The Heritage Foundation

LEGAL MEMORANDUM

No. 141 | OCTOBER 23, 2014

The Problematic Use of Nonprosecution and Deferred Prosecution Agreements to Benefit Third Parties

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Abstract

Nonprosecution and deferred prosecution agreements, a staple of the federal government's disposition of corporate criminal investigations, raise several important public policy issues and deserve to be subjected to congressional oversight and regulation. The practice of using N/DPAs to force a corporation to make contributions to third parties, for example, enables Justice Department lawyers to disburse to third parties of their own choosing funds that properly should be paid into the federal treasury, from which funds can be paid out only if elected federal officials make the relevant appropriations decisions. Congress either should prohibit this practice or should require that a magistrate judge review the appropriateness of every such disbursement to ensure that government lawyers use this disbursement authority only to compensate victims of wrongdoing, not the Administration's cronies.

Key Points

- Nonprosecution and deferred prosecution agreements (N/DPAs) resolve potential or filed criminal charges in a manner that resembles a plea bargain but does not involve the entry of a judgment enforceable by a court.
- This unregulated discretion to dispose of cases without a trial or plea agreement leads to untoward results in white-collar cases involving large corporations.
- The government uses such agreements to benefit third parties. This problem arises from the lack of any judicial review of the N/DPA process.
- This practice allows the Justice Department to pick and choose as to which private organizations will receive federal funds without any guidance from Congress or any oversight by the relevant committees in each chamber.
- One remedy for this problem is to deny the Justice Department the opportunity to make those decisions. Another is to have federal magistrate judges review those decisions to ensure that any third-party payments go only to actual victims of any alleged wrongdoing.

Unlike what King John thought[1] or what Judge Dredd proclaimed,[2] the President of the United States is not "the law." The Constitution is the nation's fundamental law,[3] and the power to supplement it by legislation resides with Congress under Article I.[4] The President enjoys only whatever authority the Constitution or Congress grants him.[5] His principal domestic power is not to *make* the law, but to *enforce* it, which Article II signifies by directing the President to "take Care that the Laws be faithfully executed."[6]

The President necessarily enjoys some discretion to decide what laws to enforce, how and how often to enforce them, and so forth. That proposition is best known in connection with the government's decision whether to charge someone with a crime, where the concept of prosecutorial discretion has an ancient lineage.[7] Con-

This paper, in its entirety, can be found at **http://report.heritage.org/lm141**

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gress gives the President only limited resources to do every job that he and his lieutenants must perform, and the President is not free to run up government credit card debt or to spend whatever additional money he may think he needs to do the job right.[8]

Yet the President does not possess complete and utter discretion to accomplish that mission however he decides best. Congress and the courts may hem in the President in the pursuit of congressional priorities or the protection of individual liberties, and sometimes they do just that.[9]

Rarely, however, does Congress tell the President or the Attorney General, the President's principal lieutenant for law enforcement,[10] how to exercise charging and plea bargaining discretion in criminal cases. No statute generally directs the Attorney General as to whether or how often to charge particular offenses or to enter into plea bargains for certain types of crimes. To be sure, the Justice Department has established various enforcement policies,[11] but they are not judicially enforceable.[12] For all practical purposes, as long as prosecutors do not let impermissible factors such as race or religion influence their decisions, they have the prerogative to decide whether and how to initiate or terminate any particular case.[13]

Nonprosecution and Deferred Prosecution Agreements Can Raise Troublesome Public Policy Problems

One of the areas where federal prosecutors currently enjoy virtually unlimited discretion occurs in connection with nonprosecution and deferred prosecution agreements (N/DPAs). Those agreements resolve potential or filed criminal charges in a manner that resembles a plea bargain but does not involve the entry of a judgment enforceable by a court. The legal community has only begun to analyze the merits and demerits of that practice, which raises a host of important public policy issues.[14]

In a recent article published by The Heritage Foundation,[15] Professor Richard Epstein argues that

