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## The President's Enforcement Power

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## ARTICLES

### THE PRESIDENT'S ENFORCEMENT POWER

KATE ANDRIAS\*

*Enforcement of law is at the core of the President's constitutional duty to "take Care" that the laws are faithfully executed, and it is a primary mechanism for effecting national regulatory policy. Yet questions about how presidents oversee agency enforcement activity have received surprisingly little scholarly attention. This Article provides a positive account of the President's role in administrative enforcement, explores why presidential enforcement has taken the shape it has, and examines the bounds of the President's enforcement power. It demonstrates that presidential involvement in agency enforcement, though extensive, has been ad hoc, crisis-driven, and frequently opaque. The Article thus reveals the need for institutional design reforms—namely more coordination across agencies and greater disclosure of enforcement policy. The seeds for such reforms can be found in several recent efforts that have yet to be made systematic. Concerns about politicization of law enforcement should not override the considerable benefits that would derive. Rather, by acknowledging the President's role in, and responsibility for, enforcement, we can better ensure the structure and transparency that promote appropriate presidential influence.*

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\* Copyright © 2013 by Kate Andrias, Assistant Professor of Law, University of Michigan Law School; formerly Associate Counsel, Special Assistant to the President, and Chief of Staff to the White House Counsel. In my former positions at the White House, I participated in some of the administrative actions discussed in the Article; those experiences inform my thinking, but the views expressed are my own and the discussion is based on publicly available documents. I am grateful to Kevin Arlyck, Nicholas Bagley, David Barron, Ashley Deeks, Ariela Dubler, Jamal Greene, Scott Hershovitz, Martin Kurzweil, Daniel Meltzer, David Noll, David Pozen, Daphna Renan, Judith Resnik, Kate Shaw, Reva Siegel, Peter Strauss, Charlotte Taylor, and especially to Robert Bauer, Gillian Metzger, Henry Monaghan, and Trevor Morrison. My thanks also to the editors of the *New York University Law Review* and to participants in workshops at Brooklyn, the University of Chicago, Columbia, Fordham, Georgetown, Harvard, the University of Michigan, the University of Texas, and the University of Virginia law schools. All errors are my own.

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## INTRODUCTION

The growth of the administrative state and the expansion of presidential power have been central features of American political development since the early twentieth century.<sup>1</sup> Commentators agree: “We live today in an era of presidential administration.”<sup>2</sup> Yet presidential administration is characterized by a strange, and largely unremarked, absence. While enforcement of law is at the very core of executive responsibility, the formal apparatus of presidential administration concerns itself little with it.

No office or staff in the White House or the Executive Office of the President (EOP) attends systematically to the enforcement of rules after they have been promulgated—that is, to problems of regulatory compliance. By contrast, a presidential office dedicated to overseeing the process of rulemaking has been a critical component of the administrative state since the Nixon Administration. Now called the Office of Information and Regulatory Affairs (OIRA), it is staffed by both political and career officials and is responsible for reviewing all significant rules promulgated by executive agencies. Republican and Democratic administrations alike have embraced OIRA’s central mission of cost-benefit analysis.

Perhaps because of this asymmetry, scholars have extensively debated presidential involvement in rulemaking,<sup>3</sup> but they have undertaken remarkably little analysis of the President’s role in agency

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<sup>1</sup> Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1383–84 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* (2010)).

<sup>2</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001); see also RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* 7 (1983). Despite this consensus, the rise of presidential power is the subject of considerable dispute, at once celebrated and lamented. Compare, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* 417 (2008) (concluding that the “sweep of history” supports the unitary executive theory, and urging presidents to resist certain congressional efforts to curtail executive power), and POSNER & VERMEULE, *supra* note 1 (arguing that the President’s power to govern has grown enormously and is largely unconstrained by law, but that politics supplies necessary checks), with BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010) (arguing that expanded presidential authority poses a grave threat to the future of the United States government), and PETER M. SHANE, *MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (2009) (arguing that presidents’ increasingly assertive claims to unilateral authority have subverted constitutional checks and balances).

<sup>3</sup> Regulatory review has its defenders, e.g., Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003); Christopher C. DeMuth and Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1082 (1986); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995); and its detractors, including Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 210 (2012).

enforcement.<sup>4</sup> This oversight is significant. In eliding the President's role in the enforcement of regulation, existing scholarship provides an incomplete account and theory of presidential administration.

Enforcement is at the core of the President's constitutional duty to "take Care"<sup>5</sup> that laws are faithfully executed. Presidential concern with enforcement is contemplated by constitutional structure and flows from the historical development of the presidency and the administrative state. And the overlapping and conflicting statutory directives of multiple agencies necessitate presidential coordination and prioritization—not just in rulemaking, but also in enforcement.<sup>6</sup> In fact, as this Article shows, notwithstanding the absence of an office dedicated to enforcement, under both Republican and Democratic administrations the White House has long influenced administrative enforcement efforts within and across executive branch agencies. Though it has received little scholarly attention, presidential influence over agency enforcement activity has been a primary mechanism for effecting national regulatory policy. Nonenforcement in particular, which is subject to few judicial checks, has proved to be an important tool for advancing the presidential agenda. President Obama's decision to use enforcement discretion to grant relief from deportation to

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<sup>4</sup> For a brief discussion of the role the President and his Executive Office play in enforcing validly enacted (and concededly constitutional) law, see Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 *YALE L.J.* 2280, 2293–95 (2005) (identifying executive enforcement as an example of "the completion power" of the President). A few scholars have examined the problem of executive nonenforcement, including whether agency decisions not to enforce should be subject to arbitrariness review and whether nonenforcement violates either the Take Care Clause or more general conceptions of separation of powers. See, e.g., Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 *N.Y.U. L. REV.* 1657, 1661 (2004) (urging courts to guard against agency arbitrariness by "eschew[ing] any special prohibitions against judicial review of agency inaction"); Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 *GEO. WASH. L. REV.* 253, 255, 279–85, 287, 288 (2003) (emphasizing that the executive has the obligation to follow statutory commands, and concluding that "courts have been noticeably deficient in providing relief against agency failures to enforce the law"); Peter L. Strauss, *The President and Choices Not to Enforce*, 63 *LAW & CONTEMP. PROBS.* 107, 107 (2000) (exploring the problem of executive nonenforcement broadly to shed light on "situations in which the President believes a particular statute is inconsistent with one or another provision of the Constitution and, therefore, should not be enforced"). There is also a rich literature on many other aspects of enforcement, including agency-specific enforcement practices, the role of state and private enforcers, and the utility of cooperative versus legalistic styles of enforcement, but none of this literature examines the role of the President.

<sup>5</sup> U.S. CONST. art. II, § 3, cl. 5.

<sup>6</sup> Cf. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 *HARV. L. REV.* 1131, 1145–51 (2012) (arguing that coordination is the central challenge of the modern administrative state).

many of those immigrants who would have been helped by the failed DREAM Act legislation is only one example of many.<sup>7</sup>

A close look at the President's role in administrative enforcement thus provides a more complete picture of presidential administration. It also reveals the need for reform. In the modern era, presidential attention to problems of regulatory compliance—whether viewed in terms of efficiency, accountability, or rule-of-law values—has been too sporadic, crisis-driven, and opaque. Presidents have legitimately exercised great influence over agency enforcement policy. Yet they have failed to ensure that their administrations' policy decisions are well-disclosed and therefore have not always been held sufficiently accountable for uses of enforcement discretion.

Meanwhile, they have developed few lasting mechanisms to further efficient and effective enforcement across the bureaucracy. For example, under the existing architecture of the EOP, little attention is paid to problems of regulatory compliance—until a crisis erupts. Additionally, enforcement is not consistently coordinated across relevant agencies. One result is episodic, sometimes fatal, enforcement failure, involving entities that violate a range of laws—environmental, labor, food safety, etc.—but whose misbehavior under each agency's purview is viewed in isolation. Another consequence is the diminished capacity of the Executive to reconcile conflicting enforcement regimes, such as immigration and labor enforcement at worksites, or to do so in a way that subjects the administration to political checks.

More attention from the EOP to interagency enforcement coordination and to enforcement policy is warranted. The seeds for reform already exist. For example, the annual regulatory planning process led by the Office of Management and Budget could be extended to include enforcement policy. There are also several promising recent interagency enforcement initiatives designed to capitalize on agency overlap—to build enforcement capacity through joint efforts—as well as a presidential memorandum on regulatory compliance that promises to make enforcement and compliance data more widely available. I propose that efforts such as these be expanded and institutionalized. Furthermore, I argue for greater disclosure and explanation of enforcement policy decisions, particularly for nonenforcement decisions. My proposal would not necessitate a radical change in the allocation of enforcement authority or in the architecture of the EOP. But it does run counter to conventional wisdom—that the

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<sup>7</sup> See *infra* notes 161–65, 200–03 and accompanying text (discussing this use of enforcement discretion).

enforcement of law should be as insulated from politics as possible.<sup>8</sup> While concerns about political involvement in enforcement actions should be taken seriously, and while it is critical that law enforcement be nonpartisan,<sup>9</sup> it is naïve to imagine that administrative enforcement can or should be insulated from the President. Such a view fails to account for the pervasiveness and inevitability of policy judgments in enforcement, sacrifices potential gains in regulatory compliance that could be achieved through greater coordination, and ignores the structural factors that make presidential involvement in administration so entrenched. By acknowledging the President's role in, and responsibility for, enforcement, we can create the structure and transparency that will promote appropriate presidential influence.

Part I demonstrates that enforcement is a powerful and flexible tool for reshaping policy and that attending to agency enforcement is a core and long-standing presidential function. As Part I.A acknowledges, the subject of "presidential enforcement" is broad and could mean different things. This Article's concern is with the role the President plays, and could play, in shaping regulatory outcomes through decisions about enforcement policy and through attention to problems of regulatory compliance. One could readily conceive of rulemaking as a form of enforcement; certainly, in implementing statutory commands, it is a form of executing law. But I focus on agencies' efforts to ensure compliance *after* rules are promulgated, as well as the President's relationship to those efforts. Moreover, although the role of the President in criminal prosecutions and in overseeing the Department of Justice is relevant to this Article, the focus here is on administrative enforcement. Part I.B shows that attending to enforcement is at the core of presidential duty and power. Article II provides that "[t]he executive Power shall be vested in a President of the United States of America."<sup>10</sup> The President's duty to "take Care" that the laws are faithfully executed necessarily includes the duty to "take Care" that laws are enforced. If the Constitution contemplates nothing else, it contemplates a law-enforcement executive who "executes"—or at least oversees the execution of—the will of Congress.<sup>11</sup> It obligates the President to ensure that agencies enforce the rights

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<sup>8</sup> See, e.g., Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 869 (describing one notion of prosecutorial neutrality as "whatever else prosecutors do, they should act nonpolitically"); see also *infra* notes 75–77, 188–91 (discussing problems of politicization).

<sup>9</sup> See *infra* notes 187–90 (discussing the importance of ensuring that partisan politics do not undermine the rule of law).

<sup>10</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>11</sup> Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 3 (1993). Whether the President may direct or merely oversee the decisions of administrative

and duties created by Congress. By placing him at the head of the Executive Branch, the Constitution also positions the President to serve as coordinator and prioritizer of overlapping and sometimes conflicting enforcement regimes.<sup>12</sup> And, as Part I.C shows, early presidential practice included involvement in enforcement actions.

Part II explicates the rulemaking-enforcement asymmetry. Part II.A shows that, notwithstanding the constitutional and historical basis for presidential attention to enforcement, modern presidents have paid less attention to enforcement than they have to rulemaking—at least formally. They have sought to align agency enforcement policy and practices with their policy goals, and they have occasionally directed particular enforcement actions. However, they have not developed lasting mechanisms to hold agencies accountable to their enforcement missions, coordinate and prioritize enforcement across agencies, or disclose enforcement policy decisions. Though presidential administration under the Obama Administration suggests innovation toward more sustained and transparent focus on enforcement coordination, these initiatives have yet to be institutionalized or made systematic. Part II.B argues that the absence of formal coordination of enforcement can be explained by two forces. First, structural and cultural features, including the fact-specific nature of individual enforcement decisions and concerns about politicization of law enforcement, make the oversight of enforcement challenging. Second, presidential administration, in its current iteration, was born of an antiregulatory agenda; effective, efficient, and robust enforcement was not a primary goal.

In Part III, I join those who argue that centralized administration need not be deregulatory in its mission,<sup>13</sup> but I contend that reforms to that end should expand beyond rulemaking: I argue for more EOP focus on interagency coordination of enforcement, information sharing, and enforcement policy. Agencies have great discretion as to how to enforce the law, and agency enforcement missions often

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agencies is long debated in the literature. Though this Article considers the debate in Part IV.A, I do not take a position on it.

<sup>12</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 702 (1951) (Vinson, C.J., dissenting) (“Unlike an administrative commission confined to the enforcement of the statute under which it was created, . . . the President is a constitutional officer charged with taking care that a ‘mass of legislation’ be executed.”).

<sup>13</sup> See, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1312–14, 1329 (2006) (arguing that the deregulatory focus of OIRA should be rethought); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 91–100 (2006) (proposing changes in the responsibilities of OIRA).



overlap and conflict. Presidential involvement in enforcement is crucial for energizing government, setting priorities, managing overlap, and resolving conflicts. Moreover, presidential involvement in enforcement is already extensive. Institutionalization would discipline the presidential role, serving both the efficiency and accountability aims of administration. Most objections, including concerns about politicization, can be addressed in the design of the endeavor.<sup>14</sup> For instance, the new office should not mirror OIRA; there should not be EOP review of all significant agency enforcement actions. Rather, presidential enforcement should facilitate interagency coordination, further accountability and efficacy in agency enforcement efforts through information sharing, and shape the broad strokes of enforcement policy. Moreover, presidential enforcement should be more transparent: Major decisions about enforcement policy generally should be disclosed. In short, the argument is not for making White House involvement in enforcement policy decisions plenary; rather, it is for facilitating coordination and for increasing disclosure of enforcement policy decisions. With these guideposts, institutionalizing presidential enforcement would improve the efficiency of administration, while also making it easier for the public and Congress to track and evaluate the political judgments that are ubiquitous in the exercise of enforcement discretion.

Part IV considers the relationship between enforcement and presidential power over the administrative state. Part IV.A shows that my thesis is consistent with virtually all conceptions of legitimate presidential control over the bureaucracy. There is disagreement among scholars about the degree of directive authority presidents may exercise over agency heads.<sup>15</sup> But whether one believes the President may

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<sup>14</sup> New governance or “experimentalism” scholarship, which advocates administrative methods in which the central government grants broad discretion to local administrative units but measures and assesses their performance in ways designed to induce continuous learning and revision of standards, could be instructive here. See, e.g., Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 55 (2011) (providing a theory of experimentalism and contrasting it to other forms of governance); cf. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004) (explaining that the new governance model challenges “the traditional focus on formal regulation as the dominant locus of change”).

<sup>15</sup> Scholars disagree about the legality of restrictions on the President’s authority to remove executive officers and about the degree to which presidents can control tasks assigned by statute to agency heads, including through centralized review of rulemaking. Compare, e.g., Peter L. Strauss, *Overseer, or “the Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704–05 (2007) (arguing that the President lacks directive authority), with Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997) (arguing for a strong unitary executive).

direct agency activity, merely oversee it, or maintain some intermediate position, presidential coordination of enforcement is both permissible and warranted. Indeed, enforcement points us to a different axis on which to evaluate presidential action, one that goes to the merits—the lawfulness—of the underlying decision, as opposed to the degree of presidential strong-arming exercised to reach that decision. As Part IV.B argues, the task of the Executive in enforcing the law is to realize a legislative command; the “take Care” duty is inconsistent with an inherent power to dispense with or suspend law. At the same time, however, the nature of statutorily conferred enforcement authority and the realities of the contemporary administrative state belie the notion that there can be a single, incontrovertible best way for the Executive to fulfill congressional preferences. “Taking care,” in the enforcement context, inevitably means making countless policy and political judgments, which are often not subject to judicial review. The best way to understand the President’s enforcement power, I argue, is that the President acts permissibly when he<sup>16</sup> uses enforcement discretion and prioritization—including nonenforcement—to advance policy goals, but only if he can articulate a reasonable statutory basis to the public and to Congress for his decisions. That is, the modern presidency is granted something akin to a form of *Chevron* deference or space in enforcing the law.<sup>17</sup> Reforming presidential enforcement as I propose would not disallow this considerable power, but would make it easier for Congress, the bureaucracy, and the public to evaluate and respond to presidential action. In short, law can discipline politics in enforcement, albeit extrajudicially.

Three caveats are in order. First, any examination of the enforcement power necessarily implicates the scholarly debate about whether the Take Care Clause allows, or even requires, the President to decline to enforce laws he deems to be unconstitutional, either via a signing statement or subsequently.<sup>18</sup> Though a deeper understanding

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<sup>16</sup> Given our presidents to date, I use the pronoun “he.”

<sup>17</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (holding that the agency’s “interpretation represent[ed] a reasonable accommodation of manifestly competing interests and [was] entitled to deference”). In Peter Strauss’s formulation, the President has significant space within which to operate with relative freedom. Peter L. Strauss, *Deference Is Too Confusing*, 112 COLUM. L. REV. 1143, 1145 (2012).

<sup>18</sup> For scholarship analyzing the duties to defend and enforce, see Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 27 (2000); Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1193–96 & nn.42–59 (2012); Saikrishna Bangalore Prakash & Neal Devins, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507 (2012); Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073 (2001). On the use of signing statements, see, for example, Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307 (2006).

of the President's administrative enforcement role may shed light on that debate, this Article addresses a different problem: enforcement of laws conceded to be constitutional, though not necessarily conceded to be wise policy.

Second, the problems I identify regarding the need for the Executive to coordinate and prioritize enforcement run throughout the Executive Branch.<sup>19</sup> I focus on the presidency because, by virtue of the responsibility to execute all law, the problems of overlap and conflict are most acute there. Thus, when I refer to the President, I also mean his immediate advisors in the White House and the EOP. These are not the President, and there may, at times, be space between their varying agendas and his.<sup>20</sup> But, as political scientists have shown, the most senior level of the bureaucracy is relatively cabined and controlled.<sup>21</sup> More importantly, the benefits of presidential coordination extend to coordination undertaken by these subordinates.

Finally, a look at the Executive's authority to enforce law raises important and interesting questions about the degree to which Congress can insulate agency enforcement decisions from presidential control or can delegate enforcement authority to states or private parties.<sup>22</sup> In addition, this examination raises questions about whether courts should engage in more aggressive review of executive nonenforcement.<sup>23</sup> I take as a working premise the current practice and

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<sup>19</sup> As the Supreme Court's recent decision in *Salazar v. Ramah Navajo Chapter* highlighted, cabinet secretaries often oversee the implementation of multiple overlapping and conflicting statutory commands. 132 S. Ct. 2181, 2195 (2012). Cabinet secretaries are also sometimes charged with coordinating across agencies. An example of a new secretary-led coordination effort focused on compliance and enforcement, as well as rulemaking, is the Financial Stability Oversight Council, chaired by the Treasury Secretary and established by the Dodd-Frank Act. 12 U.S.C. § 5321(1)(A) (2012).

<sup>20</sup> See Bressman & Vandenberg, *supra* note 13, at 49 (arguing that the presidency is a "they," not an "it").

<sup>21</sup> Terry M. Moe, *Presidents, Institutions, and Theory*, in RESEARCHING THE PRESIDENCY 337, 368 (George C. Edwards III et al. eds., 1993).

<sup>22</sup> Others have tackled some of these questions. See, e.g., Evan Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 U. KAN. L. REV. 1075 (1997) (arguing that state administration of federal programs raises separation-of-powers problems, but that the unitary executive theory should apply, at most, only to state administration of federal law, not to state administration of state laws designed to serve federal regulatory objectives); Harold J. Krent, *Federal Power, Non-Federal Actors: The Ramifications of Free Enterprise Fund*, 79 FORDHAM L. REV. 2425, 2427 (2011) (arguing that *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010), provides reason to question whether congressional delegations outside the federal government present separation-of-powers problems).

<sup>23</sup> Under *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), discretionary nonenforcement decisions are rarely subject to judicial review. See *infra* notes 37–41, 392–95, 419–23 and accompanying text.

doctrine, under which courts rarely review nonenforcement decisions and Congress can and does restrict the President's control over enforcement activity by creating independent agencies, providing for state administration of federal programs, and allowing private enforcement. Thus, I also take as a working premise (though not necessarily a constitutional given) the current executive branch practice that, when the President acts to coordinate administration, he asserts less authority over independent agencies than over executive branch agencies.<sup>24</sup> These caveats limit the immediate focus of the Article, but not necessarily its implications.

## I

### ENFORCEMENT: A CORE DUTY AND POWER

Enforcement of law lies at the heart of presidential duty and authority. Several of the most canonical constitutional law cases implicate the President's enforcement role. Take, for example, Secretary of State Madison's refusal, presumably at the behest of President Thomas Jefferson, to deliver a judicial commission in *Marbury v. Madison*,<sup>25</sup> or President Eisenhower's decision to use troops to enforce the Supreme Court's decision in *Brown v. Board of Education*.<sup>26</sup> As the circumstances surrounding these cases suggest, the President's obligation and authority to "take Care" that the vast body of law is enforced are crucial. In this Part, I further specify what I mean by enforcement. I then show that, notwithstanding the lack of sustained scholarly focus, presidential oversight of administrative enforcement is a core constitutional responsibility and has roots in early historical practice.

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<sup>24</sup> As a matter of customary practice, the President typically requests or strongly suggests that independent agencies comply with executive orders regarding centralized administrative review, while directing executive agencies to do so. Cf. Ben Protess, *Lawmakers Push to Increase White House Oversight of Financial Regulators*, N.Y. TIMES, Sept. 10, 2012, at B3 (discussing proposed legislation that would extend centralized regulatory review to independent regulatory agencies).

<sup>25</sup> 5 U.S. (1 Cranch) 137 (1803). In *Marbury*, Congress did not specifically command delivery, instead requiring the Secretary of State to perform ministerial tasks related to the commission. *Id.* at 158.

<sup>26</sup> 347 U.S. 83 (1954); see also *Cooper v. Aaron*, 358 U.S. 1, 12 (1958) ("[T]he President of the United States dispatched federal troops to Central High School and admission of the Negro students to the school was thereby effected.").

### A. *Delineating Agency Enforcement*

At the outset, it is important to define what types of agency action fall under the rubric of “enforcement.”<sup>27</sup> Most agencies can promulgate legislative rules, which, if valid, operate just like statutes: They prospectively set substantive standards of conduct for certain classes of private actors.<sup>28</sup> These legislative rules can be viewed as a type of “enforcement,” but doing so blurs what occurs *after* the rules have come into being: efforts to bring about compliance with the rules and decisions as to when and how to apply them.<sup>29</sup>

At this stage, agencies generally engage in several types of compliance and enforcement activity. They inspect; they request information from regulated parties; they even work with third-party organizations to assess whether regulated entities are in compliance with regulatory standards.<sup>30</sup> Agencies also provide training, education, outreach, and assistance. And when they find noncompliance, they take a range of actions, including administrative enforcement actions, conducted before agency adjudicators. Such actions result in sanctions against particular parties when successful. Alternatively, agencies can bring judicial enforcement actions in the federal courts, either on their own behalf or represented by the Department of Justice (DOJ), to similar effect.<sup>31</sup> Finally, they can provide guidance, through congressional testimony, speeches, or more formal documents, advising interested parties of how the agency understands its rules and how it will exercise its enforcement discretion. Such guidance is merely advisory; it does not have binding legal effect on its own, but it is also relatively easy to develop.<sup>32</sup>

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<sup>27</sup> For a helpful discussion of the policymaking tools available to agencies, their features, and how administrative law responds to them, see M. Elizabeth Magill, *Agency Choice of Policymaking Forum*, 71 U. CHI. L. REV. 1383 (2004).

<sup>28</sup> *Id.* at 1386.

<sup>29</sup> Of course, administration is broader than just rulemaking and enforcement. It also includes a host of other activities, such as awarding grants and contracts, responding to Freedom of Information Act requests, and deciding whether to grant waivers. Like enforcement, these other forms of administration are comparatively understudied and undertheorized in the legal literature.

<sup>30</sup> See ADMIN. CONFERENCE OF THE UNITED STATES, Recommendation No. 2012-7, AGENCY USE OF THIRD-PARTY PROGRAMS TO ASSESS REGULATORY COMPLIANCE, (adopted Dec. 6, 2012) available at <http://www.acus.gov/sites/default/files/documents/Recommendation%202012-7%20%28Third-Party%20Programs%20to%20Assess%20Regulatory%20Compliance%29.pdf>.

<sup>31</sup> Some agencies, such as the Department of Labor (DOL), can litigate on their own behalf, while most other executive agencies are represented by the Department of Justice (DOJ). Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1345–49 (2000).

<sup>32</sup> Magill, *supra* note 27, at 1391–92, 1394.

When an agency makes changes in its enforcement policy and tactics, it must satisfy significantly fewer procedural requirements than when it makes rule changes.<sup>33</sup> This is true even after two recent Supreme Court cases, which together could create new incentives for agencies to inform the public of shifts in enforcement policy before proceeding against particular parties.<sup>34</sup> Still, an agency changing its enforcement policies typically does not need to provide notice-and-comment procedures or present its enforcement policy decisions to an administrative tribunal or court (at least until it ultimately chooses to apply the policy to a particular party).<sup>35</sup> Moreover, although Congress has on occasion made executive decisions not to enforce reviewable,<sup>36</sup> such decisions are more typically insulated from judicial review.<sup>37</sup> As

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<sup>33</sup> *Id.* at 1391–93.

<sup>34</sup> See *FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2320 (2012) (setting aside orders resulting from enforcement actions because the FCC failed to give television networks fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167–69 (2012) (declining to provide *Auer* deference to the Department of Labor's (DOL) interpretation of its own regulation in the context of a particular enforcement action, where the DOL sought to impose liability on "conduct that occurred well before that interpretation was announced" and where the change in interpretation was "preceded by a very lengthy period of conspicuous inaction").

<sup>35</sup> *Cf.* *Chamber of Commerce v. Dep't of Labor*, 174 F.3d 206, 212–13 (D.C. Cir. 1999) (holding that the Occupational Safety and Hazard Administration (OSHA) could not decide, via policy statement, that it would implement a particular enforcement program nationwide, where the directive would affect employers' interests in the same way that a substantive rule would affect their rights and where the policy denied enforcement discretion to the inspectors). Courts have struggled to implement the distinction between legislative rules and interpretive rules or policy statements. See David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 *YALE L.J.* 276, 282–85 (2010) (describing the case law). Scholars too disagree about the correct line to draw. Compare John F. Manning, *Nonlegislative Rules*, 72 *GEO. WASH. L. REV.* 893, 933–46 (2004) (arguing that courts can better police the difference between legislative and interpretive rules by assigning different legal effects to an agency's application of rules that are adopted without notice and comment), with Franklin, *supra*, at 303–23 (rejecting a "short-cut" approach in favor of courts' traditional inquiry into a rule's nature and effects when deciding whether the agency must undergo notice-and-comment procedures).

<sup>36</sup> See *Dunlop v. Bachowski*, 421 U.S. 560, 566–68 (1975) (concluding that an agency's decision not to enforce was reviewable where Congress had provided guidelines for exercise of its enforcement power); see also *Heckler v. Chaney*, 470 U.S. 821, 833–34 (1985) (construing *Dunlop*).

<sup>37</sup> See, e.g., *Heckler*, 470 U.S. at 831 (holding that the Food and Drug Administration's refusal to take enforcement action against states' unapproved use of drugs for lethal injection was unreviewable). For critiques of *Heckler*, see, for example, Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 *VA. ENVTL. L.J.* 461, 469–84 (2008), which argues that there is no fundamental difference between agency inaction and action under the Administrative Procedure Act (APA); Bressman, *supra* note 4 at 1658–60, which argues that, consistent with the founding goals of the administrative state—promoting accountability and preventing arbitrariness—agency inaction should be subject to the same principles of judicial review as is agency action; Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 *U. CHI. L. REV.* 653,

the Supreme Court recognized in *Heckler v. Chaney*, “an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. . . . The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.”<sup>38</sup>

Notwithstanding the comparative lack of formality and judicial review, administrative enforcement is a powerful tool in the Executive’s kit. Most statutes give the Executive wide berth to decide what cases to bring and how to set enforcement priorities.<sup>39</sup> Frequently nothing prevents agencies from devoting scarce prosecutorial resources to those violations deemed most egregious.<sup>40</sup> This is true even when Congress delineates substantive mandates in great detail.<sup>41</sup>

That is not to say Congress never seeks to limit enforcement discretion. Sometimes it specifies general enforcement priorities in the substantive law or via the budget process.<sup>42</sup> On other occasions—frequently in periods of divided government—Congress attaches riders to appropriations bills that prohibit spending for specific enforcement actions, sometimes in ways that contravene established statutory

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666–69 (1985), which argues that completely abandoning review of agency inaction reflects improper privileging of common law private rights over public rights created by statute.

<sup>38</sup> 470 U.S. at 831–32.

<sup>39</sup> See, e.g., *id.* at 833 (stating that “Congress may limit an agency’s exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue,” but noting that, by tradition, it rarely does so); see also *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012) (emphasizing the complexities of and discretion in immigration enforcement).

<sup>40</sup> See *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (stating that agency allocation of funds from a lump sum appropriation is “committed to agency discretion by law” (internal quotation marks omitted)); cf. Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A) (2006) (preventing federal officials from “mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation”).

<sup>41</sup> J.R. DeShazo & Jody Freeman, *Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1453–54 (2003); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 315 (2009).

