PROSECUTING BEYOND THE RULE OF LAW: CORPORATE MANDATES IMPOSED THROUGH DEFERRED PROSECUTION AGREEMENTS

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ABSTRACT

U.S. corporate criminal enforcement policy allows prosecutors to enter into deferred and nonprosecution agreements (D/NPAs) that impose corporate reform mandates on firms with detected misconduct. This article concludes that the process governing prosecutors' use of D/NPA mandates is inconsistent with the rule of law. The rule of law requires that individual executive branch actors not be given sufficient authority to restrict the rights of others to achieve personal aims, including idiosyncratic conceptions of the public interest. To satisfy the rule of law, modern governments granting discretion to executive branch actors constrain this authority by limiting the scope of authority granted and requiring external oversight of decisions. Formal enforcement through pleas and formal agency rule-making employ both mechanisms to constrain discretionary authority. By contrast, prosecutors who use D/NPAs to create and impose new duties face few limitations on the scope of their *ex ante* authority to intervene. They also face little oversight through judicial review. This broad grant of discretion to individual prosecutors' offices is inconsistent with the rule of law.

1. INTRODUCTION

Corporate criminal liability has undergone a dramatic transformation over the last several decades. Today, federal prosecutors rely on informal enforcement (Rubin 2016) which gives them broad discretion to both sanction and regulate

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publicly held firms with detected criminal misconduct. Most publicly held firms sanctioned for federal crimes by either the Criminal Division of the Department of Justice (DOJ) or the U.S. Attorney Offices enter into deferred and nonprosecution agreements (hereinafter D/NPAs) with federal prosecutors.[1] Under D/NPAs, firms admit to criminal wrongdoing and agree to pay monetary sanctions, but avoid formal conviction (Arlen & Kahan 2017; Garrett 2007). Prosecutors not only use D/NPAs to sanction firms, they also use them to regulate their future conduct. Specifically, prosecutors use D/NPAs to impose mandates on firms that require them to change their internal governance or business practices. These D/NPA mandates thus enable prosecutors to create and impose new legal duties whose breach can subject the firm to criminal sanction (Arlen & Kahan 2017).[2]

Individual prosecutors' offices[3] have broad authority to impose the mandates they deem appropriate. The DOJ has placed few *ex ante* constraints on the scope of prosecutors' authority to create and impose mandates. Prosecutors imposing mandates also are not subject to significant *ex post* oversight, for example through judicial review.

The central claim of this article is that the prosecutors' discretionary authority to use D/NPAs to create and impose mandates on firms is inconsistent with the rule of law.[4] At its core, the rule of law requires that limitations on the legal rights of individuals must be determined by laws, rather than by potentially arbitrary and unconstrained decisions of individual government actors. Indeed,

1 See Arlen (2012a, Section 1, providing evidence on corporate criminal convictions of publicly held firms as compared with sanctions imposed through D/NPAs); compare with Alexander & Cohen (2015).

2 For a discussion of the nature of these mandates, the structural differences between D/NPAs and duty-based corporate criminal liability, and the limited situations where the imposition of these mandates is consistent with optimal deterrence, see Arlen & Kahan (2017).

3 Throughout this article, I use the term individual prosecutor to refer to the individual U.S. Attorney's offices and to specialized sections in the Criminal Division of the DOJ, such as the Fraud Section.

4 This article focuses on whether the imposition of mandates through D/NPAs conformed to the rule of law. It does not address the question of whether and when D/NPAs and D/NPA mandates should be used. These issues are addressed in Arlen & Kahan (2017). In addition, many of the rule of law concerns discussed in this article would apply as well to mandates imposed on firms through other enforcement actions, including guilty pleas, formal regulatory enforcement actions, or agreements conditioned on a waiver of regulatory enforcement. This article focuses on D/NPAs because they are regularly used to impose mandates and are subject to little if any judicial review over the content of the mandates (see Section 2). For insightful analysis of the challenges presented by regulators' use of enforcement authority to impose mandates see, e.g., Barkow & Huber (2000); Barkow (2011, discussing issues that arise when state prosecutors act as regulators); see Price (2016, concluding that authorities should only be able to use discretion to waive enforcement in return for substitute condition that impose less onerous conditions); see also Epstein (1988, p. 7–8).

all members of society, including government actors, should be bound to act in accordance with law. Accordingly, commitment to the rule of law requires that states ensure that any government actor granted discretion to affect the liberty and property interests of others be constrained to act for the public's good, as defined by duly-elected authorities or their delegates. Government actors should not be empowered to use their power to serve personal aims or to achieve personal conceptions of the public interest.[5] This constraint is binding on all exercises of government authority, including those that result from the use of police power to negotiate voluntary agreements, such as D/NPAs.[6]

Historically, the United States has relied on separation of powers to cabin government authority within the rule of law. Under separation of powers, legal duties are imposed by legislatures—which act collectively—and not by individuals in the executive branch. Yet modern legal systems often grant considerable discretion to actors in the executive branch to impose legal duties (e.g., Davis 1977; Rubin 2016). This discretion can satisfy the rule of law if the government constrains it to ensure that individual executive branch officials cannot restrict the rights of others to achieve personal or idiosyncratic aims.

Modern societies rely on two different mechanisms to bring executive discretion within the rule of law.[7] First, they limit the scope of authority granted. Government authority to impinge on the rights of individuals involves three separate exercises of authority: authority to create duties, authority to interpret existing duties, and authority to enforce duties and sanction their violation. To ensure conformity with the rule of law, modern societies tend to restrict the scope of authority granted so that no individual actor or office enjoys all three forms of authority. Second, states constrain authority through oversight, which helps ensure that government actors operate within the scope of authority granted them. They also help ensure that officials use their power to serve public purposes, as defined by legitimate sources of authority, instead of serving their own aims or their personal conception of public purpose. Oversight often is most effective when allocated to a separate branch of government, such as the judiciary, but in some cases may be effectively imposed by actors in a different division of the same branch of government (Davis 1977; see Rubin 1977).

5 Oxford English Dictionary; see generally Davis (1997, examining how to bring discretion within the rule of law); see also Rubin (1997).

6 See Section 3.2.

7 This discussion is not intended as an endorsement of current levels of discretion. The aim is to show the different vectors along which discretion could be constrained to serve public aims and establish that D/NPA mandates do not fall within either the mechanisms that traditionally constrain enforcement or agency rule-making.

Executive branch discretion falls presumptively outside the rule of law when executive branch officials have authority to create and impose new duties both with little effective *ex ante* limitations on their authority and without any genuine *ex post* oversight. Discretion to impose duties on particular individuals that can differ from those imposed on other similarly situated persons is particularly suspect.

Employing this framework, this article examines the prosecutors' authority to create and impose D/NPA mandates and concludes it is inconsistent with the rule of law.[8] This article first considers and rejects the DOJ's claim that prosecutorial discretion to impose mandates on firms through D/NPAs does not raise rule of law concerns because D/NPA mandates are the product of consensual agreements, entered into voluntarily[9] by well-informed and well-counseled firms. Thus, they are more akin to private contracts that need not satisfy the rule of law. Yet while private contracts fall outside the rule of law, D/NPAs do not. The rule of law requires that government actors use their authority to threaten to use police power and contract on the government's behalf to serve legitimate public aims. To ensure they do so, their authority must be constrained through a combination of limitations on the scope of authority and oversight.

This article next shows that prosecutors' authority to impose D/NPA mandates is not sufficiently constrained by either limitations on the scope of their authority or through *ex post* oversight to satisfy the rule of law. Consider first the scope of authority. Prosecutors imposing D/NPA mandates are not limited to enforcing duties created by legislatures and agencies. Instead, they use D/NPAs to create and impose new duties that differ from those imposed by statute or regulation (Arlen & Kahan 2017).[10] These prosecutor-imposed duties include compliance mandates that require specific internal corporate

8 In order to focus on the rule of law issues raised by mandates imposed through D/NPAs, this article sets to one side the issues raised by prosecutorial discretion over charging and plea deals seeking fines and prison terms. This article also does not examine formal enforcement that imposes mandates on individuals, such as requirements that people seek drug treatment. Many of the concerns raised here about D/NPA mandates also apply to mandates imposed on firms through guilty pleas, especially if judges do not exert genuine oversight.

9 In a legal order that views plea agreements by individual defendants as voluntary, even when made in the shadow of the death penalty or life in prison, corporate negotiations must be treated as voluntary as well, even though some firms face corporate death if convicted.

10 DOJ avoids formally creating new duties that impose new criminal liability by writing D/NPAs so that violation of the duty subjects the defendant to criminal conviction for the original crime. But since the defendant would avoid that conviction but for the violation of the new duty, and since the D/NPA includes a statement of facts that guarantees conviction for a crime that the government might not otherwise be able to prove, D/NPA mandates are properly viewed as enforced by the threat of criminal sanction (Arlen & Kahan 2017).

governance changes, such as new management or board committees, or require the firm to alter the information it collects and its avenues of internal reporting.[11] This type of discretionary authority to create and impose new legal duties is particularly troubling because it is dispersed. Each individual U.S. Attorneys' Office regularly has full discretion to impose the duties that it deems to be appropriate, free from adequate *ex ante* constraints on their authority.[12] As a result, the rights of individual defendants can vary significantly as a result of differences in the preferences and aims of individual prosecutors.[13]

Prosecutors not only enjoy quasi-regulatory authority to create new duties (Arlen & Kahan 2017), but they also are subject to little, if any, genuine external oversight. In particular, judges play little, if any, supervisory role. Nonprosecution agreements (NPAs) generally are not filed in court and thus fall outside court jurisdiction. Deferred prosecution agreements (DPAs) are filed in court, but judges have little if any authority to oversee either the decision to impose mandates or the types of mandates imposed.[14] Indeed, prosecutors appear to have largely unfettered discretion to either pursue charges or indict the firm if the prosecutor concludes the firm violated its D/NPA. This gives the prosecutor considerable ability to bind firms to his interpretation of the mandates imposed.[15]

The conclusion that prosecutorial discretion to impose D/NPA mandates falls outside the rule of law is strengthened once we compare the limited constraints on D/NPA mandates with those placed on prosecutors' authority to impose traditional sanctions (fines and prison) through formal enforcement

11 See Section 2.

12 The DOJ provides skeletal guidance on compliance programs, but many mandates go beyond the guidance provided. See U.S. Att'y Manual 9-28.800, Corporate Compliance Programs, available at http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf. Moreover, it provides no genuine guidance on when more intrusive corporate governance reforms should be imposed and what limits should be placed on their use. There are some restrictions, but they are not relevant to these mandates. See infra note 37.

13 The DOJ does exercise oversight in some areas, such as the Foreign Corrupt Practices Act. In addition, there is some informal oversight. Should a prosecutor step outside normal bounds with a large, powerful publicly held firm, that firm may well attempt to address its concerns with authorities in Main Justice (although it has no right to do so). Moreover, the DOJ values prosecutorial independence and likely cannot be relied on to intervene for all firms or in all cases where discretion is questionable. See Bristol-Myers Squibb D/NPA.

14 See infra text accompanying notes 70–76. Even with some oversight, judges would be hard-pressed to exercise it because the DOJ has never clearly stated the goal of corporate criminal liability imposed on publicly-held firms, so judges cannot easily determine when a D/NPA serves or is an affront to that goal.

15 See *Stolt-Nielsen*, 442 F.3d 177 (3rd Cir. 2006) (federal courts do not have authority to enjoin a prosecutor from indicting a firm that the prosecutor concludes violated a D/NPA); *U.S. v. Goldfarb*, No. C 11–00099 WHA, 2012 WL 3860756 (N.D. Cal. Sept. 5, 2012) (denying motion to dismiss indictment because of claimed substantial performance with D/NPA).