1. *See* William Sharpe McKechnie, Magna Carta: A Commentary on the Great Charter of King John with an Historical Introduction 96 (2d ed. 1914) ("The power of the Norman kings might almost be described as irresponsible despotism, tempered by fear of rebellion.").
2. *Judge Dredd* (Buena Vista Pictures 1995), https://www.youtube.com/watch?v=miVoe7U6Lx4.
3. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).
4. U.S. Const. art. I, § 8 (listing the subjects about which Congress may legislate).
5. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952); *id*. at 635–38 (Jackson, J., concurring).
6. U.S. Const. art. II, § 3, cl. 5.
7. *See* The Confiscation Cases, 74 U.S. (7 Wall.) 454, 457–58 (1868).
8. Congress has the prerogative to allocate federal funds. The Constitution bars the government from spending unappropriated funds, U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]"), and the Anti-Deficiency Act prohibits the government from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding…an appropriation" or relevant funds, 31 U.S.C. § 1341(a)(1)(A) (2012).
9. For example, the Tunney Act, 15 U.S.C. § 16 (2012), regulates the procedure by which the federal government can enter into a consent decree in an antitrust case.
10. The Attorney General has the power to direct civil and criminal litigation for the United States. 28 U.S.C. §§ 503, 506, 509–19 (2012).
11. *See, e.g.*, Memorandum for Selected United States Attorneys from David W. Ogden, Deputy Atty. Gen., U.S. Dep't of Justice (Oct. 19, 2009) (stating Justice Department policy on marijuana prosecutions in jurisdictions that have medical marijuana laws or that have decriminalized possession), www.justice.gov/opa/documents/medical-marijuana.pdf; Memorandum from Deputy Attorney General Eric Holder to All Component Heads and United States Attorneys on Bringing Charges Against Corporations (June 16, 1999), http://www.friedfrank.com/files/QTam/holdermemo.pdf.
12. *See* United States v. Caceres, 440 U.S. 741 (1979) (ruling that the government's acquisition of evidence in violation of an IRS regulation does not require suppression); *cf*. Philip Areeda et al., Antitrust Analysis: Problems, Text, and Cases ¶ 133, at 44–45 & n.21 (6th ed. 2004) (collecting various antitrust enforcement policies but noting that they are not enforceable in court).
13. *See, e.g.*, United States v. Armstrong, 517 U.S. 456 (1996).
14. *See generally* Paul J. Larkin, Jr., *Funding Favored Sons and Daughters: Nonprosecution Agreements and "Extraordinary Restitution" in Environmental Criminal Cases*, 47 Loyola L.A. L. Rev. 1 (2013). This *Legal Memorandum* draws on the discussion in that article.
15. Richard A. Epstein, *The Dangerous Incentive Structures of Nonprosecution and Deferred Prosecution Agreements*, The Heritage Foundation Legal Memorandum No. 129 (June 26, 2014), *available at* http://thf_media.s3.amazonaws.com/2014/pdf/LM129.pdf. For convenience, this article will refer only to nonprosecution agreements, but the points made apply equally to deferred prosecution agreements.

the government's unregulated discretion to dispose of cases without a trial or plea agreement—that is, without any involvement of the federal judiciary—leads to various untoward results in white-collar cases involving large corporations. As Epstein's article illustrates, there are systemic flaws in a system of justice that relies heavily on such agreements in order to avoid having a trier of fact decide the merits of a criminal charge against a large corporation.

A major problem is that N/DPAs severely skew the incentives that each party has to let a jury (or judge) decide the merits of the government's claims at trial. The collateral consequences that a corporation can suffer from simply being charged with a crime—for example, increased costs in capital markets, the inability to contract with the federal government, or the suspension of professional licenses—often may exceed whatever monetary penalty a court could impose on the corporation after conviction.

The result is that the N/DPA process effectively inverts the incentive structure otherwise envisioned by the criminal justice system. Using N/DPAs to resolve a potential criminal case front-loads all of the costs to the corporation because the charge itself can serve as a death sentence, as prosecutors know all too well.[16] The Arthur Andersen case is the prime example of that phenomenon.[17]

Indeed, ever since that case, both the government and corporate defendants have avoided trials like the plague, albeit for very different reasons. Corporate defendants fear being charged or convicted because either one can amount to a "corporate death sentence." The government wishes to avoid a trial because the government is limited in what it can obtain after conviction only to penalties authorized by Congress.[18] The government may find those penalties inadequate, however, because they do not permit it to engage in "regulation by prosecution"—the practice by which the government seeks to alter the conduct of a business without going through the Article I lawmaking process or the notice-and-comment rulemaking process demanded by the Administrative Procedure Act (APA).[19]

Given the risk of financial injury that a corporation can face just from being indicted, it could readily be argued that nonprosecution agreements "are no more voluntary than shotgun weddings."[20]

Required Contributions to Third Parties Chosen by the Justice Department Are One of the Problems Posed by N/DPA Agreements

A different problem with the N/DPA process arises when the government uses agreements to benefit third parties. Unlike the problem that Professor Epstein identifies, this one occurs at the back end of the N/DPA process, not the front end. It also arises due to the lack of any judicial review of the N/DPA process.

