POOLER, *Circuit Judge*:

I concur in the opinion and the judgment, but write separately to suggest that it is time for Congress to revisit the issue of deferred and nonprosecution agreements (collectively, "DPAs").

DPAs exist because Section 3161(h)(2) of the Speedy Trial Act 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). Without this exception, the filing of the criminal information would trigger the running of the speedy trial clock.

The Senate Judiciary Committee explained that this section was included in the Act:

> to encourage the current trend among United States attorneys to allow for deferral of prosecution on the condition of good behavior. A number of Federal and State courts have been experimenting with pretrial diversion or intervention programs in which prosecution of a certain category of defendants is held in abeyance on the condition that the defendant participate in a social rehabilitation program. If the defendant succeeds in the program, charges are dropped. Such diversion programs have been quite successful with first offenders in Washington, D.C. (Project Crossroads) and in New York City (Manhattan

> Court Employment Project). Some success has also been noted in programs where the defendant's alleged criminality is related to a specific social problem such as prostitution or heroin addiction. Of course, in the absence of a provision allowing the tolling of the speedy trial time limits, prosecutors would never agree to such diversion programs. Without such a provision the defendant could automatically obtain a dismissal of charges if prosecution were held in abeyance for a period of time in excess of the time limits set out in section 3161 (b) and (c). This section of S. 754 differs from its counterpart in S. 895. It now requires that exclusion for diversion only be allowed where deferral of prosecution is conducted "with approval of the court."
>
> This assures 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 the speedy trial time limits.

S. Rep. No. 93–1021, at 36–37 (1974)).

The two programs mentioned in the legislative history, Project Crossroads and the Manhattan Court Employment Project, were pretrial diversion programs aimed at helping individual defendants avoid the collateral consequences of a criminal conviction through programs that included education, job training, and substance abuse treatment. *See, e.g.*, Note, *Pretrial Diversion from the Criminal Process*, 83 Yale L.J. 827 (1974). The programs were viewed as "a functional equivalent of a sentence to pretrial probation," *id.* at 843, and were staffed with

paraprofessionals overseeing individuals in what was, "in effect a probationary-type of supervision and control," *id.* at 845.

In recent years, however, DPAs increasingly are used not to divert individual defendants but rather to divert corporations from criminal charges. Unlike individuals, corporations are not diverted into probation-like programs supervised by paraprofessionals. Rather, they enter into negotiated agreements with prosecutors that set forth the facts to which the corporation admits and a remedy that typically includes both a fine and an agreement for the corporation to make structural changes. The prosecution retains sole discretion to decide if the corporation adequately complied with the agreement, allowing the prosecution to act as prosecutor, jury, and judge. Prosecutors can enforce legal theories without such theories ever being tested in a court proceeding.

Using DPAs in this manner is neither improper nor undesirable. An indictment alone can deal a death blow to a corporation, with severe collateral consequences for blameless employees and shareholders. As the law governing DPAs stands now, however, the prosecution exercises the core judicial functions of adjudicating guilt and imposing sentence with no meaningful oversight from the courts.

I respectfully suggest it is time for Congress to consider implementing legislation providing for such review. *See United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 30 n.9 (D.D.C. 2015) ("This ambiguity, combined with the fact that Congress's original purpose had nothing to do with the broad-ranging corporate deferred-prosecution agreements that have become commonplace, suggests that congressional action to clarify the standards a court should apply when confronted with a corporate deferred-prosecution agreement may be appropriate.").

A bill introduced in the House in 2014 would, among other things, require the development of public, written guidelines for DPAs; require the text of DPAs to be placed on a Justice Department website; and require DPAs to be submitted to district courts for review. Accountability in Deferred Prosecution Act of 2014, H.R. 4540, 113th Cong. (2014). Courts would be charged with "approv[ing] the [DPA] if the court determines the [DPA] is consistent with the guidelines for such agreements and is in the interests of justice." *Id.* at § 7(a). In addition, the parties and any monitors would be required to file quarterly reports regarding the progress toward completions of the DPA with the court. *Id.* at § 7(b). Finally, the court would be charged with "review[ing] the

implementation or termination of the [DPA], and take any appropriate action, to assure that the implementation or termination is consistent with the interests of justice." *Id.* at § 7(c). Legislation along the lines of this proposed act would restore some balance in the DPA process.

Accordingly, I respectfully concur.