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Executive Discretion as to Immigration: Legal Overview

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Summary

The scope of the executive's discretion in implementing federal immigration law is a topic of perennial interest to Members and committees of Congress. Most recently, questions have been raised as to whether particular actions announced by the Obama Administration in November 2014 are within the executive's authority. See generally CRS Report R43798, *The Obama Administration's November 2014 Immigration Initiatives: Questions and Answers*, by Kate M. Manuel; CRS Report R43839, *State Challenges to Federal Enforcement of Immigration Law: Historical Precedents and Pending Litigation*, by Kate M. Manuel. However, similar questions were raised in the past about other executive actions including, but not limited to (1) suspending enforcement of certain provisions of the Immigration and Nationality Act (INA) in areas affected by natural disasters; (2) granting deferred enforced departure, extended voluntary departure, or other relief from removal to certain aliens who entered or remained in the United States in violation of the INA; and (3) "paroling," or permitting the entry of, certain aliens into the United States who were not admissible under current law.

Whether particular executive actions are permissible generally depends upon whether they can be seen as falling within one (or more) of the three broad types of authority that the executive can be seen to have as to immigration. These include the following:

- ***Express delegations of discretionary authority by statute.*** In some cases, the INA explicitly authorizes the executive to provide certain relief or benefits to foreign nationals (e.g., temporary protected status or work authorization). In other cases, the INA permits immigration authorities to waive the application of requirements which would render an alien ineligible for particular immigration benefits. The INA also grants the executive broad authority to "parole" aliens into the United States.
- ***Discretion deriving from the executive's independent constitutional authority.*** The executive is generally recognized as possessing some degree of independent authority in assessing whether to prosecute apparent violations of federal law. Courts have recognized certain actions as within the prosecutorial discretion of immigration authorities, including deciding whether to issue a Notice to Appear beginning removal proceedings; deciding whether to detain aliens who are not subject to "mandatory detention" pending removal; and granting deferred action (at least in individual cases).
- ***Discretion in interpreting and applying immigration law.*** The Supreme Court has found that some deference may be owed to agency regulations (or adjudications) which implement or apply statutes that are "silent or ambiguous" as to specific issues. The executive branch may also be afforded deference in less formal interpretations of statutes and in interpreting its own regulations.

All of these forms of discretion are subject to certain constraints. For example, exercises of statutory authority must be consistent with the terms of the delegation (although the executive branch could have some discretion in interpreting the statute). Similarly, the executive's exercise of prosecutorial or enforcement discretion could be limited by specific statutory mandates that the executive take particular actions (e.g., detaining certain aliens pending removal proceedings). The express adoption of a policy that constitutes an "abdication" of a statutory duty could also be found to be impermissible, although it might be difficult for a court to assess whether an alleged

failure to enforce the law represents an abdication. Likewise, agencies' interpretations and applications of statutes must conform to the "unambiguously expressed intent of Congress."

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The scope of the executive's discretion in implementing federal immigration law is a topic of perennial interest to Members and committees of Congress. Most recently, questions have been raised as to whether particular actions announced by the Obama Administration in November 2014 are within the executive's authority.¹ However, similar questions were raised in the past about other executive actions including, but not limited to (1) suspending enforcement of certain provisions of the Immigration and Nationality Act (INA) in areas affected by natural disasters;² (2) granting deferred enforced departure, extended voluntary departure, or other relief from removal to certain aliens who entered or remained in the United States in violation of the INA;³ and (3) "paroling," or permitting the entry of, certain aliens into the United States who were not admissible under current law.⁴

The debate over whether particular actions are within the executive's authority—acting on its own and without the enactment of additional legislation by Congress—ultimately reflects the respective roles that the executive and legislative branches play in the nation's constitutional system of government. Article I of the Constitution expressly grants the power to legislate to Congress, and Congress has exercised this power as to immigration, in part, by enacting the INA.⁵ The INA provides a comprehensive set of rules governing the admission of foreign nationals into the United States and the conditions of such aliens' continued presence in the country, including their eligibility to obtain employment and public benefits, adjust or change their immigration status, and become U.S. citizens. In addition, the INA establishes various mechanisms for enforcing these rules, including by prescribing the removal of aliens found to have entered the United States without permission, or to have violated the terms governing their authorized admission into the country.⁶ It also establishes criminal penalties for certain immigration violations.⁷

¹ See generally CRS Report R43798, *The Obama Administration's November 2014 Immigration Initiatives: Questions and Answers*, by Kate M. Manuel; CRS Report R43839, *State Challenges to Federal Enforcement of Immigration Law: Historical Precedents and Pending Litigation*, by Kate M. Manuel. See also CRS Legal Sidebar WSLG1125, *The Obama Administration's Announced Immigration Initiative: A Primer*, by Michael John Garcia.

² See, e.g., U.S. Citizenship & Immigr'r Servs. (USCIS), USCIS Reminds Individuals Affected by Hurricane Sandy of Temporary Immigration Relief Measures, September 30, 2014, available at <http://www.uscis.gov/humanitarian/special-situations/previous-special-situations/uscis-reminds-individuals-affected-hurricane-sandy-temporary-immigration-relief-measures>; U.S. Dep't of Homeland Security (DHS), Press Release, Notice Regarding I-9 Documentation Requirements for Hiring Hurricane Victims, September 6, 2005 (copy on file with the authors).

³ See, e.g., *Chinese Students in America and Human Rights in China: Hearing Before the Subcommittee on Immigration and Refugee Affairs of the Committee on the Judiciary, United States Senate*, 101st Cong., 2d sess., at 73 (1991) (noting various steps taken by the Administration of George H.W. Bush to assist certain Chinese citizens and nationals in the United States after the events in Tiananmen Square, including granting deferred enforced departure for "1 full year" and waiving certain requirements for adjustment or change of status); *Immigration Reform and Control Act of 1986 Oversight: Hearings Before the Subcommittee on Immigration, Refugees, and International Law of the Committee on the Judiciary, House of Representatives*, 101st Cong., 1st sess., at 91-92 (1990) (discussing the granting of "indefinite voluntary departure" to certain unlawfully present aliens whose family members were eligible to legalize their status under the 1986 act).

⁴ See, e.g., *Enabling the United States to Render Assistance to, Or In Behalf of, Certain Immigrants and Refugees*, H. Rpt. 94-197, at 6 (1975) (discussing the Executive's use of parole to permit the entry of Hungarians, Cubans, and Vietnamese); *Study of Population and Immigration Problems: Inquiry into Entries of Aliens under Administrative Discretionary Authority (Parole) of the Immigration and Nationality Act with Respect to Individual Hardship Cases, Recognized International Emergencies, and the Russian Old Believers*, Committee on the Judiciary, House of Representatives (1964) (raising concerns about the Kennedy Administration's parole of certain aliens from Turkey).

⁵ The INA is codified in 8 U.S.C. §1101 *et seq.*

⁶ Certain conduct by aliens who have not been lawfully admitted into the United States renders them inadmissible and, if found physically present within the United States, subject to removal. INA §212, 8 U.S.C. §1182. Aliens who have (continued...)

On the other hand, the INA expressly or impliedly confers some discretionary authority on the executive branch in matters of immigration enforcement.⁸ For example, the INA authorizes immigration officials to grant certain types of benefits or relief to qualifying aliens who lack lawful immigration status. Moreover, the INA permits immigration officials to waive certain statutory restrictions that might otherwise render an alien ineligible to receive particular immigration benefits.⁹ The exercise of these discretionary authorities may enable some unlawfully present aliens to remain in the United States—through asylum,¹⁰ temporary protected status,¹¹ cancellation of removal,¹² or some other means—rather than being removed.

In other cases, however, aliens who have entered or have stayed in the United States in violation of INA requirements may be permitted to remain in the country and, in some cases, legalize their status, not as the result of the exercise of expressly delegated authority, but as a result of the executive branch's independent discretion in enforcing the law. Article II of the Constitution specifically tasks the executive to “take Care that the Laws be faithfully executed,” and the executive branch has historically been seen as having some discretion (commonly known as prosecutorial or enforcement discretion) in determining when, against whom, how, and even whether to prosecute apparent violations of the law. For example, immigration officials may opt to give a lower priority to the removal of certain categories of unlawfully present aliens because the removal of other categories (e.g., those convicted of serious crimes) has been deemed a higher priority in light of resource constraints and other considerations.¹³ Congressional enactments could, however, be seen as limiting the executive's discretion not to take particular actions (e.g., by mandating that certain aliens be detained pending removal proceedings).¹⁴ The express adoption of an executive policy that is “in effect an abdication of ... statutory duty” could also be

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been lawfully admitted into the country may be subject to removal if they engage in specified conduct rendering them deportable. INA §237, 8 U.S.C. §1227.

⁷ See generally CRS Legal Sidebar WSLG563, *An Overview of Immigration-Related Crimes*, by Michael John Garcia.

⁸ See *Arizona v. United States*,—U.S.—, 132 S. Ct. 2492, 2499 (2012) (“A principal feature of the removal system is the broad discretion exercised by immigration officials. ... Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal.”).

⁹ See, e.g., INA §212(a)(9)(B)(v), 8 U.S.C. §1182(a)(9)(B)(v) (authorizing waiver of the ground of inadmissibility applicable to aliens unlawfully present for more than 180 days in specified circumstances); INA §212(h), 8 U.S.C. §1182(h) (conferring authority to waive many of the grounds of inadmissibility concerning criminal conduct).

¹⁰ Asylum is a discretionary form of relief from removal available to qualifying aliens who are unable or unwilling to return to their home countries due to a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. Aliens who are granted asylum may be eligible to work in the United States and adjust to lawful permanent resident (LPR) status. INA §§208, 209(b), 8 U.S.C. §§1158, 1159(b).

¹¹ Temporary protected status (TPS) is a “temporary” form of relief from removal that the Secretary of Homeland Security may grant to nationals from a specific country due to an ongoing crisis in that country. Aliens who are granted TPS are generally eligible to work in the United States so long as they have TPS. INA §244, 8 U.S.C. §1254a.

¹² Under INA §240A, the Attorney General is authorized to cancel the removal and adjust the status of otherwise inadmissible or deportable aliens who satisfy specified criteria (e.g., having been present or resided in the country for a specified period). See 8 U.S.C. §1229b. No more than 4,000 aliens may be granted such relief in any fiscal year. Aliens who were subject to removal or committed a criminal offense making them removable *prior* to the enactment of the current cancellation of removal statute may be eligible for earlier forms of relief (suspension of deportation or a “§212(c) waiver,” discussed, *infra*, at page 10), which are not subject to these numerical limitations.

¹³ See, e.g., DHS, Secretary Jeh Charles Johnson, Memorandum, Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants, November 20, 2014 (copy on file with the authors) (establishing three levels of “priority” for removal, and identifying which aliens fall within each priority level).

¹⁴ See generally INA §236(c), 8 U.S.C. §1226(c).

found to be impermissible,¹⁵ but it might be difficult for a court to assess whether an alleged failure to enforce the law constitutes an abdication.¹⁶

The executive branch's discretion to interpret applicable statutes when Congress has not spoken to the precise question at issue may also afford immigration officials some flexibility in determining how INA requirements apply to a particular alien or category of aliens.¹⁷ This discretion may be relevant in determining how particular statutory grants of discretionary authority are to be applied (e.g., what constitutes "exceptional and extremely unusual hardship" for purposes of cancellation of removal, or "extreme hardship" for purposes of certain waivers of inadmissibility).¹⁸ It can also play a role in determining whether and how particular statutes are seen to circumscribe the executive's enforcement discretion. That is, where a statute is silent or ambiguous as to the circumstances of its enforcement in particular cases, the executive may have some discretion in determining its application.¹⁹

This report provides an overview of the three broad types of discretion that the executive can be seen to have as to immigration. Namely, (1) express delegations of discretionary authority; (2) discretion in enforcement (commonly known as prosecutorial or enforcement discretion); and (3) discretion in interpreting and applying statutes. In so doing, it provides notable examples of each broad type of discretion, as well as potential constraints upon the exercise of particular types of discretion. Separate reports discuss prosecutorial discretion in immigration enforcement and the Take Care Clause—which some have suggested constrains the executive's exercise of discretion²⁰—in greater detail. See generally CRS Report R42924, *Prosecutorial Discretion in*

¹⁵ Heckler v. Cheney, 470 U.S. 821, 832-833 n.4 (1985) ("Nor do we have a situation where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities.") (citing *Adams v. Richardson*, 480 F.2d 1159 (1973) (en banc)).

¹⁶ See *supra* "Discretion in Enforcement: Potential Constraints."

