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Executive Discretion as to Immigration: Legal Overview

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Summary

President Obama announced in June 2014 that he would seek “to fix as much of our immigration system as I can on my own” through administrative action. Although the Obama Administration has not yet announced the specific immigration actions it intends to take, the President has stated that they will occur before the end of the year. It seems likely that such actions will prompt heated legal debate concerning the scope of the Executive’s discretionary authority over immigration matters, including with respect to the enforcement of immigration-related sanctions and the granting of immigration benefits or privileges. Such debate may be similar to that which followed the 2012 launch of the executive initiative commonly known as Deferred Action for Childhood Arrivals (DACA), under which certain unlawfully present aliens who were brought to the United States as children may be granted “deferred action” (a type of relief from removal) and work authorization. While some have argued that DACA constitutes an abdication of the Executive’s duty to enforce the laws and runs afoul of specific requirements found in the Immigration and Nationality Act (INA), others have argued that the initiative is a lawful exercise of the discretionary authority conferred on the Executive by the Constitution and federal statute.

Executive discretion over immigration matters is informed (and, in some instances, circumscribed) by statutory delegations of authority and constitutional considerations. In some cases, a particular immigration policy or initiative might be premised on multiple sources of discretionary authority. These sources include the following:

- ***Express delegations of discretionary authority by statute.*** In some instances, the INA grants the Executive broad discretion to provide certain forms of relief or benefits (e.g., work authorization or temporary protected status) to foreign nationals. In other instances, the INA permits immigration authorities to waive the application of requirements which would otherwise render an alien ineligible for particular immigration benefits. The INA also gives the Executive broad “parole” authority, under which immigration officials may sometimes permit aliens to physically enter or remain in the country without such entry or presence constituting “admission” for immigration purposes. Any exercises of such statutory authority must be consistent with the terms of the delegation (although the executive branch might have some discretion in interpreting the statute, as discussed below).
- ***Prosecutorial or enforcement 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. However, specific statutory mandates could be seen as limiting the Executive’s discretion to take particular actions (e.g., by requiring that certain aliens be detained pending removal proceedings). The express adoption of a policy that constitutes an abdication of a statutory duty could also be found to be impermissible, but it might be difficult for a court to assess the degree of nonenforcement that would entail an “abdication.”
- ***Discretion in interpreting and applying immigration law.*** The Supreme Court has found that some deference may be owed to agency regulations (or adjudications) which construe 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. However, agency interpretations must conform to the “unambiguously expressed intent of Congress.”

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In June 2014, President Barack Obama announced that he would seek “to fix as much of our immigration system as I can on my own” through administrative action.¹ While the President reiterated his intent to act before the end of the year in a November 5, 2014, press conference,² the Administration has not yet announced what specific measures it intends to take. Commentators have, however, suggested that the executive actions could affect significantly more unlawfully present aliens than the earlier Deferred Action for Childhood Arrivals (DACA) initiative.³ This initiative, which began in 2012, has permitted over 500,000 aliens to obtain “deferred action” (one type of relief from removal) and, in many cases, work authorization.⁴

DACA has prompted heated legal debate about the permissibility of the executive branch’s actions. Some have argued that the DACA initiative is a lawful exercise of the discretionary authority conferred on the Executive by the Constitution and federal statute.⁵ However, others have argued that the initiative impinges on congressional authority to regulate immigration, constitutes an abdication of the Executive’s duty to enforce the laws, or runs afoul of specific provisions of the Immigration and Nationality Act (INA).⁶ It seems likely that whatever actions the Obama Administration may announce in late 2014 will prompt similar debate, particularly as to the scope of the Executive’s discretionary authority over immigration matters.

This debate ultimately reflects the respective roles that Congress and the executive branch 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.⁷ The INA provides a comprehensive set of rules governing the admission of

¹ White House, Office of the Press Secretary, Remarks by the President on Border Security and Immigration Reform, June 30, 2014, available at <http://www.whitehouse.gov/the-press-office/2014/06/30/remarks-president-border-security-and-immigration-reform>.

² Assoc. Press, *Obama, Defiant, Vows Immigration Action This Year*, WASH. POST, Nov. 5, 2014, available at http://www.washingtonpost.com/politics/congress/obama-firm-on-vow-to-act-on-immigration-this-year/2014/11/05/af658b1c-652a-11e4-ab86-46000e1d0035_story.html.

³ See, e.g., *Depending on Specifics, Executive Action Could Impact Millions*, MPI Report Estimates, 8 WORKPLACE IMMIGR. REP. 606 (Sept. 11, 2014) (discussing report, Executive Action for Unauthorized Immigrants, cited *infra* note 96); *Obama Said to Be Developing Plans to Give Millions Work Authorization*, 8 WORKPLACE IMMIGR. REP. 518 (Aug. 4, 2014).

