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# HOW AGENCIES CHOOSE WHETHER TO ENFORCE THE LAW: A PRELIMINARY INVESTIGATION

Aaron L. Nielson\*

*One of the most controversial aspects of administrative law in recent years concerns agency decisions not to enforce the law. Such nonenforcement is often beneficial or, in any event, inevitable. A particular violation may be so distant from what Congress or the agency had in mind when the general prohibition was put on the books that enforcement makes little sense. Likewise, because agencies have finite resources, they cannot enforce the law in all situations. At the same time, however, nonenforcement can also raise difficult questions about basic notions of fairness and administrative regularity, as well as separation of powers concerns. Nonenforcement decisions can be particularly significant, moreover, because they often are not subject to judicial review. Despite the importance of the topic, however, little empirical work has been done on the processes agencies use to evaluate potential nonenforcement.*

*This Article has three purposes. First, drawing on interviews and survey data, it offers a preliminary real-world look into how a number of agencies choose whether to enforce the law in the context of waivers, exemptions, and prosecutorial discretion. The evidence suggests that nonenforcement is heterogeneous across numerous dimensions—including who is involved in the process, the steps the agency must take to make a nonenforcement decision, the scope of nonenforcement, and the potential for public and judicial scrutiny of the agency's decision. Second, this Article begins to sketch a taxonomy of nonenforcement. Although nonenforcement is often treated as a unitary concept, in fact it comes in many flavors, some of which are more dangerous than others. Finally, building on this taxonomy, this Article urges safeguards to prevent nonenforcement's abuse. Most significantly, nonenforcement should be rare and requests for it should serve as a signal that retrospective review may be in order.*

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\* Associate Professor, J. Reuben Clark Law School, Brigham Young University. The study and report underlying this Article were commissioned by the Administrative Conference of the United States (ACUS). Many of this Article's concepts and much of its text comes from that study and report. AARON L. NIELSON, ADMIN. CONFERENCE OF THE U.S., WAIVERS, EXEMPTIONS, AND PROSECUTORIAL DISCRETION: AN EXAMINATION OF AGENCY NONENFORCEMENT PRACTICES (2017), <https://www.acus.gov/report/regulatory-waivers-and-exemptions-final-report>. The opinions, views, and recommendations expressed here, however, are those of the author. The author also thanks the participants in the 2017 Center for the Study of the Administrative State's Research Roundtable on Beyond Deference: Emerging Issues in Judicial Review of Agency Action held at the Antonin Scalia Law School, George Mason University. Financial support for the study and report was provided by ACUS and for the Article by Brigham Young University and the Center for the Study of the Administrative State.

## INTRODUCTION

The U.S. Supreme Court recently did a remarkable thing. In 2016, the Court granted certiorari to review whether the “Deferred Action for Parents of Americans and Lawful Permanent Residents” executive action—DAPA for short—should be enjoined as unlawful. Through this program, the Obama administration purported to use enforcement “discretion to permit an alien to be ‘lawfully present,’” so long as certain conditions were satisfied.<sup>1</sup> The Supreme Court’s decision to hear the case was not remarkable; once the Fifth Circuit upheld an injunction of DAPA,<sup>2</sup> nearly everyone expected the Court to hear the case.

What was remarkable, however, was the Court’s *sua sponte* instruction that the parties also brief “[w]hether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3.”<sup>3</sup> That command turned what was already a contentious dispute about immigration in particular and administrative law in general into an all-out constitutional battle. Anticlimactically, however, the Court later announced that because the Justices were split four to four, the Fifth Circuit’s decision would be affirmed without opinion by an equally divided court.<sup>4</sup> The Court therefore did not resolve the thorny question of whether there are meaningful limits on the executive branch’s discretion to not enforce the law.

The fight over DAPA<sup>5</sup> is just one example of what has become an increasingly controversial aspect of administrative law: nonenforcement.<sup>6</sup> Similar fights have played out over federal narcotics policy,<sup>7</sup> the Affordable

1 Brief for the Petitioners at 36–37, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674).

2 See *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

3 *United States v. Texas*, 136 S. Ct. 906, 906 (2016) (mem.); see U.S. CONST. art. II, § 3 (stating that the President “shall take Care that the Laws be faithfully executed”).

4 See *Texas*, 136 S. Ct. at 2272.

5 See, e.g., Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 219 (2015) (challenging legality); Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 694 (2015) (characterizing DAPA as a “systematic and categorical implementation of enforcement discretion”). See generally Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013) (arguing that such nonenforcement is unconstitutional); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010) (defending nonenforcement).

6 See, e.g., David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 273–74 (2013); Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1769 (2016); Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1199–1200 (2014); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 697 (2014); Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 796 (2010); Daniel Stepanich, Comment, *Presidential Inaction and the Constitutional Basis for Executive Nonenforcement Discretion*, 18 U. PA. J. CONST. L. 1507, 1510–11 (2016).

7 See, e.g., Sam Kamin, *Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle*, 14 OHIO ST. J. CRIM. L. 183, 183 (2016)

Care Act,<sup>8</sup> various welfare programs,<sup>9</sup> and how to regulate “in the wake of the financial crisis.”<sup>10</sup> All the while, scholars have also considered whether there are bounds to the nonenforcement power<sup>11</sup> and, if so, where the line should be drawn and how such a line could be enforced.<sup>12</sup> Indeed, some have even suggested that if a future administration does not like certain types of federal taxes, perhaps it can simply decline to collect them.<sup>13</sup>

This recent focus on nonenforcement is noteworthy because an agency’s decision to let violations occur is not the typical emphasis of administrative law scholarship. After all, when one thinks of regulatory decisions, what often comes to mind are affirmative actions to ensure that the law is obeyed, which often includes ensuring that legal prohibitions are respected and, if appropriate, that violations of such prohibitions are sanctioned. Yet nonenforcement demonstrates that is not *all* that agencies do. Instead, agencies sometimes allow violations of the law to go without injunction or sanction.

Some nonenforcement, of course, is often beneficial and, in any event, inevitable. Agencies have finite resources; it is impossible for them to investi-

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(explaining that federal prosecutors will use discretion to not enforce federal drug laws against marijuana so long as state law allows it and various other conditions are met); *see also* Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep’t of Justice, Guidance Regarding Marijuana Enforcement 3 (Aug. 29, 2013) (explaining that where strong state regulatory systems exist controlling the usage and sale of marijuana, federal prosecutors have additional discretion in deciding whether to enforce federal drug laws against marijuana); Memorandum from Jefferson B. Sessions, III, Attorney Gen., U.S. Dep’t of Justice, Marijuana Enforcement 1 (Jan. 4, 2018) (rescinding previous guidance).

8 *See generally* Timothy Stoltzfus Jost & Simon Lazarus, *Obama’s ACA Delays—Breaking the Law or Making It Work?*, 370 NEW ENG. J. MED. 1970 (2014) (reviewing the Obama administration’s decision not to enforce parts of the Affordable Care Act for a period of time beyond that set out in the statute).

9 *See, e.g.*, Ted Cruz, *The Obama Administration’s Unprecedented Lawlessness*, 38 HARV. J.L. & PUB. POL’Y 63, 113–14 (2015) (arguing that the Obama administration was unlawfully not enforcing certain statutory restrictions on eligibility).

10 *See, e.g.*, Richard A. Rosen & David S. Huntington, *Waivers from the Automatic Disqualification Provisions of the Federal Securities Laws*, 29 INSIGHTS 2, 2–3 (2015) (observing that waiver decisions regarding financial institutions have become increasingly controversial).

11 *See, e.g.*, Kamin, *supra* note 7, at 184; Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235, 266–67 (2016); *cf.* Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1194 (2015) (“The fundamental legal and ‘common sense’ problem with DAPA is its shunning of any intelligible limiting principle that situates executive discretion within the INA’s comprehensive framework.”).

12 *See, e.g.*, Tom Campbell, *Executive Action and Nonaction*, 95 N.C. L. REV. 553, 558 (2017) (suggesting that Congress should have standing to seek judicial action requiring the law to be enforced); Daniel E. Walters, *The Judicial Role in Constraining Presidential Non-enforcement Discretion: The Virtues of an APA Approach*, 164 U. PA. L. REV. 1911, 1934 (2016) (urging review of nonenforcement under an arbitrary and capricious standard).

13 *See, e.g.*, Leigh Ososky, *The Case for Categorical Nonenforcement*, 69 TAX L. REV. 73, 73 (2015) (addressing potential categorical nonenforcement of tax laws).

gate and punish every potential violation of the law.<sup>14</sup> And sometimes there are good reasons to not even try. After all, a situation may be so distant from what Congress or the agency had in mind when a general prohibition was put on the books that enforcement makes no sense. “Indeed, a central normative reason for separating legislative and executive functions, as articulated by Montesquieu, the Federalist Papers, and other foundational sources, is to create a safety valve that protects citizens from overzealous enforcement of general prohibitions.”<sup>15</sup> As Judge Stephanos Bibas has observed, no one should bring a knife to a school. Yet there is a world of difference between an adult brandishing a switchblade and a child carrying a kitchen knife to cut a birthday cake.<sup>16</sup> Just as prosecutorial discretion makes sense when it comes to crimes by school children, nonenforcement has a place in administrative law.<sup>17</sup>

At the same time, nonenforcement can raise troubling questions. Even apart from separation of powers concerns, nonenforcement implicates basic notions of fairness and administrative regularity. As with other forms of administrative discretion,<sup>18</sup> discretionary authority to determine when the law should and should not be enforced can be put to good ends but is also subject to abuse.<sup>19</sup> In fact, “government by waiver,” if taken too far, is antithetical to liberty. As Richard Epstein has explained, agencies may be tempted to overregulate, knowing that they can fall back on nonenforcement.<sup>20</sup> The result may be that regulated parties find themselves at the mercy of the government, and “when currying the favor of capricious government officials is required for a person’s well-being or a firm’s very existence, government abuse becomes nearly impossible to oppose.”<sup>21</sup> This danger

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14 See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (explaining resource constraints); Michael Sant’Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 381, 385 (2014) (similar).

