, where the real focus was on considering matters extrinsic to the agreement.<sup>232</sup> The D.C. Circuit held that the “court was barred from reaching beyond the complaint to examine practices the government did not challenge.”<sup>233</sup> The D.C. Circuit went even further in holding that a judge may only reject an agreement “that, on its face and even after government explanation, appears to make a mockery of judicial power,” or if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, and finally, if third parties will be positively injured.<sup>234</sup> That interpretation, while permitting review in several circumstances, remains highly constrained—it sought to rewrite the Tunney Act, somehow making the standard for review under a statute that specifically states that the public interest must be examined in a narrower fashion than under consent decree approval rules more generally.<sup>235</sup> Although the D.C. Circuit was right to conclude “the Tunney Act cannot be interpreted as an authorization for a district judge to assume the role of Attorney General,” the court should have given the public interest far more scope, in line with what Congress intended and in line with standard rules regarding approval of consent decrees.<sup>236</sup> The court could have interpreted the public interest standard set out in the statute, rather than replacing it with its own language limiting the reversal authority of a judge to the situations set out. To be sure, only the third “mockery of judicial power” situation is a highly constrained one; the “inadequate” enforcement mechanism and the other situations identified do leave room to provide for the public interest.<sup>237</sup> An overreaching decision by a district judge, in a high profile case, led to an overly constrictive appellate in-

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<sup>229</sup> Lloyd C. Anderson, *United States v. Microsoft, Antitrust Consent Decrees, and the Need for a Proper Scope of Judicial Review*, 65 ANTITRUST L.J. 1, 1(1996) (*Judge Sporkin's Computer Virus*, DETROIT NEWS, Feb. 20, 1995, at A8).

<sup>230</sup> David Einstein, *The Judge Who Rejected Microsoft*, S.F. CHRON. (Feb. 16, 1995, 4:00 AM), <http://www.sfgate.com/business/article/The-Judge-Who-Rejected-Microsoft-Stanley-3044564.php> [<https://perma.cc/XWS9-R7AF>]. For a detailed and insightful discussion, see *Antitrust Consent Decrees*, *supra* note 229, at 1.

<sup>231</sup> *Microsoft*, 56 F.3d. at 1460.

<sup>232</sup> SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup II*), 752 F.3d 285, 295 (2d Cir. 2014).

<sup>233</sup> *Microsoft*, 56 F.3d. at 1460.

<sup>234</sup> *Id.* at 1462.

<sup>235</sup> *See id.*

<sup>236</sup> *See id.*

<sup>237</sup> *See id.* at 1460, 1462.

terpretation of the entire public interest standard in the Tunney Act.<sup>238</sup> The result may have been continued over-use of consent decrees, and the concern that the government seeks to regulate through the use of detailed terms in agreements, without meaningful judicial review.<sup>239</sup> That said, other courts have adopted a different approach; the Ninth Circuit Court of Appeals, for example, permits broader judicial review under the Tunney Act.<sup>240</sup>

The Tunney Act, intended to introduce broader public interest considerations in approval of antitrust consent decrees, seemingly uncontroversially permits a range of procedural steps prior to their entry, including hearings with participation by the public and agencies and monitoring.<sup>241</sup> Also troubling on the procedural side, however, is that some courts have narrowly interpreted the ability of private parties to intervene to represent the public interest in Tunney Act proceedings, stating that they may do so only after making “some strong showing that the government is not vigorously and faithfully representing the public interest.”<sup>242</sup>

What was the rationale for narrowly interpreting a statute, which adopted clear language intended to provide greater judicial review of antitrust settlements?<sup>243</sup> The D.C. Circuit later explained that this was due in “part because of the constitutional questions that would be raised if courts were to subject the government’s exercise of its prosecutorial discretion to non-deferential review.”<sup>244</sup> This sounds like a criminal analogy: does the same prosecutorial discretion apply in a civil enforcement case entered to accomplish regulatory objectives? And why does the Constitution permit only “deferential review” of negotiated settlements between the government and corporations? After all, in

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<sup>238</sup> See Anderson: *Antitrust Consent Decrees*, *supra* note 229, at 6 (“[W]hile Judge Sporkin clearly exceeded the proper scope of judicial review, the court of appeals has formulated an excessively narrow standard of judicial review.”); *id.* at 34 (“[I]n its haste and zeal to reverse Judge Sporkin, the court of appeals created bad law, both practically and legally.”).

<sup>239</sup> See, e.g., *id.* at 6; Michael L. Weiner, *Antitrust and the Rise of the Regulatory Consent Decree*, ANTITRUST, Fall 1995, at 4 (“Indeed, consent decrees have so enriched—or supplanted—case law that the advice antitrust lawyers give their clients frequently may be entirely divorced from recent case law authority.”).

<sup>240</sup> See *United States v. BNS, Inc.*, 858 F.2d 456, 462–63 (9th Cir. 1988) (construing broadly the court’s ability to review matters both within and beyond the complaint at bar).

<sup>241</sup> See 15 U.S.C. § 16(e) (2012).

<sup>242</sup> *Mass. Sch. of Law*, 118 F.3d at 783 (internal citations omitted); *United States v. LTV*, 746 F.2d 51, 54 n.7 (D.C. Cir. 1981) (quoting *United States v. Hartford-Empire Co.*, 573 F.2d 1, 2 (6th Cir. 1978)); see also *United States v. Associated Milk Producers*, 534 F.2d 113, 117 (8th Cir. 1976) (requiring the government’s “bad faith or malfeasance” to warrant judicial intervention) (internal quotation marks and modification omitted).

<sup>243</sup> For the argument that judicial review should be more searching, pre-*Microsoft*, see Note, *The Scope of Judicial Review of Consent Decrees Under the Antitrust Procedures and Penalties Act of 1974*, 82 MICH. L. REV. 153 (1983).

<sup>244</sup> *Mass. Sch. of Law*, 118 F.3d at 783; see *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003).

any case involving a preliminary injunction or consent decree, as noted, the public interest is a factor that judges must consider. Surely, such consideration of the public interest does not implicate a constitutional question. Nor did the D.C. Circuit cite to any body of law or source for its narrower interpretation of the statutory language. It is not as if the public interest is something constitutionally committed to the Executive Branch. Moreover, Congress can and has regulated judicial review of a range of criminal and civil settlements. And the Supreme Court has, if anything, empowered district judges to modify consent decrees in light of changed circumstances, a different setting than the initial approval of a decree, but one which similarly highlights the equitable power of a judge.<sup>245</sup>

A compromise approach adopted shortly after the Tunney Act's enactment by a federal district court permitted constrained public interest review:

It is not the court's duty to determine whether this is the best possible settlement that could have been obtained if, say, the government had bargained a little harder. The court is not settling the case. It is determining whether the settlement achieved is within the reaches of the public interest.<sup>246</sup>

The government may have "primacy" over charging and enforcement matters, but if it seeks judicial review and approval of a settlement, there is no constitutional reason why the courts should not assure that the settlement comports with the public interest. That is particularly the case where agencies decide to avoid adjudication of civil enforcement actions by settling them with consent decrees, which, for example, the Antitrust Division and the Federal Trade Commission increasingly do.<sup>247</sup> Nor did the public interest standard, as applied by the federal courts, raise any problems in its workability prior to the D.C. Circuit's *Microsoft* opinion.<sup>248</sup>

In response to the D.C. Circuit's *Microsoft* opinion, Congress amended the Tunney Act in 2004, to emphasize that a courts review of antitrust consent decrees should not be overly narrow and courts "shall" (rather than "may" in the prior version) consider factors in their review.<sup>249</sup> The Congressional findings emphasized that the D.C. Circuit's "mockery of the judicial function"

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<sup>245</sup> See, e.g., *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237 (1991) (remanding, instead of automatically reinstating a district court decision, so the district court could "decide, in accordance with this opinion, whether the Board [of Education] made a sufficient showing of constitutional compliance" to warrant terminating an injunction).

<sup>246</sup> *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975).

<sup>247</sup> Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, in 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE 177, 180 (Nicolas Charbit et al. eds., 2012).

<sup>248</sup> Anderson: *Antitrust Consent Decrees*, *supra* note 229, at 38–39.

<sup>249</sup> 150 CONG. REC. S3,615–16 (daily ed. Apr. 2, 2004) (statement of Senator Kohl).

standard was far too narrow a view of the discretion of district judges.<sup>250</sup> This change by Congress indicates that Congress is concerned about the overall ability of parties to enter into such agreements, using the judiciary as little more than a rubber stamp on the conditions that they set, with little to no opportunity for review to consider the public interest.