⁴ See Dept. of Homeland Security (DHS), U.S. Citizenship & Immigr. Servs. (USCIS), Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012-2014, available at http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_fy2014_qtr3.pdf (last accessed: Oct. 27, 2014).

⁵ See, e.g., Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. 59 (2013) (responding to arguments raised by Delahunty & Yoo, *infra*, note 6, and claiming that DACA is a constitutionally justified attempt by the Executive “to enforce congressionally mandated priorities” by focusing limited resources on the removal of aliens designated as a “high-priority” for removal); David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws of Kris Kobach’s Latest Crusade*, 122 YALE L.J. ONLINE 167 (2012) (arguing that DACA is consistent with the INA and with previous exercises of enforcement discretion by immigration officials).

⁶ See, e.g., *Crane v. Napolitano*, Amended Complaint, No. 3:12-cv-03247-O, filed Oct. 10, 2012 (N.D. Tex.) (lawsuit challenging DACA and arguing that the initiative is, among other things, contrary to certain provisions of the INA and 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 not purposefully refrain from enforcing federal statutes against broad categories of persons “in ordinary, noncritical circumstances”).

⁷ The INA is codified in 8 U.S.C. §1101 *et seq.*

foreign nationals into the United States and the conditions of such aliens' continued presence in the country, including their eligibility to obtain employment or public benefits, adjust 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.⁸ It also established criminal penalties for certain immigration violations.⁹

On the other hand, the INA expressly or impliedly confers some discretionary authority on the executive branch in matters of immigration enforcement.¹⁰ 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.¹¹ The exercise of these discretionary authorities may enable some unlawfully present aliens to remain in the United States—through asylum,¹² temporary protected status,¹³ cancellation of removal,¹⁴ 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.¹⁵ 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

⁸ 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 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.

⁹ See generally CRS Legal Sidebar WSLG563, *An Overview of Immigration-Related Crimes*, by Michael John Garcia.

¹⁰ 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.”).

¹¹ 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).

¹² 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).

¹³ 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.

¹⁴ 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.

¹⁵ See generally CRS Report R42924, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, by Kate M. Manuel and Todd Garvey.

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.¹⁶ 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).¹⁷ The express adoption of an executive policy that is "in effect an abdication of ... statutory duty" could also be found to be impermissible,¹⁸ but it might be difficult for a court to assess the degree of nonenforcement that would entail an "abdication."

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.¹⁹ 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).²⁰ 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.²¹

This report provides an overview of the three broad types of discretion that the Executive can be seen to have as to immigration: (1) express delegations of discretionary authority; (2) discretion

¹⁶ 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) (discussing the usage of prosecutorial or enforcement discretion by immigration officials, and identifying priorities that ICE agents should consider in the exercise of such discretion).

¹⁷ See generally INA §236(c), 8 U.S.C. §1226(c).

¹⁸ 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)).

¹⁹ 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).

²⁰ 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).

²¹ 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," 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 (Mar. 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 (Jan. 3, 1997) (noting that the INA "distinguishes between the broader term 'applicants for admission' and a narrower group, 'arriving aliens'"). See "Deferred Action" for further discussion of INA §235.

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 in greater detail. *See generally* CRS Report R42924, *Prosecutorial Discretion in 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,²² 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.²³ 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:

²² 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.

²³ *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;²⁴
- have been “continuously physically present” in the United States since the effective date of their home country’s most recent TPS designation;²⁵
- 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);²⁶
- be generally admissible as an immigrant and not ineligible for TPS (e.g., have not been convicted of specified offenses);²⁷
- register during the period prescribed for registration by the executive branch; and
- pay any registration fee required by the executive branch.²⁸

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.²⁹

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.³⁰ TPS can also be a powerful tool for the Executive in crafting immigration policy. For example, TPS could be employed to enable aliens who are from countries where large numbers of persons have been displaced—and who are unlikely to qualify as refugees³¹—to remain in the United States.³² Further, while TPS is

²⁴ 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).

²⁵ There is an exception for “brief, casual, and innocent absences.” See INA §244(c)(4), 8 U.S.C. §1254a(c)(4).

²⁶ 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).

²⁷ 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.*

²⁸ INA §244(c), 8 U.S.C. §1254a(c).

²⁹ INA §244(c)(3), 8 U.S.C. §1254a(c)(3).

³⁰ 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).

³¹ In order 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 generally do not qualify as “refugees” under the INA.

³² See, e.g., DHS, USCIS, Extension of the Designation of Somalia for Temporary Protected Status, 78 Fed. Reg. 65690 (Nov. 1, 2013) (noting that Somalia was initially designated for TPS on September 16, 1991, “based on (continued...)”).