(verdicts or guilty pleas). Prosecutors pursuing fines or imprisonment through a traditional formal enforcement action cannot determine the duties to which individuals are subject. The legal duties they can enforce are determined by legislatures or agencies; the scope of these duties is further defined by courts. Nor do prosecutors have full authority to create and impose new duties through the sentencing process. Judges, not prosecutors, are vested with ultimate authority to determine the sentence—including the terms of probation—subject to potential review by appellate courts. Formal enforcement also subjects prosecutors to more external oversight. In particular, trial and appellate judges have authority to exercise oversight over sentences, including mandates, imposed on individuals convicted of a crime. Thus, D/NPA mandates cannot root their claim for legitimacy on prosecutors' traditional discretion to select charges and recommend sanctions during formal enforcement because prosecutors pursuing formal enforcement do not have broad authority to create and impose duties free from external oversight.[16]

Of course, we do grant authority to actors in the executive branch to create and impose new duties. Yet an examination of the process employed to bring formal rule-making within the rule of law only highlights the problems with D/NPA mandates. First, formal agency rule-making creates duties that are imposed on all persons engaged in a particular activity. In contrast, D/NPA mandates regularly impose firm-specific duties that are not imposed on other similarly situated firms. Second, formal rule-making employs a variety of procedural safeguards to constrain discretion. These include the requirement that the agency act within its statutory grant of authority and the requirement that rules go through a formal approval process that includes public notice and comment and majority consent of the agency's commission. Agency rules also are subject to external oversight from judges and potentially the Office of Information and Regulatory Affairs (OIRA). In contrast, prosecutors who create and impose new duties have few formal limitations on the scope of their authority and are not channeled through a formal process. They also are not subject to oversight designed to constrain discretion.

Thus, the current process governing D/NPA mandates is inconsistent with the rule of law. Moreover, the rule of law problem cannot be resolved by simply subjecting all mandates to judicial review. Judges cannot provide effective oversight because they do not have a standard to employ to determine which

16 This is not to say that all enforcement discretion is within the rule of law. To the extent that prosecutors are granted authority to use probation to impose broad mandates on individuals with no genuine constraint imposed by judicial review, this would implicate rule of law concerns. See supra note 4 (discussing extensions of these arguments to mandates imposed on firms through pleas, regulatory actions, or regulatory inaction).

mandates are legitimate. Additional measures are needed to both facilitate the effective use of mandates (Arlen & Kahan 2017) and to bring D/NPAs mandates within the rule of law.[17]

This article proceeds as follows. Section 2 presents current federal enforcement practice focusing on the use of D/NPAs to impose mandates and its justifications. Section 3 outlines the central requirements of the rule of law. Section 4 evaluates and rejects the claim that D/NPA mandates need not comply with the rule of law because they are consensual. Section 5 shows that D/NPA mandates are not sufficiently constrained to satisfy the rule of law. Section 6 discusses measures that might be used to enable prosecutors to impose D/NPA mandates consistent with the rule of law. Section 7 concludes.

2. PROSECUTORS AS FIRM-SPECIFIC REGULATORS

This section explains how prosecutors use D/NPAs to impose both traditional monetary sanctions and new duties on firms with potentially actionable criminal misconduct. This section finds that current DOJ policy favoring mandates effectively encourages prosecutors to create new legal duties that are imposed on specific firms with little *ex ante* or *ex post* oversight. Prosecutors thus currently employ informal enforcement to act as firm-specific regulators. The question is whether this expanded authority is employed consistent with the rule of law.[18]

2.1 Transformation of U.S. Corporate Criminal Enforcement Practice

In the United States, corporations can be held criminally liable for their employees' crimes, provided the crime was committed in the scope of employment.[19] A firm is potentially criminally liable even if the crime was committed by a lower level employee or contrary to corporate instructions.[20] Corporate

17 See supra note 4.

18 This article addresses the rule of law issues presented by these mandates. It does not consider the important question of whether the DOJ is implementing mandates—or encouraging prosecutors to implement them—in a way that is consistent with optimal deterrence. For an evaluation of this question see Arlen & Kahan (2017).

19 See *New York Cent. and Hudson River R.R. Co. v. United States.*, 212 U.S. 481, 493 (1909). Technically, the firm is only liable when the employee acted to benefit the firm. Yet the benefit requirement does little to restrict the scope of liability because it is satisfied even if the employee primarily acted to benefit himself, and only incidentally intended to benefit the firm. See Automated Medical Laboratories, 770 F.2d 399, 407 (4th Cir. 1945).

20 *U. S. v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied* 409 U.S. 1125 (1973).

criminal liability can be imposed even if the firm had an effective compliance program.[21]

Nevertheless, publicly held firms[22] can generally take steps to avoid being formally convicted for a wide range of employee wrongdoing. Existing DOJ policy[23] encourages prosecutors to use D/NPAs, instead of formal conviction, to sanction firms for their employees' misconduct if the firm had an effective compliance program, self-reported, agreed to fully cooperate, and/or would face serious collateral consequences, among other considerations.[24] This policy in effect replaces the *de jure* rule of strict corporate criminal liability rule with an enforcement practice that makes formal conviction contingent on the firm's efforts to help enforcement authorities detect and sanction wrongdoing by adopting an effective compliance program, self-reporting and fully cooperating (hereinafter "corporate policing" (Arlen & Kraakman 1997)). Existing enforcement policy thus implements a form of "duty-based" liability (Arlen & Kraakman 1997), under which firms are expected to adopt and maintain an effective corporate policing program and face enhanced criminal liability for detected misconduct should they fail to do so (Arlen & Kahan 2017).

Although firms that undertake effective policing generally avoid formal conviction for a wide range of detected misconduct (see Alexander & Cohen 2015), they do not avoid criminal sanction.[25] Prosecutors use D/NPAs to impose

21 See, e.g., *U.S. v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983); *U.S. v. Twentieth Century Fox Film Corp.*, 882 F.2d 656 (2d Cir. 1989); *United States v. Potter*, 463 F.3d 9 (1st Cir. 2006); *U.S. v. Ionia Mgmt. S.A.*, 555 F.3d 303 (2d Cir. 2009); accord US Attorney's Manuel, Section 9-28.800 ("The existence of a corporate compliance program, even one that specifically prohibited the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior*.").

22 Federal corporate criminal enforcement policy discussed in this Part technically applies to all firms. Nevertheless, leniency is more often granted to publicly held firms, for reasons discussed in Arlen (2012a).

23 The DOJ formally adopted a policy of granting leniency from conviction to firms in some circumstances in 1999. Memorandum from Eric Holder, Deputy Attorney General, U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys (June 16, 1999) [hereinafter Holder Memo]. The current guidelines are contained in Principles of Federal Prosecution of Business Organizations, § 9-28.300 of the United States Attorneys Manual (USAM). Although the DOJ has embraced D/NPAs, some divisions, such as antitrust and environmental, have their own leniency policies; publicly held firms regularly are convicted of these offenses (Alexander & Cohen 2015).

24 See USAM § 9-28.300. DOJ policy also encourages prosecutors to take other considerations into account, including the collateral consequences of conviction to the firm, the effect of corporate conviction on innocent parties, and remedial measures taken by the firm, in deciding whether to defer prosecution (see General Accounting Office 2009, finding that prosecutors do take collateral consequences into account).

25 Since 2003, prosecutors have increasingly used D/NPAs to retain jurisdiction over, and impose sanctions on, firms that avoid formal indictment and/or conviction. D/NPAs were used prior to 2003, most prominently in the 1994 DPA with Prudential (White 2005, p. 818). Nevertheless, the

criminal sanctions, including criminal fines and restitution (Alexander & Cohen 2015; Arlen & Kahan 2017).[26] In addition, prosecutors regularly use D/NPAs to intervene more directly in firms' internal affairs. Most D/NPAs impose mandates on firms that require them to take specific actions for the duration of the agreement.[27] Prosecutors have used D/NPA mandates to regulate (i) the structure and extent of the firm's compliance program; (ii) the structure and composition of board and managerial oversight committees; (iii) the form and extent of external oversight of the firm's affairs (e.g., by imposing a corporate monitor); and (iv) the scope of the firm's business practices (Arlen & Kahan 2017; see Cunningham 2014; Garrett 2007).[28] Firms face serious sanction should they fail to comply, in the form of nearly-guaranteed conviction of, and enhanced sanctions for, the original crime. Conviction is guaranteed because D/NPAs generally require the firm to both admit that it committed the crime and waive the statute of limitations.[29]

Thompson memo was an official endorsement of these agreements and dramatically increased their use. See Memorandum from Larry D. Thompson, Deputy Attorney General, U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys (January 20, 2003) [hereinafter Thompson memo]. In the entire period prior to 2002, prosecutors negotiated only 18 D/NPAs. See Garrett (2007). In contrast, prosecutors entered into approximately 245 D/NPAs from 2003 to 2014 (see Alexander and Cohen 2015, providing data on 2003–2011 and Arlen & Kahan (2016), providing estimates for 2012–2014). D/NPAs issued since 2003 are more likely to impose firm-specific mandates than earlier ones (Baer 2009, p. 969–970; Griffin 2007, p. 323).

26 The sanctions imposed through D/NPAs can be large. Firms subject to particularly large penalties enforced by a D/NPA include JP Morgan Chase ($1.7 billion); HSBC Holdings and HSBC Bank USA ($1.256 billion); GlaxoSmithKline PLC ($1 billion, through D/NPA requiring firm to ensure subsidiary pays this amount); UBS AG ($500 million in 2012; this is in addition to the criminal fine imposed on UBS Japan through a guilty plea); UBS ($780 million in 2009); Adelphia Communications ($715 million); Boeing Co. ($615 million); Science Applications Int'l ($500 million); KPMG ($456 million); Credit Suisse ($536 million); and Deutsche Bank ($404 million). These estimates come from a hand-collected dataset.

27 Mandates also can be included in corporate guilty pleas. See supra note 4; see Alexander & Cohen (2015, providing evidence on mandates in D/NPAs and pleas). In addition, regulators and some state prosecutors have imposed mandates. For an excellent discussion of the exercise of this authority in the states, see Barkow (2011, when prosecutors regulate they challenge separation of powers).

28 Firms also agree to fully cooperate with the prosecutors' investigation (Arlen & Kahan 2017; Garrett 2007).

29 Firms have been convicted for breaching their D/NPA mandates. For example, in 2008 the DOJ concluded that Aibel Group "failed to meet its obligations" under its DPA and revoked its DPA with the firm. The firm pled guilty to charges of conspiracy to violate the Foreign Corrupt Practices Act (FCPA) and to a substantive violation of the anti-bribery provisions of the FCPA. Aibel was required to pay a $4.2 million fine and serve two years on organization probation. Press Release, Department of Justice, Aibel Group Ltd. Pleads Guilty to Foreign Bribery and Agrees to Pay $4.2 Million in Criminal Fines (November 21, 2008), http://www.justice.gov/archive/opa/pr/2008/November/08-crm-1041.html.

2.2 D/NPA Mandates

D/NPA mandates regularly impose new duties on firms—duties that the firm could not be sanctioned for failing to undertake absent the D/NPA and that most other firms are not required to satisfy (Arlen & Kahan 2017). For example, most D/NPAs include mandates that require the firm to adopt a compliance program that satisfies criteria specified by the prosecutor. Many of these compliance mandates explicitly impose new, firm-specific duties in that they require the firm to implement a compliance program with features that are not mandated by federal law. D/NPA compliance mandates have specified the information to be collected, the type and frequency of employee training, and the location of the Chief Compliance Officer in the corporate hierarchy. They also have required the firm to implement an internal whistle-blowing program and to substantially increase the firm's investment in compliance[30] (see Arlen & Kahan 2017, discussing mandates in more detail). Prosecutors also use D/NPAs to impose mandates regulating internal corporate governance changes. Prosecutors have used D/NPA mandates to require the firm to appoint specific independent directors,[31] create new senior management or board committees,[32] and to prohibit the Chief Executive Officer (CEO) from serving as Chairman of the Board of Directors.[33]

Many D/NPAs impose mandates designed to increase oversight both by independent actors within the firm and by outsiders (Arlen & Kahan 2017). Some alter internal oversight of management—for example, creating additional management or board committees with independent directors. Others increase external oversight by imposing new duties to provide reports to prosecutors or other federal authorities about the firm's compliance program and any

30 As part of the process leading up to the D/NPA, firms often materially alter and dramatically increase their expenditures on compliance in order to obtain leniency. For example, HSBC increased expenditures on Anti-Money Laundering compliance more than nine-fold. HSBC D/NPA, p. 5, https://www.justice.gov/sites/default/files/opa/legacy/2012/12/11/dpa-executed.pdf. These increases can exceed the level of investment required to comply with the duty to have a "reasonable" or "effective" compliance program—certainly exceeding the level as interpreted by the relevant regulatory agencies.

31 For example, CA Technologies, Inc. was required to appoint three new independent directors to the board, including former SEC Commissioner Laura Unger.

