Policy Making and the President's Enforcement Power♣

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After his party lost control of Congress, President Obama increasingly used selective enforcement of the law to shape public policy (Friess 2012). Most visibly, President Obama used his discretion over enforcement priorities to dramatically and unilaterally shape the nation's immigration policy. In June of 2012, after continued congressional gridlock and failure to pass significant immigration legislation, President Obama announced the administration's new policy of Deferred Action for Childhood Arrivals, commonly referred to as "DACA," which shielded as many as 1.8 million individuals from deportation. Two years later, after Congress again failed to pass immigration reform, President Obama expanded non-enforcement of the Immigration and Naturalization Act to provide "Deferred Action for Parents of Americans and Lawful Permanent Residents" (DAPA). Recipients of DAPA were also allowed to receive work permits. The program expanded deferred action to more than 3.6 million individuals, which, combined with DACA, expanded deferred action to over 5 million people, roughly fifty percent of the United States' unauthorized immigrant population.[1]

President Obama's decisions about how to enforce immigration laws, to prioritize criminals over children and law-abiding parents when enforcing immigration laws, is a vivid example of an underappreciated source of executive power—the enforcement power. Presidents have broad latitude to make decisions about how, when, and where to enforce the law. Administrative agencies implement scores of laws and rules, each mission requiring the allocation of attention and resources. No agencies have sufficient resources to adequately enforce every law within their jurisdiction. The Internal Revenue Service cannot audit every taxpayer, and the Occupational Safety and Health Administration cannot inspect every workplace. Law

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[1] On June 23, 2016, the Supreme Court reached a 4-4 decision in *United States v. Texas.* In *United States v. Texas* the Court allowed an injunction to halt DAPA and DACA (Denniston 2016). The Supreme Court's ruling ended President Obama's efforts to provide deportation relief for as many as five million people and deferred to the lower court ruling (Parlapiano and Park 2016).

enforcement agencies cannot investigate and prosecute every crime, and most would agree that some laws are more important to enforce than others (e.g., homicide vs. jaywalking). Presidents, with the consent of the courts, have long exercised significant executive discretion that exists within agencies to make enforcement choices (Price 2015; Cheh 2003; Johnsen 2000).

Scholars have studied numerous ways presidents influence policymaking administratively, including formal ways such as executive orders or rules, but scholarship on enforcement choices made after laws are enacted and rules promulgated is still emerging. The virtue of studying executive orders and rules is that formal choices are easy to observe. These examples are published in the *Federal Register*. However, as most presidency scholars recognize, presidents also influence policy through other common executive actions. Presidents start new initiatives, interpret existing authority, set priorities, and allocate resources like time, money, and personnel. These forms of policymaking are harder to observe but are incredibly important. Existing scholarship on enforcement choices provides details about the legal contours of this power and presents normative arguments about the proper boundaries of its use. This work is bolstered by a number of informative case studies. However, the lack of systematic data similar to that available for executive orders or signing statements has presented an obstacle to understanding this important source of executive power.

In this paper, we explore the president's enforcement power with new data drawn from a survey of more than 3,500 federal executives (Richardson 2015). The survey included questions about the extent of agency discretion over enforcement choices and the amount of influence exercised by the president and Congress on these choices. These data allow us to determine where presidents are exerting influence and where they are not, while also accounting for the influence of Congress and cases whether neither branch is exerting much influence. Our results

show reveal that executives in agencies implementing policies that are presidential priorities and executives in agencies designed to be amenable to presidential direction (e.g., Executive Office of the President, executive department) are the most likely to report significant White House influence over enforcement choices. Executives in liberal agencies report slightly more White House influence than executives in conservative agencies, except in cases where an agency is implementing a policy that is a presidential priority. We conclude that the enforcement power is an important source of policymaking power and should be numbered among the powers that presidents employ to accomplish their policy and political goals.

Presidential Use of Enforcement Discretion

Presidential use of enforcement discretion to shape policy dates back to the beginning of the nation's history. Notable cases include efforts by Presidents Adams and Jefferson to selectively enforce the Alien and Sedition Acts and the Embargo Act, respectively.[2] These actions drew the attention of elected officials and the courts and set the stage for key debates about the president's enforcement power. Since this early history, scholars have argued over the normative desirability of presidential use of enforcement discretion and described presidential use of the enforcement power in specific cases. However, no empirical work attempts to describe

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[2] President John Adams used selective enforcement of the law to decide who would face prosecution under the Sedition Act of 1798. Despite promising to minimize the president's authority, President Jefferson expanded the power of the Presidency after assuming office by refusing to enforce existing law that he did not support. Most famously, President Jefferson directed Secretary of State Madison not to enforce the law by withholding William Marbury's commission to become Justice of the Peace. Later in his administration, President Jefferson used his enforcement discretion to determine who would and would not be subject to the rules established under the Embargo Act of 1808. Later, President Jackson refused to enforce policy that he did not support after the Supreme Court mandated that the United States adhere to Indian treaties. Disagreement over the proper use of enforcement discretion continued into much of the early 19th century with *Kendall v. United States* in 1838. In *Kendall*, the Supreme Court ruled that President Van Buren could not refuse to enforce statutes for the sole reason that it did not align with his view about what the law should be. *Kendall* stated that if a president were to ignore his duty to enforce the law, then he would be nullifying the statute, which is an abdication of the law and an abuse of the separation of powers, especially the take care clause (Cheh 2003).

the contours of presidential intervention in enforcement choices across the executive establishment or explain variation in its use.

Scholars agree that presidents must have some ability to influence enforcement choices, but disagree about the president's independent authority to direct enforcement without the consent of Congress. A number of scholars point to the need for presidential enforcement discretion due to regular resource constraints that necessitate prioritization, the enactment of unconstitutional statutes (which should not be enforced), agency expertise about how best to enforce the law, and the need to establish coherence in the law (e.g., Andrias 2013; Johnsen 2000). Immigration law provides a good example. Immigration and Customs Enforcement (ICE) only has enough resources to deport four percent of undocumented immigrants. This raises the question of who is best equipped to decide how best to enforce the law given these constraints. Proponents of expansive presidential power argue that the officials best equipped to determine enforcement choices are those closest to the policy and accountable to the public for implementation. Presidents and the officials they hold accountable understand the tradeoffs involved in prioritizing some types of deportation efforts over others and how best to synchronize deportation requirements with other immigration laws. Presidential exercises of enforcement discretion also allow for electoral accountability in policymaking (Cox and Rodriquez 2015). If people do not like the executive's choices, they can remove him or her from office.