A corporation cannot be imprisoned, so the principal concern of any corporation under investigation will be the optimal dollar-and-cents resolution of the matter. If the cost of agreeing to an N/DPA is less than the cost of being charged and convicted (discounted by the strength of the defendant's proof of its innocence), which is usually the case, the corporation will agree to whatever the government offers in order to make the entire problem go away. What a corporation is concerned with is the amount of whatever check it has to write, not the name of the

16. *See* Larkin, *supra* note 14, at 18 & n.47.

17. *See* Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 Am. Crim. L. Rev. 107 (2006).

18. *See Ex parte* United States, 242 U.S. 27, 42–43 (1916); Larkin, *supra* note 14, at 27–28.

19. 5 U.S.C. §§ 701–06 (2012). Professor Epstein and other commentators have criticized the government's use of N/DPAs to evade accountability. *See* Epstein, *supra* note 15; Larkin, *supra* note 14, at 5 & nn.5–6 (collecting authorities). A similar problem also exists in the administrative process, where the government seeks to use informal regulatory devices rather than the APA rulemaking process. The legality of an agency's use of informal actions to escape APA accountability, however, is beyond the scope of this article. For discussions of that problem, see, *e.g.*, Jerry Brito, *"Agency Threats" and the Rule of Law: An Offer You Can't Refuse*, 37 Harv. J. L. & Pub. Pol'y 553 (2014); Henry N. Butler & Nathaniel J. Harris, *Sue, Settle and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 Harv. J. L. & Pub. Pol'y 579 (2014); John D. Graham & James W. Broughel, *Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act*, 1 Harv. J. L. & Pub. Pol'y: Federalist 30 (2014); John D. Graham & Cory R. Liu, *Regulatory and Quasi-Regulatory Activity Without OMB and Benefit-Cost Review*, 37 Harv. J. L. & Pub. Pol'y 425 (2014); Nina A. Mendelson & Jonathan B. Wiener, *Responses to Agency Avoidance of OIRA*, 37 Harv. J. L. & Pub. Pol'y 447 (2014); Stuart Shapiro, *Agency Oversight as "Whac-a-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 Harv. J. L. & Pub. Pol'y 523 (2014).

20. Larkin, *supra* note 14, at 8.

payee. A dollar paid to Peter costs as much (or as little) as a dollar paid to Paul.[21]

The result is twofold: The corporation is indifferent as to the recipient of a payment, and the Justice Department has unfettered discretion to decide who will receive that money. That combination can pose a real problem that has largely gone unnoticed.

Consider what the Justice Department has done with that discretion. Ordinarily, the department would deposit into the U.S. Treasury whatever checks it receives to settle a case, which enables Congress to specify the purposes for which it can be spent. Instead, the Department has required corporations to contribute to different charitable organizations of the government's choosing.[22] The practice of identifying third-party recipients of monies that a corporation pays out in an N/DPA is tantamount to dispensing taxpayer funds to whatever particular recipient the Justice Department selects. That practice raises important public policy issues that neither Congress nor the federal courts have yet addressed.[23]

The amounts involved are "real money," as the late Senator Everett Dirksen (R–IL) would have described it. As *The Economist* recently noted, the sum that the Justice Department has raked in and can disburse is "mind-boggling."[24] In 2014, JPMorgan Chase, Citigroup, Goldman Sachs, Bank of America, and other banks "have coughed up close to $50 billion for supposedly misleading investors in mortgage-backed bonds."[25] Then there is BP's $13 billion settlement for the Deepwater Horizon oil spill, Toyota's $1.2 billion settlement over alleged faults in its automobiles, among many others.[26]

There also is a decided ideology common to many of the groups that have benefitted from the Justice Department's largesse. According to *Investor's Business Daily*,

> Radical Democrat activist groups stand to collect millions from Attorney General Eric Holder's record $17 billion deal to settle alleged mortgage abuse charges against Bank of America.
>
> Buried in the fine print of the deal, which includes $7 billion in soft-dollar consumer relief, are a raft of political payoffs to Obama constituency groups. In effect, the government has ordered the nation's largest bank to create a massive slush fund for Democrat special interests.[27]

Investor's Business Daily offers the following examples:

> According to the list provided by Justice, [housing activist groups approved by HUD] include some of the most radical bank shakedown organizations in the country, including:
>
> - La Raza, which pressures banks to expand their credit box to qualify more low-income Latino immigrants for home loans;
> - National Community Reinvestment Coalition, Washington's most aggressive lobbyist for the disastrous Community Reinvestment Act;
> - Neighborhood Assistance Corporation of America, whose director calls himself a "bank terrorist;"
> - Operation Hope, a South Central Los Angeles group that's pressuring banks to make "dignity mortgages" for deadbeats.

