[ORAL ARGUMENT NOT YET SCHEDULED]
Nos. 15-3016, 15-3017

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, Appellee/Appellant,

v.

FOKKER SERVICES B.V., Appellant/Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OPENING BRIEF FOR THE UNITED STATES

VINCENT H. COHEN, Jr.
Acting United States Attorney
ELIZABETH TROSMAN
ELIZABETH H. DANELLO
MAIA L. MILLER
Assistant United States Attorneys
555 4th St., NW
Washington, D.C. 20530
Telephone: (202) 252-6829

JOHN P. CARLIN
Assistant Attorney General
for National Security
MARY B. McCORD
Principal Deputy Assistant Attorney General
J. BRADFORD WIEGMANN
Deputy Assistant Attorney General
STEVEN M. DUNNE
Chief, Appellate Unit
ADITYA BAMZAI
Attorney
National Security Division
U.S. Department of Justice
Washington, DC 20530
Telephone: (202) 532-4493

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. Parties

The United States of America and Fokker Services B.V. have both filed notices of appeal from the district court's order. This Court has appointed *amicus curiae* to present arguments in favor of the judgment below.

II. Rulings

The ruling under review in this case is the decision of the United States District Court for the District of Columbia issued on February 5, 2015, denying the parties' joint consent motion to exclude time under the Speedy Trial Act pursuant to a deferred prosecution agreement, on the ground that the penalties imposed by the United States were too lenient to punish the crimes described in the Information. *See United States v. Fokker Services B.V.*, No. 14-cr-121 (D.D.C.); Dkt No. 22 (memorandum opinion); Dkt No. 23 (order).

III. Prior Decisions and Related Cases

This Court has already consolidated the appeals filed by the United States (No. 15-3017) and Fokker Services B.V. (No. 15-3016). Together with this brief, the United States is filing a petition for a writ of mandamus and simultaneously requesting that its mandamus action be consolidated with the consolidated appeals. There are no other "related cases" within the meaning of Circuit Rule 28(a)(1)(C).

DATED: June 4, 2015

/s/ Aditya Bamzai
ADITYA BAMZAI
Attorney for the United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Other Authorities

Rules

Regulations

GLOSSARY OF ABBREVIATIONS

Deferred Prosecution Agreement	DPA
Fokker Services B.V.	FSBV
United States Attorneys' Manual	USAM

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 15-3016, 15-3017

UNITED STATES OF AMERICA,

Appellee/Appellant,

v.

FOKKER SERVICES B.V.,

Appellant/Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OPENING BRIEF FOR THE UNITED STATES

STATEMENT OF JURISDICTION

The defendant and the United States of America seek relief from an order of the district court in a criminal case. The district court, which had jurisdiction under 18 U.S.C. § 3231, entered its Opinion and Order on February 5, 2015. *See* Dkt No. 22 (memorandum opinion); Dkt No. 23 (order). The defendant and the United States filed timely notices of appeal on February 18, 2015, and March 9, 2015, respectively, and the United States filed a Petition for a Writ of Mandamus

on June 4, 2015. As explained in further detail below, this Court has jurisdiction under the collateral-order doctrine, 28 U.S.C. § 1291, or, alternatively, pursuant to its authority to issue a writ of mandamus, 28 U.S.C. § 1651(a).

RELEVANT STATUTE

The Speedy Trial Act, 18 U.S.C. § 3161, is set forth in its entirety in an Addendum to this brief.

ISSUES PRESENTED

1. Whether the district court erred by refusing to exclude time under the Speedy Trial Act, 18 U.S.C. § 3161(h)(2), based on its judgment that a deferred prosecution agreement between the government and the defendant was not an appropriate exercise of prosecutorial discretion because it was too lenient.
2. Whether this Court has jurisdiction under the collateral-order doctrine or pursuant to a writ of mandamus to correct the district court's refusal to exclude time under the Speedy Trial Act.

STATEMENT OF THE CASE

This case arises from the United States' prosecution of defendant, Fokker Services B.V. ("FSBV"), for Conspiracy to Unlawfully Export U.S.-Origin Goods and Services, in violation of 18 U.S.C. § 371 and 50 U.S.C. § 1705. On the same day that the United States filed an Information charging FSBV, the government also filed a Joint Consent Motion for Exclusion of Time Under the Speedy Trial Act, accompanied by a Deferred Prosecution Agreement. The Joint Motion sought "the entry of an Order approving the exclusion of a[n] 18-month period in computing the time" under § 3161(h)(2) of the Speedy Trial Act "to allow Fokker Services to demonstrate its good conduct and implement certain remedial measures." Joint Appendix ("JA") 15. The Deferred Prosecution Agreement required FSBV to accept and acknowledge responsibility for its illegal conduct; cooperate with U.S. authorities and agencies; implement new compliance polices; and forfeit an amount of money that, when combined with fines imposed on FSBV, equaled FSBV's gross revenue from the illegal conduct. *See* JA 19.

The district court determined that, in addressing whether to exclude time under the Speedy Trial Act, it had the authority to review the substance of the Deferred Prosecution Agreement to assess whether the government had been too lenient toward FSBV. The court concluded that the facts of the case warranted

harsher punishment of FSBV, as well as the prosecution of individuals in the company, and hence the government's negotiation of the Deferred Prosecution Agreement did "not constitute an appropriate exercise of prosecutorial discretion." Memorandum Opinion ("Mem. op."), at 13 (JA 333). Based on that rationale, the district court refused to exclude time under the Speedy Trial Act. Both parties have appealed the district court's decision, and the United States, in the alternative, has filed a petition seeking the issuance of a writ of mandamus.

A. Statutory framework

1. Under the Speedy Trial Act, a criminal trial must begin within 70 days of the later of the filing of an information or indictment or the defendant's initial appearance in court, 18 U.S.C. § 3161(c)(1), unless one of several enumerated provisions that "exclude" a period of delay applies, *see id.* § 3161(h). Among the various provisions triggering exclusion of time is § 3161(h)(2), which excludes

> [a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

18 U.S.C. § 3161(h)(2).

Section 3161(h)(2) was added to the U.S. Code when the Speedy Trial Act was enacted in 1975, *see* Pub. L. No. 93-619, § 101, 88 Stat. 2076 (Jan. 3, 1975), and has not been amended since. A Senate Report accompanying the 1975 bill

suggests that the provision was "designed to encourage the current trend among United States attorneys to allow for deferral of prosecution on the condition of good behavior." S. Rep. No. 93-1021, at 36 (1974). The Senate Report also notes that the phrase "with the approval of the court" was intended to "assure[] that the court will be involved in the decision to divert and that the procedure will not be used by prosecutors and defense counsel to avoid speedy trial time limits." *Id.* at 37.

2. The kind of agreement referenced in § 3161(h)(2) — namely, a "written agreement" in "which prosecution is deferred" — is commonly known as a deferred prosecution agreement or "DPA." A DPA is a voluntary resolution of a prosecution in which the government decides not to prosecute a defendant in exchange for the defendant's agreement to fulfill certain requirements over the course of a specified time period. A DPA is typically predicated upon the filing of a formal charging document with the appropriate court. The government agrees that, after the specified time period elapses, it will dismiss the charges if the defendant has fulfilled the DPA's requirements. *See, e.g.*, Memorandum from Craig S. Morford, Acting Deputy Attorney General, for Heads of Department Components *et al.*, *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* 1 n.2 (Mar. 7,

2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm ("Morford Mem.").

In addition to a DPA, the government and a defendant may resolve a case through either a non-prosecution agreement or a plea agreement. A non-prosecution agreement is similar to a DPA, except that formal charges are not filed and the agreement is maintained by the parties. *See* Morford Mem. 1 n.2. The decision to seek a DPA, rather than a non-prosecution agreement, hinges on the prosecutor's assessment of the benefits to the public of a filed indictment or information, which can "provide a unique opportunity for deterrence on a broad scale" by prompting similarly situated corporations "to take immediate remedial steps" to address problems that may be "pervasive throughout a particular industry." United States Attorneys' Manual ("USAM") § 9-28.200(B) (2008) (noting also that "a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees"). In contrast to a DPA or non-prosecution agreement, a plea agreement involves the formal conviction of a defendant in a court proceeding. *See* Morford Mem. 1 n.2; *see also* United States Sentencing Guidelines Manual § 4A1.2(f) (2011) (addressing varying treatment of criminal convictions and DPAs in computing criminal history under the United States Sentencing Guidelines).

