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What authority do federal courts have to review executive nonenforcement choices? On the one hand, the Supreme Court has deemed prosecutorial discretion "exclusive" and "absolute," interpreted the Administrative Procedure Act (APA) to presumptively bar judicial review of nonenforcement, and severely limited Article III standing to challenge government inaction.[2] On the other hand, the Court has indicated that agencies cannot "simply . . . disregard statutory responsibilities," suggested that they cannot adopt policies that "abdicat[e]" enforcement, and at least entertained the possibility of tort damages for nonenforcement.[3] At the same time, the Court has repeatedly coupled assertions of executive authority with descriptions of enforcement discretion as "unsuitable" for judicial review,[4] leaving it unclear whether executive nonenforcement authority is unreviewable because it is absolute, or only absolute insofar as it is unreviewable.

Clarifying the boundaries of judicial power over executive enforcement has nevertheless gained new urgency, as a result of executive initiatives aimed at converting enforcement discretion into a more consequential policy tool. The Obama Administration adopted controversial nonenforcement policies relating to marijuana, immigration, and implementation of the Affordable Care Act (ACA). The Trump Administration seems poised to follow suit. President Trump already issued one executive order all but directing agencies to decline enforcement of key ACA provisions, and his administration's deregulatory bent will likely result in deliberate under-enforcement of disfavored regulatory and statutory requirements.

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1. Summarized and excerpted from Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571 (2016).

2. Lujan v. Defs. of Wildlife, 504 U.S. 555, 575-76 (1992); Heckler v. Chaney, 470 U.S. 821, 831–32 (1985); United States v. Nixon, 418 U.S. 683, 693 (1974).

3. Town of Castle Rock v. Gonzales, 545 U.S. 748, 761, 765 (2005); Lincoln v. Vigil, 508 U.S. 182, 193 (1993); *Heckler*, 470 U.S. at 833 n.4.

4. *Heckler*, 470 U.S. at 832–33.

In future litigation, courts should recognize that law enforcement implicates the political-question doctrine. Under the Constitution's directive that the President "take Care that the Laws be faithfully executed,"[5] the executive branch is duty-bound to execute the laws Congress enacts, whether or not executive officials approve of those laws and even if they must exercise discretion in doing so. Nevertheless, courts confront very real practical and institutional challenges in adjudicating disputes about the faithful execution of prohibitory statutes by enforcement officials. As a result, executive nonenforcement authority is best understood as an area, much like certain other core executive functions, where institutional limitations on courts place a gap between what executive officials ideally should do and what courts may require of them. The twin criteria primarily used to identify political questions—"textual assignment" to a political branch and the absence of "judicially manageable standards"[6]—provide key guideposts for the limits on judicial power over executive enforcement. This framework may account descriptively for much of the key current case law while also pointing the way to appropriate normative resolutions of disputed questions.

A Political-Question Framework

The animating idea of the political-question doctrine is that some legal obligations are inappropriate for judicial resolution. The Supreme Court's recent decisions have emphasized two considerations. First, the Court has asked whether the Constitution includes a "textually demonstrable . . . commitment of the issue to a coordinate political department."[7] Second, the court has asked whether courts "lack judicially discoverable and manageable standards for resolving" the issue.[8] This factor seems to turn ultimately on a judgment of relative institutional competence—a determination that judicial line-drawing would infringe on judgments that another branch is better positioned to make.

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5. U.S. CONST. art. II, § 3.

6. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (2012); Nixon v. United States, 506 U.S. 224, 228 (1993).

7. *Nixon*, 506 U.S. at 228.

8. *Id.*

Can law-enforcement choices qualify as political questions by these standards? In some contexts, the answer is yes. As one example, because the Take Care Clause "textually assigns" the power to initiate enforcement suits to the executive branch, courts should lack authority to compel executive officials to bring particular enforcement suits before them. As another example, because deciding whether to enforce a given law in a given case typically "involves a complicated balancing of a number of factors that are peculiarly within [the agency's] expertise," courts will generally lack "judicially manageable standards for judging how and when an agency should exercise its discretion" over enforcement.[9] Second-guessing executive enforcement choices under real-world conditions would typically involve courts in the sort of unprincipled line-drawing that courts more generally describe as judicially unmanageable.