Proponents of limiting executive enforcement discretion, however, argue that a president must enforce the law to the full extent of their power, even when presidents face limitations in policy implementation, such as resource restraints (Delahunty and Yoo 2013; Price 2015). These scholars argue that the Constitution provides the power to set enforcement priorities to Congress

rather than the president (see, e.g., Strauss 2000). They worry that too much discretion will erode the separation of powers and establish a dangerous precedent of unilateral policy making. Too much enforcement power can also advantage the president in inter-branch negotiations during lawmaking and limit public accountability. Price (2015), for example, argues that presidential enforcement discretion leads to the non-enforcement of law. This weakens the expectation that the law will be enforced in the future and reduces the incentives for legislators to work together to reach deals and enact significant policy reform through legislation. The ability to forgo enforcement also gives the president significant negotiating leverage with Congress by providing a post-enactment veto. Too much presidential discretion to enforce the law also reduces public accountability since most enforcement decisions are not reported in the news (Deacon 2010).[3]

The existing empirical research on enforcement power includes a number of illuminating case studies, but provide little perspective on this phenomenon across the executive establishment. Hedge (2009) and Deacon (2010), for example, examine how the administration of George W. Bush used enforcement discretion through guidance documents and the placement of political appointees to reduce the number of enforcement actions that were brought forward by the Food and Drug Administration (FDA) from 2000 to 2005 by more than fifty percent.[4] Liu (2009) and Price (2015) detail how the Bush administration effectively weakened civil rights laws intended to protect African-Americans by shifting the enforcement priorities of the Civil Rights Division of the Justice Department to prioritize enforcing statutes that protected Hispanic Americans. A number of scholars detailed how the Reagan administration limited EPA activities

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[3] Deacon fears that pursuing large-scale policy goals through enforcement lessens the chances that the press, or congressional investigators, will report on the issue. Deacon also notes that any discretion given to the president and the executive branch after *Heckler v. Chaney* is predicated on enforcement decisions being transparent, which is not often the case.

[4] Harris, Gardiner. 2006. "Top Democrat Finds F.D.A's Efforts Have Plunged." June 27, 2006. (http://www.nytimes.com/2006/06/27/health/policy/27fda.html), accessed December 1, 2016.

through enforcement choices (e.g., Durant 1993; Mintz 2012a; Price 2015). Price relates how Reagan limited Superfund enforcement by dictating that EPA regional offices could not spend more than $50,000 without the approval of the agency's assistant administrator for enforcement. Reagan also reorganized the EPA, weakened the Office of Enforcement, and cut the budget that helped pay for on the ground enforcement projects. These works offer valuable insights into the mechanisms by which presidents influence enforcement and the legal contours of such actions but do not empirically examine when and where presidents attempt to control enforcement choices.

Where do President's Influence Enforcement Priorities?

When a new president assumes office, they confront an immense executive establishment implementing laws enacted by previous Congresses and presidents. To implement existing law, previous presidents have issued orders, directives, or memoranda. Then, agencies have independently interpreted statutes via formal rules, adjudication, written guidance, or less formal means (Mintz 2012). Agencies enforce formal policies through regularized procedures and processes created to govern things like inspections, audits, and application criteria. This routinization is mirrored by the internal allocation of budgets and personnel within and across agency structures (e.g., offices and units). The machinery of government, embodied in people, job descriptions, written rules, and standard operating procedures will continue to operate with or without the president's oversight. New presidents can only influence the exercise of discretion embodied in formal agency policies or day to day discretionary choices by purposefully intervening.

Of course, presidents do attempt to influence this activity, starting before the election with transition planning and continuing throughout the course of their terms. Presidents engage in pre-inauguration transition planning to learn about agency activity and direct agencies toward the president's policy and political goals (Burke 2000, 2004; Kumar 2015; Pfiffner 1996). This planning helps presidents learn about hundreds of agencies, their statutory responsibilities and the programs and procedures in place to carry those out. Transition teams also learn about emergent efforts to implement statutes, from proposed rules to new ideas for programs and activities to fulfill agency missions. Presidents select personnel for the Executive Office of the President and agency management teams that can help reorient agency activities where necessary (see, e.g., Mackenzie 1981; Weko 1995; Wood and Waterman 1994).

Presidential Strategy in Enforcement

Presidents, aided by the agency review teams that prepare the new administration, will have more or less ambitious plans for different agencies. Due to limitations in its own resources and the enormity of the executive establishment, the White House must prioritize.[5] The president also leave some agencies more or less alone because of disinterest, satisfaction with the status quo, or because efforts to dramatically rework activity in every agency would likely derail presidential efforts to secure changes in any. For example, President Reagan's efforts to alter

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[5] Modern presidents have increased influence over enforcement choices because of changes in administrative law, the growth in the institutional presidency, and Congress's own willingness to defer to the executive. The president's ability to oversee and coordinate enforcement grew during the Progressive and New Deal periods (Andrias 2013). Centralization within the Executive Office of the President (EOP) and the creation of the Bureau of the Budget/Office of Management and Budget (OMB) have allowed the president more institutional resources to gain direct control over enforcement decisions. Congress's move towards lower congressional staff pay and smaller staffs have allowed the executive more authority over enforcement decisions as Congress routinely fails to write specific, well-written statutes that could limit the executive's ability to dictate enforcement decisions (Cox and Rodriquez 2015). Congress's weakened ability to pass effective legislation has led to the further buildup of the administrative state, more budgetary discretion, and the passage of conflicting and interdependent statutes, which provide the president with the ability to decide which statutes to prioritize in implementation (Barkow 2012; Mintz 2012b).

enforcement activities in the Environmental Protection Agency spilled over into his efforts to accomplish other policy goals partly by sensitizing Congress and interest groups to presidential deregulatory efforts in other contexts.

Given presidents' limitations, they naturally allocate effort toward agencies where the potential benefits are greatest and the costs of intervening successfully are lowest. Obviously, presidents prioritize some policies and agencies over others because of the centrality of those issues to the president's campaign or their party. For example, in the same way that President Obama was concerned about the implementation of No Child Left Behind, President-elect Trump is likely to be concerned about immigration policy. It is hard to imagine a Trump presidency where Immigration and Customs Enforcement does not change its policy toward deportations.

> H1: Executives in agencies implementing policies that are presidential priorities
> will report more presidential influence than other agencies.

Sometimes the most important policies, from the perspective of a new president are those that are most ideologically disputed. For example, Republicans and Democrats often differ dramatically on the appropriate enforcement choices of the regulatory agencies such as the Occupational Safety and Health Administration or the Natural Resources Conservation Service. Should these policies reflect the interests or business and development or workers and the environment, respectively? When there is discretion in the law, how should enforcement be shaded? This difference in views by itself may make the benefits of enforcement changes higher for a new president.

> H2a (Ideology and benefits): Executives in agencies whose views differ
> dramatically from the president will report more presidential influence than
> agencies with views similar to the president.

On the other hand, the costs of changing behavior in agencies with views that differ from the president may also be higher as the president may have to rely on formal tools. Once a president determines the importance of various policies, they must consider the preexisting agency constraints, which will make influencing enforcement choices more difficult. For example, a president must determine if an agency's culture, structure, operating procedures, and policy preferences warrant presidential intervention, given political and resource limitations that are necessary to alter agency behavior. A president is more likely to pressure agencies to act if an agency shares the same policy views as the president, because only informal, low-cost means of communication are needed to shape agency level decision-making. Presidents are also more likely to pressure agencies if policy action is politically non-controversial and fiscally inexpensive. Sometimes agencies will willingly make changes to the ways they conduct business, engaging in the costly work of changing informal emphases, altering long-standing policies, or writing new guidance or rules. Of course, this is made easier when presidential efforts are accompanied by increased agency budgets and public attention for the agency's executives and activities.