In general, Department of Justice guidance allows prosecutors to weigh a host of factors in determining whether to charge a corporation with a criminal offense, including the nature of the offense and pervasiveness of the wrongdoing; the corporation's history of similar misconduct; the corporation's voluntary disclosure of wrongdoing; the corporation's willingness to cooperate and remedial actions; and the collateral consequences of a corporation's criminal conviction for innocent third parties such as the company's investors, pensioners, and customers. USAM §§ 9-28:300, 9-28:1000(A). Prosecutors may wish to seek a DPA, "with conditions designed to promote compliance with applicable law and to prevent recidivism," to avoid the "significant" "collateral consequences of a corporate conviction for innocent third parties," such as "a corporation's employees, investors, pensioners, and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, or have been unable to prevent it." *Id.* § 9-28:1000(B). Moreover, by using a DPA in appropriate circumstances, prosecutors may be "able to accomplish as much as, and sometimes even more than," a criminal conviction, because of the possibility of "remedial measures and improved compliance policies and practices" and enhanced "cooperat[ion] in ongoing investigations." Leslie R. Caldwell, Assistant Attorney General, *Remarks*

at the New York University Center on the Administration of Criminal Law's Seventh Annual Conference on Regulatory Offenses and Criminal Law (Apr. 14, 2015), *available at* http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-center.

As a result, the choice between pursuing a DPA or some other resolution of a criminal prosecution depends on "[a] careful consideration of [background] principles and the facts in a given case." Morford Mem. 1. As the United States Attorneys' Manual explains, "[u]nder appropriate circumstances," a DPA "can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement." USAM § 9-28:1000(B).

B. Factual and procedural background

1. Fokker Services B.V. ("FSBV") is a Dutch aerospace services provider and subsidiary of Fokker Technologies Holding B.V., a Dutch manufacturing and technical services company. Information ¶ 1 (JA 55). FSBV provides "logistical support, component maintenance, repair and overhaul, technical services, and aircraft maintenance and modification" for operators and owners of aircraft manufactured by its predecessor, Fokker Aircraft, B.V. *Id.* ¶ 3

(JA 56). In doing so, FSBV uses aircraft parts manufactured throughout the world, including in the United States. *See id.*

For national security and anti-terrorism reasons, shipments of certain goods to countries such as Iran, Burma, and Sudan are subject to export control by the Department of Treasury's Office of Foreign Assets Control and the Department of Commerce's Bureau of Industry and Security. *See* Iranian Transaction Regulations (since 2012, the "Iranian Transactions and Sanctions Regulations"), 31 C.F.R. Part 560; Sudanese Sanctions Regulations, 31 C.F.R. Part 538; and Burmese Sanctions Regulations, 31 C.F.R. Part 537; *see also* International Emergency Economic Powers Act, 50 U.S.C. § 1705; Information ¶¶ 12-18 (JA 58-61). Under the Iranian and Sudanese sanctions regimes, companies that engage in U.S. activities are prohibited from unlicensed exportation or re-exportation, directly or indirectly, of any goods, technology, or services from the United States or any U.S. person to Iran or Sudan. 31 C.F.R. §§ 538.205, 560.204. The Iranian sanctions also prohibit re-exportation from a third country to Iran of any goods, technology, or services that had been exported from the United States. *Id.* § 560.205. Under the Burmese sanctions regime, companies that engage in U.S. activities are prohibited from new investment in Burma and the exportation or re-exportation of financial services to Burma from the United States or any U.S. person. *Id.* §§ 537.202, 537.204. All

three regimes prohibit transactions by U.S. persons or within the United States to evade or to avoid the sanctions prohibitions. *Id.* §§ 537.206, 538.211, 560.203.

Over the course of a five-year period spanning 2005 to 2010, FSBV violated U.S. export laws by making (without obtaining the requisite licenses) over 1,000 separate shipments of U.S.-origin parts and components to customers located in Iran, Sudan, and Burma. Information ¶¶ 9-10 (JA 57-58). During this period, the company:

- Withheld or falsified tail numbers, or falsely indicated parts were to be used as "stock parts," when reporting to U.S. or U.K companies so as to conceal its customers' affiliations with U.S.-sanctioned countries. Information ¶¶ 21a, 22c (JA 63-64).

- Tracked whether the U.S. companies with whom it did business paid attention to export controls, and then directed its business to those companies that were not vigilant regarding compliance. *Id.* ¶ 21b (JA 63-64).

- Deleted references to Iran in materials sent to U.S. subsidiaries and repair shops. *Id.* ¶ 21c (JA 64).

- Removed fields relating to ultimate end-user information from an internal parts-tracking database. *Id.* ¶¶ 21d, 22b (JA 63-64).

- Directed employees to hide activities and documents related to Iranian transactions from U.S. Federal Aviation Administration inspectors. *Id.* ¶ 21e (JA 64).

- Ignored advice to senior management from an export compliance manager and in-house counsel that no U.S.-origin parts could be shipped to Iran. *Id.* ¶ 22f (JA 64).

These policies and practices were pursued with the knowledge and approval of senior management. JA 38 ¶ 2, JA 47 ¶ 29. In addition, FSBV applied for a license to re-export U.S.-originated traffic control systems to Iran in 2002, and was denied in 2004. JA 43 ¶ 19, JA 44 ¶ 21. A management-organized working group in 2007, moreover, expressly recognized the existence of American export prohibitions. JA 44 ¶ 23. Finally, in 2008, Dutch customs authorities detained two packages and warned FSBV that they could not defend the company if it encountered problems with U.S. authorities regarding export compliance. JA 45-46 ¶¶ 25-27. Nevertheless, in the aftermath of its meeting with Dutch authorities, the company elected to continue to conduct business with its Iranian civilian customers, though it ceased business with Iranian military customers. JA 46-47 ¶¶ 27-28.

On June 23, 2010, the company voluntarily notified the U.S. government of its illegal transactions, hired an outside law firm to conduct an internal investigation, and began cooperating with U.S. law enforcement and regulatory authorities. JA 50-51 ¶¶ 36, 38-39. The company undertook voluntary steps to enhance compliance, such as regular audits, and stopped all new business with U.S.-sanctioned countries. JA 51-53 ¶¶ 40, 40i, 40iii-v, 40ix. The company also fired its president, demoted or reassigned the duties of certain personnel, and

trained other personnel in U.S. export controls and economic sanctions. JA 52-53 ¶¶ 40ii, 40x.

The company's gross revenue from shipments that violated U.S. laws totaled approximately $21 million, with a gross pretax profit of $5.89 million. JA 39 ¶ 4.

2. On June 5, 2014, the United States filed an Information charging FSBV with one count of Conspiracy to Unlawfully Export U.S.-Origin Goods and Services, in violation of 18 U.S.C. § 371 and 50 U.S.C. § 1705. On the same day, the government filed a Joint Consent Motion for Exclusion of Time Under the Speedy Trial Act ("Joint Motion"), accompanied by a Deferred Prosecution Agreement ("DPA") and attendant Factual Statement. JA 15. The Joint Motion sought "the entry of an Order approving the exclusion of a[n] 18-month period in computing the time" under § 3161(h)(2) of the Speedy Trial Act "to allow Fokker Services to demonstrate its good conduct and implement certain remedial measures." *Id.*

The DPA is one part of a global settlement of criminal and administrative investigations reached after extensive negotiations between FSBV and the United States Government, including counsel from the Department of Treasury's Office of Foreign Assets Control and the Department of Commerce's Bureau of Industry and Security. JA 80. In the DPA, FSBV "accept[ed] and acknowledge[d]

responsibility" for its illegal conduct. DPA ¶ 2 (JA 20). The company also pledged to cooperate with U.S. authorities and agencies and to implement its new compliance program and policies. *Id.* ¶¶ 5-6 (JA 23-27). The United States, in turn, agreed to dismiss the charges with prejudice (and to forgo further charges against FSBV or other members of its corporate family), if the company complied with all terms of the agreement for a period of 18 months. *Id.* ¶¶ 4 (JA 22-23), 7 (JA 27); *see also* JA 16 ("The United States has agreed that if Fokker Services is in compliance in all respects with all of its obligations under the [DPA], the United States, within 30 days, or earlier, of the expiration of the time period set forth in the [DPA], will move this Court for dismissal with prejudice of the Information filed against Fokker Services pursuant to the terms of the [DPA].").

As part of the DPA, the company agreed to forfeit to the United States $10.5 million. DPA ¶ 3 (JA 21-22) (releasing "any and all claims it may have to such funds"). That forfeiture is in addition to $10.5 million in administrative fines that FSBV agreed to pay as part of the global settlement agreement resolving the company's civil and criminal liability. JA 93. The sum total of the forfeiture and fine — $21 million — is equal to the amount of the company's gross revenue from the illegal transactions.