“temporary,” in 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.³³

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 in response to the Executive’s prior use of extended voluntary departure (EVD) and deferred enforced departure (DED) as devices 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, Apr. 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 legally work 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.”³⁴ 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].”³⁵ This language has generally been construed as giving immigration officials broad discretion to grant EADs to aliens, including those without lawful immigration status.³⁶ There are no express conditions contained in the INA

(...continued)

extraordinary and temporary conditions resulting from armed conflict”).

³³ Certain aliens from Honduras have had TPS since 1999, while some from El Salvador have had it since 2001. See USCIS, Temporary Protected Status, Oct. 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) recently apprehended at the U.S. border with Mexico are present in the United States pursuant to TPS. See, e.g., Donald Kerwin, *The Migration of Unaccompanied Children to the United States: Stumbling Towards a Humanitarian Solution*, HUFFINGTON POST, July 20, 2014, available at http://www.huffingtonpost.com/donald-kerwin/the-migration-of-unaccomp_b_5512234.html (posting by the Executive Director of the Center for Migration Studies noting that “[a]n unknown, but likely substantial number of migrant children have U.S. resident parents in temporary protected status”). Some have recently suggested that TPS also be granted to these UACs in order to avoid their removal to countries where they face potential domestic or gang violence. See, e.g., Pangea Legal Servs., Re: Provide Temporary Protected Status for Children from El Salvador, Guatemala, Honduras, and Mexico, July 14, 2014 (copy on file with the authors).

³⁴ INA §274A, 8 U.S.C. §1324a.

³⁵ INA §274A(h)(3), 8 U.S.C. §1324a(h)(3).

³⁶ See generally 8 U.S.C. §1324a.

regarding when the Secretary of Homeland Security may grant work authorization,³⁷ and the 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.³⁸

Work authorization regulations promulgated by immigration agencies have played an important role in the Obama Administration's 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,"³⁹ DACA beneficiaries were effectively made eligible for EADs as a corollary of receiving deferred action. Further, because many states had laws providing for the issuance of driver's licenses to aliens whose presence in the United States is "authorized" under federal law, and accepted EADs as proof that an alien's presence was so authorized, DACA beneficiaries generally also became eligible to obtain driver's licenses in the states where they were residing.⁴⁰

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.⁴¹ However, federal courts may

³⁷ When first promulgated in 1987, these regulations were challenged through the administrative process on the grounds that they exceeded the INS's authority. *See* DOJ, INS, Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46092 (Dec. 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 persons. 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 also appear to suggest that, by extension, immigration officials have similarly broad discretion to grant work authorization provided any requisite regulatory criteria (e.g., "economic necessity," see *infra*, note 39) are met.

³⁸ *See generally* 8 C.F.R. §274a.12.

³⁹ 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).

⁴⁰ *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.

⁴¹ 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"). (continued...)

review questions of law raised by the Executive's use of waiver authority (e.g., whether immigration authorities properly found that an alien was statutorily *ineligible* for a waiver).⁴²

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. Some Members of Congress have, for example, recently suggested that the Executive expand its interpretation of what constitutes "hardship" for purposes of certain waivers, discussed below, so as to give additional unlawfully present aliens a basis for obtaining legal status in the United States.⁴³

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 §212.⁴⁴ In general, an alien who has not been lawfully admitted into the United States is subject to exclusion or (if the alien is found at a U.S. port of entry or within the United States) removal from the country if the alien is inadmissible under INA §212.⁴⁵ 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.⁴⁶ 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 present in the country for more than 180 days before departing the country, is thereafter inadmissible for a specified number of years.⁴⁷

(...continued)

Decisions as to whether to grant an alien asylum, however, may be reviewed to assess whether they are manifestly contrary to the law and constitute an abuse of discretion. *See* INA §242(b)(4)(D), 8 U.S.C. §1152(b)(4)(D).

⁴² 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).

⁴³ *See, e.g., Congressional Hispanic Caucus Hands DHS Recommendations for Enforcement Changes*, 8 WORKPLACE IMMIGR. REP. 261 (Apr. 14, 2014) (discussing a memorandum to DHS Secretary Jeh Johnson, which advocated that "extreme hardship" be construed to include family ties to the United States, the age of the qualifying U.S. citizen or LPR relative, and financial and educational hardships, among other things).

⁴⁴ 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).

⁴⁵ *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).

⁴⁶ 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).

⁴⁷ INA §212(a)(9)(A), 8 U.S.C. §1182(a)(9)(A) (generally providing for a five- or 10-year bar on the admission of an (continued...))

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.⁴⁸ 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.⁴⁹

Immigration officials may also waive certain grounds of inadmissibility so that aliens may be admitted into the United States on *immigrant visas* and/or granted adjustment 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.⁵⁰
- INA §212(h) generally authorizes immigration officers to waive many of the inadmissibility grounds concerning criminal activity for qualifying aliens,⁵¹ 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 who is the spouse, parent, or child of the alien.⁵² However, the eligibility for

(...continued)

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 10-year bar on the admission of an alien who was unlawfully present in the United States for more than 180 days).