32 For example, the D/NPA for Monsanto required the board to create a new committee to oversee the appointment of all foreign agents and to evaluate all joint ventures; the D/NPA for General Reinsurance required a new Complex Transaction Committee with power to reject any proposed transactions; Merrill Lynch and Co. was required to create a special structured products committee of senior management to review all complex financial transactions with a third party. Other D/NPAs that requires additional management or board committees include Deutsche Bank (2010); Friedman's Inc. (2005); and Bank of New York (2005).

33 See, e.g., D/NPAs imposed on Aibel Group (2007) and FalconStor Software (2012).

Table 1. Policing mandates imposed through D/NPAs, 2010–2014[36]

	Total D/NPAs	Compliance program mandates	Monitors	Other mandates
2010	37	30	12	28
		81%	32%	76%
2011	24	22	4	19
		92%	17%	79%
2012	33	25	12	24
		76%	36%	73%
2013	26	22	11	22
		85%	42%	85%
2014	26	23	5	18
		88%	19%	69%
Total	146	122	44	111
		84%	30%	76%

suspected wrongdoing; others require the firm to hire a prosecutor-approved outside monitor with authority to audit the firm to ensure its compliance with the duties imposed by the agreement, as interpreted by the monitor, and to seek out evidence of wrongdoing.[34] Finally, some D/NPAs contain mandates that preclude the firm from either offering certain services or entering into certain contracts with outsiders that are legal but prone to abuse (Arlen & Kahan 2017, discussing the KPMG DPA).[35]

The DPA with Bristol-Myers Squibb (BMS) illustrates the breadth of the mandates that can be, and are, imposed. Under the agreement, BMS agreed to (i) adopt a *specified* compliance program; (ii) mandate that certain employees undergo a training program covering specified topics; (iii) separate the positions of Chairman of the Board and CEO; (iv) require the Chairman to participate in preparatory meetings held by senior management prior to BMS's quarterly conference calls for analysts; (v) require the Chairman, CEO,

34 D/NPAs give a prosecutor the right to terminate the agreement and file criminal charges for the original crime should he or she decide that the firm failed to satisfy its obligations under the agreement. This situation is generally guaranteed to produce a conviction, because D/NPAs generally require a firm to agree to a statement of facts under which it in effect admits it committed the crime. *Accord* Garrett (2007, pp. 857, 928). These terminations and subsequent convictions do occur when firms violate D/NPAs. See *supra* note 29.

35 See supra notes 8 and 16.

36 This is hand-collected data on D/NPAs imposed by prosecutors in cases governed by Principles of Federal Prosecution of Business Organizations was developed in Arlen & Kahan (2017). The dataset includes D/NPAs entered into by the U.S. Attorneys' Offices or the Criminal Division of the Department of Justice, but excludes cases under the authority of the Antitrust, Environmental, or Tax Divisions of the Department of Justice. These cases are excluded because these specialized divisions have their own policies and procedures governing D/NPAs that differ materially from the policies and practices discussed in this article.

and General Counsel to monitor these calls; (vi) appoint an additional outside director, approved by the U.S. Attorney's office, to the board; (vii) hire and pay for a prosecutor-approved corporate monitor; and (viii) require the CEO, CFO, and the firm to make specific reports on a range of matters to the Chairman of the Board, the Chief Compliance Officer, the monitor, and the Securities and Exchange Commission (SEC).[37]

More recently, in 2012, MoneyGram International signed a D/NPA that, among other measures, required it to (i) create an independent Compliance and Ethics Committee of the board with direct oversight over both the CCO and the compliance program; (ii) restructure executive compensation to both require that executives be ineligible for bonuses unless they have a passing score on their compliance activities and allow "claw back" of the bonuses earned by executives who contributed to compliance failures; (iii) adopt an Anti-fraud Alert System that requires monitoring of "the maximum number of transactions feasible"; (iv) verify the accuracy of sender and receiver biographical information; (v) appoint a compliance officer for each country with a high risk of fraud or money laundering; (vi) provide a detailed report to the DOJ every 90 days concerning specific facts from every outlet with at least ten customer complaints and every agent or outlet terminated for suspected fraud or money laundering; and (vii) accept and pay for a monitor with broad authority.[38]

D/NPA mandates are far from isolated events. Indeed, DOJ policy and practice encourages prosecutors to impose mandates on any firm with detected wrongdoing that had a deficient compliance program at the time of the crime.[39]

37 Bristol-Myers Squibb D/NPA. In addition, BMS agreed to waive the attorney–client privilege. The Bristol-Myer Squibb D/NPA also included an extraordinary restitution award, requiring BMS to endow a chair in business ethics at Seton Hall Law School—the alma mater of Christopher Christie, the U.S. Attorney supervising the case (Christie & Hanna 2006, p. 1052–1053). This article does not focus on the issues of waiver, extraordinary restitution, or efforts to prohibit a firm from honoring its contractual obligations to pay its employees' attorney's fees because the DOJ has intervened to prohibit or curtail such abuses. See, e.g., U.S. Att'y Manual 9-28.710–720; Memorandum from Mark Filip to Holders of the U.S. Attorneys' Manual Re: Plea Agreements, Deferred Prosecution Agreements, Non-Prosecution Agreements and "Extraordinary Restitution" (May 14, 2008). Nevertheless, prosecutors' ability to use D/NPAs to impose such mandates in the past, and courts' willingness to enforce them, highlights the rule of law concerns presented by prosecutorial discretion to use D/NPAs to impose mandates.

38 MoneyGram Deferred Prosecution Agreement.

39 DOJ policy is contained in the U.S. Attorneys manual, which focuses on mandates in plea agreements. Similar principles apply to D/NPAs, however. See USAM § 9.28.800; Brent Snyder, Deputy Ass't Att'y Gen., Antitrust Div., DOJ, Compliance is a Culture, Not Just a Policy (September 9, 2014), available at http://www.justice.gov/atr/public/speeches/308494.pdf. The Organizational Sentencing Guidelines also encourage the imposition of compliance mandates on firms with

Prosecutors' authority to impose mandates potentially raises rule of law concerns because, as noted above, prosecutors use D/NPAs to impose new legal duties on firms—duties that the firm would not be required to satisfy but for the D/NPA. Moreover, they have enormous discretion when determining the types of mandates to impose. D/NPA mandates also expand the scope of federal prosecutorial oversight over internal corporate governance through the form of liability that is imposed. D/NPAs give federal prosecutors authority to sanction firms that breach their D/NPA-imposed policing duties even if a crime does not occur. Thus, D/NPA mandates enable prosecutors to transform themselves into firm-specific quasi-regulators: creating, imposing, and enforcing new duties on select firms where wrongdoing has been detected (Arlen & Kahan 2017). The question arises whether prosecutors' broad authority to create and enforce duties is consistent with the rule of law.

2.3 How D/NPAs Help Deter Corporate Crime

The rule of law challenge presented by D/NPA mandates need not be addressed unless D/NPAs and the mandates they impose are appropriate tools for deterring corporate crime. Previous analysis has shown that both D/NPAs and mandates are vital to the government's effort to deter criminal misconduct by publicly held firms, as explained below.

In order to deter crime by publicly held firms, criminal enforcement authorities need to induce firms to help the government detect and obtain the evidence needed to prosecute wrongdoing. Firms can assist enforcement authorities by adopting an effective compliance program designed to deter and detect misconduct, self-reporting detected misconduct, and providing the government with evidence on its extent and the identities of the individuals responsible for it (Arlen 1994; see Arlen & Kraakman 1997). Firms will not help prosecutors detect and obtain evidence of wrongdoing unless they can rely on being better off if they do. Prosecutors can most effectively induce firms to undertake effective policing if they threaten all firms with criminal liability for their employees' crimes, but then offer leniency from prosecution to those firms that adopt effective compliance programs, self-report, and fully cooperate (Arlen & Kraakman 1997; see Arlen 1994). If properly structured, D/NPAs are a particularly effective way to implement such a regime. They enable prosecutors to reward firms that adopt effective compliance programs, self-report, and cooperate with an offer of leniency from formal prosecution

deficient compliance programs at the time of the crime. For a critique of this broad policy favoring mandates, see Arlen & Kahan (2017).

and sanction mitigation, and to punish firms for the crime and any policing deficiencies through the imposition of monetary fines (Arlen & Kahan 2017).

Nevertheless, this deterrence argument for D/NPAs does not justify the imposition of mandates. Indeed, as Arlen & Kahan (2017) have shown, mandates are not justified when firms are managed to maximize profits, because the government can most effectively induce corporate policing simply by imposing clear *ex ante* duties to adopt effective policing enforced by adequately enhanced monetary sanctions imposed on firms that fail to comply with these duties. Mandates nevertheless are needed in one particular situation: when managers cannot be relied on to adopt effective policing, even when it would benefit the firm, because they obtain personal benefits from either corporate wrongdoing or reduced oversight (Arlen & Kahan 2017). In this situation, corporate fines alone will not induce optimal policing because managers are not properly motivated by costs imposed only on the firm. Mandates can be used to improve corporate policing if properly structured to reduce agency costs plaguing corporate policing, as discussed in more detail in Arlen & Kahan (2017). Thus, both D/NPAs and the mandates they impose are important to the government's ability to achieve its legitimate interest in deterring corporate crime.[40]

2.4 Prosecutorial Discretion to Impose Mandates

Although optimal deterrence supports federal authorities' use of both D/NPAs and mandates in appropriate situations, mandates are only justified if imposed through a process that ensures that government power is exercised consistent with the rule of law.

Several features of D/NPA mandates, operating in concert, raise the question of whether prosecutorial discretion to create and impose mandates is inconsistent with the rule of law.[41] First, mandates are created and imposed by individual prosecutors' offices rather than by legislatures or administrative agencies formally empowered to create new duties. Second, whereas duties adopt by legislators or through formal rule-making tend to be imposed on all firms in a particular category (e.g., publicly held firms), prosecutors can use D/NPAs to impose firm-specific mandates that differ from the mandates

40 For a full analysis of when D/NPA mandates are optimally imposed and the problems with the DOJ's existing approach to mandates see Arlen & Kahan (2017).

41 Much of the discussion in this article on mandates in D/NPAs is similarly applicable to corporate plea agreements that impose firm-specific crime-contingent duties. There is one distinction: mandates included in pleas require judicial approval; judges can be expected to review them under the Organizational Sentencing Guidelines. Nevertheless, even with this review, prosecutors enjoy enormous discretion to design and impose mandates with little effective constraint, suggesting that most of this discussion applies to these mandates as well. See *supra* note 4; see Section 5.1.

imposed on other similarly situated firms. Finally, unlike formal legislation or agency rule-making which require consent of multiple decision-makers, individual U.S. Attorneys regularly enjoy considerable discretion to create and impose the mandates they deem appropriate, unimpeded by opposing views of others. Senior DOJ officials have provided little if any effective guidance to prosecutors regarding what mandates to impose and when (Arlen & Kahan 2017; Cunningham 2014; Garrett 2007).[42] In addition, prosecutors who create mandates are subject to little, if any, genuine judicial oversight over mandates in a wide range of cases. Indeed, the DOJ has resisted isolated efforts by some judges to exercise authority over DPAs.[43] Prosecutors are thus, in effect, left with enormous discretion to create and impose the mandates they consider appropriate, often without any requirement that they defend their decisions to others empowered to determine whether their choices do indeed serve public aims.[44]

Thus, the question arises: does the existing scope of prosecutorial authority to create and impose mandates conform to the rule of law?[45]

3. EXECUTIVE BRANCH DISCRETION AND THE RULE OF LAW

To govern effectively, most modern societies grant enormous amounts of discretion to actors within the executive branch not only to execute the laws but also to create and enforce new legal duties that may limit citizens' rights to liberty and property. Yet modern societies committed to the rule of law cannot grant unfettered discretion, even to the wisest government actors. As this section explains, societies employ two interrelated mechanisms to ensure that government actions can be properly viewed as grounded in law and not the whim and will of men.

3.1 The Rule of Law

At its core, the rule of law requires that government actors with authority over others' rights should exercise power to serve public aims. They should not be

42 But see note 37 (discussing limitations on extraordinary restitution).

43 See *infra* text accompanying notes 70–76.

44 In the federal system, prosecutorial discretion depends on the type of crime. Individual U.S. Attorneys' Offices have considerable discretion over most of the enforcement actions they bring. Nevertheless some cases, such as those involving fraud, foreign bribery, antitrust, tax, or environmental, enforcement either must be coordinated with, or delegated to, a specialized division of the DOJ, such as the Antitrust Division.