<sup>42</sup> See, e.g., David A. Martin, *A Lawful Step for the Immigration System*, WASH. POST, June 24, 2012, [http://articles.washingtonpost.com/2012-06-24/opinions/35460047\\_1\\_deportation-policy-record-deportations-removals](http://articles.washingtonpost.com/2012-06-24/opinions/35460047_1_deportation-policy-record-deportations-removals) (“The policy that calls for high-volume deportations is not only, or even primarily, Obama’s. It is Congress’s policy, expressed both through the substantive immigration laws and—importantly—through annual appropriations acts. Appropriators have showered the enforcement agencies with resources over the past two decades.”); see also Joel A. Mintz, ENFORCEMENT AT THE EPA 173–75 (2012) (describing the effect of declining resources on EPA enforcement). *But cf.* David Weil, *Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters*, 28 COMP. LAB. L. & POL’Y J. 125, 145 (2007) (showing that while the DOL’s enforcement budget has been the subject of significant political debate, “[p]olitical offensives and counter-offensives have led over time to a surprisingly steady level of funding for OSHA appropriations across administrations”).

objectives.<sup>43</sup> But even when legislation circumscribes enforcement discretion, the Executive must continue to make countless policy determinations about how best to enforce other parts of the statutes or to prioritize among various statutory programs.<sup>44</sup>

And enforcement *vel non* matters: The law on the books is different from the law in action, and enforcement is a vital part of law's identity as law.<sup>45</sup> In practical terms, enforcement decisions often determine the extent to which and upon whom a law will be binding. The enforcement stage can reopen and redetermine many issues previously controlled by legislation or rulemaking. For example, even if Congress had originally adopted as legislation every detailed rule that has been subsequently adopted by the Occupational Safety and Health Administration (OSHA), the statute's influence still would differ vastly across administrations because of varying enforcement practices.<sup>46</sup> Thus, enforcement decisions often determine the

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<sup>43</sup> See CURTIS W. COPELAND, CONG. RESEARCH SERV., RL34354, CONGRESSIONAL INFLUENCE ON RULEMAKING AND REGULATION THROUGH APPROPRIATIONS RESTRICTIONS 12–13 (2008) (describing budgetary provisions that prohibit the use of funds to implement or enforce a rule or set of rules, but that do not appear to prohibit the development of the rule); Neal D. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 461–62 (1987) (describing the use of the appropriations process to accomplish substantive objectives that contravene established statutory objectives); Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 766 (2010) (showing that “a substantial number of limitation riders are employed annually to influence substantively important policy decisions, and [that] they are effective at preventing bureaucratic policy decisions”). The Fiscal Year 2012 budget, for example, included a rider preventing the government from enforcing new light bulb efficiency standards and another preventing the Administration from implementing a proposed executive order that would have required contractors bidding on government contracts to disclose their contributions to political candidates. Pete Kasperowicz, *House Votes to Block Enforcement of Energy Efficient Light Bulb Standards*, THE HILL (June 5, 2012), <http://thehill.com/blogs/floor-action/house/231117-house-votes-to-block-enforcement-of-light-bulb-standards>; Sam Rosen-Amy, Ctr. for Effective Gov't, *Congress Strips Out Many Controversial Riders from Funding Bills, but Leaves Public in the Dark*, THE FINE PRINT (Dec. 21, 2011), <http://www.foreffectivegov.org/node/11936>.

<sup>44</sup> COPELAND, *supra* note 43, at 24–25; cf. Heckler v. Chaney, 470 U.S. 821, 831 (1985) (arguing that decisions not to enforce involve “a complicated balancing of a number of factors,” including whether the agency's resources are best spent on the particular enforcement action and how the enforcement action requested best fits within the agency's overall policies). For further discussion of prosecutorial discretion, see Goldsmith & Manning, *supra* note 4, at 2293, which argues that “[p]rosecutorial discretion requires policy determinations about how best to implement a statutory program.”

<sup>45</sup> See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910) (arguing that the distinctions between the rules that purport to govern and that in fact govern are “very real” and “very deep”); Joshua Kleinfeld, *Enforcement and the Concept of Law*, 121 YALE L.J. ONLINE 293, 296 (2011) (“[E]nforcement aims to make the norms of law actual: [I]t aims to make those norms obtain in the world.” (emphases omitted)).

<sup>46</sup> Areas in which OSHA rules have remained relatively static across administrations provide ample evidence for this proposition. See Jerry L. Mashaw, *Prodelegation: Why*



substantive scope of a statute, or at least limit a statute's reach. Given the discretion inherent in enforcement, relative ease of implementing changes, and comparative lack of judicial review, executive policy-making that might otherwise occur through rulemaking is often channeled into enforcement decisions, as Part II will illustrate.

### B. *Constitutional Text and Structure*

While enforcement has received comparatively little attention from scholars of presidential administration, it is actually at the core of presidential responsibility. The Constitution does not give law-making authority to the President, yet it clearly assigns him responsibility for enforcement of law.<sup>47</sup> The President's duty to "take Care that the Laws be faithfully executed"<sup>48</sup> necessarily entails the power to "take Care" that laws are enforced: To enforce, after all, means "to carry out effectively."<sup>49</sup> Thus, while there are competing schools of thought on how much power the Take Care Clause grants the President,<sup>50</sup> there is little doubt that, without further statutory authorization, the Clause assigns to the President the ability and duty to ensure, in some way, that agency officials enforce the law.

So, too, with the Vesting Clause. It provides that the President "hold[s] [an] Office" and that "[t]he executive Power shall be vested in" that office.<sup>51</sup> If the Vesting Clause bestows any affirmative power in the President, it must include the authority to supervise enforcement.<sup>52</sup> This much is entailed by even a narrow "dictionary"

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*Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 97 (1985); see also Weil, *supra* note 42, at 125–26 (arguing that changes in enforcement policy could create a more progressive workplace regulatory policy even without statutory change).

<sup>47</sup> See *Printz v. United States*, 521 U.S. 898, 922 (1997) ("The Constitution does not leave to speculation who is to administer the laws enacted by Congress.").

<sup>48</sup> U.S. CONST. art. II, § 3, cl. 4.

<sup>49</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 383 (10th ed. 1996).

<sup>50</sup> One group emphasizes that the President must "take Care" that the laws are faithfully executed by others: He must ensure that an officer to whom discretionary authority has been granted by statute acts within the statute's bounds. *E.g.*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 648–50, 668–69 (1984). A second school claims that the Take Care Clause means that the President is to execute federal law, or at least be held responsible for his delegations. See Saikrishna B. Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 1001 (1992). Relatedly, scholars dispute whether the President can direct or can merely oversee agency actions, see *infra* notes 354–63, and whether the Clause allows (or requires) the President to decline to enforce laws he deems unconstitutional, see *supra* note 18.

<sup>51</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>52</sup> For the debate about the scope of the Vesting Clause, see, for example, Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 546–49 (2004), which provides a historical discussion of the Vesting Clause thesis; Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in*

conception of executive power.<sup>53</sup> The structure of our government also dictates that the President has, at least unless Congress indicates otherwise, the obligation and power to ensure that valid laws passed by Congress are enforced.<sup>54</sup>

Of course, there is considerable dispute about the extent to which presidents can control decisions vested by statute in individual agency heads. Though this Article does not weigh in on this long-debated question, I will return to the issue in Part IV. For now, it suffices to say that, by virtue of the Take Care Clause and constitutional structure, nearly all agree that the President has, at a minimum, the authority to oversee the decisions of agencies.<sup>55</sup> Accordingly, as the D.C. Circuit held in *Sierra Club v. Costle*, the President quite properly may shape agencies' policy agendas in all sorts of ways, including through *ex parte*, informal communications with agency staff.<sup>56</sup> Indeed, Congress itself has recognized both the need for coordination of government policy and the President's unique capacity to provide it.<sup>57</sup> Thus, as Part II demonstrates, modern presidents, in fact, exercise considerable authority to set agency priorities through the budgetary

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*Times of Crisis*, 87 B.U. L. REV. 289, 305 (2007), which argues that the President lacks any powers other than those specifically granted by the Constitution; Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 714–20, which defends the claim that the Vesting Clause vests powers.

<sup>53</sup> Monaghan, *supra* note 11, at 3 (citing HARVEY C. MANSFIELD, JR., *TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER* 2–4 (1989)).

<sup>54</sup> Thus, the power—and duty—of the President to supervise enforcement is specific to the text via the Take Care Clause, implied within the Vesting Clause, and embedded within the constitutional structure. See Saikrishna Bangalore Prakash, *A Taxonomy of Presidential Powers*, 88 B.U. L. REV. 327, 328 (2008) (setting forth a taxonomy of presidential powers that includes “specific powers,” “vesting clause powers,” “structural powers,” and “extra-textual powers”).

<sup>55</sup> See *Myers v. United States*, 272 U.S. 52, 135 (1926) (concluding that the President, as the head of the Executive Branch, is authorized to “supervise and guide” executive officers in “their construction of the laws under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone”); see also Proposed Executive Order Entitled “Federal Regulation,” 5 Op. O.L.C. 59, 61 (1981) (recognizing limits on presidential authority, including that the President may not require or permit agencies to transgress boundaries set by Congress).

<sup>56</sup> 657 F.2d 298, 404–08 (D.C. Cir. 1981).

<sup>57</sup> See, e.g., 5 U.S.C. §§ 901, 903 (2006) (authorizing the President to prepare government reorganization plans); Chief Financial Officers Act of 1990, Pub. L. No. 101-576, 104 Stat. 2838 (codified at 31 U.S.C. § 901 (2006)) (creating the position of presidentially appointed Chief Financial Officer (CFO) for every agency, giving CFOs extensive powers to monitor agency revenues, expenditures, and accounting, enhancing the Office of Management and Budget (OMB), and establishing the Office of Federal Financial Management to coordinate their activities); see also Strauss, *supra* note 50, at 587–91 (discussing managerial powers such as the DOJ's control of government litigation and the Office of Personnel Management's employment functions).

process,<sup>58</sup> political appointments,<sup>59</sup> informal jawboning,<sup>60</sup> and formal mechanisms of coordination—most notably, centralized review of rulemaking.<sup>61</sup>

This power applies to enforcement as well. Without much elaboration or discussion, the Supreme Court has repeatedly emphasized that enforcement authority lies at the core of the President's power:<sup>62</sup> "Legislative power, as distinguished from executive power," the Court has affirmed, "is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions."<sup>63</sup> Thus, under separation of powers, Congress is precluded from vesting in itself the authority to appoint commissioners who exercise enforcement authority.<sup>64</sup> Even when the

<sup>58</sup> Congress holds the power of the purse, U.S. CONST. art. I, § 7, cl. 1, and "bounds executive discretion within varying limits." HAROLD H. BRUFF, *BALANCE OF FORCES* 257 (2006). See also LOUIS FISHER, *PRESIDENTIAL SPENDING POWER* 59–61 (1975) (describing line-item appropriations). But presidents have consolidated power over the budget through the centralized preparation of the President's budget by OMB. See Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 657–58 (2005) (describing transformation of the Bureau of the Budget into the more powerful OMB). On occasion, presidents have also asserted the prerogative not to spend appropriated funds on regulatory programs they disfavor. See *infra* note 109.

<sup>59</sup> See David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1121, 1126–33 (2008) (looking at the role of personnel appointments as a means to control agency decisionmaking).

<sup>60</sup> See *Costle*, 657 F.2d at 404–08 (describing private conversations between the President and executive agency staff).

<sup>61</sup> See *infra* Part II.A (describing history of centralized regulatory review).

<sup>62</sup> As scholars have noted, the Court generally has been unwilling to police the separation of functions within agencies. Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 436, 453 (2009). Moreover, the Court has rarely tried to define the contours of the executive, legislative, and judicial functions. M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 612 (2001).

<sup>63</sup> *Springer v. Gov't of the Philippine Islands*, 277 U.S. 189, 202 (1928) (emphasis added). The canonical pair of cases defining the scope of the President's constitutional authority to remove subordinate officers also puts great emphasis on the President's enforcement authority. Just nine years after the Court emphasized broad executive power in *Myers v. United States*, 272 U.S. 52 (1926), the Court in *Humphrey's Executor v. United States*, 295 U.S. 602, 632 (1935), approved a statute providing that the President could dismiss a member of the Federal Trade Commission only for cause. The Court distinguished its earlier holding in *Myers* on the basis that, unlike a postmaster, the FTC Commissioner was not "restricted to the performance of executive functions." *Humphrey's Executor*, 295 U.S. at 627–28.

<sup>64</sup> See *Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976) (finding that the Federal Election Commission's "enforcement power . . . is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress," and concluding that "[a] lawsuit is the ultimate remedy for a breach of the law, and [that] it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed'" (quoting U.S. CONST. art. II, § 3)).

Court has allowed considerable incursion into the core prosecutorial functions of the Executive, as in *Morrison v. Olson*,<sup>65</sup> the notion that enforcement functions and decisions are the province of the Executive—and of the President, specifically—has remained bedrock.<sup>66</sup>

More recently, the Court's assertions that enforcement functions are core to the President's duties took on greater force in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.<sup>67</sup> At issue was whether Congress could provide dual for-cause protections for agency heads: Could members of a new agency charged with regulating public accounting be appointed by the Securities and Exchange Commission (SEC), an independent regulatory committee, and removable only by the SEC for cause? Applying a formalist approach,<sup>68</sup> the Supreme Court emphasized the importance of the separation of functions.<sup>69</sup> Returning to the distinction drawn in *Humphrey's Executor*, the Court held that because the Public Company Accounting Oversight Board was charged with policy-making and enforcement functions, not just adjudication, the dual

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<sup>65</sup> See 487 U.S. 654, 694–96 (1988) (emphasizing the lack of legislative aggrandizement).

<sup>66</sup> Though the majority deemed the incursion on the enforcement power permissible, it did not disagree with Justice Scalia's assertion, in dissent, that "[g]overnmental investigation and prosecution of crimes is a quintessentially executive function." *Id.* at 706 (Scalia, J., dissenting); see also *id.* at 695–96 (majority opinion) (concluding that the Act provides "the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties" to oversee prosecution of law).

<sup>67</sup> 130 S. Ct. 3138 (2010). Cf. Peter L. Strauss, *On the Difficulties of Generalization—PCAOB in the Footsteps of Myers, Humphrey's Executor, Morrison, and Freytag*, 32 CARDOZO L. REV. 2255, 2283 (2011) (noting that the majority opinion in *Free Enterprise Fund* "appears to have avoided large disruptions to the institutions whose responsibilities were immediately before them"). I take no position here on the extent to which *Free Enterprise Fund* calls into question the theory underpinning *Humphrey's Executor*.

<sup>68</sup> The canonical citation for the formalist-functional distinction is Strauss, *supra* note 50, at 579–81, 667–68. For a powerful critique of the divide in Court doctrine and in scholarship, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1942–45 (2011), which argues that, "contrary to [the] understandings of functionalism and formalism, the Constitution adopts no freestanding principle of separation of powers," but rather strikes different balances and expresses its purposes at many different levels of generality (emphasis omitted).

<sup>69</sup> See Kevin M. Stack, *Agency Independence After PCAOB*, 32 CARDOZO L. REV. 2391, 2399 (2011) ("The Supreme Court's decision in *PCAOB* draws separation of functions within the agency into separation-of-powers analysis. It does so by making the validity of good-cause removal protections under separation of powers depend on the combination of functions within the agency."). But see Magill, *supra* note 62, at 604 ("The effort to identify and separate governmental powers fails because, in the contested cases, there is no principled way to distinguish between the relevant powers.").

for-cause removal restrictions were impermissible.<sup>70</sup> Thus, the Court made clear that the scope of the President's removal power turns, at least in part, on whether an agency exercises enforcement authority.<sup>71</sup>

In short, the notion that enforcement of law is quintessentially a responsibility of the Executive Branch, and ultimately of the President, is longstanding and beyond dispute. The consequence for judicial review is significant: In the criminal context, the Supreme Court has written that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."<sup>72</sup> In the administrative context, as previously noted, despite the ordinarily strong presumption of reviewability that governs agency action—and absent congressional direction to the contrary—"an agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion."<sup>73</sup> Administrative enforcement discretion, within statutory bounds, thus falls within "the special province of the Executive Branch" and derives from the President's "take Care" powers.<sup>74</sup>

### C. Early Presidential Law Enforcement

One dominant current conception is that law enforcement policy should be driven by nonpolitical experts.<sup>75</sup> While presidents are not

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<sup>70</sup> 130 S. Ct. at 3147. Lower courts, as well, have relied on the adjudication-enforcement distinction. See, e.g., *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1536–37, 1545–47 (9th Cir. 1993) (relying on *Myers* and holding that the Endangered Species Act "God Squad" Committee proceedings are subject to the ex parte communications statutory ban and that any inappropriate communications from the White House would be covered by the ban because the proceedings are akin to adjudication).

<sup>71</sup> 130 S. Ct. at 3158–59 (emphasizing, in concluding that the dual for-cause protections were unconstitutional, that the Board was "empowered to take significant enforcement action" and that the power to "start, stop, or alter individual Board investigations, [are] executive activities typically carried out by officials within the Executive Branch").

<sup>72</sup> *United States v. Nixon*, 418 U.S. 683, 693 (1974); see also *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) ("[A]s an incident of the constitutional separation of powers, . . . the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."). For a discussion of the unique separation-of-powers issues at stake in the criminal context, see Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006).

<sup>73</sup> *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

<sup>74</sup> *Id.* at 832 (citing U.S. CONST. art. II, § 3). However, agencies can adopt legislative rules that govern how they exercise enforcement discretion; parties can then challenge an agency's failure to comply with these rules. Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 882 (2009) (citing, e.g., *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 945 (D.C. Cir. 1987) (discussing Food and Drug Administration (FDA) "action levels," which advised producers that the agency would not prosecute shipments of corn having twenty parts per billion or fewer of certain contaminants)).

<sup>75</sup> See Nancy V. Baker, *Department of Justice*, in A HISTORICAL GUIDE TO THE U.S. GOVERNMENT 345, 347–49 (George Thomas Kurian ed., 1998) (describing arguments made

forbidden from influencing enforcement, both academic and popular commentators have frowned on that sort of meddling, particularly to the extent that it takes the form of presidential direction of specific actions.<sup>76</sup> Decisions about specific administrative enforcement actions, like decisions about particular criminal prosecutions, should be made by independent professionals. Presidential involvement, the reasoning runs, risks undermining the rule of law.<sup>77</sup>

This view was not always so. Unsurprisingly, scholars' conceptions of early constitutional practice differ,<sup>78</sup> but it appears that there was considerable presidential involvement in departmental enforcement policy, as well as with individual actions.<sup>79</sup> A brief look at an early U.S. Attorney General opinion on criminal prosecutions illustrates the point.<sup>80</sup> The *Jewels of the Princess of Orange* opinion, written by Attorney General (later Chief Justice) Roger B. Taney in 1831, provides a robust defense of presidential authority over agency officials, and, in this way, breaks from an earlier opinion by U.S.

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by those who charge that law enforcement should be less political and noting historical efforts to remove the Justice Department from presidential control); Garrett Epps, *Why We Should Make Attorney General an Elective Office*, SALON (Mar. 9, 2007, 7:30 AM), [http://www.salon.com/2007/03/09/attorney\\_general/](http://www.salon.com/2007/03/09/attorney_general/); Lincoln Caplan, *Hyper Hacks: What's Really Wrong with the Bush Justice Department*, SLATE (Mar. 14, 2007, 5:53 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2007/03/hyper\\_hacks.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2007/03/hyper_hacks.html) (celebrating a "nonpolitical tradition of federal law enforcement").

<sup>76</sup> See, e.g., Strauss, *supra* note 15 (arguing that presidents may *oversee* particular agency decisions but may not *direct* them); Caplan, *supra* note 75 (arguing that law enforcement officials should be insulated from presidential politics).

<sup>77</sup> Kagan, *supra* note 2, at 2357–58; Caplan, *supra* note 75; see also *infra* notes 188–91 and accompanying text (discussing modern scandals involving politicization of law enforcement and describing internal White House rules that, in recognition of concern about politicization of enforcement, limit White House involvement in specific enforcement actions).

<sup>78</sup> Compare Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 521 (2005) (concluding that "history establish[es] that the president is the constitutional prosecutor of all federal offenses whether prosecuted by official or popular prosecutors"), with Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 562–63 (examining the early role of the Office of the Attorney General and concluding that "from the start of this Republic," questions about the scope of the President's authority over law enforcement "were present and their answers uncertain"). See also Prakash, *supra*, at 524 n.18 (collecting literature on this topic).

<sup>79</sup> Arguments based on historical practice are common in controversies relating to separation of powers. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 412, 412 (2012). I offer the following examples as illustrations of the presidential enforcement power, but do not claim that these examples provide a basis to infer congressional acquiescence to any particular understanding of that power. Cf. *id.* at 448–52 (arguing that the assumptions underlying the acquiescence-based approach to historical practice fit poorly with the reality of the modern executive-legislative relationship).

<sup>80</sup> The Jewels of the Princess of Orange, 2 Op. Att'y Gen. 482 (1831).

Attorney General William Wirt.<sup>81</sup> But the *Jewels of the Princess of Orange* opinion is not only important for the debate about the President's authority to direct or oversee subordinate executive branch actors; it also illustrates the degree to which enforcement decisions regarding the most pressing issues facing the country have been thought to be at the core of the President's authority and responsibility.

The opinion was issued in response to a request by the Secretary of State, who asked whether President Andrew Jackson could direct the Federal District Attorney (now the U.S. Attorney) to discontinue the prosecution of an action to condemn certain stolen jewels. The jewels in question belonged to a member of the royal family of the Netherlands and had been brought into the United States in violation of the revenue laws. Taney concluded that the President, by virtue of the Take Care Clause, did have the power to direct the District Attorney to discontinue the particular prosecution.<sup>82</sup> According to Taney, presidential direction of prosecutions occurred with some regularity in the early years of our Constitution.<sup>83</sup> But Taney's reasoning went beyond the context of a criminal prosecution. The President's authority did not derive from the pardon power;<sup>84</sup> rather, his authority

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<sup>81</sup> President and Accounting Officers, 1 Op. Att'y Gen. 624 (1823). In 1823, President Monroe had asked Attorney General Wirt whether he could countermand the decisions of accounting officers about the amount owed to claimants. Wirt concluded that the assumption of an adjudicative officer's authority by the President himself was impermissible. The President, rather, must see to it that those officers under his superintendence "do their duty faithfully," which he defined as "honestly: not with perfect correctness of judgment, but honestly." *Id.* at 625–26 (emphasis omitted). On the question of the authority of the President to direct subordinates, see also a subsequent opinion from Attorney General Cushing to President Buchanan: Relation of the President to Executive Departments, 7 Op. Att'y Gen. 453, 469–71 (1855) (asserting that "no Head of Department can lawfully perform an official act against the will of the President," though acknowledging that "all the ordinary business of administration" is, in statutory terms, placed under the authority of the Departments, not the President, and "may be performed by its Head, without the special direction or appearance of the President").

<sup>82</sup> 2 Op. Att'y Gen. at 487 ("The interest of the country and the purposes of justice manifestly require that he should possess [the power to direct the District Attorney to discontinue a prosecution]; and its existence is necessarily implied by the duties imposed upon him in that clause of the [C]onstitution . . . , which enjoins him to take care that the laws be faithfully executed."). Taney noted, however, that "[t]he district attorney might refuse to obey the President's order; and if he did refuse, the prosecution, while he remained in office, would still go on." *Id.* at 489.

<sup>83</sup> *Id.* at 492. See *infra* notes 89–91 and accompanying text (discussing examples from the first three administrations).

<sup>84</sup> 2 Op. Att'y Gen. at 485. Thomas Jefferson, by contrast, wrote that the authority to dismiss Sedition Act prosecutions flowed from the pardon power, suggesting that he believed that the pardon power conferred on the President some implicit control over criminal prosecutions. Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6,

was “embraced by that clause of the constitution which makes it his duty ‘to [sic] take care that the laws be faithfully executed.’”<sup>85</sup>

Critical to Taney’s analysis was the fact that the District Attorney, in enforcing the law, acted not in a judicial capacity, but instead in a core executive capacity.<sup>86</sup> Yet Taney was concerned with the President’s role as political leader, as well as with the formal separation of functions. He emphasized the importance of the controversy and the public’s interest in it.<sup>87</sup> Notably, Taney did not locate the President’s authority to intervene in the foreign affairs power.<sup>88</sup>

Numerous other instances of presidential influence over criminal enforcement can be found in the early years of the Republic. President George Washington directed numerous criminal and civil prosecutions and ordered the discontinuance of others; his involvement in prosecutions was wide-ranging, largely uncontested by Congress, and acknowledged—even expected—by the Supreme Court.<sup>89</sup> President John Adams, too, was directly involved in law enforcement, inauspiciously using the Sedition Act of 1798 to punish critics of his Administration.<sup>90</sup> And President Jefferson took an active role in high-profile prosecutions, including that of his own Vice President, Aaron Burr, for treason.<sup>91</sup>

Presidential involvement in agency enforcement thus has roots in early presidential practice. The history disrupts, to some extent,

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1819), in 10 THE WRITINGS OF THOMAS JEFFERSON, 140, 141 (Paul Leicester Ford ed., 1989).

<sup>85</sup> 2 Op. Att’y Gen. at 486 (quoting U.S. CONST. art. II, § 3). That does not mean that the President has lawmaking power: He “is not required to communicate any new authority to the district attorney.” *Id.* at 489. But if he believes that “the forms of law [are being] abused . . . it would become his duty to take measures to correct the procedure. And the most natural and proper measure to accomplish that object would be, to order the district attorney to discontinue the prosecution.” *Id.*

<sup>86</sup> See *id.* at 490–91 (discussing the District Attorney’s relationship with executive and judicial power).

<sup>87</sup> *Id.*; see also *id.* at 487 (“The interest of the country and the purposes of justice manifestly require that [the President] should possess” the power to direct the district attorney.). The jewels at issue, Taney explained, were “known to have attracted the attention of the President, and to have become the subject of a correspondence with the minister of a foreign power.” *Id.* He added, “It would be indiscreet in the highest degree [for] . . . the district attorney[] to dismiss such a prosecution on his own responsibility, without first obtaining the approbation of the President.” *Id.*

<sup>88</sup> *But cf.* BRUFF, *supra* note 58, at 456 (arguing that the opinion stands for the proposition that the President, and not a local prosecutor, makes foreign policy).

<sup>89</sup> Prakash, *supra* note 78, at 553–58.

<sup>90</sup> *Id.* at 558–60.

<sup>91</sup> CALABRESI & YOO, *supra* note 2, at 67–68; Prakash, *supra* note 78, at 560–63. More famously, Jefferson also declined to enforce the Sedition Act on the ground that he believed it to be unconstitutional. CALABRESI & YOO, *supra* note 2, at 67; Meltzer, *supra* note 18, at 1189–90. Relatedly, Jefferson ordered an end to prosecutions for libel because he believed them to be unconstitutional. CALABRESI & YOO, *supra* note 2, at 68.



contemporary notions about the proper separation between politics and law enforcement while also suggesting potential pitfalls. Nonetheless, the early history should not be treated as decisive. Indeed, in the early years of the Republic, nothing like our modern administrative state existed,<sup>92</sup> and even the emergence of a centralized litigation authority in the Executive Branch is of relatively recent origin.<sup>93</sup> The next Part thus considers presidential enforcement in the modern administrative state.

## II

### MODERN PRESIDENTIAL ADMINISTRATION: THE RULEMAKING-ENFORCEMENT ASYMMETRY

As the administrative state has expanded, presidents have sought to cement their control over the bureaucracy and to coordinate its many cacophonous voices. This Part reviews the development of centralized administration from the Progressives to President Obama. It shows that presidents have long exercised influence over enforcement to advance their policy and political agendas. As with rulemaking, presidents have used the budgetary process and the appointment power to shape agency enforcement priorities. They have also used nonenforcement as a strategy of deregulation. And, on occasion—particularly in response to crises—they have publicly directed specific enforcement actions. But presidents have failed to develop lasting mechanisms that facilitate enforcement coordination or ensure

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<sup>92</sup> BRUFF, *supra* note 58, at 459 (“For more than the first half of our nation’s history, there was no institutional mechanism for the President to use in coordinating government policymaking. . . . [D]omestic matters were left mostly to department heads.”). *But cf.* JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* 285–316 (2012) (demonstrating that basic matters of administrative institutional design and political and legal control over administration, during the first half of the Republic, are less disjunctive from contemporary practice than commonly thought); Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 *YALE L.J.* 1636, 1646 (2007) (showing that the 1807–1809 embargo “featured stunning delegations of discretionary authority both to the President and to lower-level officials”).

<sup>93</sup> HAROLD J. KRENT, *PRESIDENTIAL POWERS* 60–64 (2005); Michael Herz, *The Attorney Particular: Governmental Role of the Agency General Counsel*, in *GOVERNMENT LAWYERS* 143, 145–47 (Cornell W. Clayton ed., 1995). For nearly the first hundred years of the position’s existence, the Attorney General did not supervise litigation of local district attorneys (now U.S. Attorneys). In 1870, Congress created the DOJ with centralized litigating authority, in response to the avalanche of legal claims arising from the Civil War. Already, anxiety about expanding presidential power in the realm of law enforcement was evident. Solicitor positions that had been created previously in various departments remained dispersed, and many in Congress voiced concern about how a consolidated Justice Department would create a more dangerous presidency. Baker, *supra* note 75, at 351.

disclosure and political debate of enforcement policy decisions. While a presidential office dedicated to overseeing rulemaking became a central feature of the administrative state even before President Ronald Reagan created OIRA, the approach of modern presidents to problems of regulatory compliance has been comparatively sporadic, episodic, and informal. As a result, enforcement coordination is insufficient, and enforcement policy has not been well disclosed for public comment or examination.

What explains the lack of institutionalized presidential attention to enforcement? The reasons are, in part, sound: Presidential enforcement does not and should not directly mirror presidential rulemaking for important structural and cultural reasons. But the explanation for the absence of institutionalized presidential attention to enforcement of any sort is also ideological—and more problematic: The deregulatory roots of presidential administration have resulted in insufficient emphasis on the effective, efficient, and transparent enforcement of law.