21. The rule would be different if the corporation could claim a tax deduction for making an N/DPA payment, but the government often requires a corporation to waive any such claim. *See* Larkin, *supra* note 14, at 8.

22. Larkin, *supra* note 14, at 7.

23. *See id*. at 29–47.

24. *The Criminalization of American Business: Corporate Settlements in the United States*, The Economist, Aug. 30, 2014, *available at* http://www.economist.com/news/leaders/21614138-companies-must-be-punished-when-they-do-wrong-legal-system-has-become-extortion.

25. *Id*.

26. *Id*.

27. *Holder Cut Left-Wing Groups In On $17 Bil BofA Deal*, Investor's Business Daily, Aug. 27, 2014, *available at* http://news.investors.com/ibd-editorials/082714-715046-holders-bank-of-america-settlement-includes-payoffs-to-democrat-groups.htm?p=full. The settlement agreement with Bank of America resolves one pending case and numerous other Justice Department investigations into alleged mortgage fraud that have not resulted in criminal charges or civil complaints. *See* Settlement Agreement (signed Aug. 18–20, 2014), http://www.justice.gov/iso/opa/resources/962201482111164241759 5.pdf.

> Worse, one group eligible for BofA slush funds is a spin-off of Acorn Housing's branch in New York.
>
> It's now rebranded as Mutual Housing Association of New York, or MHANY. HUD lists MHANY's contact as Ismene Speliotis, who previously served as New York director of Acorn Housing.[28]

Moreover, the settlement stipulates that:

> [Any money remaining after four years] will go to Interest on Lawyers' Trust Account (IOLTA), which provides legal aid for the poor and supports left-wing causes, and NeighborWorks of America, which provides affordable housing and funds a national network of left-wing community organizers operating in the mold of Acorn.
>
> In fact, in 2008 and 2009, NeighborWorks awarded a whopping $25 million to Acorn Housing.
>
> In 2011 alone, NeighborWorks shelled out $35 million in "affordable housing grants" to 115 such groups, according to its website. Recipients included the radical Affordable Housing Alliance, which pressures banks to make high-risk loans in low-income neighborhoods and which happens to be the former employer of HUD's chief "fair housing" enforcer.[29]

Environmental groups have also benefitted from N/DPAs:

> [T]he federal government required the Gibson Guitar Corporation to pay a $300,000 fine for an alleged violation of an import law and to make a $50,000 "community service payment" to the National Fish and Wildlife Foundation (NFWF) for the benefit of the environment.[30]

The above examples arose during Democrat Administrations, but Republicans are guilty of the same sin.

> In 2006, Operations Management International, Inc., agreed to "donate" $1 million to the Alumni Association for the United States Coast Guard Academy, and $1 million to the Greater New Haven Water Pollution Control Authority, as part of a deferred prosecution agreement for an alleged violation of the Clean Water Act.... That year, FirstEnergy agreed to pay $4.3 million to the Ottawa National Wildlife Refuge and to other community service projects in a deferred prosecution agreement regarding allegedly false statements made to the Nuclear Regulatory Commission.[31]

And in 2005, the United States Attorney's Office for the District of New Jersey, which was headed by then-U.S. Attorney Chris Christie, negotiated a non-prosecution agreement with Bristol-Myers Squibb in which the company agreed, among other things, to make a $5 million gift to Seton Hall University's law school—Christie's alma mater—in order to avoid prosecution for securities fraud.[32]

Regardless of who benefits from such unexpected government largesse, this practice merits the considered attention of Congress.

The Justice Department's Practice Is Objectionable on Several Public Policy Grounds

There are at least three objections to this aspect of the N/DPA process. The first one is that the Justice Department lacks the authority to hand over unappropriated government funds to parties of its own choosing. The Constitution and federal law

28. *Id.*

29. *Id.*

30. *See* Larkin, *supra* note 14, at 7 n.12.