Other agencies, however, will resist when presidents try to force new policies or priorities, therefore forcing presidents to rely on more formal means to shape enforcement decisions. Workers at each stage will explain why such change does not make sense, find reasons for caution and delay, advocate more study and consultation, and generally drag their feet. Presidents facing resistant agencies rely on more formal, legally binding, means to shape enforcement decisions within agencies (Kagan 2015). Presidents are often forced to use formal means when agencies do not share the president's enforcement preferences because of political disagreements. For example, a liberal president often must resort to legally binding tools to

change enforcement priorities in a conservative agency that is staffed with conservative personnel. Moreover, formal means may be required if agencies are hesitant to enact change because it would require a lot of time and resources to implement. Often, formal means are necessary if Congress exerts influence over an agency, either through the appropriations process or through congressional oversight. Formal means are also necessary if an agency is independent or if it is structurally insulated to resist presidential pressure. Finally, formal means are needed if agencies lack the political incentive to implement the president's enforcement priorities as change may be opposed by existing constituencies.

These formal means may include structurally changing the personnel make-up of agencies, altering agency procedure making processes, changing programs, expediting new rules and regulations, and pushing for legislative changes that force agencies to change how they enforce the law. Presidents can employ these formal means and gain enforcement discretion by forcing frontline enforcement officials to enforce the law in a way that reflects their priorities by establishing specific hiring guidelines for frontline agents, such as sharing the president's policy preferences (Rourke 1972). By staffing agencies with personnel that share the president's policy preferences, the president can ensure compliance with their enforcement priorities.[6] The president may also alter the procedural norms of agencies by placing political appointees in enforcement roles.[7] Finally, the president can reduce frontline enforcement autonomy by establishing clear factors for when and how to utilize discretion and how to weigh each factor (Barkow 2016).

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[6] A prominent example of this occurred when low level ICE officials did not share President Obama's policy preference and resisted DACA and DAPA. Moreover, during the Obama Administration, several United States Attorneys wrote a letter to urge Congress to ignore the Attorney General's calls for legislation reforming mandatory minimum sentencing laws because the attorneys believed reform could limit their ability to enforce the law (Kagan 2015).

[7] Pear, Robert. "Bush Directive Increases Sway on Regulation." Jan. 29, 2007. (http://www.nytimes.com/2007/01/30/washington/30rules.html), accessed Dec. 1, 2016.

A presidentially-driven change in agency behavior can vary from low cost to high cost–from an informal change in emphases (e.g. focus more on this type of violation and less on this type) to a more formal change in the number of people conducting inspections to a very concrete change in formal policy (e.g., written guidance, rules, executive orders). From the president's perspective, the costs of intervention are lowest when they can accomplish their goals with informal direction. More time and effort is required to influence the securing and allocation of budgets. Even more difficult is changing formal policy, from long-standing procedures to more formal guidance or agency rules (Rudalevige 2015).

> H2b (Ideology and costs): Executives in agencies whose views differ dramatically from the president will report more presidential influence than agencies with views similar to the president.

We expect that an agency being ideologically aligned with the president could have two effects on presidential influence over enforcement: one positive, and one negative. Ideologically similar agencies are easier to influence, so presidents that target changes in agencies that share the president's ideology may get the most out of intervention, with only limited effort. Ideologically distinct agencies may be especially desirable targets for presidential influence, as their current enforcement priorities diverge from the president's preferred priorities. While these effects are opposite, both can exist at the same time. It seems most likely that presidents must weigh both factors– balancing the desire to spend energy on desirable changes (agencies with divergent ideology) with the desire to spend energy on easy changes (agencies with convergent ideology).

For some agencies, the idea of presidential influence over enforcement is much less relevant. Previous congresses and presidents have designed these agencies to be insulated from the interference of elected officials through features such as fixed and staggered terms, party-

balancing requirements, and streams of revenue outside the appropriations process (Lewis 2003;

Moe 1985; Selin 2015). Presidents may prefer to exert influence over enforcement choices in

agencies such as the Consumer Financial Protection Bureau or the Federal Communications

Commission, but their primary source of influence is the limited number of appointments they

can make to the leadership of these agencies, a power they share with the Senate. Various

structural features limit presidential and congressional influence over agency decision making

(Lewis 2003). Presidents have the ability to select commissioners and usually chairs of

commissions but generally have fewer appointments, and their other means of influence are

circumscribed (e.g., budgets).

> H3: Executive in agencies designed to be insulated from political influence will
> report less presidential influence over enforcement choices.

In total, presidents enter office with the task of deciding where to focus their efforts to

dictate policy enforcement. A new president must consider what agencies oversee policies that

are important to their agenda, either because of electoral or ideological concerns. Once a

president determines the importance of various policies, they must consider the preexisting

agency constraints such as agency receptiveness to presidential direction and agency structure,

which will make policy change more difficult.

Case Study: President Obama and Immigration Law

Since 2001, Congress has considered "Dream Act" legislation to provide deportation

relief to undocumented children. Congress considered the legislation in 2006, 2007, 2009, 2010,

and again in 2011 after President Obama pushed for its passage in his State of the Union address.

Despite the president's push and bipartisan support, Congress failed to enact the proposed

legislation.

In June of 2012, President Obama responded by announcing the administration's new policy of Deferred Action for Childhood Arrivals, commonly referred to as "DACA," which shielded as many as 1.8 million individuals from deportation. The Immigration and Nationality Act (INA) dictates that immigrants that are unlawfully in the United States should be removed if they have been convicted of breaking certain laws. The administration argued that the decision to not enforce provisions of the INA and to halt deportations for childhood arrivals was legal because the president had prosecutorial discretion. The White House pointed to Congress's failure to write precise legislation and provide enough resources for Immigration and Customs Enforcement (ICE) to carry out its mission of deporting undocumented immigrants. Over the past three decades, Congress has established different congressional priorities about who the INA should apply to and who it should not, such as allowing families to stay together. Moreover, Congress only appropriates a fraction of the needed resources for ICE to remove undocumented immigrants. Under its current budget, ICE can only remove about 400,000 illegal immigrants who either entered the country unlawfully or overstayed their visa, which is about 3 percent to 4 percent of the nation's illegal immigrant population. To fully enforce the INA, ICE's funding would need to increase twentyfold.

Prior to the president's actions in DACA, frontline ICE officials were able to make judgment calls about when to exercise discretion. For example, after June 17, 2011, frontline ICE agents relied on criteria laid out in ICE Director John Morton's memos. Morton provided a list of nineteen factors for ICE agents to consider when deciding to pursue a deportation case. Despite an exhaustive list of factors, most were vague, and the various factors were all weighed the same.[8]

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[8] Navarrette, Ruben. "Obama's confused policy on deportations," October 7, 2011. (http://www.cnn.com/2011/10/07/opinion/navarrette-deportations-memo/), accessed 11/2/2016.

The president's action changed the criteria outlined in the Morton memos. In June 2012, the president and Homeland Security Secretary instructed ICE officials to "defer action" against "young people who were brought to this country as children and know only this country as home."[9] Instead of targeting children for deportation, Secretary Janet Napolitano instructed ICE agents to prioritize "identifying and removing criminal aliens who pose a threat to public safety and targeting employers who knowingly and repeatedly break the law."[10] Under the new guidelines, ICE agents were instructed to halt deportations for individuals that entered the United States before their sixteenth birthday; resided in the United States for at least five years; were a student, graduate, or veteran; did not have a significant criminal record or pose a national security threat; and were thirty years old or younger. Deferred action status was to then be granted for two years and renewed every two years thereafter. President Obama was able to implement the policy of deferred action by dictating clear and specific guidelines for enforcement. In the case of DACA and DAPA, the president and the Secretary of Homeland Security, who oversaw immigration policy, shared policy preferences. With no daylight between their positions, the President and the Secretary were able to establish a list of specific factors that would make a deportation case a low or non-priority.