45 See *supra* note 4.

free to use their power to serve purely personal aims, for example by appropriating people's property for their own use. Nor should they be free to use power to serve a personal view of what is in the public's good (Davis 1977; see Rubin 1997). As Jeremy Waldron has explained,

> Rule of law is a multi-faceted ideal, but most conceptions give central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences, their own ideology or their individual sense of right and wrong (Waldron 2008–2009, p. 5).

The idea that discretion should be constrained to serve a shared—or at least legitimately derived—sets of principles or goals implies that there should be some consistency in exercises of discretion by individuals with authority to impose or enforce duties in similar circumstances. People's rights and liberties should not depend excessively on the identity of the individual exercising discretion and his or her own personal views of the appropriate actions (see Waldron 2008–2009, p. 5, identifying predictability as an important value).

Societies that create governments designed to govern by "right" and not "might" constrain their officials' power for many reasons. The most obvious concern is that "power corrupts:" power presents opportunity to pursue personal goals such as money, extra time, or political ambition. Yet this is not the only concern. Discretion must be constrained, even when government actors strive to benefit society, because of the omnipresent concern that the public-spirited official will exercise discretion to pursue a personal, idiosyncratic vision of the public good that has no claim to legitimacy. Finally, when multiple government actors assert similar types of power (e.g., enforcement powers), societies committed to the rule of law must employ constraints to promote consistency, so that rights and duties depend more on public aims than on the identity of the individual government decision-maker.

Commitment to the rule of law thus requires that societies ensure that executive branch actors do not have unfettered discretion to create or impose duties to restrict individuals' right to liberty and property. Society should also promote consistency in the duties and sanctions imposed by governments on similarly situated individuals so that liberty and property interests are not dependent on the views of individual government actors.

3.2 Bringing Discretionary Executive Authority within the Rule of Law

Legal systems employ two mechanisms to constrain discretion so that it is exercised consistent with the rule of law. First, they impose *ex ante* limitations on the scope of authority that any one individual can exercise. In addition, legal

systems constrain discretion by empowering others to exercise oversight over the decision, thereby limiting the ability of any one person to restrict others' property or liberty interests for personal or idiosyncratic reasons.[46]

3.2.1. Limiting the Scope of Authority

Executive branch actors can be granted authority to make a range of decisions. The narrowest and most traditional form is authority to enforce legal duties created by others. The second and far broader form is authority to create and impose new legal duties. Finally, government actors can be granted authority to rule on the validity of the duties created and their proper applicability in individual cases.

Government power is most vulnerable to abuse when executive branch actors are entitled to exercise all three forms of authority: authority to create duties, determine their validity and scope, and enforce them. Discretion is enhanced, and rule of law concerns are heightened, when a single individual executive branch actor is empowered to exercise all three forms of authority over any particular issue. Rule of law concerns are the greatest when many different individual executive branch actors are each empowered to create duties and enforce them against specific individuals. The duties imposed on citizens may depend more on the identity of the government actor creating the duties than on any shared conception of appropriate public policy.

Separation of powers, as set forth in the U.S. Constitution, represents an effort to use limitations on the scope of authority to ensure that power is exercised consistent with the rule of law. Separation of powers achieves this by dividing power to adopt legal duties, to interpret those duties, and to pursue violators across three branches of government; each branch serves as a check on

46 This discussion builds on discussions of discretion by Ronald Dworkin, Robert Rubin, Kenneth Culp Davis, and Jeremy Waldron. In discussing judicial discretion, Ronald Dworkin distinguishes between weak and strong discretion. Under weak discretion, the actor (in his discussion, the judge) has discretion to exercise judgment in making a decision affecting people's rights—judgment that may not be reviewable by others—but this discretion must meet standards set by external authority. These standards may arise from the language of the statute, its purpose, or the broader principles internal to the legal system, but they constrain the decision-maker in exercising judgment to enforce a legal duty or serve a policy goal established by others. Under strong discretion, the actor is not bound by standards set by the external authority (Dworkin 1977, pp. 31, 81–130; Dworkin 1986, pp. 176–275). Indeed, according to Dworkin, when correctly deployed, these external principles constrain weak discretion, yielding a definitive result. See Rubin (1997, p. 1303, discussing Taking Rights Seriously). Rubin focuses on the different forms of controlling discretion—distinguishing between control through instructions stated in advance and control through oversight of a person's activities. In addition, he distinguishes between instructions on specific conduct and the policies to be achieved; instructions also can be disaggregated depending on whether they relate to the substance of the decision or the process to be used (Rubin 1997, pp. 1303–1305).

the potential for abuse of power by individuals in the other branches.[47] In this conception, executive branch actors enforce duties created by others but do not create those duties or determine their validity or scope.

Yet the modern administrative states long ago burst through this traditional division of authority between the three branches. Out of necessity, executive branch actors have been granted considerable discretion to create, enforce, and interpret legal duties (Davis 1977; see Rubin 1997). For example, Congress often grants discretion to administrative agencies to adopt rules that constrain the rights of others, in addition to authority to pursue enforcement actions in their own administrative courts.[48] This broad grant to actors within the executive branch can benefit society because those actors often have the greatest expertise (see Davis 1977; Rubin 2016).

This expanded executive branch authority can be exercised consistent with the rule of law by limiting the scope of authority granted to individual executive branch actors to prevent them from using their power to create and impose duties to obtain either personal benefits or pursue idiosyncratic views of the public good. Legal systems employ a variety of mechanisms to limit the scope of individual executive branch actor's authority to create and impose legal duties. The first technique is to place specific *ex ante* limitations on the scope of authority granted. For example, individual executive branch actors may be given authority to impose only specific types of duties in a particular setting—e.g., a duty to seek drug treatment. The scope of authority also may be constrained through a precise statement of the social goals to be achieved and the methods employed. These constraints help promote the rule of law by forcing executive branch actors to justify their actions with respect to a legitimate articulation of the public good, and not an idiosyncratic one. The constraints also enhance consistency across decision-makers in the executive branch.

Finally, legal systems can limit the potential that any individual actor will abuse his discretion by dividing authority to create, interpret, and enforce duties across multiple independent actors in the executive branch. This can be accomplished by requiring that new duties be adopted by the majority vote of a Commission whose members are drawn from different political parties. Alternatively, initial authority to create new duties can be granted to one set of

47 Legislators cannot use their authority to pursue personal aims because they must act as a group, obtaining approval of both the House and the Senate. Moreover, Congress does not have authority to interpret or impose the legal requirements they adopt. The executive branch decides whether and how to enforce the law. The judiciary interprets the laws, muting legislatures' ability to hide private, illegitimate aims in legislation (Macey 1986; Macey & Miller 1992).

48 For an extensive discussion of why this broad delegation of discretion is important to effective regulation, see Davis (1977, pp. 36–41). For discussions of when agency authority to adopt duties falls outside the rule of law see, e.g., *id.*; Barkow & Huber (2000); Rubin (1997).

actors whose decisions are subject to review by another independent office within the executive branch. Administrative agencies often employ both of these devices. Ultimate authority of independent agencies tends to be exercised by a multi-person commission drawn from both political parties—a group that cannot act unless multiple people agree. Agencies often divide initial authority over formal rule-making and enforcement across offices: delegating formal rule-making to one group, enforcement decisions to another, and judicial resolution of enforcement to a third (e.g., administrative law judges).[49] Agency rule-making may also be subject to review by other another agency (see infra Section 3.2.2).

3.2.2. External and Internal Oversight

Discretionary authority can also be constrained through a second mechanism: oversight. Oversight operates by granting authority to a second actor to determine whether the decision-maker creating the duty acted within the scope of authority granted him and consistent with other social goals, such as Due Process.

Oversight generally operates in concert with limitations on the scope of authority both to ensure that individual actors use their power legitimately and to enhance consistency in the obligations imposed on people. Of course, oversight is only effective when the person exerting oversight is provided a standard to employ when determining whether a particular government action represents a legitimate exercise of power. Absent an external standard, those with oversight authority may exercise too little oversight in deference to the government actor. Alternatively, the actor may intervene to substitute his or her personal views of appropriate public policy. In addition, those exercising oversight must be subject to oversight that deters them from exercising oversight to pursue either private benefits or an idiosyncratic conception of public aims.

Oversight can be external or internal. Oversight is internal when it is exercised by someone within the executive branch. Oversight is external when it is exercised by a different branch of government, such as the judiciary. External oversight, such as is provided by federal judicial review, has two obvious advantages. First, judicial authority tends to be limited to approving or disapproving the executive branch decisions. In many duty-creation situations (such as

49 Discretion over enforcement also can be divided between different actors. For example, in the case of formal enforcement through conviction or pleas, prosecutors' and judges' discretion to pursue their own conception of the public good is constrained, to some degree, by the U.S. Sentencing Guidelines. The guidelines set forth the appropriate factors to be considered in sentencing and the effect these factors should have on sentencing, and require prosecutors and judges to justify their recommendations and decisions in light of these factors. Similarly, three strikes laws directly constrain judges' sentencing discretion in some cases. See, e.g., Cal. Penal Code § 667(e)(2)(A) (West) (California's habitual offender law).

agency rule-making), judge are not free to substitute their preferred rule for the decision under review. Second, judicial review by Article III judges involves oversight by actors who are independent of both the executive branch and, hopefully, the political forces that produced the government action under review. Nevertheless, judicial review has an important limitation: judges often have considerably less expertise than executive branch actors and do not have independent authority to investigate a matter under consideration (see Davis 1977, discussing limitations of judicial review). As a result, absent clear *ex ante* guidance concerning the appropriate duties to be created and/or social aims to be achieved, judges may be unable to exercise adequate oversight because, absent guidance and expertise, judges may either be too deferential or intervene inappropriately.

Internal oversight also can be used effectively to bring executive branch discretion within the rule of law. Indeed, various forms of internal oversight over formal rule-making by administrative agencies help to bring those decisions within the rule of law (see Rubin 2016). Agencies engaged in formal rule-making often subject new duties to multiple layers of internal review before a proposed rule is adopted. Independent agencies, such as the SEC, are further constrained by the requirement that they act through a multi-person commission drawn from both parties. The executive branch constrains rule-making by subjecting many new regulations to review by an independent office within the executive branch, the Office of Information and Regulatory Affairs (OIRA). Finally, the executive branch can cabin abuse by vesting ultimate authority to enforce new duties to actors in a separate part of the executive branch, such as the DOJ, whose agents are independent of the agency that adopted the regulations. While these constraints do not preclude all potential abuse, they do limit the ability of any one person in the executive branch to use formal rule-making to create and enforce duties in order to obtain personal benefits or serve a personal conception of the public good. These mechanisms also can enhance consistency in the duties imposed on, and the enforcement actions taken against, different individuals.[50]

3.2.3. *Interplay of Two Forms of Authority*

Accordingly, we see that modern legal systems employ two different forms of constraints—*ex ante* limitations on the scope of authority granted and *ex post* oversight—to enable them to grant authority to create and enforce legal duties to actors in the executive branch consistent with the rule of law.

50 Of course, as with external oversight, internal oversight can be relied on to reduce rule of law concerns, instead of enhancing them, only if those exerting oversight are also constrained through limitations on the scope of their authority or additional oversight. Scope of authority constraints are needed when those providing oversight have unilateral authority to act. In contrast, more discretion can be granted when oversight itself involves multiple actors.

Figure 1. Forms of and constraints on discretion to impose and enforce legal duties.

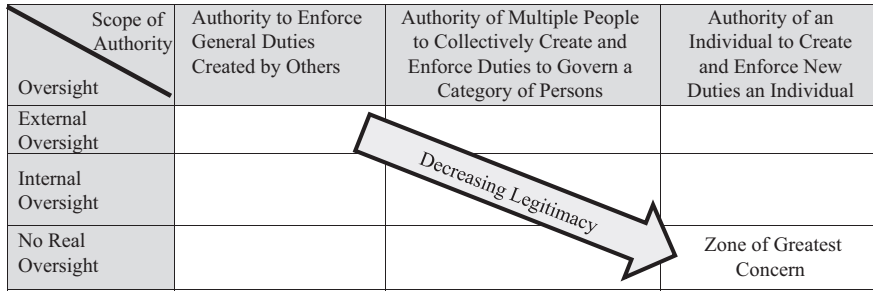

Figure 1 illustrates how these two constraints interact. Executive branch authority is narrowest in scope when executive branch actors only have discretion to enforce duties created and interpreted by others. The scope of authority is greater when executive branch actors have authority to both create new duties and determine whether and how to enforce them, but this authority is spread across multiple independent actors who must act in concert to create duties that apply generally to a specific target population. The scope of authority is greatest when individual actors (or offices) can create new duties. The potential for abuse associated with this broad individual authority is greatest when an individual has authority to impose duties on specific individuals.