¹⁷ See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984) ("[When] Congress has directly spoken to the issue, ... that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." However, where a statute is "silent or ambiguous with respect to a specific issue," courts will generally defer to an agency interpretation that is based on a "permissible construction of the statute."). See also *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) ("It is clear that principles of *Chevron* deference are applicable" to immigration agencies' interpretation of INA requirements).

¹⁸ See, e.g., INA §212(a)(9)(B)(v), (h), & (i), 8 U.S.C. §1182(a)(9)(B)(v), (h), & (i) (authorizing waiver of specified grounds of inadmissibility when the alien's removal would cause "extreme hardship" to certain family members who are U.S. citizens or LPRs); INA §240A(b)(1)(D), 8 U.S.C. §1229b(b)(1)(D) (permitting cancellation of the removal of certain aliens whose removal would cause "exceptional and extremely unusual hardship" to certain family members who are U.S. citizens or LPRs).

¹⁹ The Executive has, for example, construed provisions in INA §235, which some assert require that unlawfully present aliens be placed in removal proceedings, as applying only to "arriving aliens" encountered at ports of entry, and not to aliens who are present within the country without inspection. See Dep't of Justice (DOJ), *Immigr. & Naturalization Serv. (INS), Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10312, 10357 (March 6, 1997) (codified at 8 C.F.R. §235.3(c)). See also DOJ, *INS, Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 444, 444-46 (January 3, 1997) (noting that the INA "distinguishes between the broader term 'applicants for admission' and a narrower group, 'arriving aliens'"). See *supra* "Deferred Action" for further discussion of INA §235.

²⁰ See, e.g., *Crane v. Napolitano*, Amended Complaint, No. 3:12-cv-03247-O, filed October 10, 2012 (N.D. Tex.) (lawsuit challenging the Obama Administration's 2012 Deferred Action for Childhood Arrivals (DACA) initiative and arguing that the initiative is, among other things, contrary to the Executive's constitutional responsibility to take care that the laws are faithfully executed); 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 the DACA initiative is inconsistent with the Executive's constitutional duties, and that the President may (continued...))

Immigration Enforcement: Legal Issues, by Kate M. Manuel and Todd Garvey; CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by Todd Garvey.

Express Delegations of Discretionary Authority

In several instances, the INA expressly grants immigration officials some degree of discretion over aliens' eligibility for particular immigration benefits or relief, including adjustment to legal immigration status or authorization to work in the United States. These statutory delegations sometimes provide immigration officials with broad discretion to determine whether and when aliens may be eligible for particular immigration benefits. In other instances, such delegations may permit immigration officials to waive the application of a statutory requirement that would bar otherwise qualifying aliens from obtaining particular immigration benefits or relief.

Statutory Authorization to Grant Benefits or Relief

In some instances, the INA expressly authorizes the executive branch to grant certain benefits or relief to aliens. In these instances, aliens are eligible for the benefit or relief not because Congress has given the executive branch discretion to waive restrictions that would otherwise bar the aliens from the benefit or relief, as discussed below (see "Statutory Waivers of Restrictions on Benefits or Relief"), but because Congress has affirmatively provided for certain benefits or relief to be granted. In some cases where Congress has delegated discretionary authority over a particular form of benefit or relief to immigration officials,²¹ it has provided clear statutory guidance for when such authority may be exercised. In other cases, there are few, if any, express limits on the authority granted to the executive, although some would argue that prior uses of particular authorities should serve to constrain subsequent uses of this authority.²² The authority to grant benefits or relief can play a significant role in executive discretion as to immigration, as the examples below illustrate.

Temporary Protected Status

Temporary protected status (TPS) is a type of relief from removal that Congress has authorized the executive branch to grant to aliens who presently cannot be safely returned to their home countries. Section 244 of the INA imposes a number of conditions upon who may be granted TPS. Specifically, aliens must

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not purposefully refrain from enforcing federal statutes against broad categories of persons "in ordinary, noncritical circumstances"). *But see* *Texas v. United States*, No. 1:14-CV-254, Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed S.D. Tex. (December 24, 2014), at 30 ("None of the cases cited by Plaintiffs suggest there is judicially cognizable basis to challenge executive action under the Take Care Clause, separate and apart from an APA or statutory claim that the Executive acted outside of statutory authority.").

²¹ Not every INA provision concerning the conferral of benefits or relief is discretionary in nature. *See, e.g.*, INA §241(b)(3), 8 U.S.C. §1231(b)(3) (generally barring removal of qualifying aliens to countries where the alien's "life or freedom" would be threatened because of the alien's race, religion, nationality, political opinion, or membership in a particular social group). Discussion of such mandatory forms of benefits or relief is beyond the scope of this report.

²² *See* discussion *infra* "Potential Constraints."

- be from a foreign state that the Department of Homeland Security (DHS) has designated due to an ongoing armed conflict; an earthquake, flood, drought, epidemic, or other environmental disaster; or other “extraordinary and temporary conditions” that prevent aliens’ safe return;²³
- have been “continuously physically present” in the United States since the effective date of their home country’s most recent TPS designation;²⁴
- have “continuously resided” in the United States since whatever date the executive may designate (generally a date that is earlier than the TPS designation date);²⁵
- be generally admissible as an immigrant and not ineligible for TPS (e.g., have not been convicted of specified offenses);²⁶
- register during the period prescribed for registration by the executive branch; and
- pay any registration fee required by the executive branch.²⁷

In addition, Congress has provided that TPS is generally to be withdrawn if the alien proves to have been ineligible for such status; has not remained “continuously physically present” since the date he or she was first granted TPS; or fails “without good cause” to register annually.²⁸

Despite these conditions, a grant of TPS can afford significant relief to individual aliens because aliens with TPS are provided identifying documentation and work authorization by the executive branch, and they cannot be removed while they have TPS.²⁹ TPS can also be a powerful tool for the executive in crafting immigration policy. For example, TPS could be used to enable aliens who are from countries where large numbers of persons have been displaced, but are unlikely to qualify as refugees,³⁰ to remain in the United States.³¹ Further, while TPS is “temporary,” in

²³ In the case of natural disasters, INA §244 further requires “substantial, but temporary,” disruption of living conditions in the affected area, and the foreign state must be temporarily unable to handle the return of its nationals and request TPS designation. INA §244(b)(1)(B)(i), 8 U.S.C. §1254a(b)(1)(B)(i). Pursuant to INA §244, country designations must be published in the *Federal Register*, and may be for periods of no less than six months and no more than 18 months. INA §244(b)(1)-(2), 8 U.S.C. §1254a(b)(1)-(2). These designations must be reviewed at least 60 days before they expire, at which point, they may be extended if the conditions that gave rise to the designation persist. Otherwise, INA §244 requires that the designation be terminated. INA §244(b)(3)(A)-(B), 8 U.S.C. §1254a(b)(3)(A)-(B).

²⁴ There is an exception for “brief, casual, and innocent absences.” See INA §244(c)(4), 8 U.S.C. §1254a(c)(4).

²⁵ See, e.g., DHS, USCIS, Extension of the Designation of El Salvador for Temporary Protected Status, 78 Fed. Reg. 32418 (May 30, 2013) (establishing a TPS designation date of March 9, 2001, and a date of continuous residence of February 13, 2001).

²⁶ See INA §244(c)(2)(A)-(B), 8 U.S.C. §1254a(c)(2)(A)-(B). Certain grounds of inadmissibility are, however, waived for aliens seeking TPS. *Id.*

²⁷ INA §244(c), 8 U.S.C. §1254a(c).

²⁸ INA §244(c)(3), 8 U.S.C. §1254a(c)(3).

²⁹ INA §244(a)(1), 8 U.S.C. §1254a(a)(1) (nonremoval and work authorization); INA §244(d), 8 U.S.C. §1254a(d) (documentation).

³⁰ To qualify as a “refugee” under the INA, an alien must have experienced past persecution, or have a well-founded fear of future persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. INA §101(a)(42), 8 U.S.C. §1101(a)(42). Accordingly, aliens who fear generalized lawlessness and violence in a country typically do not qualify as “refugees” under the INA. See generally CRS Report R43716, *Asylum and Gang Violence: Legal Overview*, by Kate M. Manuel.

³¹ See, e.g., DHS, USCIS, Extension of the Designation of Somalia for Temporary Protected Status, 78 Fed. Reg. (continued...)

practice, aliens from designated countries are often able to legally remain and work in the United States for years, potentially prompting further migration from the country.³²

What Is the Relationship Between TPS and Extended Voluntary Departure and Deferred Enforced Departure?

Legislation expressly giving the executive branch the authority to grant TPS was enacted in 1990, and is generally seen to have been adopted in response to the executive's prior use of extended voluntary departure (EVD) and deferred enforced departure (DED) to permit aliens to avoid removal to certain countries for a period of time.

During various periods between 1960 and 1990, the executive branch granted either EVD or "nonenforcement of departure"—later known as DED—to persons from Poland, Cuba, the Dominican Republic, Czechoslovakia, Chile, Vietnam, Lebanon, Hungary, Romania, Uganda, Iran, Nicaragua, Afghanistan, Ethiopia, and China. Such grants of EVD and DED were not expressly authorized by statute, although in at least one case, Congress enacted legislation expressing its sense that the executive ought to consider persons from a specific country (El Salvador) for EVD.

The executive branch has continued to grant DED, in particular, even after creation of TPS authority, typically to provide relief to aliens who would not qualify for TPS. For example, in 1999, President Clinton granted DED to Liberians whose TPS had expired. This grant was continued by the George W. Bush and Obama Administrations.

See generally P.L. 98-164, §1012, 97 Stat. 1062; S. HRG. 99-204; Jeanne Butterfield, Former Director, Am. Immigr. Lawyers Ass'n, et al., Memorandum, Executive Branch Authority Regarding Implementation of Immigration Laws and Policies, April 29, 2011 (copy on file with the authors).

Work Authorization

Another example of discretionary authority to grant benefits or relief conferred by statute involves employment authorization documents (EADs) permitting aliens to work legally in the United States. In general, the INA provides that only specified categories of aliens are eligible to obtain employment in the United States, and INA §274A bars the hiring or continued employment of "unauthorized aliens."³³ The definition of *unauthorized alien* found in INA §274A describes an *unauthorized alien*, in part, as an alien who is not "authorized to be ... employed ... by the Attorney General [currently, the Secretary of Homeland Security]."³⁴ This language has generally been seen as affording immigration officials broad discretion to grant EADs to aliens, including those without lawful immigration status.³⁵ There are no express conditions contained in the INA regarding when the Secretary of Homeland Security may grant work authorization,³⁶ and the

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65690 (November 1, 2013) (noting that Somalia was initially designated for TPS on September 16, 1991, "based on extraordinary and temporary conditions resulting from armed conflict").

³² Certain aliens from Honduras have had TPS since 1999, while some from El Salvador have had it since 2001. See USCIS, Temporary Protected Status, October 16, 2014, available at <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status>. The parents of some unaccompanied alien children (UACs) apprehended at the U.S. border with Mexico in 2013-2014 are present in the United States pursuant to TPS. In December 2014, the Obama Administration began permitting aliens from Central America who are present in the United States pursuant to a grant of TPS, among others, to submit applications for their minor children to be considered for refugee status or parole while in their home countries. See USCIS, In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors—CAM), available at <http://www.uscis.gov/humanitarian/refugees-asylum/refugees/country-refugeeparole-processing-minors-honduras-el-salvador-and-guatemala-central-american-minors-cam> (last updated February 9, 2015).

³³ INA §274A, 8 U.S.C. §1324a.

³⁴ INA §274A(h)(3), 8 U.S.C. §1324a(h)(3).

³⁵ See generally 8 U.S.C. §1324a.

³⁶ When promulgated in 1987, these regulations were challenged through the administrative process on the grounds that (continued...)

executive branch has promulgated regulations that provide for the issuance of EADs to aliens who have been granted various—and often temporary—forms of relief from removal, including deferred action and deferred enforced departure.³⁷

Work authorization regulations promulgated by immigration officials have played an important role in the Obama Administration’s 2012 Deferred Action for Childhood Arrivals (DACA) initiative. Because DHS regulations had already provided for the issuance of EADs to aliens granted deferred action when such aliens establish “an economic necessity for employment,”³⁸ DACA beneficiaries were effectively made eligible for EADs as a corollary of receiving deferred action. Further, because many states have laws providing for the issuance of driver’s licenses to aliens whose presence in the United States is “authorized” under federal law, and accept EADs as proof that an alien’s presence is so authorized, DACA beneficiaries generally also became eligible to obtain driver’s licenses in the states where they were residing.³⁹

Statutory Waivers of Restrictions on Benefits or Relief

In some cases, the INA provides immigration officers with discretionary authority to waive statutory requirements that would otherwise render a particular alien ineligible to receive an immigration-related benefit or form of relief. Typically, a discretionary waiver permits immigration authorities to exempt application of some, but not all, of the eligibility requirements that an alien must otherwise satisfy. Judicial review of decisions to exercise waiver authority is typically limited and, in some cases, is largely barred by statute.⁴⁰ However, federal courts may

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they exceeded the INS’s authority. *See* DOJ, INS, Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46092 (December 4, 1987). Specifically, the challengers asserted that the statutory language referring to aliens “authorized to be . . . employed by this chapter or by the Attorney General” did not give the Attorney General authority to grant work authorization “except to those aliens who have already been granted specific authorization by the Act.” *Id.* Had this argument prevailed, the authority of the INS and, later, DHS to grant work authorization to beneficiaries of deferred action would have been in doubt, because the INA does not expressly authorize the grant of EADs to such aliens. However, the INS rejected this argument on the grounds that the:

only logical way to interpret this phrase is that Congress, being fully aware of the Attorney General’s authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined “unauthorized alien” in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute.