15 Price, *supra* note 6, at 675; see also *id.* (collecting citations).

16 See, e.g., Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 369, 370 (2010).

17 Cf. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (“The Government’s argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.”).

18 See, e.g., Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 57 (2016) (“The danger is that although discretion can be and, indeed, usually is used for the public’s benefit, it can also serve self-interested ends—for instance by allowing regulators to make their own lives easier.” (footnotes omitted)); *id.* at 77 (explaining that “much of administrative law as we know it is addressed toward ‘the dangers associated with the exercise of discretion’” (quoting Rachel E. Barkow, Essay, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1334 (2008))).

19 See, e.g., Ruth Colker, Essay, *Administrative Prosecutorial Indiscretion*, 63 TUL. L. REV. 877, 880 (1989) (“As administrative agencies become more sensitive to political considerations, their exercise of discretion is more likely to be in response to these concerns, rather than to the facts and law of the specific cases.”).

20 See Richard A. Epstein, *Government by Waiver*, NAT’L AFF., Spring 2011, at 39.

21 *Id.* at 41.

comes to the forefront when agencies deliberately engage in nonenforcement for self-aggrandizing reasons, especially to obtain ends that are outside of the agency's statutory authority.<sup>22</sup> But the risk of abuse can also arise in more mundane situations, for instance, where agency officials, perhaps unconsciously, play favorites.<sup>23</sup>

Although nonenforcement has received some theoretical consideration in the academy, it has not received much empirical examination. This Article attempts to begin filling that void. Drawing on survey data from nine agencies and interviews with officials from the Consumer Financial Protection Bureau (CFPB), Federal Aviation Administration (FAA), Mine Safety and Health Administration (MSHA), and the Alcohol and Tobacco Tax and Trade Bureau (TTB), this Article explores nonenforcement (specifically waivers, exemptions, and prosecutorial discretion) at these agencies. This empirical investigation, moreover, serves as a springboard for a hopefully more fulsome conceptual understanding of when nonenforcement is dangerous and how to safeguard against abuse. Indeed, this Article makes three contributions to the nonenforcement literature.

First, Part I describes how certain agencies evaluate potential nonenforcement. For instance, what are the steps and who is involved? What procedures do they use? How regularly do agencies engage in nonenforcement? Do they reject requests for nonenforcement and, if so, how often? Empirically, it turns out that the answers to these questions vary widely across agencies. Some agencies have robust nonenforcement practices; the FAA, for instance, makes hundreds and sometimes even thousands of formal nonenforcement decisions per year. Because of the volume of nonenforcement decisions, the Agency has developed regularized procedures to evaluate requests, which often include a public process. By contrast, the CFPB has developed two formal nonenforcement programs, one of which has *never* been used, and the other of which has only been used once. And the TTB makes dozens of formal nonenforcement decisions each year but, due to privacy concerns, essentially never publishes them. All the while, agency inspectors informally may be making countless nonenforcement decisions each day, particularly in certain industries. There is at least one characteristic,

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22 See *id.* at 50 (“It is common for the agency to insist that drug companies accept conditions that are found nowhere in the statutory scheme—conditions that, for instance, can limit the distribution or advertisement of a drug, or govern its recall in case a problem with it should arise—in exchange for the FDA’s waiving other requirements or granting early approval.”).

23 See, e.g., *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) (“Complainants the agency ‘likes’ can be excused, while ‘difficult’ defendants can find themselves drawing the short straw.”); cf. Glenn Harlan Reynolds, Essay, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 103 (2013) (“Attorney General (and later Supreme Court Justice) Robert Jackson once commented: ‘If the prosecutor is obliged to choose his cases, it follows he can choose his defendants.’ This method results in ‘[t]he most dangerous power of the prosecutor: that he will pick people he thinks he should get, rather than pick cases that need to be prosecuted.’” (alteration in original) (footnote omitted)).

however, that cuts across agencies: very few of these decisions are ever challenged in court.

Second, reflecting this heterogeneity, this Article begins to sketch a taxonomy of nonenforcement. Not all nonenforcement is the same and some varieties of it are especially dangerous. For example, nonenforcement may be particularly susceptible to abuse when the agency acts *sua sponte* in a scheme with opaque substantive standards and no notice-and-comment procedures. By contrast, nonenforcement may be relatively less problematic when the agency, acting upon a formal request, applies neutral standards following a public comment process. And these factors do not exhaust the full range of potential considerations. Until nonenforcement is disaggregated, evaluation of it is incomplete.

And third, this Article explores how to prevent nonenforcement from being abused. Most importantly, nonenforcement and retrospective review should not be understood as discrete aspects of administrative law. Instead, successful requests for nonenforcement, especially when there are many similar ones, should be understood as a presumptive signal that the agency should engage in retrospective review. If a prohibition no longer makes sense, it is understandable that agencies may employ their nonenforcement authority. But rather than rely too much on nonenforcement, the better path may be simply to change the law for everyone.

## I. BRIEF BACKGROUND

Nonenforcement is an important part of administrative law. The issue has taken on particular significance in recent years as presidents have begun aggressively using nonenforcement for ideological ends.

Administrative law has long recognized the benefits of nonenforcement. This recognition is well illustrated by *Heckler v. Chaney*,<sup>24</sup> “one of the modern landmarks of administrative law.”<sup>25</sup> In *Heckler*, the Court confronted alleged nonenforcement by the Food and Drug Administration (FDA). A group of death row inmates challenged the Agency’s refusal to regulate certain drugs that states were using for executions. The Agency disagreed with the prisoners’ view of the law, but also declared that even if the prisoners were right, the Agency would not enforce federal law in these circumstances because “enforcement proceedings in this area are initiated only when there is a serious danger to the public health or a blatant scheme to defraud.”<sup>26</sup> The D.C. Circuit held that the Agency’s decision was reviewable.<sup>27</sup>

The Supreme Court disagreed, concluding that at least when it comes to whether to bring an enforcement action, agency nonenforcement should “be presumed unreviewable under the ‘committed to agency discretion’ excep-

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24 470 U.S. 821 (1985).

25 Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 159 (1996).

26 *Heckler*, 470 U.S. at 824–25.

27 *Id.* at 825.

tion to the general rule of reviewability under the APA.”<sup>28</sup> The Court explained, among other points, that nonenforcement requires “a complicated balancing” that considers not only whether the law has been violated, but also “whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.”<sup>29</sup> Likewise, “when an agency refuses to act it generally does not exercise its *coercive* power over an individual’s liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect.”<sup>30</sup> And an agency’s decision not to bring an enforcement action is analogous to “the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch.”<sup>31</sup> Hence, unless, for instance, Congress has “provided guidelines for the agency to follow in exercising its enforcement powers,” an agency’s decision not to bring an enforcement action cannot be reviewed in court.<sup>32</sup>

This is not to say, however, that all nonenforcement decisions cannot be reviewed. Sometimes, for instance, the presumption is rebutted. In *FEC v. Akins*,<sup>33</sup> a case about whether an agency must require disclosure of certain election-related information, the Court concluded that the *Heckler* presumption was overcome because the Court addressed “a statute that explicitly indicates” that the agency must act.<sup>34</sup> Likewise, the D.C. Circuit concluded in a case with facts similar to those in *Heckler* that the presumption was rebutted. In *Cook v. FDA*,<sup>35</sup> the court held that certain prisoners could challenge the FDA’s refusal to bring an enforcement action against importers of drugs used in executions because Congress “set[ ] forth precisely when the agency must determine whether a drug offered for import appears to violate [federal law].”<sup>36</sup>

The *Heckler* presumption likewise does not extend to denials of petitions for rulemaking. This point was made in *Massachusetts v. EPA*.<sup>37</sup> There, the Court did not use *Heckler* to evaluate an agency’s refusal to issue a notice of proposed rulemaking. The Court explained that “[t]here are key differences between a denial of a petition for rulemaking and an agency’s decision not to initiate an enforcement action,” including the fact that “agency refusals to initiate rulemaking ‘are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explana-

28 Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 662 (1985) (quoting 5 U.S.C. § 701(a)(2) (1982)).

29 *Heckler*, 470 U.S. at 831.

30 *Id.* at 832.

31 *Id.*

32 *Id.* at 833.

33 524 U.S. 11 (1998).

34 *Id.* at 26.

35 733 F.3d 1 (D.C. Cir. 2013).

36 *Id.* at 7.

37 549 U.S. 497 (2007).



tion.’”<sup>38</sup> Accordingly, even though “an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities,” *Heckler* does not apply, but, to be sure, review of an agency denial of a petition for rulemaking is “extremely limited” and “highly deferential.”<sup>39</sup>

Another type of nonenforcement that is reviewable occurs when an agency only *partially* engages in nonenforcement. An example is when an agency determines not to enforce one of its procedural rules within a proceeding. The D.C. Circuit addressed this situation in *NetworkIP, LLC v. FCC*.<sup>40</sup> There, a complainant was late in filing a complaint against a pair of telecommunications companies for two reasons: it was supposed to include two checks with its complaint instead of just one, and its filing fee “was \$5.00 short.”<sup>41</sup> The FCC determined that it would waive its procedural rules under its general authority to excuse compliance “if good cause therefor is shown.”<sup>42</sup> The D.C. Circuit reviewed that exercise of the Agency’s waiver authority and rejected it, ruling that “before the FCC can invoke its good cause exception, it both ‘must explain why deviation better serves the public interest, and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.’”<sup>43</sup> Otherwise, “[c]omplainants the agency ‘likes’ can be excused, while ‘difficult’ defendants can find themselves drawing the short straw.”<sup>44</sup> The court explained that although agencies are afforded deference when it comes to waiver, “procrastination plus the universal tendency for things to go wrong (Murphy’s Law)—at the worst possible moment (Finagle’s Corollary)—is not a ‘special circumstance,’ as any junior high teacher can attest.”<sup>45</sup>

Agency refusals to engage in nonenforcement can also sometimes be reviewed, though, again, agencies receive a great deal of deference. In *Blanca Telephone Co. v. FCC*,<sup>46</sup> for instance, the Agency promulgated a requirement that handsets be compatible with hearing aids. Unfortunately, many providers could not meet the Agency’s deadline and requested waivers. The Agency granted many of these requests but not all, concluding that some companies had not done enough to try to comply with the new requirements. Those companies then unsuccessfully sought judicial review. The D.C. Circuit concluded that an agency’s refusal to grant a waiver will be upheld so long as the agency offers an “adequate explanation before it treats similarly

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38 *Id.* at 527 (quoting *Am. Horse Prot. Ass’n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987)).