⁴⁸ INA §212(d)(3), 8 U.S.C. §1182(d)(3).

⁴⁹ INA §245(a), 8 U.S.C. §1255(a).

⁵⁰ 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.

⁵¹ 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).

⁵² 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).

- 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.⁵³
- 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,⁵⁴ 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.⁵⁵
 - 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).⁵⁶ 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.⁵⁷ 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).⁵⁸

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 greater harm than typically results from an alien’s removal, 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 include: the affected family member’s ties to the United States; the conditions of the country

⁵³ 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).

⁵⁴ 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)).

⁵⁵ *Id.* Somewhat different eligibility requirements apply to VAWA self-petitioners.

⁵⁶ Former INA §212(c), 8 U.S.C. §1182(c) (1994).

⁵⁷ *See, e.g.,* Francis v. INS, 532 F.2d 268 (2d Cir. 1976); *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976).

⁵⁸ *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”).

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 23 I. & N. Dec. 56 (BIA 2001); 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 otherwise be 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,⁵⁹ and has not been conferred with 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).⁶⁰ Aliens granted parole may also, under current regulations, be granted work authorization.⁶¹

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, but the focus has remained upon those persons whose entry into the country is deemed warranted due to emergent or 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.⁶²

As noted in the text box below, parole authority has been exercised by the executive branch with respect to various groups of aliens. Most routinely, "advance parole" has been used to permit certain non-LPRs (e.g., nonimmigrants whose visa does not permit readmission; aliens who lack lawful immigration status but have been permitted to remain in the country) to reenter the United

⁵⁹ *Leng May Ma v. Barber*, 357 U.S. 185, 189 (1958).

⁶⁰ 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).

⁶¹ 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").

⁶² 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).

States after a brief departure.⁶³ “Parole-in-place” has also been granted to some unlawfully present aliens, 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.⁶⁴ Once granted parole-in-place, such aliens are no longer seen as unlawfully present and are potentially eligible to adjust status pursuant to INA §245, as discussed below (see “Eligibility of Aliens with TPS for Adjustment of Status”). Most recently, some commentators have suggested that the Executive could make greater use of parole and parole-in-place to facilitate the entry of more nonimmigrant workers, or permit immediate relatives of U.S. citizens or LPRs to legalize their status.⁶⁵

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 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, 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

⁶³ Advance parole requests will typically be approved only if certain criteria are met. *See, e.g.*, DHS USCIS, Frequently Asked Questions Concerning Deferred Action for Childhood Arrivals, updated Oct. 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).

⁶⁴ DHS, USCIS, 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), Nov. 15, 2013 (copy on file with the authors).

⁶⁵ Stuart Anderson, National Foundation for American Policy, Executive Action and Legal Immigration, NFAP Policy Brief, at 9 Sept. 2014 (copy on file with the authors) (parole of additional H1-B workers); Marshall Fitz, Center for American Progress, What the President Can Do on Immigration if Congress Fails to Act, at 21-22 (July 2014) (parole-in-place of certain family members).

defense projects” following a typhoon.

In some instances, Congress pushed back against 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 three- 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.⁶⁶

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.⁶⁷ 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.⁶⁸ An argument

⁶⁶ See 8 U.S.C. §1182(a)(9)(B)(v).

⁶⁷ 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.

⁶⁸ See generally CRS Report R43223, *The Framework for Foreign Workers’ Labor Protections Under Federal Law*, by (continued...)

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.”⁶⁹ It is generally recognized that the executive branch may exercise prosecutorial or enforcement discretion in the field of immigration,⁷⁰ including in determining:

- whether to commence removal proceedings and the nature of the particular charges to lodge against an alien;⁷¹
- whether to cancel a Notice to Appear (NTA) or other charging document before jurisdiction vests with an immigration judge;⁷² and
- whether to appeal an immigration judge’s decision or order.⁷³

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.⁷⁴

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⁶⁹ 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.

⁷⁰ 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.”).

⁷¹ 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 (3^d 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).

⁷² 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).

⁷³ 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).

⁷⁴ 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.”).

The exercise of prosecutorial or enforcement discretion in specific cases has historically been based on humanitarian factors,⁷⁵ and/or resources constraints.⁷⁶ 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 legal status, despite the alien having legal permission to remain in the country.⁷⁷ 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).⁷⁸

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.⁷⁹ 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. 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.⁸⁰ (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).⁸¹

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

⁷⁵ See, e.g., Exercising Prosecutorial Discretion, *supra* note 16 (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, Oct. 24, 2005, at 2 (copy on file with the authors) (similar).

⁷⁶ See, e.g., U.S. ICE, Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities, No. 306-112-002b, Aug. 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, Mar. 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).