Id. Subsequent case law has generally affirmed that immigration officials have broad discretion in determining whether to deny or revoke work authorizations to persons granted deferred action. *See, e.g.,* Perales v. Casillas, 903 F.2d 1043, 1045 (5th Cir. 1990); Chan v. Lothridge, No. 94-16936, 1996 U.S. App. LEXIS 8491 (9th Cir. 1996). These cases would suggest that, by extension, immigration officials have similarly broad discretion to grant work authorization provided any requisite regulatory criteria are met (e.g., “economic necessity,” see, *infra*, note 38).

³⁷ *See generally* 8 C.F.R. §274a.12.

³⁸ 8 C.F.R. §274a.12(c)(14). Under these regulations, the “basic criteria” for establishing economic necessity are the federal poverty guidelines. *See* 8 C.F.R. §274a.12(e).

³⁹ *See generally* CRS Report R43452, *Unlawfully Present Aliens, Driver’s Licenses, and Other State-Issued ID: Select Legal Issues*, by Kate M. Manuel and Michael John Garcia; CRS Legal Sidebar WSLG1057, *9th Circuit Decision Enables DACA Beneficiaries—and Other Aliens Granted Deferred Action—to Get Arizona Driver’s Licenses*, by Kate M. Manuel.

⁴⁰ INA §242(a)(2)(B), 8 U.S.C. §1152(a)(2)(B) (generally barring judicial review of administrative judgments concerning specified forms of discretionary waivers or relief from removal, as well as “any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified . . . [in the INA’s immigration] subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security”). Decisions as to whether to grant an alien asylum, however, may be reviewed to assess whether they are manifestly (continued...)

review questions of law raised by the executive's use of waiver authority (e.g., whether immigration authorities properly found that an alien is statutorily *ineligible* for a waiver).⁴¹

The parameters of any waiver authority are controlled by the terms of the relevant statute, but where that statute is silent or ambiguous, the executive could be said to have some discretion in determining how the waiver is applied. For example, among the actions that the Obama Administration announced in November 2014 is “clarifying” what is meant by “extreme hardship” for purposes of the provisions in INA §212(a)(9)(B)(v), which permit immigration officials to waive the 3- and 10-year bars upon the admission of an alien who has been unlawfully present in the United States for more than 180 days, if denying the alien admission would result in “extreme hardship” to qualifying relatives who are U.S. citizens or LPRs.⁴²

Waivers of Grounds of Inadmissibility

Arguably some of the most significant examples of discretionary waiver authority involve application of the grounds of inadmissibility listed in INA §212.⁴³ In general, an alien who has not been lawfully admitted into the United States is subject to exclusion or removal from the country if the alien is inadmissible under INA §212.⁴⁴ Some grounds of inadmissibility constitute permanent bars to an alien's admission into the United States, such as those applicable to aliens who have committed specified criminal offenses or who have sought to procure an immigration benefit through fraud or misrepresentation.⁴⁵ In other cases, a ground of inadmissibility may bar an alien from being admitted into the United States for a certain period of time. For instance, an alien who was previously ordered removed from the United States, or who had been unlawfully

(...continued)

contrary to the law and constitute an abuse of discretion. *See* INA §242(b)(4)(D), 8 U.S.C. §1152(b)(4)(D).

⁴¹ INA §242(a)(2)(D), 8 U.S.C. §1152(a)(2)(D) (provisions barring review of discretionary actions not precluding “review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals”). Most, but not all, reviewing courts have held that this provision permits only the review of “pure” questions of law, and not “mixed” questions involving the application of the law to undisputed facts. *See* *Al Ramahi v. Holder*, 725 F.3d 1133, 1138 n.2 (9th Cir. 2013) (interpreting the INA to permit judicial review of mixed questions of law and fact, but observing that most other appellate courts have disagreed with this interpretation).

⁴² DHS, Secretary Jeh Charles Johnson, Memorandum, Expansion of the Provisional Waiver Program, November 20, 2014 (copy on file with the authors). As of the date of this report, the exact criteria to be used in assessing “extreme hardship” has not yet been publicly articulated. However, the Administration anticipates that factors to be considered will include: “family ties to the United States and the country of removal, conditions in the country of removal, the age of the U.S. citizen or permanent resident spouse or parent, the length of residence in the United States, relevant medical and mental health conditions, financial hardships, and educational hardships.” *Id.* The Administration may also establish a presumption of hardship in certain cases. *Id.*

⁴³ The INA also gives immigration officials discretion to waive other statutory requirements. *See, e.g.*, INA §216(c)(4), 8 U.S.C. §1186a(c)(4) (hardship waiver applicable to certain adjustment requirements for conditional permanent resident aliens who are spouses or sons or daughters of U.S. citizens or LPRs); INA §217, 8 U.S.C. §1187 (authorizing establishment of a visa waiver program, under which certain visa requirements may be waived with respect to qualifying aliens from certain countries who seek entry into the United States as tourists for less than 90 days); INA §237(a)(1)(E), 8 U.S.C. §1227(a)(1)(E) (providing for limited waiver of the ground of deportability concerning alien smuggling).

⁴⁴ *See* 8 U.S.C. §1182. Aliens who are admitted into the United States as nonimmigrants, or who are paroled into the country, are generally barred from adjusting to LPR status if they are covered by the inadmissibility grounds of INA §245(a), 8 U.S.C. §1255(a).

⁴⁵ INA §212(a)(2), 8 U.S.C. §1182(a)(2) (criminal grounds of inadmissibility); INA §212(a)(6)(C), 8 U.S.C. §1182(a)(6)(C) (inadmissibility grounds concerning fraud and misrepresentation).

present in the country for more than 180 days before departing, is thereafter inadmissible for a specified number of years.⁴⁶

The INA provides immigration authorities with the ability to waive application of many of these grounds in certain situations, and thereby enable otherwise-excludable aliens to be lawfully admitted into the United States. Most notably, the immigration authorities have discretion to waive most of the inadmissibility grounds with respect to applicants for *nonimmigrant visas*, so that such aliens may be permitted to enter the United States on a temporary basis.⁴⁷ An alien who obtains such a waiver remains ineligible to receive an immigrant visa allowing him or her to come to the United States on a permanent basis, and would also be unable to adjust to LPR status while present in the United States on a nonimmigrant visa.⁴⁸

Immigration officials may also waive certain grounds of inadmissibility so that aliens may be admitted into the United States on *immigrant visas* and/or permitted to adjust to LPR status in certain instances. Examples include the following:

- INA §212(a)(9)(B)(v) permits the waiver of the inadmissibility provision applicable to aliens who have been unlawfully present in the United States for more than 180 days, if immigration authorities determine that refusing to admit the alien would result in “extreme hardship” for a U.S. citizen or LPR who is the spouse or parent of the alien.⁴⁹
- INA §212(h) generally authorizes immigration officers to waive many of the inadmissibility grounds concerning criminal activity for qualifying aliens,⁵⁰ including those (1) whose convictions for the criminal offenses rendering them inadmissible occurred more than 15 years before the date of the alien’s application for a visa, admission, or adjustment of status, and who are deemed rehabilitated and not a threat to U.S. welfare, safety, and security; or (2) whose denial of admission would result in “extreme hardship” for a U.S. citizen or LPR

⁴⁶ INA §212(a)(9)(A), 8 U.S.C. §1182(a)(9)(A) (generally providing for a five- or ten-year bar on the admission of an alien who was previously removed, with lengthier or permanent bars applicable in certain circumstances); INA §212(a)(9)(B), 8 U.S.C. §1182(a)(9)(B) (generally establishing either a three- or ten-year bar on the admission of an alien who was unlawfully present in the United States for more than 180 days).

⁴⁷ INA §212(d)(3), 8 U.S.C. §1182(d)(3).

⁴⁸ INA §245(a), 8 U.S.C. §1255(a).

⁴⁹ 8 U.S.C. §1182(a)(9)(B)(v). In 2013, USCIS promulgated regulations which permit unlawfully present alien spouses or children of U.S. citizens who are seeking admission to the United States as legal immigrants to apply for provisional waivers of the bars on admissibility before departing the United States in order to adjust to lawful status. *See generally* CRS Legal Sidebar WSLG385, *Provisional Waivers of the Three- and Ten-Year Bars to Admissibility to Be Granted to Certain Unlawfully Present Aliens*, by Kate M. Manuel. Among the actions announced in November 2014 is granting such “provisional waivers” to aliens whose spouses or parents are LPRs (as opposed to U.S. citizens). *See* Expansion of the Provisional Waiver Program, *supra* note 42.

⁵⁰ The use of such a waiver with respect to the drug-related ground of inadmissibility is statutorily limited. Moreover, the commission of certain types of criminal offenses renders an alien ineligible to obtain a waiver. INA §212(h), 8 U.S.C. §1182(h) (barring issuance of waivers to aliens who have committed, or conspired or attempted to commit, murder or acts of torture, and also barring waivers to aliens previously admitted as LPRs who thereafter were convicted of an aggravated felony). *See also* 8 C.F.R. §212.7(e) (providing that waiver authority shall generally not be exercised, “except in extraordinary circumstances,” with respect to aliens who seek such a waiver on the basis of hardship caused to U.S. family members but who are inadmissible due to “violent or dangerous crimes”); *Matter of Jean*, 23 I. & N. Dec. 373 (AG 2002) (depending on the gravity of the offense rendering the alien inadmissible, even “exceptional and extremely unusual hardship” likely to be suffered by the alien’s U.S. citizen or LPR family members might be inadequate grounds to justify the exercise of waiver authority).

who is the spouse, parent, or child of the alien.⁵¹ However, the eligibility for waivers of aliens who had previously been admitted as LPRs and lost such status, and thereafter seek to be readmitted as LPRs or adjust to LPR status, is circumscribed.⁵²

- INA §212(i) permits the waiver of the ground of inadmissibility applicable to aliens who procured or sought to procure an immigration benefit through fraud or misrepresentation,⁵³ when it is determined that the denial of the alien’s lawful admission would result in “extreme hardship” to a U.S. citizen or LPR who is the spouse or parent of the alien.⁵⁴

Former INA §212(c) gave immigration officials discretion to waive most grounds of inadmissibility with respect to LPRs who had temporarily proceeded abroad and sought reentry into the United States, provided that the LPR had been domiciled in the United States at least seven years and met certain other conditions (i.e., had not served at least five years’ imprisonment for an aggravated felony conviction, and was not inadmissible on grounds relating to national security or international child abduction).⁵⁵ This waiver authority had also been construed by immigration officials and reviewing courts to apply to LPRs who were present in the United States and undergoing deportation hearings.⁵⁶ Although this waiver provision was deleted from the INA in 1996, courts have construed such authority as remaining available to immigration officials with respect to resident aliens who are removable on account of guilty pleas arising prior to the repeal of INA §212(c).⁵⁷

Hardship as a Requirement for Certain Relief from Removal

In several instances, the INA provides that, for an alien to be eligible for a particular form of relief from removal, the alien’s removal must cause “hardship” to a member of the alien’s immediate family who is a U.S. citizen or LPR. The nature of these hardship requirements has changed over time, and varies depending upon the particular benefit at issue. Most of the current hardship-based waivers to the grounds of inadmissibility require that the alien’s exclusion or removal would cause “extreme hardship” to an immediate family member who is a U.S. citizen or LPR. On the other hand, to qualify for cancellation of removal under INA §240A(b)(1), aliens who are not LPRs must establish that their removal would cause “exceptional and extremely unusual hardship” to a spouse, parent, or child who is a U.S. citizen or LPR.