Two years later, after Congress again failed to pass immigration reform, President Obama expanded non-enforcement of the INA to provide "Deferred Action for Parents of Americans and Lawful Permanent Residents" (DAPA).[11] Under DAPA, ICE deferred deportations of

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[9] The Morton memos still allowed front-line ICE agents considerable enforcement discretion until November 2014 when the memos were replaced by more specific enforcement priorities which laid out three priority groups for immigration enforcement. By explicitly dictating when ICE agents should enforce the law, the president was able to extend his control over immigration enforcement policy.

[10] DHS. "Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities" June 15, 2012. (https://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low), accessed December 1, 2016.

[11] The administration intended to shape immigration enforcement priorities through more informal means. Namely the Morton memos by ICE Director John Morton issued on July 20, 2011 which laid out a series of criteria to

unauthorized immigrants that resided in the United States and had children that were United States citizens or held green cards (Shear 2014). Recipients of DAPA were also allowed to receive work permits. The program expanded deferred action to more than 3.6 million individuals, which, combined with DACA, expanded deferred action to over 5 million people, roughly fifty percent of the United States' unauthorized immigrant population.

To effectively shape his immigration policy on the ground, the president changed the personnel makeup of ICE. To ensure that his enforcement priorities were followed in the field, the Obama administration hired over 1000 new ICE agents that were more sympathetic to the president's policy to handle DACA claims to circumvent lower level DHS officials that did not share the president's policy preference. Indeed, the union representing border patrol agents lobbied against the enactment of the DREAM Act (Kagan 2015). The president was also able to circumvent the congressional appropriations process, because the new ICE agents were hired using self-supporting fees, which prevented Congress from halting policy implementation by cutting funding.

In June 2016, President Obama's immigration actions were halted by the U.S. Supreme Court decision in *United States v. Texas* on the grounds that DACA and DAPA violated the Administrative Procedure Act's notice and comment requirements for rules. The decision leaves that status of the president's enforcement power unclear but the episode illustrates the president's willingness to rely on enforcement to shape policy. Since his party lost control of Congress in 2011, President Obama shifted his administration's attention to using selective enforcement of the law to shape public policy (Friess 2012).

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consider before proceeding with deportations. However, frontline ICE officers balked at the memo's suggestions, which led President Obama to cement DAPA through executive order because the executive order would be perceived to be more binding.

The case of immigration law highlights a number of features of the strategy behind using the enforcement power. First, while the policy and electoral benefits of using his enforcement power to change immigration policy were high, the costs were also high. The president created the new programs, DACA and DAPA, through executive order because of resistance within ICE to the president's views on immigration.[12] Second, the president did not pursue DACA and DAPA type changes across the board. Rather, he focused his attention on a priority issue. Third, his actions were politically costly. DACA and DAPA were struck down by the lower courts and were a significant source of contention with members of Congress and during the 2016 election. This case illustrates how presidents can influence enforcement, but they must do so judiciously, carefully weighing the likely costs and benefits and one of the costs can be difficult publicity and political cost.

Data, Variables, and Methods

To describe the extent of presidential influence over enforcement choices, we use new data from a 2014 survey of 3,551 appointed and career federal executives from across the executive establishment (Richardson 2015).[13] The survey targeted all components of the executive establishment that were headed by a Senate-confirmed appointee whose functions were not exclusively advisory (Lewis and Selin 2012). Scholarship agencies, regional agencies, and non-profits and cooperatives were also excluded. Within agencies the survey was sent to all

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[12] The unions for Border Patrol and Customs Enforcement and ICE publicly endorsed Donald Trump during the campaign, and ICE union testified against the DREAM Act.

[13] The survey sample was drawn from the *Federal Yellow Book* and the survey was implemented by the Princeton Survey Research Center. Surveys were sent to 14,698 executives and the response rate was 24 percent, 18 percent for appointees and 25 percent for career executives. Of the 3,551, 586 answered via paper survey and the remainder took the online version.

political appointees[14], all career members of the Senior Executive Service, U.S. based members

of the Senior Foreign Service, and other high-level executives that ran programs and agencies.[15]

The survey included a number of questions about the backgrounds, experiences, and

political views of federal executives, including questions about enforcement discretion and

influence. Importantly, the survey asked the following questions about enforcement:

> How much discretion does [your agency] have over the following aspects of its
> management environment? Enforcement priorities [None (0), Little (1), Some (2),
> A good bit (3), A great deal (4), Don't know]

> How much direct influence does the president/White House exert over the
> following decisions in [your agency]? Enforcement priorities [None (0), Little (1),
> Some (2), A good bit (3), A great deal (4), Don't know]

> How much direct influence does the Congress (e.g., members, committees,
> leaders) exert over the following decisions in [your agency]? Enforcement
> priorities [None (0), Little (1), Some (2), A good bit (3), A great deal (4), Don't
> know]

Average answers to these questions across agencies provide a useful way of measuring the hard

to observe concept of enforcement discretion. The mean agency response to the first question

(i.e., "How much discretion does [your agency] have") is 2.8 (SD 0.94; min 0, max 4) and the

agency median is 3 or "a good bit." In other words, respondents in the median agency report a

notable amount of discretion in determining enforcement priorities. When asked about the

influence of the White House and Congress over enforcement priorities, respondents reported on

average between Little (1) and Some (2) influence by elected officials over enforcement

priorities.[16]

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[14] Specifically, the survey was sent to all Senate-confirmed, other presidential appointees not requiring Senate confirmation, non-career SES, and Schedule C appointees in the instrumentalities of the United States government described in this section.

[15] Among other career executives, the survey was sent to executives comparable to members of the SES in agencies without SES members, program and agency managers at the GS 14, 15 level with specific job functions as listed in the *Federal Yellow Book*.