3. At several status hearings, the district court expressed concern that the DPA was "extraordinarily disproportionate to the conduct that's alleged in this Information if it can be proved" and "a very sweetheart deal for this company." Transcript of Status Conference (June 25, 2014) at 3:20-23, 4:12-13 (JA 70-71). The court reasoned that "the burden is on the Government as far as I am concerned to demonstrate why they haven't abused their discretion in coming up with the deal they have come up with." *Id.* at 4:14-16 (JA 71). The court recognized that the company was paying to the government an amount equivalent to its gross revenue from the illegal transactions, but faulted the government for not seeking a "fine above that, which is what you would normally have in a criminal prosecution." Transcript of Hearing (Oct. 29, 2014) at 6:7-8 (JA 302). And the court stated that it believed the deal was "way too good" for FSBV "to the point where there is a question as to whether your prosecutorial discretion has been abused." *Id.* at 4:1-4 (JA 300).

In addition to these remarks about the particular DPA at issue in this case, the district court generally observed that "deferred prosecution agreements . . . have in recent times become a matter of great concern to many district judges around the country." *Id.* at 10:2-7 (JA 306). The court likewise stated that "SEC consent decrees . . . have become a matter of great concern to courts around the

country . . . . I have had a number of colleagues who have raised concerns about civil enforcement of consent decrees in the SEC's context." *Id.* at 10:9-15 (JA 306).

4. On February 5, 2015, the district court denied the Joint Motion to exclude time under the Speedy Trial Act. The court relied on the Speedy Trial Act's language requiring exclusion of "[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." 18 U.S.C. § 3161(h)(2) (emphasis added). The court reasoned that the Speedy Trial Act thereby called for "court approval" of the terms of the DPA pursuant to the Court's "supervisory powers . . . to protect the integrity of the judicial process." Mem. op. 7-9 (JA 327-29).

The court "agree[d] with [the] well-reasoned conclusion" reached by Judge Gleeson in the Eastern District of New York "that a District Court has the authority 'to approve or reject the DPA pursuant to its supervisory power.'" Mem. op. 8 (JA 328) (quoting *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161, at *4 (E.D.N.Y. July 1, 2013)). Thus, the district court concluded that — although the government "has the clear authority *not* to prosecute a case"

and the court "would have no role here if the Government had chosen not to charge Fokker Services with any criminal conduct" — the parties' decision to use a DPA meant that the "criminal case would remain on this Court's docket for the duration of the agreement's term" and, consequently, that it was the court's "duty to consider carefully whether that approval should be given." Mem. op. 9-10 (JA 329-30); *see also id.* at 10 (JA 330) ("'By placing a criminal matter on the docket of a federal court, the parties have subjected their DPA to the legitimate exercise of that court's authority.'") (quoting *HSBC*, 2013 WL 3306161, at *5).

While conceding that "this is not a typical case for the use of such powers" because FSBV had signed the DPA, the court asserted that it "must consider the public as well as the defendant" and that "the integrity of judicial proceedings would be compromised by giving the Court's stamp of approval to either overly-lenient prosecutorial action, or overly-zealous prosecutorial conduct." Mem. op. 10 (JA 330). The Court refused to "approve" the DPA on the ground that it was "grossly disproportionate to the gravity of Fokker Services' conduct in a post-9/11 world." *Id.* at 12-13 (JA 332-33). The court reasoned that it would "undermine the public's confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time and for the

benefit of one of our country's worst enemies." *Id.* at 13 (JA 333). The district court found it "surprising" that "no individuals are being prosecuted for their conduct at issue here," *id.* at 11 (JA 331), and that certain employees involved in the illegal conduct were merely removed from decision-making positions or demoted, *see id.* at 12 (JA 332). The court strongly suggested that, "at a minimum," an adequate DPA would include "a fine that exceeded the amount of revenue generated, a probationary period longer than 18 months, and a monitor trusted by the Court to verify for it and the Government both that this rogue company truly is on the path to complete compliance." *Id.* at 13 (JA 333); *see also id.* at 12 (JA 332) ("[T]he DPA does not call for an independent monitor, or for any periodic reports to be made to either this Court or the Government verifying the company's compliance with U.S. law over this very brief 18-month period.").

As a result, the district court declared that the DPA "does not constitute an appropriate exercise of prosecutorial discretion." *Id.* at 13 (JA 333). And although the court signaled that it would be "open to considering a modified version" of the DPA, it made clear that it would do so only if "the parties agree to different terms and present such an agreement for my approval." *Id.*

INTRODUCTION AND SUMMARY OF ARGUMENT

As early in the Nation's history as the year 1800, then-Congressman (later Chief Justice) John Marshall explained in a speech before the House of Representatives that, under the principle of prosecutorial discretion, the Executive Branch possesses "an indubitable and a constitutional power" to "direct that the criminal be prosecuted no farther." 10 Annals of Cong. 615 (1800). "This is no interference with judicial decisions," Marshall explained, "nor any invasion of the province of a court." *Id.* Making a similar point in a more recent decision, this Court explained that, "when the government is challenged for not bringing as extensive an action as it might, a district judge must be careful not to exceed his or her constitutional role." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995). The decision below violates this separation-of-powers principle by improperly interfering with the Executive Branch's exercise of prosecutorial discretion in a criminal case. Whether through appellate review under the collateral-order doctrine, or by issuing a writ of mandamus, this Court should reverse the district court's aggrandizement of its judicial role well beyond settled constitutional limits.

I. It is well-established that the Executive Branch has broad discretion to determine when to prosecute an individual for violation of the criminal laws. That principle applies in a variety of different contexts, such as the dismissal of criminal charges, evaluation of plea agreements, and even review of consent decrees and similar civil agreements. Courts, including this Court, have repeatedly stressed the bedrock principle that Article III courts cannot intrude upon the prosecutorial discretion of the Executive Branch.

The principle is equally applicable in the context of a DPA negotiated to exclude time under the Speedy Trial Act. The text, structure, and history of the Speedy Trial Act establish that district courts have authority to review DPAs to ensure that they have been negotiated "for the purpose of allowing the defendant to demonstrate his good conduct." 18 U.S.C. § 3161(h)(2). Nothing in the Speedy Trial Act suggests that Congress altered the established prosecutorial-discretion framework by authorizing district courts to review intrusively the terms of DPAs for excessive leniency toward defendants. Indeed, to the extent that the Act is ambiguous about the scope of district-court review, it must be construed to avoid any clash with established principles of constitutional law.

Measured against this yardstick, the district court's order was clearly erroneous. The court expressly premised its decision on its view that the

government had been too lenient toward the corporate defendant — as well as, remarkably, its surprise that the government did not prosecute any individual corporate officers. Nothing within the district court's supervisory powers allows it to intrude on the prosecutorial function and violate the separation of powers in this fashion.

II. This Court has jurisdiction to correct the district court's legal error, either under the collateral-order doctrine or pursuant to a writ of mandamus. With respect to the collateral-order doctrine, it is clear that the district court's order "conclusively" resolved an "important" legal question "separate from the merits" of the underlying criminal action — namely, the validity of the DPA. That legal question would be "effectively unreviewable" on final judgment, which the parties could achieve only by obtaining dismissal of the charges or by proceeding to a criminal trial.

If, however, this Court believes that the collateral-order doctrine does not apply to this appeal, mandamus stands as a ready alternative. Although mandamus is surely a "drastic and extraordinary" remedy, the circumstances here warrant its use. The parties lack another means by which to obtain relief. The district court's intrusion into the Executive Branch's prosecutorial function is clear and indisputable. And the writ is appropriate under the circumstances. Indeed, as

explained below, courts of appeals have on many occasions issued writs of mandamus to reverse comparable district-court intrusions into the prosecutorial function.

STANDARD OF REVIEW

The question before this Court is whether the district court violated the constitutional principle of separation of powers and exceeded its role under the Speedy Trial Act, 18 U.S.C. § 3161(h)(2). These are legal questions, which the Court reviews *de novo*. *See, e.g.*, *United States v. Rice*, 746 F.3d 1074, 1077-78 (D.C. Cir. 2014); *United States v. Papagno*, 639 F.3d 1093, 1095-96 (D.C. Cir. 2011); *see also Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

ARGUMENT

I. The district court's order violates the separation of powers and contravenes the principle of prosecutorial discretion.