31. *See* Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 Am. Crim. L. Rev. 1095, 1160–61 (2006) (discussing the deferred prosecution agreements with FirstEnergy and Operations Management International, Inc., for Clean Water Act violations).

32. See Larkin, *supra* note 14, at 32 & n.99. Handing out money that properly should be deposited in the federal Treasury is not the only problem with N/DPAs. "In a criminal prosecution of KPMG LLP for abusive tax shelters, the federal government coerced the company to cut off funding that it previously had agreed to provide to its employees for their defense. The district court ruled that the government's actions unconstitutionally interfered with the employees' ability to mount a defense and so greatly jeopardized the likelihood of a fair trial that dismissal of the charges was appropriate, a decision and remedy that the Second Circuit upheld on the government's appeal." Larkin, *supra* note 14, at 31–32.

speak to how taxpayers' money can be disbursed, and the teaching of those authorities is that it is Congress's prerogative to decide who should receive federal funds.[33]

Congress also cares greatly about the issue, as witnessed by the detailed allocations of federal funds made by the annual appropriations bills that it passes. Congress does not give the President a lump-sum allowance that he can spend as he sees fit; it specifies in detail exactly which Tom, Dick, or Harry can receive appropriated funds, how much money each one gets, and for what purposes it can be used. The N/DPA process therefore is an end run around Congress's role in the federal appropriations process.

The second objection is that the practice denies the public the opportunity to know how public funds are spent and to hold elected officials accountable for their choices. The Constitution and federal law combine to ensure that the executive branch cannot spend money without the prior approval of Congress, which requires every Member to cast a ballot for the annual appropriations bills. That rule ensures that each voter can know what every Member does with the public's tax dollars and can use that information every two or six years when a new election comes around to decide whether to "throw the bums out."

By letting the executive branch make decisions that the Constitution envisions that only Congress should make, the Members of Congress who allow this practice to continue are simply asking the voters to "pay no attention to that man behind the curtain"[34] in the hope that they will not hold Senators and Representatives accountable at the polls for any funding decisions that the public dislikes. The N/DPA process therefore denies the public valuable information that it needs to make an informed decision at the polls.

The third objection is that the practice allows the Justice Department to pick and choose among private organizations as to which ones will receive federal funds without any guidance from Congress or any oversight by the Judiciary or Appropriations Committees in each chamber. The entirely discretionary nature of this process can easily lead to favoring one charity or organization over another on entirely subjective grounds.

The parties who benefit from the government's disbursement of N/DPA funds may be organizations that should receive federal funds because they improve the lot of the citizenry in particular ways, such as by helping to improve the environment in areas that a corporation allegedly (since there is no conviction) damaged. But why should an environmental organization, for example, receive money that could just as easily go to Guiding Eyes for the Blind, a school that trains dogs to serve as companions to the blind and the interface between them and the world?

There is no guarantee that the payments a corporation makes to a third party chosen by the government will go to the actual victims of an environmental crime or housing fraud scheme, while the payments made to an organization like Guiding Eyes for the Blind will doubtless benefit people who are obviously less fortunate than most. A reasonable argument can be made that any number of other charitable organizations deserve the same opportunity to assist people who need better food, drinking water, health care, education, access to public transportation, housing, and so forth.

Decisions about how to disburse federal funds and whether any of those funds should be given directly to private organizations should not be made through a process that shrouds how those decisions are made and permits individual decisionmakers to rely on personal biases and predilections. The Justice Department's actions may or may not be defensible under the law, but they certainly do not give the appearance of having been made in a just manner or ensuring a just result. The Justice Department's N/DPA and settlement practices justify the inference that the federal government is extorting settlements from businesses in order to transfer funds to cronies that the Administration could never persuade Congress to appropriate for them.

To be sure, leaving appropriations decisions to Members of Congress hardly guarantees that personal biases will play no role in how public funds are spent. No one is that gullible. But the public has the opportunity to hold Senators and Representatives accountable at the polls for their decisions, an opportunity that they lack whenever career lawyers or political appointees at the Justice Depart-

33. *Supra* note 7.

34. *The Wizard of Oz* (Metro-Goldwyn-Mayer 1939), https://www.youtube.com/watch?v=YWyCCJ6B2WE.

ment decide which organizations will benefit from an N/DPA. The public deserves the opportunity to hold the government accountable for its taxing and spending decisions. Returning that decision to Congress whenever the Justice Department uses an N/DPA would be a big step in the right direction.

