

**The Bill Blackwood  
Law Enforcement Management Institute of Texas**

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**Structuring Discretion:  
The Effects of Policy on Officer Perceptions  
of Discretionary Authority**

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**An Administrative Research Paper  
Submitted in Partial Fulfillment  
Required for Graduation from the  
Leadership Command College**

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**By  
Gary W. Ellington**

**Harris County Sheriff's Office  
Houston, Texas  
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## ABSTRACT

This research is an inquiry into the effect of departmental policies, procedures, rules, regulations, and management practices on the individual officer's perception of his or her own discretionary authority. The issue at hand is whether a department's policies, procedures, rules, regulations, and management practices can adversely affect the officer's ability to exercise discretion effectively in the rapidly changing law enforcement climate of today. The author conducted extensive text research, but the primary source of information in this study has been the author's field research, utilizing a questionnaire as a survey instrument. The survey instrument was distributed to two distinct populations composed of a group of supervisors and the general membership of a large metropolitan law enforcement agency in the western United States. This survey measured the officer's perceptions of his or her discretionary authority in different law enforcement and order maintenance situations. The author analyzed the survey results and discovered the existence of a significant number of officers in Department X who consistently rated their levels of discretionary authority to be lower than the norm established by the whole of that population. By comparing and contrasting the differences and occasional similarities between the two populations and the separate cohort within Department X, the author found that Department X's policies, or, more likely, management practices, did have an adverse effect on the *perceived* discretionary authority of Cohort A, which comprised nearly 21% of the respondents of Department X. Although this finding is certainly not cause for alarm for the department's leadership, the author recommends that a review of management and, especially, leadership practices be conducted by Department X in the future.

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## INTRODUCTION

The intended purpose of this document is to establish the findings of the author's investigation into the effect of policies, procedures, rules, regulations, and management practices on the officer's perception of his or her discretionary authority and its effect on the decision-making process of the individual officer in the field. The subject of officer discretion has been the topic of heated discussion, having been debated in both the public forum and in the courts. The relevance of the question to the law enforcement profession is clear- whether the public expects officers to exercise their own judgment in policing, or to execute their duties in a ministerial fashion is an issue that has perhaps not yet been fully resolved. Nevertheless, officers do exercise discretion in the prosecution of their duties, to greater or lesser extents, in all agencies.

This inquiry, although it will include an overview of the officer discretion controversy, will focus on a less well-investigated facet of the subject. The question at hand is, "What effect, if any, do policies, procedures, rules, regulations, and management practices have on the officer's perceptions of his or her own discretionary authority?" Understanding the answer to this question will, hopefully, lead to an analysis by departments of their own policies, procedures, rules, regulations, and management practices, regarding their utility and value to officers in the field. The author expects that the investigation will reveal that policies, procedures, rules, regulations and management practices can have a significant effect on the officer's perception of his or her own discretionary authority, possibly limiting the officer's ability to engage in the problem-solving activities necessary to operate in today's fluid environment.

The method of inquiry used during this investigation includes research of existing text and web-based resources, and field research using a survey instrument. The survey instrument, which was developed by the author, was presented to officers at all levels employed by a large metropolitan agency in the western United States, and to a group of police managers in the author's Module II Leadership Command College class. This questionnaire asks the officers a series of questions regarding their reliance on, policies, procedures, rules, and regulations in making decisions in key areas of controversy, such as self-initiated patrol activity, use of force, response to domestic violence, and order maintenance activities. The survey instrument will also address the officers' perceptions of the level of discretion they may exercise in criminal investigations, and whether policies exist for the sole benefit of the department, or if they do, in fact, provide them with guidance in performing their duties.