[16] The agency average presidential influence is 1.48 (SD 0.88; min 0, max 4) and the average congressional influence is 1.78 (SD 0.87; min 0, max 4).
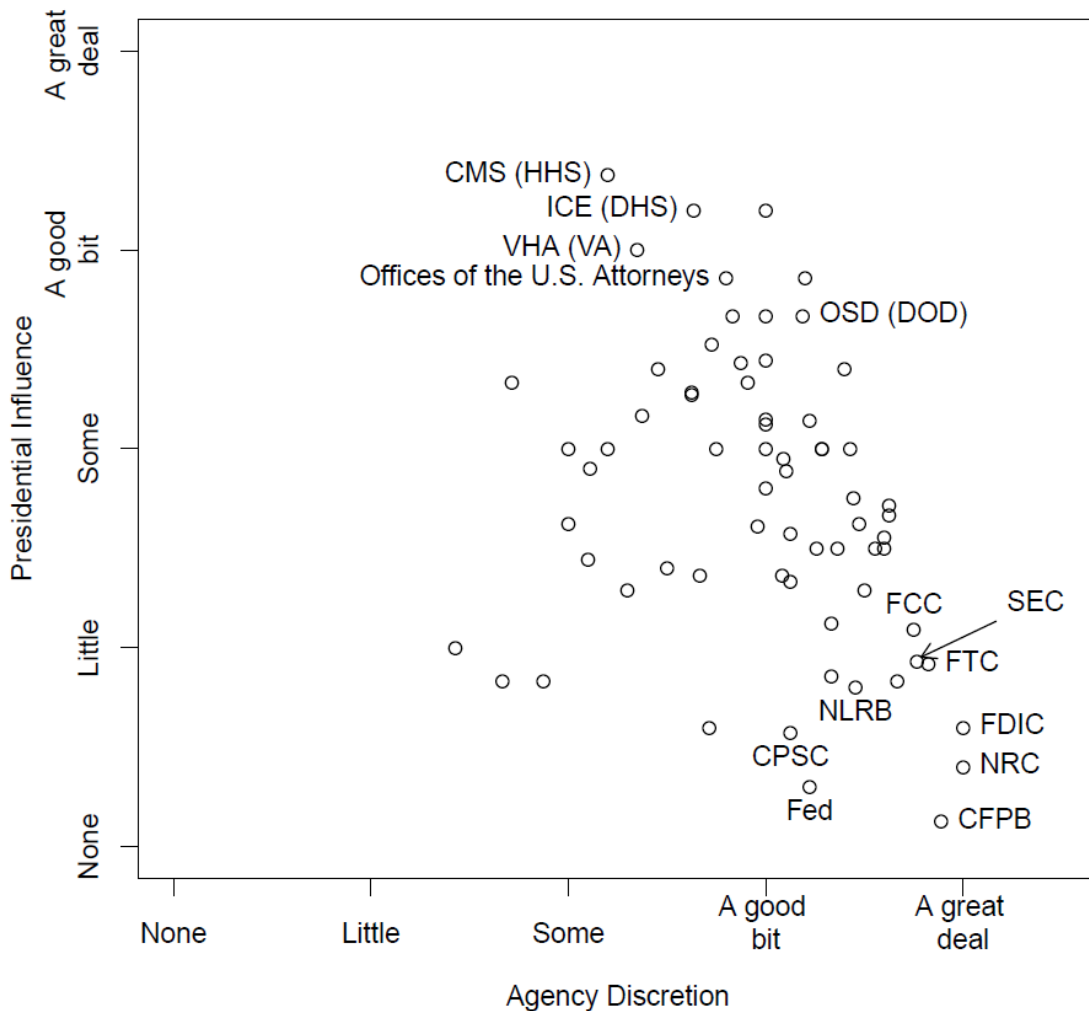
Enforcement Priorities

Figure 1. Agency Average Responses to Questions about Agency Enforcement Discretion and Presidential Influence Over Enforcement Choices, 2014. Source: Survey on the Future of Government Service.

In Figure 1 we graph responses to the questions about enforcement discretion and presidential influence. Each dot represents an average agency response to those questions. Responses further to the right indicate more agency discretion over enforcement priorities and responses higher on the graph indicate more presidential/White House influence over enforcement priorities. Notably, agencies such as the Centers for Medicare and Medicaid Services (Affordable Care Act), Immigration and Customs Enforcement (Immigration), and the Veterans Health Administration (Veterans hospital scandal) report the most presidential

influence. These agencies are responsible for implementing policies on the president's agenda such as the Affordable Care Act, DACA, and veterans health care. In addition, respondents in most independent regulatory commissions such as the Consumer Product Safety Commission and the National Labor Relations Board report high-levels of discretion over enforcement priorities but little White House influence. This is *prima facie* evidence that independent agencies are less susceptible to presidential efforts to change enforcement priorities.

Enforcement Priorities
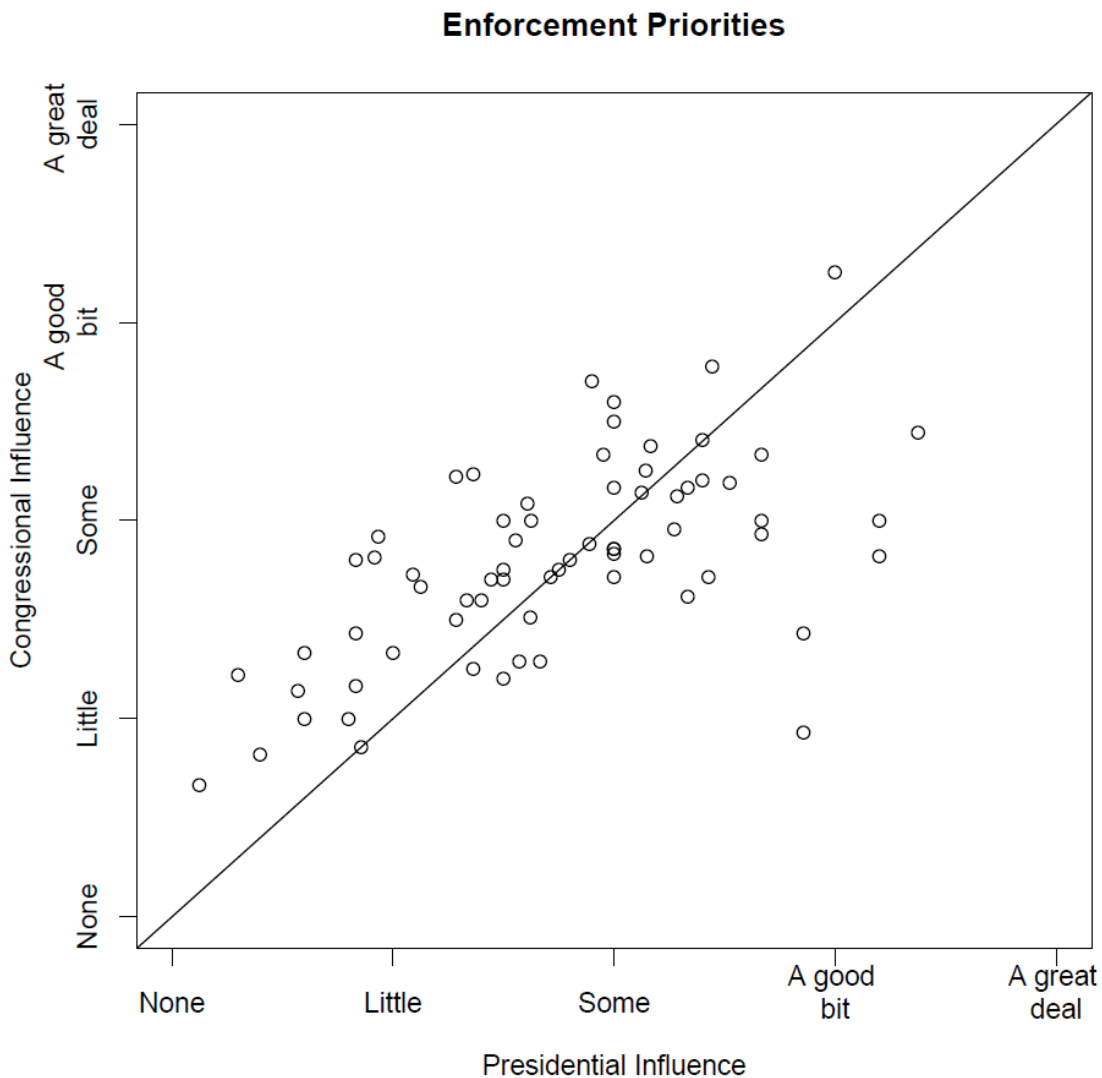
Figure 2. Agency Average Responses to Questions about Presidential and Congressional Influence Over Agency Enforcement Choices, 2014. Source: Survey on the Future of Government Service.