⁷⁷ Cf. USCIS, Frequently Asked Questions, *supra* note 63 (“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.*

⁷⁸ Cf. *Reno*, 525 U.S. at 490 (“Postponing justifiable deportation (in the hope that the alien’s status will change—by, for 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.”).

⁷⁹ See sources cited *supra* note 71.

⁸⁰ INS, Annual Report of the Immigration and Naturalization Service, at 4 (1962) (copy on file with the authors).

⁸¹ *Id.*

in arrests, interviews, searches, or surveillance for purely immigration enforcement purposes near schools or churches.⁸² Conversely, the “highest priority” is given to the removal of:

aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security; aliens convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders; aliens not younger than 16 who participated in organized criminal gangs; aliens subject to outstanding criminal warrants; and aliens who otherwise pose a serious risk to public safety.⁸³

Some have recently called for changes to the executive branch guidance regarding the issuance of NTAs and, in particular, the cessation of the Secure Communities program.⁸⁴ Secure Communities relies upon information sharing between various levels and agencies of government to identify potentially removable aliens,⁸⁵ and critics have alleged that the program has resulted in the removal of aliens who are not priorities for removal under the DHS guidance quoted above.⁸⁶

Deferred Action

Another example of discretion in enforcing immigration law involves the granting of deferred action to removable aliens.⁸⁷ Grants of deferred action date back to at least the 1970s,⁸⁸ 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.⁸⁹

⁸² DHS, ICE Director John Morton, *Enforcement Actions at or Focused on Sensitive Locations*, Oct. 24, 2011 (copy on file with the authors).

⁸³ Civil Immigration Enforcement: Priorities, *supra* note 76, at 1-2.

⁸⁴ See, e.g., Congressional Hispanic Caucus Hands DHS Recommendations, *supra* note 43, at 5.

⁸⁵ See DHS, ICE, *Secure Communities: The Basics*, available at http://www.ice.gov/secure_communities (last accessed: Nov. 2, 2014).

⁸⁶ 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/>. In a May 2014 interview on the PBS NewsHour, Secretary of Homeland Security Jeh Johnson said he was taking a “fresh look” at Secure Communities, in part, because of such criticisms. See Alex Rogers, *Obama Administration Taking “Fresh Look” at Deportation Review Program*, TIME, May 16, 2014, available at <http://time.com/102694/obama-deportation-program-reviews/#102694/obama-deportation-program-reviews/>.

⁸⁷ 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).

⁸⁸ 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”).

⁸⁹ See generally Charles Gordon, Stanley Mailman, & Stephen Yale-Loehr, IMMIGR. L. & PROC. §72.03(2)(h) (2009).

Immigration officials may grant deferred action on their own initiative, or aliens can request deferred action if they know it is an option. The Obama Administration's DACA initiative is perhaps the best known example of deferred action, although it arguably differs from other grants of deferred action in that the ability to request relief is widely known and the factors considered in granting it are explicit.⁹⁰ Additionally, grants of deferred action through DACA last for two years, with the possibility of renewal, as opposed to being open-ended like grants of deferred action outside DACA generally are.⁹¹ Some have also said that grants of deferred action through DACA are different in that DACA applies to a "category" of aliens.⁹² However, determinations as to whether to grant deferred action through DACA are made on an individual basis,⁹³ and the Obama Administration has repeatedly stated that no one is entitled to deferred action through DACA, not even if all "the guidelines [suggesting the alien warrants a favorable exercise of discretion] are met."⁹⁴ The Administration has also continued to grant deferred action to aliens outside the DACA initiative, although on a smaller scale.⁹⁵ Some have recently called for the extension of DACA, or a DACA-type program, for other aliens, although proposals as to which aliens should be granted deferred action through such a program have varied (e.g., parents of U.S. citizens, aliens eligible to legalize under S. 744, 113th Cong.).⁹⁶

Potential Constraints

The executive branch's enforcement discretion is subject to two notable limits, neither of which is necessarily judicially enforceable.⁹⁷ 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

⁹⁰ By publicizing the availability of deferred action and the criteria applied in determining whether a favorable exercise of discretion is warranted, the DACA initiative 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 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, Apr. 6, 2007 (copy on file with the authors).

⁹¹ Compare Frequently Asked Questions, *supra* note 63 (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).

⁹² *See, e.g.,* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 675 (2004) (prosecutorial discretion not extending to "entire categories" of aliens); *Dream On*, *supra* note 6, at 846 (similar).

⁹³ *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.").

⁹⁴ *See* Frequently Asked Questions, *supra* note 63 ("[USCIS] retains the ultimate discretion to determine whether deferred action is appropriate in any given case even if the guidelines are met.").

⁹⁵ *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* (Nov. 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.

⁹⁶ *See, e.g.,* Randy Capps & Marc R. Rosenblum, Executive Action for Unauthorized Immigrants, Migration Policy Institute Issue Brief No. 10, at 3 (Sept. 2014) (discussing how many aliens might be affected if deferred action were granted to certain segments of the population of unlawfully present aliens).