The author wishes to express his understanding of the necessity of having written policies, procedures, rules and regulations in place. Properly written, policies should give the officer guidance without detracting from the officer's ability to solve problems creatively. Also, properly written rules and regulations should express to the officer that certain activities are absolutely forbidden. The author's concern is that overly restrictive policies, procedures, rules and regulations can prevent, rather than assist, the officer in the performance of his job, and, in extreme cases, place the officer in the awful position of having to choose between obeying his employer or his sense of duty. The author hopes to alleviate this predicament by clarifying the value of policies to the officer, through an understanding of their effect on the officer's perceptions of his or her own discretionary authority. Secondly, the author wishes to understand the effects

of management and leadership practices on the officer's perceptions of his or her own discretionary authority

## REVIEW OF LITERATURE

Jeffrey Reiman, in his article *Is Police Discretion Justified in a Free Society?* argues fervently, but with qualification, against the notion that the police should have the power to exercise discretion in the performance of their law enforcement duties. Reiman's sole acceptable justification for the exercise of discretion lies in the realm of order maintenance, which he regards as not so much the power to "limit freedom as it is ...to get troublesome individuals to desist... or clear the area." (Reiman, 1996, p. 71). He remarks about Plato's conclusion that rule by law is less well crafted than the perfect justice of the king *cum* philosopher. He relies upon Plato's lessons to draw certain conclusions about the nature of the rule of law: that its function is not just to render justice, but also to protect the governed from the governors; and that it produces imperfect results while protecting from tyranny. Reiman regards Plato's idealism as the beginning of his attack on the practice of generalized police discretion. He also refers to Hobbes and Locke's works on social contracts, and their belief that political authority and personal authority are at odds with each other. He regards police discretion as not simply the right not to arrest, but a separate coercive power that has not been granted legitimately to the police by consent of the governed. He also draws from the work of Montesquieu by referring to police discretion as "a mixing of legislative and judiciary power with executive power, and ...a threat to political liberty" (Reiman, 1996, p. 80). Reiman concludes that liberty will be best served by each branch of government

performing its mandated duties, and that police discretion has no “rightful place in a free society” (Reiman, 1996, p.80).

In his *Response: Police Discretion to Arrest*, William Heffernan generally agrees with Reiman. His differences in opinion do not involve their mutual distrust of police discretion but their chains of reasoning. He further states that his thoughts on police discretion are limited to distrust, not an outright rejection of its role in law enforcement. Heffernan’s line of reasoning attempts to address the issue by asking three questions. The first question is, “*Do officers exercise authority in a generally just society?*” The second is, “*Are they charged with enforcing unjust laws?*”, and the third is, “*Is there is a division of labor that justifies citizens in relying on the police for law enforcement services?*” (Heffernan, 1996, p. 82). He points out that Reiman confined his inquiry to the question of whether officers exercise authority in a just society. Heffernan argues that officers are justified in failing to enforce unjust laws, even if they are generated by legitimate political institutions (Heffernan, 1996, p. 84). He concludes, based on the officer’s pay, level of training, and legally privileged position, that society does, in fact, rely on modern police to enforce the laws. He addresses the role of officer discretion in response to systemic staffing shortages, but insists that there must be absolute equity in which laws the police will refuse to enforce during the period of staffing shortages, even going so far as to say that the police should publicize those laws that are temporarily un-enforced (Heffernan, 1996, p. 86).

Howard Cohen, in *Police Discretion and Police Objectivity*, states that police are allowed to exercise discretion because it can lead “to better results than setting up an inflexible set of rules, policies, and procedures that cannot be altered...” (Cohen, 1996,

p. 92). He cautions that the exercise of discretion creates difficulties for police administrators, because officers should be held accountable for the decisions they make (Cohen, 1996, p. 93). He contends that the key element in evaluating discretionary judgments should be whether the judgment was made objectively, with an evident focus on process, rather than results. Cohen quotes Kenneth Culp Davis, from *Discretionary Justice: A Preliminary Inquiry*, when he refers to “optimum discretion”, which Davis describes in his maxim, “A rule is undesirable when discretion will serve better” (Davis, 1971, qtd. in Cohen, 1996, p. 97). Davis further argues that police administrators can structure discretion in order to “achieve a higher quality of justice” (Davis, 1971, qtd. in Cohen, 1996, p.97). Author Gregory Williams points out the United States Supreme Court’s recognition of police discretionary authority in his *The Law and Politics of Police Discretion*, citing *Foley v. Connelie* (Williams, 1984, p. 89). He cautions that, although the court has recognized the power of the police, there remain difficulties in deciding the extent of that power, and the methods for controlling it.