### *b. Public Participation in Consent Decrees*

Where the fairness and reasonableness of a consent decree may require input by non-parties, public participation and defined procedures are required for approval of a range of civil agreements that raise issues of public importance, and not just in the antitrust context. For settlements of enforcement actions by agencies, several federal agencies must permit notice and comment from the public before they enter into consent decrees regarding certain federal statutes.<sup>251</sup> Further, in civil actions filed by agencies, third parties potentially affected by a consent decree may participate in a fairness hearing before court approval.<sup>252</sup> Courts have been more open to requirements of public or third-party participation, as opposed to substantive review of the agreements. For example, in 2003 in *Swift v. United States*, the D.C. Circuit interpreted a provision of the False Claims Act (“FCA”) providing a *qui tam* relator’s right to a hearing (set out in 31 U.S.C. § 3730(c)(2)(A)), as permitting the hearing, but not judicial review of a decision by the government to dismiss an FCA case.<sup>253</sup>

And yet, courts have not been wholly consistent in their focus on procedure over substance. Compare the approach towards judicial review of civil rights settlements, which have received quite intrusive judicial review under demanding standards that focus on the substance of settlement terms.<sup>254</sup> If the D.C. Circuit was right that it raised a constitutional question to apply the Tunney Act to consider the public interest in an antitrust settlement, then there should be a far greater constitutional concern with statutes such as the Prison Litigation Reform Act, which states that injunctive relief in prison suits should

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<sup>250</sup> Standards Development Organization Advancement Act of 2004, Pub. L. No. 108–237, § 221(a)(1)(B), 118 Stat. 661, 668.

<sup>251</sup> See, e.g., Tunney Act, 15 U.S.C. § 16(b) (2012); Clean Water Act, 33 U.S.C. § 1319(g)(4) (2012); Safe Drinking Water Act, 42 U.S.C. § 300h-2(c)(3)(B) (2012); CERCLA, 42 U.S.C. § 9622(d)(2); 16 C.F.R. § 2.34(c) (2006) (FTC consent orders); Supplement Rules Governing Public Notice and Comment in Proceedings Under Sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act and section 1423(c) of the Safe Drinking Water Act, 40 C.F.R. § 22.45(b) (2017) (detailing Environmental Protection Agency public notice requirements).

<sup>252</sup> See Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986).

<sup>253</sup> *Swift*, 318 F.3d at 250, 254.

<sup>254</sup> Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 726 [hereinafter Anderson: *Structural Reform Litigation*]; Timothy Stoltzfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1103, 1129 (1986); Lloyd C. Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation*, 1983 U. ILL. L. REV. 579, 584–86.

be “narrowly drawn” and the “least intrusive” remedy for the violation of federal rights in question.<sup>255</sup>

Some of those suits involving consent decrees are brought by government enforcers while others are brought by private litigants. Private consent decrees, like public consent decrees, involve elements of contract, in that parties have agreed to settle a case. But they also invoke the ongoing equitable powers of the court, and similarly require judicial review and approval. Moreover, because private consent decrees require ongoing compliance, they typically require ongoing reporting to the parties and to the court, or through a monitor or a special master.<sup>256</sup> The court will resolve disputes that arise under the consent decree by interpreting its terms and issuing injunctions to achieve compliance.<sup>257</sup>

When legislation requires that the substantive terms of private settlements be subject to judicial review, courts take that legislation seriously and conduct the required review. Under the FRCP, a class action settlement must be found “fair, reasonable and adequate” before it is given final approval.<sup>258</sup> In that context, the rule reflects due process concerns with the effects of a settlement on non-participating class members, including the need to avoid potential intra-class conflicts, preferential treatment of certain class members over others, or inadequate representation. Courts have elaborated on further considerations regarding the complexity of the case, such as the participation of government litigants and the reaction of class members.<sup>259</sup> The fairness concerns in the context of a criminal prosecution are different because adequacy of representation is not applicable, though an analogous concern—the interests of victims—may be implicated. A court must also approve shareholder derivative suit settlements under standards that require careful judicial review.<sup>260</sup> Courts have not shied away from carefully scrutinizing such settlements prior to approval. Moreover, some settlements involve parallel negotiation and settlement of multiple types of these agreements, including actions by civil, criminal, and private litigants. Not all of these agreements overlap in their requirements for public participation.

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<sup>255</sup> 18 U.S.C. § 3626(a)(1)(A) (2012).

<sup>256</sup> Anderson: *Structural Reform Litigation*, *supra* note 254, at 731–34.

<sup>257</sup> *Id.* at 738–39.

<sup>258</sup> FED. R. CIV. P. 23(e)(2).

<sup>259</sup> *See, e.g.*, Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998) (holding a district court must balance many factors, including “the presence of a governmental participant; and the reaction of the class members to the proposed settlement”).

<sup>260</sup> *See, e.g.*, FED. R. CIV. P. 23.1.

## II. THE PUBLIC INTEREST IN CORPORATE SETTLEMENTS

### *A. Equity and the Public Interest*

Corporate settlements involve elements of contract and the law of equitable judgments. There is a tension reflected in the cases discussed in the last Part between the desire to allow parties to settle their cases through a contract with negotiated terms, the power of an enforcer to decide whether and how to pursue adjudication,<sup>261</sup> and the equitable power of a court over a judgment that it is being called on to potentially enforce and interpret going forward.<sup>262</sup> The concern for the public interest can be lost in settlements between enforcing entities and corporations if not directly preserved in judicial review.

What is the scope of the countervailing judicial review power? As the Supreme Court has put it: “the essence of equity jurisdiction has been the power . . . to do equity, particularly when an important public interest is involved.”<sup>263</sup> Relatedly, the longstanding and traditional standards for injunctive relief include four factors. As the Supreme Court summarized the standard in its ruling in *eBay, Inc. v. MercExchange* in 2006:

a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.<sup>264</sup>

The public interest is a longstanding element in a federal judge’s review of injunctive relief as well as consent decrees.<sup>265</sup> Parties cannot simply contract into injunctive relief; the judge still examines the public interest.<sup>266</sup> To be sure,

<sup>261</sup> See *Chaney*, 470 U.S. at 824.

<sup>262</sup> See *Frew*, 540 U.S. at 437 (“Consent decrees entered in federal court must be directed to protecting federal interests.”); *Lawyer v. Dep’t of Justice*, 521 U.S. 567, 579 n.6 (1997) (“[I]t is the parties’ agreement that serves as the source of the court’s authority to enter any [consent] judgment at all.”) (quoting *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 552 (1986)); *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 378 (1992) (describing consent decrees as “an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees”).

<sup>263</sup> *Park ’N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 217 (1985) (Stevens, J., dissenting) (internal citation and quotation marks omitted).

<sup>264</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

<sup>265</sup> See *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 552 (1937).

<sup>266</sup> Indeed, there is a difficult constitutional question whether Congress can require the judge to enter an injunctive remedy for a violation of federal law, even if the parties do not seek it. For an insightful discussion of this question, see Gene R. Shreve, *Federal Injunctions and the Public Interest*,

some agreements do not implicate the rights of third parties or the public. But if the public is implicated, then the courts have a “heightened responsibility,”<sup>267</sup> and a “larger role,” to be “satisfied of the fairness of the settlement.”<sup>268</sup>

The equitable power protects both sides of a dispute and the public interest may also counsel modification of a settlement. Judges must ensure that an agreement is terminated when its goals have been accomplished, and, if the agreement’s public interest goal still remains unfulfilled, judges must also ensure the agreement be made more rigorous to accomplish those goals. Thus, the Supreme Court has emphasized that “[t]he federal court must exercise its equitable powers to ensure that when the objects of the decree have been attained,” the consent decree is ended, while if the State, in a decree involving a government actor, “establishes reason to modify the decree, the court should make the necessary changes; where it has not done so, however, the decree should be enforced according to its terms.”<sup>269</sup>

As described in the last Part, in troubling cases in different contexts—ranging from SEC settlements to the Tunney Act, and to DPAs—courts have stepped away from public interest review to narrow the authority of district judges.<sup>270</sup> Nevertheless, those courts, I have argued, misinterpreted governing legal standards narrowed the ability of a trial judge to assess the public interest before entering a decree or approving a settlement.<sup>271</sup> What would a more public interest-oriented approach look like?