Notwithstanding broad authority, rule of law concerns can be reduced through oversight provided that those exerting oversight are provided sufficient guidance to enable them to determine when the duties imposed are inappropriate. Those exerting oversight also ideally should be independent of the actors creating the duties.

Thus, we see that, all else equal, grants of discretion in the upper left-hand corner of Figure 1 are the least likely to raise rule of law concerns. In contrast, grants of discretion in the bottom right-hand corner of Figure 1 involve the greatest rule of law concerns: these grants entail discretion to create, interpret, and enforce new duties without genuine oversight over whether the duties imposed genuinely serve the public interest. Rule of law concerns are greatest when duties are imposed on a case-specific basis, instead of applying generally, as this scenario can lead to rights being determined by the whims of men.

Guided by the preceding analysis about the rule of law's constraints on the exercise of executive branch discretion, we can now determine whether the DOJ's existing policy governing the imposition of mandates through D/NPAs conforms to the rule of law.

4. MUST CONSENSUAL PRETRIAL DIVERSION AGREEMENTS CONFORM TO THE RULE OF LAW?

Before we consider whether D/NPA mandates conform to the rule of law, it is necessary to address the claim that they need not conform because mandates are imposed through voluntary agreements[51] executed between prosecutors and corporations. Thus, arguably, they should not be viewed as exercises of government power that must conform to the rule of law.

The proposition that D/NPAs are simply voluntary agreements that impose conditions on firms is not without its appeal. Corporations consent to all mandates imposed on them when they enter into D/NPAs. This consent is voluntary, even though these agreements are signed in the shadow of the threat of indictment and subsequent prosecution (but see Epstein 2011, p. 40–41). The firm's consent is not the product of genuine duress, blackmail, or other illegality. The firm consents to avoid the serious negative consequences of a legitimate prosecutor-initiated prosecution. The fact that the benefit gained from consenting to a D/NPA is enormous does not render this consent involuntary.

Nevertheless, although D/NPAs are voluntary agreements, they are not the equivalent of private contracts whose terms need not conform to the rule of law. D/NPAs are not private contracts. They involve the exercise of discretionary governmental power at every stage of the process of negotiating and implementing the mandates they impose—discretionary power that must be employed consistent with the rule of law.

Prosecutors use governmental power when they negotiate the terms of a D/NPA as their bargaining power is grounded in the threat that they will pursue a conviction if the firm does not agree to the D/NPA. Negotiations of private agreements also often involve the exercise of bargaining power. Yet, this bargaining power generally arises from each individual's right to refuse to enter into an agreement if it does not serve his interests. Private parties thus can use their right over their own entitlements to pursue purely personal and idiosyncratic aims, provided they are legal. Prosecutors' bargaining power, in contrast, arises from their authority to employ police power to either pursue a conviction or defer it. As prosecutors' bargaining power is grounded in police power which must be employed for public aims, prosecutors do not enjoy unfettered discretion to use this bargaining power to impose whatever terms they deem to be appropriate. Instead, they are only authorized to employ police power to serve legitimate public purposes.

51 See *supra* note 9 (discussing why these agreements are appropriately viewed as voluntary even when firms face ruinous collateral consequences if convicted).

Prosecutors also employ state power when they seek to enforce these agreements. When a breach occurs, prosecutors do not seek classic contract remedies such as damages or specific performance. Instead, they invoke their police power, asserting the right to declare breach and indict the firm for the original wrong (Cunningham 2014, p. 43–44). Courts have not treated prosecutorial response to breach as they would any other contract; instead, they tend to defer to prosecutorial discretion over whether the government has a right to indict.[52] Thus, D/NPAs are properly viewed as an exercise of governmental authority with the power to limit individuals' rights—authority that must be exercised consistent with the rule of law.[53]

The conclusion that D/NPAs must be imposed consistent with the rule of law has many implications. Most obviously, prosecutors should not be allowed to threaten something unlawful to obtain a concession. They also should not be able to use the threat of enforcement to induce firms to undermine Constitutional or other legal rights that are not properly waived under these circumstances. Yet, beyond this, the rule of law requires the state to ensure that the scope of individual prosecutors' authority to create mandates is adequately constrained. Prosecutors also must be subject to adequate oversight in order to ensure that they only impose mandates that promote a legitimate conception of the public good, and do not use mandates to serve either their own personal aims or an idiosyncratic conception of the public good. Constraints also should be employed to promote consistency in order to ensure that the mandates imposed do not vary widely depending on the identity of the individual prosecutor.

The claim that voluntariness is not a substitute for the constraints needed to bring D/NPA mandates within the rule of law is aptly illustrated by the DPA that then-U.S. Attorney Christopher Christie negotiated with BMS.[54] This D/NPA required the firm to endow a chair in business ethics at Christie's alma mater, Seton Hall Law School, at a cost of $5 million (Christie & Hanna 2006, p. 1044). Christie imposed this mandate even though he decided not to fine the firm because it was already obligated to pay $450 million to civil regulators and private plaintiffs. Christie justified the mandate on the grounds that he only told BMS that it had to donate to a New Jersey law school; Bristol

52 See *supra* note 15.

53 Relatedly, Richard Epstein has argued that although the government can always ask for waivers of constitutional rights, it cannot use its power to grant or deny governmental benefits to coerce someone into giving up a constitutional right. This limitation precludes the invalid exercise of the monopoly power of the state to induce people to relinquish liberties granted them by the Constitution—liberties the government could not otherwise get them to relinquish (Epstein 1988, p. 7–8).

54 Indeed, the DOJ subsequently prohibited the use of these mandates in such cases. See supra note 37.

Myers selected Seton Hall (Christie & Hanna 2006, note 29). Yet Bristol Myers' sensible decision (under the circumstances) to agree to the donation and to select Seton Hall does not eliminate the obvious issue that then-U.S. Attorney Christie used the police power delegated to him to impose a mandate that, at best, appears grounded in an idiosyncratic conception of the public good and, at worst, is an example of the use of prosecutorial authority to serve personal aims.

5. ARE D/NPA MANDATES SUFFICIENTLY CONSTRAINED TO SATISFY THE RULE OF LAW

D/NPA mandates must be imposed through a process that conforms to the rule of law even though they are imposed through voluntarily agreements. This section evaluates existing prosecutorial discretion to impose D/NPAs mandates to determine whether prosecutorial discretion is adequately constrained by either limitations on the scope of their authority or adequate internal or external oversight. This section finds that prosecutorial discretion to use D/NPAs to create and impose mandates is not subject to sufficient *ex ante* or *ex post* constraints to satisfy the rule of law.

5.1 Why Mandates Imposed through D/NPAs Violate the Rule of Law

D/NPA mandates result from prosecutors' use of informal enforcement to create new legal duties—duties that can be enforced through the imposition of criminal sanctions that otherwise would not be imposed (see Rubin 2016, distinguishing informal enforcement from formal rule-making and enforcement). This use of informal enforcement implicates the rule of law because it enables prosecutors to reach beyond the constraints on the scope of authority that normally bind them, without adequate *ex ante* or *ex post* oversight.

5.1.1. Broad Scope of Authority

Individual prosecutors' offices exercise the broadest potential form of authority when they create and impose new mandates—authority to create, impose, and potentially enforce duties that bind individual firms.[55] Indeed, prosecutors not only use D/NPAs to create new duties, they use them to impose new duties on specific firms.

55 Similar issues can arise when prosecutors assert authority to create and impose new duties to govern individuals subject to guilty pleas. In theory, judges assert more oversight over pleas, as discussed below. The question of whether this oversight is sufficiently robust to bring this practice under the rule of law is beyond the scope of this article.

D/NPA mandates create and impose new legal duties whenever the D/NPA mandate requires the firm to undertake an action that it would not have been legally required to do—and thus could not have been sanctioned for failing to do—but for the D/NPA (Arlen & Kahan 2017).[56] Mandates requiring new undertakings create new legal duties because firms that violate them risk criminal prosecution that would not occur but for the breach (see Arlen & Kahan, 2017, showing that D/NPA mandates impose *ex post* duties enforced by non-harm-contingent liability).

Examples of D/NPA mandates that create new duties governing internal corporate affairs that go beyond those required by another source of authority (such as a regulator) include those that:[57]

- mandate the creation of specific new board committees beyond those legally required;[58]
- require the appointment to the board of additional independent directors (beyond the number required by law);
- require the appointment to the board of specific independent directors;
- mandate the creation of specific management committees (such as a Disclosure Committee) (including, in some cases, mandates governing which officers will be on those committees);[59]
- mandate that executives' performance reviews and compensation be expressly dependent on the executive's efforts to ensure compliance by those under them;[60]
- mandate that the firm publicly post the report of its Compliance Committee on its website and include it in the annual proxy statement to shareholders;[61]
- mandate separation of the Chairman of the Board and the CEO;[62]

56 D/NPAs that simply require the firm to adopt a compliance program that meets the definition of compliance program in the Organizational Sentencing Guidelines (Organizational Guidelines, §8B2.1) also may impose new duties if the prosecutor both imposes the mandate and then insists that the firm undertake certain specific actions to comply with the mandate—actions that are not clearly required by the Guidelines.

57 Prosecutors have authority to impose similar mandates through corporate guilty pleas. This article focuses on D/NPAs because of the heightened rule of law concerns when prosecutors not only have authority to create duties but are not subject to external oversight. See Section 5.1.2.

58 See, e.g., MoneyGram International (2012); and others D/NPAs discussed *supra* Section 3.

59 See, e.g., Computer Associates (2004); MoneyGram International (2012); and others D/NPAs discussed *supra* Section 3.

60 See, e.g., MoneyGram International (2012).

61 See, e.g., Computer Associates (2004).

62 See, e.g., FalconStor Software (2012) D/NPA.

- mandate that all consulting contracts be in writing and signed by multiple specific executives or by the Compliance Officer;[63]
- prohibit all gifts to government personnel including travel and entertainment (even though the latter is explicitly permitted by the FCPA in certain situations);[64]
- require Compensation Committee approval of all bonuses over $25,000;[65] and
- require that the firm exit legal forms of business that were the source of previous wrongful acts.[66]

Although prosecutors can use D/NPAs to create new duties, senior DOJ officials have not adopted *ex ante* guidelines to constrain the scope of individual prosecutors' authority over the mandates they can impose. As a result, there is no genuine mechanism to ensure consistency in the mandates imposed on similarly situated firms by different prosecutors' offices. Instead, each individual U.S. Attorney's office has authority to create and impose the duties that the specific U.S. Attorney's office concludes should be imposed, provided that the firm is willing to consent in order to avoid prosecution.[67] Thus, prosecutors imposing mandates through D/NPAs are not restricted to imposing duties that have been legitimated either by other government actors with legislative or rule-making authority or by senior enforcement officials. Instead, they are able to create new duties, whose claim to legitimacy rests entirely on that specific offices' view that the mandate serves the public interest. The scope of authority granted them appears to be sufficiently broad to enable prosecutors to impose mandates that promote their individual views of the internal governance and compliance duties that firms should have—views that may reflect personal preferences and not the public good. This very broad authority resides along the far right-hand column of Figure 2.

63 See, e.g., Wright Medical Technology D/NPA (2010, extension); Exactech Inc. D/NPA; see also D/NPAs for Stryker Orthopedics, Zimmer Holdings.

64 See, e.g., FalconStor Software (2012) D/NPA.

65 Id.

66 See, e.g., UBS's 2009 DPA requires it to implement its program to exit the business of providing cross-border banking or securities services to U.S. residents with undeclared accounts. KPMG's DPA precludes it from offering particular prepackaged tax products. Cf. see Barkow (2011, pp. 177–180, prosecutors go beyond the mandates approved by the Organizational Guidelines when they impose mandates that restrict operations going forward or impose mandates beyond compliance; this regulation by prosecutors challenges separation of power).