39 *Id.* at 527–28 (quoting *Nat’l Customs Brokers & Forwarders Ass’n of Am. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989)) (internal quotation marks omitted).

40 548 F.3d 116 (D.C. Cir. 2008).

41 *Id.* at 126.

42 47 C.F.R. § 1.3 (2017).

43 *NetworkIP*, 548 F.3d at 127 (emphasis omitted) (quoting *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)).

44 *Id.*

45 *Id.*

46 743 F.3d 860 (D.C. Cir. 2014).

situated parties differently.”<sup>47</sup> Similarly, if nonenforcement is implemented on a categorical basis, as opposed to through individualized assessments, judicial review may be available.<sup>48</sup> The idea is that a general nonenforcement policy is more likely to be based on statutory interpretation than on a careful assessment of individualized evidence.<sup>49</sup>

Another potentially reviewable form of nondiscretion occurs when an agency prospectively authorizes conduct that would otherwise be unlawful—for instance, via an exemption or waiver—for an individual entity or for a class of entities. To the extent, for instance, that this sort of decision is conceived of as an exercise of the agency’s permitting authority, such a decision is reviewable, so long as the other justiciability requirements are met (which sometimes can be challenging).<sup>50</sup>

Unsurprisingly, there are open questions about nonenforcement. Perhaps most importantly, can nonenforcement violate the Take Care Clause<sup>51</sup> and, if so, when? This is a difficult question because, as the Supreme Court explained in *Heckler*, some nonenforcement is inescapable and judicial efforts to zealously police it will mire courts in agency management decisions because of competing resource demands.<sup>52</sup> Beyond that, does anyone deny that it does not always make sense to execute the law in a maximalist fashion—that there is a place for some enforcement discretion?<sup>53</sup> Thus, there does not appear to be any appetite to eliminate nonenforcement altogether. On the other hand, if the executive branch can simply refuse to enforce a statute because the President disagrees with the legislature’s policy choice, Congress’s powers may be negated. Can that outcome be reconciled with the Take Care Clause?

As noted above, that constitutional question was briefed at the Supreme Court’s *sua sponte* insistence in the *United States v. Texas* litigation about DAPA. The United States urged that the Take Care Clause be deemed non-justiciable: “For the Judicial Branch to undertake such an inquiry would express a ‘lack of the respect due’ to the Nation’s highest elected official, by

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47 *Id.* at 864 (quoting *Morris Commc’ns, Inc. v. FCC*, 566 F.3d 184, 188 (D.C. Cir. 2009)) (internal quotation marks omitted).

48 *See, e.g., Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676 (D.C. Cir. 1994) (“[A]n agency’s statement of a general enforcement policy may be reviewable for legal sufficiency where the agency has expressed the policy as a formal regulation.” (emphasis omitted)).

49 *Id.*

50 *See, e.g., New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002) (rejecting a challenge to a license for lack of standing).

51 *See* U.S. CONST. art. II, § 3 (stating that the President “shall take Care that the Laws be faithfully executed”).

52 *See Heckler v. Chaney*, 470 U.S. 821, 834–35 (1985).

53 *Cf. Bond v. United States*, 134 S. Ct. 2077, 2092 (2014) (“[W]e have traditionally viewed the exercise of state officials’ prosecutorial discretion as a valuable feature of our constitutional system.”); Transcript of Oral Argument at 28, *Yates v. United States*, 135 S. Ct. 1074 (2015) (No. 13-7451) (“What kind of a mad prosecutor would try to send this guy up . . . ?”) (Scalia, J.).

assuming judicial superintendence over the exercise of Executive power that the Clause commits to the President.”<sup>54</sup> The United States also said that it *was* faithfully executing the law by focusing on the greatest risks, thus using the resources it had been allocated in a permissible way. Texas and the other relevant states disagreed, explaining, among other points, that the government’s argument has no limiting principle: “A future President could ‘cease enforcing environmental laws, or the Voting Rights Act, or even the various laws that protect civil rights and equal opportunity’—deeming unlawful conduct to be lawful when faced with resource constraints.”<sup>55</sup> Because the Justices split, the Supreme Court did not issue an opinion.

## II. NONENFORCEMENT’S HETEROGENEITY

To date, little empirical work has been done on nonenforcement. This Article begins to fill the void by providing data about some of the practices of nine agencies. Based on the result of this study, it appears that nonenforcement practices are notably heterogeneous. Different agencies have different authorizations to engage in nonenforcement; they also use different processes to evaluate potential nonenforcement, use their nonenforcement authority for different types of situations, engage in markedly different amounts of nonenforcement, and work within contexts with different types of checks and balances regarding nonenforcement. For reasons explained below, understanding this heterogeneity is important when evaluating the costs and benefits of nonenforcement discretion and potential safeguards on it.

### A. *Study Methodology*

This study does not purport to be a comprehensive empirical analysis of all agencies. It is, however, a preliminary investigation of the subject for some agencies. To conduct the study, the author prepared a five-part survey. The first part addressed specific statutory authorization to “waive” legal duties for private entities, with waiver being defined as express authority from Congress to excuse private parties from legal duties. The second part addressed specific statutory authorization to “waive” such duties for states (i.e., so-called “federalism waivers”). The third part addressed agency “exemption” authority, with exemption being defined as power to excise private parties from legal duties even without specific congressional authorization to do so. The fourth part addressed prosecutorial discretion, which was defined as authority to not enforce the law against already-completed viola-

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54 Brief for the Petitioners at 73, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)); *see also id.* at 73–74 (“Indeed, this Court has recognized that ‘the duty of the President in the exercise of the power to see that the laws are faithfully executed’ ‘is purely executive and political,’ and not subject to judicial direction.” (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1866))).

55 Brief for the State Respondents at 74, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674).

tions of legal duties. And finally, the fifth part contained various catch-all questions (e.g., whether the agency engaged in conduct akin to one of the other categories). Within each part were specific questions. Some of these questions addressed whether the agency has such authority, how often the agency is asked to use its authority, how often the agency actually does so, whether the agency can exercise such authority without a request, what procedures the agency must use, and whether decisions are publicly available. Working with an ACUS staff member, the survey was then sent to numerous agencies.<sup>56</sup>

Following that initial contact and several follow-up messages, nine agencies submitted a survey response: the TTB, Community Development Financial Institutions Fund (“CDFI Fund”), CFPB, Employee Benefits Security Administration (EBSA), FAA, Federal Motor Carrier Safety Administration (FMCSA), Federal Transit Administration (FTA), Mine Safety and Health Administration (MSHA), and Pipeline and Hazardous Materials Safety Administration (PHMSA). The TTB and CDFI Fund are both part of the Treasury Department; the EBSA and MSHA are within the Labor Department; the FAA, FMCSA, FTA, and PHMSA are part of the Transportation Department; and the CFPB is an “independent bureau” within the Federal Reserve System. Not all of these agencies answered every question, but each answered at least some of the questions. Many of these agencies shared data about their nonenforcement practices—often detailed data. Many also provided specific information regarding the procedures used to make nonenforcement decisions.

After reviewing these surveys, and still working with an ACUS staff member, the author was able to arrange in-person interviews with representatives of the FAA, MSHA, and TTB. The author also arranged an interview via telephone with representatives of the CFPB. These interviews were not recorded but detailed notes were kept by interns. The purpose of these interviews was to gain a deeper understanding of the agencies’ specific practices. Afterwards, a draft report was prepared. The agencies that agreed to participate in these interviews were given an opportunity to review that draft report for accuracy.<sup>57</sup>

### *B. General Study Findings*

The most apparent finding is that agency nonenforcement practices vary widely, including in frequency, transparency, and procedural steps.

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<sup>56</sup> The survey is attached as an appendix to the Author’s ACUS Report. See Aaron L. Nielson, Admin. Conference of the U.S., *Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices* 68–71 (2017), <https://www.acus.gov/report/regulatory-waivers-and-exemptions-final-report>.

<sup>57</sup> Unfortunately, because even seemingly common terms like “waiver” or “exemption” do not appear to have uniformly shared definitions, and because the contexts in which these terms are applied vary widely, it can be difficult to conduct cross-agency analysis.