### A. *The History of the Asymmetry*

#### 1. *Progressives and the New Deal: The Rise of Presidential Administration*

Presidential control over the administrative state is often dated to the Reagan Administration, but centralization was advanced as essential to administration many years earlier by Progressives—with very different aims.<sup>94</sup> These reformers believed that a powerful presidency, assisted by new forms of democratic engagement and by independent experts, would help realize the Progressive goal of an activist government.<sup>95</sup> Congress laid the foundation for presidential control of the regulatory state when it passed the Budget and Accounting Act of 1921<sup>96</sup> and created the Bureau of the Budget—the predecessor to the

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<sup>94</sup> On the Progressive Movement's effect on administration and the presidency, see, for example, Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2071, 2083–92 (2009); and Andrea Scoseria Katz, *The Progressive Presidency and the Shaping of the Modern Executive*, at 14–19, 21–31 (2011) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1900936](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1900936).

<sup>95</sup> Skowronek, *supra* note 94, at 2084–85. It is important to note, however, that Progressives also sought to insulate administration from political control. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 422–23 (1987) (discussing the desire for independent commissions during the New Deal).

<sup>96</sup> Pub. L. No. 67-13, 42 Stat. 20.

Office of Management and Budget (OMB), which oversees the legislative and budgetary requests of federal agencies.<sup>97</sup>

New Deal reformers took the shift further, arguing that centralization generates economies of scale and that centralized bureaucracy is less vulnerable to capture by regulated industries.<sup>98</sup> In 1937, the Brownlow Committee, a study group established by President Franklin Delano Roosevelt, called for fundamental reforms in administration.<sup>99</sup> After lengthy and contentious debate, Congress ultimately adopted only some of the Committee's key recommendations. Nonetheless, the resulting legislation allowed Roosevelt to create the EOP, move the Bureau of the Budget within it, and employ an expanded staff.<sup>100</sup> The new EOP was the "institutional capstone of the progressive presidency," representing the Movement's commitment to both "presidential empowerment and collective control."<sup>101</sup>

The Progressive and New Deal periods witnessed robust presidential attention to enforcement of law, particularly to civil and criminal litigation. President Theodore Roosevelt, for example, intervened in law enforcement actions, personally directed investigations of government scandals, dictated that lawsuits be brought under the Sherman Act, and instructed the Attorney General to abandon a suit regarding rebates.<sup>102</sup> Presidents Woodrow Wilson and Franklin Delano Roosevelt both issued executive orders mandating that the Attorney General supervise the litigation of other departments.<sup>103</sup> Though centralization under Wilson proved short-lived, Roosevelt ultimately succeeded at consolidating most litigation authority in the

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<sup>97</sup> See Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 546 (1989) (describing the responsibilities of OMB); PERI E. ARNOLD, *MAKING THE MANAGERIAL PRESIDENCY* 53 (1998) (describing the creation of the Bureau of the Budget); Terry M. Moe, *The Politicized Presidency, in THE MANAGERIAL PRESIDENCY* 135, 142–43 (James P. Pfiffner ed., 1991) (describing politicization and centralization of bureaucracy and the role of the Bureau and OMB); see also CALABRESI & YOO, *supra* note 2, at 427 (noting that "the OMB regulatory review program can be traced to the creation of the Bureau of the Budget during the Harding administration").

<sup>98</sup> See DWIGHT WALDO, *THE ADMINISTRATIVE STATE* 133–35 (1984) (describing New Deal writings in support of centralization); Luther Gulick, *Politics, Administration, and the "New Deal,"* 169 ANNALS AM. ACAD. POL. & SOC. SCI. 55, 58–59, 64–66 (1933) (offering defense of centralization, including on the ground that it promotes economies of scale and democratic engagement).

<sup>99</sup> PERI E. ARNOLD, *MAKING THE MANAGERIAL PRESIDENCY* 93–107 (1998).

<sup>100</sup> *Id.* at 114–15.

<sup>101</sup> Skowronek, *supra* note 94, at 2091.

<sup>102</sup> CALABRESI & YOO, *supra* note 2, at 241.

<sup>103</sup> Baker, *supra* note 75, at 351.

DOJ and thereby strengthening the President's hold on the burgeoning administrative state.<sup>104</sup>

## 2. *Presidents Nixon to Reagan: The Institutionalization of Centralized Regulatory Review*

Control over the DOJ continued to be important to presidents—and was hotly contested with Congress—in subsequent years. During the Nixon Administration, when members of Congress floated a proposal to turn the DOJ into an independent agency, the Executive challenged the constitutionality of the proposal forcefully, noting in legislative testimony that “the enforcement of the laws is an inherently executive function” and that “the executive branch has the exclusive constitutional authority to enforce laws.”<sup>105</sup>

The Carter Administration, despite embracing a weaker version of presidential power, likewise objected to making the DOJ more independent. Attorney General Griffin Bell wrote in an Office of Legal Counsel (OLC) opinion: “[T]he President is given not only the power, but also the constitutional obligation to execute the laws.”<sup>106</sup> The opinion added that the “constitutional responsibility for the execution of the laws” cannot be altered by legislation or even waived by executive order.<sup>107</sup>

Nonetheless, formal presidential coordination of administration has focused much more on rulemaking than on enforcement. The current architecture can be traced to President Nixon, who implemented a series of structural reforms designed to increase presidential control over American government and politics.<sup>108</sup> Among the reforms was a new requirement of interagency comment for certain Environmental Protection Agency (EPA) and OSHA rules; the goal was to curtail those rules Nixon deemed too burdensome to industry.<sup>109</sup> Nixon's

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<sup>104</sup> *Id.*; see also Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 251 n.79, 257–58 & 258 n.116 (1996) (reviewing WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* (1995)) (describing Franklin Delano Roosevelt's efforts to achieve centralization).

<sup>105</sup> Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 663 (2005).

<sup>106</sup> *Proposals Regarding an Independent Attorney General*, 1 Op. O.L.C. 75, 75 (1977).  
<sup>107</sup> *Id.* at 77.

<sup>108</sup> Skowronek, *supra* note 94, at 2098.

<sup>109</sup> David E. Lewis & Terry M. Moe, *The Presidency and the Bureaucracy: The Levers of Presidential Control*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 367, 389–90 (Michael Nelson ed., 9th ed. 2010). Nixon's other reforms included an enlarged White House staff, a new White House-centered Domestic Council to formulate policy positions, and an expansive OMB. Kagan, *supra* note 2, at 2276. Nixon also unsuccessfully tried to impound money that Congress had appropriated for executive agencies, ordering agencies not to spend billions of dollars earmarked for a variety of domestic programs. See *Train v.*

centralized regulatory review proved enduring. Presidents Ford and Carter built incrementally on the administrative framework. Ford directed agencies to consider the inflationary impact of all major rules and to submit their analyses to a new office in the EOP.<sup>110</sup> Carter created a new organizational arrangement, led by OMB, for carrying out the reviews.<sup>111</sup>

President Reagan expanded and formalized the system of centralized regulatory review, molding it into its lasting shape. By executive order, he created a new office within OMB called OIRA, and required agencies to submit to that office a regulatory impact analysis for any major rule they wished to promulgate.<sup>112</sup> Reagan's order also supplied substantive criteria to govern agency rulemaking: To the extent permitted by law, an agency could regulate only if "the potential benefits to society . . . outweigh[ed] the potential costs" and if the choice among alternatives "involve[d] the least net cost to society."<sup>113</sup> Though the Order disclaimed any right on the part of OMB, or the President himself, to dictate or displace agency decisions delegated by law,<sup>114</sup> it gave OMB the authority to determine the adequacy of an impact analysis and to prevent publication of a proposed or final rule, even indefinitely, until the completion of the review process.<sup>115</sup> A subsequent executive order added the requirement that agencies submit for OMB review an annual regulatory plan listing proposed actions for the year, giving the EOP an early chance to weigh in on

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City of New York, 420 U.S. 35 (1975) (holding that the EPA Administrator was not authorized to allot to the states less than the entire amounts authorized to be appropriated); FISHER, *supra* note 58, at 147–201 (describing history of presidential impoundment); Abner J. Mikva & Michael F. Hertz, *Impoundment of Funds—The Courts, the Congress and the President: A Constitutional Triangle*, 69 NW. U. L. REV. 335 (1974) (analyzing the history of impoundment, as well as the political and judicial response, and concluding that the practice is unconstitutional). Congress responded with the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 298 (codified as amended at 2 U.S.C. §§ 621–691 (2006)), which establishes a framework for mandatory and discretionary spending and forces the President to seek legislative approval before terminating appropriations. The Act also established the Congressional Budget Office as a counterweight to OMB. Yoo, Calabresi & Colangelo, *supra* note 105, at 666.

<sup>110</sup> Kagan, *supra* note 2, at 2276.

<sup>111</sup> Lewis & Moe, *supra* note 109, at 390.

<sup>112</sup> Exec. Order No. 12,291 § 3, 3 C.F.R. 127, 128–30 (1981); *see also* Lewis & Moe, *supra* note 109, at 390 (discussing Reagan's regulatory efforts). Reagan also created a Task Force on Regulatory Relief that suspended some two hundred pending regulations. Lewis & Moe, *supra* note 109, at 390.

<sup>113</sup> Exec. Order No. 12,291 §§ 2, 3, 3 C.F.R. at 128.

<sup>114</sup> *Id.* § 3(f)(3), 3 C.F.R. at 130; *see also* Proposed Executive Order Entitled "Federal Regulation," 5 Op. O.L.C. 59, 63–64 (1981) (reasoning that the President and OMB Director lacked authority to displace agencies in discharging their statutory functions).

<sup>115</sup> Exec. Order No. 12,291 § 3(e)–(f), 3 C.F.R. at 129–30.

rulemaking.<sup>116</sup> Ultimately, by delaying, blocking, and revising rules, OMB used its powers under the executive orders to implement Reagan's vision of regulatory policy.<sup>117</sup>

While Reagan explicitly formalized regulatory review, his approach to enforcement policy was indirect and informal. Using the large national budget deficit as a justification, he proposed and won a series of budget cuts that effectively reduced federal agencies' enforcement capability.<sup>118</sup> Reagan's political appointees in the various agencies gave life to his deregulatory commitments in part through the exercise of administrative enforcement discretion. For example, the DOJ's antitrust enforcement record directly corresponded with the Administration's "repeated assertion that virtually all business activity except horizontal price fixing [was] good for the American consumer and good for the economy."<sup>119</sup> Another example is the EPA, where Reagan used political appointments and budgetary cuts to induce the agency to reduce its level of enforcement and compliance activity.<sup>120</sup> Yet Reagan's own role in enforcement policy was ambiguous, and he put no formal mechanism of enforcement coordination into place.

### 3. *President Clinton: Continued Centralized Regulatory Review and New Use of Administrative Directives*

Reagan's centralized regulatory review system was largely maintained by President George H.W. Bush,<sup>121</sup> and despite considerable criticism from Democrats and their allies, President Clinton followed suit. Though Clinton instituted reforms that pushed centralized review in a somewhat less deregulatory direction, he maintained the basic system, even increasing OMB's influence over independent agency rulemaking.<sup>122</sup> Clinton also exercised control over the administrative

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<sup>116</sup> Exec. Order No. 12,498, 3 C.F.R. 323 (1985); see also Kagan, *supra* note 2, at 2277–78 (discussing Executive Orders 12,291 and 12,498).

<sup>117</sup> Bagley & Revesz, *supra* note 13, at 1265 (citing Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1065 (1986)).

<sup>118</sup> Jeffrey A. Fine & Richard W. Waterman, *A New Model of Presidential Leadership: Controlling the Bureaucracy*, in *PRESIDENTIAL LEADERSHIP: THE VORTEX OF POWER* 19, 40 (Bert A. Rockman & Richard W. Waterman eds., 2008).

<sup>119</sup> Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 947 (1987).

<sup>120</sup> Fine & Waterman, *supra* note 118, at 20, 33. These efforts were of mixed success as they were met with considerable opposition from Congress and agency officials. *Id.* at 33, 38.

<sup>121</sup> Lewis & Moe, *supra* note 109, at 391.

<sup>122</sup> Clinton's OMB review process, established in Executive Order 12,866, again required that agencies submit major regulations to OMB for review, continued cost-benefit

state in new ways, including by using formal directives to department heads to spur new rules. A central objective of the Clinton White House “was to devise, direct, and/or finally announce administrative actions . . . to showcase and advance presidential policies.”<sup>123</sup>

While Clinton focused on enforcement, he did so less frequently, and rarely with respect to identifiable parties. Firearms regulation was one of the few areas in which Clinton directed “not only rulemakings but enforcement strategies.”<sup>124</sup> Here, he called on the Treasury Secretary and the Attorney General, “in reliance on partnerships with state and local officers, to begin enforcement efforts to trace all guns used to commit crimes in cities throughout the United States.”<sup>125</sup> He also “endorsed a threat of suit against gun manufacturers . . . by the Secretary of Housing and Urban Development and announced the agreement of Smith & Wesson, prompted in part by that threat, to make certain changes in the design and marketing of the company’s firearms.”<sup>126</sup>

#### 4. *President George W. Bush: More Centralized Regulatory Review and Deregulation by Nonenforcement*

Formal, centralized regulatory review continued to play a major role in President George W. Bush’s Administration. Bush oversaw an aggressive OIRA review process in which many regulations were sent back to agencies for modification.<sup>127</sup> In addition, Bush issued an executive order requiring every regulatory agency to have a policy review office headed by a presidential appointee.<sup>128</sup> These offices were

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analysis as “the basic criterion in assessing regulatory decisions” and established an “annual regulatory planning process” similar to Reagan’s. Kagan, *supra* note 2, at 2285–86; see also Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted as amended in 5 U.S.C. § 601 (2006). But Executive Order 12,866 also enabled the President’s delegates to “request further consideration” on proposed rules of independent agencies that appeared to conflict with other agency action, the regulatory principles set out in the executive order, or “the President’s priorities.” Exec. Order No. 12,866 § 4(c), 3 C.F.R. at 642–43.

<sup>123</sup> Kagan, *supra* note 2, at 2248.

<sup>124</sup> *Id.* at 2305.

<sup>125</sup> *Id.* at 2305–06.

<sup>126</sup> *Id.* at 2306.

<sup>127</sup> Lewis & Moe, *supra* note 109, at 393. The Bush OIRA also “invented a new tool called the ‘prompt’ letter—a public letter to an agency suggesting that it should consider adopting a new regulation.” John D. Graham, Paul R. Noe & Elizabeth L. Branch, *Managing the Regulatory State: The Experience of the Bush Administration*, 33 *FORDHAM URB. L.J.* 953, 972 (2006). The Bush OIRA issued over a dozen such letters, while also launching a process for reviewing and reforming existing regulations. *Id.* at 972–73.

<sup>128</sup> Exec. Order No. 13,422 § 5(b), 3 C.F.R. 191, 193 (2007). On the use of the appointment power to populate the bureaucracy with politically responsive actors, see Barron, *supra* note 59, at 1121–33, and Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235 (John E. Chubb & Paul E. Peterson eds., 1985).

directed to supervise the development of new rules and impose new criteria raising the threshold for issuing new regulation. Notably, however, Bush's order instructed the policy review offices to oversee how agencies use guidance documents, which are informal statements instructing businesses on how agency rules will be interpreted and enforced. In so doing, the new regulatory offices effectively extended presidential control over enforcement practices.<sup>129</sup>

In general, Bush exercised more extensive control over enforcement than did many of his predecessors. Across agencies, there was a significant trend toward deregulation through nonenforcement and a shift toward different enforcement priorities, consistent with the Administration's articulated policy goals.<sup>130</sup> Nonetheless, the White House rarely claimed responsibility for these decisions. Rather, presidential influence over enforcement during the Bush Administration continued to be less formal and less transparent than was control over rulemaking. For example, a 2006 report commissioned by the Minority Staff of the U.S. House of Representatives Committee on Government Reform charged that between 2000 and 2005, enforcement actions brought by the Food and Drug Administration (FDA) declined significantly.<sup>131</sup> The number of warning letters issued by the agency decreased by over fifty percent during this period, even though the overall number of violations discovered by field inspectors did not decline significantly.<sup>132</sup> According to the report, political appointees at the central offices of the FDA frequently undertook enforcement actions weaker than those recommended by field officers, even refusing to follow such recommendations at times.<sup>133</sup> The report suggests presidential influence over these decisions; it repeatedly faults the Bush Administration for the trend and cites the role of "FDA headquarters" in the decisions.<sup>134</sup> But the report does not evidence any statement by the President himself—or any EOP or White House

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<sup>129</sup> Lewis & Moe, *supra* note 109, at 393–94. For an overview of centralized regulatory review under the Bush Administration, see, for example, Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257, 1286–304 (2006).

<sup>130</sup> See Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 807–15 (2010) (examining modes of deregulation through nonenforcement under the second Bush Administration).

<sup>131</sup> MINORITY STAFF OF H. COMM. ON GOV'T REFORM, SPEC. INVESTIGATIONS DIV., PRESCRIPTION FOR HARM: THE DECLINE IN FDA ENFORCEMENT ACTIVITY, at i (2006), available at <http://oversight-archive.waxman.house.gov/documents/20060627101434-98349.pdf>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 10–12.

<sup>134</sup> *E.g., id.* at i, 6–7.



officials—claiming responsibility for the significant change in enforcement priorities and practices at the FDA.

So, too, with the Department of Labor (DOL). One of the largest regulatory enforcement agencies, the DOL is also one of the federal agencies in which the ideological differences separating Democrats and Republicans are most stark.<sup>135</sup> Not surprisingly, the Bush DOL's enforcement tactics differed significantly from those of the Clinton DOL; under Bush, the agency shifted resources towards voluntary compliance and away from punitive enforcement.<sup>136</sup> According to critics, underenforcement of existing law and underfunding of enforcement units helped the Administration achieve its deregulatory goals.<sup>137</sup> Indeed, funding for OSHA enforcement activity declined even faster than the agency's overall budget during the Bush years.<sup>138</sup> Yet, in few instances did the Administration generally, or the President in particular, claim responsibility for these significant enforcement changes.

Similarly, there was an overall decline in enforcement at the EPA during the Bush Administration.<sup>139</sup> This included some announced

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<sup>135</sup> See Michael A. Fletcher, *Labor Dept. Accused of Straying From Enforcement*, WASH. POST, Dec. 1, 2008, at A2 (noting that “[t]here are few federal agencies where the ideological differences separating many Democrats and Republicans play out more plainly” than in the DOL).

<sup>136</sup> See *id.* (describing the Bush DOL's shift in emphasis).

<sup>137</sup> One report issued by the Government Accountability Office (GAO) found that the Bush Administration's DOL inadequately investigated reports from low-wage workers of employers who failed to pay the federal minimum wage, neglected to pay overtime, or refused to issue final paychecks. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-458T, WAGE AND HOUR DIVISION'S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT 3-4 (2009); see also Press Release, H. Comm. on Educ. & Labor, Bush Labor Department Failed to Properly Investigate Wage Theft, GAO Tells House Panel (Mar. 25, 2009), available at <http://democrats.edworkforce.house.gov/press-release/bush-labor-department-failed-properly-investigate-wage-theft-gao-tells-house-panel> (discussing this report). Another report, issued by the DOL Inspector General, found that the Mine Safety and Health Administration did not conduct federally required inspections at fifteen percent of the country's underground coal mines. U.S. DEP'T OF LABOR, OFFICE OF INSPECTOR GEN., REP. NO. 05-08-001-06-001, UNDERGROUND COAL MINE INSPECTION MANDATE NOT FULFILLED DUE TO RESOURCE LIMITATIONS AND LACK OF MANAGEMENT EMPHASIS 1 (2007); see also Fletcher, *supra* note 135, at A2 (discussing this report). Another audit by the DOL Inspector General found that a number of workplace hazards may have been deterred if OSHA had engaged in appropriate enforcement and inspection activity. U.S. DEP'T OF LABOR, OFFICE OF INSPECTOR GEN., REP. NO. 02-09-203-10-105, EMPLOYERS WITH REPORTED FATALITIES WERE NOT ALWAYS PROPERLY IDENTIFIED AND INSPECTED UNDER OSHA'S ENHANCED ENFORCEMENT PROGRAM 2-3 (2009); see also R. Jeffrey Smith, *Initiative on Worker Safety Gets Poor Marks; IG's Report Links Weak Enforcement to Job Fatalities*, WASH. POST, Apr. 2, 2009, at A6 (discussing this report).

<sup>138</sup> Fletcher, *supra* note 135.

<sup>139</sup> Deacon, *supra* note 130, at 809 n.87. A former director of the EPA's Office of Civil Enforcement, for example, explained the decline as caused by a “lack [of] political support

policies of nonenforcement. For example, Vice President Dick Cheney's Energy Task Force undertook a multiyear effort to ease regulatory burdens on power plants.<sup>140</sup> Under the oversight of the centralized review process, the EPA promulgated new safe harbor rules that made it easier for power plants undergoing renovations or modifications to avoid coming under the ambit of the more stringent standards of the Clean Air Act.<sup>141</sup> In 2006, the D.C. Circuit struck down the rule as a violation of the statute.<sup>142</sup> In response, the EPA moved to effect its policy through an enforcement memorandum that instructed agency officials to give effect to the safe harbor rules in a case-by-case analysis of whether to bring new enforcement actions.<sup>143</sup> New enforcement activity virtually disappeared.<sup>144</sup>

The same pattern existed with independent agencies, such as the SEC,<sup>145</sup> and certain divisions of the DOJ, such as the Civil Rights Division. They too adopted enforcement strategies designed to advance the Administration's policy goals.<sup>146</sup> But again, the White House and political leaders of the agency rarely claimed responsibility for the policy changes, nor did the agencies consistently disclose the shifts in policy. The enforcement policy shifts at the DOJ, in particular, were roundly criticized for lacking transparency and being politically driven. According to critics, the Department took positions in service of political goals, even where applicable law or available evidence pointed to a different conclusion.<sup>147</sup>

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[that field agents] used to be able to count on, especially in the White House." *Id.* at 809 nn.87–88 (quoting John Solomon & Juliet Eilperin, *Bush's EPA is Pursuing Fewer Polluters: Probes and Prosecutions Have Declined Sharply*, WASH. POST, Sept. 30, 2007, at A1).

<sup>140</sup> *Id.* at 812 (citing Joel A. Mintz, "Treading Water": A Preliminary Assessment of EPA Enforcement During the Bush II Administration, 34 ENVTL. L. REP. 10,912, 10,918 (2004)).

<sup>141</sup> Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 NW. U. L. REV. 1677, 1678–79 (2007).

<sup>142</sup> *New York v. EPA*, 443 F.3d 880, 890 (D.C. Cir. 2006).

<sup>143</sup> Nash & Revesz, *supra* note 141, at 1678–79; see also Steven D. Cook, *Effect of New Source Review Decision Limited by EPA Policy, Proposed Rule*, 37 ENV'T REP. (BNA) 662, 662 (Mar. 31, 2006).

<sup>144</sup> See Mintz, *supra* note 140, at 10,919 (noting that as of 2004 only one new enforcement case had been brought by the EPA during the Bush Administration). For further discussion, see Deacon, *supra* note 130, at 812.

<sup>145</sup> See Norman S. Poser, *Why the SEC Failed: Regulators Against Regulation*, 3 BROOK. J. CORP., FIN. & COM. L. 289, 309–17 (2009) (detailing the SEC's enforcement failures).

<sup>146</sup> For example, the Bush Administration did not enforce employment or voting rights laws as aggressively as did its predecessor, but it devoted significant resources to enforcing the prohibition on sex trafficking and combating various forms of religious discrimination. Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL'Y 77, 81 (2009).

<sup>147</sup> *Id.* at 81–82.

5. *President Obama: Centralized Regulatory Review, a New Compliance Memorandum, and Announced Policies of Prosecutorial Discretion*

When President Obama took office, he rescinded Bush's centralized regulatory review executive order, returning to Clinton's.<sup>148</sup> Two years later, Obama issued a supplementary executive order of his own, with somewhat greater emphasis on scientific integrity, distributional impacts of rulemaking, and public participation.<sup>149</sup> Overall, however, Obama's approach to regulatory review has been largely a continuation of much-studied past practice: It is formalized and centralized, utilizes cost-benefit analysis, and puts significant emphasis on reducing regulatory burdens.<sup>150</sup>

The Obama Administration's approach to enforcement is also, in many ways, a continuation of the past. Like his predecessors, Obama has used budgetary authority and political appointments to shift the direction of administrative agencies. New agency leadership, in turn, has transformed agency priorities. Particularly across the consumer, environmental, and labor agencies, Obama Administration appointees have engaged in more aggressive and punitive enforcement strategies and have shifted resources to prioritize pursuing those deemed to be the most flagrant violators.<sup>151</sup>

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<sup>148</sup> Exec. Order No. 13,497, 3 C.F.R. 218 (2009).

<sup>149</sup> See Exec. Order No. 13,563, 3 C.F.R. 215 (2011). The Obama Administration has also encouraged independent agencies, as well as executive agencies, to engage in retrospective review of regulations and has put greater emphasis on centralization of rulemaking in negotiations with trade partners. See Exec. Order No. 13,579, 3 C.F.R. 256, 257 (2011) (requesting that independent regulatory agencies engage in retrospective review); Exec. Order No. 13,609, 77 Fed. Reg. 26,413, 26,413–14 (May 1, 2012) (promoting international regulatory cooperation through the Regulatory Working Group).

<sup>150</sup> In May 2012, the President issued another executive order, directing executive agencies to take further steps to engage in retrospective review of regulations, with the aim of modernizing them and removing those deemed unnecessary. Exec. Order No. 13,610, 77 Fed. Reg. 28,469 (May 10, 2012).

<sup>151</sup> For example, OSHA has increased its inspection and citation rates considerably, while committing to a new form of risk-based enforcement, which targets certain high-risk sectors and firms. See OMB WATCH, THE OBAMA APPROACH TO PUBLIC PROTECTION: ENFORCEMENT 6, 8 (2010), available at <http://www.ombwatch.org/files/regs/obamamidtermenforcementreport.pdf> (reporting a 167% increase in the number of OSHA citations from the previous year during Obama's first full year in office). OSHA also announced that it will reevaluate its voluntary compliance program, which was favored by the Bush Administration and applauded by numerous academics but had significant problems in practice according to the GAO. See Press Release, U.S. Dep't of Labor, OSHA, U.S. Department of Labor's OSHA Begins Evaluation of Voluntary Protection Programs (June 18, 2009), available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=NEWS\\_RELEASES&p\\_id=18065](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=18065); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 09-395, OSHA'S VOLUNTARY PROTECTION PROGRAMS: IMPROVED OVERSIGHT AND CONTROLS WOULD BETTER ENSURE PROGRAM QUALITY 18 (2009) (criticizing operations of the voluntary compliance program and recommending changes to the

Still, early in the Obama Administration, when the President's own party controlled both houses of Congress, the use of administrative agencies—for enforcement or other purposes—did not attract significant presidential attention. Like those before him governing with a near-supermajority in Congress, the President had little incentive to use unilateral power in place of more lasting forms of policymaking.<sup>152</sup> A series of crises in 2010, however, brought Obama squarely into the field of administrative enforcement. On April 5, 2010, the Massey Energy Upper Big Branch mine in West Virginia exploded, killing twenty-nine miners; it was the worst American mining accident in over forty years.<sup>153</sup> In response, Obama took the unusual step of ordering specific enforcement activity: He called for the immediate deployment of inspectors to all mines with similar poor safety records and ordered the DOL to determine whether enforcement could be more effective.<sup>154</sup> Only two weeks later, on April 20, 2010, the Deepwater Horizon rig, operated by BP Oil, exploded, killing eleven people and spilling millions of barrels of oil into the Gulf of Mexico.<sup>155</sup> In the face of one of the worst environmental crises in the country's history, presidential response was inevitable and immediate. Obama oversaw the imposition of a moratorium on deepwater drilling and established a new commission tasked with studying the causes of the accident and evaluating whether statutory or regulatory changes were needed.<sup>156</sup> He also called for better enforcement of existing laws governing offshore drilling.<sup>157</sup>

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program); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 04-378, WORKPLACE SAFETY AND HEALTH: OSHA'S VOLUNTARY COMPLIANCE STRATEGIES SHOW PROMISING RESULTS, BUT SHOULD BE FULLY EVALUATED BEFORE THEY ARE EXPANDED 4, 43 (2004) (recommending further evaluation of OSHA's voluntary compliance program).

<sup>152</sup> See, e.g., WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 177, 180 (2003) (explaining that the use of unilateral measures increases during periods of congressional gridlock).

<sup>153</sup> Ian Urbina, *No Survivors Found at Site of W.Va. Mine Disaster*, N.Y. TIMES, Apr. 10, 2010, at A1.

<sup>154</sup> Remarks Following a Meeting on Mine Safety, 2009 DAILY COMP. PRES. DOC. 1 (Apr. 15, 2010). The Mine Safety and Health Administration (MSHA) ultimately conducted impact assessments at eleven coal, metal, and nonmetal mines based on factors that indicate safety problems, including frequent complaints to regulators, high injury and illness rates, and fatalities. The MSHA found "significant and substantial" violations at all but three of the eleven mines. See News Release, Mine Safety and Health Administration, MSHA Puts 8 Mines on Notice for Potential Patterns of Violations (Nov. 30, 2011).

<sup>155</sup> NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING—REPORT TO THE PRESIDENT, at vi (2011), available at <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>.

<sup>156</sup> Address to the Nation on the Oil Spill in the Gulf of Mexico, 2009 DAILY COMP. PRES. DOC. 2 (June 15, 2010).

<sup>157</sup> *Id.* at 3.

Once Obama's party no longer controlled both houses of Congress, he began to focus more attention on using enforcement and other administrative strategies to achieve policy goals. For example, his 2012 State of the Union Address emphasized problems of regulatory compliance, announcing several specific new enforcement initiatives.<sup>158</sup> Still, like former presidents' efforts, these forays were sporadic and not sustained by formal institutions in the EOP.