67 The DOJ does limit certain mandates—such as monitors and extraordinary restitution. In addition, certain enforcement actions, such as the FCPA, Antitrust, or Environmental, are channeled through specialized offices. But outside of those areas, prosecutors enjoy enormous discretion to create and impose mandates.

Figure 2. Constraints on Executive Discretion.

Scope of Authority / Oversight over the Decision	Authority to Enforce General Duties Created by Others	Authority to Act as a Group to Create and Enforce Duties to Govern Target Population	Authority of an Individual to Create New Duties and Enforce Them to Govern a Specific Individual
External Oversight	Guilty pleas, trial convictions, and civil enforcement actions that impose fines or jail Administrative enforcement of duties adopted by Congress	Formal regulatory rulemaking under a broad grant of authority that is enforced by monetary sanctions	
Internal Oversight	D/NPAs that only impose monetary sanctions and involve internal review		D/NPAs mandates imposed through multiple independent actors in the DOJ
No Genuine Substantive Review by Others	Prosecutor's decision not to prosecute D/NPAs that only impose monetary sanctions absent internal review		D/NPA mandates imposed by a single prosecutor's office with no formal oversight by others

Decreasing Legitimacy

5.1.2. Absence of Effective Oversight over Mandates

Prosecutors who use informal enforcement through D/NPAs to impose new mandates not only exercise broad authority to create new duties, but they also generally are not subject to any genuine external oversight over either the mandates they impose or their decision of whether the firm has complied with the mandates.

Consider the role of judicial review. Judicial review serves to police abuses of discretion when duties are imposed through formal enforcement or rulemaking. Yet prosecutorial discretion use D/NPAs to create and impose new duties is not similarly constrained by judicial review. First, prosecutors imposing mandates may be able to avoid judicial review altogether by entering into NPAs instead of DPAs. Unlike DPAs, NPAs generally are not filed in court and thus can avoid judicial review. Technically, the Organizational Sentencing Guidelines also do not apply to NPAs. Thus, there is no apparent formal external oversight by an independent party of these agreements, even though NPAs can impose both sanctions and mandates.

DPAs, in contrast, are filed in court. Yet, both judges and the DOJ have concluded that judges do not have the same authority to oversee sanctions imposed through DPAs that they have when sanctions are imposed through a formal enforcement action, such as a guilty plea. Judges exercise clear oversight authority over guilty pleas. Indeed, prosecutors in theory generally simply

recommend the sanction; judges have ultimate authority to determine the appropriate sentence imposed by a formal conviction.[68] Beyond this, both judges' and prosecutors' authority over sentences imposed through guilty pleas is constrained to some degree by the Organizational Sentencing Guidelines. These guidelines not only provide recommendations governing fines but also have provisions governing the types of mandates that are appropriately imposed.[69]

In contrast, in the case of DPAs, prosecutors, not judges, appear to have ultimate authority over the fines and sanctions imposed. Judges do not appear to have the right to reject a mandate, provided it does not violate the constitution or some law or DOJ policy.[70] Indeed, the DOJ has taken the position that judges determining whether to approve a DPA may only consider whether the prosecutor is using the DPA to circumvent the Speedy Trial Act.[71] Judges, in this view, do not have the right to second-guess either the prosecutors' decision to impose a DPA or the form of mandate imposed.[72] Consistent with this view, the D.C. Circuit in *U.S. v. Fokker Services* recently held that trial judges

68 Judges oversight also is limited in the case of Rule 11c pleas, but judges can reject the plea if they conclude the sentence is not appropriate. The DOJ takes the position that judges do not have authority to reject a DPA if they conclude the sentence is inappropriate.

69 Judges can impose mandates through probation orders. The Organizational Guidelines recommend that judges impose probation "if such sentence is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct" (§8D1.1). The Organizational Guidelines provide that judges should impose "conditions that (1) are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization; and (2) involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing" (§8D1.3(c)). For example, recommended conditions of probation include requiring the corporation to develop and submit to the court an effective compliance program that satisfies §8B2.1 of the Organizational Guidelines; but courts are not encouraged to reach beyond the bare--bones requirements of §8B2.1 to impose more intrusive internal governance reforms. Moreover, any mandates imposed by a trial judge are subject to appellate review.

70 NPAs need not be filed with the court, and thus judges tend to play no role with NPAs. DPAs are filed with the court, but at present the DOJ claims that judges have little authority to oversee them (they are limited to making sure that prosecutors are not violating the defendant's speedy trial right). Even Gleeson's HSBC decision recognizes weak oversight. And even with some oversight, judges would be hard-pressed to exercise it because the DOJ has never clearly stated the goal of corporate criminal liability, so judges cannot easily determine when a DPA serves or is an affront to that goal.

71 Prosecutors file DPAs in court to obtain a tolling of the Speedy Trial Act. Speedy Trial Act, 18 U.S.C. § 3161(h)(2). Government Brief in Saena Tech.

72 The DOJ asserts that court authority to oversee DPAs is restricted to ensuring that the prosecutor is not abusing the system in seeking a waiver of the Speedy Trial requirement. It does not recognize court authority to examine specific mandates imposed to determine whether they comply with existing law or policy. Government's Supplemental Brief at 6-8, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. August 8, 2014); Government's Reply to Memorandum of Law of Amicus Curiae Law Professor at 5, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. August 29, 2014).

reviewing a DPA under the Speedy Trial Act cannot reject it based on concerns about the prosecutors' charging decisions. The court also concluded that courts "play no role in monitoring the defendant's compliance with the DPA's conditions . . .. Rather, the prosecution – and the prosecution alone – monitors a defendant's compliance with the agreement's conditions . . .."[73]

The other leading opinion on this issue was written by Judge John Gleeson of the Eastern District of New York. In HSBC, Judge Gleeson concluded that judges have considerably less authority to oversee DPAs than guilty pleas.[74] He concluded that judges do not have broad authority to reject or redesign mandates as being contrary to public policy. Nevertheless, according to Judge Gleeson, judges do have supervisory authority both to reject a mandate on the grounds that it violates either the constitution or DOJ policy and to require ongoing reporting to the judge.[75] This narrow authority falls far short of the authority needed to ensure that prosecutors conform to the rule of law when they impose mandates governing compliance programs, corporate governance reforms, and restrictions on business practices. In addition, courts have concluded that judicial review is not available in situations where prosecutors refuse to dismiss pending charges at the end of the agreement and/or indict the firm on the grounds that the firm failed to satisfy a D/NPA mandate.[76]

73 *U.S. v. Fokker Services, B.V.*, No. 15-3016, D.C. Circuit (April 5, 2016).

74 See Memorandum and Order, *U.S. v. HSBC Bank*, US, WL 3306161*3 (Judge Gleason) (EDNY, July 1, 2013) (discussing the government position) (hereinafter HSBC Order).

75 Judge John Gleason found that judges have some supervisory authority over DPAs but this authority is not coextensive with their authority over guilty pleas. He concluded that substantive review of the content of DPAs only extends to egregious abuses that violate fundamental rights, such as due process, or the DOJ's own guidelines. For example, in HSBC Judge Gleason specifically identified mandates that require extraordinary restitution and waiver of the attorney–client privilege as a condition of cooperation as the types of mandates that could be invalidated. These two mandates would both be directly contrary to DOJ policy as set forth in the USAM. Interestingly, Gleason claims that judges have authority to oversee compliance with the USAM even though the USAM itself explicitly states that it does not create rights for defendants. *United States v. HSBC Bank*, 2013 BL 175499 (E.D.N.Y. July 1, 2013). The D.C. Circuit in *Fokker* explicitly chose not to address the claim that judges have authority to reject a DPA that contains illegal or unethical terms, noting that Judge Leon did not reject the DPA in Fokker on that basis. *Fokker*, at p. 21.

76 See *Fokker*, at p. 16 (concluding that prosecutors have sole authority to determine whether the defendant's efforts to comply with the DPA were sufficient to justify dismissal of pending charges); *Stolt-Nielsen*, 442 F.3d 177 (3rd Cir. 2006) (federal courts do not have authority to enjoin a prosecutor from indicting a firm that the prosecutor concludes violated a D/NPA); *U.S. v. Goldfarb*, No. C 11–00099 WHA, 2012 WL 3860756 (N.D. Cal. September 5, 2012) (denying motion to dismiss indictment because of claimed substantial performance with D/NPA).

Taken together, the analysis above places the scope of authority and oversight over mandates in the bottom right-hand corner of Figure 2.[77] This is a zone that presumptively violates the rule of law.

5.1.3. Firm-Specific Duties

In fact, the rule of law problem presented by the current policy governing mandates is worse than the proceeding analysis suggests. As previously noted, the rule of law requires that states limit the ability of individual decision-makers to act in the name of the state to impose duties that limit the rights of others. Yet beyond this, adherence to the rule of law requires that governments strive to achieve consistency in the limitations imposed on similarly situated individuals. This is needed to ensure that people's rights and duties depend on legitimate policy decisions more than on the identity of the specific individual exercising power over them.

In the case of formal legislation or rule-making, governments strive to achieve consistency by adopting rules that apply to all persons in a specific category—for example, all publicly held firms. The duties and category of affected persons are identified *ex ante*, as are the range of penalties for breach. In addition, often additional mechanisms are employed—such as the U.S. Sentencing Guidelines and judicial review—to promote consistency in the application of these duties to specific cases.

In contrast, the DOJ has not intervened adequately to ensure consistency in the mandates imposed on firms through D/NPAs. The DOJ allows individual U.S. Attorney's Offices to determine what mandates to impose, with few restrictions.[78] First, the DOJ has not provided prosecutors with clear *ex ante* guidance on either when mandates should/can be imposed or what types of mandates are appropriate.[79] The DOJ has placed controls on a few mandates, such as monitors and extraordinary restitution. The Organizational Sentencing Guidelines provide very general guidance on the nature of effective compliance.

77 The lack of oversight is in many ways ironic since the DOJ does not exercise the level of internal controls over the actions of its U.S. Attorneys actions that it insists corporations exercise over their agents through the adoption of effective compliance programs. For a discussion of why the DOJ, just like other organizations, would benefit from an effective "compliance program," see Barkow (2010).

78 USAM 9-2.001. There are exceptions. Specialized divisions within Main Justice assert authority over enforcement actions involving Antitrust, Tax, Environmental, FCPA, and certain other crimes. But otherwise Main Justice leaves the USAs free to decide when to prosecute and what sanctions to recommend with little *ex ante* guidance from, or *ex post* review by, Main Justice.

79 The USAM suggests that mandates should be considered when the firm did not have an effective compliance program. Yet, the manual provides no real guidance about what other factors are relevant to the decision to impose mandates and no real guidance on what types of governance mandates are legitimate.

The DOJ also provides general guidelines governing the nature of an effective compliance program, particularly in the FCPA area. But the DOJ has not provided *ex ante* guidance to prosecutors and the firms on the degree to which prosecutors can go beyond these general compliance provisions when imposing a compliance program mandate. In particular, the DOJ has not provided any genuine available guidance on the appropriateness of corporate governance reforms that go beyond compliance programs. It also has not adopted a clear process for overseeing mandates designed to ensure consistency and standardization of mandates. Except for specialized areas such as antitrust, tax, FCPA, and antifraud and money laundering, individual U.S. Attorneys' Offices are free to make their own decisions about when to impose a mandate and what form it should take, without formal *ex ante* supervision. They are not required to seek approval of mandates from Main Justice, even when mandates are imposed on a multinational firm, outside of a few select areas (such as the FCPA). Nor are they required to standardize the types of mandates imposed (across crimes, industries, or otherwise) or provide clear justifications for the mandates imposed in an effort to constrain arbitrariness. The DOJ also provides little effective *ex post* oversight. In rare cases, where a mandate garnered considerable negative media attention—e.g., Chris Christie's BMS DPA imposing a mandate to endow a chair at his alma mater, Seton Hall Law School—authorities in Main Justice have intervened, *ex post*, to limit the use to such mandates going forward. But intervention generally has not occurred in response to mandates that do not garner national media attention.

As a result, the existing system fails to satisfy the rule of law because it allows individual prosecutors to impose duties on a firm that can differ materially from the duties imposed on a similarly situated firm by a different prosecutor. Moreover, because of the lack of *ex ante* and *ex post* oversight, the prosecutor often can impose duties that vary from those imposed by other prosecutors without having to defend the decision to an outside authority charged with overseeing these decisions in the public interest.