## 1. Waiver

A majority of the agencies that participated in the survey identified authority to waive some statutory or regulatory requirements. In fact, the FAA has so many potential authorizations of waiver that it was unable to catalog them all but did list eight distinct grants of statutory waiver authority.<sup>58</sup> The TTB also listed eight grants of statutory authority.<sup>59</sup> The PHMSA can waive duties under the Hazardous Materials Safety Enhancement Program<sup>60</sup> and the Pipeline Safety Program,<sup>61</sup> while the FMCSA has authority to not enforce motor carrier safety duties<sup>62</sup> and the FTA may waive certain grant and “Buy America” requirements.<sup>63</sup> The MSHA can waive mine safety requirements under its “petitions for modification”<sup>64</sup> process.<sup>65</sup>

Although many agencies have authority to waive requirements, how often they exercise that authority is far from uniform. The TTB, for instance, receives fewer “than 25” requests in a typical year.<sup>66</sup> The PHMSA, by contrast, receives over 1800 requests relating to hazardous materials alone.<sup>67</sup> The FMCSA receives less than a dozen requests, while the MSHA receives approximately fifty requests per year. The FAA has only recently begun recording the number of waiver requests it receives so there is no data yet. Agencies also grant markedly different percentages of requests. The FMCSA and FTA grant virtually all requests.<sup>68</sup> The MSHA, by contrast, grants somewhere in the range of 36%.<sup>69</sup> The PHMSA simply says it “[v]aries.”<sup>70</sup> And the TTB grants “[a]pproximately 85%” of requests.<sup>71</sup>

Similarly, at least among this group of agencies, *sua sponte* waivers are uncommon. The PHMSA, MSHA, and TTB never exercise waiver authority without a request. The FMCSA says it has only done so “once to date,” and

58 FAA Survey Response (on file with author) (citing 49 U.S.C. §§ 40125(d), 41104, 44710(f), 44706, 44721, 44726(f), 47528(b)(1) (2012); 51 U.S.C. §§ 50901–50923 (2012)).

59 See 26 U.S.C. §§ 5181(b), 5201(b), 5312, 5417, 5554, 5556, 5561, 5562 (2012).

60 See 49 U.S.C. § 5117(a)(1).

61 See *id.* § 60118(c)(1)(A).

62 See *id.* §§ 31136(e), 31315(a).

63 See *id.* §§ 5323(j)(2), 5324(d). The FTA also has nonenforcement authority regarding emergencies. See *id.* § 5324(e)(3).

64 See *infra* subsection II.C.iii.

65 The CFPB and the CDFI Fund do not list any waiver authority in their survey responses, and the EBSA classifies its nonenforcement authority as exemption authority. See CDFI Fund Survey Response (on file with author); CFPB Survey Response (on file with author); EBSA Survey Response (on file with author).

66 TTB Survey Response (on file with author).

67 PHMSA Survey Response (on file with author). Almost half of these, however, were requests for renewals. The agency typically receives less than ten special permit requests for pipelines. *Id.*

68 See FMCSA Survey Response (on file with author); FTA Survey Response (on file with author).

69 MSHA Survey Response (on file with author). This point may be slightly misleading. Many requests are withdrawn rather than denied.

70 PHMSA Survey Response, *supra* note 67.

71 TTB Survey Response, *supra* note 66.

that was only a “limited 90-day waiver.”<sup>72</sup> The FTA did so once as well: “Subsequent to Hurricane Sandy, FTA issued blanket waivers for several statutory and regulatory provisions.”<sup>73</sup> Thus, at least among these agencies, almost all waivers require a request from a regulated party.

Procedures also vary. For instance, Congress set forth specific requirements for the PHMSA (including both procedural and substantive requirements),<sup>74</sup> and ordered the Agency to deal with applications quickly.<sup>75</sup> Congress also specified how long such nonenforcement could continue.<sup>76</sup> And as to pipelines, Congress specifically requires the PHMSA to give a reason for granting a waiver.<sup>77</sup> By contrast, Congress has declared that a waiver from the FMCSA cannot exceed three months, must be “limited in scope,” must be “for nonemergency and unique events,” and will be “subject to such conditions as the Secretary may impose.”<sup>78</sup> The FTA uses notice-and-comment procedures, and “will issue a formal determination, which also is published in the *Federal Register*.”<sup>79</sup> The process used by the FAA, MSHA, and TTB is explained in greater detail below;<sup>80</sup> for purposes here, it is enough to observe that their procedures differ markedly.

Finally, some, but not all, of these agencies make their waiver decisions public or provide public notice during the evaluation process. The TTB, for instance, does not because “the decisions are fact-specific, and disclosure rules under the Internal Revenue Code generally prevent the agency from publicizing the decisions.”<sup>81</sup> Similarly, the FMCSA reports that it may “grant short-term waivers for special situations without providing public notice.”<sup>82</sup> The MSHA, however, “publishes all petitions for modification, as well as all granted modifications, in the *Federal Register*,” and “publishes all decisions (or dispositions of any type) on its website.”<sup>83</sup> The PHMSA also makes its decisions public.<sup>84</sup> The FTA also “publishes requests for waivers and responses in the emergency relief docket on [www.regulations.gov](http://www.regulations.gov)” and publishes other types of decisions on its own webpage or in the *Federal Register*.<sup>85</sup> Similarly, “the FAA publishes those decisions in the *Federal Register*[ ] that are novel,

72 FMCSA Survey Response, *supra* note 68.

73 FTA Survey Response, *supra* note 68.

74 See 49 U.S.C. § 5117(b) (2012) (requiring a “safety analysis,” notice-and-comment procedures, and other transparency mechanisms).

75 See *id.* § 5117(c) (requiring prompt action or an explanation for delay).

76 See *id.* § 5117(a)(2) (unless extension granted, limited to two years).

77 See *id.* § 60118(c).

78 See *id.* § 31315(a).

79 FTA Survey Response, *supra* note 68 (discussing 49 U.S.C. § 5323(m)(3) and 49 C.F.R. § 661.7 (2017)).

80 See *infra* subsections II.C.ii–iv.

81 TTB Survey Response, *supra* note 66.

82 MSHA Survey Response, *supra* note 69.

83 FMCSA Survey Response, *supra* note 68.

84 PHMSA Survey Response, *supra* note 67; see also 49 U.S.C. § 5117(b).

85 FTA Survey Response, *supra* note 68.

significant, or are of first impression to alert the public to such determinations.”<sup>86</sup>

## 2. Exemptions

The TTB, FTA, CFPB, and CDFI Fund do not list any exemption authority. The other agencies do, however—and the number of requests for exemptions can be remarkable. The PHMSA, for instance, reports “[a]pproximately 16,000” requests per year, of which it grants between 70% and 85% depending on the type.<sup>87</sup> Likewise, since August 2016, when “the FAA published a final rule allowing civil operation” of certain types of unmanned aircraft systems, it has received over 16,000 requests; it has granted about 25%, denied slightly less than 50%, and has not yet decided the rest.<sup>88</sup> The FAA “receives approximately 400–500 requests for exemption per year” for other programs, of which it grants approximately 75%.<sup>89</sup> The FMCSA receives about 1100 requests per year, and grants just shy of 60%.<sup>90</sup> In contrast to these large numbers, the EBSA reports that it typically receives fewer than 100 requests and that it does not grant many of them. Indeed, at least as of July 31, 2017, it had not granted *any* in 2017.<sup>91</sup>

As with waivers, these agencies with exemption authority typically do not often grant exemptions without a petition or application. The PHMSA, for instance, says it never does so;<sup>92</sup> the FAA “typically” does not.<sup>93</sup> The EBSA reports that between 2012 and 2016, the Agency “granted an exemption without a formal applicant approximately 9 times (2 new exemptions and 7 amendments to existing exemptions),” but stressed that “[i]t is unlikely that EBSA would propose an individual exemption on its own motion.”<sup>94</sup> The FMCSA has only done so “once to date.”<sup>95</sup>

The procedures these agencies use also diverge. The FAA has a public docket for requests, and “[m]ost requests are reviewed by an attorney in the Regulations Division of the FAA’s Office of the Chief Counsel.”<sup>96</sup> The FMCSA also has an office that is “responsible for reviewing exemption requests and making recommendations to the Administrator.”<sup>97</sup> The EBSA’s procedures vary, depending on the type of exemption at issue.<sup>98</sup> The

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86 FAA Survey Response, *supra* note 58.

87 PHMSA Survey Response, *supra* note 67.

88 FAA Survey Response, *supra* note 58.

89 *Id.*

90 FMCSA Survey Response, *supra* note 68.

91 EBSA Survey Response, *supra* note 65.

92 PHMSA Survey Response, *supra* note 67.

93 *See* FAA Survey Response, *supra* note 58.

94 EBSA Survey Response, *supra* note 65.

95 FMCSA Survey Response, *supra* note 68.

96 FAA Survey Response, *supra* note 58.

97 FMCSA Survey Response, *supra* note 68.

98 EBSA Survey Response, *supra* note 65.

PHMSA has an entire “desk guide” to explain its procedures.<sup>99</sup> Each, however, attempts to publicize its decisions.

### 3. Prosecutorial Discretion

Agencies were not forthcoming regarding prosecutorial discretion. The PHMSA, EBSA, MSHA, and CDFI Fund, for instance, did not respond to this section of the survey. Agencies, it appears, may not wish to share specifics, presumably in hopes of encouraging greater compliance.<sup>100</sup>

Of the agencies that did respond, most answers were not expansive. The TTB simply said “no” when asked whether it ever “choose[s] not to enforce the law against known violations.”<sup>101</sup> The FTA said that “[t]o the extent possible violations are discovered, FTA requires grantees to take corrective action[ ].”<sup>102</sup>

Some responses, however, were more detailed. The FAA, in particular, said this:

[T]he FAA does not exempt persons who have violated FAA statutes or regulations from the requirements of those provisions. Rather, when an FAA inspection produces sufficient evidence to conclude that a regulated person has violated a statute or regulation, the FAA takes action appropriate to address the noncompliance. The types of actions the FAA takes, and the bases for selecting such actions, are detailed in FAA Order 2150.3B, chap. 5, at 5-1 to 5-9, which guides FAA personnel in the exercise of prosecutorial discretion (available online). Pursuant to this policy, the FAA may take compliance action, administrative action, or legal enforcement action.