Also like presidents prior—most prominently George W. Bush—Obama began using nonenforcement to achieve substantive policy goals. However, he has done so somewhat more transparently. Two examples, to which I will return in Parts III and IV, illustrate the point. The first is in the realm of criminal prosecution, outside the focus of this Article but illustrative nonetheless: Early in the Obama Administration, Attorney General Eric Holder “outlined a shift in the enforcement of federal drug laws, saying the administration would effectively end the Bush administration’s frequent raids on distributors of medical marijuana.”<sup>159</sup> Although the policy was issued by the DOJ in a memorandum from the Deputy Attorney General, Holder suggested that the shift was driven by the President and his campaign commitments.<sup>160</sup>

Second, failing to achieve during the first term either comprehensive immigration reform or a more limited targeted reform that would have granted residency rights to certain young people and relatives of military veterans,<sup>161</sup> the Administration announced that it would use “prosecutorial discretion” to achieve some portion of those policy goals.<sup>162</sup> A post on the White House blog declared that the decision to

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<sup>158</sup> Obama announced the creation of a Trade Enforcement Unit charged with investigating unfair trade practices in countries like China; a Financial Crimes Unit of highly trained investigators to crack down on large-scale fraud and protect people’s investments; and a special unit of federal prosecutors and leading state attorneys general focused on the mortgage crisis. Address Before a Joint Session of Congress on the State of the Union, 2012 DAILY COMP. PRES. DOC. 3, 8 (Jan. 24, 2012).

<sup>159</sup> David Johnston & Neil A. Lewis, *Ending Raids of Dispensers of Marijuana for Patients*, N.Y. TIMES, Mar. 19, 2009, at A20; see also Erick Eckholm, *Medical Marijuana Industry is Unnerved by U.S. Crackdown*, N.Y. TIMES, Nov. 24, 2011, at A22 (noting the DOJ’s shift).

<sup>160</sup> See Johnston & Lewis, *supra* note 159, at A20 (noting that “the new approach was consistent with statements made by President Obama in the campaign and was based on an assessment of how to allocate scarce enforcement resources”).

<sup>161</sup> See Julia Preston, *Students Press for Action on Immigration*, N.Y. TIMES, May 31, 2012, at A14 (noting young activists’ frustration with congressional inaction and with the President’s refusal to halt deportation).

<sup>162</sup> Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), available at <http://www.ice.gov/doclib/>

impose this policy of prosecutorial discretion was the President's.<sup>163</sup> Nearly a year later, the Secretary of Homeland Security announced an even broader program of "deferred action" for "young people who are low enforcement priorities."<sup>164</sup> Under that new policy, relief would continue to be available only on a case-by-case basis, but the discretion of reviewing Immigrations and Customs Enforcement (ICE) officers would now be cabined.<sup>165</sup> Though the directive to Department of Homeland Security (DHS) officials came from Secretary Janet Napolitano, the President himself, speaking in the Rose Garden shortly after her announcement, left no doubt that he intended to claim the policy decision as his own.

Finally, while presidential attention to enforcement under Obama—including the use of nonenforcement to achieve policy aims—has remained largely episodic and not institutionalized, there are also suggestions of a shift toward more formal and sustained enforcement coordination. Most notably, on January 18, 2011, Obama issued a Memorandum on Regulatory Compliance to the federal executive department and agencies.<sup>166</sup> Released at the same time as a

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secure-communities/pdf/prosecutorial-discretion-memo.pdf. Cristina Rodriguez and Adam Cox have shown how the President has historically exercised power over core immigration policy in a manner obscured from scrutiny, through prosecutorial discretion and the use of discretionary enforcement power. Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 *YALE L.J.* 458, 510–30 (2009).

<sup>163</sup> Cecilia Muñoz, *Immigration Update: Maximizing Public Safety and Better Focusing Resources*, WHITE HOUSE BLOG (Aug. 18, 2011, 2:00 PM), <http://www.whitehouse.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources>.

<sup>164</sup> Press Release, Dep't of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), available at <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>; see also Memorandum from Janet Napolitano, Sec'y of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) [hereinafter Napolitano Prosecutorial Discretion Memorandum]. General authority for deferred action exists under the Immigration and Nationality Act (INA) § 103(a), 8 U.S.C. § 1103(a) (2006), which provides the Secretary of Homeland Security authority to enforce the immigration laws. Deferred action is a discretionary determination to decline pursuing a removal action against an individual as an act of prosecutorial discretion; it does not confer lawful status upon an individual. It has more frequently been used to grant temporary relief to nationals of particular countries in times of crisis. Individuals who have been granted deferred action are eligible to receive employment authorization for the period of deferred action.

<sup>165</sup> The policy makes clear that individuals meeting specified criteria are in fact eligible for deferred action, although decisions will still be made on a case-by-case basis. Napolitano Prosecutorial Discretion Memorandum, *supra* note 164, at 1–2. It also formalizes the relief available and even extends it to individuals who are not yet in deportation proceedings. *Id.* at 2.

<sup>166</sup> Presidential Memorandum on Regulatory Compliance, 76 Fed. Reg. 3825, 3825–26 (Jan. 18, 2011).

long-awaited executive order clarifying the Obama Administration's approach to centralized regulatory review, the Compliance Memorandum received little attention. Yet it was actually the more innovative of the two: It represented the first public, formal effort of a White House to coordinate, where appropriate, regulatory enforcement across agencies in a comprehensive way.<sup>167</sup>

The Compliance Memorandum directs agencies to develop plans to make compliance information to which the public is already entitled easily "accessible, downloadable, and searchable online."<sup>168</sup> It then directs two officials within OMB (the Chief Information Officer (CIO) and the Chief Technology Officer (CTO)) to develop tools to make cross-agency comparisons possible and to "engage[ ] the public in new and creative ways of using the information."<sup>169</sup> Finally, it requires the CIO and CTO to work with agencies to explore how best to generate and share enforcement and compliance information across the government.<sup>170</sup> According to the Compliance Memorandum, disclosure of enforcement data "fosters fair and consistent enforcement of important regulatory obligations" and encourages "the public to hold the Government and regulated entities accountable."<sup>171</sup>

The Compliance Memorandum is thus both modest and novel in the direction it gives to agencies and in its normative claims. It is modest in that it sets no benchmarks for enforcement goals, nor does it establish any formal White House oversight of enforcement efforts. It merely touts the right of Americans to make informed decisions, the importance of holding the government accountable for its enforcement activities, and the need to "level[ ] the playing field" between those entities that comply with the law and those that do not.<sup>172</sup> According to the Memorandum, "[a] lack of compliance in one area by a regulated entity may indicate a need for examination and closer attention by another agency. Efforts to share data across agencies, where appropriate and permitted by law, may help to promote flexible and coordinated enforcement regimes."<sup>173</sup> There is, in short, nothing controversial or striking about these claims—except that presidents have so rarely made them. Likewise, the limited scope of the Memorandum's directives underscores its novelty: There was

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<sup>167</sup> In contrast, the regulatory review memorandum largely embraced the Clinton approach. See *supra* notes 123–24 (discussing the Clinton Memorandum).

<sup>168</sup> Presidential Memorandum on Regulatory Compliance, 76 Fed. Reg. at 3825.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 3825–26.

<sup>171</sup> *Id.* at 3825.

<sup>172</sup> *Id.* Notably, independent agencies are encouraged to comply only with the first directive—that of making their own information available. *Id.*

<sup>173</sup> *Id.* at 3826.

previously no centralized system within the government through which agencies could pool compliance information.

Finally, the Compliance Memorandum is notable for its embrace of a trend in administrative law theory. Rather than commanding a particular result or establishing a single, central process of review, it emphasizes stakeholder-driven use of enforcement data and information pooling. As such, it exemplifies the “experimentalist” approach to administration advanced by scholars such as Charles Sabel and William Simon.<sup>174</sup> The assumption underlying the Memorandum is that new data sharing will enable learning through monitoring and will result in ongoing improvement. At the same time, the Memorandum implies a more prominent role for the EOP than has existed—or at least than has been acknowledged—previously.

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In sum, putative presidential control of the federal bureaucracy through centralized regulatory review is now permanently incorporated into the institutional design of the U.S. government.<sup>175</sup> Centralized review has enabled presidents to further a variety of policy goals, including advancement of their administrations’ principles, reduction of regulatory costs, and coordination of agency activity.<sup>176</sup> Presidents are also open about their use of centralized regulatory review. In contrast, this Part has shown that presidential attention to agency enforcement efforts has been comparatively informal, episodic, and opaque. Although presidents have used enforcement discretion to advance their policy agendas, they have established few lasting coordination mechanisms. Moreover, the mechanisms by which presidents have influenced agency enforcement decisions have been largely ambiguous, and nonenforcement policies have been left undisclosed. There are, however, suggestions of a shift toward better coordination and more disclosure, offering a possible path to further reform.

## *B. Explaining the Shape of Presidential Enforcement*

### *1. Systemic Causes for Presidential Use of Enforcement Discretion*

What explains the way in which presidents have approached enforcement? Unilateral policymaking, political scientists agree, has

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<sup>174</sup> Sabel & Simon, *supra* note 14, at 78.

<sup>175</sup> Pildes & Sunstein, *supra* note 3, at 15.

<sup>176</sup> *Id.* at 16.



become “an integral feature of the modern presidency.”<sup>177</sup> The sheer volume of statutes over time (including two recent pieces of major legislation—the Patient Protection and Affordable Care Act<sup>178</sup> and the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>179</sup>) has increased the President’s total responsibilities, and the laws are “interdependent and conflicting in ways that the individual statutes themselves do not recognize.”<sup>180</sup> Presidents have taken advantage of the resulting interdependence, statutory conflict, and ambiguity to advance their own priorities in governing and to expand executive power.<sup>181</sup>

Enforcement provides yet another mechanism for increasing presidential power, advancing the presidential agenda, and demonstrating leadership.<sup>182</sup> It is also a mechanism that is flexible, inexpensive, and subject to few checks.<sup>183</sup> Predictably, therefore, enforcement has for many years served as an important presidential tool for effectuating policy goals. Furthermore, as use of the filibuster, secret holds, and other legislative vetoes has become routine, presidents have even greater incentives to use enforcement to effect policy change.<sup>184</sup>

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<sup>177</sup> HOWELL, *supra* note 152, at 179; *see also* Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES, Apr. 23, 2012, at A1 (discussing President Obama’s decision to use unilateral policymaking power to bypass congressional inaction).

<sup>178</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

<sup>179</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code).

<sup>180</sup> Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850, 860 (1999).

<sup>181</sup> *Id.*

<sup>182</sup> *See id.* at 854–55 (arguing that Presidents use ambiguity in the Take Care duty as source of unilateral power); *cf.* Moe, *supra* note 97, at 140–42 (arguing that Presidents have centralized and politicized administration for systemic reasons, because of the nature of our institutions and the location of Presidents within them).

<sup>183</sup> *See supra* notes 34–44 and accompanying text (comparing the heightened procedural requirements and expanded judicial review imposed on rulemaking with the informal nature and lessened reviewability of enforcement documents and of decisions not to enforce).

<sup>184</sup> *See* HOWELL, *supra* note 152, at 179–81 (explaining that presidents have relied on unilateral powers with greater frequency due to overwhelming demands on their time, congressional gridlock, and the growth of the administrative state); STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE* 31, 55–57, 442–46 (1993) (arguing that traditional means of enforcing presidential power remain important in the modern presidency); *see also* STEPHEN SKOWRONEK, *PRESIDENTIAL LEADERSHIP IN POLITICAL TIME* (2008) (arguing that the thickening of our political institutions has introduced numerous veto points into the system); Moe & Howell, *supra* note 180, at 852 (“[T]he President’s powers of unilateral action are a force in American politics precisely because they are *not* specified in the formal structure of government. . . . The result is a slow but steady shift of the institutional balance of power over time in favor of presidents.”); Andrew Rudalevige, *Executive Orders and Presidential Unilateralism*, 42 PRESIDENTIAL STUD. Q. 138 (2012) (exploring

But if presidents have long used enforcement as a tool to advance their policy goals, why, at the same time, have they taken so few steps—at least publicly—to formally direct or oversee agency enforcement activity? As the President's own bureaucracy has expanded, why do the White House and the EOP lack any office or staff tasked with coordinating enforcement? This Part concludes that the explanation is not only structural and cultural but also ideological.

## 2. *Structural and Cultural Obstacles to Centralized Enforcement*

Several factors explain why formal presidential administration does not (and should not) entail a direct enforcement analogue to OIRA. Review of major individual enforcement actions would pose numerous problems. First, while cost-benefit analysis for rulemaking has substantial (albeit contested) value, no similar trans-substantive metric exists for deciding whether a particular enforcement action should go forward. Second, while critics have charged that centralized review of major rules has contributed to ossification of rulemaking, centralized review of individual enforcement actions would pose an even greater drag on the operation of the administrative state. Given limited time and resources, it would be logistically impossible for the White House to review all significant individual enforcement actions, even if it were possible to identify which actions should be considered significant. Moreover, presidents and their White House staff often lack capacity or expertise to determine if a particular enforcement decision should go forward, even more so than for a particular rule.<sup>185</sup> Agencies are better equipped to make such determinations.<sup>186</sup> Third, routine White House review of individual enforcement actions would increase the risk of partisan politics undermining the rule of law. It is in the area of individual enforcement actions, which are focused on

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the use of executive orders and concluding that, even when issuing unilateral orders, a President must persuade and bargain with members of the bureaucracy).

<sup>185</sup> See GEORGE C. EDWARDS III & STEPHEN J. WAYNE, *PRESIDENTIAL LEADERSHIP: POLITICS AND POLICY MAKING* 260 (1994) (“[P]residents often lack experience in administration and find other tasks more compatible with their skills and interests.”).

<sup>186</sup> As some of the administrative state's most famous architects and theorists have written, specialization and fragmentation are integral to expertise in decisionmaking. See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* 61–63 (1993) (discussing the “virtues of bureaucracy”); JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 23 (1938) (arguing that “the art of regulating an industry requires knowledge of the details of its operation”). For this reason, several administrative law doctrines reinforce specialization in administration. See, e.g., *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984) (noting that agencies “implement[ ] policy decisions in a technical and complex arena”); *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (establishing that courts must be at their most deferential when agencies are acting at the frontiers of science).

particular persons and firms, that “the crassest forms of partisan politics . . . pose the greatest danger of displacing professionalism and thereby undermining confidence in legal decisionmaking.”<sup>187</sup> One needs to think no further than President Nixon’s efforts to direct the Internal Revenue Service (IRS) to engage in politically motivated tax audits<sup>188</sup> or his direction to the Attorney General to drop the government’s appeal of an antitrust suit against the International Telephone and Telegraph Corporation (which had made considerable contributions to the Republican Party)<sup>189</sup> to understand the importance of keeping law enforcement nonpartisan,<sup>190</sup> and the problems that can arise when presidents direct individual prosecutions. Accordingly, internal White House rules typically prohibit White House staffers from contacting agencies about specific enforcement actions without preclearance from the White House Counsel’s Office.<sup>191</sup>

But concluding that enforcement could not and should not be centralized in the same way as rulemaking does not explain why there is no central, institutionalized attention of any sort to problems of regulatory compliance. Why, for example, is there no formal system by which data are shared across agencies to improve targeting of law violators? Or how about a mechanism for facilitating coordination among agencies that seek compliance from the same entities? Here too, structural and cultural obstacles make effective presidential coordination and prioritization of enforcement challenging. Identifying these factors is critical for considering where one might focus possible reforms.

Most elementarily, centralization of compliance data poses significant logistical and technical challenges for the government, more so than even centralized attention to rulemaking. The modern American administrative state is a vast and sprawling bureaucracy, short on resources and, in many areas, well behind the private sector in

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<sup>187</sup> Kagan, *supra* note 2, at 2357–58.

<sup>188</sup> See Joshua D. Blank, *In Defense of Individual Tax Privacy*, 61 EMORY L.J. 265, 278–79 (2011) (describing charges by the House Judiciary Committee in its articles of impeachment against Nixon).

<sup>189</sup> See Sue Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 653 & n.215 (1989).

<sup>190</sup> The recent scandal involving IRS targeting of Tea Party groups demonstrates the dangers of partisan bias in enforcement and the problems that can arise even without any apparent presidential involvement. See, e.g., Jonathan Weisman, *I.R.S. Apologizes to Tea Party Groups over Audits of Applications for Tax Exemption*, N.Y. TIMES, May 11, 2013, at A11, available at <http://www.nytimes.com/2013/05/11/us/politics/irs-apologizes-to-conservative-groups-over-application-audits.html>. At the same time, the incident suggests the importance of greater oversight and disclosure of administrative enforcement policy.

<sup>191</sup> E.g., Memorandum from Charles F.C. Ruff, Counsel to the President, and Daniel Marcus, Senior Counsel (Nov. 24, 1998), available at [http://www.clintonlibrary.gov/\\_previous/KAGAN%20DPC/DPC%205-17/DOMESTIC%20POLICY%20COUNCIL%20BOXES%205-30\\_Part185.pdf](http://www.clintonlibrary.gov/_previous/KAGAN%20DPC/DPC%205-17/DOMESTIC%20POLICY%20COUNCIL%20BOXES%205-30_Part185.pdf).

technology use. Dozens of federal agencies engage in enforcement across hundreds of industries. In some cases, it would be illegal or inappropriate for data related to enforcement actions to be shared among those agencies.<sup>192</sup> In other cases, intra- and even extragovernmental sharing of information would be permissible, or even required under the Freedom of Information Act (FOIA).<sup>193</sup> Yet the government has no way of knowing that an entity failing to comply with one set of regulations is the same as or related to an entity violating another set of rules. For example, there is no system by which the government as a whole assigns unique corporate identifiers or shares compliance data.

In addition, there are not the same kinds of incentives for presidents to invest *ex ante* in prophylactic enforcement coordination as there are to monitor and influence the promulgation of new regulation. More often than not, routine compliance problems do not make headlines. The converse is true as well: Successful programs of enforcement and compliance do not generally bring the President immediate political rewards or credit.<sup>194</sup> Effective implementation is unlikely to be attributed to the President; the day-to-day functioning of government is often not very visible in comparison to promulgating new regulations or rescinding old ones.<sup>195</sup> Of course, high-profile enforcement failures can implicate the President, necessitating some kind of presidential response (a rhetorical one, at least). The BP oil spill and the West Virginia Massey mine explosion are examples.<sup>196</sup> But these are the unusual cases.

Finally, the enforcement power of the President, more so than the process of regulatory review, depends substantially on affecting the behavior of subordinates within the Executive Branch. To the extent the bureaucracy is resistant to the presidential directives, a President is better served by not drawing attention to his impotence in implementation.<sup>197</sup>

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<sup>192</sup> See, e.g., 26 U.S.C. § 6103(a), (d)(1) (2006) (providing that “[r]eturns and return information shall be confidential” and excepting from the general nondisclosure rule requests from only certain agencies, in certain circumstances).

<sup>193</sup> 5 U.S.C. § 552 (2012) (detailing circumstances under which agencies must make information available to the public).

<sup>194</sup> EDWARDS & WAYNE, *supra* note 185, at 260.

<sup>195</sup> *Id.* (“[P]residents are more likely to try to provide the public with immediate gratification through the passage of legislation or the giving of speeches than with efforts to manage the implementation of policies.”).

<sup>196</sup> See *supra* notes 153–57 and accompanying text (discussing the presidential response to the two events).

<sup>197</sup> Cf. COLLEEN J. SHOGAN, *THE MORAL RHETORIC OF AMERICAN PRESIDENTS* 172 (2006) (“[E]xalted rhetoric fosters the notion that modern presidents have the power to

The experience of the Obama Administration in responding to state medical marijuana initiatives, as well as with the initial DREAM Act directive, highlights the degree to which a presidential policy decision does not always translate into on-the-ground enforcement changes. Two years after Attorney General Holder announced the shift in policy, U.S. Attorneys in several states where medical marijuana is legal informed state officials that they would prosecute violations of federal law aggressively.<sup>198</sup> Medical marijuana advocates accused the Obama Administration of going back on earlier promises not to go after groups abiding by local laws, while career federal justice officials argued that the behavior of local groups, and not federal guidelines, had changed.<sup>199</sup> One can only speculate about the internal and external dynamics that produced the retreat from the initial broad policy, since the degree of presidential control over enforcement policy here, as in prior examples, was ambiguous. However, the events suggest the political and bureaucratic forces that act to check such policy shifts.

The example of the DREAM Act enforcement directive shows another way this dynamic plays out. There, the White House initially announced a limited program of case-by-case discretion to be exercised by line officers.<sup>200</sup> Almost one year after the enforcement policy shift, however, few individuals had received a reprieve from deportation.<sup>201</sup> Again, the public perception, at least, was that line officials were resisting implementation of the President's policy. In this case, however, the bureaucratic checks gave way to public prods: Under mounting pressure from immigrant advocacy groups, immigration law experts, and members of the Hispanic Congressional Caucus,<sup>202</sup> the Administration announced a broader program.<sup>203</sup>

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accomplish tasks that no executive embedded within a separated power system possesses.”).

<sup>198</sup> William Yardley, *New Federal Crackdown Confounds States That Allow Medical Marijuana*, N.Y. TIMES, May 8, 2011, at A13.

<sup>199</sup> Eckholm, *supra* note 159, at A22.

<sup>200</sup> See *supra* notes 162–63 and accompanying text (discussing the Obama Administration policy of prosecutorial discretion).

<sup>201</sup> Julia Preston, *Deportations Continue Despite U.S. Review of Backlog*, N.Y. TIMES, June 7, 2012, at A13 (reporting that fewer than two percent of the more than 411,000 deportation cases reviewed were closed).

<sup>202</sup> See, e.g., Letter from Immigration Law Professors to President Barack Obama on Executive Authority to Grant Administrative Relief for DREAM Act Beneficiaries (May 28, 2010), available at <http://www.nilc.org/document.html?id=754> (outlining statutory bases for broader relief).

<sup>203</sup> For further discussion, see *supra* notes 162–66, *infra* notes 411–15 and accompanying text.

### 3. *Ideological Obstacles to Centralized Enforcement: The Deregulatory Roots of Presidential Administration*

While the obstacles to centralized enforcement discussed in Part II.B.1 are important, they are incomplete because they lack grounding in the history of presidential administration. That history contains another powerful explanation for the lack of institutionalized presidential enforcement: Presidential administration in its current form was shaped by its conservative, deregulatory roots. Centralization was initially pushed by Progressives and New Dealers to achieve what they believed would be a more accountable and effective system of government with more protective social policy.<sup>204</sup> Notably, this period also witnessed significant public presidential involvement in enforcement.<sup>205</sup> But in the aftermath of the Vietnam War and Watergate, liberals “developed anxiety and ambivalence about the powers of the presidency.”<sup>206</sup> This change in the left’s perspective about the proper bounds of presidential power was, in turn, met with a transformative conservative social movement that viewed presidential power as the means through which its ambitions could be realized.<sup>207</sup> Redesigning administration away from robust regulation, along with rethinking the case for presidential power, was a focal point of the conservative agenda.<sup>208</sup>

Centralized regulatory review was born out of this antiregulatory agenda. OIRA’s primary function at its inception was to “create a rebuttable presumption against regulation in order to curb agencies’ supposed instincts to over-regulate.”<sup>209</sup> The structural features of centralized review, despite modest reforms by Clinton and Obama, remain largely unchanged since OIRA’s creation. They establish a profound institutional bias against regulation.<sup>210</sup> In practice, OIRA reviews agency regulations almost exclusively to ensure that they are not too costly. It rarely reviews agency decisions to deregulate as rigorously as it does new regulations, and it generally does not review

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<sup>204</sup> See *supra* Part II.A.1 (discussing the Progressive movement’s goals regarding centralized administration).

<sup>205</sup> See *id.* (discussing presidential involvement in enforcement during Progressive era).

<sup>206</sup> Pildes, *supra* note 1, at 1383.

<sup>207</sup> See Skowronek, *supra* note 94, at 2072; Pildes, *supra* note 1, at 1384.

<sup>208</sup> See Skowronek, *supra* note 94, at 2073, 2092–96 (describing the conservative movement’s arguments in support of presidential power and its opposition to market regulation); Bagley & Revesz, *supra* note 13, at 1263–64 (describing support for presidential control of the administrative state and opposition to overzealous regulators).

<sup>209</sup> Bagley & Revesz, *supra* note 13, at 1261–62 (internal quotation marks omitted); see also generally RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY* (2008) (arguing that cost-benefit analysis has been misused by conservative opponents of regulation and advancing a series of reforms to provide more balance).

<sup>210</sup> Bagley & Revesz, *supra* note 13, at 1262.

agency inaction.<sup>211</sup> In addition, the delay associated with OIRA review cuts against new regulation. Thus, as Richard Revesz and Nicholas Bagley have argued, these institutional design features have imposed “a sizeable drag on the regulatory state,” whether under the leadership of Democrats or Republicans.<sup>212</sup> OIRA’s architecture, they contend, demands revision: Its premise of agency overregulation is ill-founded, and it should focus more on harmonization and less exclusively on cost-benefit analysis.<sup>213</sup>

This critique of the shape of presidential administration, while penetrating, is too narrow in scope. The initial deregulatory impetus for centralized review helps explain not only the nature and shape of centralized rulemaking, but also the focus on rulemaking to the near-exclusion of regulatory compliance. As Part III will show, presidential coordination can greatly contribute to the efficiency and efficacy of administrative enforcement. Yet, because the primary aim of centralized administration initially was to reduce burdens on regulated industry, effective, efficient, and robust enforcement was not a primary goal. Given deregulation as the goal, presidential direction to agencies to train their focus on effective enforcement made little sense.

Indeed, lax enforcement furthers a deregulatory agenda. For starters, it can achieve deregulation *sub rosa*, as in the examples from the Bush Administration.<sup>214</sup> When systematic under-enforcement results in a failure of government to deliver on statutory promises or to protect vulnerable citizens, it can also undermine support for the regulatory state.<sup>215</sup> As political scientists have demonstrated, the

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<sup>211</sup> *Id.* at 1267–68.

<sup>212</sup> *Id.* at 1268. Whether the Obama Administration has addressed the deregulatory effect of centralized regulatory review in any significant way is the subject of debate. See Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209, 268 (2012) (arguing that centralized regulatory review during the Obama Administration remains a one-way ratchet for weakening protective rules).

<sup>213</sup> Bagley & Revesz, *supra* note 13, at 1324; see also Daniel A. Farber, *Rethinking the Role of Cost-Benefit Analysis*, 76 U. CHI. L. REV. 1355, 1356–57 (2009) (reviewing REVEZ & LIVERMORE, *supra* note 209) (arguing that cost-benefit analysis has been used to evade clear statutory mandates and that reform of OIRA should go further than what is urged by Revesz and Livermore).

<sup>214</sup> See *supra* Part II.A.4 (discussing the Bush Administration’s enforcement efforts).

<sup>215</sup> See Kenneth Newton & Pippa Norris, *Confidence in Public Institutions: Faith, Culture or Performance?*, in DISAFFECTED DEMOCRACIES: WHAT’S TROUBLING THE TRILATERAL COUNTRIES? 52, 62 & 72–73 (Susan J. Pharr & Robert Putnam eds., 2000); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1717, 1721 (2006) (arguing that when the state “routinely and predictably fails to enforce” the criminal law “to the detriment of vulnerable residents,” it “weakens broader values of public protection, official evenhandedness, respect for the law, and democratic responsiveness”).

public holds presidents responsible for much of governmental performance. Unsurprisingly, presidents generally want the bureaucracy to respond to them and to provide them with the tools they need to be perceived as effective leaders.<sup>216</sup> To justify active government, presidents have to find ways to signal that power is being used effectively. If, however, the aim is smaller government and less regulation, a high level of administrative effectiveness does not necessarily serve the President's needs. If government is not perceived to be acting effectively, opposition to the project of government is likely to mount.<sup>217</sup> This poses fewer political problems for presidents if they are able to disassociate themselves from enforcement failure by pursuing under-enforcement through stealth means or by declining to take formal responsibility for problems of regulatory compliance.

Of course, it is true that a formal structure for coordinating enforcement could also be used to achieve less enforcement. This may not always be a bad thing. The ability to identify patterns of over-enforcement and related misallocation of resources may, in fact, be another benefit of coordination. But, in most cases, avowed under- or nonenforcement of existing law is a difficult position to defend on principle. Both Congress and the public expect the Executive to carry out the law. Consider, for example, the controversies around decisions not to defend certain laws on the grounds that the President believes them to be unconstitutional,<sup>218</sup> or the distress regarding Obama's recent immigration nonenforcement decision.<sup>219</sup> In contrast, furtive nonenforcement—made easier, Part III will show, by the lack of institutionalization—allows the pursuit of deregulatory policies that would otherwise be politically or legally unattainable.

### III

#### THE CASE FOR REFORMING PRESIDENTIAL ENFORCEMENT

The current state of presidential attention to enforcement thus has structural, cultural, and ideological roots. But to describe presidential enforcement and the reasons it has taken its form is not to draw any conclusions about its desirability. Parts I and II described

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<sup>216</sup> See HOWELL, *supra* note 152, at 180 (arguing that, given public expectations, "it is difficult to think of a single area of governance that modern presidents can safely ignore"); Moe, *supra* note 97, at 141 (noting that presidents seek "responsive competence").

<sup>217</sup> Cf. Pildes, *supra* note 1, at 1387 ("[T]he public[] will permit presidents to exercise more or less discretion depending on how credible those presidents are perceived to be.").

<sup>218</sup> See *supra* note 18 (discussing the controversies generated from presidential decisions not to enforce laws that the President believes are unconstitutional).

<sup>219</sup> See *infra* note 415 and accompanying text (discussing Justice Scalia's opinion in *Arizona v. United States*, 132 S. Ct. 2492 (2012)).



the constitutional and historical bases for presidential coordination of agency enforcement. Presidential coordination of enforcement policy flows from constitutional structure, from early presidential practice, and from the historical development of the administrative state. This Part makes the case for reforms. Part III.A first provides several illustrations of the problems that result from insufficient coordination of enforcement. Part III.B shows how reforms in presidential administration could address them. The weightiest objections to my proposal, including concerns about politicization of law enforcement, can be satisfied by two critical design elements. First, presidential enforcement should be focused on facilitating interagency coordination and should not entail systematic review of individual enforcement actions. Second, although presidents should continue to influence critical enforcement-policy questions, enforcement policy should involve a greater measure of transparency—not of deliberation, but of the ultimate decisions made. Without attempting to offer a comprehensive design proposal, Part III.C provides some preliminary thoughts as to what this reformed system could look like. The goal is not to delineate, precisely, the contours of an office. Rather, I argue that better enforcement coordination, accompanied by more disclosure, is warranted.