It has long been established that the Executive Branch possesses broad discretion to decide when to initiate — and by implication when to resolve — criminal cases. The Speedy Trial Act does not disturb this separation-of-powers principle. The district court's invocation of a "supervisory power" to review the terms of a DPA for leniency in this case transgresses the foundational principle of prosecutorial discretion, as well as the text, structure, and history of the Speedy Trial Act.

A. The Executive Branch has broad prosecutorial discretion.

1. "The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws." *Community for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986). Accordingly, as an unbroken line of precedents attests, "when reviewing the exercise of that power, the judicial authority is [ ] at its most limited." *Id.*; *see ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 (1987) ("[I]t is entirely clear that the refusal to prosecute cannot be the subject of judicial review."); *United States v. Batchelder*, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that

generally rest in the prosecutor's discretion."); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (reasoning that "the decision whether or not to prosecute . . . generally rests entirely in [the government's prosecutorial] discretion"); *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *United States v. Giannattasio*, 979 F.2d 98, 100 (7th Cir. 1992) ("A judge in our system does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them.").

The principle of prosecutorial discretion serves at least three distinct and important purposes in the broader separation-of-powers framework. First, the principle reflects certain well-recognized limitations on the judicial capacity to review charging decisions. As the Supreme Court has explained, the decision whether to prosecute "is particularly ill-suited to judicial review" because it hinges on factors that "are not readily susceptible to the kind of analysis the courts are competent to undertake," such as "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan." *Wayte v. United States*, 470 U.S. 598, 607 (1985). Likewise, as then-Judge (later Chief Justice) Burger observed in an opinion for this Court, "[f]ew subjects are less adapted to

judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made or whether to dismiss a proceeding once brought." *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (noting that "the existence of very broad discretion in the prosecutor has long been taken for granted"); *Gray v. Bell*, 712 F.2d 490, 514 (D.C. Cir. 1983) (observing that "the prosecutor's decision whether or not to initiate prosecution has historically been subject to little or no judicial scrutiny and is not readily amenable to evaluation by courts"); *Nader v. Saxbe*, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974) (observing that the determination "that no legitimate consideration informed the prosecutor's decision not to prosecute . . . would normally be very difficult, for a prosecutor may lawfully take account of many factors other than probable cause in making such decisions"). Even in the civil context, the Supreme Court has recognized that courts are not well situated to weigh the considerations that inform enforcement decisions for which there are no judicially manageable standards. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise."); *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1031 (D.C. Cir. 2007) (applying *Chaney* to settlement of enforcement action).

Second, the principle of prosecutorial discretion "safeguards liberty" by "assur[ing] that no one can be convicted of a crime without the concurrence of all three branches." *In re United States*, 345 F.3d 450, 454 (7th Cir. 2003). Under the constitutional structure, the prosecution of a criminal case requires the participation of the legislature (which enacts the laws), the executive (which chooses whether to prosecute), and the judge and jury (which adjudicate guilt and innocence). *See id.* (observing that criminal contempt of judicial orders "constitutes a limited exception" to this principle). By contrast, "[w]hen a judge assumes the power to prosecute, the number" of branches involved in the criminal process "shrinks to two." *Id.*

Third, the principle of prosecutorial discretion helps "to keep the courts as neutral arbiters in the criminal law generally," by foreclosing Article III involvement in charging decisions outside of an appropriate adversarial process. *Nader*, 497 F.2d at 679 n.18; *see also Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 U.S. Op. Off. Legal Counsel 101, 114 n.18 (1984) (noting that the drafters of the Constitution "intended to preserve the impartiality of the judiciary . . . by separating the judiciary from the prosecutorial function"). If the rule were otherwise, it would be natural for a criminal defendant to question the impartiality

of a judicial officer who *both* initiated the criminal charges in a case *and* later assessed the legal validity of those charges. *Cf. United States v. Davila*, 133 S. Ct. 2139, 2148 (2013) ("In recommending the disallowance of judicial participation in plea negotiations now contained in [Fed. R. Crim. P. 11(c)(1)], the Advisory Committee stressed that a defendant might be induced to plead guilty to avoid antagonizing the judge who would preside at trial."). For that reason, "in our system of criminal justice, unlike that of some foreign nations, the authorized powers of federal judges do not include the power to prosecute crimes." *In re United States*, 345 F.3d at 452.

2. A necessary corollary to the principle of prosecutorial discretion is that courts may not exceed their traditional authority in reviewing the government's initiation, dismissal, and resolution of criminal matters. The government may have a wide range of reasons for electing not to prosecute a defendant for a particular crime or for pursuing a milder punishment than the maximum permitted. To take just a few (among many possible) examples, the defendant may have cooperated with the government in exchange for leniency in punishment; the government may believe that the costs of devoting further resources to prosecution outweigh the benefits of harsher punishment; or the government may simply have doubts about the strength of its case that are not

readily explainable in a public filing. *See, e.g.*, *Heckler*, 470 U.S. at 831 (noting, in the civil context, that "the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all"); *Smith v. United States*, 375 F.2d 243, 247 (5th Cir. 1967) ("[I]n order to keep from congesting the courts and wasting the prosecutors' time with many ordinary cases, in some areas the government must choose to prosecute only impressive test cases with a high potential of success."); *In re Aiken County*, 725 F.3d 255, 266 (D.C. Cir. 2013) (opinion of Kavanaugh, J.) (defining prosecutorial discretion to "encompass[] the Executive's power to decide whether to initiate charges for legal wrongdoing and to seek punishment, penalties, or sanctions against individuals or entities who violate federal law"). As cases from three commonly occurring factual scenarios illustrate, courts have long been careful not to intrude into the zone of prosecutorial discretion.

a. *Rule 48 dismissal*. Under Rule 48 of the Federal Rules of Criminal Procedure, "[t]he government may, with leave of court, dismiss an indictment, information, or complaint." Fed. R. Crim. P. 48(a). Before the promulgation of

the current version of the Rule in 1944, the government could, under the common-law rule of *nolle prosequi*, dismiss a prosecution *without* leave of court. *See* Advisory Committee's Note to Subdivision (a) (1944 adoption); 3B Charles Alan Wright & Peter J. Henning, *Federal Practice and Procedure* § 802, at 332 (4th ed. 2013). In the aftermath of Rule 48(a)'s adoption, the Supreme Court observed that the "principal object" of the provision is "to protect a defendant against prosecutorial harassment, *e.g.*, charging, dismissing, and recharging, when the Government moves to dismiss an indictment over the defendant's objection." *Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977).

Consistent with *Rinaldi*, and in light of the serious separation-of-powers concerns that a contrary interpretation might raise, subsequent courts have construed Rule 48(a)'s "leave of court" language narrowly. Echoing the Supreme Court, the Seventh Circuit has observed that the "principal purpose" of Rule 48(a) "is to protect a defendant from the government's harassing him by repeatedly filing charges and then dismissing them before they are adjudicated." *In re United States*, 345 F.3d at 453. In reaching that conclusion, the Seventh Circuit further observed that it was unaware of "any appellate decision that actually upholds a denial of a motion to dismiss a charge" agreed upon by the government and the criminal defendant, notwithstanding "speculations in some judicial opinions" that

courts have such authority. *Id.*; *see United States v. Henderson*, 951 F. Supp. 2d 228, 230 (D. Mass. 2013) (observing that an aggressive reading of Rule 48(a) would "invite[] the judiciary to exceed its constitutional role and breach the separation of powers by intruding upon the plenary prosecution power of the Executive Branch"); *cf. United States v. Pimentel*, 932 F.2d 1029, 1033 n.5 (2d Cir. 1991). Instead, the language requiring the government to obtain "leave of court" before dismissal of criminal charges has been construed to preserve the appropriate balance between the Executive and the Judiciary in a criminal proceeding — with the Judiciary acting as a check to ensure that the Executive does not harass criminal defendants through successive filings, but deferring to the Executive's determination that criminal charges should not be further pursued.

In a comparable setting in the civil context — addressing a statute requiring the court to "provid[e] the person [who initiates a qui tam action] with an opportunity for a hearing on the motion" before granting the government's motion to dismiss, 31 U.S.C. § 3730(c)(2)(A) — this Court has reasoned that, absent fraud on the court or similar exceptional circumstance, the government possesses a "virtually 'unfettered' discretion to dismiss [a] *qui tam* claim." *Hoyte v. American Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008). Thus, as this Court put it, the government's "decision to dismiss the case, based on its own assessment, is not

reviewable in the district court or this court." *Id.* To the contrary, as this Court explained in *Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003), the government has "an unfettered right to dismiss" *qui tam* claims, and the "function of a hearing . . . is simply to give the relator a formal opportunity to convince the government not to end the case." *Id.* at 252-53.

b. *Plea agreements*. Although sentencing judges have historically played a role in evaluating the propriety of penalties in the sentencing and plea-agreement context, *see*, *e.g.*, Fed. R. Crim P. 11(c), courts have made clear that such authority is circumscribed and limited to the judge's traditional participation in the sentencing process. *Cf. United States v. Maddox*, 48 F.3d 555, 556 (D.C. Cir. 1995) (holding that district court authority "to accept or reject a guilty plea . . . is not unfettered"); *United States v. Ammidown*, 497 F.2d 615, 622 (D.C. Cir. 1972).