One perhaps surprising fact about responses to the questions about enforcement priorities is that respondents report more congressional than presidential influence on average. Figure 2 includes a graph of agency average responses to questions about presidential versus congressional influence over enforcement priorities. The figure shows a high correlation among responses to the question, suggesting that agencies attracting presidential attention are also attracting congressional attention. The large number of agencies above the 45-degree line reflect the fact that a greater number of agencies report higher levels of congressional than presidential influence. Still, there are a significant number of agencies below the line, indicating that respondents in these agencies reported more presidential influence. Collectively, the data suggest that there is significant variation among agencies and that responses to these questions are likely correlated with one another.

Key Independent Variables

To disentangle the forces that explain presidential influence from congressional influence we estimate models accounting for factors described above. First, we include an indicator for whether or not an agency implements a policy that is a presidential priority in the year of the survey, either something worthy of mention in the State of the Union or something that is a priority because of a visible public failure (0,1; 20%). Specifically, we coded all agencies whose policy issues were mentioned in the 2014 State of the Union with a 1.[17] We also coded agencies

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[17] To identify 2014 priorities, we used the NPR article shown here (http://www.npr.org/sections/itsallpolitics/2014/01/28/267939585/inside-the-state-of-the-union-what-the-president-proposed, accessed December 21, 2015). This article described the major policy issues and provided some background and context. After this, we did research on each policy area/proposal to identify the agencies involved in implementation, either through rulemaking or enforcement. For example, when the president described efforts to raise the minimum wage for contract employees, this was carried out by the Wage and Hour Division of the Department of Labor. We coded the Wage and Hour Division and Office of the Secretary of Labor with a 1. In the case of specific bureaus in larger departments, we also identified the Office of the Secretary as relevant. In each

with a 1 if the agency was involved in a visible public failure during the Obama Administration, using data from Light's (2014) work on government failure. Among agencies coded as presidential priorities, the average reported presidential influence by agency, which varies from 0 (None) to 4 (A great deal) is 2.20, compared to 1.33 for agencies not listed as a presidential priority. Executives working in agencies whose policies were mentioned in the State of the Union or agencies that experienced large visible failures during the Obama Administration report more presidential influence than other agencies.

To account for ideological differences among agencies we use agency ideology estimates generated by Richardson et al. (2016). Richardson et al. (2016) collected the expert evaluations of more than 1,500 federal executives with direct experience with federal agencies about the ideology of agencies. They analyze the responses using a statistical measurement model to account for inter-executive variation and generate estimates for 165 different agencies in the executive establishment.[18] We have two different expectations about the influence of ideology. On the one hand, agencies with divergent preferences (i.e., conservative agencies under Obama) would seem the most attractive for President Obama to target. On the other hand, the costs of influencing enforcement in such agencies is also highest since presidents are most likely to encounter resistance. To see whether the effect of ideology depends upon the importance of the agency to the president we also include an interaction of the measure of presidential priority with agency ideology.

In Figure 3 we include graphs of reported White House influence over enforcement choices and the ideology of agencies by whether or not the agency is a presidential priority. The

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case, we tried to find a helpful source to justify the identification of the agencies. Full details are included in Appendix B.

[18] See http://www.mrichardson.info/research, last accessed December 26, 2016.

figure shows that respondents working in agencies whose policies are a presidential priority are more likely to report presidential influence. The figure also suggests that the effect of ideology may be contingent on whether or not the agency is a presidential priority. For agencies that are not on the president's public agenda, ideology either has no effect or the effect of ideology is slightly negative. A negative effect suggests that in low priority agencies, the president intervenes where intervention is easiest. In higher priority agencies, however, executives in conservative agencies report significantly more presidential influence. Presidents may be more likely to target conservative agencies but only in cases where their policies are important for the president's agenda.
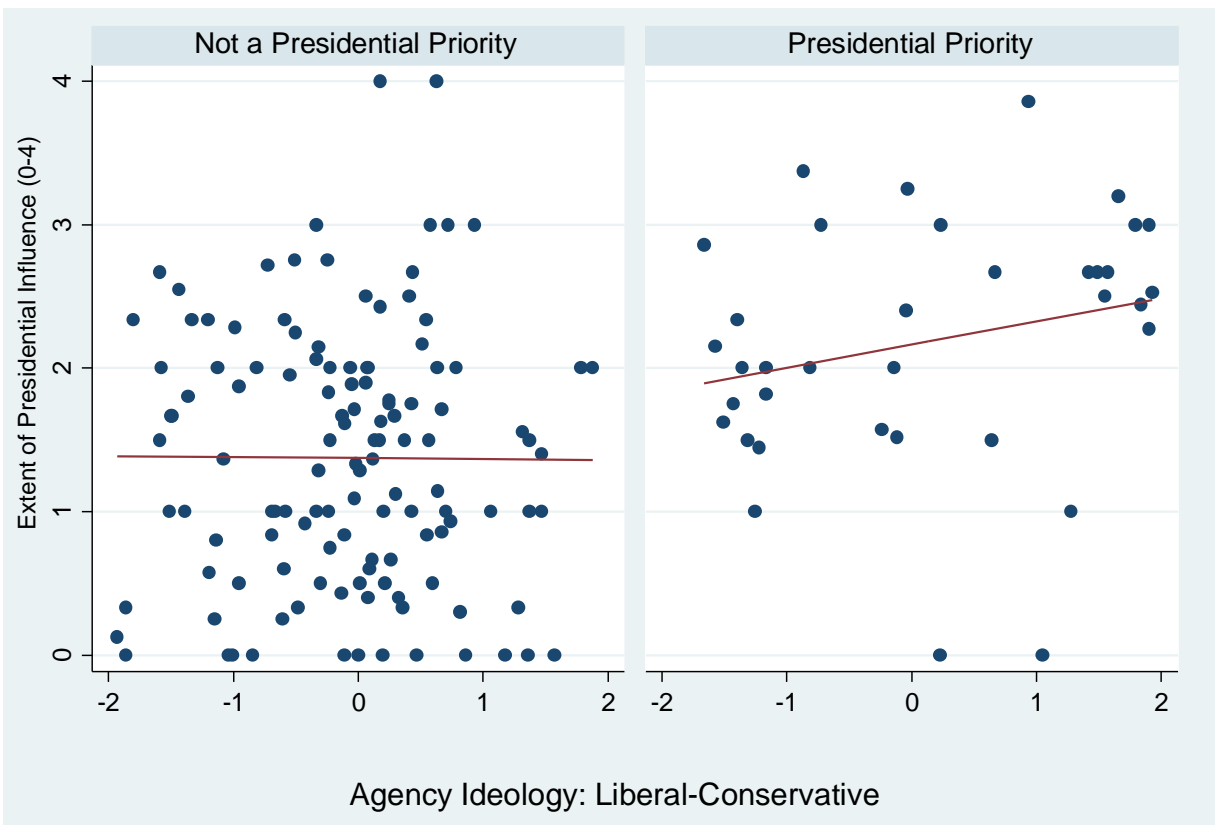
Figure 3: Bivariate Relationship Between Agency Average Responses to Questions about Presidential Influence Over Agency Enforcement Choices and Agency Ideology, by Presidential Priority (0,1), 2014. Source: Survey on the Future of Government Service.