⁹⁷ For a discussion of standing, see the text box, "Who Has Standing to Challenge Exercises of Enforcement Discretion?", *infra* page 20.

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 an abdication of its statutory responsibilities.”⁹⁸ However, the *Heckler* Court did not elaborate upon what might constitute such an abdication,⁹⁹ and at least one federal court of appeals subsequently took the view that “[r]eal or perceived inadequate enforcement ... does not constitute a reviewable abdication of duty.”¹⁰⁰ 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.¹⁰¹

Does DACA Constitute an Abdication of Duty?

Some have suggested that, with DACA, the Executive has essentially adopted a general policy which is in effect an abdication of its statutory duty insofar as 1.76 million aliens are potentially eligible for relief from removal under DACA. However, the fact that a prosecutorial discretion policy favorably affects a large number of people may not – in and of itself – amount to an abdication of a statutory duty. Courts might also consider the size of the total population against whom the law could be enforced, as well as the resources available for enforcing the law, on the theory that “the President cannot secure full execution of the laws, if Congress denies to him adequate means of doing so.” *Myers v. United States*, 272 U.S. 52, 291-92 (1926) (Brandeis, J., dissenting).

The existence of multiple—and sometimes inconsistent—enforcement mandates from Congress might also factor into a court’s analysis of whether nonenforcement policies constitute an abdication of duty, particularly in situations where an agency elects to concentrate limited resources upon offenders (or offenses) that Congress has indicated are a priority. For example, following the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which some assert amended the INA to require the removal of at least some unauthorized aliens, Congress enacted a number of measures directing DHS to give priority to the removal of “criminal aliens.” See, e.g., 125 Stat. 950; 123 Stat. 2142; 122 Stat. 3659; 121 Stat. 2050-2051. DHS has emphasized that its diminished focus on the removal of DACA-eligible individuals corresponds to an increased focus on criminal aliens, and a reviewing court could potentially find that enforcement of later-enacted mandates (as to criminal aliens) may justify more limited enforcement of earlier enacted mandates (as to unauthorized aliens generally).

The second limitation involves the view that statutes using “shall” invariably require agency action. Some statutes using “shall” have been construed in this way.¹⁰² Perhaps most notably, a federal district court recently found that immigration officers are required to place all aliens who have not been admitted to the United States into removal proceedings because of the use of “shall” in three purportedly “interlocking provisions” in INA §235.¹⁰³ These provisions state that:

⁹⁸ *Heckler*, 470 U.S. 832-833 n.4 (internal citations omitted).

⁹⁹ 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.

¹⁰⁰ *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997).

¹⁰¹ *Id.*

¹⁰² See, e.g., *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (“Congress’ use of the permissive ‘may’ in §3621(e)(2)(B) contrasts with the legislators’ use of a mandatory ‘shall’ in the very same section. Elsewhere in §3621, Congress used ‘shall’ to impose discretionless obligations, including the obligation to provide drug treatment when funds are available. See 18 U.S.C. §3621(e)(1) (‘Bureau of Prisons shall, subject to the availability of appropriations, provide residential substance abuse treatment (and make arrangements for appropriate aftercare)’); see also, e.g., §3621(b) (‘The Bureau shall designate the place of the prisoner’s imprisonment... In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or economic status.’)).

¹⁰³ *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 U.S. Dist. LEXIS 57788, *27-*39 (N.D. Tex., Apr. 23, 2013).

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.¹⁰⁴

Thus, the district court concluded that DACA runs afoul of the INA because many of the aliens granted deferred action through DACA had never been placed in removal proceedings as required, in the court's view, by INA §235. (This same court, however, later ruled that it lacked jurisdiction over the case.¹⁰⁵ That decision has been appealed, and it is presently unclear whether and how its earlier decision construing INA §235 could be seen to restrain any future grants of deferred action.¹⁰⁶)

On the other hand, not all statutes using “shall” have been construed to eliminate executive discretion, particularly not in cases where the statute prescribes that persons be sanctioned for particular violations.¹⁰⁷ 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 the fact that the INA uses “shall” in describing who is subject to expedited removal.¹⁰⁸ 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.¹⁰⁹

¹⁰⁴ See INA §235(a)(1), (a)(3), & (b)(2)(A), 8 U.S.C. §1225(a)(1), (a)(3), & (b)(2)(A).

¹⁰⁵ *Crane*, No. 3:12-cv-03247-O, Order (N.D. Tex., July 31, 2013) (copy on file with the authors).

¹⁰⁶ Moreover, even if the district court's interpretation were adopted, an argument could be made that the provisions of the INA discussed by the district court 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 removal, until he or she is removed.

¹⁰⁷ 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.*

¹⁰⁸ *Matter of E-R-M & L-R-M*, 25 I. & N. Dec. 520, 523 (BIA 2011).