### A. *The Problem of Noncoordinated Enforcement*

#### 1. *When Agency Missions Overlap*

The absence of formal presidential coordination of administrative enforcement can have serious consequences. The 2010 salmonella outbreak, which preceded the issuance of President Obama's Compliance Memorandum, provides a stark illustration. More than 1900 people became sick from salmonella traced to two Iowa egg farms, leading to the largest recall of eggs in U.S. history.<sup>220</sup> Reports of conditions on the farms were alarming, hearkening back to images from Upton Sinclair's *The Jungle*.<sup>221</sup> Visiting one of the farms after the outbreak, FDA inspectors found henhouses bulging with manure and piles of dead chickens; mice ran under their feet and bugs swarmed; the stench was overwhelming.<sup>222</sup> In the weeks following the outbreak, it became clear that the farm owner at the center of the massive recall was not

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<sup>220</sup> Alec MacGillis, *Egg Firm Has Long Record of Violations*, WASH. POST, Aug. 22, 2010, at A1 (noting that the farm had "repeatedly paid fines and settled complaints over health and safety violations and allegations ranging from maintaining a 'sexually hostile work environment' to abusing the hens that lay the eggs").

<sup>221</sup> Upton Sinclair, *THE JUNGLE* (1906).

<sup>222</sup> See Lyndsey Layton, *Unsafe Eggs Linked to U.S. Failure to Act*, WASH. POST, Dec. 11, 2010, at A1, A4 (describing conditions on farm).

only a repeat food-safety offender in multiple states, but had a long track record of violating other state and federal laws, including labor, environmental, and animal cruelty laws.<sup>223</sup> Federal and state regulators had repeatedly visited farms owned by this company and had found significant problems; after all, the problems were so grave they could not be missed.<sup>224</sup> But none of the disparate federal or state agencies flagged concerns about compliance for other agencies or trained their inspectors to do so.<sup>225</sup>

Remarkably, no centralized system within the federal government existed for domestic policy agencies to pool enforcement information or to track corporate entities across sites. This was true even though it is not uncommon for multiple agencies to regulate the same entities, and even though, at least in some circumstances, noncompliance in one area or at one site may indicate increased risk of violations in other areas or at other sites. And this was not the first instance of such a problem. For example, a fatal 1991 fire in the Imperial food processing plant in North Carolina, which captured national news headlines, similarly suggests the failure of a host of agencies to coordinate enforcement, track violations across corporate entities, and assign resources accordingly.<sup>226</sup>

Of course, coordination—or the lack thereof—is not a problem limited to the enforcement arena. As Jody Freeman and Jim Rossi detail in a recent article, many areas of federal administrative law are characterized by fragmented and overlapping delegations of power, making such shared regulatory space inevitable.<sup>227</sup> This feature of

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<sup>223</sup> MacGillis, *supra* note 220, at A11.

<sup>224</sup> See Layton, *supra* note 222, at A4 (describing conditions on farm).

<sup>225</sup> Layton, *supra* note 222, at A4; MacGillis, *supra* note 220, at A11 (listing federal and state environmental, immigration, labor, employment, and animal cruelty regulatory violations by the company, in addition to food safety violations); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-435T, FEDERAL OVERSIGHT OF FOOD SAFETY: FDA'S FOOD PROTECTION PLAN PROPOSES POSITIVE FIRST STEPS, BUT CAPACITY TO CARRY THEM OUT IS CRITICAL 8 (2008), available at <http://www.gao.gov/new.items/d08435t.pdf> (discussing overlapping and duplicative responsibilities of food safety agencies). For further discussion of the food safety agencies' overlapping regulatory schemes, see Freeman & Rossi, *supra* note 6, at 1147 & nn.47–55.

<sup>226</sup> See *Company in Fatal Fire Cited in Third State*, N.Y. TIMES, Sept. 16, 1991, at A14 (describing fire); Peter T. Kilborn, *North Carolina Is Told to Improve Safety Role*, N.Y. TIMES, Jan. 9, 1992, at A17 (describing failures of state agency charged with enforcing federal and state worker safety law and federal response).

<sup>227</sup> See Freeman & Rossi, *supra* note 6, at 1138–55 (discussing policy-driven and public choice theories of why such delegations occur, and providing examples of “shared regulatory space”). Until recently, most administrative law scholarship either has treated federal administrative agencies as monolithic—that is, it has looked at the administrative state as a general problem—or has focused on individual agency procedures and policy choices. Historically, scholars have paid little attention to the relationships and interplay among agencies. Of late, however, scholars have begun to recognize that interagency coordination is an

administrative design presents both disadvantages and opportunities. Dispersal and overlap of authority can cause redundancy, inefficiency, gaps, and significant coordination challenges. But overlapping and fragmented delegations can also make agency capture more difficult and allow regulators to bring multiple types of expertise and enforcement authority to bear on difficult problems.<sup>228</sup> In the context of rulemaking, presidential coordination typically involves bringing together agencies with overlapping substantive responsibilities to solve a common challenge. Freeman and Rossi provide the example of the environmental and energy agencies working together to develop a strategy of carbon capture and sequestration.<sup>229</sup> A related challenge in the enforcement area is the need to delineate jurisdictional lines when multiple agencies are charged with enforcing similar misdeeds.<sup>230</sup>

But, as the salmonella example illustrates, cross-agency enforcement presents a unique, perhaps more complicated, challenge of coordination. While regulatory coordination and jurisdictional delineation typically involve coordination in one substantive area—for example, banking, antitrust, or the environment—interagency enforcement also presents the opportunity, and sometimes the necessity, for multiple agencies to coordinate across seemingly unrelated substantive legal areas. An examination of almost any workplace highlights this problem. Several separate employment law statutes, which are generally enforced by separate bodies, are nearly always at play—the Occupational Safety and Health Act,<sup>231</sup> the Mine Safety and Health

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important feature of the modern administrative state. They have begun to consider the origins, purposes, problems, and possibilities of fragmented and overlapping delegations. In addition to the Rossi and Freeman article, see, for example, Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1 (2009); Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745 (2011); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201; Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181 (2011).

<sup>228</sup> See Freeman & Rossi, *supra* note 6, at 1184–87 (discussing the impact of interagency coordination on decision quality and agency capture); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 55–56 (2010) (discussing the impact of shared agency enforcement responsibilities).

<sup>229</sup> Freeman & Rossi, *supra* note 6, at 1175 (discussing the presidential memoranda directing the EPA, Departments of Energy and Interior, and other agencies to work together on problems related to carbon).

<sup>230</sup> While much of Freeman and Rossi's focus is on coordination among agencies to facilitate rulemaking and policy generation, they also discuss the use of memoranda of understanding to facilitate implementation of regulatory regimes. See *id.* at 1161–63 (discussing the use of memoranda of understanding to delineate jurisdictional lines for enforcement purposes, establish procedures for information sharing, and synchronize operational missions); see also Barkow, *supra* note 228, at 56 (recommending a designated enforcer in circumstances of shared enforcement authority).

<sup>231</sup> 29 U.S.C. §§ 651–678 (2006).

Act,<sup>232</sup> the Fair Labor Standards Act,<sup>233</sup> the National Labor Relations Act,<sup>234</sup> and several anti-discrimination statutes.<sup>235</sup> But so too are multiple other statutes, including the Internal Revenue Code<sup>236</sup> and the Immigration and Nationality Act.<sup>237</sup> Depending on the nature of the workplace, environmental, food safety, and consumer protection laws may be enforced as well. Failure of these agencies to coordinate against the most flagrant violators is at best inefficient and at worst contributes to significant regulatory failures.

## 2. *When Agency Missions Conflict*

Just as enforcement efforts can complement one another, enforcement efforts by multiple agencies at particular sites can also operate with conflicting purposes.<sup>238</sup> Labor and immigration law present a stark (though by no means the sole) example. From its inception, the DOL's mission has been entangled with immigration policy. When it was first established in 1913, the DOL was charged with the nation's immigration enforcement; two of the Department's four bureaus dealt exclusively with immigration.<sup>239</sup> After numerous disputes about immigration enforcement, those functions were ultimately removed by Congress in 1940.<sup>240</sup>

Today, workplaces populated by undocumented immigrants are notorious for their comparatively high rates of health and safety, wage

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<sup>232</sup> 30 U.S.C. §§ 801–965 (2006).

<sup>233</sup> 29 U.S.C. §§ 201–219 (2006).

<sup>234</sup> 29 U.S.C. §§ 151–169 (2006).

<sup>235</sup> For a partial but lengthy list of the workplace law statutes, see Weil, *supra* note 42, at app. at 149 fig.1.

<sup>236</sup> 26 U.S.C. §§ 1–9834 (2006 & Supp. V 2012).

<sup>237</sup> 8 U.S.C. §§ 1101–1537 (2006).

<sup>238</sup> For a recent illuminating discussion of conflicting agency decisions, see Emily Hammond Mezell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763 (2012), which examines a conflict between the Nuclear Regulatory Commission and the EPA over a permitting application and argues that fidelity-to-statute and reasoned-decisionmaking requirements, not presidential direction or expertise, should remain the centerpieces of judicial review.

<sup>239</sup> See Judson MacLaury, *Department of Labor, in A HISTORICAL GUIDE TO THE U.S. GOVERNMENT*, *supra* note 75, at 353; see also CONG. RESEARCH SERV., HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE (1980).

<sup>240</sup> The transfer of immigration functions followed complaints from members in Congress that the Department of Labor was granting too many waivers to individuals facing deportation and was too sympathetic to non-citizen Communist labor leaders. See Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 LAW & HIST. REV. 69, 102 (2003) (describing congressional opposition to the DOL's use of waivers); Peter Irons, *Politics and Principle: An Assessment of the Roosevelt Record on Civil Rights and Liberties*, 59 WASH. L. REV. 693, 712 (1984) (explaining that Congress transferred immigration functions to the DOJ and sought to impeach Labor Secretary Frances Perkins, in part because of her refusal to deport a Communist union leader).

and hour, and other workplace law violations.<sup>241</sup> Yet fear of immigration enforcement can dissuade these employees from reporting labor violations or from cooperating with DOL investigations.<sup>242</sup> Viewed from the opposite perspective, lax immigration enforcement can encourage employment of undocumented workers, undermining immigration laws and lowering standards for authorized workers.<sup>243</sup>

*Hoffman Plastic Compounds, Inc. v. NLRB* illustrates the tensions between the agencies' enforcement missions.<sup>244</sup> At issue was whether an undocumented employee, who suffered a National Labor Relations Act (NLRA) violation when he was fired for engaging in union organizing, could be awarded back pay as a remedy.<sup>245</sup> The National Labor Relations Board (NLRB) had determined that the employee was entitled to the monetary award.<sup>246</sup> The agency recognized that its decision implicated a different statutory regime—the Immigration Reform and Control Act of 1986 (IRCA)—but concluded that “the most effective way to accommodate and further the immigration policies embodied in the [IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees . . . .”<sup>247</sup>

In a 5-4 decision, the Supreme Court disagreed. The Court concluded that awarding NLRA back pay to an undocumented worker would harm the IRCA's underlying policies.<sup>248</sup> In the Court's view, “the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer . . . .”<sup>249</sup> Awarding the employee NLRA back pay, the Court concluded, would “encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage

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<sup>241</sup> ANNETTE BERNHARDT ET AL., NAT'L EMP'T LAW PROJECT, BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 42–48 (2009), available at <http://www.nelp.org/page//brokenlaws/BrokenLawsReport2009.pdf> (collecting data demonstrating that minimum wage violations, in particular, are higher among immigrant workers).

<sup>242</sup> For this view, see, for example, REBECCA SMITH, ANA AVENDAÑO & JULIE MARTÍNEZ ORTEGA, NAT'L EMP'T LAW PROJECT, ICED OUT: HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS' RIGHTS (2009), available at [http://www.nelp.org/page/-/Justice/ICED\\_OUT.pdf](http://www.nelp.org/page/-/Justice/ICED_OUT.pdf).

<sup>243</sup> For a discussion of this debate, see Jennifer Gordon, *Tensions in Rhetoric and Reality at the Intersection of Work and Immigration*, 2 U.C. IRVINE L. REV. 125, 128–45 (2012).

<sup>244</sup> 535 U.S. 137 (2002).

<sup>245</sup> *Id.* at 140.

<sup>246</sup> *Id.* at 140–41.

<sup>247</sup> *Hoffman Plastic Compounds, Inc.*, 326 N.L.R.B. 1060, 1060 (1998) (second supp. decision), *rev'd*, 535 U.S. 137 (2002).

<sup>248</sup> *Hoffman Plastic Compounds*, 535 U.S. at 149.

<sup>249</sup> *Id.* at 147.

future violations.”<sup>250</sup> The Court reached this determination notwithstanding that “all the relevant agencies (including the Department of Justice),” presumably with the White House’s approbation, told the Court that “the [NLRB’s] limited backpay order [would] not interfere with the implementation of immigration policy. Rather, it [would] reasonably help[ ] to deter unlawful activity that both labor laws and immigration laws seek to prevent.”<sup>251</sup> Indeed, during argument, Justice Scalia repeatedly pressed the Government’s counsel as to whether the Immigration and Naturalization Service had agreed with the position advanced by the Solicitor General and was incredulous at the response that the agency had consented.<sup>252</sup>

As illustrated by this colloquy, as well as by Congress’s decision to remove immigration functions from the DOL many years before, the prioritization of agency missions deemed appropriate by different institutional actors varies. Sometimes the underlying statutes themselves are thought to be in conflict; at other times relevant actors prioritize different regulatory goals differently. While Congress, by virtue of reorganization authority, and the Court, by virtue of review in specific cases, have weighed in on the immigration-labor conflict at different points, the Executive Branch must balance the conflicting goals continuously. Someone—whether a line official, a political appointee, or the President himself—must make a judgment call, transparently or not. So, too, with the many intrastatutory prioritization decisions that are made regularly throughout the administrative state due to budgetary constraints and broad delegations.

### B. *Advancing Efficiency and Accountability*

As the above examples illustrate, insufficient coordination of enforcement undermines the capacity of the administrative state to make good on statutory commitments and enforce the law rationally, effectively, and energetically. The current informal and opaque approach to enforcement also decreases accountability by obscuring the political nature of much enforcement decisionmaking. Recent reforms, though promising, need to be institutionalized and made more systematic. Creating a new office within the EOP dedicated to

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<sup>250</sup> *Id.* at 151. The National Labor Relations Board (NLRB) recently held that, after *Hoffman*, the remedy of back pay is not available to any undocumented worker, even those who did not use false documents to obtain employment. *Mezonos Maven Bakery, Inc.*, 357 N.L.R.B. No. 47, at \*4 (Aug. 9, 2011) (supp. decision).

<sup>251</sup> *Hoffman Plastic Compounds*, 535 U.S. at 153 (Breyer, J., dissenting) (emphases omitted).

<sup>252</sup> Transcript of Oral Argument at 27–28, *Hoffman Plastic Compounds*, 535 U.S. 137 (No. 00-1595).

problems of regulatory compliance, or adding responsibilities to an existing office, would further the efficiency and accountability goals of administration. The primary objections to this proposal can be addressed by focusing presidential enforcement on facilitating coordination and on disclosing enforcement policy decisions.

### 1. *Efficiency and Efficacy*

Coordination of the sprawling federal bureaucracy, with all of its jurisdictional overlap, is a central challenge of the modern administrative state.<sup>253</sup> The President's unique position in the governmental structure effectively requires him to tackle that challenge, since he is responsible for executing many statutes at once. From his vantage point, he can focus on issues that fall within the jurisdiction of a variety of executive and independent agencies, each dealing with only part of the problem. As Chief Justice Vinson wrote in dissent in *Youngstown Sheet & Tube Co. v. Sawyer*: "Unlike an administrative commission confined to the enforcement of the statute under which it was created, or the head of a department when administering a particular statute, the President is a constitutional officer charged with taking care that a mass of legislation be executed."<sup>254</sup> Judge Friendly similarly observed: "Each agency has a natural devotion to its primary purpose . . . no matter how many statutes . . . say that it shall 'consider' other interests as well. Someone in Government, and in the short run that someone can only be the President, must have power to make the agencies work together . . ." <sup>255</sup>

The President is thus better situated to coordinate than is any single agency within the Executive Branch, at least under our current institutional arrangement. In most cases, he is also better positioned—and has more incentive—to coordinate than does Congress. Political scientists have written about the ways in which Congress's power is limited by its factional and multimembered nature. Congress tends to respond to challenges in a partisan and constituency-driven way.<sup>256</sup>

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<sup>253</sup> See Freeman & Rossi, *supra* note 6, at 1134–36 (describing the problem of agency overlap, and arguing that encouraging coordination among agencies is the best way to manage the complex system).

<sup>254</sup> 343 U.S. 579, 702 (1952) (Vinson, C.J., dissenting) (internal quotation marks omitted).

<sup>255</sup> COMM'N ON LAW & THE ECON., AM. BAR ASS'N, FEDERAL REGULATION: ROADS TO REFORM 163 (1979) (separate statement of Hon. Henry J. Friendly, concurring in part with the Commission's recommendations), *cited in* Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 189–90 (1986).

<sup>256</sup> See Moe & Howell, *supra* note 180, at 856–57, 861 (using spatial models to demonstrate the relative power of Congress and the President, and explaining practical reasons for the power differential).

Congress also often lacks necessary foresight to anticipate problems of conflict.<sup>257</sup> These features make congressional coordination of multiple conflicting agency missions difficult, if not impossible, and minimize the incentives for effective coordination. As a procedural matter, it is also difficult for Congress to act. A bill faces multiple veto points. It must pass through some combination of subcommittees, full committees, floor votes in the House and Senate, and reconciliation in the conference committee. It is also subject to filibusters and holds.<sup>258</sup> Thus, while Congress could theoretically address coordination and prioritization issues, it is unlikely to do so in any effective or sustained way.

Enforcement, like rulemaking, thus demands institutionalized presidential coordination. Such coordination would result in several benefits. First, it would promote information sharing among agencies, helping them prioritize scarce enforcement resources to the worst actors. A few existing efforts between individual agencies, though sporadic and not institutionalized, illustrate how this would work. Following the salmonella outbreak, the FDA and OSHA signed a Memorandum of Understanding (MOU) that committed the two agencies to sharing information, where legally permissible, “on health[-] or safety-related problems that are relevant to the regulatory and enforcement responsibilities of the other agency” and to implementing training programs for their staff.<sup>259</sup> The Memorandum recognized that “[w]hen inspecting food facilities in furtherance of their responsibilities, FDA investigators and OSHA compliance officers may observe conditions or obtain information relevant to the other agency’s safety or health mission.”<sup>260</sup> The FDA and U.S. Department of Agriculture ultimately reached a similar agreement designed to promote information sharing.<sup>261</sup> Likewise, in September 2011, the

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<sup>257</sup> See Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 383–87 (discussing the limits of congressional foresight given the American system of lawmaking, particularly the lack of executive control of the legislature).

<sup>258</sup> Moe & Howell, *supra* note 180, at 861.

<sup>259</sup> Memorandum of Understanding Between OSHA and the FDA, Sharing Health and Safety Information Related to Facilities Where Food Is Produced, Processed, or Held (June 20, 2011), available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=MOU&p\\_id=1005](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=MOU&p_id=1005).

<sup>260</sup> *Id.* The extent of White House involvement in this agreement is unclear from the text. However, the White House’s subsequent decision to tout the FDA’s response to the salmonella outbreak on its website suggests the MOU was, at the least, brought about with oversight and involvement from the White House. See Margaret Hamburg, Comm’r, FDA, *What You Need to Know About the Egg Recall*, WHITE HOUSE BLOG (Aug. 26, 2010), <http://www.whitehouse.gov/blog/2010/08/26/what-you-need-know-about-egg-recall>.

<sup>261</sup> Memorandum of Understanding Between the USDA and the FDA Concerning Information Sharing Related to Food Safety, Public Health, and Other Food-Associated Activities (Jan. 19, 2012) available at [http://www.fsis.usda.gov/PDF/USDA\\_FDA\\_](http://www.fsis.usda.gov/PDF/USDA_FDA_)



DOL and the IRS signed an MOU, which was designed to address misclassification of employees that led to improper wage and tax payments.<sup>262</sup> This is precisely the sort of enforcement coordination that institutionalized presidential enforcement would engender, but it would do so in a more systematic and comprehensive manner.

Second, institutionalized attention to problems of regulatory compliance could facilitate more systematic coordination between those agencies with insufficient enforcement mechanisms and those with more meaningful tools, thereby increasing overall administrative capacity. Again, consider the enforcement of workplace law, which is notoriously lacking, particularly in low-wage and dangerous workplaces.<sup>263</sup> One study calculated that, on average, OSHA officers inspect a workplace once every 107 years.<sup>264</sup> Another recent report found that the DOL's Wage and Hour Division frequently responds inadequately to complaints, "leaving thousands of low[-]wage workers vulnerable to wage theft" and other labor law violations.<sup>265</sup> While

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Info\_Sharing\_MOU.pdf; see also *id.* app. B at 9 (describing additional memoranda of understanding that are amended or superseded by this Memorandum). These agencies, along with others, had been brought together by the White House to focus on problems of food safety, including egg safety. See The White House, *The Federal Food Safety Working Group Progress Report* (Dec. 2011), available at [http://www.whitehouse.gov/sites/default/files/fswg\\_report\\_final.pdf](http://www.whitehouse.gov/sites/default/files/fswg_report_final.pdf) (describing the progress of the White House working group, including on egg safety).

<sup>262</sup> Memorandum of Understanding Between the IRS and the DOL (Sept. 19, 2011), available at <http://www.dol.gov/whd/workers/MOU/irs.pdf>. According to the DOL's Press Release, the Memorandum will enable the DOL to share information and coordinate law enforcement with the IRS "in order to level the playing field for law-abiding employers and ensure that employees receive the protections to which they are entitled under federal and state law." Press Release, Labor Secretary, Dep't of Labor, IRS Commissioner Sign Memorandum of Understanding to Improve Agencies' Coordination on Employee Misclassification Compliance and Education (Sept. 19, 2011), available at <http://www.dol.gov/opa/media/press/whd/WHD20111373.htm>. Notably, the Memorandum was framed as a White House initiative: "These memorandums of understanding arose as part of the department's Misclassification Initiative, which was launched under the auspices of Vice President Biden's Middle Class Task Force with the goal of preventing, detecting and remedying employee misclassification." *Id.*

<sup>263</sup> BERNHARDT ET AL., *supra* note 241, at 2 (finding that workplace violations are severe and widespread in the low-wage labor market); JENNIFER S. BRAND, NAT'L STATE ATT'YS GEN. PROGRAM AT COLUMBIA LAW SCH., ADDING LABOR TO THE DOCKET: THE ROLE OF STATE ATTORNEYS GENERAL IN THE ENFORCEMENT OF LABOR LAWS 7 n.9 (2007), available at [http://www.law.columbia.edu/null?&exclusive=filemgr.download&file\\_id=1399&rtcontentdisposition=filename%3DBrand\\_Labor%20Article.pdf](http://www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=1399&rtcontentdisposition=filename%3DBrand_Labor%20Article.pdf) (collecting studies demonstrating persistent violations of labor laws in industries that employ low-wage workers).

<sup>264</sup> Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 330 & n.39 (2005) (citing *OSHA Inspection Cycle Equals 107 Years, Because of Low Resources*, AFL-CIO Reports, 81 DAILY LAB. REP. (BNA), Apr. 26, 2000, at A-7, available at 2000 WL 503696).

<sup>265</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 137, at 18.

many causes of enforcement failure exist, scarce resources and low statutory penalties are significant factors.<sup>266</sup>

During the Bush Administration, OSHA, the EPA, and a group of Justice Department prosecutors established a partnership to identify and prosecute the nation's most flagrant workplace safety violators.<sup>267</sup> According to a *New York Times* article, the initiative was premised on two concepts: First, the agencies believed that "shoddy workplace safety" often accompanies "shoddy environmental practices"; second, they recognized that federal agencies have failed to take a coordinated approach toward corporations that repeatedly violate both environmental and labor regulations.<sup>268</sup> Yet after the *New York Times* began investigating, the initiative ran into unexplained problems. First, the name was changed.<sup>269</sup> Then, a news conference to announce the initiative was cancelled, leading the *Times* to speculate that hesitation existed at the political level.<sup>270</sup> Under the Obama Administration, however, the initiative has been revamped and expanded.<sup>271</sup> Indeed, the White House has appropriated the joint enforcement project as part of Vice President Biden's Middle Class Task Force initiative.<sup>272</sup> Still, the effort remains relatively isolated and informal.

Indeed, a considerable amount of informal enforcement coordination among agencies, as well as between agencies and the White House, occurs as a matter of course.<sup>273</sup> This happens even without any actual communication, as when one agency observes what another agency is doing and adjusts its own actions accordingly.<sup>274</sup> In other instances, informal coordination is explicit and involves conversations, shared practices, and unwritten, but nevertheless express, agreements between officials in different agencies<sup>275</sup> or between White House

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<sup>266</sup> See, e.g., THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, *WORKERS AT RISK* 212–13 (1993) (discussing incentives of employers that make noncompliance likely); Estlund, *supra* note 264, at 330 & nn.36–40 (describing causes of enforcement failures).

<sup>267</sup> David Barstow & Lowell Bergman, *With Little Fanfare, a New Effort to Prosecute Employers That Flout Safety Laws*, N.Y. TIMES, May 2, 2005, at A17.

<sup>268</sup> *Id.* The effort sought to marshal a range of existing laws that carry considerably stiffer penalties than workplace safety statutes, including environmental laws, criminal racketeering laws, and some provisions of Sarbanes-Oxley to target notorious health and safety violators. Inspectors and attorneys from OSHA would be trained by DOJ officials to spot criminal violations and to refer cases for enforcement. *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> Maureen Tracey-Mooney, *Honoring 29 Miners*, WHITE HOUSE BLOG (Apr. 5, 2011, 6:06 AM), <http://www.whitehouse.gov/blog/2011/04/05/honoring-29-miners>.

<sup>272</sup> *Id.*

<sup>273</sup> Freeman & Rossi, *supra* note 6, at 1156.

<sup>274</sup> *Id.* at 1156.

<sup>275</sup> *Id.* at 1156.

officials and agency officials. But because of its ad hoc nature, informal coordination is limited and transitory and lacks the transparency and accountability advantages of a more formal arrangement.<sup>276</sup> Institutionalized presidential enforcement could improve and extend these existing efforts at coordination and cooperation. In so doing, it would improve the ability of the Administration to address not only problems of underenforcement, but also problems of duplicative enforcement due to overlap.

Institutionalized presidential attention to enforcement could also facilitate the Executive Branch's handling of agency conflicts. As the immigration-labor example illustrates, one agency's enforcement mission will sometimes clash with another's. Someone—whether the President or not—must reconcile the conflicting enforcement goals. Again, however, existing interagency mechanisms address these problems only sporadically and often not transparently. For example, the DOL and the DHS have entered into an MOU to prevent conflicts in the two agencies' worksite-based enforcement activities.<sup>277</sup> But the MOU does not extend to all relevant labor enforcement agencies, such as the NLRB and the Equal Employment Opportunity Commission, nor is it replicated in other areas of agency conflict. Institutionalized presidential attention could facilitate the extension of this MOU, identify areas in which additional agreements are needed, and shepherd those agreements to completion.

In addition to coordinating among agencies, the President, by virtue of his position at the top of the bureaucracy, can also energize enforcement policy *within* agencies. Indeed, at least as a formal matter, it is easier for presidents to spur agencies to action in the enforcement context.<sup>278</sup> Many scholars have argued that procedural constraints imposed on federal agencies have had the undesirable effect of “ossifying” federal rulemaking; these scholars contend that the process has become so burdensome and inefficient that federal agencies now routinely promulgate important regulations only after significant delay.<sup>279</sup> While I have noted that a President's direction

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<sup>276</sup> *Id.* at 1156–57.

<sup>277</sup> Revised Memorandum of Understanding Between the DHS and the DOL Concerning Enforcement Activities at Worksites (Dec. 7, 2011) [hereinafter DHS-DOL Worksite Enforcement MOU], available at [www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf](http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf) (limiting the worksite enforcement power of DHS's Immigration and Customs Enforcement (ICE) agency when a DOL investigation is pending).

<sup>278</sup> *Cf.* Kagan, *supra* note 2, at 2344–45 (describing administrative ossification and presidential responses).

<sup>279</sup> *See, e.g.*, Paul R. Verkuil, Comment, *Rulemaking Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453, 453 (1995) (“Virtually everyone agrees that the process of promulgating . . . rules is too time[-]consuming, burdensome, and unpredictable.”). Recent

regarding enforcement policy is not always effectively implemented on the ground,<sup>280</sup> it is also the case that enforcement policies and practices are subject to fewer procedural requirements. At the very least, therefore, presidents can attempt to galvanize agencies to make enforcement changes more quickly.<sup>281</sup>

Perhaps more importantly, presidential attention to enforcement can help reduce shirking. It can send the message to agencies that enforcement is a priority, demanding efficiency, efficacy, and innovation. And if presidential attention to enforcement is characterized by a measure of transparency—that is, if presidential commitment to and decisions about enforcement policies generally are disclosed—institutionalized presidential enforcement can also facilitate interagency, congressional, and public monitoring. By elevating the visibility of enforcement, the President communicates its importance to the bureaucracy, regulated entities, and beneficiaries, while improving other parties' abilities to track the process.<sup>282</sup> A more transparent approach could also prod the President himself to focus more on

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empirical scholarship draws into question some of these conclusions. *See, e.g.*, Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rulemaking "Ossified"?*, 20 J. PUB. ADMIN. RES. & THEORY 261 (2009) (presenting an empirical study showing that ossification has not occurred to the extent assumed).

<sup>280</sup> *See, e.g.*, *supra* notes 197–203 and accompanying text (explaining that the President's enforcement power depends upon affecting the behavior of subordinates within the Executive Branch, and using as examples the Obama Administration's experiences in responding to state medical marijuana initiatives and with the DREAM Act).