Brown’s discussion of police discretion in *Working the Street: Police Discretion and the Dilemmas of Reform* centers upon the norms of working officers, and their effective decentralization of decisionmaking, with or without the consent of the organization. He notes the limiting effect this has on hierarchical controls within police agencies, and believes it creates a mere illusion of centralization, when, in fact, hierarchical controls “merely constrain a patrolman’s decisions without really controlling them” (Brown, 1981, p. 95). He contends the police administrator’s emphasis on discipline, which he regards as the “concern for obedience to trivial rules and the punitive character of supervision...”, is at least partially because of the difficulties of



“...closely supervising men who work alone and the inability to specify, through policy guidelines, how a patrolman should behave...” (Brown, 1981, p. 89).

In his doctoral dissertation, *No One to Count Cadence: The Police Officer as Law Maker*, Driscoll rejects the notion that police exercise of discretion is a “deviant activity and a usurpation of power” (Driscoll, 1977, ix). He contends that police are forced to use discretion because of the failure of police organizations and society to create a clear picture of expectations, and the “imprecisions of statutory law and court decisions” (Driscoll, 1977, ix). He further posits that the police do not merely enforce the law, but embody and create it, through their exercise of discretion (Driscoll, 1977, 27). His final analysis of the police organization is that, although it purports to be a “hierarchical bureaucracy”, it is, in fact an “expert-oriented bureaucracy”, in which the “expert is the officer and he develops, demonstrates and exercises his expertise through the use of police discretion” because of the “vacuum we have created” (Driscoll, 1977, p. 28).

Each of the above authors has at least a slightly different approach to the issue of police discretion. Reiman and Heffernan take similar positions on the matter, with differences that are of degree and extent, rather than truly divergent perspectives. Cohen’s position is opposed to that of Reiman and Heffernan, in that he accepts a need for generalized police discretion, but believes police administrators should structure it in order to achieve the aims of justice. Williams establishes the legal legitimacy of generalized police discretion, but cautions that the extent of such power remains to be established or fully explored. Brown and Driscoll are very much in agreement in their positions, with both regarding the existence of police discretion as a necessary construct in response to failures in the police organization, legal systems, and society.

Driscoll speaks of the illusory nature of hierarchical controls in the police organization, and Brown goes even further in condemning hierarchical controls as a mere hindrance to the individual officer.

## **METHODOLOGY**

The question this inquiry seeks to answer is, "What effect, if any, do policies, procedures, rules, regulations, and management practices have on the officer's perception of his or her discretionary authority?" The author's expected result proposes that policies, procedures, rules, regulations, and management practices have a significant effect on the officer's perception of his or her own discretionary authority. This, in turn, may limit the officer's ability to engage in the problem-solving activities necessary for effective operation in today's fluid environment. The author will utilize a questionnaire as part of the research, and circulate it among two distinct populations of respondents.

The survey instrument will consist of 23 questions, not including demographic information. The first population to be surveyed will consist of members of Department X, and the second will consist of the author's Texas Leadership Command College Module II class. The author expects a total of approximately two hundred respondents, a response rate of approximately 30%. The author hopes, through this research, to achieve a better understanding of the effects that management actions have on subordinate officers' perceptions of their own operational discretion.

## **FINDINGS**

Population A of the author's survey is composed of the author's fellow students in a Module II class of the Leadership Command College, and is comprised of a group of

eighteen persons, with a response rate of 100%. Population A is 94.4% White and 5.6% Hispanic, with 66.7% having greater than 15 years of law enforcement experience, and the remaining having at least nine years. The ranks of the Population A respondents ranged from sergeant to chief of police, with a broad range of assignments.

Population B is composed of members of Department X, a large metropolitan law enforcement agency in the western United States. The ranks of the Population B respondents ranged from entry-level officer to captain, with 85.7 % of the respondents holding officer-level rank. Population B is 90.1% male and 67.1% White, with 70% having at least 12 years of law enforcement experience. The race/ethnic background of the other respondents was 14% African-American, 2.7% Asian, 12.2% Hispanic, and 4.1% other. Roughly sixty-two percent of the Population B respondents (62.8%) were assigned to patrol, 32.7% were assigned to investigations, and the remaining respondents were assigned to detention, other support, and other assignments. The author circulated approximately 625 questionnaires to the patrol and investigative divisions of Department X, in addition to a much smaller number to other support functional areas, including detentions. The author received 223 completed questionnaires from Population B, a response rate of 35.6%. The author identified a smaller group, which he refers to as Cohort A, within Population B. The author identified and classified Cohort A by its response to a specific target statement. Cohort A was composed of 46 persons, ranging in rank from entry-level officer to sergeant. When asked to respond to the target statement, "Department policies and procedures

allow me to make better decisions”, All members of Cohort A responded with either “disagree”, or “strongly disagree.”