An illustrative case is *In re Vasquez-Ramirez*, 443 F.3d 692 (9th Cir. 2006). In that case, the Ninth Circuit issued a writ of mandamus to a district court that had rejected a guilty plea on the ground that the defendant's criminal history warranted a sentence higher than the statutory maximum for the charges to which the defendant had pleaded guilty. *See id.* at 695. In issuing the writ, the Ninth Circuit reasoned that the government's decision to drop a charge "exercis[ed] classic

prosecutorial discretion," for which the prosecutor "may have any number of reasons . . . , such as wise allocation of scarce resources, none of which are the district court's business." *Id.* at 697. The district court's attempt "to force the government to pursue a charge it [did] not wish to pursue . . . intrude[d] too far into the executive function." *Id.* at 698. A judge, the Ninth Circuit held, "has no constitutional role" in either "the prosecutor's decision regarding which charges to pursue," or in "Congress's decision to create a statutory maximum sentence for those charges" — "one is strictly executive and the other is strictly legislative." *Id.* Thus, as the court concluded, a sentencing judge may not "overstep[] his bounds" by "forc[ing] the prosecutor to pursue charges the prosecutor would rather not, just because the judge disagrees with the sentencing range to which he would otherwise be limited." *Id.* at 701; *see also id.* (reasoning that, in this context, it is irrelevant whether the district court believes the "prosecutor's charging decision was too aggressive or too lenient"); *In re Ellis*, 356 F.3d 1198, 1209 (9th Cir. 2004) (en banc) ("[W]hen the district court made the further decision that the second degree murder charge itself was too lenient, it intruded into the charging decision, a function 'generally within the prosecutor's exclusive domain.'"); *United States v. Robertson*, 45 F.3d 1423, 1438 (10th Cir. 1995) ("[C]harge bargains directly and

primarily implicate prosecutorial discretion whereas judicial discretion is impacted only secondarily.").

Another illustrative case is the Seventh Circuit's opinion in *In re United States*. There, the government and a defendant entered into an agreement under which the defendant would plead guilty to one count in an indictment and the government would dismiss the other two counts, both of which carried a higher sentencing guideline range than the agreed-upon charge. *See* 345 F.3d at 451. The district judge "rejected the plea agreement on the ground that the one count of which [the defendant] would be convicted if the agreement were accepted did not reflect the gravity of his actual offense." *Id.*; *see also id.* (noting that the prosecutor "explained that his main aim was to get a felony conviction . . . without the risk of a trial, which might result in [the defendant] being acquitted"). Following sentencing on the charged count, the court rejected the government's motion to dismiss the other two counts and appointed a private lawyer to prosecute the case further. *See id.* at 452. The Seventh Circuit granted a writ of mandamus to correct the district judge's intrusion into the prosecutorial function. The court rejected the district judge's argument that the government had impermissibly tried to "circumvent his sentencing authority" by dismissing the charges and observed that "[t]he district judge simply disagrees with the Justice Department's exercise of

prosecutorial discretion." *Id.* at 452-53; *see also In re United States*, 503 F.3d 638, 642 (7th Cir. 2007) (overturning district court's order requiring government to provide information relating to substantial-assistance motion before accepting guilty plea and reasoning that "[e]xercises of prosecutorial discretion may be overseen only to ensure that the prosecutor does not violate the Constitution or some other rule of positive law").

c. *Consent decrees and certain civil settlements.* In certain circumstances, and in order to protect third parties, Congress has codified a requirement that a government agreement with a private party be "in the public interest," 15 U.S.C. § 16(e) (Antitrust Procedures and Penalties Act), or "fair, adequate, and reasonable," 31 U.S.C. § 3730(c)(2)(B) (False Claims Act); *United States ex rel. Schweizer v. Oce N.V.*, 677 F.3d 1228, 1236 (D.C. Cir. 2012) (observing that this provision was designed to "protect[] the relator"). Precedents, including opinions from this Court, have recognized that such provisions must be construed to preserve the enforcement discretion of the Executive Branch. Even in the context of such provisions (where Congress expressly envisions a limited role for the judiciary to weigh whether sanctions are in the "public interest"), this Court has made clear that district courts may not invade the zone of discretion impliedly left to the Executive Branch.

In *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995), for example, this Court held that a district court "exceeded its authority" when it refused to enter an antitrust consent decree under § 16(e)'s "public interest" standard. *Id.* at 1451. The district court had refused to enter the proposed decree because, according to the judge, the court lacked "the information it need[ed] to make a proper public interest determination"; "the scope of the decree [was] too narrow"; the parties had failed "to address certain anticompetitive practices," thereby rendering the antitrust remedy ineffective; and the "enforcement and compliance mechanisms in the decree [were] [un]satisfactory." *United States v. Microsoft Corp.*, 159 F.R.D. 318, 332 (D.D.C. 1995).

In rejecting the district court's analysis, this Court held that § 16(e)'s "public interest" standard did not authorize a district court to "reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made." 56 F.3d at 1459. This Court further reasoned that "the district judge would [ ] not be empowered to reject [the remedies sought] merely because he believed other remedies were preferable." *Id.* at 1460. And the Court found it "inappropriate for the judge to measure the remedies in the decree as if they were fashioned after trial," holding that the "remedies were not so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Id.* at

1461. As a result, this Court concluded, a district court should not review remedies for adequacy "[s]hort of" a consent decree that makes "a mockery of judicial power," lest it impermissibly "assume the role of Attorney General." *Id.* at 1462. Later cases from this Court have similarly emphasized that, to avoid interference with functions traditionally lodged with the Executive Branch, "the district court's 'public interest' inquiry into the merits of the consent decree is a narrow one." *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004); *see also Massachusetts School of Law v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997) (reasoning that the district court "should withhold approval only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes 'a mockery of judicial power'").

More recently, in *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285 (2d Cir. 2014), the Second Circuit held that a district court could not withhold approval of a pending consent decree because the court disagreed with the government "on discretionary matters of policy," such as not requiring admission of liability, or believed that the agency "failed to bring the proper charges." *Id.* at 296-98. The court rejected the district court's rationale that "[i]f the allegations of the Complaint are true, this is a very good deal for Citigroup; and, even if they are

untrue, it is a mild and modest cost of doing business." *SEC v. Citigroup Global Markets, Inc.*, 827 F. Supp. 2d 328, 333 (S.D.N.Y. 2011).

These cases, it bears noting, arose in the context of civil enforcement, where "it has occasionally been posited that the President's power not to initiate a civil enforcement action may not be entirely absolute (unlike with respect to criminal prosecution)." *Aiken County*, 725 F.3d at 264 n.9 (opinion of Kavanaugh, J.). The cases therefore starkly illustrate the importance of the broader principle that a reviewing court should not disturb an enforcement decision where it "would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830. Thus, the Supreme Court has "recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id.* at 831.

B. Nothing in the Speedy Trial Act seeks to disturb the established separation-of-powers framework and the traditional scope of prosecutorial discretion.

The text, structure, and legislative history of § 3161(h)(2), when interpreted in light of applicable rules of construction, establish that Congress had no intention to upset the traditional separation-of-powers framework by authorizing intrusive district-court review of DPAs.

1. The relevant provision of the Speedy Trial Act provides for the exclusion of "[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." 18 U.S.C. § 3161(h)(2). By inserting the phrase "with the approval of the court" in § 3161(h)(2), Congress did not upend the core principle that deciding when and whom to prosecute is entrusted to the Executive.

Several aspects of § 3161(h)(2) make this congressional intention clear. First, the text of the statute links the "approval of the court" with the parties' "purpose of allowing the defendant to demonstrate his good conduct." That statutory language naturally indicates that a district court has authority to ensure that the government and defendant have entered into the DPA for an appropriate "purpose," rather than to evade Speedy Trial Act time limitations. Indeed, the

provision's legislative history bolsters this inference, by noting that § 3161(h)(2) was "designed to encourage the current trend among United States attorneys to allow for deferral of prosecution on the condition of good behavior" and that a court's role would be simply to assure that "the decision to divert . . . will not be used by prosecutors and defense counsel to avoid speedy trial time limits." S. Rep. No. 93-1021, at 36-37 (1974). Neither the statute's text nor its history, in other words, suggests that a district court may conduct a more intrusive review of a DPA's terms.