Neither “extreme hardship” nor “exceptional and extremely unusual hardship” is defined by the INA, and both terms have been subject to varying interpretations over the years. Immigration authorities have typically construed “extreme hardship” to necessitate a showing of harm greater than that which typically results from an alien’s removal,

⁵¹ Aliens who are self-petitioners for immigration status under the terms of the Violence Against Women Act (VAWA) are not required to satisfy some of the eligibility requirements to obtain a 212(h) waiver that other classes of aliens must meet. INA §212(h)(1)(C), 8 U.S.C. §1182(h)(1)(C).

⁵² INA §212(h), 8 U.S.C. §1182(h) (barring waivers from being issued to former LPRs subsequently convicted of an aggravated felony, or who had not continuously and lawfully resided in the country for at least seven years prior to the initiation of removal proceedings).

⁵³ INA §212(i), 8 U.S.C. §1182(i) (concerning application of INA §212(a)(6)(C), 8 U.S.C. §1182(a)(6)(C)).

⁵⁴ *Id.* Somewhat different eligibility requirements apply to VAWA self-petitioners.

⁵⁵ Former INA §212(c), 8 U.S.C. §1182(c) (1994).

⁵⁶ *See, e.g.,* Francis v. INS, 532 F.2d 268 (2d Cir. 1976); *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976).

⁵⁷ *See, e.g.,* Judulang v. Holder, —U.S.—, 132 S. Ct. 476 (2011); INS v. St. Cyr, 533 US 289, 326 (2001) (construing the amendment and subsequent repeal of INA §212(c) in 1996 as not eliminating the availability of waivers for those aliens whose pre-1996 criminal convictions “were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect”).

but the elements required to demonstrate “extreme hardship” are dependent upon the facts and particularities of each case. A nonexhaustive list of factors potentially relevant to assessing whether removal would cause “extreme hardship” to a qualifying relative have included: the affected family member’s ties to the United States; the conditions of the country where the qualifying relative might relocate as a result of the alien’s removal, and the relative’s ties to that country; the financial impact of the qualifying relative’s departure from the United States in order to join the relocated alien; and the potential implications that the alien’s removal would have for the qualifying relative’s health.

The “exceptional and extremely unusual hardship” standard used to assess aliens’ eligibility for cancellation of removal under INA §240A(b)(1) has been construed to require the alien to demonstrate a greater degree of hardship than the “extreme hardship” standard, although the alien need not show such hardship is “unconscionable.”

See generally *Matter of Monreal*, 23 I. & N. Dec. 56 (BIA 2001); *Matter of Cervantes*, 22 I. & N. Dec. 560 (BIA 1999).

Parole

While not typically characterized as a waiver, INA §212(d)(5) gives immigration officials broad discretion to permit aliens to enter or remain in the United States, at least temporarily, notwithstanding the fact that the alien may be otherwise inadmissible. As previously discussed, the INA authorizes immigration officials to waive certain grounds of inadmissibility, and thereby permit excludable aliens to be admitted into the United States as immigrants or nonimmigrants. In contrast, the parole of an alien into the United States does not constitute “admission” for immigration purposes. Despite the paroled alien’s physical presence in the country, the alien is “still in theory of law at the boundary line” of the United States,⁵⁸ and does not have a legal immigration status. Nonetheless, some aliens who obtain parole may be able to adjust to lawful permanent resident (LPR) status while present in the United States (provided they are not covered by a ground of inadmissibility, or any applicable ground of inadmissibility is waived).⁵⁹ Aliens granted parole may also, under current regulations, be granted work authorization.⁶⁰

The use of parole authority has been authorized by statute since the INA was originally enacted in 1952. Over the years, the statutory language concerning parole authority has been amended somewhat, but the focus has remained upon those persons whose entry into the country is deemed warranted due to pressing “humanitarian” concerns, or because the alien’s entry is in the “public interest.” The INA currently permits the Secretary of Homeland Security to parole aliens into the United States “only on a case-by-case basis for urgent humanitarian reasons or significant public benefit,” and further restricts the usage of parole with respect to alien crewmembers or refugees.⁶¹

As noted in the text box below, parole authority has been exercised by the executive branch to permit the entry of various groups of aliens into the United States. In addition, “advance parole” has been used to permit certain non-LPR aliens who are physically present within the United States to reenter the United States after a brief departure (e.g., nonimmigrants whose visa does

⁵⁸ *Leng May Ma v. Barber*, 357 U.S. 185, 189 (1958).

⁵⁹ INA §245(a), 8 U.S.C. §1255(a) (potentially enabling parolees to adjust to LPR status, provided that such persons are not covered by any grounds of inadmissibility in INA §212).

⁶⁰ See 8 C.F.R. §274a.12(a)(4) (authorizing aliens paroled into the United States as refugees to be employed for the period of time they are in that status) & (c)(11) (providing that aliens must apply for work authorization if temporarily paroled into the country “for emergency reasons or reasons deemed strictly in the public interest”).

⁶¹ INA §212(d)(5), 8 U.S.C. §1182(d)(5). Prior to the 1980 Refugee Act, which circumscribed the use of parole to facilitate the entry of refugees, parole had regularly been used with respect to persons fleeing persecution. See text box, “A Brief History of the Executive Branch’s Parole of Aliens into the United States”; 1980 Refugee Act, P.L. 96-212, §202(f) (limiting use of parole for refugees except when there were “compelling reasons in the public interest” to require the alien to be paroled into the country rather than being admitted as a refugee).

not permit readmission; aliens who lack lawful immigration status but have been permitted to remain in the country).⁶² “Parole-in-place” has also been granted to some aliens who are physically present within the United States, but lack a legal immigration status, most notably, the spouses, children, or parents of those serving, or who previously served, on active duty in the U.S. Armed Forces or the Selected Reserve of the Ready Reserve.⁶³ Once granted parole-in-place, such aliens are no longer seen as unlawfully present and may be eligible to adjust status pursuant to INA §245, as discussed below (see “Adjustment of Status by Aliens Granted Advance Parole”). Among the actions announced by the Obama Administration in November 2014 is the paroling of certain inventors, researchers, and entrepreneurs into the United States on the grounds that their entry will provide “significant public benefit.”⁶⁴ Other actions involve greater consistency in determinations as to whether to grant advance parole,⁶⁵ and the parole of certain unlawfully present spouses, children, and parents of U.S. citizens and LPRs seeking to enlist in the armed forces.⁶⁶

A Brief History of the Executive Branch’s Parole of Aliens into the United States

The executive branch’s practice of paroling excludable or inadmissible aliens into the United States dates back to at least the early 1900s, when immigration officials adopted the practice to avoid holding aliens in custody pending their exclusion. Parole was also used to permit aliens to remain in the United States for a period of time when “the case was exceptionally meritorious and immediate deportation would be inhumane.”

When the INA was adopted in 1952, it provided express statutory authority for this executive branch practice,

⁶² Advance parole requests have traditionally been approved only if specified criteria are met. *See, e.g.*, DHS USCIS, Frequently Asked Questions Concerning Deferred Action for Childhood Arrivals, updated October 23, 2014, *available at* <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> (noting that aliens who receive deferred action under the DACA initiative may be able to travel abroad if granted advance parole, and stating that parole will only be granted to enable travel for specific purposes, including a family emergency, or educational or employment purposes).

⁶³ DHS, USCIS, Policy Memorandum (PM) PM-602-0091, Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i), November 15, 2013 (copy on file with the authors). It is unclear exactly when the Executive began the practice of granting parole-in-place, as such, to unlawfully present aliens. The November 2013 memorandum cited here notes a 1998 decision by the General Counsel of the then-Immigration and Naturalization Service (INS) as having “formally recognized the legal authority for granting parole in place.” *Id.* (citing Memorandum from Paul W. Virtue, INS General Counsel, to INS officials, “Authority to Parole Applicants for Admission Who Are Not Also Arriving Aliens,” Legal Op. 98-10 (August 21, 1998)). The 2013 memorandum also notes that the Commissioner of the then-INS endorsed the INS General Counsel’s view in 1999, and that the General Counsel for DHS concurred, in relevant part, with these views in 2007. *Id.* (citing Memorandum from Doris Meissner, INS Commissioner, to INS officials, “Eligibility for Permanent Residence Under the Cuban Adjustment Act Despite Having Arrived at a Place Other than a Designated Port-of-Entry” (April 19, 1999) & Memorandum from Gus P. Coldebella, DHS General Counsel, to DHS officials, “Clarification of the Relation Between Release under Section 236 and Parole under Section 212(d)(5) of the Immigration and Nationality Act” (September 28, 2007)). The 2013 memorandum further suggests that, insofar as the provisions of the INA authorizing parole refer to “any alien applying for admission to the United States,” parole-in-place can be seen as permissible pursuant to INA §235(a)(1), which expressly defines an applicant for admission to include “an alien present in the United States who has not been admitted.” *Id.* (citing 8 U.S.C. §1225(a)). However, it is possible that immigration officials may have utilized something akin to parole-in-place—but not characterized it as such—prior to 1998.

⁶⁴ DHS, Secretary Jeh Charles Johnson, Memorandum, Policies Supporting U.S. High-Skilled Businesses and Workers, November 20, 2014 (copy on file with the authors).

⁶⁵ DHS, Secretary Jeh Charles Johnson, Memorandum, Directive to Provide Consistency Regarding Advance Parole, November 20, 2014 (copy on file with the authors).

⁶⁶ DHS, Secretary Jeh Charles Johnson, Memorandum, Families of U.S. Armed Forces Members and Enlistees, November 20, 2014 (copy on file with the authors).

permitting aliens applying for admission to be paroled into the United States “temporarily under such conditions as [the executive] may prescribe for emergent reasons or for reasons deemed strictly in the public interest.” The legislative history suggests that the INA’s drafters intended the parole authority to be used only in limited circumstances. The initial draft of the INA reportedly would have restricted parole to aliens requiring medical treatment in the United States. Although the language adopted was not so narrow, the drafters seem to have envisioned parole being used to permit aliens to enter only for “immediate medical attention,” or as “a witness or for purposes of prosecution.” Subsequent statements of members of the drafting committee support this view, emphasizing that the drafters envisioned parole as applying in “unique individual cases” on a “temporary and at best conditional basis.”

The executive branch, however, used its parole authority under the INA more broadly. For example, the 1953 INS annual report notes the parole into the United States of 386 natives of Estonia, Latvia, Finland, Sweden, Poland, and the Soviet Union who had initially sought refuge from Russian Communists in Sweden, and then sailed to various U.S. ports between 1945 and 1950. A subsequent Senate report similarly notes the parole of 925 orphans from Eastern Europe in 1956; 38,045 refugees from Hungary in 1957; 19,754 refugees from Eastern Europe in 1960-1965; 14,741 Chinese refugees from Hong Kong and Macao in 1962; 692,219 refugees from Cuba in 1962-1979; 35,758 refugees from the Soviet Union in 1973-1979; 208,200 Indochinese refugees in 1975-1979; 1,422 Chileans in 1975-1977; another 343 Latin Americans in 1976-1977; an estimated 1,000 Lebanese in 1978-1979; and an estimated 15,000 Cuban prisoners and family members in 1979. Later, although parole was arguably less common, it was still used with Jewish persons from the Soviet Union in 1988-1989; certain Haitians interdicted at sea and detained at Guantanamo who had medical conditions in 1991-1992; and Haitian orphans in 2010. These grants of parole generally reflected humanitarian concerns tied to the aliens’ situations. However, domestic labor needs were sometimes taken into account when granting parole, as happened when Hong Kong Chinese were selected for parole based, in part, on their “possessing special skills needed in the United States,” and 2,468 aliens were paroled into Guam to “support defense projects” following a typhoon.

In some instances, Congress expressed concerns about the executive branch’s broad use of its parole authority, as when a 1965 committee report stated that “it is the express intent of the committee that the parole provisions ... be administered in accordance with the original intention of the drafters ... The parole provisions were designed to authorize the Attorney General to act only in emergent, individual, and isolated situations, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside of the limit of the law.” However, in other cases, Congress responded to the executive branch’s granting of parole to groups of refugees by enacting legislation which permitted parolees to become LPRs (e.g., P.L. 85-559 (Hungarian parolees); P.L. 89-732 (Cuban parolees)). In addition, in 1960, Congress enacted legislation (P.L. 86-648) that could be seen as having ratified (at least for a time) the executive branch’s use of parole to admit refugees by temporarily authorizing the use of parole for this purpose.

See generally INS Annual Reports for 1949, 1950, 1962, and 1963; 2 U.S.C.C.A.N. 1653, 1706 (1952); S. REP. NO. 748, 89th Cong., 1st Sess. at 16-17; H.R. REP. NO. 96-814, at 88; S. REP. NO. 256, 96th Cong., 2d Sess. at 6; Soviet Refugees: Hearing, 101st Cong., 1st Sess. (1989); 27 Geo. Wash. L. Rev. 373, 374 n. 11 (1959); 16 IN DEFENSE OF THE ALIEN 135 (1993); 55 N.Y. L. SCH. L. REV. 791 (2010).