First, judges should permit public participation where appropriate, and certainly when required, as in criminal matters (both regarding plea agreements and DPAs as required by federal statutes), and when consent decrees call for it. The information provided by the public, or interest groups, or victims, can inform substantive review of the corporate agreement. As one scholar has put it: “In all cases, the courts must understand the prospective decree well enough to conclude that there is a reasonable possibility for compliance.”<sup>272</sup>

Second, the public interest should be routinely considered, but informed by a range of factors. The Supreme Court has stated: “[e]quity eschews mechanical rules; it depends on flexibility.”<sup>273</sup> That said, factors can inform this flexible analysis. Across a range of legal and regulatory contexts, common problems are emerging when constructing and reviewing complex corporate settlements. I have proposed a set of functional factors that can usefully break

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51 GEO. WASH. L. REV. 382, 401–03 (1983) (noting also that “courts’ ability to question the substantiality of a legal wrong should be limited”).

<sup>267</sup> *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990).

<sup>268</sup> *Janus Films, Inc. v. Miller*, 801 F.2d 578, 582 (2d Cir. 1986).

<sup>269</sup> *Hawkins*, 540 U.S. at 442.

<sup>270</sup> See *supra* notes 221–250 and accompanying text.

<sup>271</sup> See *supra* notes 221–250 and accompanying text.

<sup>272</sup> Shreve, *supra* note 266, at 405.

<sup>273</sup> *Holmberg v. Armbricht*, 327 U.S. 392, 396 (1946).

out separate considerations when reviewing such settlements, each of which broadly relates to the public interest in obtaining a settlement that furthers underlying legal or regulatory enforcement goals. These factors expand on those discussed by Judge Sullivan in his ruling in *United States v. Saena Tech Corp.*<sup>274</sup> They set out practical problems and mechanisms that corporate settlements typically use. Each of these factors is explored in depth in the sections that follow; they are not an exclusive list, however, and additional factors may impact the public interest.

Third, the court should carefully consider agency explanations and evidence, concerning the agency's policy and the individual reasons for settling a case in a particular manner. Each of those reasons should receive careful deference, since the agency has regulatory expertise, although the judge still must have sufficient information to assess the claims of the enforcing agency.

### B. Public Interest Factors

#### 1. Adequacy of Financial Penalties

Agreements that do not impose any fines or other penalties, or that impose fines and penalties that do not comport with the purposes of the Organizational Sentencing Guidelines or statutory fines provisions, may deserve particular scrutiny. Most DPAs do not include a Sentencing Guidelines calculation or other explanation of the origin of any fine amount or other penalty.<sup>275</sup> Many such criminal agreements provide for no criminal fine at all, sometimes without explanation.<sup>276</sup> Sometimes the company is understandably given credit for payments to regulators or other prosecutors.<sup>277</sup> In some cases, the company may be defunct or unable to pay. Without explanation, however, it is difficult to evaluate whether the amounts of penalties are reasonable or fair. The same concerns can arise in the context of forfeiture, restitution, and other types of payments made in corporate settlement agreements of various types.

Judges may sometimes consider the amount of the fine in their decision to approve a settlement, but it may not be enough alone to uphold the court's rejection of an agreement. In 2010 in *SEC v. Bank of America Corp.*, Federal Judge Jed Rakoff of the Southern District of New York approved a settlement

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<sup>274</sup> See *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 31 (D.D.C. 2015); *supra* notes 127–129 and accompanying text.

<sup>275</sup> See GARRETT: TOO BIG TO JAIL, *supra* note 1, at 149–50 (describing how 12 percent, or 30 of 255 deferred prosecution agreements entered from 2001–2012, involved a sentencing guidelines calculation, and when it was provided, almost without exception, it was at or below the bottom of the guidelines range, even for cases involving large public companies).

<sup>276</sup> *Id.* at 69, 149–50 (noting that almost half of deferred prosecution agreements from 2001–2012 provided for no fine, and prosecutors provided no explanation for not doing so except in a few cases involving firms unable to pay a fine).

<sup>277</sup> See *id.* at 68–70.

after raising concerns regarding the size of the fine, noting that a \$150 million fine was “paltry” in the context of a multi-billion dollar merger, and where its cost would be borne by shareholders and not responsible actors.<sup>278</sup> The judge approved the settlement, but found that these flaws raised public interest concerns.<sup>279</sup> In *Citigroup I*, however, the judge rejected the agreement, focusing on the failure to require the bank to admit liability, but also noting that the fine was “pocket change” for a bank so large, and it was far smaller than a fine in a similar case involving Goldman Sachs during the same time period.<sup>280</sup> When the Second Circuit reversed, the panel did not address the concerns raised in the district court regarding the small size of the fine.<sup>281</sup> Although judges have noted the adequacy of a fine, this alone may not be enough to justify a judge’s rejection of an agreement and uphold that judge’s decision on appeal.

## 2. Compliance

Agreements that do not impose compliance terms or supervision of compliance may raise accountability concerns. As discussed, judges have rejected plea agreements with corporations that do not impose supervised probation in order to ensure compliance.<sup>282</sup> Also of concern are agreements that do require that a company make changes to its policies and compliance program without clearly explaining what changes are required. If the sought after good conduct is not spelled out in the DPA, it is unclear how the government will determine whether the company has demonstrated its good conduct. When judges are tasked with overseeing corporate agreements that call for ongoing supervision of compliance, judges understandably should insist that the public interest requires ongoing information about compliance and probation, monitoring, or other mechanisms to ensure that compliance is adequately assessed. Indeed, many agreements do not require that compliance be regularly audited or assessed, which the Sentencing Guidelines view as crucial, along with internal whistleblowing or reporting systems.<sup>283</sup> The Sentencing Guidelines describe in some detail what minimally effective compliance may require, and taking into account the size of the organization.<sup>284</sup> Accomplishing improvements to compliance is an important goal of corporate prosecution, but only if that compli-

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<sup>278</sup> SEC v. Bank of Am. Corp., No. 09 Civ. 6829 (JSR), 2010 WL 624581, at \*4 (S.D.N.Y. Feb. 22, 2010).

<sup>279</sup> *Bank of Am.*, No. 09 Civ. 6829 (JSR), 2010 WL 624581, at \*6; see also SEC v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 310, 313–14 (S.D.N.Y. 2011).

<sup>280</sup> SEC v. Citigroup Glob. Mkts. (*Citigroup I*), Inc., 827 F. Supp. 2d 328, 334 (S.D.N.Y. 2011), *rev’d and vacated*, 752 F.3d 285 (2d Cir. 2014).

<sup>281</sup> See SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup II*), 752 F.3d 285, 289 (2d Cir. 2014).

<sup>282</sup> See GARRETT: TOO BIG TO JAIL, *supra* note 1, at 153–54.

<sup>283</sup> See U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 8B1.1(b) (Nov. 2016) [hereinafter 2016 SENTENCING GUIDELINES].

<sup>284</sup> *Id.* § 8B2.1 & Commentary.

ance is not “cosmetic,” and is carefully-assessed and audited to ensure its effectiveness. Cases that involve foreign companies can also potentially raise questions regarding the intersection of compliance with U.S. laws and regulations and foreign corporate governance rules. Some DPAs have even called for the appointment of foreign corporate monitors to help assure that governance changes are suitable to the United States as well as the foreign country’s laws, regulations, and business norms.<sup>285</sup> These monitors further keep corporations accountable to continue to comply with the conditions of the agreement.

### 3. Monitoring

The role of an independent monitor has become regarded as a powerful tool to ensure compliance and promote the public interest in corporate settlements because it holds corporations accountable for longer periods of time. For example, the Antitrust Division has emphasized importance of “effective compliance programs,” and that the Division will “reserve the right to insist on probation, including the use of monitors, if doing so is necessary to ensure an effective compliance program and to prevent recidivism.”<sup>286</sup> The stated goal is for the corporation to benefit from “expertise in the area of corporate compliance from an independent third party.”<sup>287</sup> The SEC has more often appointed monitors in securities fraud actions and more recently, in FCPA actions.<sup>288</sup> In a wide range of areas, the DOJ has led the way in establishing independent monitoring to reform institutions, and it typically has insisted that the reports of such monitors be made public.<sup>289</sup> For years, the quarterly reports of the independent monitor of the Los Angeles Police Department have been made public, for example.<sup>290</sup> It is standard for reports of policing monitorships established through DOJ consent

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<sup>285</sup> See Garrett: *Globalized Corporate Prosecutions*, *supra* note 3, at 1838, 1852–53, 1856.