The FAA generally uses compliance and administrative actions (which do not result in remedial or punitive FAA enforcement) to ensure that regulated persons return to full compliance and take measures to prevent recurrence. It is appropriate for FAA personnel to take legal enforcement action (for remedial or punitive purposes) against a regulated person for noncompliances resulting from: intentional conduct, reckless conduct, failure to complete corrective action, conduct creating or threatening to create an unacceptable risk to safety, conduct where legal enforcement action is required by law, repeated noncompliance, the provision of inaccurate data

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99 See PHMSA Survey Response, *supra* note 67; see also PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., U.S. DEP’T OF TRANSP., APPROVALS PROGRAM DESK GUIDE (2016).

100 See, e.g., *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1192–93 (D.C. Cir. 2009) (“[Freedom of Information Act (FOIA)] Exemption 7(E) shields information if ‘disclosure could reasonably be expected to risk circumvention of the law.’ If the FOIA request here sought a checklist used by agents to detect fraudulent tax schemes or the words most likely to trigger increased surveillance during a wiretap, the applicability of the exemption would be obvious.” (quoting 5 U.S.C. § 552(b)(7)(E) (2008))); see also Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 GEO. IMMIGR. L.J. 345 (2013) (describing how difficult it is to get this information). Although some secrecy is understandable, it is not altogether for the good. After all, to the extent that one might worry about unequal treatment and “insiders” having privileged access to information, this secrecy may enable agencies to engage in such conduct.

101 TTB Survey Response, *supra* note 66.

102 FTA Survey Response, *supra* note 68.



to the FAA, actions pertaining to competency or qualification, and law enforcement-related activities. Regardless of how a noncompliance is addressed, the regulated person must return to compliance, now and for the future, or legal enforcement action may be taken.<sup>103</sup>

Similarly, the FMCSA also had interesting thoughts on the subject that merit quotation in full:

In addition, FMCSA conducted almost 8,000 investigations in FY2016. Regulatory violations of varying severity are found in almost every investigation. The investigations resulted in the issuance of approximately 4,400 Notices of Claim alleging one or more violations of the safety, commercial, or hazardous materials regulations. As more fully described below, FMCSA regularly discovers violations for which it chooses not to take enforcement action. FMCSA's overarching goal is safety, so before it initiates an enforcement action, it considers whether that enforcement action is the best method for achieving compliance. . . . Because it is likely that regulatory violations were found in almost all of the investigations, FMCSA's decision to not issue Notices of Claim in the other 3,000+ investigations could be described as an exercise of prosecutorial discretion.<sup>104</sup>

Because of the limited response rate, prosecutorial discretion remains in many respects an empirical mystery, even among these agencies.

#### 4. Miscellaneous

Finally, the survey also asked about the role those outside the agency play in nonenforcement decisions. Interestingly, each of the agencies that participated and that answered this question stated that those outside of the agency do not participate—at least not “generally.”<sup>105</sup> Of course, this point does not necessarily extend to all agencies. We know that *sometimes* those outside of the agency do participate. For instance, the White House's involvement in immigration nonenforcement is well documented.<sup>106</sup> But this does suggest that involvement by those outside of the agencies may be limited.

The survey also asked agencies of their view of the D.C. Circuit's analysis in *NetworkIP*, which vacated an agency's decision to waive a procedural rule because “special circumstances” were not present.<sup>107</sup> Many of the surveyed agencies did not respond to this question. One simply said it agreed with the

103 FAA Survey Response, *supra* note 58; *see also* FED. AVIATION ADMIN., U.S. DEP'T OF TRANSP., GUIDANCE FOR IMPLEMENTING THE FAA COMPLIANCE PHILOSOPHY (2015).

104 FMCSA Survey Response, *supra* note 68.

105 FAA Survey Response, *supra* note 58; *see also* EBSA Survey Response, *supra* note 65 (“With EBSA's decisions to grant statutory waivers, administrative exemptions that are processed on a class rather than individual basis are processed much like regulatory initiatives and will undergo a Departmental Clearance process prior to submission to the Office of Management and Budget.”); FAA Survey Response, *supra* note 58 (“In some instances, the agency may consult with other federal entities if their interests warrant consideration, such as aircraft operations over national parks.”).

106 *See, e.g.*, Delahunty & Yoo, *supra* note 5.

107 *See NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008).

analysis with little explanation,<sup>108</sup> while another largely said the same.<sup>109</sup> Because agencies frequently appear before the D.C. Circuit, their reticence to comment on that court's cases is understandable. That said, two agencies did share some interesting thoughts.

The FMCSA addressed *NetworkIP* at some length. Specifically, the Agency explained that:

FMCSA generally agrees with the court's view in *NetworkIP, LLC v. FCC*, 548 F.3d 116 (D.C. Cir. 2008). Criteria that set forth the special circumstances where waiver of or exemption from a rule is appropriate increase the likelihood of consistent and predictable outcomes. Nonetheless, the purpose of waivers and exemptions is to give an agency the flexibility to reach an equitable result in a particular situation. It is not feasible or efficient for an agency to contemplate the multitude of circumstances that would warrant waivers and exemptions across the broad spectrum of rules it administers. While more specific waiver and exemption criteria may be feasible in limited circumstances, such as in the case of the filing deadline considered by the court in *NetworkIP*, in many instances the decision regarding whether to grant a waiver or exemption is more appropriately based on the totality of the circumstances, particularly when significant policy considerations are present. As long as an agency adequately articulates the special circumstances that warrant deviation from the rule at issue, future parties are on notice as to how the agency will interpret its rule and judicial review is not frustrated. Moreover, such a view is consistent with the court's position in *NetworkIP* that an agency is afforded deference regarding its decision whether to waive one of its own rules.

As specifically concerns FMCSA's waiver and exemption authority and regulatory standards for exercising that authority, we would note incidentally that the Agency's exercise of discretion is defined by the requirement that relief from regulatory obligations in such circumstances would likely achieve a level of safety equivalent to or greater than the level that would be achieved absent the involved waiver or exemption. Accordingly, FMCSA's waiver and exemption statutory framework and regulatory structure is constrained by a safety-related standard that is inherently more stringent than "whatever is consistent with the public interest" as referenced by the D.C. Circuit's *NetworkIP* ruling.<sup>110</sup>

The EBSA also addressed this question—and identified the downside of overly rigid requirements.

Greater clarity on the criteria used to make waiver determinations will instill the public's trust that its government institutions are not making decisions in an arbitrary manner. However, agencies need flexibility in applying criteria used to grant waivers in order to avoid treating all applications the

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108 TTB Survey Response, *supra* note 66.

109 See CDFI Fund Survey Response, *supra* note 65 (agreeing that "grants of waivers should be determined in a fair and equitable manner"); TTB Survey Response, *supra* note 66 ("Yes. Because TTB's waiver decisions are frequently fact-specific and generally subject to disclosure restrictions, criteria used to evaluate waiver requests should be clear and applied consistently to regulated parties.").

110 FMCSA Survey Response, *supra* note 68 (quoting *NetworkIP*, 548 F.3d at 127).

same. Exemption applications submitted to EBSA are very fact-specific, and a decision whether or not to grant an exemption may turn on one small detail. A more rigid set of criteria that focuses less on the individual facts of an application may either cause EBSA to grant exemptions that it would not currently grant, or to deny applications otherwise deserving of exemptive relief.<sup>111</sup>

### C. Four Case Studies

The study also addressed four agencies in some detail: the CFPB, FAA, MSHA, and TTB. The following case studies are based on interviews with agency officials, agency survey responses, and additional research. The views expressed do not necessarily reflect those of the agencies, especially because even within agencies, practices may not be monolithic. But these case studies are interesting.

#### 1. The CFPB

Consider first the CFPB, a new agency that regulates consumer-focused financial products and services.<sup>112</sup> This Agency merits attention because although several of the laws it administers explicitly allow nonenforcement,<sup>113</sup> the CFPB does not engage in much of it, at least in certain contexts. To be sure, when implementing a statute through rulemaking, the CFPB may identify requirements that do not make sense for certain categories of entities through the notice-and-comment process. But, as to individual companies, the CFPB's formal nonenforcement experience is limited, despite the Agency's authority and efforts to create nonenforcement programs. Informally, however, the Agency does engage in nonenforcement, especially during investigations.

Perhaps the best example is the Trial Disclosure Program, which the Agency described in the *Federal Register*.<sup>114</sup> The Agency can approve, following a proposal from a regulated entity, disclosures that would otherwise be unlawful.<sup>115</sup> To implement that statutory power, the CFPB solicited comments. Following that process, the Agency finalized its program. An applicant must submit a proposal that “[d]escribe[s] how these changes are

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111 EBSA Survey Response, *supra* note 65.

112 *Creating the Consumer Bureau*, CONSUMER FIN. PROTECTION BUREAU, <https://www.consumerfinance.gov/about-us/the-bureau/creatingthebureau/> (last visited Jan. 31, 2018).

113 See, e.g., 12 U.S.C. §§ 1831t, 5532(e)(2) (2012); 15 U.S.C. §§ 1639, 1691c–2(g)(2) (2012).

114 See Policy to Encourage Trial Disclosure Programs; Information Collection, 78 Fed. Reg. 64,389 (Oct. 29, 2013).

115 See 12 U.S.C. § 5532(e)(1)–(2) (stating that the Agency, through a public process, “may permit a covered person to conduct a trial program that is limited in time and scope, subject to specified standards and procedures, for the purpose of providing trial disclosures to consumers[,]” and that such a person “shall be deemed to be in compliance with, or may be exempted from, a requirement of a rule or an enumerated consumer law”).

expected to improve upon existing disclosures, particularly with respect to consumer use, consumer understanding, and/or cost-effectiveness,” and “[p]rovide[s] a reasonable basis for expecting these improvements, and metrics for testing whether such improvements are realized.”<sup>116</sup> Thereafter, the CFPB evaluates the proposal using factors that include “[t]he extent to which the program anticipates, controls for, and mitigates risks to consumers.”<sup>117</sup> Approvals are made public.<sup>118</sup> Despite the efforts put into creating this program, however, the Trial Disclosure Program has not resulted in a single approved or denied proposal. Simply put, no one has used it.