5.2 Comparison with Formal Enforcement through Fines and Prison

Prosecutors often defend the current practice governing mandates on the grounds that their authority to impose D/NPA mandates is directly comparable to their authority to impose traditional sanctions on defendants through guilty pleas. Yet this is not the case. Indeed, the rule of law issues raised by D/NPA mandates become clearer once we compare prosecutors' authority to impose mandates with their authority to impose traditional sanctions—fines and imprisonment—through formal enforcement, either following trial or after a guilty plea.

Prosecutors making enforcement decisions have a considerable amount of discretion, but they do not enjoy the same amount of discretion when they seek to restrict individuals' rights as they enjoy when they decide not to intervene. Prosecutors' offices can decide not to charge someone with a crime, often without any genuine oversight. Yet their authority to sanction an individual for breach of a duty is limited in a variety of ways. First, the scope of prosecutors' authority to use formal enforcement to determine whether individuals owe and breached particular duties is limited: prosecutors can enforce legal duties created by others, but they are not free to unilaterally create and then enforce new duties. Prosecutors exercising formal enforcement authority are not free to conclude that firms or individuals should be sanctioned for breach of a duty that the legislatures or regulators did not impose on them. Indeed, even when the duties imposed by law are sufficiently vague to grant prosecutors considerable leeway when interpreting those duties, prosecutors do not have formal authority to simply create new duties.[80] They are charged with interpreting the duties as imposed by Congress or the regulator. In addition, prosecutors' ability to pursue a novel and idiosyncratic interpretation of the law is constrained by judicial review. Defendants can seek judicial review of the validity of charges filed at the indictment stage, at trial, and on appeal. These layers of review by different judges limit prosecutors' ability to use broad statutes to create and impose duties to serve personal or idiosyncratic goals.

Nor do prosecutors pursuing formal enforcement actions have authority to unilaterally create duties through their authority to impose new duties when determining the sanctions that will be imposed on offenders. Congress, and not the federal prosecutor, determines the range and maximum magnitude of the fines and prison terms that can be imposed for each offense and the maximum punishment for the crime.[81] The Sentencing Guidelines contain advisory provisions designed to further constrain discretion. Finally, judges, not prosecutors, have ultimate discretion to determine the sanctions to be imposed. Accordingly, even though prosecutors can use probation to impose mandates on individuals or firms subject to formal enforcement, they do not enjoy

80 For a discussion of the breadth of many federal criminal statutes and the benefits of the resulting expansive discretion exercised by enforcement authorities to determine what conduct is illegal, see Buell (2008).

81 Congress determines maximum punishments both directly, through provisions dictating the minimum and maximum penalty for each count of the crime, and indirectly, through statutes governing sentences to be imposed on defendants who have prior convictions. While Congress's tendency to impose harsh sentences often effectively removes any legislatively adopted limits on the potential sentences, many statutes do have maximum sentences. Moreover, statutes providing for fines all impose per-count maximums.

unilateral authority to create and impose mandates.[82] They may negotiate a plea that imposes mandates, but the plea effectively serves as a recommendation to the judge, who is free to impose the sanctions the judge deems appropriate. Thus, prosecutors imposing sanctions through pleas do not formally have the right to unilaterally create and impose mandates. They must persuade the judge to do so.

Of course, judges often heed prosecutors' recommendations. Yet even here the system includes mechanisms designed to limit prosecutors' influence. First, prosecutors recommending unusual sentences need to contend with the Organizational Sentencing Guidelines that specify the considerations that should govern the use of probation to impose mandates. Although the Sentencing Guidelines are advisory after *U.S. v. Booker*,[83] many judges prefer to conform to the Guidelines (or at least not exceed them) when sentencing defendants convicted of a crime.[84]

Prosecutors pursuing formal enforcement also are subject to more external oversight. Judges have authority to review prosecutors' charging decisions both to determine whether the prosecutor has correctly interpreted the statutory duty and to assess whether there is sufficient evidence to charge. In addition, trial and appellate judges also have authority to assess the prosecutor's interpretation of the statute or rule both when presenting jury instructions and in determining whether the conviction is valid. This oversight helps ensure that prosecutors do not exceed their authority to enforce the legal duties created by Congress and regulators by using enforcement to impose new duties that serve either personal aims or are based on an illegitimate interpretation of the existing law.[85] Oversight also helps reduce the risk of prosecutors abusing their power by convicting people of crimes without sufficient evidence of guilt to support the

82 U.S. Sentencing Guidelines § 5B1.3; C.

83 543 U.S. 220 (2005).

84 See Fischman & Schanzenbach (2011, identifying factors determining judicial conformity to the Guidelines post-Booker); cf. Alexander, Arlen, & Cohen (1999, showing that after the adoption of the Organizational Guidelines, judges imposed higher fines both in cases governed by the Organizational Guidelines and in cases that were not governed by the Guidelines; moreover, there was no significant difference in total sanctions imposed in constrained and unconstrained cases after the promulgation of the Organizational Guidelines). The prosecutor may succeed when the deviation conforms to policy goals but is less likely to succeed with recommended deviations—particularly upwards—that are motivated by personal goals or a personal view of justice.

85 *Ex ante* constraint imposed through limitations on the scope of authority and external oversight are particularly important because there is little effective *ex post* internal intervention to genuinely sanction prosecutors who cross the line. Although judges and state boards are supposed to exercise oversight over and punish prosecutors who abuse the discretion given them, in fact they rarely do so effectively. See Barkow (2010, prosecutors' offices should incorporate compliance programs into their own organizations to ensure that prosecutors conform to the law).

conclusion that the defendant is guilty.[86] Finally, oversight helps promote consistency of duties across people subject to the law.

Prosecutorial discretion is subject to less oversight when the defendant enters a guilty plea.[87] Yet, guilty pleas also must be approved by a trial judge who reviews both the defendant's decision-making—is the defendant competent, was the decision voluntary, and did the defendant exercise knowing decision-making—and whether the indictment or criminal information is facially valid.[88] Indeed, defendants who plead guilty can reserve their right to appeal the prosecutors' interpretation of the law. While questions abound about whether judges can and do adequately assert this oversight, the important point is that the legal system granting prosecutors' discretion to negotiate pleas determined that it was important for judges to exert oversight over these consensual agreements.[89]

In sum, although prosecutors have considerable influence over formal enforcement, prosecutors do not have the unilateral right to use formal enforcement to create and impose new duties. Charging decisions can only enforce violations of duties created by others. While prosecutors can recommend new mandates in a plea, they cannot unilaterally impose them. Unlike D/NPAs, judges can reject a mandate that they conclude are unethical or otherwise do not serve legitimate public objectives.

5.3 Comparison with Formal Agency Rule-making

Although prosecutors engaged in formal enforcement do not have authority to create new duties on their own, other executive branch actors—agencies—may create new duties through formal rule-making. Yet a comparison of prosecutorial authority to use D/NPAs to create new duties with the mechanisms established to govern formal rule-making highlights the rule of law concerns

86 See generally Kadish et al. (2012, p. 1125). Of course, this all depends on the degree to which judges exercise sufficient oversight over the plea process to curtail the most egregious abuses.

87 In this part we do not consider prosecutors' use of pleas to impose mandates. This practice raises many of the rule of law concerns raised by mandates imposed through D/NPAs, although in theory, mandates through pleas are subject to more judicial oversight and would be formally guided by the Sentencing Guidelines. Nevertheless, to the extent prosecutors are using pleas to impose mandates that reach into corporate governance reforms, these also raise the rule of law concerns.

88 Rule 11, Federal Rules of Criminal Procedure grants trial judges authority to oversee and/or reject a guilty plea. See generally Alschuler (1976).

89 There is a rich literature on whether our current plea bargaining system is unjust or fails to conform to the rule of law. See, e.g., Schulhofer (1992, pp. 1987–1990, discussing why prosecutors' and defense attorneys' pursuit of personal goals, rather than social benefit, may produce plea agreements that do not promote justice); see also Lynch (1998, discussing changes to the plea bargaining process that would promote justice); Schulhofer (1988, pp. 57–59, monitoring of poor representation is weaker when defendants plea than when they go to trial); see generally, Kadish et al. (2012, pp. 1146–1148).

presented by D/NPA mandates. Formal agency rule-making is subject to both scope of authority constraints and oversight constraints that do not apply to D/NPA mandates.

First, administrative agencies often are constrained by Congress to create new duties to achieve particular objectives (e.g., deter securities fraud). Second, and perhaps more important, formal rule-making does not grant authority to a single individual within an agency to impose new duties. Indeed, independent agencies generally are structured by Congress to ensure that no one person can use the agency to pursue purely personal aims: these agencies tend to be run by a five-person commission from different political parties. In addition, the legal duties imposed by many agencies are subject to review by OIRA, an authority within the executive branch that does not answer to the head of the agency adopting the duty.

The formal rule-making process also helps constrain agencies. Congress adopted the Administrative Procedures Act[90] to constrain the exercise of agency rule-making by requiring agencies to provide the public with notice of, and a right to participate in, agency rule-making. Formal rule-making also imposes generalized duties on a category of persons, instead of imposing firm-specific duties. Public notice and standardization of duties helps ensure that rules serve public goals and not the particular political aims of particular regulators. Public notice gains particular effect when combined with Congress's power over the purse, which Congress can use to increase its authority over agencies pursuing policies it does not favor. In contrast, DOJ policy permits prosecutors to create duties without providing *ex ante* notice or seeking comment from anyone other than the defendant. Indeed, some prosecutors have imposed NPAs that are not publicly recorded.

Finally, agency rule-making involves a more presumptively valid form of duty creation—duties that attach to all persons engaged in a particular activity. This is consistent with conceptions of the rule of law that disfavor the imposition of legal duties that apply to only one person and do not also apply to similarly situated persons. Indeed, the combination of generally-applicable duties and notice and comment helps give the public incentive to intervene and can enhance the effectiveness of intervention. In contrast, the use of D/NPAs to impose ostensibly firm-specific duties, without notice and comment, reduces incentives of people to intervene. It shields duty-creation through D/NPAs from the public scrutiny that normally attends rule-making. This in turn also reduces the likelihood of Congressional oversight (cf. Barkow & Huber 2000, p. 69).

90 5 U.S.C. § 500 et seq.

5.4 Summary

Accordingly, whether we evaluate D/NPA mandates on their own (as in Section 5.1) or compare them with formal enforcement or formal rule-making, the conclusion remains the same: the DOJ's current approach to D/NPA mandates is inconsistent with the rule of law. Prosecutors who create D/NPA mandates are not subject to adequate *ex ante* constraints on the scope of their authority to create and impose new duties and do not face adequate oversight to bring their exercise of executive branch discretion within the rule of law. Unlike traditional formal enforcement, prosecutors imposing D/NPA mandates assert broad authority to create and impose new duties. In addition, prosecutorial authority to impose duties through D/NPAs is subject to less *ex ante* and *ex post* oversight than prosecutorial discretion to impose sanctions through formal enforcement. Finally, prosecutors are not subject to the safeguards employed to constrain duty-creation through formal rule-making.

Instead, the DOJ has left prosecutors free to let many flowers bloom. But discretion to create new duties to constrain future conduct is not an area where broad individual discretion is appropriate. Moreover, prosecutors' discretion to impose D/NPA mandates is particularly troubling because mandates govern issues where prosecutors have limited expertise, such as internal governance (Arlen 2011). Finally, the DOJ has exacerbated the rule of law concerns by allowing each U.S. Attorneys' Office to make its own decisions on mandates. This exacerbates rule of law concerns because unilateral, uncoordinated, decision-making enhances the ability of a government actor to pursue private aims, either deliberately or as a result of an idiosyncratic interpretation of public aims. It can result in duties and legal liability that depend more on the identity and personal views of the individual prosecutor than on any consistent feature of the legal regime.

6. BRINGING D/NPA MANDATES WITHIN THE RULE OF LAW

This section examines potential proposals to bring D/NPA mandates within the rule of law. It first considers the simplest solution, which is to require that D/NPAs be subject to judicial review. It finds that judicial review would help to address the rule of law problems posed by D/NPA mandates, but it would not suffice. This section suggests additional approaches that could be considered; full articulation of solutions is reserved for future analysis.