Cohort A is 95.7% male and 73.9% White, with 76.1% percent of the respondents assigned to patrol. Approximately seventy percent of the respondents (69.5%) have 12 years or more law enforcement experience, with 89.1% holding an officer level rank. The race/ethnic background of the other respondents was 10.9% African-American, 10.9% Hispanic, and 4.7% other. The author was unable to discern any statistically significant difference in the demographic composition of Population B and Cohort A, with one exception. The proportion of Cohort A respondents assigned to patrol, at 76.1%, is significantly higher than the proportion, 62.8%, assigned to Population B as a whole. The author compared Cohort A's responses to that of Population B, leaving Cohort A's responses as a part of the whole of Population B's statistical responses. The members of Cohort A, which is 20.6% of the whole of Population B, responded in a significantly different manner than Population B as a whole, when asked to respond to a number of statements and questions on the survey instrument.

The first section of the questionnaire requests demographic information about the respondent, his or her experience levels, supervisory experience, if any, and current assignment. The second section of the questionnaire asks for the respondent's response to statements about departmental policies, with possible responses of “strongly agree”, “agree”, “neither agree nor disagree”, “disagree”, and “strongly disagree.” In the third section of the questionnaire, the respondents are asked to describe the amount of discretion they believe they have, whether that level of

discretion is appropriate, and whether they believe they should have a higher, lower, or the same level of discretion, when engaged in common law enforcement and order maintenance activities. The respondents have the possible responses of “complete discretion”, “significant discretion”, “limited discretion”, and “no discretion” available when asked how much discretion they believe they have under the prescribed circumstances. “Yes” or “no” are possible responses to whether or not the level of discretion is appropriate, and “more discretion”, “same discretion”, and “less discretion” are possible responses to the level of discretion they believe to be appropriate under the prescribed set of circumstances. In the fourth section of the questionnaire, the same methodology is used as in the third section, with the respondents being asked to respond to questions about their perceived levels of discretion when involved in a use of force incident while affecting an arrest or search.

Additionally, the findings of this inquiry are based on several presumptions. The first is that officers *do* exercise discretion in their daily activities. The second is that officers will generally not exceed their *perceived* level of authority, regardless of the true extent of that authority. The third is that unwritten common practices, whether by design or default, are de facto policies, whether they are contrary to written policies or in conjunction with them. Reiman (1996) regards the exercise of police discretion as not simply the power not to take action, but as a separate power altogether. Assuming this is true, the police have a responsibility to ensure this power is exercised wisely. Given that the current trend in policing is the decentralization of decision making to the lowest possible level, the wise exercise of discretion is even more critical because it is now, and probably always has been, applied at the action-taking level.

Reiman and Heffernan have both argued against the propriety of police discretion for rather idealistic reasons. Cohen argues for it because of the tailor-made manner in which it produces justice. He further stresses the need for the structuring of discretion to ensure the best results. Williams points out the United States Supreme Court's recognition, and, one assumes, acceptance, of the practice of police discretion, but cautions the need for further exploration of the extent to which it may be exercised. Brown and Driscoll argue for the absolute necessity of police discretion, regarding it as a reaction against the failures of society, the law, and the police organization's hierarchical structures.

The author's own research yielded some interesting results regarding officer perceptions of their own discretion. Generally, the respondents believed they possessed a sufficient amount of discretionary authority to perform their duties and avoid disciplinary action, and that departmental policies were helpful to them. Population A, the members of the author's Leadership Command College Module II Class, completed the survey in an unsurprisingly uniform fashion. The author noted very little deviation in any of the population's response to key questions or statements. For instance, in response to the statement, "Departmental policies and procedures allow me to make better decisions", 78% percent of the class responded that it either agreed or strongly agreed, with an additional 16.7 % giving a neutral response. By contrast, only 53.3% of Population B, composed of members of Department X, responded that it agreed or strongly agreed, with an additional 26% giving a neutral response. Cohort A, which was identified and classified by its response to this statement, consisted of 20.6%

of the whole of Population B, and answered that it either disagreed or strongly disagreed with the target statement.