Potential Constraints

As these examples suggest, exercises of affirmative authority to grant benefits or relief, or to waive restrictions on benefits or relief, must be consistent with any statutory limitations. For example, the executive is arguably barred from considering “hardship” to the alien, or to the alien’s children, in determining whether to waive the 3- and 10-year bars upon the admissibility of aliens who have accrued at least 180 days of unlawful presence in the United States because INA §212(a)(9)(B)(v) expressly refers to waivers:

in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established ... that the refusal of

admission to such [an] alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.⁶⁷

However, in cases where the INA is silent or ambiguous, the executive could potentially have more discretion as to how affirmative authority to grant benefits or relief, or waive restrictions on benefits or relief, is exercised. (See “Discretion in Interpreting and Applying Statutes.”)

In addition, even where there are few, if any, statutory restrictions upon the executive’s ability to grant immigration-related benefits or relief, questions might be raised about whether particular exercises of authority are consistent with historical practice, other provisions of the INA, or Congress’s intent in granting the executive branch specific authority. For example, while nothing in the INA expressly prohibits the executive branch from doing so, granting EADs to every alien who comes to the United States, regardless of such alien’s legal status, would be unprecedented.⁶⁸ Similarly, if the executive hypothetically were to propose granting work authorization to all aliens coming to the United States, an argument could be made that doing so would be inconsistent with the provisions that Congress made in the INA for the protection of domestic labor in the granting of employment-based immigrant and nonimmigrant visas.⁶⁹ An argument could also be made that Congress is unlikely to have defined *unauthorized alien* and prohibited the knowing hiring or employment of such aliens if it contemplated the executive branch granting work authorization to all aliens.

Discretion in Enforcement

The executive is generally recognized as possessing some degree of independent authority in assessing when, against whom, how, and even whether to prosecute apparent violations of federal law; an authority generally referred to as “prosecutorial discretion” or “enforcement discretion.”⁷⁰ Such authority has been seen to exist in the field of immigration, and to grant the executive some discretion in determining, among other things,⁷¹

⁶⁷ See 8 U.S.C. §1182(a)(9)(B)(v).

⁶⁸ On the other hand, there could be cases where historical precedent could be said to support particular exercises of discretionary authority, as with the executive branch’s practice of continuing to grant DED after the creation of TPS. See text box, *supra* page 6.

⁶⁹ See generally CRS Report R43223, *The Framework for Foreign Workers’ Labor Protections Under Federal Law*, by Margaret Mikyung Lee and Jon O. Shimabukuro.

⁷⁰ See generally DOJ, United States Attorneys’ Manual, §9-27.110(B) (2002). There is some debate over the basis for prosecutorial discretion; that is, whether it arises from an English common law procedural mechanism known as the *nolle prosequi*, the structure of the U.S. Constitution, or other sources. See “Prosecutorial Discretion Generally,” in CRS Report R42924, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, by Kate M. Manuel and Todd Garvey.

⁷¹ See, e.g., *Arizona*, 132 S. Ct. at 2498 (“A principal feature of the removal system is the broad discretion entrusted to immigration officials.”); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 490 (1999) (finding that the various prudential concerns that prompt deference to the executive branch’s determinations as to whether to prosecute criminal offenses are “greatly magnified in the deportation context,” which involves civil (as opposed to criminal) proceedings). See also *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (noting that immigration is a “field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program”).

- whether to commence removal proceedings and the nature of the particular charges to lodge against an alien;⁷²
- whether to cancel a Notice to Appear (NTA) or other charging document before jurisdiction vests with an immigration judge;⁷³ and
- whether to appeal an immigration judge’s decision or order.⁷⁴

The granting of immigration benefits, in contrast, has historically been seen not as an exercise of prosecutorial or enforcement discretion inherent to the executive branch, but as an exercise of authority expressly delegated by Congress.⁷⁵

The exercise of prosecutorial or enforcement discretion in specific cases has historically been based on humanitarian factors,⁷⁶ and/or resources constraints.⁷⁷ A “favorable” exercise of discretion (e.g., one permitting a potentially removable alien to remain in the United States) generally does not grant the alien a legal immigration status, despite the alien having official permission to remain in the country.⁷⁸ However, by enabling the alien to remain in the United States, a favorable exercise of discretion could permit the alien to acquire a basis for legalization in the future (e.g., the establishment of ties that would provide a basis for adjustment of status under current law, or following the enactment of a legalization measure like the Immigration Reform and Control Act of 1986).⁷⁹

⁷² See, e.g., *Hanggi v. Holder*, 563 F.3d 378, 383 (8th Cir. 2009); *Rodrigues v. Attorney General of the United States*, 414 Fed. App’x 484, 488 (3rd Cir. 2011); *Matter of Avetisyan*, 25 I. & N. Dec. 688 (BIA 2012); *Matter of Bahta*, 22 I. & N. Dec. 1381 (BIA 2000); *Matter of Singh*, 21 I. & N. Dec. 427 (BIA 1996); *Matter of Ruis*, 18 I. & N. Dec. 320 (BIA 1982); *Matter of Roussis*, 18 I. & N. Dec. 256 (BIA 1982); *Matter of Lennon*, 15 I. & N. Dec. 9 (BIA 1974).

⁷³ See, e.g., *Matter of G-N-C-*, 22 I. & N. Dec. 281 (BIA 1998). See also *Akhtar v. Gonzales*, 450 F.3d 587, 591 (5th Cir. 2006) (recognizing immigration officials’ prosecutorial discretion in determining whether to terminate removal proceedings to allow the alien to apply for any immigration benefits that may be available).

⁷⁴ See, e.g., *Matter of Avetisyan*, 25 I. & N. Dec. 688 (BIA 2012); *Matter of York*, 22 I. & N. Dec. 660 (BIA 1999); *Matter of Joseph*, 22 I. & N. Dec. 660 (BIA 1990).

⁷⁵ See, e.g., DOJ, INS General Counsel Bo Cooper, INS Exercise of Prosecutorial Discretion, July 11, 2000, at 4 (copy on file with the authors) (“The doctrine of prosecutorial discretion applies to enforcement decisions, not benefit decisions. For example, a decision to charge, or not to charge, an alien with a ground of deportability is clearly a prosecutorial enforcement decision. By contrast, the grant of an immigration benefit, such as naturalization or adjustment of status, is a benefit decision that is not a subject for prosecutorial discretion.”).

⁷⁶ See, e.g., DHS, U.S. Immigration and Customs Enforcement (ICE) Director John Morton, Memorandum, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, June 17, 2011 (copy on file with the authors) (noting, among the factors to be considered in determining whether a favorable exercise of discretion is warranted, the alien’s length of presence in the United States and the circumstances of the alien’s arrival in the United States); William J. Howard, Principal Legal Advisor, ICE, DHS, Prosecutorial Discretion, October 24, 2005, at 2 (copy on file with the authors) (similar).

⁷⁷ See, e.g., U.S. ICE, Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities, No. 306-112-002b, August 23, 2013 (copy on file with the authors) (“This and other memoranda related to prosecutorial discretion are designed to ensure that agency resources are focused on our enforcement priorities.”); DHS, ICE Director John Morton, Director, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens, March 2, 2011, at 1-2 (copy on file with the authors) (“ICE ... only has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population of the United States.”); Prosecutorial Discretion, *supra* note 76 (noting demands created by the establishment of DHS, among other things).

⁷⁸ Cf. USCIS, Frequently Asked Questions, *supra* note 62 (“Deferred action does not confer lawful [immigration] status upon an individual.”). However, individuals granted deferred action are seen as being lawfully present, at least for purposes of federal immigration law, while they have deferred action. *Id.*

⁷⁹ Cf. *Reno*, 525 U.S. at 490 (“Postponing justifiable deportation (in the hope that the alien’s status will change—by, for (continued...)

Determining Whether to Issue an NTA

One example of the executive’s prosecutorial or enforcement discretion as to immigration involves determinations as to whether to issue Notices to Appear (NTAs) or other charging documents initiating proceedings against individual aliens who are believed to be removable.⁸⁰ Such discretion has likely been used as long as there have been grounds for deporting or removing aliens, with individual immigration officers determining that humanitarian factors or resource constraints were such that action against specific individuals was not warranted.⁸¹ A few “large scale” examples have also been noted, such as the then-INS’s determination in 1962 to permit “56,800 refugee overstay visitors [from Cuba] ... to remain in the United States for an indefinite period,” rather than seeking their removal.⁸² (These persons were apparently separate and apart from the 62,500 Cuban parolees, and the 6,500 Cubans in visitor status, also reported that year as having been permitted to remain in the United States indefinitely).⁸³

However, there is only sporadic evidence regarding such uses of discretion until the mid-1970s, when the executive branch began issuing memoranda that elaborated on specific aspects of immigration enforcement and, particularly, its practices and priorities as to immigration enforcement. Currently, for example, these memoranda establish a general policy of not engaging in arrests, interviews, searches, or surveillance for purely immigration enforcement purposes near schools or churches.⁸⁴ Conversely, the “highest priority” is given to the removal of

- (a) aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;
- (b) aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States;
- (c) aliens convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. §521(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang;

(...continued)

example, marriage to an American citizen—or simply with the object of extending the alien’s unlawful stay) is often the principal object of resistance to a deportation proceeding.”)

⁸⁰ See sources cited *supra* note 72.

⁸¹ Immigration officials have been said to have seen themselves to lack discretion as to whether to initiate removal proceedings against removable aliens at certain points in time. See, e.g., Maurice A. Roberts, *Relief from Deportation: Discretion and Waivers*, 55 INTERPRETER RELEASES 184, 187 (May 5, 1978) (“Until relatively recently, the INS focused on the word ‘shall’ [in the statute governing deportation] and regarded it as a command to start deportation proceedings against all aliens who fit within the enumerated deportable classes.”). However, other sources suggest that, at other points in time, immigration officials declined to take action to remove at least certain removable aliens. See, e.g., *United States v. Chum Shang Yuen*, 57 F. 588, 590 (S.D. Cal. 1893) (Executive declining to execute the Geary Act insofar as it provided for the deportation of Chinese nationals who had not obtained the requisite certificates of residence). The Executive had cited resource constraints in the latter case. However, the court afforded little weight to this argument and ordered that the alien be deported, on the grounds that the Executive apparently viewed itself as having the funds to enforce other provisions of the Geary Act regarding the exclusion of Chinese nationals.

⁸² INS, Annual Report of the Immigration and Naturalization Service, at 4 (1962) (copy on file with the authors).

⁸³ *Id.*

⁸⁴ DHS, ICE Director John Morton, *Enforcement Actions at or Focused on Sensitive Locations*, October 24, 2011 (copy on file with the authors).

(d) aliens convicted of an offense classified as a felony in the convicting jurisdiction, other than a state or local offense for which an essential element was the alien's immigration status; and

(e) aliens convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the INA at the time of the conviction.⁸⁵

Amending DHS's enforcement priorities—to establish the listing given above—was one of the actions taken by the Obama Administration in 2014. The recent federal district court decision enjoining implementation of the Administration's 2014 deferred action initiatives (discussed below) expressly noted the court's view that the Administration's enforcement priorities are within its discretion.⁸⁶

The Administration also took action in November 2014 to discontinue its former Secure Communities program and replace it with the Priority Enforcement Program (PEP).⁸⁷ Like Secure Communities, PEP will rely upon information sharing between various levels and agencies of government to identify potentially removable aliens.⁸⁸ However, unlike Secure Communities, PEP will focus primarily on aliens who have been convicted of felonies or "significant" misdemeanors, and generally will not entail states and localities holding aliens after they would have otherwise been released for the state or local offense that prompted their initial arrest so that DHS can take custody of them.⁸⁹ These changes can also be seen as changes in enforcement priorities.⁹⁰

⁸⁵ Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants, *supra* note 13, at 1-2.

⁸⁶ See *Texas v. United States*, No. B-14-254, 2015 U.S. Dist. LEXIS 18551, at * 118 (S.D. Tex., February 16, 2015) ("The law is clear that the Secretary's ordering of DHS priorities is not subject to judicial second-guessing: [T]he Government's enforcement priorities and ... the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to make. *Reno [v. Arab-American Anti-Discrimination Committee]*, 525 U.S. [471,] 490 [(1999)] (quoting *Wayte v. United States*, 470 U.S. 598, 607-08 (1985)).") .

⁸⁷ DHS, Secretary Jeh Charles Johnson, Memorandum, Secure Communities, November 20, 2014 (copy on file with the authors).