<sup>286</sup> Bill Baer, Assistant Att’y Gen., Remarks as Prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium: Prosecuting Antitrust Crimes 8 (Sept. 10, 2014) (on file with author).

<sup>287</sup> Memorandum from Craig S. Morford, Acting Deputy Att’y Gen., for Heads of Dep’t Components & U.S. Att’y’s, 1–2 (Mar. 7, 2008) (on file with author).

<sup>288</sup> F. Joseph Warin et al., *Somebody’s Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321, 322 (2011); O’Hare, *supra* note 13, at 89–90; Mary Jo White, Chair, Sec. & Exch. Comm’n, Speech Before the NYC Bar Association’s Third Annual White Collar Crime Institute: Three Key Pressure Points in the Current Regulatory Environment (May 19, 2014), <https://www.sec.gov/news/speech/2014-spch051914mjw.html> [<https://perma.cc/7HX5-4GSZ>] (describing increased SEC use of monitors).

<sup>289</sup> See, e.g., JAMES D. GINGER, MONITOR’S FIRST REPORT: COMPLIANCE LEVELS OF THE ALBUQUERQUE POLICE DEPARTMENT AND THE CITY OF ALBUQUERQUE WITH REQUIREMENTS OF THE COURT-APPROVED SETTLEMENT AGREEMENT (2015), <http://documents.cabq.gov/police/reports/departament-of-justice/independent-monitors-first-report.pdf> [<https://perma.cc/8SHK-6KTM>].

<sup>290</sup> See, e.g., REPORT OF THE INDEPENDENT MONITOR FOR THE QUARTER ENDING DECEMBER 31, 2008, OFFICE OF THE INDEP. MONITOR FOR THE L.A. POLICE DEP’T (2009), [http://assets.lapdonline.org/assets/pdf/LAPD\\_Q30\\_Final\\_Report\\_02-17-2009.pdf](http://assets.lapdonline.org/assets/pdf/LAPD_Q30_Final_Report_02-17-2009.pdf) [<https://perma.cc/3X4T-XE6J>].

decrees to be made public.<sup>291</sup> Many of these reports contain extremely detailed findings concerning compliance by the police departments subject to the decrees.<sup>292</sup> These findings can further ensure that the parties to the agreement remain accountable to their promises, as well as assist judges in ascertaining whether or not a consent decree is contrary to the public interest.

In criminal cases, a similar role can be observed in court ordered probation where, pursuant to special conditions, federal courts have long appointed special masters or corporate monitors.<sup>293</sup> Over two-thirds of convicted corporations are put on probation.<sup>294</sup> According to Sentencing Guidelines, corporations shall be put on probation if they lack an effective compliance program and have more than fifty employees or were otherwise required to have such a compliance program.<sup>295</sup> In addition, such probation can be more actively monitored if “special conditions” are imposed to ensure “changes are made within the organization to reduce the likelihood of future criminal conduct.”<sup>296</sup> Corporate probation is court-supervised and a judge can make information about the process public and available on the docket.

Yet, the use of monitors is highly uneven, particularly in criminal prosecutions, where monitors are typically not appointed and when they are, their work has remained almost entirely non-public.<sup>297</sup> Only one-quarter of deferred and non-prosecution agreements since 2001 call for the appointment of a corporate or independent monitor to supervise compliance, which can provide outside assurance that compliance has been improved.<sup>298</sup> Absent judicial approval, there may be concerns with the selection process for the monitor position and the monitor’s neutrality. Concerns have also been raised about the terms of retention of monitors, including their pay. Some agreements require creation of an internal Chief Compliance Officer or other similar position to ensure the compliance function is strengthened within the company. There is a growing field of scholarship critically examining the widespread role of these monitors in criminal prosecutions.<sup>299</sup> Periodic reporting to a court may provide

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<sup>291</sup> See, e.g., GINGER, *supra* note 289.

<sup>292</sup> See *id.*

<sup>293</sup> See 2016 SENTENCING GUIDELINES, *supra* note 283, § 8D1.1.

<sup>294</sup> See, e.g., U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, table 54 (2012), <https://www.ussc.gov/research/sourcebook/archive/sourcebook-2012> [<https://perma.cc/7923-EA2S>].

<sup>295</sup> 2016 SENTENCING GUIDELINES, *supra* note 283, § 8D1.1(a)(3).

<sup>296</sup> *Id.* § 8D2.5(a)(6).

<sup>297</sup> GARRETT: TOO BIG TO JAIL, *supra* note 1, at 147–71.

<sup>298</sup> *Id.* at 190–92.

<sup>299</sup> See, e.g., Vikramaditya Khanna, *Reforming the Corporate Monitor?*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 226, 238–41, 244 (Anthony S. Barkow & Rachel E. Barkow eds., 2011); Warin et al., *supra* note 288, at 322 & n.2; Christie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 732–34 (2009) (discussing the difficulties inherent in being a corporate monitor).

further assurance that compliance is being effectively improved. Some have recommended that monitors could be selected in a fairer or more impartial manner; they have asked whether monitors effectively supervise and improve compliance; and whether their role is adequately defined. Scholars have asked why monitors are often not appointed in DPAs, if prosecutors are concerned that compliance programs be effective.<sup>300</sup>

Each of these concerns could be addressed through a more robust consideration of the public interest, beginning with the role of federal judges in supervising the approval and implementation of corporate settlements. Equitable standards can inform whether monitors are to be appointed and the scope of their duties.<sup>301</sup> Judges should also ask whether they should approve an agreement that does not call for compliance to be independently monitored. Judge Gleeson cited to his “supervisory power” when calling for the monitor to report to the court.<sup>302</sup> Here, however, Judge Gleeson could have more broadly relied on equitable authority; then again, given the tenor of the Second Circuit’s reversal on appeal, and its ruling in the *Citicorp* case, one wonders whether the panel would have been amenable to arguments more firmly grounded in the public interest. Judges already exercise such authority in a range of settings, however, when they assess the public interest in civil consent decree approvals, or decide whether to impose special conditions of corporate probation. But they have tended not to do so in other settings, such as with DPAs. Regulators, or some independent third party monitor, should thus assess or monitor corporate compliance in order to assure that injunctive conditions of a settlement are effectively satisfied and in accord with the public interest.

Moreover, the reports of monitors should be made public, so affected parties have enough information to know whether to intervene if compliance is lacking. Special master reports in consent decrees can be quite detailed and they are typically made public. In some cases, reports and hearings involving testimony of a special master discussing compliance of a company on corporate probation are part of the federal docket.<sup>303</sup> Some corporations have themselves made public the reports of independent monitors during probation.<sup>304</sup>

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<sup>300</sup> See GARRETT: TOO BIG TO JAIL, *supra* note 1, at 190–92.

<sup>301</sup> For a proposal along those lines, see generally O’Hare, *supra* note 13, at 89.

<sup>302</sup> *United States v. HSBC Bank USA, N.A. (HSBC I)*, No. 12-CR-763, 2013 WL 3306161, at \*1 (E.D.N.Y. July 1, 2013), *rev’d*, 863 F.3d 125 (2d Cir. 2017).

<sup>303</sup> For example, a series of hearings are available in the case of *United States v. Ionia Management*. See *07-134 USA v. Ionia Management S.A. et al*, U.S. GOV’T PUBL’G OFFICE, [https://www.gpo.gov/fdsys/granule/USCOURTS-ctd-3\\_07-cr-00134/USCOURTS-ctd-3\\_07-cr-00134-17](https://www.gpo.gov/fdsys/granule/USCOURTS-ctd-3_07-cr-00134/USCOURTS-ctd-3_07-cr-00134-17) [<https://perma.cc/4F4H-WN38>]; see, e.g., Special Master’s Second Report, *United States v. Ionia Mgmt. S.A.* (D. Conn. Aug. 5, 2009) (No. 3:07-CR-134 (JBA)). Special Master’s Fifth Report, *United States v. Ionia Mgmt. S.A.*, 2009 WL 3074727 (D. Ct. Conn. Jan. 12, 2011) (No. 3:07-CR-134 (JBA)).

<sup>304</sup> See *Environmental Compliance Plans*, DUKE ENERGY, <https://www.duke-energy.com/our-company/environment/compliance-and-reporting/environmental-compliance-plans> [<https://perma.cc/8VEA-K4F2>].

The outlier situation is in cases settled out of court, particularly criminal DPAs, in which monitors reports have almost never been made public.<sup>305</sup> In these instances, affected parties may not be able to seek intervention if the corporation is not compliant.