<sup>281</sup> *See supra* notes 33–43 and accompanying text (describing the procedural requirements agencies must satisfy to change their enforcement policies, and explaining the advantages of a flexible process for agencies).

<sup>282</sup> Empirical and descriptive research by political scientists demonstrates that presidents increasingly have relied on the bully pulpit and have used it to build presidential legitimacy and institutional power. *See, e.g.*, GEORGE C. EDWARDS III, *THE PUBLIC PRESIDENCY* 38–103 (1983) (examining presidential efforts to shape public opinion); COLLEEN J. SHOGAN, *THE MORAL RHETORIC OF AMERICAN PRESIDENTS* (2006) (examining how presidents have used moral and religious rhetoric as a leadership tool); JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 4 (1987) (arguing that “[s]ince the presidencies of Theodore Roosevelt and Woodrow Wilson, popular or mass rhetoric has become a principal tool of presidential governance” and that an essential task of the President is now to serve as a leader of public opinion). Notably, however, the rise of the Internet, decline of the broadcast network monopoly, increase in polarization of the news media, and other developments have made it harder for the President to ensure an audience for his views. *See* Jeffrey E. Cohen, *Presidential Leadership in an Age of New Media*, in *PRESIDENTIAL LEADERSHIP: THE VORTEX OF POWER*, *supra* note 118, at 171–72 (explaining how the changing media landscape reduces the President's ability to lead public opinion); George C. Edwards III, *Impediments to Presidential Leadership: The Limitations of the Permanent Campaign and Going Public Strategies*, in *PRESIDENTIAL LEADERSHIP: THE VORTEX OF POWER*, *supra* note 118, at 145, 164–65 (asserting that the options offered by cable television, the reluctance of networks to give the President airtime, and polarized public opinion hinders the President's ability to communicate to the public).

effective enforcement. Furtive use of enforcement or nonenforcement to achieve particular policy goals—without disclosure of those decisions—becomes harder when responsibility for effective enforcement is publicly and formally located within the EOP.

To borrow from Richard Pildes's recent discussion of presidential power, holding agencies and presidents responsible for the enforcement mission serves both Holmesian and Hartian visions of the law.<sup>283</sup> For Holmesians, or rational choice theorists, who are concerned with the material consequences that flow from compliance or defiance of the law, what matters is that enforcement coordination could raise material costs of noncompliance for regulated entities by aggregating penalties and dedicating resources to the worst actors.<sup>284</sup> More central attention to enforcement and more disclosure of enforcement track records could also increase material costs for agencies that fail to enforce their rules efficiently and effectively. For Hartians, who view law as normatively binding, more institutionalized and disclosed presidential attention to enforcement is also promising.<sup>285</sup> This approach posits that an internal sense of obligation to administer the law most efficaciously influences public actors, while a sense of obligation to obey law influences private actors. Institutionalized presidential enforcement would create more opportunities for shaming noncompliant firms, as well as ineffective agencies and presidents, and for celebrating compliant firms and effective administrations. These two visions are not as distinct as they seem, for legal compliance in the political world also provides presidents with credibility.<sup>286</sup>

## 2. *Democratic Accountability*

Efficiency and effectiveness are not the only criteria by which administrative action is or should be assessed. Responsiveness to the broader electorate and the public's ability to understand the exercise

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<sup>283</sup> See Pildes, *supra* note 1, at 1404 n.69 (laying out these competing visions).

<sup>284</sup> See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (arguing that the law should be understood from the perspective of the bad man who cares only for the material consequences of his actions).

<sup>285</sup> See H.L.A. HART, *THE CONCEPT OF LAW* (2d. ed. 1994) (arguing that law is experienced as normatively binding); see also Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 791 (2010) (arguing that "law is what officials accept and apply as law").

<sup>286</sup> See Pildes, *supra* note 1, at 1411 (asserting that "public judgment is constantly refracted through judgments about whether various actors, including the President, are acting lawfully"); Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. FORUM 62, 64 (2011) (arguing that "signaling and maintaining a willingness to treat OLC's legal advice as presumptively binding enhances the credibility of a president's claims of good faith and respect for the law, which in turn can help generate public support for his actions").

of bureaucratic power are also critical.<sup>287</sup> Popular representation, all agree, is foundational in a democracy.<sup>288</sup> Because administration entails such large delegations to unelected agency officials, one persistent concern is ensuring democratic accountability through the design of the administrative state.<sup>289</sup> Administrative law literature debates at great length the extent to which a model of presidential administration fits the bill.<sup>290</sup> The theory in support is familiar. It derives from *Publius* and was recently reiterated by the Supreme Court:

The diffusion of power carries with it a diffusion of accountability. The people do not vote for the “Officers of the United States.” They instead look to the President to guide the “assistants or deputies . . . subject to his superintendence.” Without a clear and effective chain of command, the public cannot “determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.”<sup>291</sup>

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<sup>287</sup> See Kagan, *supra* note 2, at 2337 (“It is when presidential control of administrative action is most visible that it most will reflect presidential reliance on and responsiveness to broad public sentiment.”). Nonarbitrariness is another paramount value in administration, though not one always served by a presidential control model. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003) (arguing for more direct focus on the concern for arbitrariness in administration). In thinking about the design and limits of presidential enforcement, concerns about arbitrariness must be addressed. For some initial thoughts on this issue, see *infra* Parts III.C & IV.B.

<sup>288</sup> Cf. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–17 (1962) (discussing the countermajoritarian difficulty of judicial review).

<sup>289</sup> See Kagan, *supra* note 2, at 2253–55, 2260–61, 2264–65 (discussing how “transmission belt,” “expertise,” and “interest group” models of administration claim to address the accountability problem).

<sup>290</sup> For examples of scholarship advancing the connection between presidential administration and accountability, see Kagan, *supra* note 2, at 2331–38; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 105–06 (1994); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 35–36, 45, 59 (1995). For criticism of the accountability thesis, see, for example: Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 465–502 (2010), which advances an alternative “fiduciary representation” model to promote accountability; Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741 (2009), which argues that a strong unitary executive undermines accountability; Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2076–83 (2005), which argues that accountability is furthered not by occasional elections but by the complex chains of authority and expertise that characterize bureaucracy; and Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 613–14 (1989), which questions whether political accountability is furthered by centralizing discretionary decisionmaking in the presidency, where less dialogue and transparency exists.

<sup>291</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) (citations omitted) (quoting U.S. CONST. art. II, § 2, cl. 2.; THE FEDERALIST NO. 72, at 487 (Alexander Hamilton) (J. E. Cooke ed., 1961); THE FEDERALIST NO. 70, *supra*, at 476

Similarly, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, when describing why courts should defer to agencies' reasonable constructions of statutory ambiguities, the Court emphasized that "it [was] entirely appropriate for th[e] political branch of the Government to make . . . policy choices," for "[w]hile agencies are not directly accountable to the people, the Chief Executive is."<sup>292</sup>

Academic proponents of presidential administration offer a similar explanation for how presidential involvement in administration promotes accountability. First, it establishes an electoral link between the public and the bureaucracy, and second, it enables the public to understand better the sources and nature of bureaucratic power.<sup>293</sup> Presidents, the theory goes, are popularly elected. They are the only governmental officials elected by a national constituency focused on general, rather than local, issues.<sup>294</sup> Of course, election results rarely provide conclusive support for even a candidate's most important positions, but democratic checks on the President are more than retrospective. After winning national election, presidents continually work to expand their support among the public (or at least a majority of the public).<sup>295</sup> Presidents tend to pay closer attention to national trends and broad public opinion than individual bureaucrats do, and this phenomenon is reinforced in our era of the permanent campaign.<sup>296</sup> Presidents also care deeply about their historical legacies, and they need public support to advance their agendas. As a result, they are responsive to public opinion even in a second term.<sup>297</sup> These features, supporters of presidential administration argue, make the President well situated to design policy that is responsive to the interests of the public as a whole. Moreover, the President's greater public visibility means that, when the President claims responsibility for the exercise of bureaucratic power, the public is more likely to be able to evaluate resulting decisions.<sup>298</sup>

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(Alexander Hamilton)); see also *INS v. Chadha*, 462 U.S. 919, 948 (1983) (emphasizing the President's unique role as national representative).

<sup>292</sup> 467 U.S. 837, 865 (1984); see also Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1764 (2007) (noting that *Chevron* is the "most prominent example" of how administrative law reflects the presidential control model).

<sup>293</sup> Kagan, *supra* note 2, at 2331–32.

<sup>294</sup> Mashaw, *supra* note 46, at 95.

<sup>295</sup> See RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* 77–78 (2d ed. 1990) (describing the importance of the President's public prestige to his political power).

<sup>296</sup> JAMES P. PFIFFNER, *THE MODERN PRESIDENCY* 40–50 (1994).

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

<sup>298</sup> See Mashaw, *supra* note 46, at 95–96 (arguing for broad delegations since the President is more accountable than the Congress).

These arguments apply to presidential enforcement as well as to presidential rulemaking. By virtue of the President's democratic accountability, he has at least some incentive to pursue enforcement policies that benefit broad segments of the public. The BP Oil spill and Massey mine explosion provide examples, albeit reactive in nature, of how the dynamics of political accountability can force presidential attention to enforcement.<sup>299</sup> But because presidents have not claimed responsibility for supervising enforcement in a sustained and transparent way, accountability is limited. While regulatory review has been criticized for its opacity during some Administrations, presidential control of enforcement has consistently been even less visible.<sup>300</sup> As a result, the public, interest groups, and Congress are significantly limited in their ability to identify both who exercises control over enforcement policy and how effectively they do so. Moreover, the President's incentives to serve national interests through enforcement policy are diminished.<sup>301</sup> By elevating responsibility of enforcement to the President in ways subject to public evaluation, we can both increase the degree to which presidential action is likely to track public preferences and the degree to which the public can understand the exercise of the enforcement power.

The Obama Administration's labor-immigration MOU satisfies the standard I have outlined in part, but not in full.<sup>302</sup> The agencies rightly formalized and made public their agreement to privilege labor enforcement over immigration enforcement in certain circumstances. In so doing, they resolved a policy issue of national importance. Yet the degree to which the MOU was directed or even overseen by the President is unclear from the public record.<sup>303</sup> Because central

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<sup>299</sup> See *supra* notes 153–57 and accompanying text (discussing the presidential response to those disasters).

<sup>300</sup> See *supra* Part II.A (tracing the history of presidential control over the administrative state).

<sup>301</sup> See Kagan, *supra* note 2, at 2337 (discussing how opacity increases the potential for factional influence).

<sup>302</sup> See *supra* note 277 and accompanying text (discussing the DHS-DOL MOU).

<sup>303</sup> One can surmise some level of White House influence for at least three reasons. First, the MOU was first released during a rollout over several months of presidential and Cabinet-level immigration events in the spring of 2011. See, e.g., Melody Barnes, *Immigration & Winning the Future*, WHITE HOUSE BLOG (Jan. 27, 2011, 3:00 PM), <http://www.whitehouse.gov/blog/2011/01/27/immigration-winning-future>; Melody Barnes, *The President's Blueprint for Building a 21st Century Immigration System*, WHITE HOUSE BLOG (May 10, 2011, 3:15 PM), <http://www.whitehouse.gov/blog/2011/05/10/president-s-blueprint-building-21st-century-immigration-system>. Second, the MOU's policy choices are consistent with those articulated by the White House to deemphasize worksite raids. See Andrew Becker, *Immigration Policies Sparking Tensions with ICE; Obama Administration Stances on Detentions Face Internal Resistance*, WASH. POST, Aug. 27, 2010, at B3 (describing the Obama Administration's position on worksite enforcement). Third, independent agencies,



administration did not claim responsibility for, or even publicize, the policy decision, it went largely unnoticed despite touching on a controversial subject and on the conflicting responsibilities of two agencies. Assuming the White House did supervise the decision, the lack of acknowledgment of presidential involvement may have minimized the ability of the public—or of Congress—to hold the President accountable. However, serious concerns would still arise if the White House were not involved or were unaware: Unelected agency heads with neither presidential oversight nor clear statutory authorization would have made an important policy decision with significant implications for two separate statutory regimes.

### 3. *Objections*

My contention that institutionalized presidential enforcement can advance the efficiency and accountability goals of administration faces several objections. For one, there are reasons to be skeptical of the accountability theory of presidential administration—both in general and as applied to enforcement in particular. First, the resolution of enforcement issues plays only a small role in the public's overall estimation of presidential performance.<sup>304</sup> Second, national elections do not typically confer mandates upon presidents to pursue specific regulatory policies, and certainly not specific enforcement policies.<sup>305</sup> And third, even the continued need to build public support does not ensure accountability, for the public often has no opinion on many issues of regulatory governance and enforcement.<sup>306</sup>

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such as the NLRB or the Equal Employment Opportunity Commission, were conspicuously absent from the MOU, even though those agencies have similar stakes in the conflict; this may be because the White House, by tradition and some legal interpretation, exerts little influence over these entities. See DHS-DOL Worksite Enforcement MOU, *supra* note 277; see also Kirti Datla & Richard Revesz, *Deconstructing Independent Agencies*, CORNELL L. REV. (forthcoming 2013), at 5, 19, 21, 22, 25, 29, 31, 35, 39 & nn. 68, 90, 106, 116, 118, 136, 147–48, 192–93 (developing a taxonomy of agencies and identifying various indicia of independence of agencies, including the NLRB and EEOC); *supra* note 24 (discussing differences in the way that the President treats independent agencies).

<sup>304</sup> See Criddle, *supra* note 290, at 461–62 (collecting literature demonstrating that most administrative action flies under the public's radar).

<sup>305</sup> See *id.* at 462 (noting that “the electorate has few effective tools to hold presidents accountable” once they are elected).

<sup>306</sup> *Id.* at 461; see also Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 992–1007 (arguing that accountability justifications for strong presidential power are premised on false understandings of the popular will); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1821–25 (1996) (asserting that political accountability justifications for broad presidential authority rest on an unduly simple understanding of accountability); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008) (arguing that “a moderate degree of bureaucratic insulation alleviates rather than exacerbates the countermajoritarian problems inherent in bureaucratic policymaking”).

To the extent these counterarguments are offered as grounds to eliminate presidential administration, however, they do not persuade. From a democratic accountability perspective (as opposed to from an expertise or non-arbitrariness perspective), there is no better realistic alternative to at least some measure of presidential administration. The counterproposals advanced—for example, fiduciary administration unguided by the President's own policy preferences—have a certain counterfactual aspect to them. They do not account for the structural features of our government that make presidential supervision of administration so deeply entrenched, if not constitutionally required.<sup>307</sup> These alternate proposals also bring with them equal, if not greater, flaws than does the presidential administration model. Presidential administration, within a pluralist system, advances core democratic values more than would exclusive control by unelected judges or by the staff of the permanent bureaucracy.<sup>308</sup> Administrative officials selected by the President, leaders of interest groups, or members of congressional committees elected from particular districts do not consistently offer stronger connections to national majoritarian preferences and interests.<sup>309</sup> In short, concerns about the degree to which presidential administration actually and always advances democratic accountability underscore the need to qualify and cabin presidential management and to supplement it with other forms of influence. But these concerns do not justify the elimination of presidential enforcement, even in the unlikely event that one could eliminate it successfully.<sup>310</sup>

There are also a number of objections to my claim that more formal coordination of enforcement would advance efficiency goals. Yet while these too should inform the design of presidential enforcement, they do not support an effort to eliminate it. First, critics might argue that presidential involvement creates a risk of undermining

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<sup>307</sup> See, e.g., Criddle, *supra* note 290, at 465–502 (proposing an alternative model that relies on fiduciary representation of the public by agency heads). For a discussion of the larger structural factors pressing toward presidential control, see *supra* notes 177–84.

<sup>308</sup> See Richard J. Pierce, Jr., *Presidential Control Is Better than the Alternatives*, 88 TEX. L. REV. 113 (2009) (critiquing Criddle).

<sup>309</sup> See Pierce, *supra* note 308, at 114–15 (“There is no reason to believe that a President who cannot be trusted to act in accordance with public preferences would appoint officers who can be trusted to do so.”); see also Kagan, *supra* note 2, at 2336 (“Take the President out of the equation and what remains are individuals and entities with a far more tenuous connection to national majoritarian preferences and interests . . .”).

<sup>310</sup> Cf. Jerry L. Mashaw, *Structuring a “Dense Complexity”: Accountability and the Project of Administrative Law*, ISSUES IN LEGAL SCHOLARSHIP, Mar. 2005, at 35 (“The challenge is to design administrative institutions that creatively deploy multiple modalities of accountability for the pursuit of complex public purposes.”).

scientific and technical bases of enforcement decisions.<sup>311</sup> On issues involving highly technical determinations, presidents add little to the decisionmaking process. In those instances, presidential involvement is suspect. In fact, agencies that make primarily technical decisions are more likely to be designed to provide some insulation from presidential control.<sup>312</sup>

The answer to the expertise-related concern—and to concerns about arbitrariness of administrative action—is to design presidential enforcement wisely. Presidential enforcement should focus not on technical determinations, but on facilitating coordination and on making the already extensive White House involvement in policy questions of national importance more rational and transparent.<sup>313</sup> Seeking to eliminate presidential involvement from enforcement altogether would be inappropriate. Many enforcement policy decisions are not and cannot be entirely technocratic in nature. Key decisions that fundamentally reshape substantive policy—including prioritizing one agency's enforcement mission over another, exercising prosecutorial discretion regarding classes of individuals or even in particularly important individual cases, aggregating enforcement tools to enhance penalties, or shifting resources from one set of violations to another—determine to what extent, how, and upon whom the law will be binding. In these areas, the President's distinctive position at the head of the bureaucracy, along with his democratic legitimacy and responsiveness to the broader public, plays an important role.

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<sup>311</sup> Critics have made this charge of centralized regulatory review. *See, e.g.*, Bressman & Vandenberg, *supra* note 13, at 97 (providing examples of OIRA questioning scientific determinations of EPA officials).

<sup>312</sup> For example, many believe that the Federal Reserve's mission—regulating the monetary system—is a technical judgment that should be shielded from politics. *See, e.g.*, Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 *VAND. L. REV.* 599, 616 (2010) (tracing the history of the Federal Reserve as an example of the struggle to strike a balance between political control and the independence of experts in agencies); *cf.* Jacob E. Gersen, *Designing Agencies*, in *RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW* 333, 348 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (noting that the need for long-term stability explains central bank independence in the United States and elsewhere). Even independent agencies insulated from presidential pressure through removal restrictions, however, are accountable to the political branches in other ways, such as via nominations and appropriations. *See Note, Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 *HARV. L. REV.* 1822, 1827–29, 1839 (2012) (explaining mechanisms of presidential control over independent agencies).

<sup>313</sup> The latter restrictions are, in fact, largely inevitable. The President and his immediate staff could never be involved in all or even many enforcement actions because they lack both expertise and time. *See* Bressman, *supra* note 287, at 511–12 (emphasizing limits on presidential time).

Other potential objections include that more formal presidential involvement in enforcement could serve as another veto point, increase agency decision costs through greater time and staff requirements, or decrease the flexibility of the Executive in responding to crises.<sup>314</sup> But, again, these concerns highlight the need to shape presidential enforcement wisely, rather than to try to eliminate it. The absence of presidential enforcement would also create veto gates and agency costs. For example, lack of coordination and centralization in areas of overlap risks inconsistency, waste, confusion, and failure to deliver on putative statutory goals.<sup>315</sup> Through greater coordination agencies may acquire useful information from their counterparts, allowing them to avoid the expense of acquiring it independently; by sharing information to identify patterns in noncompliance, they may deal early on with problems that could later become more costly or intractable.<sup>316</sup>

Third, one might worry that institutionalizing and disclosing *non-enforcement* policy decisions, in particular, could augment their effect, resulting in greater unilateral deregulation. If the White House, or an agency, makes clear that the agency will not enforce a set of rules against a particular class of regulated parties, it could give that class greater ability to act with impunity than if it leaves a policy of nonenforcement unspoken or informal. The concern has some merit. And, for this reason, there may be instances where disclosure is not the best course.<sup>317</sup> But the presumption should be in favor of disclosure for several reasons. First, the problem of deregulation as a result of disclosure arises, in its strongest form, when the Executive adopts a policy of categorical nonenforcement that removes discretion from line officials. This is unlikely to occur frequently, however, for such a policy would only rarely pass internal review. As discussed in Part IV.B, a policy of statutory abdication would exceed presidential power even under existing doctrine and would also subject the

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<sup>314</sup> Cf. Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 570 (2006) (“The modern administrative state continually struggles to strike the right balance between rule of law values—binding officials to clear rules known in advance—and the need for flexibility—allowing officials to exercise informed discretion in individual cases.”); Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 613 (2011) (noting that while OIRA-induced delay has decreased since the Reagan Administration, it is still a source of ossification).

<sup>315</sup> Freeman & Rossi, *supra* note 6, at 1182.

<sup>316</sup> See *id.* (arguing that these benefits outweigh the upfront investment costs of coordination).

<sup>317</sup> See *infra* notes 334–36 and accompanying text (discussing the importance of confidentiality in deliberations and the need for exceptions to the default rule of policy disclosure).

Executive to greater, unwelcome judicial review under *Heckler v. Chaney*.<sup>318</sup> An expectation of disclosure therefore only makes policies of categorical nonenforcement less likely. Second, sophisticated regulated parties are typically aware of informal, undisclosed policies of nonenforcement or prioritization.<sup>319</sup> For example, business entities with substantial resources, experienced counsel, and well-connected government relations departments are familiar with the enforcement practices of agencies. Disclosure in these circumstances is unlikely to change the behavior of regulated parties significantly, but is likely to have a democratizing effect, making policies more accessible to the press, regulatory beneficiaries, and relevant congressional committees. Finally, to the extent that an administration publicly defends a policy of underenforcement by providing a legal basis and subjecting that policy to political review, it is not clear that we should be concerned about the comfort of certain regulated parties. In those circumstances, the benefits of disclosure outweigh the costs of furtive nonenforcement.

Fourth, some might argue that formalizing presidential involvement in enforcement poses a risk of greater drift in agency enforcement activity; that is, it could cause movement away from the preferences of the legislators who enacted the statutes in the first place.<sup>320</sup> In theory, agencies with a clear mission are less likely to deviate from statutory purpose than is a President facing multiple competing pressures. But this ignores the fact that presidents are already extensively involved in shaping agency enforcement activity to advance policy goals. Drift is less likely if this role is more public. Moreover, as the examples illustrate, the very nature of enforcement discretion and competing priorities among agencies belies the claim that there is always, or even usually, a best enforcement policy from which the President inappropriately drifts—a point to which I will return in Part IV. The focus of reforms should be on recognizing and disciplining this power.

Finally, some might worry that more institutionalized coordination of enforcement is likely to increase the risk of

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<sup>318</sup> 470 U.S. 821, 832–33 (1985) (holding that agency decisions not to act are presumptively unreviewable, but that agencies are not free to disregard their statutory mandates).

<sup>319</sup> For example, attorneys commonly advise their clients as to how to minimize risks of enforcement actions. Less commonly, corporate entities pay for intelligence about agency behavior. *E.g.*, Brody Mullins & Susan Pulliam, *Buying “Political Intelligence” Can Pay Off Big for Wall Street*, WALL ST. J., Jan. 18, 2013, at A1.

<sup>320</sup> See Freeman & Rossi, *supra* note 6, at 1187 (citing Pablo T. Spiller & John Ferejohn, *The Economics and Politics of Administrative Law and Procedures: An Introduction*, 8 J.L. ECON. & ORG. 1, 6–7 (1992)) (explaining the risk that an agency might deviate from the interests of the coalition that created the agency).

enforcement-activity capture.<sup>321</sup> The classic conception of capture theory posits that special interest groups exert undue influence over members of Congress or the President, who rely on those groups to fund their political campaigns. Elected officials then pressure agencies on behalf of those groups. More nuanced versions of capture theory also point out that agencies may come to rely on information, political support, and guidance provided by outside groups, giving these groups direct influence over regulatory decisions.<sup>322</sup> Typically discussed in the context of rulemaking, capture can be an even greater problem in enforcement, where there are fewer checks in the form of public comment or judicial review.<sup>323</sup>

But presidential involvement does not necessarily increase the risk of capture. Rather, defenders of White House review of rulemaking have argued that because the President is responsible to a national constituency, he (or she) will be less sensitive to the kinds of special-interest pressure that might dominate the agencies.<sup>324</sup> Even those skeptical of this accountability-based anticapture theory agree that generalist institutions and multiagency bodies are more difficult to capture.<sup>325</sup> The ability of any one interest group to dictate decisions in such circumstances increases the cost of capture.<sup>326</sup> The benefits of capturing a generalist institution are comparatively less than those of capturing a specialized institution. From an interest group's perspective, hard-fought influence is wasted on institutions that only rarely touch on its issues. Conversely, many more groups seek the generalist institution's attention. Actors within the institution are not exposed to

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<sup>321</sup> Similar arguments apply to the issue of agency arbitrage, which refers to the possibility that regulated entities will seek to take advantage of situations of shared or overlapping authority to get the best deal possible or play agencies against one another to push standards down. Freeman & Rossi, *supra* note 6, at 1185 & n.264 (citing Victor Fleisher, *Regulatory Arbitrage*, 89 TEX. L. REV. 227 (2010)).

<sup>322</sup> Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1685 (1975).

<sup>323</sup> See Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 126–31 (2002) (describing this dynamic in the context of environmental regulation).

<sup>324</sup> See Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986) (arguing that presidents and legislatures are less vulnerable to capture than agencies).

<sup>325</sup> Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. (forthcoming 2013) (manuscript at 3), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1986928](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1986928).

<sup>326</sup> See *id.* at 3, 30 (arguing that diffuse incentives create collective action problems for regulated entities attempting to capture OIRA); see also Freeman & Rossi, *supra* note 6, at 1185–87 (describing how agency coordination can increase the costs of capture).

the same sustained and continual pressure that is associated with the highest risk of capture.<sup>327</sup>

Critics of presidential administration will likely disagree: The more the White House is understood to be involved in setting enforcement priorities, they argue, the more it might become a target of capture. Its generalist nature insulates it from capture to some extent, but its enormous power also makes it an attractive focal point for interest groups. A related risk is that the needs of powerful political supporters, rather than law or even policy, will be the driving influence in enforcement actions.<sup>328</sup> Recall, for example, Nixon's direction to the Attorney General to drop the government's appeal of an antitrust suit against a large contributor.<sup>329</sup> With individual enforcement decisions, campaign politics pose a danger of displacing professionalism to the detriment of particular individuals, thereby undermining confidence in legal decisionmaking. This problem should not be understated. But it is not solved by vesting responsibility solely with agencies, were that even possible. Agencies, after all, are subject to different mechanisms of capture; for example, agency officials may develop cozy relationships with repeat players, especially those who provide information, guidance, and a range of perks, including post-government employment opportunities.<sup>330</sup> Nor is the problem of capture solved by leaving presidential enforcement practice in its current informal state. By bringing presidential enforcement out of its past of relative stealth and into a more public space, capture becomes less likely. To the extent that presidential supervision of enforcement remains hidden from public scrutiny, presidents are more likely to yield to special interests.<sup>331</sup>

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<sup>327</sup> See Livermore & Revesz, *supra* note 325, at 30 (stating that OIRA review often involves different actors for review of each rule).

<sup>328</sup> Critics of presidential control of rulemaking have argued that it contributes to inappropriate political influence. *E.g.*, Criddle, *supra* note 290, at 464; *see also* Strauss, *supra* note 50, at 664–65 (describing how political advisors to the President may influence agency decisions away from broad national interests).

<sup>329</sup> See *supra* note 189 and accompanying text.

<sup>330</sup> See, *e.g.*, Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 247 (1987) (describing the risks that agency officials might ally with interest groups to pursue their own agendas or be captured by those they are obligated to regulate).

<sup>331</sup> Indeed, critics of centralized regulatory review have charged that such review has been more solicitous of industry than has review by individual agencies. *See, e.g.*, Bressman & Vandenberg, *supra* note 13, at 49–51 (discussing a survey that showed that former EPA officials believed that White House officials favored business groups); Morrison, *supra* note 117, at 1067–68 (describing the opacity of and the potential for industry influence over OMB); *cf.* Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 27 (1994) (describing the potential for presidential oversight to serve as a conduit for industry influence over an agency). Others provide mixed reviews

### C. Reforming Presidential Enforcement

#### 1. Coordination and Disclosure

As the above discussion implies, presidential enforcement must be cabined by two important principles to advance the efficiency and democratic accountability goals of administration. First, presidential attention to enforcement should be focused on facilitating interagency coordination, and it should remain focused on shaping enforcement policy regarding matters of national importance. In contrast, decisions pertaining to individual enforcement actions generally should remain insulated from presidential control. This constraint is critical to safeguarding administrative expertise and due process rights of individuals, but it is also relevant to accountability. The degree to which presidential administration actually establishes an electoral link between the public and the bureaucracy, or enables the public to understand better the sources and nature of bureaucratic power, depends in large part on whether the questions at issue are of concern to the public. On the most salient issues, the public, or some fraction thereof, will have relevant views for which electoral accountability is necessary or helpful.<sup>332</sup> Likewise, when enforcement decisions involve prioritizing among policy goals under a single statute or among competing statutory commands, the President, more than any single, unelected agency official, is more likely to act in a way that is responsive to the public—or, at least, can be held to account more easily by the public.

It bears emphasizing, however, that the line between individual enforcement actions and enforcement policy is not always so clear, particularly when policy is made through individual enforcement actions or when an individual enforcement action has broad-reaching and likely recurring policy consequences. Consider, for example, an enforcement question about whether OSHA should enter a particular Native American reservation, against the will of the tribe, to pursue violations of health and safety laws that led to the death of a

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on cost-benefit analysis. See, e.g., CASS R. SUNSTEIN, *THE COST-BENEFIT STATE* (2002) (defending, with caveats, the use of cost-benefit analysis); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 882–83 (2003) (providing a qualified defense of the use of cost-benefit analysis).