To the extent that § 3161(h)(2) contains any ambiguity on the scope of the district court's role, the provision must be construed to avoid constitutional questions. Intrusive review into the Executive Branch's prosecutorial decisionmaking may pose constitutional difficulties under Article II and the broader framework for the separation of powers. *See, e.g.*, *Aiken County*, 725 F.3d at 263 (opinion of Kavanaugh, J.) ("In light of the President's Article II prosecutorial discretion, Congress may not *mandate* that the President prosecute a certain kind of offense or offender."). Accordingly, this Court has construed comparable statutory-review provisions "narrowly" to avoid "the constitutional questions that would be raised if courts were to subject the government's exercise of its prosecutorial discretion to non-deferential review." *Massachusetts School of*

Law, 118 F.3d at 783 (citation omitted); *Swift*, 318 F.3d at 252 (referring to a "presumption that decisions not to prosecute . . . are unreviewable"). The same principle applies here. As in *Swift*, "[n]othing in" § 3161(h)(2) "purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States." *Id.* at 253. Absent further elaboration in the statute, Congress should not be assumed to have upset the traditional balance between the Executive and the Judiciary on the propriety of the charges brought.

A contrary reading of § 3161(h)(2), moreover, would yield anomalous results. The government can replicate the effect of a DPA either by agreeing to a DPA before the defendant enters an initial appearance or by using a non-prosecution agreement that does not require court approval. For example, because the filing of a criminal information does not necessarily trigger the start of the speedy trial clock, *see* 18 U.S.C. § 3161(c)(1) (establishing that the clock is triggered in a case where a defendant has entered a plea of not guilty after the later of an in-court appearance or the filing of the information), the government in many districts may file a criminal information without an in-court appearance. In such circumstances, courts often do not hold a hearing to address the DPA in the case either under § 3161(h)(2) or any other provision of the Speedy Trial Act. *See, e.g.*,

United States v. Pfizer HCP Corp., No. 12-CR-169 (D.D.C. Aug. 7, 2012); *United States v. Orthofix Int'l, N.V.*, No. 4:12-cr-00150 (E.D. Tex. July 10, 2012); *United States v. Data Systems & Solutions LLC*, No. 12-CR-262 (E.D. Va. June 18, 2012); *United States v. Bizjet Int'l Sales & Support, Inc.*, No. 12-CR-061 (N.D. Okla. Mar. 14, 2012); *United States v. Marubeni*, No. 12-CR-022 (S.D. Tex. Jan. 17, 2012); *United States v. Maxwell Technologies, Inc.*, No. 11-CR-329 (S.D. Cal. Jan. 31, 2011).

Given the availability of the alternatives, it makes little sense to construe § 3161(h)(2) to authorize the district court to withhold approval of the government's exercise of discretion to defer a prosecution in exchange for the imposition of particular penalties. By contrast, it makes good sense for Congress to have required the court to oversee the bargain to ensure that a DPA is not being used to *evade* the requirements of the Speedy Trial Act.

2. The sole case that extensively addresses the role of the judiciary in reviewing DPAs is the district court opinion in *HSBC*, which recognizes that judicial review is poorly suited to policing the decision to prosecute, including in the context of a DPA, and cautions that judges "need to be mindful that they have no business exercising [prosecutorial] discretion and, as an institutional matter, are not equipped to do so." 2013 WL 3306161, at *8; *see also United States v. KPMG*

LLP, No. 05-903, 2007 WL 541956, at *7 (S.D.N.Y. Feb. 15, 2007) (noting that "deferred prosecution agreements with restitution and/or other monetary components are entirely consistent with the fundamental principle that the Executive Branch alone is vested with the power to decide whether or not to press charges"); *United States v. The Royal Bank of Scotland PLC*, No. 13-cr-0074 (D. Conn. 2013). The *HSBC* court observed, moreover, that the goal of the Speedy Trial Act's "with the approval of the court" language is to ensure that the parties do not "collude to circumvent the speedy trial clock." 2013 WL 3306161, at *3. Thus, as the court put it, § 3161(h)(2) "appears to instruct courts to consider whether a deferred prosecution agreement is truly about diversion and not simply a vehicle for fending off a looming trial date." *Id.*

At the same time, the *HSBC* court hypothesized that district courts could review DPAs to guard against illegality or unethical conduct, such as violations of constitutional rights; "fund[ing] an endowed chair at the United States Attorney's *alma mater*"; or appointment of an independent monitor who is "an intimate acquaintance of the prosecutor proposing the appointment." *Id.* at *6. But the court made clear that it could disapprove a DPA only if the agreement "so transgresse[d] the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the court." *Id.* at *6; *cf.* USAM § 9-16.325

(recognizing that DPAs and other similar agreements "should not include terms requiring the defendant to pay funds to a charitable, educational, community, or other organization or individual 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"). That limitation on the court's power was a result of the "[s]ignificant deference [that] is owed the Executive Branch in matters pertaining to prosecutorial discretion." 2013 WL 3306161, at *8. The *HSBC* court, moreover, had no occasion to address the hypotheticals that it raised and, indeed, approved the DPA at issue in that case. *Id.* at *1.

C. The District Court exceeded its proper role when it refused to exclude time under § 3161(h)(2) based on its judgment that the terms of the DPA are too lenient.

The district court in this case transgressed the separation-of-powers framework and exceeded its role under § 3161(h)(2). The district court based its decision not to exclude time under the Speedy Trial Act solely on its view that the terms of the DPA were too lenient. Indeed, the court was remarkably candid on this point, asserting that it had authority to weigh the interests of "the public as well as the defendant" and to police "overly-lenient prosecutorial action," concluding that the DPA was not "an appropriate exercise of prosecutorial discretion" and giving no sign of deferring to the government's judgment.

Mem. op. 10, 13 (JA 330, 333). At bottom, the court's decision rests on nothing more than its judgment that the penalties imposed on FSBV and individuals within the corporation are "grossly disproportionate to the gravity of Fokker Services' conduct in a post-9/11 world." *Id.* at 12-13 (JA 332-33). Indeed, the court's belief that "individuals" should be "prosecuted for their conduct at issue here," *id.* at 11 (JA 331), is doubly incorrect — given both the irrelevance of charges against individuals to the propriety of a DPA involving charges solely against a corporation, and the fact that the decision whether to charge individuals is a matter assigned solely to the Executive Branch.

In reaching its conclusion, the district court invoked the text of the Speedy Trial Act, the decision in *HSBC*, and its own "supervisory power." But none of these authorizes a district court to engage in the kind of intrusive review for leniency that the court conducted here. As explained above, the Speedy Trial Act's language requiring "approval of the court" naturally encompasses solely the court's review to ensure that the parties have entered the agreement for the "*purpose* of allowing the defendant to demonstrate his good conduct." 18 U.S.C. § 3161(h)(2) (emphasis added). The district court nowhere suggested that the parties lacked such a purpose, or had entered into the agreement solely to avoid the requirements of the Speedy Trial Act.

Likewise, the district court's opinion in *HSBC* recognized the possibility that courts may review the terms of a DPA to ensure they do not "so transgress[] the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the court." 2013 WL 3306161, at *6. In the absence of unlawful or unethical DPA terms, however, the *HSBC* court recognized that judicial review is poorly suited to policing the decision to prosecute, and cautioned that judges "need to be mindful that they have no business exercising [prosecutorial] discretion and, as an institutional matter, are not equipped to do so." *Id.* at *8.