The author continued his study of the contrast between the answers of Populations A and B, and Cohort A. In response to the statement, "I can make decisions without worrying about being disciplined or getting in trouble", 41% of Population B either disagreed or strongly disagreed, a surprisingly high proportion, but small compared to the 84.8% of Cohort A that responded in the same way. Only 11 % of Population A responded that it disagreed with the statement. In response to the statement, "I have enough power and authority to make the right decisions on the street or in my assignment", 94.5% of Population A agreed or strongly agreed, 75.3% of Population B agreed or strongly agreed, but only 54.2% of Cohort A agreed or strongly agreed. In response to the statement, "Departmental policies and procedures simply get in the way of me doing my job: I could do better without them", 88.8 % of Population A disagreed or strongly disagreed, 59.8% of Population B disagreed or strongly disagreed, but only 33% of Cohort A disagreed or strongly disagreed.

The established trend of Cohort A's generally low valuation of policy and its intent, as well as perceptions of discretion, remained consistent throughout its responses to statements in Part II of the survey instrument, with one exception that will be discussed later in this section. This trend discontinued in responses to questions in Part III, which addressed officer's perceptions of their discretion when making arrests for various offenses. Cohort A's rate of positive responses to Part III questions were generally only slightly lower, if at all, when compared to those of Population B. There is one significant exception to this new trend. In response to the question, "In general,

how high a level of discretion do you believe you have in any situation you may encounter?” 84.4% of Population A responded that it had complete or significant discretion, 71.2% of Population B responded that it had complete or significant discretion, but only 56.5% of Cohort A responded in a similar manner.

In Part IV, the subjects responded to questions regarding the amount of discretion they believed they had in situations involving the use of force to effect an arrest or search. The author noted a trend in which Population A had the highest percentage of complete or significant discretion responses, Population B had the second highest percentage, and Cohort A the lowest percentage. This trend shifted somewhat in response to questions regarding the use of firearms, when Populations B and A switched roles, with a higher percentage of Population B believing it had complete or significant discretion. Another interesting development took place with this question, when the author discovered that 48.9% of respondents from Cohort A believed they should have more discretion in the use of firearms, compared to 5.9% from Population A, and 27.4 percent from Population B.

When asked to respond to the statement, “The law allows me to exercise discretion in making arrests or performing other duties”, 88.2% percent of Population A agreed or strongly agreed, 87.9% of Population B agreed or strongly agreed, and 86.9% of Cohort agreed or strongly agreed. The implication of this high level of agreement is that all three groups understand the relatively lenient nature of the law with regard to exercise of discretion by officers. The author noted significant differences; however, in how the three groups responded to the statement, “Departmental policies and procedures allow me to exercise discretion in making arrests or performing other



duties.” In response to the statement, “Departmental policies and procedures allow me to exercise discretion in making arrests or performing other duties”, 11.1% of Population A disagreed or strongly disagreed, 20.3% of Population B disagreed or strongly disagreed, but 52.1% of Cohort A disagreed or strongly disagreed. The contrast in responses is important in that it illustrates the effect departmental policies and procedures have had on a significant portion of Population B.

The author believes the text evidence presented in this study supports the utility and necessity of police discretion. Generally, the respondents in Populations A and B believed they had significant amounts of discretion in performing their duties. Cohort A, although a minority group within Population B, still comprises both a significant percentage and number of officers. Cohort A’s responses, although not surprising to the author, are still of great concern. The members of Cohort A have demonstrated an understanding that the state’s law provides for the exercise of discretion, but have failed, for whatever reason, to understand that Department’s X’s policies provide for the same. The author has sufficient familiarity with Department X’s policies, procedures, rules, and regulations to state that they generally offer guidance, with relative ambiguity, to a sufficient degree that officers may feel free, given the right command climate, to conduct their activities, as they believe they should. The author finds that Department X’s policies, or, more probably, management practices, have affected the members of Cohort A in such a manner that they may have difficulty in operating in today’s rapidly changing environment.