Two Potential Remedies for the N/DPA Third-Party Payment Problem

One remedy for this problem is to deny the Justice Department the opportunity to make those decisions at all. Congress could require by statute that any and all funds paid by a corporation in connection with an N/DPA or settlement go into the public treasury where they would be paid out as part of the ordinary appropriations process. The Justice Department could encourage Congress to fund particular organizations with the money received through an N/DPA, but it would be up to the Senate and the House to decide whether to endorse or reject that recommendation in the same way that those chambers make all other appropriations decisions. That approach would at least return the disbursement process to its rightful place in government.

Another remedy is to enlist the aid of federal magistrate judges to review those decisions to ensure that any third-party payments go only to actual victims of any alleged wrongdoing. At present, the N/DPA process is largely left to the parties to negotiate a workable agreement without any judicial oversight. In the case of a deferred prosecution agreement, the government already has filed a charge in federal court, so a district court judge must approve the government's decision to dismiss an indictment or information.[35]

Judicial review, however, is quite limited in that setting. For all practical purposes, as long as the government has not sought to dismiss the prosecution for an illegitimate reason—for instance, the prosecutor was bribed to "deep six" the case—the district court must go along with the government's request.[36] By contrast, whenever the government seeks to enter into a nonprosecution agreement, no charges have been or will be filed, so no district court judge may be able to review the agreement's terms.[37]

Given the Article III "Case or Controversy" requirement, it may not be possible to enlist a federal district court to review such an agreement.[38] Congress could entrust that responsibility, however, to a magistrate judge, who is not an Article III officer.[39] That option would be less desirable from the perspective of ensuring the public accountability of elected officials for their appropriations decisions, but if Senators and Representatives are dead set on punting the ball to someone else and avoiding public responsibility for those decisions, this alternative at least would ensure that a second, neutral pair of eyes reviews every nonprosecution agreement and that only the victims of any possible crimes benefit from any N/DPA third-party payments.

Conclusion

N/DPAs have become a staple of the federal government's disposition of corporate criminal investigations. They raise several important public policy issues, however, and deserve to be subjected to congressional oversight and regulation.

One of the issues is the practice of using N/DPAs as a vehicle to force a corporation to make contribu-

35. *See* Fed. R. Crim. P. 48(a) ("The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent.").

36. *See, e.g.*, Rinaldi v. United States, 434 U.S. 22, 30 (1977) (stating that, when the government seeks to dismiss an indictment or information, "[t]he salient issue…is not whether the decision to maintain the federal prosecution was made in bad faith but rather whether the Government's later efforts to terminate the prosecution were similarly tainted with impropriety."); SEC v. Citigroup Global Markets, Inc. 752 F.3d 285, 294 (2d Cir. 2014) (applying a similar standard to determine whether the SEC and a private party should be allowed to dispose of a civil case via a consent decree; "the proper standard for reviewing a proposed consent judgment involving an enforcement agency requires that the district court determine whether the proposed consent decree is fair and reasonable, with the additional requirement that the 'public interest would not be disserved'" (quoting eBay, Inc. v. MercExchange, 547 U.S. 388, 391(2006)).

37. Federal judges can be tasked with the performance of duties other than adjudicating cases and controversies. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 384-408 (1989) (Article III judges can voluntarily serve as members of the U.S. Sentencing Commission). The Supreme Court, however, may find that supervising the administration of N/DPAs too closely resembles the process of supervising the parties' duties under a consent decree for an Article III judge to undertake that task.

38. *See, e.g.*, Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) (Article III courts cannot issue advisory opinions).

39. *Compare, e.g.*, U.S. Const. art. III, § 1 (Article III judges serve during "good Behaviour"), *with* Federal Magistrate's Act, 28 U.S.C. § 631 (2012) (full-time magistrates serve an eight-year term; part-time magistrates, a four-year term).

tions to third parties designated in the agreement. That practice enables Justice Department lawyers to disburse to third parties of their own choosing funds that properly should be paid into the federal treasury, from which funds can be paid out only if elected federal officials make the relevant appropriations decisions. Congress either should prohibit this practice altogether or should require that a magistrate judge review the appropriateness of every such disbursement in order to ensure that government lawyers use this disbursement authority only to compensate victims of wrongdoing, not the Administration's cronies.

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