Finally, although a district court certainly has a supervisory role not expressly set forth by statute, it must "refrain from using the supervisory power to conform executive conduct to judicially preferred norms." *United States v. Santana*, 6 F.3d 1, 9-11 (1st Cir. 1993). Specifically, a district court has supervisory power (1) to remedy a violation of individual rights; (2) to deter illegal conduct; and (3) to preserve judicial integrity. *United States v. Hasting*, 461 U.S. 499, 505 (1983). But the "primary meaning of 'judicial integrity' . . . is that the courts must not commit or encourage violations of the Constitution." *United States v. Janis*, 428 U.S. 433, 458 n.35 (1976). Thus, "[j]udicial integrity is rarely threatened significantly when executive action does not violate the Constitution, a federal statute, or a procedural rule." *United States v. Gatto*, 763 F.2d 1040, 1046

(9th Cir. 1985). For that reason, "the separation-of-powers principle imposes significant limits" on courts' supervisory authority, and courts "may not exercise any supervisory power absent 'a clear basis in fact and law for doing so.'" *Id.*

The facts of this case illustrate with the utmost clarity the impropriety of judicial review of DPAs for leniency. As the district court recognized, FSBV is in serious financial distress, *see* mem. op. 12 n.5 (JA 332) ("Fokker Services requires financial support from its parent company . . . in order to meet the costs of complying with this agreement and others Fokker Services has reached with other U.S. agencies"); voluntarily disclosed its violations and cooperated with the government's investigation, *see id.* at 12 & n.4 (JA 332); and disgorged the total revenues that it earned from illegal activities in fines and forfeitures, *see id.* at 11 (JA 331). Moreover, the case arises out of a prosecution for violations of a national security-related statute restricting exports to foreign nations and involves a foreign company — areas implicating complex threat assessments and foreign-policy determinations over which the Executive Branch has unique authority and expertise. *Cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

Taken together, these factors bring the prosecutors' actions here well within the scope of permissible discretion. The United States reasonably weighed the

important national-security interests at stake in this case. The government believed that the DPA was appropriate because it has a strong interest in encouraging companies to voluntarily disclose criminal activity, because FSBV had already been fully cooperative for four years, and because FSBV was in financial distress and could not afford a larger penalty. *See* JA 79-80; *see also* JA 128 (analysis indicating that "a larger penalty could impose financial difficulties rendering impossible receipt of any payment by the Department of Justice"). In addition, the United States carefully considered the appropriate use of scarce agency resources, particularly given the difficulty of obtaining witnesses and evidence not located in the United States and the difficulty of proving every element of an International Emergency Economic Powers Act violation beyond a reasonable doubt. *See* JA 97 (observing that "the government lacked sufficient proof to demonstrate that a person with adequate responsibility over the company's affairs had both the necessary knowledge of the corporation's legal responsibility to abide by U.S. sanctions and knowledge of the manner in which Fokker Services was evading those sanctions").

The district court would have given these considerations less weight and would have placed greater importance on the seriousness of the underlying conduct. That may not be an unreasonable judgment, but it is not one that courts

are well-suited or constitutionally empowered to make. The district court's contrary judgment that the DPA "does not constitute an appropriate exercise of prosecutorial discretion" illustrates why prosecutors, not courts, should be allowed to make these decisions. Mem. op. 13 (JA 333).

II. This Court has jurisdiction under the collateral-order doctrine or pursuant to a writ of mandamus.

This Court has jurisdiction to correct the district court's error under the collateral-order doctrine or, in the alternative, pursuant to a writ of mandamus. Neither of the two cases that this Court directed the parties to address — the Supreme Court's opinion in *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989), and this Court's opinion in *United States v. Crosby*, 20 F.3d 480 (D.C. Cir. 1994) — precludes jurisdiction in this case. *See* Order, No. 15-3016 (filed May 5, 2015) (directing the parties to address this Court's jurisdiction and specifically citing these two cases). Both cases confronted collateral-order appeals in circumstances where the need to avoid piecemeal litigation was stark. In addition, the United States seeks, in the alternative, the issuance of a writ of mandamus. Neither *Midland Asphalt* nor *Crosby* addressed the jurisdiction of this Court pursuant to a petition for a writ of mandamus.

A. This Court has jurisdiction under the collateral-order doctrine.

Under the collateral-order doctrine, this Court may exercise appellate review of district court orders that (1) are "conclusive," (2) "resolve important questions separate from the merits," and (3) "are effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009); 28 U.S.C. § 1291. Although it is true that the Supreme Court has "interpreted the collateral order exception 'with the utmost strictness' in criminal cases," *Midland Asphalt*, 489 U.S. at 799, this appeal presents one of the "very few" instances in which it is appropriate to permit the government to invoke the doctrine, *Carroll v. United States*, 354 U.S. 394, 403 (1957).

The district court's order was unquestionably a "conclusive" rejection of the DPA. That issue is "completely separate from the merits" of the action in the district court, *i.e.*, whether FSBV is guilty of the criminal charges. And the district court's ruling would be effectively unreviewable on appeal from a final judgment on the merits, in part because the very purpose of a DPA is to avoid any further proceedings in the case. This case accordingly comes within the narrow class of criminal appeals where the "interests asserted by the Government or by the public at large are sufficiently important to merit interlocutory review." *United States v. Mitchell*, 652 F.3d 387, 395 (3d Cir. 2011) (en banc) (allowing government appeal

of district court's order prohibiting pretrial collection of a DNA sample from defendant); *United States v. Moussaoui*, 483 F.3d 220, 226-32 (4th Cir. 2007) (allowing government appeal of district court's order directing government to provide non-public discovery materials to civil plaintiffs in related litigation).

Put slightly differently, the doctrine's requirements essentially ask whether, when the category of order at issue is considered as a class, "[t]he justification for immediate appeal [is] sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes." *Mohawk Indus.*, 558 U.S. at 107. Here, the district court's refusal to exclude the DPA period under § 3161(h)(2) has left the parties with essentially three choices: (1) renegotiate the DPA to the court's satisfaction, (2) proceed to a trial or plea, or (3) allow the speedy-trial clock to run, obtain dismissal of the case, and then appeal. The first two options render the disapproval of the original DPA unreviewable and deny the government the ability to resolve the charges in the manner it believes best serves the public interest. *Cf. Carson v. American Brands, Inc.*, 450 U.S. 79, 86-88 (1981) (reasoning that denying immediate review of an order rejecting a consent decree in a civil case could "have the 'serious, perhaps irreparable, consequence' of denying the parties their right to compromise the dispute on mutually agreeable terms") (citation omitted). The third option entails a risk that the district court could

dismiss with prejudice, *see* 18 U.S.C. § 3162(a)(2), leaving the government with no ability to refile the charges absent successful appeal of the dismissal. Alternatively, if the government successfully obtained a dismissal of the case without prejudice, it would create the risk that this Court might conclude that such a dismissal is not an appealable final judgment, *see United States v. Davis*, 766 F.3d 722 (7th Cir. 2014), *reh'g en banc granted* (Feb. 13, 2015), or the risk that the government could not refile charges that fall outside the statute of limitations, *see id.* at 730 (noting that "statute of limitations [c]ould prevent the government from reindicting the defendants"); 18 U.S.C. § 3282(a). Given the various risks that a dismissal with or without prejudice creates, in the narrow circumstances present here, forcing the parties to obtain either a conviction or dismissal would negate their ability to obtain the benefits of the underlying DPA.

That commonsense conclusion is all the more appropriate in light of the primary rationale for limiting the collateral-order doctrine — namely, the desire to avoid piecemeal appeals. *See, e.g.*, *Mohawk Indus.*, 558 U.S. at 106 (listing as the primary "virtue[] of the final-judgment rule" the preclusion of "piecemeal, prejudgment appeals"); *Mitchell*, 652 F.3d at 398 (observing that "exercise of jurisdiction over [ ] appeal pursuant to the collateral order doctrine is consistent with the policy of finality"). Unlike the factual circumstances and procedural

posture at stake in *Midland Asphalt* and *Crosby*, an immediate appeal here would not encourage "piecemeal, prejudgment appeals." For example, in *Midland Asphalt*, the Supreme Court rejected a criminal defendant's invocation of the collateral-order doctrine to appeal the denial of a motion to dismiss an indictment for an alleged violation of grand jury secrecy where the government sought to proceed directly to trial. 489 U.S. at 795-96. Similarly, in *Crosby*, one of the defendants argued that a pending prosecution, on which the United States sought to proceed immediately, "violate[d] the terms of two earlier plea agreements." 20 F.3d at 487.

In this instance, both parties seek to resolve a legal question — whether the district court erroneously failed to exclude time under the Speedy Trial Act — rather than proceed to a criminal trial at all. *Cf. Midland Asphalt*, 489 U.S. at 800 (observing that the collateral-order doctrine may be used, in appropriate circumstances, where appeal addresses the right "*not be tried at all*"); *Carson*, 450 U.S. at 88 ("Settlement agreements may thus be predicated on an express or implied condition that the parties would, by their agreement, be able to avoid the costs and uncertainties of litigation."). The district court's order interferes with the parties' ability to negotiate an agreement; creates considerable uncertainty in the ability of the government to reach comparable agreements with other parties; and,

as explained in detail above, trenches upon the prosecutorial discretion of the United States.