The same is largely true of the CFPB’s “no action” letters. Staff may issue one of these nonbinding letters if there is no intention to recommend initiation of an enforcement or supervisory action. Like the Trial Disclosure Program, the CFPB has established a system for granting such letters, which was also implemented again after soliciting public comments.<sup>119</sup> Agency staff may issue such letters “involving innovative financial products or services that promise substantial consumer benefit where there is substantial uncertainty whether or how specific provisions of statutes implemented or regulations issued by the Bureau would be applied.”<sup>120</sup> Such letters, as a rule, “would be publicly disclosed.”<sup>121</sup> Again, however, despite the Agency’s efforts to create and popularize this program, it has only been used once to date.<sup>122</sup>

During the interview and follow-up communications, officials stressed that they would like these programs to be used. And they do not know for sure why the programs have not been used. One possibility is that the current regulations are so familiar that regulated parties do not want to spend the resources necessary to prepare a proposal, especially if it means being the first one to do so. The fact that the process is public may also be an issue; companies may be hesitant to open themselves up to scrutiny. Ignorance is possible too, but that does not seem likely; many of these regulated entities are sophisticated.

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116 Policy to Encourage Trial Disclosure Programs; Information Collection, 78 Fed. Reg. at 64,393 (footnote omitted).

117 *Id.* at 64,394.

118 *See id.* (“The Bureau will publish notice on its Web site of any trial disclosure program that it approves for a waiver. The notice will: (i) Identify the company or companies conducting the trial disclosure program; (ii) summarize the changed disclosures to be used, their intended purpose, and the duration of their intended use; (iii) summarize the scope of the waiver and the Bureau’s reasons for granting it; and (iv) state that the waiver only applies to the testing company or companies in accordance with the approved terms of use.”).

119 Like the Trial Disclosure Program, the No-Action Letter policy was also published in the Federal Register. *See* Policy on No-Action Letters; Information Collection, 81 Fed. Reg. 8686 (Feb. 22, 2016).

120 *Id.* at 8686. Such letters “may be conditioned on particular undertakings by the applicant with respect to product or service usage and data-sharing with the Bureau.” *Id.*

121 *Id.*

122 *See CFPB Announces First No-Action Letter to Upstart Network*, CONSUMER FIN. PROTECTION BUREAU (Sept. 14, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-first-no-action-letter-upstart-network/>.

Not surprisingly, the CFPB engages in prosecutorial discretion. This may be inevitable for agencies that supervise financial institutions because there are so many of such institutions and there are many ways in which a violation can occur. The CFPB, however, has attempted to create a process for such discretion. Specially, the Agency prioritizes which violations are most serious by using an examination manual that is publicly available.<sup>123</sup>

## 2. The FAA

Unlike the CFPB, the FAA engages in a large volume of formal nonenforcement. And, perhaps because of that volume, it has developed both expertise and regularized procedures.

In its survey response, the FAA identified eight sources of waiver authority, plus it indicated that it “has a robust practice in considering regulatory exemptions in general, as well as specific waiver programs that may be built into those regulations.”<sup>124</sup> And it is a “robust practice” indeed—the Agency resolves thousands of requests for nonenforcement each year.<sup>125</sup> This is especially true regarding drones; in one year, the FAA received over 16,000 requests for drones.<sup>126</sup> Beyond that, it regularly “receives approximately 400–500 requests for exemption per year.”<sup>127</sup>

The process for resolving nonenforcement requests is regularized. It begins with a formal request submitted to a public docket (on Regulations.gov). The FAA’s Office of Rulemaking then begins producing a formal response. In particular, requests “are assigned for review and disposition to the program office . . . that covers the particular regulations from which relief is requested.”<sup>128</sup> “Most requests are reviewed by an attorney in the Regulations Division of the FAA’s Office of the Chief Counsel.”<sup>129</sup> The answer is placed on the public docket. Requests for reconsideration are permitted, and “[s]uch requests are ultimately reviewed by the Administrator to be considered final agency action.”<sup>130</sup> Importantly, the public can comment during this process and the Agency “regularly publishes a summary of requests for exemption in the Federal Register for requests that are novel, significant, or are of first impression to alert the public to such requests.”<sup>131</sup>

Like the CFPB, the FAA has a formalized guide for use by Agency “personnel in the exercise of prosecutorial discretion.”<sup>132</sup> Specifically, the Agency “may take compliance action, administrative action, or legal enforce-

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123 See CONSUMER FIN. PROT. BUREAU, CFPB SUPERVISION AND EXAMINATION PROCESS (2017).

124 FAA Survey Response, *supra* note 58.

125 See *id.*

126 *Id.*

127 *Id.* (emphasis omitted).

128 *Id.*

129 *Id.*

130 *Id.* (citing 14 C.F.R. § 11.101 (2017)).

131 *Id.*

132 *Id.*

ment action.”<sup>133</sup> During the interview, officials stressed that the Agency is more likely to pursue punitive action against serious violations,<sup>134</sup> but “does not exempt persons who have violated FAA statutes or regulations from the requirements of those provisions.”<sup>135</sup> Instead, if punitive measures are deemed unwarranted, the Agency “generally uses compliance and administrative actions (which do not result in remedial or punitive FAA enforcement) to ensure that regulated persons return to full compliance and take measures to prevent recurrence.”<sup>136</sup> Because safety is paramount, the Agency is unlikely to accept the argument that compliance is too costly. Likewise, although the Agency often declines enforcement on an individual plane-by-plane basis, it is not opposed to fleet-wide decisions (for instance, where there is a common issue). The Agency does not place summaries of all decisions in the *Federal Register*, but it tries to do so for the ones that break new ground. (Of course, what is novel may be in the eye of the beholder. That said, the Agency emphasized that it tries to be transparent in its nonenforcement decisions.)

The Agency receives requests for nonenforcement from both large and small companies. Individuals sometimes seek nonenforcement too (for instance, if a restraint system will not work for a particular person), but that is often handled by the airlines. Judicial review of one of these decisions is almost unheard of. The officials interviewed could only remember one such suit, and it did not proceed to a formal judicial decision.<sup>137</sup>

### 3. The MSHA

The MSHA, which helps protect the health and safety of those working in the mining industry, is, in many ways, somewhere in between the CFPB and the FAA. The MSHA is like the FAA because both are concerned with safety and evaluate nonenforcement on those grounds. It is like the CFPB, however, because it does not engage in a large amount of nonenforcement; whereas the FAA may evaluate thousands of requests for nonenforcement in a year, the MSHA is likely to evaluate less than 100.

The MSHA has defined procedures for modifying future enforcement of a particular standard (often adding replacement requirements), which the

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133 *Id.*; see also FED. AVIATION ADMIN., *supra* note 103.

134 FAA Survey Response, *supra* note 58 (“It is appropriate for FAA personnel to take legal enforcement action (for remedial or punitive purposes) against a regulated person for noncompliances resulting from: intentional conduct, reckless conduct, failure to complete corrective action, conduct creating or threatening to create an unacceptable risk to safety, conduct where legal enforcement action is required by law, repeated noncompliance, the provision of inaccurate data to the FAA, actions pertaining to competency or qualification, and law enforcement-related activities.”).

135 *Id.*

136 *Id.*

137 *Id.*

agency dubs “petitions for modification.”<sup>138</sup> Indeed, the Agency has an entire handbook, publicly accessible, that details how the Agency processes such requests.<sup>139</sup> A mine must formally request a modification, at which point the Agency posts the request in the *Federal Register*.<sup>140</sup> Interested parties thereafter can file comments.<sup>141</sup> Ordinarily, not many comments are filed, but the Agency observed during the interview that union representatives frequently file comments. The Agency then conducts a field investigation, which examines the facts but does not make a recommendation.<sup>142</sup> Higher-level officials thereafter examine the request, any comments, and the field report to make a decision called a Proposed Decision and Order.<sup>143</sup> That decision can be appealed to an administrative law judge, whose decision in turn can be appealed to the Agency’s assistant secretary.<sup>144</sup> Following that, it is possible to seek review in district court, but that is very rare.

By statute, mines must raise one of two arguments in support of a modification to a safety standard.<sup>145</sup> First, that the mine will engage in another practice that is at least as safe as what the regulation hopes to achieve.<sup>146</sup> Or second, that if the regulation is followed as written, it will result in a diminution of safety, at least for the specific location.<sup>147</sup> The MSHA will not grant a modification if the result would be a less safe working environment for miners. For example, MSHA regulations require that coal mines maintain a 300-foot diameter around oil and gas wells.<sup>148</sup> (Coal mining could cause sparks, which would be very dangerous around a gas or oil well.) If a mine wants to move closer to the well, it can request a modification. The MSHA will then consider granting such a modification if the mine can show that the proposal is as safe as the standard.<sup>149</sup> Outside of coal, a typical situation involves use of pressurized air to dust off miners. Ordinarily, that is not permitted, but when an outside company constructed a safe machine to do it, the Agency began readily authorizing such modifications.<sup>150</sup> The process, on average, takes approximately nine months, but there are means for expedited consid-

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138 See MINE SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR, PETITIONS FOR MODIFICATION: COAL MINE SAFETY AND HEALTH AND METAL AND NONMETAL MINE SAFETY AND HEALTH (2008).

139 See *id.*

140 *Id.* at 6.

141 *Id.*

142 *Id.* at 26.

143 See *id.*

144 See 30 C.F.R. § 44.35 (2017).

145 See 30 U.S.C. § 811(c) (2012).

146 *Id.*

147 *Id.*

148 30 C.F.R. § 75.1700.