<sup>332</sup> See David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 440 (1997) (“High salience issues on which the public has an identifiable preferred alternative are likely to produce congruence between the general public’s preferences and those of their elected representatives . . .”). On what constitutes a salient issue, see, for example, Christopher Wlezien, *On the Salience of Political Issues: The Problem with ‘Most Important Problem,’* 24 ELECTORAL STUD. 555 (2005) (describing political science literature on “salience” but showing the difficulty of determining the salience of issues in practice).



non-Native American citizen. Or consider the question of whether the DOL should enforce wage and hour violations that stem directly from a state's budget crisis. In such cases, presidential involvement should not be verboten; rather, internal executive branch controls, along with appropriate public disclosure of ultimate policy decisions, can help police the line between inappropriate meddling in an individual's case and appropriate influence over policy, even if such influence is in the context of a single action.<sup>333</sup>

Second, presidential enforcement should facilitate disclosure of enforcement policy decisions.<sup>334</sup> The form is not necessarily important. Policy decisions can be memorialized in executive orders, presidential memoranda, or other formal written material, or they can be communicated clearly in public speeches by the President, cabinet secretaries, or other officials. The point is that the President, or officials at the highest levels of his Administration, should claim responsibility for enforcement policy he directs or that agencies adopt consistent with his agenda. This proposal does not mean that internal information about particular enforcement actions should be made public. Many decisions about particular enforcement actions are rightly kept confidential, in the interests of the integrity of ongoing investigations and to protect the rights of targets, as well as witnesses. This proposal also does not mean that presidential *deliberation* about enforcement policy should be transparent. As the Supreme Court has recognized, confidential deliberation serves important separation-of-powers goals.<sup>335</sup> But when the President makes a significant decision about

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<sup>333</sup> Others have written about how these controls operate and how they might be strengthened. See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006) (arguing that a "critical mechanism to promote internal separation of powers is bureaucracy," and offering ways to strengthen this mechanism); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1492–94 (2010) (analyzing how the Office of Legal Counsel should balance executive branch precedent and presidential preferences).

<sup>334</sup> This prescription is consistent with the Supreme Court's recent decision in *FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2317–18 (2012), which held that a change in FCC enforcement policy violated the Due Process Clause because it did not give the regulated parties fair notice. Numerous scholars have raised concerns about the lack of transparency in presidential administration. See, e.g., Kitrosser, *supra* note 290, at 1774 (arguing that a unitary executive approach undermines accountability by increasing the President's ability to control information and "make or implement policy behind closed doors"); see also Bressman & Vandenberg, *supra* note 13, at 91–99 (suggesting steps, including greater transparency, for improving White House involvement in agency decisionmaking and better advancing accountability, efficiency, and rule-of-law values); Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1163–66 (2010) (arguing that agencies should be required to summarize executive influence on significant rulemaking decisions).

<sup>335</sup> *United States v. Nixon*, 418 U.S. 683, 708 (1974).

enforcement policy—for example, deciding to prioritize one agency's enforcement mission over another or asking an agency to engage in prosecutorial discretion for a category of offenses—those decisions should typically be disclosed.<sup>336</sup> Critics might argue that an expectation of disclosure would just increase ad hoc decisionmaking. But, in fact, that has been the dominant practice to date.<sup>337</sup> Accepting that presidential influence over enforcement is not inappropriate and institutionalizing capacity for that influence would decrease incentives for presidents to control enforcement policy by stealth.

The need for public disclosure of enforcement policy decisions thus brings us back to the second fundamental argument for presidential administration—that it enables the public to understand more accurately the sources of bureaucratic power. Presidential administration, proponents argue, employs clearer lines of command and makes the exercise of power more visible, thereby allowing for easier public evaluation.<sup>338</sup> But to make good on this promise and address concerns about responsiveness to the public, presidential administration must be executed with some meaningful transparency.

## 2. *Presidential Enforcement in Practice*

With this focus on coordination and disclosure, what might reformed presidential enforcement look like in practice? A full design prescription is beyond the scope of this paper. The goal is to persuade that reforms are needed, not to provide a blueprint. Nevertheless, this Part offers a brief sketch of the possibilities and some preliminary suggestions.

Responsibility for facilitating enforcement coordination would most sensibly be housed in OMB, perhaps either under the auspices of OMB's implementation of the new GPRA (Government Performance and Results Act) Modernization Act of 2010<sup>339</sup>—which requires OMB to establish Administration-wide priorities<sup>340</sup>—or under a differently constituted and reimagined OIRA.<sup>341</sup> In response, critics might object

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<sup>336</sup> Cf. Morrison, *supra* note 333, at 1520 (arguing that the President should have the power to abrogate Office of Legal Counsel precedent, but that the decision to do so should be publicly disclosed).

<sup>337</sup> See, e.g., *supra* Part II.A (describing how presidents have, in an often ad hoc and opaque manner, influenced enforcement policy).

<sup>338</sup> See Kagan, *supra* note 2, at 2333 (arguing for more visible White House control of agency action).

<sup>339</sup> Pub. L. No. 111-352, 124 Stat. 3866 (codified in scattered sections of 5 U.S.C. and 31 U.S.C.).

<sup>340</sup> See Freeman & Rossi, *supra* note 6, at 1193 (discussing Pub. L. No. 111-352, 124 Stat. 3866).

<sup>341</sup> See *id.* at 1193 (suggesting that the task of facilitating greater agency coordination could be assigned to OIRA). Alternatively, responsibility for coordinating enforcement

that a new coordinating body in OMB would simply create an additional level of bureaucracy, shifting responsibility not to the President himself but from one set of subordinate officials to another. Certainly, it is true that there is space between the views of the President and those of his advisors in the EOP: The White House is a “they,” not an “it.”<sup>342</sup> It is also true that, in many respects, OMB is legally equivalent to other executive branch agencies. But as a matter of practice and culture, OMB leadership and White House Office officials tend to be considerably closer to the President, figuratively and literally, than are Cabinet officials and their subordinates. By virtue of their position at the center of the Administration, OMB and EOP are in a unique position to perform a coordinating role.<sup>343</sup>

In thinking about that coordinating role, it is easy to specify what the office should *not* do. As discussed in Part II.B.1, a reactive system mirroring that of OIRA, whereby all significant individual enforcement actions require White House clearance, would undermine efficiency goals. That approach would risk greater ossification and delay, lack methodological coherence, substitute centralized control even when lower-level or local officials might have better information, and potentially involve unnecessary and unproductive political involvement in individual actions.

Instead, creating a new office or reshaping an existing office or council to focus on enforcement coordination and regulatory compliance would provide an opportunity to realize theories of “experimentalism” or “new governance,” which are already implicit in some recent developments under the Obama Administration.<sup>344</sup> For example, the office might work with agencies to develop best practices, making enforcement efforts more efficient and effective. In so doing, centralized attention to enforcement need not minimize agency-level discretion and innovation. Rather, the center would “monitor[ ] . . . performance, pool[ ] information . . . and create[ ]

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could lie within the Domestic Policy Council, a newly constituted White House council, or even within the DOJ. The first two options would enhance political control, while the third would likely diminish it.

<sup>342</sup> Bressman & Vandenbergh, *supra* note 13, at 49.

<sup>343</sup> *Cf.* Moe, *supra* note 21, at 367–68 (explaining how administration officials are likely to be more politically and ideologically aligned with the President and how that alignment minimizes the principal-agent problem within the White House).

<sup>344</sup> *See* Sabel & Simon, *supra* note 14, at 55–56 (noting that certain Obama Administration initiatives embody experimentalism); *see also supra* notes 171–74 and accompanying text (describing Obama initiatives); Edward Rubin, *Can the Obama Administration Renew American Regulatory Policy?*, 65 U. MIAMI L. REV. 357, 389–92 (2011) (suggesting ways the Obama Administration could use “new governance” models to address the financial crisis).

pressures and opportunities for continuous improvement.”<sup>345</sup> Agencies, for example, could be required to submit for review annual or bi-annual reports detailing enforcement priorities, analyzing shortcomings or regional inconsistencies, and highlighting major enforcement policy issues, including those implicated by particular enforcement actions.

A related task would be to expand upon the initiative begun by the Obama Compliance Memorandum by institutionalizing and strengthening nascent efforts to share data among agencies and to release data to the public.<sup>346</sup> The office, for example, could help establish a system of unique corporate identifiers. It could also build a central database that collects publicly available information about corporate entity compliance records and makes such information more accessible to federal, state, and local agencies, as well as the public at-large.

The office could also facilitate interagency enforcement coordination in order to build administrative capacity. Here, many of the reforms proposed by Jody Freeman and James Rossi, which were adopted by the Administrative Conference of the United States, are instructive.<sup>347</sup> These proposals focus on improving joint rulemaking and joint policymaking, but could be adapted to enforcement. For example, the office might require all agencies to identify areas of overlapping enforcement. It would then develop and adopt policies for joint enforcement aimed at addressing existing enforcement weaknesses. These initiatives could follow along the lines of the DOL-IRS and OSHA-FDA agreements discussed in Part III.B.1. Such policies would be publicly released and easily accessible, thereby advancing both accountability and efficiency goals. Similarly, the office might require agencies to identify points of conflict in enforcement. It would then facilitate agreement or, when necessary, provide presidential direction on how to prioritize between agency missions, again publicly releasing those agreements or directives.

The Domestic Policy Council and other relevant White House officials could continue working with agencies to develop major enforcement policies, and they could continue consulting regarding

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<sup>345</sup> Sabel & Simon, *supra* note 14, at 55.

<sup>346</sup> Presidential Memorandum on Regulatory Compliance, 76 Fed. Reg. 3825, 3825–26 (Jan. 18, 2011).

<sup>347</sup> Freeman & Rossi, *supra* note 6, at 1193–96; *see also* ADMIN. CONFERENCE OF THE UNITED STATES, IMPROVING COORDINATION OF RELATED AGENCY RESPONSIBILITIES (2012). New York City has developed a successful data program to address problems of regulatory compliance, which could serve as a model. *See* Alan Feuer, *The Mayor's Geek Squad*, N.Y. TIMES, Mar. 23, 2013, at MB1 (describing “big data” program).

individual enforcement actions with significant policy implications. The argument is not for expanding the extent to which the White House is involved in enforcement policy decisions, but for making existing involvement in high-salience issues more rational and for facilitating disclosure of policy decisions.<sup>348</sup> But what about centralized review of enforcement policy documents?<sup>349</sup> Bush's decision to extend OMB review to guidance documents met significant public outcry.<sup>350</sup> But a modest form of centralized review of enforcement policy documents, under which agencies provide an annual enforcement policy plan, without disclosing either the guidance itself or the underlying economic analysis, would formalize what already occurs informally. It would allow OMB or others in the White House to review the small share of guidance documents meriting consideration by limited EOP staff and other interested agencies.<sup>351</sup> Indeed, this already occurs, but formalization could make that process more accessible for public debate.

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<sup>348</sup> Indeed, “[n]o President has used directives on any more than a selective basis as to executive-branch agencies. The White House has picked its battles, acting only when an issue is particularly salient.” Bressman & Thompson, *supra* note 312, at 646.

<sup>349</sup> There is a lengthy debate in the literature about the way federal agencies issue interpretive rules and statements of policy, and the way courts react to such documents. See Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 332–33 (2011) (reviewing the literature); see also Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 434 (2007) (focusing on the hardships that use of guidance documents can cause to regulatory beneficiaries and arguing that stakeholders should be able to petition for amendment or repeal of a guidance document). The Administrative Conference of the United States (ACUS) and the American Bar Association (ABA) have both long urged greater use of informal notice and comment for significant guidance documents and greater disclosure. See, e.g., Am. Bar Ass'n, *Annual Report Including Proceedings of the Fifty-Eighth Annual Meeting* 57 (1993) (recommending that “[b]efore an agency adopts a nonlegislative rule that is likely to have a significant impact on the public, the agency provide an opportunity for members of the public to comment on the proposed rule and to recommend alternative policies or interpretations, provided that it is practical to do so; when nonlegislative rules are adopted without prior public participation, immediately following adoption, the agency afford the public an opportunity for post-adoption comment and give notice of this opportunity”); see also Paul R. Noe & John D. Graham, *Due Process and Management for Guidance Documents: Good Governance Long Overdue*, 25 YALE J. ON REG. 103, 105–06 (2008) (detailing the positions of the ABA and ACUS). Only a few scholars have examined the effect of the Bush Administration's decision to subject these documents to review. See Noe & Graham, *supra*, at 103–04 (arguing in support of OMB review of policy documents); Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 787 (2010) (finding that agencies do not frequently abuse guidance documents to avoid issuing significant legislative rules). Greater study of the experience under the Bush Executive Order is warranted.

<sup>350</sup> See Noe & Graham, *supra* note 349, at 103 n.2 (collecting public-opinion pieces opposing the Bush Executive Order).

<sup>351</sup> *Id.* at 111.

Finally, regarding disclosure, those officials tasked with overseeing enforcement would be responsible for ensuring that significant shifts in enforcement policy are made public and easily accessible for examination. This, however, raises two difficult questions. First, when precisely would disclosure be expected, and second, why would presidents agree to more disclosure of decisions, at least when disclosing the information could be politically disadvantageous? As noted, the argument is for disclosure of policy decisions, not of deliberations. Exceptions could be made for disclosures that would have significant negative impact on the success of ongoing enforcement actions or on compliance with the law, but the presumption would be in favor of disclosure. Indeed, disclosure of policies already occurs to some extent, such as through the release of memoranda of understanding and agency enforcement guidance. Often, however, information is hard to locate, and release occurs only in response to FOIA requests. Switching to a system of increased *ex ante* disclosure would have few costs for the Administration and would provide some political benefit given the popularity of transparency and open government. Nonetheless, it would be naïve to think that administrations would not still resist disclosure when it is politically disadvantageous, perhaps by engaging in furtive nonenforcement to achieve unpopular goals. Creating an office focused on regulatory compliance, with a norm of disclosure, would be no panacea to this problem, but it would create an additional pressure point to help guard against such activity.

#### IV

#### PRESIDENTIAL ENFORCEMENT AND PRESIDENTIAL POWER

So far, I have defended presidential coordination of enforcement as a matter of constitutional text and structure, as well as of the historical development of the presidency, and I have shown that reforms to presidential enforcement would improve the effectiveness and accountability of administration. Nonetheless, those who worry about the already expansive power of the President may remain skeptical about my argument. For those scholars, any effort that might increase presidential control over the bureaucracy is cause for unease, if not alarm.<sup>352</sup> But in fact, as this Part shows, my thesis is consistent with virtually all competing conceptions of the President's legitimate

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<sup>352</sup> See, e.g., ACKERMAN, *supra* note 2 (arguing that increased presidential power is a cause for concern); see also Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 *FORDHAM L. REV.* 2577, 2583 (2011) (arguing that the use of White House "czars" shifts more power to the President and decreases transparency).

control over the bureaucracy.<sup>353</sup> Furthermore, while institutionalizing presidential enforcement would not disallow the considerable power presidents currently exercise over enforcement decisions, it would permit Congress, the bureaucracy, and the public to evaluate presidential action and respond more easily.

### A. *The Classic Debate: Oversight Versus Direction*

The predominant debate about presidential power over administration centers on a single question: Can the President direct or oversee agency enforcement decisions? Notwithstanding the consensus that the Constitution creates a single chief executive, scholars disagree about how much coercive power the President should have over subordinates.<sup>354</sup> I have alluded to this debate previously. It is useful to explore the academic literature more systematically here both to show that my thesis is compatible with even a narrower conception of legitimate presidential control over the bureaucracy and to suggest the limitations of the debate itself.

Defenders of a strongly “unitary” executive argue that the Constitution requires that all executive power be vested in the President; therefore, any agency action should be subject to presidential direction.<sup>355</sup> Under this theory, the President has “direct power to supplant any discretionary executive action taken by a subordinate with which he disagrees, notwithstanding any statute that attempts to vest discretionary executive power only in the subordinate.”<sup>356</sup> Strong-unitary-executive theorists contend that the Constitution commands unity as a formal matter of text, history, and structure;<sup>357</sup> but

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<sup>353</sup> Just as institutionalized presidential enforcement would not necessarily provide the President more directive power over agency heads, it also would not need to increase the President’s ability to monopolize the enforcement of federal law vis-à-vis states or private actors. Cf. Roderick M. Hills, Jr., *Arizona v. United States: The Unitary Executive’s Enforcement Discretion as a Limit on Federalism*, in *CATO SUPREME COURT REVIEW: 2011–2012*, at 189, 190 (Ilya Shapiro ed., 2012), available at <http://www.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2012/9/scr-2012-hills.pdf> (arguing that *Arizona v. United States* seems to vindicate such an extraordinary presidential prerogative and thereby obstruct the faithful execution of federal law).

<sup>354</sup> The debate has been running throughout our history, not just among academics, but among those in government. See Lessig & Sunstein, *supra* note 290, at 5 & n.7 (collecting sources).

<sup>355</sup> See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *YALE L.J.* 541, 594–96 (1994) (arguing that the Constitution grants executive power to the President alone; that the President therefore has the power to act in place of agency officials, to nullify their actions, and to remove agency officials; and that Congress is given no power to create subordinate entities that exercise executive power).

<sup>356</sup> Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *HARV. L. REV.* 1153, 1166 (1992).

<sup>357</sup> Calabresi & Prakash, *supra* note 355.

they also argue that such unity is desirable to promote accountability, coordination, and uniformity.<sup>358</sup> Closely akin to those scholars are others, like Cass Sunstein, Lawrence Lessig, and Elena Kagan, who argue that the Constitution does not confer ultimate decisional or directional authority on the President, but that this authority should be presumed to exist unless Congress specifies otherwise.<sup>359</sup> They argue that the basic commitments of the constitutional system are served by a unitary executive and that the arc of growth has been in that direction.<sup>360</sup>

At the other end of the spectrum are scholars, like Peter Strauss, who contend that the President, unless expressly authorized by Congress, may only *oversee* agencies' decisionmaking processes, not make decisions.<sup>361</sup> According to this more restrained conception of the unitary executive, the President does not have authority to direct the substance of agency decisions entrusted to agency heads by statute, even if he may ultimately exercise his removal authority.<sup>362</sup> These theorists worry that proponents of a strong unitary executive risk overpoliticizing administrative law and improperly expanding the powers of the presidency.<sup>363</sup>

To be sure, this Article's proposal for institutionalized presidential attention to enforcement is less likely to appeal to those in the oversight-only camp. But, in fact, institutionalized presidential enforcement can be made consistent with all of the varying conceptions of legitimate presidential control. Depending on which rule is adopted, the President can, for example, direct DHS to prioritize its

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<sup>358</sup> See Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696 (2009) (making normative case for the unitary executive).

<sup>359</sup> See Kagan, *supra* note 2, at 2251 (arguing that the President is presumed to have direct authority over agencies); Lessig & Sunstein, *supra* note 290, at 2, 4 (arguing that Congress has broad power to structure the Executive Branch, but also embracing the theory of a strong unitary executive).

<sup>360</sup> Lessig & Sunstein, *supra* note 290, at 4.

<sup>361</sup> See Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 123–24 (1994) (noting that the Framers rejected concentration of law-executing and lawmaking governmental power in the Executive); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 966 (2001) (arguing that the President lacks the authority to dictate substantive decisions entrusted to agencies by law); Strauss, *supra* note 50, at 579, 581 (arguing that even though the President has authority to control agencies to a degree, those agencies are also beholden to Congress and the courts); cf. Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006) (arguing that the President has authority to direct the administration of the law only under statutes that expressly confer it on him).

<sup>362</sup> Percival, *supra* note 361, at 966.

<sup>363</sup> Cf. Criddle, *supra* note 290, at 448 (arguing for replacing presidential administration with "fiduciary" administration).



resources in favor of criminal deportations, or he can merely suggest it; he can demand that DOL investigations be privileged over DHS raids, or he can simply request it.

Indeed, spinning out these options in the enforcement context illustrates the limited operational utility of the distinction. Even assuming the oversight-only camp has the better constitutional reading, presidents *do* exercise significant control over agencies as a matter of contemporary practice.<sup>364</sup> Furthermore, while there is no doubt that the ways in which the President and administrators understand their relationships will affect the dynamics of those relationships, in application, the two versions of presidential control—direction versus oversight—have much in common.<sup>365</sup> Under the oversight model, a President can still oversee agency action. He can appoint a leader of the agency who he believes shares his policy goals and who will be a “good soldier[ ].”<sup>366</sup> He can also attempt to influence what agencies do through informal and formal communications, budgetary mechanisms (at least for most executive agencies), threats of reorganization, and other management tools. And he can remove the head of an executive agency who does not follow the President’s wishes. Under the strong unitary model, the President can do all these things; he can also give orders. But the executive agency head can still refuse to act, subject only to the threat of removal. The agency head can also exploit congressional oversight and political criticism to resist presidential directives.<sup>367</sup> Moreover, courts are unable to enforce a legal limit on presidential authority based on a distinction between

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<sup>364</sup> See *supra* notes 151–65 and accompanying text (describing President Obama’s impact on enforcement). Recent opinions from the Supreme Court and the D.C. Circuit gesture favorably toward a stronger unitary executive view. *E.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010) (relying on a theory of presidential accountability to strike down a provision limiting the President’s removal authority); *In re Aiken Cnty.*, 645 F.3d 428, 442–44 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (questioning the wisdom and correctness of *Humphrey’s Executor*, and noting that “the *Free Enterprise* Court repeatedly emphasized the central role of the President under Article II and the importance of that role to a government that remains accountable to the people”).

<sup>365</sup> Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 645–46 (2010) (arguing that the two theories are indistinguishable from each other in practice).

<sup>366</sup> *Id.* at 646 (internal quotation marks omitted). Coglianese suggests that this is “the strongest possible control over an agency.” *Id.* But of course, initial agreement on policy goals and initial promises of loyalty do not always translate into consistent agreement or loyalty over time.

<sup>367</sup> Independent agencies are, of course, situated differently: The threat of removal is substantially weakened. See Bressman & Thompson, *supra* note 312, at 600–01 (arguing that despite weakened removal powers, the President still exerts influence over these agencies).

oversight and control; no court can peer into the inner workings of administrators' minds.<sup>368</sup>

There is no doubt that the ways in which the President and administrators understand their relationships will affect the dynamics of those relationships. But the context of enforcement highlights yet another limit of the oversight-direction debate. Specifically, the question of control does not lend itself well to political debate, congressional oversight, or internal executive branch controls—the forums in which enforcement policy shifts and nonenforcement decisions are most frequently reviewed. The general public is unlikely to care whether the President exercised too much authority over an agency official. Congress can no better investigate the difference between coercion and influence than the courts. And those on the inside who perform a checking function, such as career bureaucrats and attorneys in the various legal offices including OLC, are responsible for examining law and policy, not for ferreting out coercion.<sup>369</sup> If anything, the focus on coercion tends to drive political influence underground, even when it ought to be disclosed and evaluated. In short, focusing on enforcement highlights the limits of the long-running oversight-direction debate, and points us to a different axis on which to evaluate presidential action: one that goes to the merits—the lawfulness—of the underlying decision, as opposed to the degree of coercion exercised.

### B. Enforcement, Law, and Politics

My argument for institutionalizing presidential coordination of enforcement effectively accepts that, under our current system, presidents can and do exercise significant control over administration. Politics and policy pervade enforcement decisions. That does not mean, however, that enforcement discretion is not, or should not be, bound by law.<sup>370</sup> To the contrary, institutionalizing presidential

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<sup>368</sup> See Coglianese, *supra* note 365, at 648 (arguing that this limitation renders the distinction between oversight and control slight); see also *id.* at 638 (“Rather than offering a legal constraint, those who argue that the Constitution creates such a line over the exercise of presidential power seem to offer little more than another rhetorical arrow to be flung by political partisans when it suits their purposes.”). Strauss, of course, is fully aware of these points. He acknowledges that the distinction between presidential influence and control is “subtle”; for him, the difference is in the mentality with which advice is given and received. Strauss, *supra* note 15, at 704.

<sup>369</sup> Of course, these internal officials can decline to approve formal directives. See Morrison, *supra* note 333, at 1460 (noting the role of the Office of Legal Counsel (OLC) in reviewing the legality of executive orders).

<sup>370</sup> Compare POSNER & VERMEULE, *supra* note 1, at 4 (arguing that constraints on the Executive arise primarily from politics, not from law), with Pildes, *supra* note 1, at 1424 (recognizing that the relationship between presidential power and law is complex, and

enforcement would help law better discipline exercises of enforcement discretion, helping to separate permissible enforcement discretion from impermissible unilateral lawmaking.

Before proceeding, it is important to acknowledge that questions about how law constrains politics are profound as a theoretical matter<sup>371</sup> and difficult to evaluate as an empirical matter.<sup>372</sup> This brief discussion obviously cannot do these questions justice. Rather, I aim to highlight the inevitable and irreconcilable tensions between law and politics in the enforcement context and to sketch out how institutionalization and disclosure of enforcement decisions might facilitate extrajudicial legal checks. The discussion necessarily leaves numerous difficult questions for future examination.

The President is not constitutionally invested with either legislative power or the power to suspend or dispense with law. But it is hard to distinguish between these practices and legitimate exercises of enforcement power. Constitutional text provides little guidance. “While the Constitution of the United States divides all power conferred upon the Federal Government into ‘legislative Powers,’ Art. I, § 1, ‘[t]he executive Power,’ Art. II, § 1, and ‘[t]he judicial Power,’ Art. III, § 1, it does not attempt to define those terms.”<sup>373</sup> As Gary Lawson notes, “[t]he problem of distinguishing the three functions of government has long been, and continues to be, one of the most intractable puzzles in constitutional law.”<sup>374</sup>

Some have characterized “enforcement,” and its parent, “execution,” in narrow terms. Mansfield writes:

Derived from the Latin *exsequor*, meaning “follow out,” “execute” is used by both classical authors and the Roman law in the extended and particular sense of following out a law to the end: to vindicate or to punish. . . . In this primary meaning, the American President

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concluding that the complex relationship between law and politics ultimately functions to constrain the executive).

<sup>371</sup> For example, what do we mean by “law”? What does it mean to constrain? For scholarship examining these difficult questions, see, for example, Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 1024–34 (2009) (examining how the Constitution constrains nonjudicial officials); and Frederick Schauer, *When and How (If at All) Does Law Constrain Official Action?*, 44 GA. L. REV. 769, 770 (2010) (positing that “officials who are in theory subject to the law may consider themselves less so than is commonly believed”). See also sources cited *supra* note 370 (discussing the various ways in which law and politics constrain the Executive).

<sup>372</sup> The empirical challenge is particularly acute with respect to the President, whose deliberation is rarely disclosed.

<sup>373</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992).

<sup>374</sup> Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1238 n.45 (1994); see also M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1155–82 (2000) (arguing that the Constitution embraces competing traditions of separation and balancing of powers).

serves merely to carry out the intention of the law, that is, the will of others—of the legislature, and ultimately of the people.<sup>375</sup>

This was, of course, the version of executive power Justice Black advanced in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>376</sup> and that which Chief Justice Vinson, in dissent, dismissed as a “messenger-boy concept of the Office.”<sup>377</sup> This view animates those scholars who contend that the Executive must work as a faithful agent of Congress,<sup>378</sup> worry about politicization of administration, and advocate proposals to vest discretion in professional bureaucrats rather than political officials.<sup>379</sup>

Indeed, when the President is involved in enforcement, his primary duty is to make real the promise of the relevant statutes—to “take Care” that the law is faithfully executed.<sup>380</sup> In so doing, he may not act contrary to law; he may not forbid the execution of law by directing that a constitutional statute not be enforced.<sup>381</sup> As the Court wrote in *Kendall v. United States*, “to contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.”<sup>382</sup> Thus, a President may not enforce only those statutes that conform to his view of what the law should be; policy disagreement cannot be the sole reason for nonenforcement. For example, a President committed to cost-benefit analysis may not decline to enforce OSHA on the ground that it does not further efficiency, just as the executive cannot decline to act because of the costs of regulation where costs are not a relevant consideration under the statute.<sup>383</sup> Nor may the President direct that Title VI of the Civil Rights Act not be enforced.<sup>384</sup> If the President could ignore the mandate to enforce, he would be able to nullify statutes, an

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<sup>375</sup> MANSFIELD, *supra* note 53, at 2.

<sup>376</sup> See 343 U.S. 579, 587 (1952) (“In the framework of our constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”).

<sup>377</sup> *Id.* at 708–09 (Vinson, C.J., dissenting).

<sup>378</sup> See Cheh, *supra* note 4, at 288 (arguing that the President is “required to follow congressional commands”).

<sup>379</sup> See, e.g., ACKERMAN, *supra* note 2, at 143, 146 (proposing various reforms aimed at reducing presidential power).

<sup>380</sup> Cf. Mashaw, *supra* note 310, at 4 (“[P]residentialism does not exclude, or even suppress, the demand for conformity to legislation.”).

<sup>381</sup> Sunstein, *supra* note 37, at 670; see also Goldsmith & Manning, *supra* note 4, at 2295 (noting that the President’s completion power is defeasible by congressional command).

<sup>382</sup> 37 U.S. (12 Pet.) 524, 613 (1838).

<sup>383</sup> See Sunstein, *supra* note 37, at 677–78 (contending that agency discretion is limited because inaction may not be based on statutorily irrelevant factors).

<sup>384</sup> See *Adams v. Richardson*, 480 F.2d 1159, 1163–66 (D.C. Cir. 1973) (holding that enforcement of Title VI is mandatory).

outcome wholly inconsistent with the separation of powers and the Take Care Clause.<sup>385</sup> The only constitutional method for the President to invalidate a statute—at least a constitutional statute—is through exercising his veto power.<sup>386</sup>

At the same time, Justice Black's assertion that presidential law-making functions are constitutionally confined to recommendations to Congress and to vetoes, while formally true, is challenged by both longstanding conceptions of presidential power and the practical reality of executive power. From the founding, the prevailing view was that the executive power "necessarily included some measure of executive discretion 'to fill in the details' in implementing legislation."<sup>387</sup> Hamilton, writing as Publius, insisted that responsibility for administration of government fell "peculiarly within the province of the executive department," and he assumed that this entailed some flexibility as to means.<sup>388</sup> Jefferson wrote that "if means specified by an act are impracticable, the constitutional [executive] power remains, and supplies them. . . . This aptitude of means to the end of a law is essentially necessary for those which are executive; otherwise the objection that our government is an impracticable one, would really be verified."<sup>389</sup> In the modern era, congressional delegation of authority is the dominant characteristic of the administrative state.<sup>390</sup> In particular, as Parts II and III demonstrated, presidential involvement in the enforcement of statutes involves a considerable degree of law-shaping, if not

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<sup>385</sup> See Eugene Gressman, Observation, *Take Care, Mr. President*, 64 N.C. L. REV. 381, 382–83 (1986) (arguing that the power to execute does not include the power to ignore or disobey). Nonenforcement of criminal law and the problem of desuetude raise different questions, which are beyond the scope of this Article. For a discussion, see, for example, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 591–94, 597–98 (2001).