¹⁰⁹ *Id.* at 522.

Who Has Standing to Challenge Exercises of Enforcement Discretion?

Standing requirements are concerned with who is a proper party to seek judicial relief from a federal court. Standing requirements derive from Article III of the Constitution, which confines the jurisdiction of federal courts to actual “Cases” and “Controversies.” 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.” 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.

Standing can be difficult to show in cases involving an Executive’s policy or practice of not enforcing the law in particular cases. Those whose sole injury is the government’s alleged failure to follow the law will generally be found to lack standing because this injury is not personal and particularized.

Government officers and employees, who have taken an oath to uphold the law, will also generally be found to lack standing so long as their only asserted injury is being forced to violate their oaths by implementing an allegedly unlawful policy or practice. Instead, they must allege some separate and concrete adverse consequence that would flow from violating their oath, and courts have reached differing conclusions as to whether the possibility of being disciplined for obeying—or refusing to obey—allegedly unlawful orders suffices for purposes of standing, or whether such injury is “entirely speculative” and, therefore, lacking imminence. In the case of the ICE officers who brought suit to challenge the Obama Administration’s DACA initiative, the reviewing district court found that the plaintiffs had standing because of the possibility of such discipline. However, because such discipline constitutes an adverse employment action, this court subsequently found that the plaintiff’s case is within the jurisdiction of the Merit Systems Protection Board, rather than that of the court.

Individual Members of Congress also generally lack standing to challenge presidential actions. In *Raines v. Byrd*, the Supreme Court held that in order to obtain standing an individual Member must assert either a personal injury, like the loss of his or her congressional seat, or an institutional injury which cannot be addressed by an extant legislative remedy.

See CRS Report R42924, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, by Kate M. Manuel and Todd Garvey; CRS Report R43712, *Article III Standing and Congressional Suits Against the Executive Branch*, by Alissa M. Dolan.

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 articulated 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.”¹¹⁰ 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,”¹¹¹ on the grounds that the executive branch must fill any “gaps” implicitly or explicitly left by Congress in the course of administering congressional programs.¹¹² 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.¹¹³ There are a number of places where the INA is silent or ambiguous

¹¹⁰ 467 U.S. 837, 842-43 (1984).

¹¹¹ *Id.* at 843.

¹¹² *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.”).

¹¹³ *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (“Interpretations such as those in opinion letters - (continued...)”).

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,¹¹⁴ these executive branch interpretations could potentially be changed to expand (or restrict) aliens’ ability to enter or remain in the United States without the enactment of additional legislation.

Not Counting Derivatives

One recently proposed change in the Executive’s interpretation of the INA involves the counting of so-called “derivatives”—or noncitizen spouses or children of alien beneficiaries of family- or employment-based visa petitions, who are not themselves the subject of such petitions.¹¹⁵ Derivatives can immigrate with the so-called “principal” whom they accompany,¹¹⁶ but the INA does not expressly address whether derivatives are to be counted against the annual caps on the number of immigrants (other than “immediate relatives” of U.S. citizens) who may be admitted to the United States each year. Section 203(d) of INA states only that:

A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 1101(b)(1) of this title shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c) of this section, be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.¹¹⁷

The executive branch has historically counted derivatives against the annual caps on the number of immigrants, with the result that 78,089 of the 143,998 total employment-based immigrant visas issued in FY2012 reportedly went to derivatives.¹¹⁸ Because the counting of derivatives can thus be seen as diminishing the number of aliens who may immigrate each year for employment reasons, and as delaying family-based immigration, some have recently suggested that the executive branch cease counting derivatives against the annual caps as a way to permit additional employment- or family-based immigration without congressional action (e.g., the adoption of legislation increasing the annual caps provided in INA §201).¹¹⁹ Other provisions of the INA

(...continued)

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).

¹¹⁴ *See supra* note 43.

¹¹⁵ Executive Action and Legal Immigration, *supra* note 65; Gary Endelman & Cyrus D. Mehta, The Family That Is Counted Together Stays Together: How to Eliminate Immigrant Visa Backlogs, Sept. 15, 2014, *available at* <http://blog.cyrusmehta.com/2014/09/the-family-that-is-counted-together.html>; American Immigration Lawyers Ass’n, Letter to Cecilia Muñoz, Assistant to the President and Director of the Domestic Policy Council, Aug. 6, 2014, at 2 (copy on file with the authors).

¹¹⁶ *See* INA §203(d), 8 U.S.C. §1153(d) (providing that derivatives are entitled to the “same status, and the same order of consideration,” as the principals they accompany (or follow to join) in immigrating).

¹¹⁷ 8 U.S.C. §1153(d).

¹¹⁸ Executive Action and Legal Immigration, *supra*, note 65, at 3.