To measure differences in agency structure we include indicators for agencies in the Executive Office of the President (0,1; 3%) or executive departments (0,1; 70%) since such agencies are designed to be amenable to presidential influence.[19] We expect that insulated agencies should report less presidential influence. Indeed, the bivariate evidence indicates that agencies in the EOP and the executive departments report more presidential influence on average, 2.28 and 1.71, respectively. This is compared to an average of 0.97 for other agencies. While agencies report a significant amount of discretion in setting enforcement priorities, presidents are able to direct this discretion in some agencies more than others.

Controls

To account for differences among respondents we include the average proportion of respondents working in Washington, DC (0.82; SD 0.24; min 0.01, max 1.0), the average years of agency experience (14.3; SD 6.21; min 0, max 40). Our expectation is that that agencies with higher proportions of respondents outside Washington, DC will report less presidential influence over their choices, as will respondents with more agency experience. We have also estimated models for a host of other factors including the structure of congressional oversight and the size of the agency but the substantive conclusions are robust to specification.

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[19] We have also estimated models using agency insulation measures from Selin (2015). Selin uses and IRT model to generate numerical estimates of agency political insulation based upon formal agency characteristics (e.g., fixed terms, omission from OMB budget review, etc.). These estimates measure insulation on two dimensions, insulation related to personnel selection (e.g., fixed terms for appointees, party balancing; Mean 0.05, SD 0.94, Min -0.79, Max 2.35) and insulation related to policy review by bodies outside the agency (e.g., ability to bypass OMB with budget submission; Mean 0.16, SD 1.01, Min -0.99, Max 4.02). The two dimensions of insulation are negatively correlated with presidential influence, -0.25 and -0.34 respectively. We do not use these measures in the main specification because Selin's data does not include estimates for many of our agencies. When we estimate models with these measures, results are broadly similar.

Table 1. SUR Estimates of Presidential and Congressional Influence over Enforcement Choices, 2014

	Presidential Influence		Congressional Influence		Agency Discretion	
	B	SE	B	SE	B	SE
Pres. Priority (0,1)	0.71**	0.17	0.34**	0.15	0.22	0.16
Agency Ideology: L-C	-0.08	0.09	0.01	0.08	0.08	0.09
Pres. Priority Agency Ideology	0.27*	0.15	0.10	0.13	-0.11	0.14
Agency Characteristics						
EOP (0,1)	0.94**	0.45	0.12	0.39	-0.87**	0.42
Cabinet Department (0,1)	0.43**	0.16	0.17	0.14	-0.12	0.15
Respondent Characteristics						
Washington DC %	-0.88**	0.34	-0.79**	0.29	0.42	0.31
Avg. Yrs. Agency					0.02**	0.01
Employment	-0.01	0.01	-0.00	0.01		
Constant	1.91**	0.42	2.11**	0.36	2.22**	0.39
Agency Observations	158		158		158	
R^2	0.22		0.11		0.07	
X^2	44.26**		20.33**		12.26*	

Note: *significant at the 0.10 level; **significant at the 0.05 level in two-tailed test. Dependent variables are agency average responses to the following questions: "How much direct influence does the president/White House exert over the following decisions in [your agency]? Enforcement priorities" and "How much direct influence does Congress exert over the following decisions in [your agency]? Enforcement priorities." "How much influence does [your agency] have over the following aspects of their management environment? Enforcement priorities." [None (0), Little (1), Some (2), A good bit (3), A great deal (4)]. The correlation of residuals among models is 0.56 (president v. Congress) and -0.10 (president v. agency) and 0.06 (Congress v. agency) for the estimates.

Methods

To evaluate the hypotheses above more fully, we estimate a series of seemingly unrelated regression (SUR) models of presidential influence on enforcement priorities alongside 1) congressional influence and 2) self-reported agency discretion over enforcement priorities since the equation errors for these models should be correlated. These models also allow for the evaluation of coefficient estimates across models. Specifically, we estimate models on agency average responses to the survey questions above about spending influence for all agencies that have at least 5 respondents and 30 potential respondents.

Results

Model estimates largely confirm what is evident in the bivariate relationships, namely that average agency responses to the degree of presidential or White House influence increase for agencies implementing policies that are priorities for the president and agencies designed to be amenable to presidential influence. The effects of agency ideology depend upon whether the agency is an agency important to the president. The correlation of the residuals in the presidential and congressional influence equations is 0.57, and the correlation of the residuals between the presidential influence and agency discretion equations is -0.22. A Breusch-Pagan test indicates that we can reject the null of a 0 correlation (3 df, 52.1; $p<0.00$), justifying the joint estimation of these equations.

There are a few noteworthy estimates among the controls. First, agencies where a significant proportion of respondents work outside Washington, DC report significantly less influence by both the White House and Congress. A one standard deviation decrease in the proportion of respondents working in Washington is estimated to decrease the reported influence of the White House by about 0.20 of response category (e.g., from "Some" to a "a Good bit"). In

other words, 1 in 5 survey respondents would report 1 response category lower in presidential influence. These results suggest that the extent of political control varies significantly across the executive establishment and that political control can seem quite remote for executives working in a regional office. Second, executives with more experience in their agencies report more discretion over enforcement choices, although no less presidential or congressional influence. It is likely that experienced executives have a better understanding of what the law allows and a better appreciation for what can and cannot be done within the confines of law and regulation. Substantively, an increase in 10 years of experience is estimated to increase average agency perceptions of discretion by about 0.25.

Our expectation was that the reported perceptions of presidential influence in enforcement choices would be determined importantly by the president's calculation of the costs and benefits. These would be determined by the importance of agency policies to the president, ideology, and structural features making intervention harder or easier. One unequivocal result is that respondents in agencies whose policies were mentioned in the State of the Union and respondents working in agencies with visible failures report dramatically more presidential influence, but also more congressional influence. Respondents in agencies whose policies are a presidential priority report 0.71 more presidential influence on a 0 to 4 scale, with values higher or lower depending on the ideology of the agency. The coefficient estimate on the interaction between whether an agency is on the president's agenda and agency ideology is positive and estimated relatively precisely ($p < 0.07$). The estimate suggests that presidents are more involved in agencies implementing presidential priorities, but particularly when the agency is conservative. In some cases, the president may be willing to let appointees and their agencies implement presidential priorities but for the most important policies, where the resistance is greatest, the White House may lend their weight to efforts to change enforcement priorities.

Interestingly, the coefficient estimate on whether an agency is a priority is positive in the equation predicting agency discretion in setting enforcement priorities. This could imply that presidents (and Congress) give new authority to agencies implementing key policy initiatives.

Interestingly, the coefficient estimate on agency ideology is negative but estimated imprecisely. Substantively, this implies that during the Obama Administration, respondents in more conservative agencies report less presidential influence on average although we cannot reject the null hypothesis of no effect of ideology. As with the bivariate relationship in Figure 3, however, the model estimates suggest that the effect of ideology is conditional on whether the agency is a priority of the president. One possible interpretation of these results is that executives in liberal agencies observe more White House influence than executives in conservative agencies unless an agency implements a policy important to the president. In other words, the White House intervenes more in places where their intervention is easier and more natural unless agency ideology and policy importance push the White House to expend effort to get control of enforcement priorities, as is the case in ICE and the Department of Defense.