The entire concept of a corporate monitor is to retain a person or entity that is independent: not an agent of the corporation or of the prosecutor, but rather an entity serving in the public interest. This independent party provides information to the parties as well as the judge, and in my view, it should also inform the public. The reports by that monitor, properly redacted, should inform the judge's supervision of a case, whether it is a civil or criminal judgment or settlement. Among the public, other corporations can benefit from best practices and success stories described in monitor reports, as well as from the difficulties monitors encounter. Thus, despite the Second Circuit ruling in *HSBC IV*, I hope the practice changes and that prosecutors and corporations make it a policy to routinely make portions of these monitors reports public. Such lessons may ultimately help prevent corporate violations in the first instance, which, in my view, serves perhaps the largest public interest of all.

#### 4. Cooperation with Law Enforcement

Settlement agreements with corporations can include agreements of the corporation to cooperate with law enforcement after investigations have concluded. These also take into account a corporation's cooperation before a settlement was reached. One common feature of corporate settlements is agreement by the company to cooperate in any pending investigations of misconduct. Some settlements might not involve the need for any such further cooperation. Any investigations of individuals, such as criminal investigations, may have been declined or completed. If further investigations are anticipated, however, it is highly problematic from a public interest perspective if agreements do not require cooperation, or where a company that did not fully cooperate at times prior to settlement still receives leniency. This is problematic because it does not incentivize cooperation by the corporations prior to the settlement stage and hinders the outcome of investigations, and, thus, the ability of the investigatory agency to build its case.

Self-reporting by a company deserves particular credit, where the conduct might not otherwise have come to the attention of law enforcement.<sup>306</sup> Initial non-cooperation, in contrast, may not warrant the same treatment. An agreement that provides some sort of release from prosecution of responsible indi-

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<sup>305</sup> See GARRETT: TOO BIG TO JAIL, *supra* note 1, at 177 (noting that few such reports have been made public).

<sup>306</sup> See, e.g., 2016 SENTENCING GUIDELINES, *supra* note 283, § 8C2.5(g) (instructing prosecutors to “subtract . . . points” for “[s]elf-reporting, [c]ooperation, and [a]cceptance of [r]esponsibility”).

viduals who might otherwise have been prosecuted may raise concerns. Although courts have, in rare cases, with examples noted, rejected organizational plea agreements expressing concern with the non-prosecution of individuals, the authority to consider non-cooperation regarding other prosecutions as a factor is less than entirely clear. Agreements commonly provide for the full cooperation of the company with all pending investigations by regulators and prosecutors. Terms requiring waiver of work product or attorney client privilege have raised judicial concerns in past cases.<sup>307</sup>

## 5. Substantive Law and Unrelated Terms

The public interest in a corporate settlement is fundamentally defined by the underlying sources of substantive law that give rise to the offense. Settlements should not be entered that contradict the goals of those sources of substantive law. For example, I have suggested that imposing substantial, unrelated obligations on an organization, which are not called for by governing statutes or sentencing guidelines, would call for judicial review. In the context of criminal DPAs, terms such as those requiring a charitable contribution unrelated to remedying the harm caused by the crime, might also deserve judicial intervention. Those terms are now contrary to the DOJ's own guidelines and, so, a party would be unlikely to include them in a criminal prosecution agreement.<sup>308</sup> If obligations wholly unrelated to the agreement are included, judicial intervention should block them. Such judicial review does not contravene separation of powers, but rather aims to prevent enforcers from themselves stepping outside the bounds defined by substantive law.

## 6. Collateral Consequences

In corporate prosecutions and settlements, there are often unintended consequences that accompany the intended penalty to the corporation. For some companies, and in some regulated industries, a conviction could result in suspension or debarment that would have unduly severe consequences for a company.<sup>309</sup> If a company was debarred from doing work critical to its business,

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<sup>307</sup> See Garrett: *Corporate Confessions*, *supra* note 51 (discussing controversy and policy changes concerning both types of privilege).

<sup>308</sup> See U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-16.325 (May 2008) (stating that such agreements should not include terms requiring payments to a person or organization "that is not a victim of the criminal activity or is not providing services to redress the harm caused by the defendant's criminal conduct").

<sup>309</sup> Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 426 (2007) ("A criminal indictment can have devastating consequences for a corporation and risks the market imposing what is in effect a corporate death penalty."); Edward B. Diskant, Note, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L.J. 126, 128–29 (2008) ("[I]t is common wisdom with-

employees and shareholders who did not participate in the wrongdoing could be seriously harmed. The public might be harmed if the company provides an important product or service to the public or to the government. Fairness may sometimes counsel a settlement that avoids such collateral consequences, and such consequences are understandably a factor that prosecutors take great care to consider. Sometimes suspension or debarment from government contracting might be a consequence of a violation or a conviction. In addition, a deferred prosecution, although not a judgment, may itself result in legal and collateral consequences, providing still additional reasons for a judge to supervise and approve the agreement.<sup>310</sup>

That said, collateral consequences can often be avoided through negotiations with regulators. Further, concerns that public companies would be destroyed by an indictment, much less a conviction, have turned out to be highly overstated. Many public companies have been convicted in recent years without such consequences.<sup>311</sup> Thus, judges should carefully assess any claims that potential collateral consequences demand more lenient treatment.

A different use of equitable power by the judge to avoid undue collateral consequences can involve the use of a stay of civil proceedings, pending resolution of criminal proceedings. Parallel proceedings are common and encouraged by government policy,<sup>312</sup> and they are permitted where enforcers have overlapping authority.<sup>313</sup> Equitable remedies, however, can ensure that discovery from a criminal case can be used in a civil case, but also that criminal procedure protections are not eroded through use of evidence in a civil case,

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in the business community that a conviction amounts to a potentially lethal blow for a corporation, one from which the corporation may not recover even if it is actually innocent . . . .”)

<sup>310</sup> See, e.g., *Harmon v. Teamsters, Chaffeurs & Helpers Local Union 371*, 832 F.2d 976, 980 (7th Cir. 1987) (“We conclude that ‘conviction’ within the meaning of section 504 includes punishment under the deferred-judgment procedure.”); *McKinney v. Moore*, No. 04 Civ. 07926(RCC), 2007 WL 1149253, at \*3, (S.D.N.Y. Apr. 16, 2007) (“This deferred prosecution agreement, which contains several remedial and punitive provisions, renders it well within the broad meaning and reading of ‘conviction.’”).

<sup>311</sup> See generally Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797 (2013) (positing that the “corporate death penalty” is a myth, and DPAs should be the exception instead of the norm in corporate criminal prosecutions).

<sup>312</sup> See GARRETT: TOO BIG TO JAIL, *supra* note 1 and accompanying text; see also U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 1-12.000 (Feb. 2013) (“Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings”) [hereinafter ATTORNEYS’ MANUAL: 2013].

<sup>313</sup> *SEC v. Dresser Indus.*, 628 F.2d 1368, 1374 (D.C. Cir. 1980) (en banc) (“The civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous. In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence.”).

where the same protections and standards of proof do not apply.<sup>314</sup> Doing so can also reduce the burden on the judicial system of managing parallel litigation regarding the same corporate conduct.

## 7. The Public and Victims

When a settlement impacts third parties, there is much broader agreement among the legal community that a judge should more carefully review its terms.<sup>315</sup> Process values matter in such circumstances, and not just the procedural fairness to the defendant, but procedural fairness to members of the public, victims, or third parties who may have an opportunity to intervene and participate. Judges should be attentive to the procedural and substantive rights of the public in such settlements, and in some areas of law, those rights can be fairly robust. For example, the U.S. Sentencing Guidelines prioritizes payment of restitution to victims over fines paid to the government.<sup>316</sup> Some DPAs provide for restitution to victims, but there is the concern that victims do not participate as they would in a plea proceeding, and cannot raise questions relevant to their interests as well as the public interest.<sup>317</sup> Whether restitution would be appropriate or participation by victims is appropriate could be a factor to consider. Recently, Congress spoke on the issue of DPAs by further buttressing the role of judicial supervision and approval of DPAs, in line with the concerns set out in this Article.<sup>318</sup> In the Justice for Victims of Trafficking Act of 2015, Congress included a provision that victims have a statutory right to be notified of DPAs.<sup>319</sup> The CVRA was amended to establish that each “crime victim” has “[t]he right to be informed in a timely manner of any plea bargain or deferred prosecution agreement,” thus facilitating their “right to full and timely restitution as provided in law,” providing, in addition, for appellate review of any denial of restitution.<sup>320</sup> Those provisions assure that when a DPA is filed in court, it cannot be approved without the involvement of relevant victims.<sup>321</sup>

Those provisions highlight how approval and supervision of DPAs, or, for that matter, potentially any type of settlement between a corporation and the government, implicates judicial review, public interests, and specifically victim

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<sup>314</sup> For a wonderful Note exploring these issues and recommending the use of equitable power to stay parallel civil proceedings, see generally Note, *Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions*, 98 HARV. L. REV. 1023, 1024 (1985).