¹¹⁹ *See* sources cited, *supra* note 115.

could, however, potentially be said to be inconsistent with such an interpretation,¹²⁰ and might factor into any Executive determination as to whether to adopt this interpretation.

Eligibility of Aliens with TPS for Adjustment of Status

Another recently proposed change in the executive branch's interpretation of the INA concerns whether aliens granted TPS under INA §244 are eligible for adjustment of status under INA §245.¹²¹ Section 245 permits adjustment of status for aliens who were “inspected and admitted or paroled” and are “admissible for permanent residence,” among other things.¹²² However, the executive branch has historically taken the view that aliens granted TPS are neither “admitted or paroled” nor “admissible” as those terms are defined by INA §101.¹²³ Thus, in DHS's long-standing view, they are ineligible for adjustment of status.

On the other hand, neither INA §245 nor INA §101 expressly addresses whether unlawfully present aliens granted TPS are eligible for adjustment of status or are admitted/admissible, and a draft memorandum sent by several USCIS employees to the Director of USCIS in 2010 noted that changing DHS's interpretation to permit adjustment of status under INA §245 for aliens with TPS would “promote family unity” and “reduce the threat of removal for certain individuals present in the United States without authorization.”¹²⁴ DHS has generally not adopted such an interpretation to date. However, it has adopted the interpretation within the territorial jurisdiction of the U.S. Court of Appeals for the Seventh Circuit¹²⁵ following a 2013 decision wherein that court found that INA §244—which governs the granting of TPS—requires that those with TPS be seen as admissible.¹²⁶

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

¹²⁰ In particular, under INA §201(b), 8 U.S.C. §1151(b), immediate relatives of U.S. citizens, special immigrants, or aliens granted cancellation of removal are expressly exempted from being counted against the annual limits on the number of immigrants admitted, but derivatives of immigrants admitted on employment- or family-based visas are not. Because Congress clearly identified parties who should not be counted, an argument could be made that the statute precludes the Executive from using its discretion not to count derivatives, as Congress did not list them among the persons exempted from counting.

¹²¹ See, e.g., Letter to Cecilia Muñoz, *supra* note 115, at 3.

¹²² INA §245(a), 8 U.S.C. §1255(a).

¹²³ See, e.g., *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013) (“USCIS argues that Mr. Suazo and other TPS beneficiaries who initially entered the United States without inspection and have an independent basis for a visa can never satisfy the threshold requirement of being ‘admitted or paroled’ or ‘admissible.’ The USCIS argues that Suazo is only allowed protection under TPS as long as the designation is conferred upon him. USCIS argues that he is unable to adjust to LPR under the independent basis—through his wife’s application—because he was not admitted.”); Denise A. Vanison, Policy and Strategy, USCIS, et al., Memorandum to Alejandro N. Mayorkas, *Administrative Alternatives to Comprehensive Immigration Reform*, undated (copy on file with the authors) (“Individuals in TPS continue to be deemed ineligible to adjust or change status in the U.S. based on legal opinions rendered in the early 1990s by a General Counsel of the former Immigration and Naturalization Service (INS).”).

¹²⁴ *Alternatives to Comprehensive Immigration Reform*, *supra* note 123, at 1.

¹²⁵ See, e.g., Letter to Cecilia Muñoz, *supra* note 115, at 3.

¹²⁶ See *Flores*, 718 F.3d at 553.

may be constrained if Congress has directly spoken to the precise question at issue.¹²⁷ 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.¹²⁸

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*.¹²⁹ 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 Act."¹³⁰ More recently, questions have been raised about changes in certain informal interpretations of agency regulations. Several federal courts of appeals have found that agencies cannot substantively change rules interpreting agency regulations that parties have relied upon without providing formal public notice and requesting comment under the APA.¹³¹ Other courts

¹²⁷ See *supra* note 110 and accompanying text.

¹²⁸ See *supra* note 111 and accompanying text.

¹²⁹ 545 U.S. 967, 981 (2009).

¹³⁰ *Id.*; see also *Motor Vehicle Manufacturers Ass'n v. State Farm Ins.*, 463 U.S. 29 (1983).

¹³¹ 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).

have adopted a different view,¹³² and the Supreme Court is scheduled to hear oral arguments on the issue in December 2014.¹³³

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.”¹³⁴ The *Brown & Williamson* Court also suggested there may be reason to deny deference in all “extraordinary cases” that involve “major questions.”¹³⁵ 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.¹³⁶

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¹³² *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).

¹³³ *See Perez v. Mortgage Bankers Association & Nickols v. Mortgage Bankers Association*, 134 S. Ct. 2820 (2014).

¹³⁴ 529 U.S. 120, 133 (2000).

¹³⁵ *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).

¹³⁶ *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?*, Feb. 3, 2014, available at <http://blogs.berkeley.edu/2014/02/03/is-it-unconstitutional-for-the-president-to-implement-major-new-policies-by-regulation/>.