149 See *id.* § 44.16(e).

150 See, e.g., Affirmative Decisions on Petitions for Modification Granted in Whole or in Part, 81 Fed. Reg. 8996, 8996–97 (Feb. 23, 2016).

eration.<sup>151</sup> Once granted, the permission is generally permanent; modifications usually do not have time restrictions. After all, often a modification requires a physical change to the mine. A temporary modification makes little sense for a physical change to the mine itself.

According to the Agency, it received sixty-four petitions for modification in 2014, and granted twenty-three of them “at least to some extent.”<sup>152</sup> Yet that does not mean that all of the other petitions were denied. Sometimes requests for nonenforcement are withdrawn because the mine can find another way to accomplish its goal. Similarly, MSHA officials made an interesting observation during the interview. They explained that one reason that there are few requests for modifications of standards is that the mining industry is an established one; technological changes occur sometimes, but often not especially quickly. Thus, mines may not need regulatory modifications all that often. Likewise, the Agency’s substantive standards themselves are often performance based (i.e., they are based on outcomes, not necessarily specific means). This may also reduce the need for nonenforcement.

The MSHA stressed that it does not engage in prosecutorial discretion—inspectors must cite violations. That said, the Agency recognizes that infeasibility can be a defense and may delay enforcement in narrow instances to allow an industry or an operator to come into compliance. For instance, soon after a new standard is promulgated, the Agency may not require immediate implementation so long as the regulated mine is making a good-faith effort to comply. This sort of analysis is generally mine-specific. Sometimes, moreover, the Agency uses infeasibility in a categorical way. One example involved self-contained self-rescuers (SCSRs), which are devices that provide breathable air to miners during emergencies. During the interview, an instance was recounted in which the Agency required a certain type of SCSR for coal miners, but the SCSRs, although ordered, were not arriving in time for mines to comply with the new standard. The Agency accordingly informed mines across the board that they would not be cited as long as they could show that they had ordered the required SCSRs.

#### 4. The TTB

The final case study is the TTB. The TTB is an interesting agency; it operates both as a taxing agency and as a consumer protection agency. Housed within the Treasury Department, it is tasked with “enforcing the provisions of the Federal Alcohol Administration Act . . . to ensure that only qualified persons engage in the alcohol beverage industry” by regulating alcohol and tobacco production, with a focus on taxation but also on product labeling.<sup>153</sup>

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151 30 C.F.R. § 44.13(a); *see also* MINE SAFETY & HEALTH ADMIN., *supra* note 138, at 17–18.

152 MSHA Survey Response, *supra* note 69.

153 TTB’s *Mission—What We Do*, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, <https://ttb.gov/consumer/responsibilities.shtml> (last updated Feb. 14, 2018); *see, e.g.*,



In some respects, the TTB is closer to the MSHA than it is to the FAA. Like the MSHA, the amount of nonenforcement is fairly limited; whereas the FAA may consider hundreds or even thousands of requests in a single year, the TTB will often receive less than fifty. In other respects, however, the TTB is similar to both the FAA and the MSHA. It also requires an application before it engages in nonenforcement and it does not grant all requests, denying approximately fifteen percent of them.

In many ways, however, the TTB is different from both the FAA and the MSHA. Most obviously, whereas the MSHA and the FAA make nonenforcement decisions public, including through use of notice-and-comment procedures, the TTB typically does not place information about its nonenforcement decisions in the *Federal Register* or otherwise make them available.<sup>154</sup> The primary reason for this, according to the Agency, is that confidentiality is especially important when it comes to taxes. Thus, the Agency is reluctant to share too much information. That said, the Agency emphasized that if there is an issue of widespread applicability, it is willing to issue guidance documents to the regulated community.<sup>155</sup> But the process under the TTB is different because, as a rule, it is not public.

The TTB has specific statutory grants to engage in nonenforcement; it also does so through what it calls “Alternate Methods or Procedures,” which allow nonenforcement where the regulated party can demonstrate that another method will work just as well.<sup>156</sup> The Agency typically pursues known violations, thus exercising prosecutorial discretion somewhat rarely. Typically, this occurs at the investigator level. Judicial review of any aspect of the Agency’s nonenforcement is very unusual.

In the TTB’s experience, it is more often the larger manufacturers that seek prospective nonenforcement. One potential explanation is that smaller players do not need exceptions as often. Lack of knowledge is possible, but, given the many contacts between the Agency and those it regulates (e.g., licenses and inspections), this explanation may be unlikely.

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TTB Approves General-Use Formulas for Certain Agricultural Wines, TTB Ruling No. 2016–2 (Sept. 29, 2016) (“As part of its ongoing efforts to reduce for industry members the regulatory burdens associated with formula approval and to increase administrative efficiencies for the Bureau, consistent with its mission to protect the public and collect the revenue, TTB has reviewed the formula requirements for certain agricultural wines to determine where its formula review process could be streamlined and modernized. As a result of this review, TTB has determined that its formula review process for certain standard agricultural wine products can be accomplished in a more efficient manner while still being consistent with TTB’s mission.”); Alcohol and Tobacco Tax and Trade Bureau, Alcohol and Tobacco Export Documentation Procedures (Industry Circular No. 2004–3, Aug. 31, 2004) (“We are issuing this circular to announce an alternative procedure to allow you to request approval to retain export documentation at your premises.”).

154 TTB Survey Response, *supra* note 66.

155 See, e.g., Alcohol and Tobacco Tax and Trade Bureau, Pinot Noir from the Languedoc-Roussillon Region of France; Cancellation of Declaration Requirement (Industry Circular No. 2017–3, May 18, 2017).

156 See, e.g., 27 C.F.R. §§ 19.26, 19.27 (2017).

### III. A TAXONOMY OF NONENFORCEMENT

Agency approaches to nonenforcement are heterogeneous. This suggests that the term “nonenforcement” is too broad. Nonenforcement includes a great many types of situations, some of which are more dangerous than others. Accordingly, in evaluating a particular nonenforcement decision, it is useful to explore the characteristics of that decision across numerous factors. It is not always clear whether one type of decision is more or less susceptible to abuse than another. But it is clear that different varieties should not be clumped together.

#### A. *Timing Factors*

Obviously, one of the most important factors is whether an agency’s exercise of its nonenforcement authority is prospective or retrospective—in other words, has the regulated party violated the law yet or not? If a violation has already occurred, nonenforcement is an exercise of prosecutorial discretion; the agency could enforce the law but has chosen not to. If the violation has not occurred, nonenforcement is best understood as prospective authorization; the agency is giving permission for a violation to occur by declaring, in a sense, that the prohibition does not apply. This sort of timing distinction is common in law.<sup>157</sup> Of course, it is possible for one regulated entity to seek both prospective authorization and retrospective forgiveness, for instance, if it has violated the law and wishes to continue doing so. But it is analytically useful to draw a distinction.

#### B. *Nontiming Factors*

Various nontiming, situational factors are important.<sup>158</sup> Although this list is not meant to be comprehensive, at least ten should be considered. Many of these factors are presented as binary when, in fact, a spectrum is more accurate. A binary framework, however, is easier to conceptualize.

#### 1. Who Makes the Decision?

It matters *who* makes the decision. Specifically, is the decision left to staff or must it be made by a political appointee? And, if a political appointee is involved, is involvement meaningful or pro forma? Likewise, are individuals outside of the agency involved in the process? Why the “who” question matters is obvious: career staff and political appointees may have different characteristics. To the extent that we worry about the politicization of nonenforcement, one might prefer staff to make these decisions. At the same

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157 See, e.g., *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929 (1975) (“Having violated the ordinance . . . M & L cannot now be heard to complain that its constitutional contentions are being resolved in a state court.”).

158 Other potential factors include the reasons for the violation, the consequences of nonenforcement, the ease of identifying whether a violation has occurred, and agency design (e.g., whether enforcement is handled by a separate office).

time, however, for accountability reasons, there is a good argument that political appointees should be involved. That principle may extend to involvement of a political outsider of the agency. For purposes here, it is enough to recognize that how one thinks about nonenforcement may vary depending on who makes the decision.

## 2. The Nature of the Agency Judgment

Another important factor addresses the nature of the agency judgment: Is it “policy driven” or “technical”?<sup>159</sup> The line between “policy driven” and “technical” decisions is no doubt a fuzzy one, but it is also a line recognized in the literature. Determining whether a law should apply in a certain situation cannot entirely be divorced from politics. But one’s sense of the riskiness of nonenforcement might change, for instance, when it looks like the agency is acting for political reasons—especially political reasons that may not reflect the statutory directive of the Congress that enacted the relevant law.

## 3. The Source of the Legal Duty

Likewise, it is also important to consider the source of the legal duty. Was it created by Congress in a statute or by the agency in a regulation?<sup>160</sup> Of course, agencies need congressional authority to act, so, in a sense, all regulations are created by Congress. Even so, a regulation is not a statute, and the agency often has more authority to define the scope of a regulation. One might think that decisions to not enforce congressional commands are more serious because they threaten Congress’s ability to create policy. On the other hand, decisions not to enforce regulations may be more serious because of the incentives they create for agencies; agencies may, for instance, intentionally promulgate a broad rule knowing that they can use nonenforcement when they choose.

## 4. The Instigation of Nonenforcement

It also is worth knowing whether the agency can act *sua sponte* or whether a regulated party must ask. Presumably, many instances of prosecutorial discretion are *sua sponte*; regulated parties may be wary of voluntarily seeking nonenforcement for what has already happened because doing so would require a confession. Yet, some exercises of prospective nonenforcement authority are also *sua sponte*. *Sua sponte* nonenforcement authority reflects greater discretion and suggests that the agency could more easily use nonenforcement for political reasons.

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159 See, e.g., Osofsky, *supra* note 13, at 112 (drawing this distinction).