<sup>315</sup> For an excellent discussion of the importance of adequacy of consideration of third party interests in enforcement decrees, see generally W. Hamilton Jordan, *Calibrating Judicial Scrutiny of Agency Enforcement Decrees*, 34 YALE L. & POL’Y REV. 57, 89 (2015).

<sup>316</sup> 2016 SENTENCING GUIDELINES, *supra* note 283, § 8B1.1.

<sup>317</sup> For a discussion of these challenges, see GARRETT: TOO BIG TO JAIL, *supra* note 1, at 117–46.

<sup>318</sup> 18 U.S.C. § 3771(a)(9) (2012 & Supp. III 2015).

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* § 3771(a).

<sup>321</sup> *See id.*

rights.<sup>322</sup> Similarly, provisions could be enacted in a range of civil contexts as well; the Tunney Act and certain other statutes contain such provisions, but it could be a broader principle that any settlement with a corporation, civil or criminal, can only be approved with notice and participation of relevant victims. These provisions protect the victims, as well as bolster the role of the public interest in these corporate settlements.

## 8. Government Interests

The goals of prosecutors or regulatory enforcers and the underlying substantive goals of regulatory schemes, where the crime is a provision incorporated into such a scheme, are highly relevant to evaluating the fairness and reasonableness of a corporate agreement. These are considered the government's interests. None of this discussion has been to suggest that judges should not assume that the government should and does represent the public interest. Instead, these factors have focused on situations in which the public interest may diverge. This is important because, where these interests do diverge, the judiciary may be the only point at which settlements are reviewed with the public interest in mind.

Moreover, judicial review can help to sort out situations in which the government itself does not speak uniformly. A criminal prosecution may be the product of a referral by regulators as a particularly serious violation, but one that would otherwise be handled using a civil agreement with a set of compliance terms developed by regulators. The reasonableness and fairness of agreements with regulatory subject matter may be assessed with reference to the goals and the enforcement outcomes in similar (or parallel) administrative proceedings. In addition, the views of the referring agency may also be relevant on the reasonableness of the agreement as these agencies originally had the capacity to resolve the situation itself.

Judges should also consider whether other parallel actions may vindicate some of the relevant public interests. Further, if other sovereigns are involved, the public interest may be attenuated. For example, if the conduct and the victims are foreign, and separate actions abroad are being pursued, judges may conclude that the public interest of citizens of the United States is attenuated. Moreover, in general, prosecutions involving foreign corporations may involve special issues and practical difficulties making settlements particularly desirable, including difficulties in securing access to evidence overseas, challenges faced in extraditing individuals, jurisdictional obstacles to prosecution or the enforcement of judgments, questions of foreign policy, and matters raising diplomatic concerns.<sup>323</sup> Of course, there are also concerns that foreign companies

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<sup>322</sup> *See id.*

<sup>323</sup> *See* Garrett: *Globalized Corporate Prosecutions*, *supra* note 3, at 1838, 1852–53, 1856.

be held to the same legal standards as domestic companies.<sup>324</sup> All of those concerns should be considered carefully when reviewing corporate settlements.

## 9. Delay

An additional factor is the effect of the period of delay on statutes of limitations or other interests. In some cases, the implementation of an agreed upon resolution with a corporation will take a considerable period of time. The period of delay during an agreement may itself be prejudicial to certain types of interests and worth examining in certain cases. Any consent decree or agreement will typically require some period of time for its implementation (if it did not, the company would pay a fine but not be subject to any ongoing agreement). During that time, statutes of limitation to pursue charges against individual officers or employees may expire, and investigations may be ongoing.<sup>325</sup> As a result, cooperation of the company during that time may be important. In general, an organizational prosecution agreement anticipates a range of future conduct that itself may implicate judicial supervision. The fact that a judge would require certain assurances that good conduct will result from an agreement, before approving such an agreement to delay litigation, and retain authority to supervise a case on the docket, seems quite uncontroversial.

## 10. Informing the Public

A distinct interest that the public shares in resolution of corporate settlements is in obtaining information about conduct that affects the public. The statements of facts and other documents that can accompany such settlements may set out what the violations were to give the public an accounting. As described, ongoing monitoring can describe the progress of change at a company, and I have argued that there is a public interest in being informed as to the status of that progress. One concern in these cases has been the lack of transparency in corporate agreements, including a lack of explanation regarding how fines were calculated, a lack of factual accounting describing who or what was involved in the relevant violations, and agreements and monitor reports that have not been made public. In criminal prosecutions of corporations, a compa-

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<sup>324</sup> See Alice S. Fisher, Assistant Att’y Gen., U.S. Dep’t of Justice, Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act 2–3 (Oct. 16, 2006) (on file with DOJ).

<sup>325</sup> For a discussion of this problem, see Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1841–42 (2015). The general federal criminal statute of limitations is three years. 18 U.S.C. § 3282(a) (2012). Longer statutory periods are available for certain types of offenses such as conspiracy charges, charges affecting a financial institution, and cases involving mutual assistance charges. 18 U.S.C. §§ 3292–3293.

ny must typically admit its responsibility and guilt and do so in detail, with a prohibition on contradicting those factual representations.<sup>326</sup>

However, civil agreements may not include nearly as much information. One of the concerns raised concerning the past use of “neither admit nor deny” settlements with the SEC was that it was in the public interest to know whether the company did in fact engage in wrongdoing.<sup>327</sup> Judge Rakoff had rejected the *Citigroup I* settlement, with its “neither admit nor deny” language, in part because “the court, and the public, need some knowledge of what the underlying facts are.”<sup>328</sup> Private settlements may be entirely confidential, but to enter into a settlement with the government that keeps important facts from the public is harder to square with the purpose of public enforcement; as Judge Rakoff put it, the SEC itself has a duty to ensure that “the truth emerges.”<sup>329</sup> Similarly, federal prosecutors have such a duty, and just as in a case resolved by a guilty plea in which factual admissions are put on the record,<sup>330</sup> and court-supervised probation results in monitor reports put on the record, prosecutors should insist that the facts are made public in cases resolved through deferred and non-prosecution agreements.

Admissions of wrongdoing and detailed factual statements also help to accomplish deterrence: they may affect the reputation of firms, and they may result in collateral consequences in subsequent litigation.<sup>331</sup> Apart from those features of public admissions, corporate enforcement can serve to inform the public as to the nature of the relevant violations.<sup>332</sup> The public cannot be assured that enforcers are actually acting in the public interest if cases are settled in a way that the public cannot fully see or understand.

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<sup>326</sup> Although most corporate prosecution agreements include those features, for the concern that corporate prosecution agreements do not always include detailed statements of facts or descriptions of the circumstances of a company’s cooperation, see GARRETT: TOO BIG TO JAIL, *supra* note 1, at 61–63.

<sup>327</sup> SEC v. Citigroup Glob. Mkts. (*Citigroup I*), Inc., 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011), *rev’d and vacated*, 752 F.3d 285 (2d Cir. 2014); Edward Wyatt, *S.E.C. Changes Policy on Firms’ Admission of Guilt*, N.Y. TIMES (Jan. 6, 2012), <http://www.nytimes.com/2012/01/07/business/sec-to-change-policy-on-companies-admission-of-guilt.html> [<https://perma.cc/Q95Y-YFPF>].

<sup>328</sup> *Citigroup I*, 827 F.Supp.2d at 332.

<sup>329</sup> *Id.* at 335.

<sup>330</sup> The DOJ permits a *nolo contendere* or *Alford* plea that does not include a factual admission of guilt only in “the most unusual circumstances” and with high-level DOJ approval. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL §§ 9-16.010, .015 (Oct. 2008). An *Alford* plea is “when a defendant maintains his or her innocence with respect to the charge to which he or she offers to plead guilty.” *Id.* § 9-16.015 (citing *North Carolina v. Alford*, 400 U.S. 25 (1970)).