B. In the alternative, this Court has jurisdiction pursuant to a writ of mandamus.

In the alternative, this Court has jurisdiction to correct the district court's error pursuant to a writ of mandamus. *See* 28 U.S.C. § 1651(a) (authorizing this Court to "issue all writs necessary or appropriate in aid of" its jurisdiction "and agreeable to the usages and principles of law"). Neither of the two cases that the Court directed the parties to address — *Midland Asphalt* and *Crosby* — involved the mandamus jurisdiction of the courts of appeals and, hence, neither is relevant to this issue. *See, e.g.*, *In re Kellogg Brown & Root*, 756 F.3d 754, 762 (D.C. Cir. 2014) (observing that mandamus "remains a useful safety valve" even where the collateral-order doctrine does not apply) (internal quotation marks omitted).

As this Court has explained previously, a court of appeals possesses mandamus jurisdiction if three requirements are met: (1) there is "'no other adequate means to attain the [requested] relief'"; (2) the "right to issuance of the writ is 'clear and indisputable'"; and (3) "'the writ is appropriate under the circumstances.'" *In re Kellogg Brown & Root*, 756 F.3d at 760 (quoting *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 380-81 (2004)). Although "[m]andamus is a 'drastic and extraordinary' remedy 'reserved for really

extraordinary causes,'" *id.*, courts have the authority to issue the writ to "forestall future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice," *In re Sealed Case*, 151 F.3d 1059, 1067 (D.C. Cir. 1998) (quotation marks omitted).

All three prongs for mandamus relief are met in this case. First, any relief that the government could obtain through an appeal after final judgment is not "adequate." As noted above, it would deny the parties the benefits of their DPA to require the government to let the Speedy Trial Act time period elapse and then take an appeal from a dismissal of the Information with prejudice. Such a requirement would not only create a period of time when no charges would be pending, it would force the parties to engage in unwanted litigation and create uncertainty given the risk that, if an appeal from dismissal failed, the government would be left with no avenue (or more limited avenues) to punish a concededly guilty defendant. *Cf. Kellogg Brown & Root*, 756 F.3d at 761 ("It is also true that a party in KBR's position may defy the district court's ruling and appeal if the district court imposes contempt sanctions for non-disclosure. But as this Court has explained, forcing a party to go into contempt is not an 'adequate' means of relief in these circumstances."). In addition, absent immediate relief, the government and the defendant may be effectively obliged either to proceed with a plea or trial or to

enter into a new DPA or a non-prosecution agreement, thereby foreclosing the government's ability to remedy the district court's erroneous ruling on the DPA.

Second, the government's right to relief is "clear and undisputable." In particular, many of the cases that vindicate the government's prosecutorial discretion authority necessarily arise in the mandamus context, and courts have not been hesitant to issue the writ where district courts have sought to review or to supplant the government's exercise of prosecutorial discretion. *See In re United States*, 503 F.3d 638, 642 (7th Cir. 2007) (granting mandamus and holding, where district court ordered government to provide information relating to substantial-assistance motion before accepting guilty plea, that "[e]xercises of prosecutorial discretion may be overseen only to ensure that the prosecutor does not violate the Constitution or some other rule of positive law"); *In re United States*, 345 F.3d 450, 451, 453 (7th Cir. 2003) (granting mandamus where "judge rejected the plea agreement on the ground that the one count of which [defendant] would be convicted if the agreement were accepted did not reflect the gravity of his actual offense" and reasoning that "[t]he district judge simply disagrees with the Justice Department's exercise of prosecutorial discretion"); *see also In re United States*, 572 F.3d 301, 312 (7th Cir. 2009) (observing, in granting a writ of mandamus, that "[j]udges do not possess, and should not attempt to exercise, prosecutorial

discretion"); *In re United States*, 441 F.3d 44, 58 (1st Cir. 2006) (observing, in granting a writ of mandamus, that "[u]nlike in many foreign countries, the federal courts in the American criminal justice system generally do not have the power to act as investigators or prosecutors of misconduct, including misconduct by government prosecutors" and that "[i]nvestigatory and prosecutorial decisions are usually made outside the supervision of the court") (citation and quotation marks omitted); *In re United States*, 398 F.3d 615, 618 (7th Cir. 2005) (observing, in granting a writ of mandamus, that "temptation" for a judge to play a larger role in the prosecutorial decision "must be resisted in order to maintain separation between executive and judicial roles"); *Vasquez-Ramirez*, 443 F.3d at 700 (issuing writ of mandamus because district court decision to "reject [defendant's] guilty plea is clearly erroneous and raises important issues involving prosecutorial discretion and separation of powers").

Third, the writ is "appropriate under the circumstances." *Kellogg Brown & Root*, 756 F.3d at 762. In particular, mandamus is appropriate notwithstanding the "novelty of the District Court's" ruling if the ruling has "potentially broad and destabilizing effects in an important area of law." *Id.* at 763; *Cheney*, 542 U.S. at 390 (mandamus is warranted in "exceptional circumstances amounting to a judicial usurpation of power," including cases where the court's actions "constituted an

unwarranted impairment of another branch in the performance of its constitutional duties") (citation and internal quotation marks omitted). Under this standard, the Seventh Circuit noted in *In re United States* that there cannot "be much doubt that [interlocutory] relief is available by way of mandamus" when a district court refuses to dismiss a count in a criminal case on the rationale that the government had failed to pursue the charges. 345 F.3d at 452.

In analogous circumstances, this Court in *Microsoft* recognized that the district court's refusal to enter a proposed consent decree could have "serious consequences" for the government by putting it "to a difficult, perhaps Hobson's, choice" and forcing it either to "drop its case against Microsoft entirely and allow Microsoft to continue to engage in practices which the government believes are anticompetitive" or "to litigate and presumably proceed under a vastly expanded complaint that in effect asserts that Microsoft engaged in activities which the government does not believe are illegal . . . or seeks remedies which the government does not believe are justified by the evidence." 56 F.3d at 1456 (addressing jurisdiction under 28 U.S.C. § 1292(a)(1), which authorizes appellate jurisdiction over "[i]nterlocutory orders . . . refusing . . . injunctions"). Moreover, the *Microsoft* court noted that the "consent decree is part of a negotiated settlement" whose rejection "cannot but have enormous practical consequences for

the government's ability to negotiate future settlements." *Id.* Similarly, the Second Circuit recognized that the *Citigroup* case raised "important questions," including "the division of responsibilities as between the executive and the judicial branches and the deference a federal court must give to policy decisions of an executive administrative agency as to whether its actions serve the public interest (and as to the agency's expenditure of its resources)." *SEC v. Citigroup Global Markets, Inc.*, 673 F.3d 158, 160 (2d Cir. 2012).

This appeal raises similarly weighty issues on the allocation of power between the executive and the judiciary. Its resolution by this Court would resolve the status of the DPA in this case, over which the parties have engaged in lengthy negotiations. Its resolution by this Court would also resolve the appropriate scope of judicial review of DPAs generally, thereby reducing the uncertainty that the district court's expansive view of its own authority has created and, by extension, clarifying the ground on which future negotiations over DPAs occur. Failure to intercede, by contrast, will leave in place the uncertainty created by the district court's opinion, which may well impede future negotiations over DPAs between the government and potential defendants.

CONCLUSION

For these reasons, the decision below should be reversed, and the case remanded with instructions to grant the Joint Consent Motion for Exclusion of Time Under the Speedy Trial Act.

Respectfully submitted,

VINCENT H. COHEN, Jr.
Acting United States Attorney
ELIZABETH TROSMAN
ELIZABETH H. DANELLO
MAIA L. MILLER
Assistant United States Attorneys
555 4th St., NW
Washington, D.C. 20530
Telephone: (202) 252-6829

JOHN P. CARLIN
Assistant Attorney General
for National Security
MARY B. McCORD
Principal Deputy Assistant Attorney General
J. BRADFORD WIEGMANN
Deputy Assistant Attorney General
STEVEN M. DUNNE
Chief, Appellate Unit
/s/ Aditya Bamzai
ADITYA BAMZAI
Attorney
National Security Division
U.S. Department of Justice
Telephone (202) 532-4493

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 12,572 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font size and Times New Roman type style.

/s/ Aditya Bamzai
ADITYA BAMZAI
Attorney for the United States

Dated: June 4, 2015

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on June 4, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Aditya Bamzai
ADITYA BAMZAI
Attorney for the United States

Addendum

18 U.S.C. § 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of

subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period

between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from trial with respect to other charges against the defendant;

(C) delay resulting from any interlocutory appeal;

(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any 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.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(6) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, 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. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent

preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(8) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly--

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)(1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.