## DISCUSSION

The purpose of this study has been the investigation of the effect of departmental policies, procedures, rules, regulations, and management practices on officer perceptions of their discretionary authority. The issue at hand has not been whether officer discretion exists- it does; or whether it should- because it should; but how far departments should go in structuring or hindering that discretion. The expected result has been the discovery of a definite effect on officer perceptions of discretionary authority to the extent that at least some officers feel confined in their abilities to perform their duties. This study has proven that a significant proportion of the officers in Department X perceive that their discretionary authority is severely limited, with an associated diminution in their power to perform their duties to the best of their abilities. The specific cause(s) of that perception lies in murkier waters.

This study began as something somewhat different from the version the reader has in his possession, in that the author's original undertaking was to literally study the effects of policies on the officer's decisionmaking process. After examining the evidence available, the author eventually understood that very little of it related directly to the original research issue. What the author did realize is that the evidence did measure the individual officer's perceptions of his or her own discretionary authority and its limits. It is those perceptions that are now the subject of this inquiry, and, although perceptions may be based on facts, they may be just as easily based on fiction, or, more likely, facts that have been filtered through the prism of an individual's past experiences.

Department X, again, is a large metropolitan agency in the western United States. It is headed by an elected official from a conservative political party who generally enjoys significant public support. Like many metropolitan agencies, Department X serves a jurisdiction that is very diverse, with municipal politics dominated by a liberal political party, and county politics dominated by a conservative political party. Department X's policies are usually no more confining to the officer than are those restrictions imposed by state law. There are two significant exceptions to this dichotomy. The first is the department's deadly force policy, which generally prohibits the use of deadly force against the occupants of motor vehicles. The second is its traffic enforcement policy, which often requires the issuance of citations at motor vehicle accident scenes.

This study should not be construed as a sweeping condemnation of any agency's desire to provide its officers with guidance in the form of policies, procedures, rules or regulations. On the contrary, as a police manager, the author understands very well the absolute necessity for rules that officers must follow, and that those rules are in the best interest of all parties involved, including the public, the agency, and the officers themselves. The author also wishes to express that this study is not a denunciation of the policies, procedures, rules and regulations of Department X. The author's understanding of those policies is that they are typically quite permissive, generally offering a minimum of restriction, but still containing well-defined lines that the officer must never cross. The author believes that such a construction is optimal for creating an atmosphere in which the officer can, using his own training, experience, and native intelligence, create solutions in the problem-solving environment in which

modern law enforcement agencies operate. This understanding creates a dilemma, though. If the department's written policies are not apt to create a stifling environment, and they are not, then what has? The author suspects the answer lies in a better understanding of the role of leadership at all levels in an agency generally devoid of strict written controls, except where absolutely necessary.

The findings of this study are not without flaws. Any interpretation of the results of the survey instruments should be considered carefully because of the potentially skewed effects caused by the composition of the population surveyed. Department X, like most agencies, has a much higher percentage of patrol officers than investigators. The response rate of the patrol division in Department X was only 28%, especially small when compared to the 73% response rate of the investigative division. Although the patrol respondents and investigative respondents responded in a roughly similar fashion about questions regarding their discretionary authority, one statement in Part II of the survey instrument yielded some interesting responses. In response to the statement, "I can make decisions without worrying about being disciplined or getting in trouble", 49.4% of the investigator respondents agreed or strongly agreed, with an additional 20.5% giving a neutral response. In contrast, only 33.8% of the patrol respondents agreed or strongly agreed, with an additional 20.9% giving a neutral response. Clearly, the patrol respondents feel much more constrained in their actions, evidently by fear, than their counterparts in the investigative division. The author suspects this fear of consequences is at least a partially motivating factor behind the relatively low response to the survey instrument by patrol officers.

This study has not revealed the existence of a mother lode of discontent and distrust within Department X. It has, perhaps fortunately, uncovered a significant vein of concern within the ranks. This revelation should not be treated as cause for exorcism, but an opportunity for evangelism. The author's recommendation is a review of management and leadership practices, specifically those that deal with achieving employee participation in accomplishing the agency's goals. Again, the role of leadership at all levels will be critical in dealing with this matter, and how the department's leadership handles this opportunity may well set the tone for the future of the agency and its ability to perform its mission in the 21<sup>st</sup> century.

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