<sup>386</sup> This basic principle is illustrated as well by the Nixon impoundment controversy. See *supra* note 109 (discussing the controversy).

<sup>387</sup> Monaghan, *supra* note 11, at 39; see also WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 78–79 (1916) ("Statutory construction is practically one of the greatest of executive powers," particularly in cases that do not "affect[] private right[s], . . . [which are] likely to come before the courts."); Goldsmith & Manning, *supra* note 4, at 2302 ("Presidents have long exercised, and courts have long recognized, some version of a presidential authority to prescribe incidental details of implementation necessary to complete an unfinished statutory scheme.").

<sup>388</sup> THE FEDERALIST NO. 72, *supra* note 291, at 403; see also Monaghan, *supra* note 11, at 39 (describing Hamilton's views on the executive).

<sup>389</sup> Thomas Jefferson, Letter to Governor Cabell, Aug. 11, 1807, in 9 THE WRITINGS OF THOMAS JEFFERSON 318, 320 (Albert Ellery Bergh ed., 1907).

<sup>390</sup> The Court continues to insist that lawmaking authority cannot be delegated. *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 472 (2001) ("Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers . . ."). However, the dominant reality is otherwise.

lawmaking: Political value judgments are inevitable given conflicting enforcement missions, broad delegations, and scarce resources.

Institutionalizing presidential enforcement would not negate this considerable power, but would make it easier for Congress, the bureaucracy, and the public to evaluate and respond to presidential action. Specifically, it would improve the ability of other actors to consider, in the nonjudicial forums in which enforcement policy decisions are typically evaluated, whether the President has a reasonable basis in statute for his choice to emphasize one enforcement policy over another or to prioritize one agency's mission over another's. This would amount to a nonjudicial form of *Chevron* review.<sup>391</sup>

An expectation that the President root enforcement (and non-enforcement) policy decisions in statute finds ample support in doctrine—and not only in the famous formulation of *Chevron*. Return again to *Heckler v. Chaney*, in which both the majority and the concurrences noted outer limits on the bounds of enforcement discretion. The majority set a high bar for judicial review over nonenforcement decisions, over the objection of Justice Marshall and instead of a narrower approach advanced by Justice Brennan.<sup>392</sup> Numerous scholars have criticized the Court's approach; they argue that it erects too high a barrier for reviewing nonenforcement decisions.<sup>393</sup> But a portion of the reasoning—the part agreed to by all of the Justices—embraces the importance of both executive discretion and reasonable fidelity to statute. At bottom, the Court made clear that while the Executive must be able to choose “how to allocate finite enforcement resources,”<sup>394</sup> Congress did not set the Executive “free to disregard legislative direction in the statutory scheme that the agency administers.”<sup>395</sup>

The nondelegation doctrine, such as it is, provides similar guidance, with specific reference to the President.<sup>396</sup> As Justice Cardozo

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<sup>391</sup> See *supra* note 17 and accompanying text (discussing this view); cf. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 702 (2000) (arguing that treaty interpretation deference is best understood as a form of *Chevron* deference); Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539 (2005) (arguing that courts should apply *Chevron* deference to presidential actions taken under statutes).

<sup>392</sup> See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (holding that there should be a presumption that agency action is not reviewable).

<sup>393</sup> See, e.g., Biber, *supra* note 37 (arguing for greater judicial review of agency inaction by drawing on examples from environmental law); Sunstein, *supra* note 37 (noting controversy regarding *Heckler* and discussing reviewability of inaction).

<sup>394</sup> *Heckler*, 470 U.S. at 842 (Marshall, J., concurring in judgment).

<sup>395</sup> *Id.* at 833 (majority opinion).

<sup>396</sup> Many have argued that the nondelegation doctrine is no doctrine at all, for the Supreme Court has struck down a federal statute on the ground that it delegated too much authority to the executive branch in only two cases. *E.g.*, Cass R. Sunstein, *Nondelegation*

wrote in *A.L.A. Schechter Poultry v. United States*, allowing the President to operate a “roving commission” that can “inquire into evils and upon discovery correct them” would unbalance the constitutional scheme.<sup>397</sup> The Court’s preference that legislative judgments be the touchstone for presidential discretion emerged again in *Clinton v. City of New York*.<sup>398</sup> The statute under review in that case allowed the President to “cancel” certain expenditure and tax benefit provisions that had been signed into law.<sup>399</sup> The Court held that the Act violated Article I, Section 7 of the Constitution by allowing the President to repeal parts of later-enacted statutes unilaterally.<sup>400</sup> The majority’s position was formalistic: The Act violated the “finely wrought” and temporally specific Presentment Clause procedures.<sup>401</sup> But, the majority seemed bothered less by the formal violation and more by the fact that Congress had authorized the President to implement his domestic policy views even when they conflicted with prior legislative judgments.<sup>402</sup>

What would presidential reason-giving regarding enforcement policy look like? Others have examined how actors within the executive branch reason through questions about statutory (and constitutional) meaning.<sup>403</sup> For these purposes, I am assuming that the Executive would use accepted modes of arguing about statutory

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*Canons*, 67 U. CHI. L. REV. 315, 323 (2000). However, the Court—at least historically—has seemed suspicious of the President as policymaker. See Kagan, *supra* note 2, at 2364–65 (positing that the doctrine “well might distrust presidential action”); Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 2 TEL AVIV U. STUD. L. 9, 22–23 (1992) (suggesting that the nondelegation doctrine has been invoked where power was delegated to the President). But see *supra* note 364 (noting recent case law embracing a stronger unitary executive).

<sup>397</sup> 295 U.S. 495, 551 (1935) (Cardozo, J., concurring) (arguing for invalidation of a broad presidential power even if granted by Congress).

<sup>398</sup> 524 U.S. 417 (1997).

<sup>399</sup> *Id.* at 436 (quoting 2 U.S.C. § 691(a) (Supp. II 1994), *declared unconstitutional* by *Clinton v. City of New York*, 524 U.S. 417).

<sup>400</sup> *Id.* at 439–40; see also U.S. CONST. art. I, § 7, cl. 2 (establishing the constitutional requirements of bicameralism and presentment).

<sup>401</sup> *Clinton*, 524 U.S. at 439–40, 447 (citing *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

<sup>402</sup> Kagan, *supra* note 2, at 2366 (citing *Clinton*, 524 U.S. at 445–56). The dissenters disagreed. In their view, the Act passed both the formal and the functional test: It did not grant the President nonexecutive power, did not aggrandize Congress’s power, and did not give the President too much power in violation of the nondelegation doctrine. See *Clinton*, 524 U.S. at 465–69 (Scalia, J., concurring in part and dissenting in part); *id.* at 480–84 (Breyer, J., dissenting).

<sup>403</sup> See, e.g., Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005) (examining how agencies interpret statutes); Morrison, *supra* note 333 (describing and critiquing the role of the OLC).

meaning.<sup>404</sup> My point is simply that disclosure of enforcement policy decisions, accompanied by explanations rooted in law, would discipline exercises of presidential enforcement discretion, while still recognizing the inevitability of discretion and the value of presidential prioritization.

As an example, consider first the MOU between the DOL and DHS on worksite enforcement.<sup>405</sup> Rather than a pure policy preference, the MOU offers a rationale grounded in law, albeit at a general level: The specific enforcement missions of both agencies, the Memorandum insists, are advanced by limiting the ICE agency's worksite enforcement power during pending DOL investigations.<sup>406</sup> The Memorandum's publication allowed public consideration of that statutory rationale. However, because the President did not claim ownership, or even awareness, of the Memorandum, it largely flew beneath the political radar, even though it prioritized between two conflicting statutory commands and involved controversial policies of national importance.

In contrast, the Obama DREAM Act enforcement policy is also an aggressive use of enforcement discretion but one that was prominently disclosed.<sup>407</sup> The announcement was structured in a way that allowed other actors to consider whether the President had a reasonable basis in law for his decision—and to respond accordingly. The White House and the DHS publicly and formally acknowledged the shift in enforcement policy and provided a rationale based in law.<sup>408</sup> According to the White House, the initial directive was justified as the best way to advance the statutory mandate in light of limited

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<sup>404</sup> See Abbe Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750, 1761–70 (2010) (providing overview of debates regarding methods of statutory interpretation).

<sup>405</sup> See *supra* note 277 and accompanying text (discussing the MOU).

<sup>406</sup> DHS-DOL Worksite Enforcement MOU, *supra* note 277.

<sup>407</sup> Readers will likely differ as to whether this enforcement policy crossed the line into unilateral dispensation of law. Compare, e.g., Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of the Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 *TEX. L. REV.* 781 (2013) (arguing that the President's claim of prosecutorial discretion exceeds the scope of his executive authority under the Constitution), and Amended Complaint, *Crane v. Napolitano*, No. 3:12-cv-03247-O, (N.D. Tex. Oct. 10, 2012) (alleging, in a lawsuit brought by ICE agents, that the President's directive violates the Administrative Procedure Act, immigration statutes, and constitutional separation of powers), with David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 *YALE L.J. ONLINE* 167 (2012), <http://yalelawjournal.org/2012/12/20/martin.html> (defending the Administration's actions and making the case that the *Crane* plaintiffs' argument misunderstands the law).

<sup>408</sup> See *supra* notes 163–65 (describing White House and DHS statements on the DREAM Act enforcement initiative).



appropriations.<sup>409</sup> Given its current budget, the Administration pointed out, ICE simply could not remove much of the undocumented immigrant population, making prioritization necessary.<sup>410</sup> Moreover, according to Secretary of Homeland Security Napolitano, the DREAM Act enforcement policy was consistent with a tradition of discretion within the statutory framework. Napolitano acknowledged that “[o]nly the Congress, acting through its legislative authority, can confer [substantive] rights”; however, she added that “[i]t remains for the executive branch . . . to set forth policy for the exercise of discretion within the framework of the existing law.”<sup>411</sup> The DHS, she contended, was doing just that by employing “deferred action,” a long-standing form of executive enforcement discretion under the immigration laws.<sup>412</sup>

Perhaps the Obama Administration could have more fully developed the legal explanation of its own authority. Nonetheless, the decision’s public disclosure and law-based reasoning, even as minimal as it was, provided a focal point for debate. And, indeed, debate ensued. Responding to the White House’s initial announcement in a *Washington Post* editorial, two Republican former DOJ officials contested the President’s decision to direct the use of prosecutorial discretion and disagreed with the assertion that the President was following the law while trying to change it.<sup>413</sup> While the Executive Branch has broad authority to exercise discretion and set priorities, Obama, the critics charged, had overstepped his authority and had effectively amended the law without congressional approval.<sup>414</sup>

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<sup>409</sup> See, e.g., Muñoz, *supra* note 163 (discussing the motivations for the Administration’s decision).

<sup>410</sup> Removal of all undocumented immigrants in the nation, consistent with law, would likely require an ICE budget of at least \$100 billion more than the current budget. Compare WILLIAM L. PAINTER, CONG. RES. SERV., R42557, DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS: A SUMMARY OF THE HOUSE-PASSED AND SENATE-REPORTED BILLS FOR FY 2013, at 6 (2012) (describing current budget), available at <http://www.fas.org/sgp/crs/homesecc/R42557.pdf>, with Jana Kasperkevic, *Deporting All of America’s Illegal Immigrants Would Cost a Whopping \$285 Billion*, BUS. INSIDER, Jan. 30, 2012, <http://www.businessinsider.com/deporting-all-of-americas-illegal-immigrants-would-cost-a-whopping-285-billion-2012-1> (estimating the cost of a mass-deportation program).

<sup>411</sup> Napolitano Prosecutorial Discretion Memorandum, *supra* note 164, at 3.

<sup>412</sup> *Id.*; see also *supra* note 164 (discussing the general authority for deferred action). Notably, the practice of prosecutorial discretion in immigration law is not limited to deferred action: It “extends to decisions about which offenses or populations to target; whom to stop, interrogate, and arrest; whether to detain or to release a noncitizen; whether to initiate removal proceedings; whether to execute a removal order; and various other decisions.” Shoba S. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2009).

<sup>413</sup> David B. Rivkin, Jr. & Lee A. Casey, Editorial, *Obama’s Illegal Move on Immigration*, WASH. POST, Sept. 2, 2011, at A19.

<sup>414</sup> *Id.*; see also Lamar Smith, *The President Can’t Wait to Ignore Our Laws*, NAT’L REV. ONLINE: THE CORNER (May 1, 2012, 11:32 AM), <http://www.nationalreview.com/corner>

Likewise, Justice Scalia, dissenting in *Arizona v. United States*, referenced the DREAM Act decision. Arguably exceeding the Supreme Court's function as a legal check, he joined the political debate, accusing the Executive Branch of selectively invoking "enforcement priorities" and resource scarcity to change policy and infringe on state sovereignty.<sup>415</sup>

As these critiques illustrate, and as those who fear presidential power would argue, a rule demanding reasonable, statutory reasoning for enforcement and nonenforcement policy decisions allows the President significant latitude. The President need not adopt the "best" reading of the statutes in any neutral sense.<sup>416</sup> Much can be justified as a reasonable choice when presidents are deciding precisely those issues not defined by statute.<sup>417</sup> Different presidents can, and frequently have, had very different views about what constitutes the most faithful exercise of enforcement discretion, both in terms of how to enforce any particular statute given limited resources and how to resolve enforcement conflicts among several statutes. Certainly Justice Scalia would have prioritized differently in the DREAM Act example, as would have the former Justice Department officials writing in the *Washington Post*.

And, as previously discussed, few external legal constraints cabin this discretion. Courts are unlikely to review presidential direction even on substantive grounds. They typically stay out of controversies surrounding executive programmatic decisions, including nonenforcement decisions.<sup>418</sup> As the Court recognized in *Heckler v. Chaney*,

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/297408/president-cant-wait-ignore-our-laws-lamar-smith (criticizing the President's enforcement priorities).

<sup>415</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2521 (2012) (Scalia, J. dissenting); *cf. id.* at 2499 (majority opinion) (embracing the Executive's right to exercise enforcement discretion).

<sup>416</sup> See Morrison, *supra* note 333, at 1502 (discussing how the OLC need not provide an objectively neutral view of the law); *cf. Pildes, supra* note 1, at 1402 (noting that there are different possible meanings when asking presidents to comply with law in contexts in which courts will not provide judicial answers, and asking whether "the President [is] obligated to adopt the 'best' interpretation of law, such as the one that an impartial detached legal interpreter would take" or whether "it [is] enough that the President's position be a 'plausible' legal one").

<sup>417</sup> See *supra* notes 39–44 and accompanying text (describing how, when Congress imposes legislative constraints, it typically leaves ample room for enforcement discretion). Indeed, for this reason, one might object that demanding articulation of legal reasons for exercises of enforcement discretion expands accepted notions of legal reasoning so far as to undermine law's value. This concern, while not illegitimate, does not outweigh the accountability benefits that can result from forcing a process of legal reasoning and expecting disclosure.

<sup>418</sup> See *supra* notes 36–38 and accompanying text (discussing judicial responses to non-enforcement decisions).

“[t]he danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that the courts are the most appropriate body to police this aspect of their performance.”<sup>419</sup> When courts do get involved, they often defer to executive action and interpretation. Judicial relief is even less likely when a presidential decision is at issue, at least when the decision is understood as properly within the President’s power to make.<sup>420</sup>

It is conceivable that institutionalizing and disclosing presidential enforcement (and nonenforcement) policy decisions would make court review more likely. Under *Heckler v. Chaney* and its progeny, review of discretionary nonenforcement decisions is available if “the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”<sup>421</sup> Accordingly, greater disclosure of presidential enforcement decisions in a certain form could, in fact, lead to more attempts by parties to seek judicial review.<sup>422</sup> Yet more judicial review seems unlikely to materialize. While it is true that institutionalization and disclosure would entail conscious and express adoption of general policies, an expectation of disclosure would also make presidents less likely to abdicate statutory responsibilities; disclosure would subject presidential decisions to both internal legal review and to external political review.<sup>423</sup> Similarly, institutionalization and disclosure need not entail policy announcements so formal as to trigger greater

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<sup>419</sup> 470 U.S. 821, 834 (1985). One problem is that it is hard to fashion judicial relief. To illustrate this point, Peter Strauss points to the fourteen-year struggle to compel the Secretary of Labor to issue a rule providing drinking water access to agricultural workers. See Strauss, *supra* note 4, at 113 (discussing *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 614 (D.C. Cir.), *vacated as moot*, 817 F.2d 890 (D.C. Cir. 1987)).

<sup>420</sup> See *Dalton v. Specter*, 511 U.S. 462, 476 (1994) (finding that a presidential decision on military base closure recommendations is not reviewable, and adding that a President could “approv[e] or disapprov[e] the recommendations for whatever reason he sees fit”); *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (holding that the President’s decision of whether to transmit the Census report to Congress was unreviewable by courts for abuse of discretion); cf. *Franklin*, 505 U.S. at 799–800 (noting that it was “important to the integrity of the process” that the decision was made by the President, a “constitutional officer,” as opposed to the unelected Secretary of Commerce).

<sup>421</sup> *Heckler*, 470 U.S. at 833 n.4 (1985) (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)); see also 5 U.S.C. § 706 (2012) (permitting review for agency action unlawfully withheld or unreasonably delayed).

<sup>422</sup> The suit filed by ICE agents, objecting to the DREAM Act enforcement policy decision, might be one such example. See Amended Complaint, *supra* note 407 (alleging, in a lawsuit brought by ICE agents, that the President’s directive violates the APA, immigration statutes, and constitutional separation of powers).

<sup>423</sup> Of course, disclosure of presidential enforcement policy decisions might increase attempts for court review and might lead to judicial rethinking of standards for review. What might develop raises a host of questions—from standing to ripeness to the scope of the APA—all of which are beyond the scope of this Article.

obligations under the APA.<sup>424</sup> In short, without significant rethinking of the legal rules under which courts review enforcement decisions or presidential direction generally—a project beyond the scope of this paper<sup>425</sup>—there is no reason to expect that this proposal would necessarily result in greater judicial review or less discretion for the Executive.

Nonetheless, reforms of the sort I urge could do significant work in channeling presidential power. First, expecting the President to articulate a reasonable basis in law for enforcement policy decisions actually allows the President significantly less latitude than the rule urged by several prominent scholars and presidents. Proponents of broader executive power have concluded that the only substantive restriction on presidential discretion is that it cannot be exercised contrary to law.<sup>426</sup> Under this view, minimal enforcement of a law with which the President disagrees raises no concern. The President is free to direct agencies to take such steps in any way he wishes, as long as Congress does not expressly forbid his choice—even if this means effective defeat of a statute's goals. A reasonableness standard sets a higher bar.

Second, expecting articulation of reasonable statutory rationales for enforcement (and nonenforcement) policy decisions can strengthen the process of political checks and root those checks in law. As numerous political scientists have shown, even when not held in

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<sup>424</sup> See *supra* note 35 (discussing distinction between legislative and nonlegislative rules).

<sup>425</sup> Katherine Watts argues for an expansion of arbitrary and capricious review to award “credit” to certain political influences that an agency transparently discloses and relies upon in its rulemaking record. Katherine A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 2 (2009). Elena Kagan has argued that courts should apply *Chevron* deference when presidential involvement “rises to a certain level of substantiality, as manifested in executive orders and directives, rulemaking records, and other objective indicia of decisionmaking processes.” Kagan, *supra* note 2, at 2377.

<sup>426</sup> Goldsmith & Manning, *supra* note 4, at 2309. President William Howard Taft relied on the Take Care Clause to support the notion that the President can act to advance federal interests without specific legal authority. See *TAFT*, *supra* note 387, at 78, 125 (supporting the notion, while recognizing that the President may not tell his employees to act *contra legem*). President Theodore Roosevelt, too, believed that the Take Care Clause meant that the President could do anything on behalf of the nation except what the Constitution and the laws expressly proscribed. THEODORE ROOSEVELT, *AN AUTOBIOGRAPHY* 352–53 (1929), cited in Lessig & Sunstein, *supra* note 290, at 63 n.256; Skowronek, *supra* note 94, at 2078 (describing Theodore Roosevelt's stewardship theory of the presidency). Even most unitary executive scholars, however, reject this theory in its strongest form. See CALABRESI & YOO, *supra* note 2, at 245 (distinguishing Theodore Roosevelt's stewardship theory from unitary executive theory, and claiming that the latter theory rejects the notion that presidents have inherent authority to act in the absence of a statute).

check by courts, presidents are significantly constrained by Congress, politics, and internal bureaucratic controls.<sup>427</sup> If presidents move too fast, they risk reversal or congressional oversight.<sup>428</sup> Presidents are constrained by public opinion as well, not only in election years but continually; they depend on public support for legitimacy and political power. Public opposition in one area can threaten other areas of presidential agendas.<sup>429</sup> The internal bureaucracy also provides important checks, in the form of agency general counsels, the OLC, and others.<sup>430</sup> Thus, it is simply not the case that executive tyranny will follow if there is no meaningful or practical external legal constraint on presidential directive or oversight power.<sup>431</sup> While presidents have strong incentives to push the ambiguities of the formal structure to expand their own powers and to advance their political agendas, their use of such authority is strategic and moderate. Should presidents move too quickly, too aggressively, or into the wrong areas at the wrong time, they face heavy political costs.<sup>432</sup>

By expecting presidents to defend the statutory bases for their discretionary enforcement decisions, we can enhance public, congressional, and bureaucratic debates. Indeed, congressional oversight, political checks, and internal controls can assess the statutory bases for presidential enforcement decisions better than they can examine the degree of coercion exercised by the President over agencies or evaluate a purely political decision unmoored from law.

Again, consider President Obama's DREAM Act directive.<sup>433</sup> This executive action raises different sets of questions. The first set relates to the degree of presidential coercion. Was it appropriate for the President to direct an agency, no less an enforcement agency, to adopt a particular policy? Did he exercise too much directive authority over officials who were better positioned to make the

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<sup>427</sup> See NEUSTADT, *supra* note 295, at 28–37 (arguing that the President ultimately has only the “power to persuade”); HOWELL, *supra* note 152, at 70–75, 101–35 (analyzing how and when Congress constrains the President).

<sup>428</sup> See Moe & Howell, *supra* note 180, at 856 (noting that overly aggressive action by the President can have political consequences).

<sup>429</sup> See *id.* (noting the role of public opinion).

<sup>430</sup> See *supra* note 333 and accompanying text (collecting literature on internal executive branch checks); cf. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 *YALE L.J.* 1256, 1261–62 (2006) (discussing the “internal law of administration” as consisting of internal instructions issued by higher level officials to control the exercise of discretion by their subordinates).

<sup>431</sup> Cf. ACKERMAN, *supra* note 2, at 1–12 (predicting a constitutional crisis arising from the unitary executive and catastrophic decline of democratic republican values).

<sup>432</sup> See Moe & Howell, *supra* note 180, at 856 (noting that overly aggressive action by the President can have political consequences).

<sup>433</sup> See *supra* notes 161–65 and accompanying text (discussing the President's DREAM Act directive).

decision and statutorily responsible for it? The second set of questions is substantive, but rooted in law. Was the President's direction consistent with the statute? Was it a reasonable interpretation of our immigration law?

The former set is where much of the academic literature on the unitary executive has focused. But the latter set of questions better reflects and engages the public debate. Indeed, statutory policy is where two Republican former DOJ officials focused their criticism.<sup>434</sup> Obama, they believe, crossed the line from permissible executive enforcement discretion to impermissible suspension of statutory requirements: He failed to interpret reasonably the statute that the Executive Branch was charged to enforce.<sup>435</sup> Disputes about substantive policies actually underlie most of the public criticisms of presidential control.<sup>436</sup>

Asking substantive and statutory questions also better enables internal checks. Agency officials will likely be more effective when they highlight substantive and statutory disagreements than when they argue about political interference.<sup>437</sup> Lawyers in the White House Counsel's Office, OLC, and agency general counsel offices, who review and respond to the directives of White House officials, can evaluate the legal basis for decisions. Although they can change an executive order's direction to a suggestion, in most cases they cannot monitor the degree of pressure communicated from the White House.

Finally, when focused on a President's enforcement choices as a matter of law and policy—and not as a matter of coercion—Congress is more likely to respond substantively. Institutionalized presidential enforcement can serve, in this way, as “prods” or “pleas.”<sup>438</sup> By focusing on the substance of presidential enforcement, while tethering that substance to law, we can strengthen internal checks, engage the public, and channel congressional reaction into lawmaking. Moving in this direction is particularly important in an era of legislative gridlock.

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<sup>434</sup> See *supra* note 413 and accompanying text (discussing the *Washington Post* editorial).

<sup>435</sup> Rivkin & Casey, *supra* note 413, at A19.

<sup>436</sup> Compare, e.g., Kimberley A. Strassel, *Obama's Imperial Presidency*, WALL ST. J., July 6, 2012, at A11 (arguing that President Obama exceeded executive power with the DREAM Act), with Editorial, *Fixing the Game*, N.Y. TIMES, Dec. 5, 2005, at A22 (arguing that President Bush exceeded executive power with enforcement of the Voting Rights Act).

<sup>437</sup> One historical example is the backlash from EPA line officials against Reagan's non-enforcement of environmental law. See *supra* note 120 and accompanying text (discussing Reagan's efforts and the resulting backlash).

<sup>438</sup> See Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 354 (2011) (arguing that “prods” and “pleas” are part of the separation of powers, along with “checks” and “balances”).

## CONCLUSION

Scholars have written volumes about presidential administration. It is not surprising that rulemaking, along with appointments and removals, has commanded the bulk of the attention from administrative law scholars, for this is where presidents have publicly focused and where courts have faced the thorniest and most difficult cases. When the gaze shifts to enforcement and problems of regulatory compliance, however, a different set of issues arises.

Focusing on the problem of enforcement, which typically occurs after the completion of rulemaking, trains our attention on the separation of functions among the branches and on the core duties of the Executive. Several scholars have written compellingly about the challenge, if not the impossibility, of trying to identify and separate governmental powers. Elizabeth Magill, for example, concludes that in the contested cases, “there is no principled way to distinguish between the relevant powers.”<sup>439</sup> But enforcement is, at least on the most basic level, an uncontested case: It is clearly an executive power. Under the Take Care Clause, the President has the obligation and the power to attend to enforcement generally, to oversee major policies of prosecutorial discretion, and to resolve, or oversee the resolution of, conflicts between agencies exercising enforcement authority. Rethinking the administrative apparatus of the White House—by providing for more institutionalized coordination of enforcement and bringing presidential enforcement decisions into the public light—would better achieve those goals.

This Article has outlined what more formal and transparent presidential enforcement could look like. Presidential intervention should extend to the situations in which increased presidential oversight is most justified—namely, where there is a need to coordinate and rationalize the web of statutes and set broad policy direction on issues of national importance. In most cases, presidential enforcement should promote information sharing and prescribe general principles, not particular outcomes. Case-by-case decisionmaking generally should remain insulated from presidential control. Furthermore, public disclosure of enforcement policy decisions is essential.

Of course, recognizing enforcement as a core executive function or thinking about the institutional design reforms that follow does not answer many of the difficult separation-of-powers questions related to enforcement. This paper has offered some initial thoughts to that end. As both a constitutional and normative matter, the President’s exercise of his enforcement power should be robust, yet constrained by

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<sup>439</sup> Magill, *supra* note 62, at 604.

law. Though he has great latitude to influence enforcement policy, the President also has an obligation to use his enforcement authority in a way that he can defend as consistent with the law. A focus on the statutory bases and policy content of presidential influence over agency enforcement discretion, as opposed to a focus on whether too much politics has infected law enforcement, provides a more effective check on presidential behavior, while still recognizing the value of energetic presidential action and the inevitability of politics in law.

Other challenging questions about presidential enforcement remain untouched. What doctrinal changes, if any, follow from more institutionalized presidential enforcement? For example, how could legal rules encourage greater disclosure of presidential enforcement decisions, and how could legal rules foster decisions more faithful to statutory objectives? Would these legal rules differ from those in other areas of presidential administration?

As for the relationship between the political branches, should Congress have less ability to insulate enforcement from presidential control than it has for rulemaking or administrative adjudication? Or does the permeability of the line between lawmaking and enforcement cut against these arguments? Should we rethink congressional or other standing rules to allow for more checks on presidential enforcement decisions?<sup>440</sup> Are there special due process concerns raised by presidential influence over enforcement?<sup>441</sup> Finally, what role should state, local, and private enforcers play, and how can coordination and centralization also recognize the value of devolution and local expertise?

In the end, given all the structural forces that encourage unilateral executive action, and given our basic constitutional structure, it is hard to imagine a world without presidential enforcement. Modern presidents have all engaged in it, albeit fitfully. By moving presidential enforcement out of the shadows, we can, with further attention to the preceding questions, better discipline its use, increasing the accountability and effectiveness of the federal government.

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<sup>440</sup> See Brianne J. Gorod, *Defending Executive Non-Defense and the Principal-Agent Problem*, 106 Nw. U. L. REV. 1201, 1232 n.138 (2012) (citing *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 888 (3d Cir. 1986); *Am. Fed'n of Gov't Emps. v. Pierce*, 697 F.2d 303, 305 (D.C. Cir. 1982)) (discussing the problems associated with congressional standing).

<sup>441</sup> As Gillian Metzger has noted, some internal separation-of-powers mechanisms “appear primarily animated by concerns about individual fairness and have a due process element—in particular, the division of functions within agencies and the separation of adjudication from legislative, investigatory, and enforcement activities.” Metzger, *supra* note 62, at 429.