160 Cf. Barron & Rakoff, *supra* note 6, at 267.

## 5. The Clarity of the Criteria

The criteria an agency uses to evaluate nonenforcement are also important. In particular, it matters how specific the criteria are, because the more open-ended the standard, the more discretion the agency has. This point was made by the D.C. Circuit in *NetworkIP*.<sup>161</sup> If an agency can decide to waive regulatory requirements whenever doing so is in the “public interest,” it has a great deal of discretion. Because discretion can be abused, open-ended criteria are especially problematic since they may enhance an agency’s ability to engage in biased decisionmaking.

## 6. The Breadth Across Entities

It is also worth knowing how many regulated parties the agency’s nonenforcement decision applies to. Does it apply to just one entity, a handful, or an entire industry? It is not clear whether broad or narrow nonenforcement is more dangerous. When nonenforcement is narrow, presumably there is more compliance with the law overall. But if we are worried about bias, broader nonenforcement may be preferable. In any event, the scope of nonenforcement should influence our assessment of it.

## 7. The Breadth for a Single Entity

Similarly, we should want to know how much nonenforcement is occurring for a single entity. Has the agency determined not to enforce all parts of the law or only certain parts of the law? Relatedly, the agency may decide to waive requirements for one party in an adjudication but not another, thus potentially determining who will win. *NetworkIP* again is a good example of this. There, the Agency waived a procedural rule for one party but did not waive the related substantive requirements for the other side.<sup>162</sup>

## 8. Public Disclosure

“Old-fashioned publicity is another significant check on agency action.”<sup>163</sup> Hence, it is significant whether the agency’s decision is publicly available. Disclosure, moreover, extends beyond just the final decision. Does the agency acknowledge its nonenforcement authority and publish the procedures it uses? Does it allow interested parties to comment on requests for nondisclosure? Does it provide enough information about its nondisclosure decision that its analysis can be subjected to public scrutiny? In evaluating nonenforcement, all of these questions matter.

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161 See *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008).

162 See *id.* at 126.

163 T. Alexander Aleinikoff, *Non-Judicial Checks on Agency Actions*, 49 ADMIN. L. REV. 193, 195 (1997). But see Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 902–03 (2006) (setting forth some of “transparency’s limits”).

## 9. Benefit to Agency

Whether the agency benefits (and if so, how?) from nonenforcement is also relevant. Must the regulated party do something in exchange for a waiver, and if so, what? Such benefits may bias agency decisionmaking. This factor relates to the clarity of the agency's criteria, as well as to the source of the legal duty. The clearer the standard, the less likely it is that the agency can engage in "horsetrading." Likewise, to the extent that the agency wishes to engage in "horsetrading," it may draft overly broad prohibitions to create the leverage it needs to do so.

## 10. Whether There Is Judicial Review

Finally, the availability of judicial review also matters. One of the purposes of judicial review is to prevent arbitrary or biased decisions, and to the extent that agencies know that their decisions will be reviewed, they have incentives to be careful from the beginning.<sup>164</sup> There are costs and benefits to judicial review, of course. Thus, recognizing that judicial review may prevent bad acts by agencies does not necessarily mean that judicial review is always worthwhile. But the prospect of judicial review should factor into one's appraisal of nonenforcement.

### C. *Visual Taxonomy*

It is possible to evaluate a nonenforcement decision across all of these factors.

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<sup>164</sup> See, e.g., Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 529.

Taxonomy of Nonenforcement				
		Previolation		Postviolation
		Waiver	Exemption	Prosecutorial Discretion
Who Decides	Agency Principals			
	Agency Staff			
Policy Nature	Policy-Driven			
	Technocratic			
Legal Duty	Statutory Duty			
	Regulatory Duty			
Investigate	Sua Sponte			
	Upon Request			
Criteria	Open-Ended			
	Specific			
Breadth Across Entities	Categorical			
	Individualized			
Breadth for Entity	Complete			
	Partial			
Public Notice	No Public Notice			
	Public Notice			
Agency Benefit	Within Authority			
	Outside of Authority			
Judicial Review	Unreviewable			
	Reviewable			

#### IV. A BETTER APPROACH?

Nonenforcement is valuable but dangerous. There are times when it is not possible to enforce the law against all violations, and there are also times when it would not be desirable to do so even it could be done. Hence the value of discretion. Yet this form of discretion, like others, can be used in

problematic ways. This is especially true in the context of nonenforcement of agency-created regulatory duties, because awareness that nonenforcement is available may create bad incentives for agencies when they design rules from the outset. After all, perhaps agencies will be less precise when drafting regulations if they know that they can always just grant a waiver. How then to strike the balance?

There are several obvious safeguards. Unless there is a *very* good reason not to, for instance, agencies should publicize their nonenforcement programs and policies, as well as their nonenforcement decisions. They can also encourage public comments, especially from those most likely to be affected.<sup>165</sup> To the extent that these sorts of commonsense safeguards are not already being used, agencies should rethink their practices, or, if need be, Congress should consider legislation. While important, however, these mechanisms do not always get at the heart of the problem. The truth is that nonenforcement should be the exception, not the rule, and discretion to exercise nonenforcement authority should be used carefully.

Why should nonenforcement be the exception? *Because it is dangerous.* For instance, unless there is a compelling justification for requiring *ex ante* approval,<sup>166</sup> in a free society, one should be able to look at the relevant legal texts and, if one's conduct comports with that law, act with confidence.<sup>167</sup> By the same token, if there are certain types of conduct that the lawmaker (be it Congress or an agency) has concluded are not problematic, regulated parties should not have to ask permission before engaging in that conduct. Even apart from the affront to liberty, it is costly to force regulated parties (i) to figure out in the first instance whether their intended conduct comports with

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165 See, e.g., EBSA Survey Response, *supra* note 65 (“Applicants must disclose, under penalty of perjury, all relevant factual information that may be used by EBSA to make its findings whether to grant an exemption. EBSA will only grant an exemption based on a fully developed record that is open to the public. Before granting an exemption, EBSA must publish a proposed exemption on the *Federal Register* and give interested persons the ability to comment and request a hearing. Only after considering commenters’ input may EBSA then grant an exemption.” (emphasis added)).

166 For instance, if conduct is particularly dangerous (e.g., generating nuclear power), it may make sense to prohibit such conduct unless the regulated party can demonstrate special competence. In other words, sometimes it makes sense to create broad prohibitions but then to have exceptions (i.e., a permit system). See generally Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133 (2014) (recognizing value of permits).

167 See, e.g., Richard A. Epstein, Essay, *The Permit Power Meets the Constitution*, 81 IOWA L. REV. 407, 407 (1995) (“One’s attitude toward the permit power is heavily influenced by one’s attitude toward individual liberty more generally. An old observation of the German system of freedom is that all which is not permitted is prohibited (which is at least better than what I take sometimes to be the modern American position that all which is not prohibited is required). The classical American view generally took the form that all that is not prohibited is permitted, which sets the initial presumption in favor of liberty—not in favor of government action.”); cf. Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 543 (2009) (“When people are confident that they are aware of the applicable laws, they will be more confident taking the business risks that drive our economy.”).

the law and (ii) if not, to figure out how to prompt nonenforcement by the agency. To be sure, it is not costless for the lawmaker to anticipate activities that are not problematic and write legal prohibitions that do not capture such activities, especially if some unobjectionable activities are idiosyncratic; bounded rationality applies to lawmakers, too.<sup>168</sup> But, if many regulated parties whose conduct is not objectionable are being affected by the prohibition, often something has gone wrong, *even if* the agency routinely grants waivers. The law on the ground should reflect the law on the books. This is especially true because not everyone is legally sophisticated. It is almost certainly easier for big, established companies, for instance, to navigate the world of waiver than it is for small, upstart competitors. And, the less discretion there is, the fewer opportunities there are that discretion will be abused.<sup>169</sup> Thus, although there is a place for nonenforcement in administrative law, it should be a small place.

The D.C. Circuit's analysis in *NetworkIP* bears close attention because it is sensitive to these concerns. The court explained that an agency must be able to "articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation."<sup>170</sup> And the reason the D.C. Circuit did this was because it wanted to prevent nonenforcement from becoming too common. Related to the idea that nonenforcement should be the exception rather than the rule is the notion that the agency should be able to explain why a particular situation is unusual, preferably with objective criteria. If the agency cannot do so, there is a danger that it is behaving in an arbitrary manner.

The realization that nonenforcement should be the exception rather than the rule has significant implications. If a lawmaker (either Congress or an agency) knows that a large category of conduct is unobjectionable, any prohibition it creates should not capture that conduct. Sometimes, however, the lawmaker does not know that such a category of unobjectionable conduct exists when it enacts a legal prohibition, perhaps because the category does not yet exist at the time but only later comes into existence. The result might be that the agency finds itself granting many requests for nonenforcement. When that happens, nonenforcement may be useful as a temporary measure, but the best response should be to change the prohibition. In other words, nonenforcement should not be seen as distinct from retrospective review. Rather, a large number of requests for nonenforcement should be understood, at least presumptively, as a trigger for retrospective review.

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168 See, e.g., Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1064 n.98 (1990).

169 See, e.g., Clifford Rechtschaffen, *Promoting Pragmatic Risk Regulation: Is Enforcement Discretion the Answer?*, 52 U. KAN. L. REV. 1327, 1354 (2004) ("As the discretion afforded to regulators increases, so does the potential for biased or inconsistent enforcement. There is considerable evidence showing that enforcement personnel exhibit systematic biases when they make discretionary decisions.").

170 *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) (quoting *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)) (internal quotation marks omitted).



## CONCLUSION

Even apart from its implications for high-level constitutional theory, nonenforcement raises important questions about how best to manage the tradeoffs between the benefits of discretion and the dangers of its abuse. This Article is intended as a step towards striking the right balance.