⁸⁸ See DHS, ICE, *Secure Communities: The Basics*, available at http://www.ice.gov/secure_communities (accessed March 23, 2015).

⁸⁹ These changes can be seen to respond to criticisms that the Secure Communities program resulted in the removal of aliens who were not priorities for removal under the Obama Administration's priorities. See, e.g., Human Rights Watch, *Immigrants "Afraid to Call 911,"* May 15, 2014, available at <http://www.hrw.org/news/2014/05/14/us-immigrants-afraid-call-911>; Am. Civil Liberties Union, *Domestic Violence Victim's 911 Call for Help Results in Deportation Proceedings*, May 12, 2011, available at <https://www.aclusocal.org/a-domestic-violence-victims-911-call-for-help-results-in-deportation-proceedings-secure-communities-program-endangers-crime-victims/>.

⁹⁰ The primary means that DHS had relied upon to request that states and localities "hold" potentially removable aliens identified through Secure Communities—so-called "immigration detainers" (Form I-247)—have recently been the subject of extensive litigation. In March 2014, the U.S. Court of Appeals for the Third Circuit ruled that federal law does not require states and localities to hold aliens who are subject to immigration detainers, and that any attempt to require states and localities to do so would run afoul of the "anti-commandeering" principles of the Tenth Amendment. See *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014). More recently, in April 2014, a federal district court found that states and localities must have probable cause to hold an alien pursuant to a detainer; the mere filing of a detainer does not provide the requisite legal authority for such holds. See *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 U.S. Dist. LEXIS 50340 (D. Or., April 11, 2014). For more information, see generally CRS Report R42690, *Immigration Detainers: Legal Issues*, by Kate M. Manuel.

Deferred Action

Another example of discretion in enforcing immigration law involves the granting of deferred action to removable aliens.⁹¹ Grants of deferred action date back to at least the 1970s,⁹² and are distinct from determinations not to issue NTAs or take other enforcement action. Generally, there is no record of an immigration officer's determination not to issue an NTA, and one immigration officer's determination not to issue an NTA to an individual alien is generally not seen as "binding" on other officers encountering the same alien. The situation is different as to grants of deferred action, which are documented in the alien's immigration file (commonly known as the "A file"), and have historically been seen to govern unless and until there are changes in the alien's circumstances.⁹³

Immigration officials may grant deferred action on their own initiative, or aliens can request deferred action if they know it is an option. Perhaps the best known examples of deferred action involve the Obama Administration's 2012 DACA initiative, along with the Administration's 2014 announcement of a planned expansion of DACA and the creation of a DACA-like program for unlawfully present aliens who are the parents of U.S. citizens or LPRs, known as "DAPA." However, these deferred action programs arguably differ from prior grants of deferred action in that the availability of deferred action is widely known, and the factors considered in determining whether to grant it are explicit.⁹⁴ Additionally, grants of deferred action through DACA and DAPA (if implemented) last for a specified period of time (two years under the 2012 DACA initiative, three years under the proposed DAPA program and DACA expansion), with the possibility of renewal, as opposed to being open-ended like grants of deferred action outside DACA and DAPA (if implemented) potentially are.⁹⁵ Some have also said that grants of deferred action through DACA and DAPA are to be seen as different in that these initiatives involve "categories" of aliens.⁹⁶ However, the Obama Administration has emphasized that determinations as to whether to grant deferred action through DACA and DAPA are to be made on an individual

⁹¹ See, e.g., *Hotel & Rest. Employees Union Local 25 v. Smith*, 846 F.2d 1499, 1510-1511 (D.C. Cir. 1988); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1119 n.3 (9th Cir. 2001); *Johnson v. INS*, 962 F.2d 574, 579 (7th Cir. 1992); *Carmona Martinez v. Ashcroft*, 118 Fed. App'x 238, 239 (9th Cir. 2004); *Matter of Yauri*, 25 I. & N. Dec. 103 (BIA 2009); *Matter of Singh*, 21 I. & N. Dec. 427 (BIA 1996); *Matter of Luviano-Rodriguez*, 21 I. & N. Dec. 235 (BIA 1996); *Matter of Quintero*, 18 I. & N. Dec. 348 (BIA 1982).

⁹² See *Lennon v. INS*, 527 F.2d 187, 191 n.7 (2^d Cir. 1975) (describing deferred action as an "informal administrative stay of deportation").

⁹³ See generally Charles Gordon, Stanley Mailman, & Stephen Yale-Loehr, IMMIGR. L. & PROC. §72.03(2)(h) (2009).

⁹⁴ By publicizing the availability of deferred action and the criteria applied in determining whether a favorable exercise of discretion is warranted, the DACA and DAPA initiatives could be seen as responding to criticisms that prosecutorial discretion has historically been exercised with little accountability or oversight. See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 911-916 (2009). In 2007, the USCIS Ombudsman had expressly recommended that DHS post information about deferred action on its website, among other things. See Recommendation from the CIS Ombudsman to the Director, USCIS, April 6, 2007 (copy on file with the authors). In November 2014, DHS also made publicly available information about seeking deferred action from ICE outside of the DACA and DAPA initiatives. See generally DHS, ICE, How to Seek Prosecutorial Discretion from ICE, available at <http://www.ice.gov/immigrationaction> (accessed March 20, 2015).

⁹⁵ Compare, e.g., Frequently Asked Questions, *supra* note 62 (grants of deferred action through DACA lasting two years) with CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, IMMIGR. L. & PROC. §72.03(2)(h) (2009) (noting "periodic reviews" of non-DACA grants of deferred action to determine whether deferred action is still warranted).

⁹⁶ See, e.g., Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 675 (2014) (prosecutorial discretion not extending to "entire categories" of aliens); *Dream On*, *supra* note 20, at 846 (similar).

basis,⁹⁷ and that no one is “entitled” to deferred action through these initiatives, even if all “the guidelines [suggesting the alien warrants a favorable exercise of discretion] are met.”⁹⁸ The Administration has also continued to grant deferred action to aliens outside the DACA initiative and the proposed DACA expansion and DAPA initiatives, although on a smaller scale.⁹⁹

A recent federal district court decision, discussed below, enjoined the Administration from implementing DAPA and the DACA expansion.¹⁰⁰ It did not enjoin the 2012 DACA initiative or the granting of deferred action in individual cases outside of DACA and DAPA.¹⁰¹

Potential Constraints

The executive branch’s enforcement discretion is subject to two notable limits, neither of which is necessarily judicially enforceable in particular cases.¹⁰² The first is that the express adoption of a policy that constitutes an abdication of a statutory duty could be found to be impermissible under the rationale articulated by the Supreme Court in its 1985 decision in *Heckler v. Cheney*. The *Heckler* Court expressly recognized the possibility of an executive agency “consciously and expressly adopt[ing] a general policy [of not enforcing the law] that is so extreme as to amount to

⁹⁷ See Janet Napolitano, Secretary of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 15, 2012, at 2 (copy on file with the authors) (“[R]equests for relief pursuant to this memorandum are to be decided on a case by case basis.”); DHS Secretary Jeh Charles Johnson, Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and With Respect to Certain Individuals Who Are Parents of U.S. Citizens or Permanent Residents*, November 20, 2014, at 5 (copy on file with the authors) (“Under any of the proposals outlined above, immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis.”).

⁹⁸ See Frequently Asked Questions, *supra* note 62 (“[USCIS] retains the ultimate discretion to determine whether deferred action is appropriate in any given case even if the guidelines are met.”).

⁹⁹ See, e.g., Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 GEO. IMMIGR. L.J. 345, 350 (2013) (reporting that ICE processed 698 deferred action cases in the first three quarters of FY2012). By contrast, USCIS reports that it granted 1,707 requests for deferred action through DACA in September 2012 alone. See USCIS, *Deferred Action for Childhood Arrivals Process* (November 2012 reporting date), available at http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Static_files/2012-1116%20DACA%20Monthly%20Report.pdf.

¹⁰⁰ See *infra* notes 105 to 108 and accompanying text.

¹⁰¹ *Texas v. United States*, No. B-14-254, Order of Temporary Injunction, filed February 16, 2015 (S.D. Texas) (copy on file with the authors) (enjoining DAPA and “any and all aspects or phases of the expansions (including any and all changes) to the [DACA] program as outlined in the DAPA Memorandum”).

¹⁰² Concerns about standing—or who is a proper party to seek judicial relief from a federal court—may limit judicial review in particular cases. Standing requirements derive from Article III of the Constitution, which confines the jurisdiction of federal courts to actual “Cases” and “Controversies.” U.S. CONST., art. III, §2, cl. 1. The case-or-controversy requirement has long been construed to restrict Article III courts to the adjudication of real, live disputes involving parties who have “a personal stake in the outcome of the controversy.” *Baker v. Carr*, 369 U.S. 186, 204 (1962). Parties seeking judicial relief from an Article III court must generally show three things in order to demonstrate standing: (1) they have suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) the injury is likely to be redressed by a favorable decision. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). There could also be questions about whether particular exercises of discretion are committed to agency discretion as a matter of law and, thus, not judicially reviewable. See, e.g., *Heckler*, 470 U.S. at 826. A court’s determination that agency action is not subject to judicial review does not necessarily constitute an endorsement of the lawfulness of executive action, but may simply be due to the court finding that it lacks a manageable standard or is otherwise ill-equipped to assess the propriety of the action.

an abdication of its statutory responsibilities.”¹⁰³ However, the *Heckler* Court did not elaborate upon what might constitute such an abdication,¹⁰⁴ and at least one federal court of appeals later took the view that “[r]eal or perceived inadequate enforcement ... does not constitute a reviewable abdication of duty.”¹⁰⁵ Instead, the appellate court opined that the plaintiffs must show that the executive either is “doing nothing to enforce the ... laws,” or has “consciously decided to abdicate” its enforcement responsibilities.¹⁰⁶

More recently, however, the federal district court hearing a challenge to the 2014 DAPA initiative and the expansion of DACA brought by 26 states or their representatives distinguished this case from prior cases involving the federal government’s alleged failure to enforce the immigration laws on the grounds that the 2014 actions involve “abdication by any meaningful measure,” not “mere ineffective enforcement.”¹⁰⁷ In so doing, the court seems to have been influenced by the government’s explicit announcement that it would not be seeking the removal of certain aliens, as well as the sheer number of aliens eligible for the 2014 deferred action initiatives.¹⁰⁸ The court did not, however, find that the plaintiffs could maintain their challenge based solely on “the concept of abdication standing.”¹⁰⁹ Further, its decision to enjoin the Administration from implementing the 2014 deferred action initiatives was based on its finding that the initiatives constituted a “substantive rule,” but had been promulgated without compliance with the notice-and-comment requirements of the Administrative Procedure Act (APA); not because they constituted an “abdication” of the executive’s statutory duties.¹¹⁰ The government has sought a

¹⁰³ *Heckler*, 470 U.S. 832-833 n.4 (internal citations omitted).

¹⁰⁴ The *Heckler* Court cited the U.S. Court of Appeals for the District of Columbia Circuit’s decision in *Adams v. Richardson* in support of its view that a policy of nonenforcement could constitute abdication, but does not otherwise attempt to define the parameters of what could be said to be abdication.

¹⁰⁵ *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997).

¹⁰⁶ *Id.* See also *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994) (distinguishing the non-reviewability of a “single-shot non-enforcement decision” by a federal agency from a “general enforcement policy,” which may be reviewable in some contexts).

¹⁰⁷ *Texas*, 2015 U.S. Dist. LEXIS 18551, at *100.

¹⁰⁸ *Id.* at *99-*100 (“[W]ith the exception of *Crane* [which challenged the 2012 DACA initiative], none of the cases involved the Government announcing a policy of non-enforcement. Here, the DHS has clearly announced that it has decided not to enforce the immigration laws as they apply to approximately 4.3 million individuals—as well as to untold millions that may apply but be rejected by the DAPA program. The DHS has announced that the DAPA program confers legal status upon its recipients and, even if an applicant is rejected, that applicant will still be permitted to remain in the country absent extraordinary circumstances. There can be no doubt about this interpretation as the White House has made this clear by stating that the ‘change in priorities applies to everybody.’”). See also *id.* at *168-*169 (“This Court finds that DAPA does not simply constitute inadequate enforcement; it is an announced program of non-enforcement of the law that contradicts Congress’ statutory goals. Unlike the Government’s position in [the 1997 case of] *Texas v. U.S.*, the Government here is ‘doing nothing to enforce’ the removal laws against a class of millions of individuals (and is additionally providing those individuals legal presence and benefits). See *id.* Furthermore, if implemented exactly like DACA (a conclusion this Court makes based upon the record), the Government has publicly declared that it will make no attempt to enforce the law against even those who are denied deferred action (absent extraordinary circumstances). Theoretically, the remaining 6-7 million illegal immigrants (at least those who do not have criminal records or pose a threat to national security or public safety) could apply and, thus, fall into this category. DAPA does not represent mere inadequacy; it is complete abdication.”).