The Supreme Court's twin criteria for non-justiciable political questions thus help explain and rationalize courts' general reluctance to intrude on executive enforcement choices. Yet framing the problem this way also has important normative implications, for both courts and the executive branch.

Judicial Power and Executive Duty

One key implication is that courts' analysis of enforcement questions should not fully define how executive officials understand their own obligations. Deciding that some legal obligation is not judicially enforceable is different from determining that no legal obligation has been breached. Indeed, one key purpose of deeming the question political is to impose accountability more squarely on the branch that made the determination in the first place. Here, as with other political questions, the reasons for limited judicial review depend principally upon institutional limitations on courts rather than upon any persuasive conception of executive authority.

Reviewable Policies

The framework also helps identify enforcement decisions that may properly be subject to judicial review because problems of

9. *Heckler*, 470 U.S. at 832–33.

textual assignment and judicial unmanageability are absent. At least two types of general enforcement policies may present appropriate questions for judicial review under the APA or other applicable statutes.

First, policies that purport to change the law itself, rather than simply to forbear from enforcing it, require more specific statutory authority than mere organic agency enforcement discretion. By invalidating such policies, and thereby restoring the deterrent effect of underlying prohibitions, courts may enforce the most important substantive limit on executive enforcement discretion: that as a default matter, enforcement discretion is an authority to ignore but not authorize, to allocate effort but not to change effective governing law.

Second, policies that functionally alter governing legal requirements by definitively specifying the government's enforcement plans should also be subject to judicial review and invalidation in at least the clearest cases. Insofar as such policies do not formally alter underlying legal requirements, in principle they may leave regulated parties exposed to enforcement in the future if the government shifts its priorities. In practice, however, such policies may well be perceived as a green light to violate substantive prohibitions with impunity. To forestall that result and preserve the underlying law's deterrent effect, courts should review and invalidate such policies. Even if doing so does not result directly in any particular enforcement action being brought, wiping away such overly permissive policies may help preserve the ultimate primacy of substantive law over executive policy in determining regulated parties' behavior.

Deferred Action Agreements

A third implication of the framework is that Congress may enable a broader judicial role with respect to nonenforcement if it so chooses. Because problems of judicial unmanageability result principally from Congress's failure to specify which violations executive officials should prioritize, nothing in the Constitution precludes Congress from authorizing broader judicial review, as long as Congress stops short of requiring judicially compelled prosecution.

In at least one important context, approval of so-called "deferred prosecution agreements" (DPAs), Congress has effectively done just that, yet some courts have persisted in rubber-stamping the parties' proposals, presumably out of a misplaced fear of interfering with prosecutorial discretion. Such agreements allow the government to file criminal charges against a suspected wrongdoer and yet defer actual prosecution without falling afoul of otherwise-applicable statutory deadlines for proceeding to trial. Prosecutors have increasingly used such agreements as a tool for imposing extensive internal changes at corporations suspected of criminal wrongdoing, yet some past DPAs have included terms bearing no evident relation to assuring future compliance with the statutes being enforced. Because the statute in question specifically requires court approval of such agreements, and because exercising review in this context presents no problem of judicial unmanageability or compelled prosecution, courts should not hesitate to exercise this authority to impose reasonable limits on terms included in such DPAs.

Standing Questions

Finally, the framework developed here could support recognizing broader Article III standing to bring suits challenging executive inaction. In key standing decisions, the Supreme Court has invoked concerns about judicial interference with executive enforcement discretion as a reason to limit standing to challenge exercises of that discretion.[10] Yet viewing law enforcement as a political question responds more directly to such concerns about improper judicial oversight of fundamentally executive functions. Accordingly, instead of a hard Article III limit on standing to challenge executive inaction, courts should shift focus to elaborating presumptive, congressionally defeasible limits on who may sue to challenge executive nonenforcement with respect to any particular statutory scheme.

Conclusion

Overall, the framework developed here underscores that within our system of coequal branches and separated powers, courts cannot enforce every obligation; some obligations should be left to public

10. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 562 (1992).

officials' accountability and conscience. But by the same token, in law enforcement, as in other areas, the political branches should recognize that the limits of judicial supervision are not necessarily the limits of the law.