6.1 Judicial Review

The United States tends to rely on separation of powers to ensure that discretion is exercised consistent with the rule of law. Consistent with this view,

leading critics of the DOJ's approach to D/NPAs have tended to call for increased judicial review (Garrett 2007). Judicial review over D/NPAs should be a component of any effort to bring D/NPA mandates into conformity with the rule of law. Yet enhanced judicial review of mandates alone is not sufficient to bring the practice of imposing mandates on firms with detected wrongdoing into conformity with the rule of law.

Judicial review does not suffice to ameliorate the rule of law concerns triggered by prosecutors' use of D/NPAs to create and impose new duties on select firms because it cannot, in and of itself, effectively constrain discretion. Judges cannot assert effective oversight over mandates because they do not have a plausible standard to use when evaluating mandates.[91] No legislation or formal rules provides clear guidance on when D/NPAs should be imposed instead of a plea. Nor do statutes, regulations or written DOJ policies provide adequate guidance on permissible and impermissible forms of mandates. Judges could turn to the compliance program provision in the advisory Organizational Sentencing Guidelines, but this provision provides only general guidance. The Organizational Guidelines do not provide adequate guidance on when it is appropriate to impose mandates that require internal governance reforms, such as changes to the board structure, management committees, or other reforms.[92] Absent guidance, judges would have little choice but to either (i) approve all mandates that are not constitutionally or legally infirmed (e.g., HSBC); (ii) restrict prosecutors to imposing mandates consistent with a narrow interpretation of the Organizational Guidelines (or imposed with consent of regulators), or (iii) approve those mandates that the judge personally concludes are reasonable, based on the judge's own views of the purposes of corporate liability and appropriate use of mandates. None of these options provides the form of oversight and constraint likely to both bring mandates under the rule of law and render them effective.

91 In contrast, the United Kingdom adopted a statute that both provides for judicial review of DPAs and specifies when DPAs should be employed and what provisions they should contain. DPA Code of Practice, http://www.legislation.gov.uk/ukpga/2013/22/schedule/17/enacted.

92 To see the challenge, it is useful to compare judicial review of legal duties imposed through D/NPA mandates with judicial review of legal duties created through agency rule-making both in terms of the authority asserted and the potential for judicial review. Agency rule-making generally follows an explicit grant of authority in a statute. This grant of authority often specifies not only the general and specific objectives, but also may constrain the way these objectives are to be achieved. In other cases, the grant of authority specifies general and specific objectives (e.g., promote well-functioning securities markets by adopting rules to regulate proxies), where the objectives are set forth in the statute and/or legislative history. This grant of authority not only cabins the proper exercise of authority but also provides judges with a basis for evaluating whether the legal duties imposed are a proper exercise of government authority.

The DOJ is significantly responsible for this impediment to judicial review. While the DOJ has asserted authority for its prosecutors to impose D/NPA mandates—and in fact encourages them to do so—it has not adopted clear guidelines governing when mandates should be imposed and what form of mandates are appropriate. Instead it has provided only general guidance on when mandates may be appropriate. It has not provided genuine limitations on the forms that mandates may take—except in a few limited instances. The DOJ's inaction in crafting reasonably responsible guidelines for its prosecutors would put judges exercising review in an unenviable position of having to defer to the prosecutor or make their own independent assessment about appropriate corporate enforcement policy. Neither option serves the public interest.

Moreover, even if judges were given standards, judicial review alone is unlikely to suffice to bring D/NPAs under the rule of law. First, absent a change in legal practice, judicial review cannot address the rule of law problems associated with NPAs as NPAs generally are not filed in the court. This is significant because it is likely that if judges start exercising active review over mandates imposed through DPAs, then prosecutors may respond by making greater use of NPAs. This would only reduce the level of oversight over mandates. The increase in the Security and Exchange Commission's use of administrative proceedings following Judge Jed Rakoff's initial refusal to approve the settlement agreement between the SEC and Citibank suggests this concern is not hypothetical.[93]

Second, turning to DPAs, it is likely that judicial review over DPAs generally will be less effective than judicial review over pleas, even if judges are given clear authority to assert broad review and are provided some guidance. Judges often are less familiar with the circumstances surrounding a firm subject to a D/NPA than a plea. Judges overseeing other forms of settlement often gained jurisdiction over the matter when charges are filed or the defendant was arraigned. By the time the case is resolved, the judge may be familiar with the facts and the parties, and have an investment in the case. In contrast, with D/NPAs the judge often first encounters the case when the D/NPA is filed. The judge often is faced with a matter with which he is unfamiliar, a statement of facts concerning the crime and the firm's response that has been carefully negotiated by the parties, and a complex set of penalties and mandates. It is the rare judge who can be expected to have either the expertise or the incentives to intervene to provide genuine oversight.

93 Jean Eaglesham, The SEC is Steering More Cases to the Judges It Appoints, *Wall Street Journal* (October 21, 2014).

6.2 Enhancing Internal and External Oversight

Judicial review thus will not suffice to ensure that discretionary executive branch authority over D/NPA mandates is exercised consistent with the rule of law. Other measures must be used in addition to enhance and properly delineate judicial review over DPAs.[94]

In considering how to adequately constrain discretion, it is important to recognize that mandates on firms with detected wrongdoing are best designed by experts. This argues for leaving duty-creation authority within the executive branch.[95] The challenge is to determine both which actors in the executive branch should be granted this discretion, and how to employ the constraints available to bring this discretion under the rule of law. While the precise framework for bringing mandates within the rule of law is beyond the scope of this article, we can identify some useful principles.

At present, prosecutors enjoy considerable freedom to impose any mandates that have a plausible claim to be likely to deter crime in the future. This is a tremendous degree of discretion. D/NPA mandates could be brought into better conformity with the rule of law—and at the same time improved in terms of their impact—if a government authority were to undertake a more formal process to produce guidelines and rules to govern D/NPA mandates. These guidelines should govern both the purposes and preconditions for imposing mandates.[96] More specific guidelines also are needed to govern the types of mandates that prosecutors can legitimately impose. Finally, it is important that the decision to impose mandates be subject to additional internal and external oversight.

In considering the rules governing when and what mandates should be imposed, in theory the DOJ should be able to improve mandates and reduce the rule of law concerns by working with regulatory agencies to encourage them to adopt rules delineating the appropriate mandates to be imposed on

94 See *supra* note 91.

95 See Davis (1977, providing a more detailed discussion of when discretion to adopt rules often needs to be exercised by agencies and others in the executive branch).

96 Arlen & Kahan (2017) finds that mandates are justified in some cases, but only when the firm is plagued by agency costs directly affecting corporate policing: only when there is evidence that management is not appropriately attending to compliance to serve their aims and the board does not exercise effective oversight. Evidence that management has not attended to compliance because they did not think it was important to do so is not sufficient. That problem is best addressed through clear articulation of what is required to have optimal compliance *ex ante* coupled with serious monetary sanction enhancements sufficient to ensure management wants to comply. In contrast, management that is motivated by personal concerns to have weak compliance (or commit crimes) will not adopt effective compliance even if the firm faces serious liability (Arlen & Kahan 2017). Articulating the goal of mandates enables us to determine the proper scope of authority that should be granted.

wrongdoers and guidelines to govern their use.[97] For example, both the SEC and DOJ have jurisdiction to evaluate whether firms have adequate internal controls under the FCPA. Yet the SEC has the ability to engage in formal rule-making, including the ability to solicit public comment. Should the SEC have the political will to engage in effective rule-making in this area, having the SEC adopt clear rules on when mandates should be imposed and what forms they should take in FCPA and other related cases could help reduce rule of law concerns.

Yet the DOJ is not restricted to relying on agencies. The DOJ regularly issues guidance to prosecutors through the USAM. It would appear to have authority to turn to experts within the DOJ to provide an expert analysis—ideally with public comment—on what guidelines should govern mandates.

Clearer *ex ante* guidelines governing mandates would have additional benefits beyond reducing rule of law concerns. D/NPA mandates can promote public welfare if, but only if, they optimally deter crime. Individual prosecutors cannot be relied on to individually identify and employ an optimal approach to mandates. Most individual prosecutors have an adjudicatory—case by case—approach. Yet mandate design requires a more regulatory approach focused on forward-looking incentives. Many prosecutors do not have either the personal expertise or the incentives to do the analysis needed to design appropriate mandates. Nor can they rely on the adjudicatory process to provide the information needed. The adjudicatory process is limited: it is aimed at resolving a particular dispute. It is not designed to obtain information from a broad range of individuals on the appropriate solution to a problem.[98] The DOJ should take a more regulatory approach to designing D/NPA mandates, designed to promote more consistent decision-making in mandate design, enhance expertise, and increase internal and external oversight. This would not only promote the rule of law, but also could improve the consistency, efficacy, and cost-effectiveness of the mandates imposed.[99]

97 Cf. Asimow (2004, calling on Congress to amend the APA to bring all federal agency adjudication under the procedural protections that apply to Type A agency adjudication).

98 Barkow & Huber (2000, p. 59); see Shapiro (1965, p. 930).

99 Standardization of mandates could also provide allocative efficiency benefits. D/NPA mandates govern activities that have a material effect on the firm's operations. Many compliance programs are extraordinarily expensive both directly and through their effect on firm productivity. For example, HSBC recently announced that its mandated compliance program, which increased annual expenditures on compliance from $24 million to more than $240 million in 2011 produced a 5% reduction in profits. JP Morgan was required to dramatically increase its expenditures on compliance, and now employs over 8,000 people in this area. Yet it recently announced that it is laying off thousands in other areas. Neither these costs nor their consequences are necessarily contrary to social welfare. But concerns arise if mandates with material consequences are not imposed

7. CONCLUSION

Corporate crime causes billions of dollars of harm at home and abroad. Deterring these wrongs is of paramount importance. Deterring crime requires that prosecutors have authority to impose adequate sanctions on wrongdoers. In appropriate circumstances, federal enforcement authorities also need to be able to impose mandates designed to improve compliance programs and enhance internal and external oversight over the firm's compliance undertakings (Arlen & Kahan 2017).

Nevertheless, while prosecutors need discretionary authority to impose D/NPA mandates in appropriate circumstances, their authority must be adequately constrained to ensure that power is exercised in conformity with the rule of law. At present, it is not. The rule of law requires that government actors not be allowed to use state power to pursue either their own aims or idiosyncratic views of public aims. In addition, adequate attention to the rule of law favors the use of measures that promote consistency in the duties imposed on similarly situated individuals. Yet over a wide range of cases the DOJ has effectively granted authority to individual prosecutors' offices to use D/NPAs to create duties, interpret them, and enforce them, without either adequate constraint on their authority to create duties or effective oversight, internal or external. While many prosecutors use their discretion wisely and to achieve aims that most would agree serve the public's interest, not all do. Conformity with the rule of law requires that constraints be placed on the scope of prosecutors' authority and that mandate decisions be subject to more effective oversight.

Of course, any effort to bring D/NPAs into better conformity with the rule of law necessarily comes at a cost. Any serious effort to develop guidelines and enhance oversight will increase the influence of Congress, agencies, or senior DOJ officials. These actors are more vulnerable than many line prosecutors to political influences aimed at weakening enforcement. Congress is undermined by rent-seeking.[100] Many administrative agencies also are subject to capture; in addition, independent agencies that are run by a five-person politically-divided commission often find it difficult to take genuine aggressive action to deter corporate crime. Senior officials in the DOJ also can be vulnerable to political

consistently across similar firms with similar wrongs. The resulting differential costs could distort the industry, favoring firms that objectively are not superior.

100 As a result, it has tended to talk tough about corporate enforcement while appeasing powerful interests by under-funding enforcement. See Richman (2015, discussing Congress's practice of approving increased funding for enforcement that it later does not appropriate).

pressure. Thus, reasons exist to worry that enhanced oversight may increase the effectiveness of political pressures designed to reduce corporate enforcement (Richman 1999). In addition, centralization and oversight could deter the development of valuable and innovative mandates. These potential concerns are undeniable. Yet, in fashioning legal systems we cannot only be concerned with the public-regarding visionary who may develop a welfare-enhancing innovation. The rule of law is there to safeguard us from the inevitable instances where government actors, lacking adequate guidance or oversight, deliberately or unintentionally use their authority improperly. The impediments placed on the rare visionary may be a reasonable price to pay for the benefit of increased safeguards from potential abuse.

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