¹⁰⁹ *Id.* at *114.

¹¹⁰ For further discussion, see generally CRS Legal Sidebar WSLG1177, *Federal District Court Bars Implementation of the Obama Administration’s Latest Deferred Action Initiatives (Part 2): Reviewability and Rulemaking under the APA*, by Kate M. Manuel.

stay of this injunction pending appeal, but as of the date of this report, no ruling has been issued¹¹¹

The second limitation involves specific statutory mandates that particular exercises of prosecutorial or enforcement discretion could be seen to violate. For example, in 2012, a federal district court found that DACA runs afoul of three purportedly “interlocking provisions” in INA §235 which the court construed as requiring that all aliens who have not been “admitted” into the United States be placed in removal proceedings.¹¹² These provisions state that

1. any alien present in the United States who has not been admitted *shall* be deemed an applicant for admission;
2. applicants for admission *shall* be inspected by immigration officers; and
3. in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall* be detained for removal proceedings.¹¹³

Each provision uses “shall,” which the court viewed as indicating “mandatory” agency action.¹¹⁴ This court later ruled that it lacked jurisdiction over the case,¹¹⁵ a decision which has been appealed. However, the federal district court hearing the challenge brought by 26 states or their representatives to the proposed DACA expansion and DAPA initiatives recently adopted a similar interpretation of these three provisions, noting that “the applicable statutes use the imperative term ‘shall,’ not the permissive term ‘may’” (although its order enjoining implementation of DAPA and the DACA expansion was not based on this interpretation).¹¹⁶

It is important to note, however, that not all statutes using “shall” have been construed to eliminate executive discretion, particularly in cases where the statute prescribes that persons be sanctioned for particular violations.¹¹⁷ For example, in a 2011 decision, the Board of Immigration Appeals (BIA), the highest administrative body for construing and applying immigration law, found that immigration officers have discretion as to whether to pursue expedited removal proceedings under INA §235 or formal removal proceedings under INA §240, notwithstanding

¹¹¹ See, e.g., Administration Seeks Expedited Appeal of Injunction Against DAPA, DACA Programs, 9 Workplace Immigr. Rep. 179 (March 16, 2015).

¹¹² Crane v. Napolitano, No. 3:12-cv-03247-O, 2013 U.S. Dist. LEXIS 57788, *27-*39 (N.D. Tex., April 23, 2013).

¹¹³ See INA §235(a)(1), (a)(3), & (b)(2)(A), 8 U.S.C. §1225(a)(1), (a)(3), & (b)(2)(A).

¹¹⁴ For further discussion of the court’s decision here, see generally CRS Legal Sidebar WSLG498, Federal District Court Finds that DACA Is Prohibited by the INA, by Kate M. Manuel.

¹¹⁵ Crane, No. 3:12-cv-03247-O, Order (N.D. Tex., July 31, 2013) (copy on file with the authors).

¹¹⁶ Texas, 2015 U.S. Dist. LEXIS 18551, at *164. Note, however, that even if the district courts’ interpretations here were adopted, an argument could be made that these three provisions of the INA require only that arriving aliens be placed in removal proceedings, not that removal proceedings be pursued to a decision on the merits or, if the alien is found removable, until he or she is removed.

¹¹⁷ The statute at issue in *Heckler*, for example, stated that “[a]ny article of food, drug, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale ... after shipment in interstate commerce, or which may not ... be introduced into interstate commerce, *shall be liable to be proceeded against.*” 470 U.S. at 835 (quoting 21 U.S.C. §334(a)(1) (emphasis added)). Nonetheless, despite its use of “shall,” this statutory provision was seen by the Court as “framed in the permissive.” *Id.*

the fact that the INA uses “shall” in describing who is subject to expedited removal.¹¹⁸ In so doing, the BIA specifically noted that,

in the Federal criminal code, Congress has defined most crimes by providing that whoever engages in certain conduct “shall” be imprisoned or otherwise punished. But this has never been construed to require a Federal prosecutor to bring charges against every person believed to have violated the statute.¹¹⁹

Discretion in Interpreting and Applying Statutes

Another type of discretion that the executive branch may exercise as to immigration law involves the interpretation and application of statutes. As the Supreme Court explained in its 1984 decision in *Chevron U.S.A. v. Natural Resources Defense Council*, when “Congress has directly spoken to the issue, ... that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹²⁰ However, where a statute is “silent or ambiguous with respect to a specific issue,” courts will generally defer to an agency interpretation that is based on a “permissible construction of the statute,”¹²¹ on the grounds that the executive branch must fill any “gaps” implicitly or explicitly left by Congress in the course of administering congressional programs.¹²² The degree of deference afforded to particular executive branch interpretations can vary depending upon the facts and circumstances of the case, including whether the interpretation is a “formal” one adopted through notice-and-comment rulemaking or case-by-case adjudication.¹²³ There are a number of places where the INA or other immigration-related statutes are silent or ambiguous on particular issues, and the executive branch has—expressly or practically—adopted an interpretation that significantly affects the implementation of immigration law. As some commentators have suggested,¹²⁴ these executive branch interpretations can be changed to expand (or restrict) aliens’ ability to enter or remain in the United States, or the conditions of their continued presence here, without the enactment of additional legislation.

¹¹⁸ *Matter of E-R-M & L-R-M*, 25 I. & N. Dec. 520, 523 (BIA 2011).

¹¹⁹ *Id.* at 522.

¹²⁰ 467 U.S. 837, 842-43 (1984).

¹²¹ *Id.* at 843.

¹²² *See, e.g., Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (“The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”).

¹²³ *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (“Interpretations such as those in opinion letters - like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law - do not warrant *Chevron*-style deference.”). Instead, such “informal” interpretations may be afforded a lesser degree of deference that depends upon various factors including “the degree of the agency’s care, its consistency, formality, and relative expertness, and ... the persuasiveness of the agency’s position,” as well as the “writer’s thoroughness, logic, and expertise, its fit with prior interpretations, and any other source of weight.” *United States v. Mead Corp.*, 533 U.S. 218, 228, 235 (2001); *see also Skidmore v. Swift*, 323 U.S. 134 (1944).

¹²⁴ *See supra* note 42.

What Constitute Federal Means-Tested Public Benefits

One example of the executive's discretion in interpreting and applying the law involves the provisions in the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) which restrict noncitizens' eligibility for "federal means-tested public benefits" and other public benefits. PRWORA itself does not affirmatively define what constitutes a "federal means-tested public benefit."¹²⁵ Rather, it excludes certain benefits (e.g., some emergency disaster relief) from the application of the general bar upon the receipt of such benefits by LPRs and other "qualified aliens" during their first five years after entering the United States in a qualified status.¹²⁶ Instead, the executive branch, through the promulgation of regulations, has determined that "federal means-tested public benefits" encompasses only Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), Medicaid, food stamps, and the state Child Health Insurance Program (SCHIP), not other benefits.¹²⁷

Some have questioned the executive's determination to include only these mandatory spending programs, and not any discretionary ones, in defining "federal means-tested public benefits" for purposes of PRWORA. However, the Office of Legal Counsel (OLC) at the Department of Justice has opined that the executive's regulations here would likely be viewed as entitled to deference by a court, since the statutory text is ambiguous, and the agency's construction is a reasonable

¹²⁵ As introduced in the House and Senate, PRWORA would have defined "federal means-tested public benefits" to mean "a public benefit (including cash, medical, housing, and food assistance and social services) of the Federal Government in which the eligibility of an individual, household, or family eligibility unit for benefits, or the amount of such benefits, or both are determined on the basis of income, resources, or financial need of the individual, household, or unit." *Personal Responsibility and Work Opportunity Reconciliation Act of 1996: Conference Report to Accompany H.R. 3734, H.R. Rpt. 104-725, 104th Cong., 2d Sess., July 30, 1996*, at 381-82. However, this definition was stricken from the bill passed by the Senate because PRWORA was brought to the floor as a reconciliation measure and, as such, was subject to procedural rules allowing challenges to extraneous provisions. As used here, extraneous provisions included provisions that "produced changes in outlays or revenues which are merely incidental to the non-budgetary components of the provision." The proposed definition of federal means-tested public benefits was deemed to be extraneous because it "reached discretionary spending programs, which, in this context, lay beyond the proper scope of the reconciliation process." See Dep't of Justice, Office of Legal Counsel, Proposed Agency Interpretation of "Federal Means-Tested Public Benefits" Under Personal Responsibility and Work Opportunity Reconciliation Act of 1996, January 14, 1997 (copy on file with the authors). However, the conference report accompanying the language that was ultimately enacted as PRWORA included a statement that the conferees intended the term federal means-tested public benefit to be construed in light of the definition given in the bill as introduced. *Personal Responsibility and Work Opportunity Reconciliation Act of 1996: Conference Report*, at pg. 382.

¹²⁶ 8 U.S.C. §1613(c)(2). PRWORA further defines a "qualified alien" to encompass: LPRs; aliens granted asylum; refugees; aliens paroled into the United States for a period of at least one year; aliens whose deportation is being withheld; aliens granted conditional entry; and Cuban and Haitian entrants. 8 U.S.C. §1641(b)(1)-(7). However, certain other aliens are also treated as qualified aliens for purposes of PRWORA. 8 U.S.C. §1641(c) (victims of domestic violence).

¹²⁷ See Social Security Admin., Personal Responsibility and Work Opportunity Reconciliation Act of 1996: Federal Means-Tested Public Benefits Paid by the Social Security Administration, 62 Fed. Reg. 45284, 45284-85 (August 26, 2007) ("The Social Security Administration announces that, of the programs it administers, only supplemental security income benefits under title XVI of the Social Security Act are 'Federal means-tested public benefits' for purposes of title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, as amended."); Dep't of Health & Human Services, Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of "Federal Means-Tested Public Benefit," 62 *Federal Register* 45256 (August 26, 1997) ("[T]he HHS programs that constitute 'Federal means-tested public benefits' under PRWORA are Medicaid and TANF."); Dep't of Ag., Food Stamp Program: Noncitizen Eligibility, and Certification Provisions of P.L. 104-193, as Amended by Public Laws 104-208, 105-33 and 105-185, 65 *Federal Register* 10856, 10876 (February 29, 2000) ("[F]ood stamps are a 'Federal means-tested public benefit' under section 403.").

one.¹²⁸ In so doing, OLC acknowledged that “[s]everal aspects of the text and legislative history of [PRWORA], when viewed in isolation,” could potentially be said to “support a broad[er] interpretation of ‘federal means-tested public benefit’ that would include discretionary programs.”¹²⁹ However, OLC viewed these factors as carrying less weight than Congress’s ultimate decision not to incorporate a definition of “federal means-tested public benefits” that encompassed discretionary spending programs in the text of PRWORA, as enacted.¹³⁰ OLC cited, in support of this conclusion, the “well-settled canon of interpretation that ‘where the final version of a statute deletes language contained in an earlier draft, [it may be presumed] that the earlier draft is inconsistent with ultimate congressional intentions.’”¹³¹ It also pointed to several provisions that had been struck from the Senate-passed version of PRWORA on the grounds that they were extraneous, and subsequently been reintroduced by the conference committee.¹³² The definition of “federal means-tested public benefits” was not one of these. OLC further suggested that PRWORA ought to be construed in light of the rules governing reconciliation that shaped its enactment, which foreclosed consideration, in that context, of provisions affecting discretionary spending.¹³³

No court to date appears to have taken a different view than OLC on this question.

Adjustment of Status by Aliens Granted Advance Parole

Another example of discretion in interpreting and applying statutes concerns the question of whether aliens who have accrued more than 180 days of unlawful presence in the United States may adjust to LPR status if granted advance parole.¹³⁴ Section 245 of the INA permits immigration officials to adjust the status of status of aliens who were “inspected and admitted or paroled” and are “admissible for permanent residence,” among other things.¹³⁵ A grant of advance parole would appear to constitute being “paroled” for purposes of Section 245. However, INA §212(a)(9)(B)(i) provides that aliens who “depart” the United States after accruing more than 180 days of unlawful presence are inadmissible for three to ten years after departing and was, until recently, seen to render aliens who left the United States pursuant to a grant of advance parole inadmissible and, thus, ineligible for adjustment of status.¹³⁶ This view resulted, in part, because the BIA had construed “departure” broadly in its 2007 decision in *Matter of Lemus*:

¹²⁸ See Proposed Agency Interpretation of “Federal Means-Tested Public Benefits,” *supra* note 127.