<sup>331</sup> Samuel W. Buell, *Liability and Admissions of Wrongdoing in Public Enforcement of Law*, 82 U. CIN. L. REV. 505, 506–12 (2013) [hereinafter Buell: *Liability and Admissions*]; Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 483, 507 (2006).

<sup>332</sup> This can in turn buttress deterrence. “If the enterprise of public prosecution appears unprincipled or even random, then surely deterrence is seriously weakened.” Buell: *Liability and Admissions*, *supra* note 331, at 514.

### *C. Deference*

Although the judge should consider these functional public interest factors, in context, the judge must significantly defer to agency priorities and interests in settlement. There will be disagreements on what constitutes the “public interest” in certain cases. Therefore, it is important for judges to be transparent in their explanations of how they have weighed the factors involved. Moreover, when enforcement entities make initial decisions and courts review them, courts should give deference to those decisions.<sup>333</sup> I have argued that this judicial review should not just examine the procedural regularity of settlements, but also their substance. Accordingly, judges should give great deference to decisions made by enforcers. But, how much deference is due?

The more the settlement conforms to statutory and regulatory procedures and substance, the more deference should be due. Thus, a plea bargain, within the range set out by sentencing guidelines, receives a great deal of deference by a judge. A DPA, in contrast, would not be due the same deference.

In no context in which public interest is a factor is a judge permitted to substitute an assessment of the public interest entirely for that of the agency. Agencies must be able to decide whether to pursue adjudication, and in what form. Any settlement necessarily involves compromise by both sides. Moreover, agencies must be free to alter their policies or tailor them in individual cases. The Tunney Act approach requiring an agency to publicly state its reasons for settling a case, and providing evidence to support its consent decree, provides a useful model. As one scholar has suggested, a court can presume the public interest is satisfied, absent strong evidence to the contrary, but place the burden on the agency to initially demonstrate that it has considered all of the affected interests in deciding to settle the case.<sup>334</sup> Similarly, a judge should not engage in “rubber stamp approval” of an independent evaluator or monitor, but should make a separate and independent assessment.<sup>335</sup> This balance between deference to the agency decision along with an outspoken judicial concern for the public interest overall helps ensure that corporate settlements are not contrary to the public interest.

### III. IMPROVING THE LAW AND EQUITY OF CORPORATE SETTLEMENTS

In this Part, I turn to proposals to improve the review of corporate settlements, not just through judicial review, but also through internal regulatory measures.

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<sup>333</sup> *Chevron*, 467 U.S. at 843–45 (holding “that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer”).

<sup>334</sup> Shapiro, *supra* note 29, at 102–03.

<sup>335</sup> *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974) (a district court “must eschew any rubber stamp approval in favor of an independent evaluation”).

First, Congress can intervene, as it has in the past, to enact legislation to provide clearer avenues for the public interest to be considered in corporate settlements.

Second, prosecutors can implement internal procedural changes to better account for the public interest and participation by the public. The DOJ has pushed for more consistency in its process of investigating and charging corporations, both civilly and criminally. These internal procedural changes, however, lack any acknowledgement of role for the public interest in these prosecutions. Guidelines internal to the DOJ have been adopted but without notice and comment or participation by the public. High profile settlements are still entered without meaningful participation of victims or public interest groups.

Third, judicial review under equitable principles can further safeguard the public interest, if judges assert their role more forcefully. I argue that no matter what the mechanism, the key feature of equitable review should remain central to efforts to improve corporate settlements: a careful consideration of the public interest. As described, that judicial review should be more deferential to the extent a settlement tracks statutory and regulatory procedures and substance. Less formal settlements negotiated farther outside established procedures and substance deserve, and should receive, less judicial deference. In this way, the public interest in corporate settlements can be more protected in a more established way while still allowing the settlements outside of statutory procedures to withstand judicial review.

### A. Legislation

Legislation can provide greater or fewer tools to judges when they review settlements. The Supreme Court has held that the equitable powers of federal judges are not viewed as restricted by Congress absent a clear statement, a “clear and valid legislative command.”<sup>336</sup> Courts have followed legislation that has narrowed judicial review of complex agreements, chiefly in the institutional reform setting in civil rights cases, but also regarding corporate settlements of class actions, without raising any constitutional concerns. Nevertheless, courts have narrow authority to review corporate settlements, despite legislation calling for public interest review.<sup>337</sup> For example, Congress not only had to enact the Tunney Act to ensure careful judicial review of the public interest in antitrust consent decrees, but then amended the Act in 2004 to highlight the mandatory nature of judicial review.<sup>338</sup> Congress intervened to ensure that victim interests are considered when DPAs are entered.

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<sup>336</sup> *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

<sup>337</sup> *See, e.g.*, 15 U.S.C. § 16(b) (2012).

<sup>338</sup> *See id.* § 16(e).

It is a larger question whether equitable authority to review settlements is part of the Article III authority of federal judges, and whether the only way to in fact reduce such power is to deny jurisdiction over a type of case. Regardless, when legislation does provide for public interest review, judges should carefully carry out those duties. Congress may increasingly intervene if appellate courts continue to limit the public interest power of federal judges. Recent legislation designed to accomplish this goal has been proposed, such as the bipartisan “Transparency in Settlements” legislation passed by the U.S. Senate but not the House of Representatives,<sup>339</sup> and no doubt Congress will consider further legislation in the future. When the United Kingdom adopted DPAs, lawmakers set out in an act, the considerations judges should take into account when deciding whether to approve them, as well as the process to be followed.<sup>340</sup> Such a statute could be enacted in the United States as well. Legislation enacted by courts that further clarifies Congressional concern for the public interest will cause courts to take up concern for the public interest more frequently.

### *B. Internal Guidelines*

Second, many have observed how internal administrative mechanisms can regulate enforcement. One solution is for units within agencies to consider enforcement priorities and solicit input from the public. One scholar has argued that in the criminal prosecution agreement context, judges may lack “the expertise or the incentives to intervene to provide genuine oversight,” and because prosecutors have a “tremendous degree of discretion,” it falls to prosecutors to create more specific guidelines to govern such settlements.<sup>341</sup> Indeed, a proliferating approach among agencies is to issue guidelines for enforcement.<sup>342</sup> There are even guidelines emphasizing the importance of issuing more guidelines. Thus, the DOJ has emphasized in recent years that: “Every United States Attorney’s Office and Department litigating component should have policies and procedures for early and appropriate coordination of the government’s criminal, civil, regulatory, and administrative remedies.”<sup>343</sup> These guidelines, however, have tended not to discuss issues specific to enforcement against corporations and the equitable decisions that must be made when designing such matters. Therefore, it is increasingly important for these

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<sup>339</sup> See Truth in Settlements Act of 2015, S. 1109, 114th Cong. (as passed by Senate, Sept. 21, 2015).

<sup>340</sup> Crime and Courts Act of 2013, c. 22, § 45, sch. 17 (Eng.).

<sup>341</sup> Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 228–30 (2016).

<sup>342</sup> Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 398 (2007).

<sup>343</sup> ATTORNEYS’ MANUAL: 2013, *supra* note 312, § 1-12.000.

agencies to review their internal procedures related to enforcement against corporations.

Another approach is to create specialized oversight within enforcement agencies to coordinate enforcement and adopt uniform approaches towards remedies. One professor has described such “offices of goodness,” including offices designed to ensure protection of civil rights and civil liberties.<sup>344</sup> There may also be pressure from other agencies placed upon enforcement agencies, when there is a disconnect between their approaches.<sup>345</sup> Many agencies have adopted cooperation agreements, formal and informal, to coordinate enforcement in complex corporate cases.<sup>346</sup>

In the criminal context, charging factors are laid out in guidelines, as well as procedural rules for appointing monitors, among the topics addressed in detail, but not the substance of the terms of those complex agreements. For corporate prosecution agreements, the main DOJ Fraud Section has created a compliance counsel position to advise the DOJ on complex compliance issues.<sup>347</sup> And, to be sure, the DOJ is right to have “no formulaic requirements regarding corporate compliance programs.”<sup>348</sup> Without adopting rigid requirements that do suit the variety of corporations and cases, the DOJ could insist that compliance be rigorously audited utilizing industry-specific best practices. Where many agreements lack much specificity concerning compliance or how it is to be implemented, the DOJ and other agencies could go much further.