The final hypothesis suggested that executives in insulated agencies would report less presidential influence. This is what we observe. Respondents in EOP agencies and cabinet departments significantly more presidential involvement in enforcement choices. Respondents in the EOP agencies (e.g., OMB, CEQ) are estimated to respond about one full response category different from those in independent agencies (e.g., "a good bit" to "a great deal"), or about 1 standard deviation more. Respondents in executive departments have an average response about half a standard deviation more than respondents in independent agencies (i.e., agencies outside the EOP and cabinet) or the equivalent of about half a response category. This is important evidence that the president's enforcement power is constrained by the existing structure of the executive establishment.

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Discussion and Conclusion

While running for president in 2008, Barack Obama repeatedly condemned President

Bush's expansive uses of executive power. However, President Obama, like presidents before

him turned to an expansive understanding of the enforcement power when it was institutionally

expedient. For example, in addition to using enforcement discretion to shape immigration law,

President Obama ordered the Department of Justice to halt raids on medical marijuana suppliers,

although federal law mandated prosecution (Johnston and Lewis 2009). He directed his

Department of Education not to enforce No Child Left Behind by allowing states to sign waivers

to opt out of the program (Motoko 2012). President Obama's use of enforcement to shape

important domestic policy, from drug policy, education reform, and immigration law illuminates

a larger narrative about when presidents are willing to circumvent Congress to achieve political

goals and enact policy reform.[20]

President Obama's use of enforcement discretion highlights one of the many tools that

the Trump Administration will undoubtedly use to shape policy. Despite his party's control of

Congress, the Trump administration will likely use enforcement on issues such as immigration

and trade. Using President Obama's example, President Trump could informally cajole ICE to

shift its enforcement priorities or more formally encourage the director of ICE to issue new

memoranda resetting deportation priorities. On trade, the Trump administration could shift

United States' trade policy without the consent of Congress by altering the contours and

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[20] Even as the Obama administration winds down, the use of enforcement discretion to shape policy continues to be a primary tool. In October, for example, Defense Secretary Ashton Carter announced that he ordered the Department of Defense to halt its collection of paybacks from veterans that received inaccurate enlistment bonuses. "I have ordered the Defense Finance and Accounting Service to suspend all efforts to collect reimbursement from affected California National Guard members, effective as soon as is practical," remarked Carter (Lamothe 2016). Carter explained that he would work with Congress to fix the problem, but he acted before Congress had the chance to enact new legislation. Carter's willingness to change policy by ordering non-enforcement of the law, and the White House's willingness to go along, highlight the prevalence of using enforcement discretion to shape policy, without legislative action.

stringency of the enforcement of trade deals such as the North American Free Trade Agreement. Should the Trump White House lose its majorities in Congress, the White House could continue to advance its policy agenda by dictating how the law is enforced, in much the same way that the Obama administration used enforcement discretion after losing control of Congress in 2010.

The analysis presented here highlights the extent of agency discretion in choosing enforcement priorities. It also explains why executives report more or less White House involvement in enforcement choices. Scholars have long recognized the importance of presidential efforts to shape enforcement choices, but it has been difficult to characterize these efforts empirically. This research has presented some of the first systematic empirical research on this important presidential power. Most notably, it illustrates how presidents wield more power over enforcement decisions in agencies implementing policies on the president's agenda and agencies that are not structurally insulated from the president's control. Moreover, the president's ability to control enforcement discretion increases further when political actions are deemed low-cost in financial and personnel resources. The ideological leanings of agencies both motivate presidential intervention and are a barrier to effective White House involvement.

While illuminating, this research relies on survey data, and it can only speak to cross-sectional variation at one point in time. This feature of the data should not dampen enthusiasm for the ability to observe and analyze cross-agency variation in this important presidential power for the first time.

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Appendix A. Screen Shots of Questions Regarding Enforcement Discretion and Influence

PRINCETON UNIVERSITY

Survey Research Center

Some of the key features of executive management are choices about the interpretation of law, the prioritization of agency responsibilities, and the allocation of time and resources to different agency tasks.

How much discretion does the Economic Research Service have over the following aspects of its management environment?

	None	Little	Some	A good bit	A great deal	Don't know
The proper interpretation of statutes	○	○	○	○	○	○
The prioritization of some agency responsibilities over others	○	○	○	○	○	○
The allocation of personnel to different jobs or offices	○	○	○	○	○	○
Spending decisions after funds have been appropriated by Congress	○	○	○	○	○	○
Enforcement priorities	○	○	○	○	○	○

How much direct influence does the president/White House exert over the following decisions in the Missile Defense Agency?

	None	Little	Some	A good bit	A great deal	Don't know
The proper interpretation of statutes	○	○	○	○	○	○
The prioritization of some agency responsibilities over others	○	○	○	○	○	○
The allocation of personnel to different jobs or offices	○	○	○	○	○	○
Spending decisions after funds have been appropriated by Congress	○	○	○	○	○	○
Enforcement priorities	○	○	○	○	○	○

How much direct influence does Congress (e.g., members, committees, leaders) exert over the following decisions in ${e://Field/Name}?

	None	Little	Some	A good bit	A great deal	Don't know
The proper interpretation of statutes	○	○	○	○	○	○
The prioritization of some agency responsibilities over others	○	○	○	○	○	○
The allocation of personnel to different jobs or offices	○	○	○	○	○	○
Spending decisions after funds have been appropriated by Congress	○	○	○	○	○	○
Enforcement priorities	○	○	○	○	○	○

Appendix B1. Priorities Mentioned in the 2014 State of the Union and Associated Agencies

State of the Union	Bureau or Agency
Minimum Wage for Contract Employees	Wage and Hour Division (DOL)
Health Care	CMMS; FDA; EBSA; IRS; AHRQ; OS; HRSA; NIH; AA; CDC; NIH; HIS
Immigration	CBP; CIS; Consular (STAT); ICE; DOL (OFLC);
War on Terror; Afghanistan	Military Services; Intelligence; State
Foreign Policy	Office of the Sec. State, OSD (DOD)
Education: Pre-K; community colleges; race to the top	OPS (DoEd); OESE (DoEd); SERS (DoEd)

Source: "Inside the State of the Union: What the President Proposed." *National Public Radio*, January 29, 2014 (http://www.npr.org/sections/itsallpolitics/2014/01/28/267939585/inside-the-state-of-the-union-what-the-president-proposed, accessed December 27, 2015).

Appendix B2. Public Policy Failures of the Obama Administration and Associated Agencies

Scandal	Year	Agency
Fort Hood	2009	Army
Christmas Day Bombing Plot	2009	TSA
Gulf Oil Spill	2010	MMS
GSA Conference Scandal	2010	GSA
Fast and Furious	2011	ATFE
Benghazi	2012	Diplomatic Security; Consular Affairs
Secret Service Misconduct	2012	Secret Service
Boston Bombing	2013	FBI; CIA
Navy Yard Shootings	2013	Navy
Healthcare.gov Launch	2013	CMMS
Texas Fertilizer Plant Explosion	2013	EPA; OSHA; Pipeline and Hazardous Materials Safety Admin
IRS Targeting	2013	IRS
NSA Leaks	2013	NSA
Veterans Health Care Waitlist	2014	VHA
Chevy Cobalt Accidents	2014	NHTSA

Source: Light, Paul. 2014. "A Cascade of Failures: Why Government Fails, and How to Stop It." Brookings Institution, Center for Effective Public Management, July 2014 (http://www.brookings.edu/~/media/research/files/papers/2014/07/light-cascade-of-failures/light_cascade-of-failures_why-govt-fails.pdf, accessed December 27, 2015).