¹²⁹ *Id.* (noting particularly the dictionary definition of “means-tested;” certain conference report language; and the inclusion of some discretionary programs in the listing of programs expressly excluded from the application of PRWORA’s restrictions on the provision of federal means-tested public benefits to qualified aliens).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See generally CRS Report IF10044, *Deferred Action, Advance Parole, and Adjustment of Status*, by Kate M. Manuel.

¹³⁵ INA §245(a), 8 U.S.C. §1255(a).

¹³⁶ This view is perhaps best illustrated by the removal proceedings described in the 2012 decision by the Board of Immigration Appeals (BIA) in *Matter of Arrabally and Matter of Yerrabelly*, discussed below. Here, two aliens who had left the United States for India several times between 2004 and 2006 pursuant to a grant of advance parole were informed by USCIS officials in 2007 that they were inadmissible under INA §212(a)(9)(B)(i)(II) because they had departed the United States after having been unlawfully present for one year or more and were seeking admission less than 10 years after having departed. 25 I. & N. Dec. 771, 773 (BIA 2012). A USCIS Field Office Director took a (continued...)

to encompass any ‘departure’ from the United States, regardless of whether it is a voluntary departure in lieu of removal or under threat of removal, or it is a departure that is made wholly outside the context of a removal proceeding.¹³⁷

Five years later, though, the BIA revisited the meaning of “departure” for purposes of INA §212(a)(9)(B)(i), pursuant to the Board’s 2012 decision in the consolidated cases of *Matter of Arrabally and Matter of Yerrabelly*. In its decision, the BIA adopted a narrower construction that opens the door for at least some aliens granted advance parole to adjust their status pursuant to INA §245.¹³⁸ The BIA did so by first noting that its earlier decision in *Matter of Lemus* involved an alien who had accrued more than one year of unlawful presence in the United States and then departed the country without obtaining advance permission to return.¹³⁹ Thus, in the BIA’s view, his situation was distinguishable from that of aliens in *Matter of Arrabally and Matter of Yerrabelly*, who had left pursuant to a grant of advance parole.

This difference prompted the BIA to conclude that its “unqualified declaration in *Lemus* ... that inadmissibility under section 212(a)(9)(B)(i)(II) could be triggered by literally ‘any departure’ from the United States has had implications that bear additional consideration.”¹⁴⁰ Upon further consideration of these implications, the BIA found that Congress had not intended INA §212(a)(9)(B)(i) to apply to aliens who left and returned to the United States pursuant to a grant of advance parole.¹⁴¹ Thus, it held that aliens who leave the United States pursuant to a grant of advance parole do not make a “departure” from the United States for purposes of INA §212(a)(9)(B)(i).¹⁴²

Interpretations set forth in BIA decisions, like those discussed here, are afforded the same deference under *Chevron* as agency regulations.¹⁴³

(...continued)

similar view of the aliens’ admissibility. *Id.* An immigration judge apparently adopted the same interpretation when the aliens were placed in removal proceedings, finding that they were inadmissible under INA §212(a)(9)(B)(i)(II). *Id.* at 773-774.

¹³⁷ *Matter of Lemus*, 24 I. & N. Dec. 373 (BIA 2007).

¹³⁸ 25 I. & N. Dec. 771, 779 (BIA 2012).

¹³⁹ *Id.* at 775.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 775-76 (“As we have noted elsewhere, section 212(a)(9)(B)(i)(II) was enacted pursuant to section 301(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of P.L. 104-208, 110 Stat. 3009-546, 3009-575 (effective April 1, 1997). See *Matter of Rodarte*, 23 I&N Dec. 905, 909 (BIA 2006). The legislative history of section 212(a)(9)(B)(i)(II) is rather sparse. Nevertheless, the manifest purpose of the provision (and of the related provisions surrounding it) is to ‘compound the adverse consequences of immigration violations by making it more difficult for individuals who have left the United States after committing such violations to be lawfully readmitted thereafter.’ *Id.* Section 212(a)(9)(B)(i)(II) thus places most aliens who are unlawfully present in the United States for a significant period of time on fair notice that if they leave this country—whether through removal, extradition, formal ‘voluntary departure,’ or other means—they will be unwelcome to return for at least 10 years thereafter. But the same cannot be said for the respondents, who left the United States and returned with Government authorization pursuant to a grant of advance parole.”).

¹⁴² *Id.* at 779.

¹⁴³ See *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999).

Potential Constraints

Although these examples illustrate that the executive branch may have some discretion in interpreting and applying immigration law when the INA is silent or ambiguous on particular issues, this discretion is not unlimited. As previously noted, the executive branch’s interpretation may be constrained if Congress has directly spoken to the precise question at issue.¹⁴⁴ Moreover, even if Congress has not spoken on the question, the executive branch’s interpretation must still be seen as constituting a “permissible” and “reasonable” interpretation of the underlying statute in order to be afforded deference by the courts.¹⁴⁵

How Does the Executive Branch Change Its Interpretation?

How the executive branch changes its interpretation of an immigration statute depends, in part, upon the degree of formality surrounding the issuance of its current interpretation. There are two primary ways to change *formal interpretations* (i.e., regulations, adjudication). One involves the promulgation of changes to regulations through notice-and-comment rulemaking. Such rulemaking can be expedited in limited circumstances (e.g., direct final rules, interim final rules). Alternatively, a BIA decision could be certified to the Attorney General (AG).

DOJ regulations implementing the INA, rather than the INA itself, provide for the *certification* of BIA decisions to the AG for his review. Specifically, these regulations require that the Board refer to the AG for review all cases that: (i) the AG directs the Board to refer; (ii) the Chairman or a majority of the BIA believes should be referred; or (iii) the Secretary of Homeland Security, or specific DHS officials designated by the Secretary with the concurrence of the AG, refers for review. These regulations also require that the decisions of the AG in certified cases be in writing and transmitted to the BIA or DHS for forwarding to the aliens or parties affected.

However, the regulations impose no other requirements, leaving the AG with discretion to certify any BIA decision he wishes, and to address any issues he chooses in a decision that is certified to him. Historical example suggests that the BIA decisions which are certified to the Attorney General need not be published or precedential ones, and that their certification to the Attorney General may occur many months after the BIA decision. In addition, prior AGs have characterized their power of review in certified cases as “plenary”, in that they may engage in *de novo* review of law and facts, unconstrained by the regulations that bind the BIA in their consideration of cases.

Informal interpretations are generally more quickly and easily changed, for example, by withdrawing or modifying informal guidance. For example, in January 2014, the Department of State (DOS) announced changes in its interpretation of the term *parent* in INA §§301 & 309, which govern the acquisition of citizenship at birth for persons born abroad. It did so through a policy memorandum noting that it had formerly construed *parent* to require there be a genetic link between the U.S. citizen parent(s) and the child, but would hereafter recognize gestational ties as well. DHS subsequently announced the issuance of a similar policy in October 2014.

See generally 8 C.F.R. §1003.1(h)(1)(i)-(iii) & (2); *Matter of J-S-*, 24 I. & N. Dec. 520, 531 (AG 2008); *Matter of D-J-*, 23 I. & N. Dec. 572, 575 (AG 2003).

Concerns could also be raised about the deference to be accorded to new agency interpretations that are inconsistent with a long-standing interpretation of the agency, particularly an interpretation that third-parties have relied upon. The Supreme Court rejected the view that “inconsistency” in agency regulations is a “basis for declining to analyze the agency’s interpretation under the *Chevron* framework” in its 2005 decision in *National Cable & Telecommunications Association v. Brand X Internet Services*.¹⁴⁶ However, in so doing, it noted that any “[u]nexplained inconsistency” could be a “reason for holding a regulatory interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure

¹⁴⁴ See *supra* note 120 and accompanying text.

¹⁴⁵ See *supra* note 121 and accompanying text.

¹⁴⁶ 545 U.S. 967, 981 (2009).

Act.”¹⁴⁷ More recently, questions were raised about the permissibility of changes in certain informal interpretations of agency regulations.¹⁴⁸ However, in its 2015 decision in *Perez v. Mortgage Bankers Association*, the Supreme Court unanimously found that an agency need not undergo notice-and-comment rulemaking procedures when modifying an interpretive rule.¹⁴⁹

Some may also argue that certain executive actions as to immigration implicate the “major policy” exception to the general principle of *Chevron* deference in cases where the executive’s interpretation could be said to mark a significant change in policy that Congress arguably did not directly contemplate. Such an exception is generally grounded in the Supreme Court’s statement, in its 2000 decision in *FDA v. Brown & Williamson* that “Congress could not have intended to delegate a decision of such economic and political significance [as whether to regulate tobacco pursuant to delegated authority to regulate ‘drugs’] to an agency.”¹⁵⁰ The *Brown & Williamson* Court also suggested there may be reason to deny deference in all “extraordinary cases” that involve “major questions.”¹⁵¹ However, the Supreme Court’s 2007 decision in *Massachusetts v. EPA* is generally seen to have limited, if not vitiated, the “major policy” exception by requiring the executive to implement an arguably major policy adopted by the Environmental Protection Agency through regulations rather than by statute.¹⁵²

Conclusion

Whether particular actions within the field of immigration are within the executive’s authority has long been of interest to Congress. Certain actions announced by the Obama Administration in November 2014 have prompted particular questions about this topic. However, similar questions arose in the past as to specific executive actions, and seem likely to recur in the future.

¹⁴⁷ *Id.*; see also *Motor Vehicle Manufacturers Ass’n v. State Farm Ins.*, 463 U.S. 29 (1983).

¹⁴⁸ Specifically, several federal courts of appeals had found that agencies cannot substantively change rules interpreting agency regulations that parties have relied upon, unless they provide formal public notice and request comment under the APA. See, e.g., *Mortgage Bankers Ass’n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013); *Alaska Professional Hunters Ass’n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999). However, other courts had adopted a different view. *Miller v. California Speedway Corp.*, 536 F.3d 1020 (9th Cir. 2008), *cert. denied*, 555 U.S. 1208 (2009); *Warder v. Shalala*, 149 F.3d 73, 75-79 (1st Cir. 1998), *cert. denied*, 526 U.S. 1064 (1999).

¹⁴⁹ *Perez v. Mortgage Bankers Ass’n*, Nos. 13-1041 & 13-1052, 2015 U.S. LEXIS 1740 (March 9, 2015). See generally CRS Legal Sidebar WSLG1192, *Supreme Court Rules on Interpretive Rule Procedural Requirements*, by Daniel T. Shedd.

¹⁵⁰ 529 U.S. 120, 133 (2000).

¹⁵¹ *Id.* at 159. See also *id.* at 133 (“In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.”). See also *MCI v. AT&T*, 512 U.S. 218 (1994) (rejecting the Federal Communications Commission’s (FCC’s) interpretation of a statutory provision permitting it to “modify” requirements under a specific provision of its governing act to eliminate a tariff requirement on the grounds that de-tariffing was a “major” and “fundamental” change, which would eliminate a “crucial provision of the statute for 40% of a major sector of the industry” regulated by the FCC).

¹⁵² See, e.g., Abigail R. Moncrieff, *Reincarnating the “Major Questions” Exception to Chevron Deference as a Doctrine of Non-Interference (Or Why Massachusetts v. EPA Got It Wrong)*, Harvard Law School Faculty Scholarship Series Paper 12 (2008), at 1 (copy on file with the authors). At least one commentator has taken issue with the view that this exception forecloses recent Obama Administration actions. See Dan Farber, *Is It Unconstitutional for the President to Implement Major New Policies by Regulation?*, February 3, 2014, available at <http://blogs.berkeley.edu/2014/02/03/is-it-unconstitutional-for-the-president-to-implement-major-new-policies-by-regulation/>.

Whether particular actions are within the executive’s existing authority depends upon whether these actions can be seen to fall within one (or more) of the three broad types of discretion that the executive is generally seen to have as to immigration. Namely, (1) express delegations of discretionary authority; (2) discretion in enforcement (commonly known as prosecutorial or enforcement discretion); and (3) discretion in interpreting and applying statutes.

Each of these three types of authority is subject to certain constraints. For example, exercises of statutory authority must be consistent with the terms of the delegation (although the executive branch could have some discretion in interpreting the statute). Similarly, the executive’s exercise of prosecutorial or enforcement discretion could be limited by specific statutory mandates that the executive take particular actions (e.g., detaining certain aliens pending removal proceedings). The express adoption of a policy that constitutes an abdication of a statutory duty could also be found to be impermissible, although it might be difficult for a court to assess whether an alleged failure to enforce the law constitutes an “abdication.” Likewise, agencies’ interpretations and applications of statutes must conform to the “unambiguously expressed intent of Congress.”

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