Of course, there is also a concern that centralizing review and oversight could harm experimentation and innovation, and make it easier for the industry to capture the process and promote less stringent enforcement remedies.<sup>349</sup> Informal guidelines do not have the status of regulations. They can therefore be more easily changed from one administration to the next, offering less certainty to companies. And even if there are guidelines for corporate remedies, it will still be important for judges to conduct review to ensure that they are adhered to and that the public interest is observed. Changes to internal regulations in administrative bodies may aid in settlements where the underlying issues relate to the specialized knowledge of these agencies, but the need to protect the pub-

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<sup>344</sup> Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 54–56 (2014).

<sup>345</sup> See Barkow, *supra* note 185, at 1153–54.

<sup>346</sup> Regarding DOJ efforts, see *supra* note 343 and accompanying text.

<sup>347</sup> *New Compliance Counsel Expert Retained by the DOJ Fraud Section*, DEP’T OF JUSTICE, <https://www.justice.gov/criminal-fraud/file/790236/download> [<https://perma.cc/DA3M-TK7L>].

<sup>348</sup> U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-28.800 (Aug. 2008) (Corporate Compliance Programs).

<sup>349</sup> Arlen, *supra* note 341, at 231 (“Many administrative agencies also are subject to capture; in addition, independent agencies that are run by a five-person politically-divided commission often find it difficult to take genuine aggressive action to deter corporate crime.”). For the reverse argument that the DOJ could benefit from monitoring and compliance of prosecutors’ work, see generally Rachel Barkow, *Organizational Guidelines for the Prosecutor’s Office*, 31 CARDOZO L. REV. 2089 (2010).

lic interest in these settlements does not absolve the parties from the potential need for judicial review.

### C. Judicial Review

Why have courts of appeals occasionally tried to tie the hands of district judges? What was most troubling about the D.C. Circuit's ruling in *Fokker III*, as with its ruling two decades earlier in *Microsoft*, was not the result (defensible in both cases), but the reasoning emphasizing that legislation should be interpreted to maximize executive discretion in settling criminal cases.<sup>350</sup> In contrast, the Second Circuit's ruling in *Citigroup II* emphasized the need for a judge to stay within the boundaries of a consent decree, but it did not carefully preserve the role of a judge to review whether an agreement comports with the public interest.<sup>351</sup> Where the D.C. Circuit's canon of legislative construction came from is hard to say, but in both cases, it represents a remarkable abdication of the crucial Article III role in assuring that settlements entered in court satisfy the public interest as a matter of equity. The public interest was nowhere discussed in those two opinions, except in an implicit assumption that whatever the government decides to do necessarily represents the public interest. That is where the D.C. Circuit and Second Circuit panels got it wrong. The equitable power of Article III judges cannot be so blithely constrained. Judges, as described, may modify consent decrees and other settlements using equitable powers, although judges are supposed to protect federal interests and defer to expertise of enforcement agencies.<sup>352</sup>

Congress has wisely intervened to enact legislation protecting that role, including in the Tunney Act and to protect certain victim rights in such deferred prosecution settlements.<sup>353</sup> Although such legislation is desirable, and can define and bound judicial review of settlements, no such legislation should be needed. As I have argued, judicial review is most important and should be least deferential in areas in which there is not legislation or regulations that provide guidance for settlements in enforcement actions. At a minimum, Article III equitable powers remain intact unless clearly limited by valid legislation. Fortunately, courts continue to emphasize the importance of the judicial review to safeguard the public interest in a range of contexts. It is unfortunate,

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<sup>350</sup> See *United States v. Fokker Servs. B.V. (Fokker III)*, 818 F.3d 733, 750–51 (D.C. Cir 2016); *Microsoft*, 56 F.3d at 1452.

<sup>351</sup> See *SEC v. Citigroup Glob. Mkts., Inc. (Citigroup II)*, 752 F.3d 285, 295 (2d Cir. 2014).

<sup>352</sup> See *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 378 (1992) (describing a consent decree as “an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees”); *Chevron*, 467 U.S. at 844 (“[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”).

<sup>353</sup> See 15 U.S.C. § 16(e) (2012).

though, that the influential D.C. Circuit and Second Circuit Courts of Appeal have, from time to time, taken such narrow approaches towards the responsibilities of district judges to review and supervise corporate settlements.

### CONCLUSION

In approving the DPA with HSBC, Judge John Gleeson warned that a settlement of a federal criminal case is “not window dressing,” and a federal judge is not “a potted plant.”<sup>354</sup> Or, as another court put it, “[a]lthough the court’s discretion should be exercised in favor of the strong policy favoring voluntary settlement of litigation, when reviewing a consent decree, a district court must independently scrutinize its terms and avoid ““rubber stamp approval.””<sup>355</sup> Or, continuing with that theme, another court found courts may not “merely imprimis [the parties’] decision as though possessed of a clerical rubber stamp.”<sup>356</sup> Whether the case is civil or criminal, and regardless what form the settlement takes, the public interest is an inherent part of a judge’s equitable power to approve and supervise an injunctive decree. Yet, that judicial role has been neglected and eroded in the context of some types of corporate settlements, including those in which judicial review should be the least deferential. Judges have acted like potted plants and appellate courts have relegated to them a rubber-stamp role, even in the face of federal statutes to the contrary and settlements that take place outside statutory and regulatory guidelines.

Judicial supervision must take many forms in complex agreements that anticipate complex and lengthy injunctive remedies. The role of the judge begins with the decision whether to approve the agreement; to supervise a judgment entered in a civil consent decree, a criminal plea bargain or a more informal DPA; to resolve any disputes that occur during the pendency of the agreement; and to decide whether and when to narrow the remedies or terminate an agreement as having been satisfied. Any type of corporate agreement filed in court that calls for injunctive remedies implicates the equitable power of a judge to consider the public interest.

The public interest standard must be informed so that judges exercise meaningful review that protects the public interest and participation rights, as well as respects the discretion and judgment of government agencies. Judge Rakoff expressed the concern in *Citigroup I* that

[t]he injunctive power of the judiciary is not a free-roving remedy to be invoked at the whim of a regulatory agency, even with the con-

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<sup>354</sup> *United States v. HSBC Bank USA, N.A. (HSBC I)*, No. 12-CR-763, 2013 WL 3306161, at \*5 (E.D.N.Y. July 1, 2013), *rev’d*, 863 F.3d 125 (2d Cir. 2017).

<sup>355</sup> *Turtle Island*, 834 F.Supp.2d at 1009 (quoting *United States v. Montrose Chem. Corp. of Cal.*, 50 F.3d 741, 747 (9th Cir. 1995)).

<sup>356</sup> *United States v. Telluride Co.*, 849 F. Supp. 1400, 1402 (D. Colo. 1994).

sent of the regulated. If its deployment does not rest on facts—cold, hard, solid facts, established either by admissions or by trials—it serves no lawful or moral purpose and is simply an engine of oppression.<sup>357</sup>

Judges require both facts and guiding factors to inform their review and supervision through injunctive action. Fortunately, judges have developed factors to inform their review in several contexts, and that case law can inform consideration of the public interest in corporate settlements.

The complexity of corporate agreements and their public importance provides all the more reason to conduct a careful individualized review of their fairness and reasonableness before approval. Doing so may safeguard the public interest, as with the judicial review of plea agreements and civil settlements. Careful judicial review can avoid unnecessary disputes during the implementation of corporate agreements with an organization. More comprehensive judicial review, where the parties negotiate outside statutory and regulatory bounds, can incentivize more regularized settlement practices. The multi-billion dollar settlements that have proliferated raise substantial public interest concerns, from the perspectives of public interest groups, industry groups, and citizens. Clearer guidance on the scope and goals of remedies, and independent review of content and implementation would benefit all sides. After all, as the U.S. Supreme Court has emphasized, some agreements may need to be strengthened to accomplish the public interest, while others may need to be narrowed or terminated, where “enforcement of the decree without modification would be detrimental to the public interest.”<sup>358</sup>

In this Article, I have made the case that the public interest is central to the equitable role of federal judges when considering corporate settlements of all stripes. An examination of the public interest is not just within the capacity of federal judges, it is at the core of their responsibility when approving and supervising detailed corporate settlements that call for ongoing remedies. All corporate agreements filed in a federal court demand a rigorous, informed, and careful consideration of the public interest.

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<sup>357</sup> SEC v. Citigroup Glob. Mkts. (*Citigroup I*), Inc., 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011), *rev'd and vacated*, 752 F.3d 285 (2d Cir. 2014).

<sup>358</sup> *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 384 (1992).

