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# Prosecutorial Discretion in Immigration Enforcement: Legal Issues

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December 27, 2013

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

R42924

## Summary

The term *prosecutorial discretion* is commonly used to describe the wide latitude that prosecutors have in determining when, whom, how, and even whether to prosecute apparent violations of the law. The Immigration and Naturalization Service (INS) and, later, the Department of Homeland Security (DHS) and its components have historically described themselves as exercising prosecutorial discretion in immigration enforcement. Some commentators have recently challenged this characterization on the grounds that DHS enforces primarily civil violations, and some of its components cannot be said to engage in “law enforcement,” as that term is conventionally understood. However, even agencies that do not prosecute or engage in law enforcement have been recognized as having discretion (sometimes referred to as *enforcement discretion*) in determining whether to enforce particular violations.

Federal regulation of immigration is commonly said to arise from various powers enumerated in the Constitution (e.g., naturalization, commerce), as well as the federal government’s inherent power to control and conduct foreign relations. Some, although not all, of these powers belong exclusively to Congress, and courts have sometimes described Congress as having “plenary power” over immigration. However, few courts or commentators have addressed the separation of powers between Congress and the President in the field of immigration, and the executive has sometimes been said to share plenary power over immigration with Congress as one of the “political branches.” Moreover, the authority to exercise prosecutorial or enforcement discretion has traditionally been understood to arise from the Constitution, not from any congressional delegation of power.

Certain decisions have been widely recognized as within the prosecutorial discretion of immigration officers. These include deciding whether to initiate removal proceedings and what charges to lodge against the respondent; canceling a Notice to Appear or other charging document before jurisdiction vests with an immigration judge; granting deferred action or extended voluntary departure to an alien otherwise subject to removal (deportation); appealing particular decisions or orders; and imposing fines for particular offenses, among other things. Enforcement priorities and resources, as well as humanitarian concerns, have typically played a role in determining whether to exercise discretion in individual cases. For example, the George W. Bush Administration temporarily suspended employer sanctions in areas affected by Hurricane Katrina, and the Obama Administration recently began granting deferred action to certain unauthorized aliens brought to the United States as children.

While the executive branch’s prosecutorial or enforcement discretion is broad, it is not unfettered, and particular exercises of discretion could potentially be checked by the Constitution, statute, or agency directives. *Selective prosecution*, or prosecution based on race, religion, or the exercise of constitutional rights, is prohibited, although aliens generally cannot assert selective prosecution as a defense to removal. A policy of non-enforcement that amounts to an abdication of an agency’s statutory responsibilities could potentially be said to violate the Take Care Clause. However, standing to challenge alleged violations of the Take Care Clause may be limited, and no court appears to have invalidated a policy of non-enforcement founded upon prosecutorial discretion on the grounds that the policy violated the Take Care Clause. Non-enforcement of particular laws could also potentially be challenged under the Administrative Procedure Act if a statute provides specific guidelines for the agency to follow in exercising its enforcement powers. In addition, an agency could potentially be found to have constrained its own discretion, as some courts found that the INS had done in the 1970s with its operating instruction on deferred action.

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## Introduction

The term *prosecutorial discretion* is commonly used to describe the “wide latitude” that prosecutors have in determining when, whom, how, and even whether to prosecute apparent violations of the law.<sup>1</sup> The Immigration and Naturalization Service (INS) and, later, the Department of Homeland Security (DHS) and its components have historically described themselves as exercising prosecutorial discretion in the enforcement of federal immigration law, which is largely contained in the Immigration and Nationality Act of 1952 (INA), as amended.<sup>2</sup> Some commentators have recently challenged this characterization on the grounds that DHS enforces primarily civil violations, and some of its components cannot be said to engage in “law enforcement,” as that term is conventionally understood.<sup>3</sup> However, even agencies that do not prosecute or engage in law enforcement have been recognized as having discretion (sometimes referred to as *enforcement discretion*) in determining whether to enforce particular violations,<sup>4</sup> and immigration officers appear to have exercised such discretion in individual cases and on a categorical basis for decades. For example, the Kennedy Administration granted extended voluntary departure to persons from Cuba in 1960,<sup>5</sup> allowing many otherwise deportable Cuban nationals to remain in the United States for an extended period, while the George W. Bush Administration temporarily suspended employer sanctions on entities that employed unauthorized aliens in areas affected by Hurricane Katrina.<sup>6</sup>

The scope of prosecutorial discretion in immigration enforcement has recently been of interest to Congress and the public due to certain initiatives of the Obama Administration.<sup>7</sup> In 2011, John

<sup>1</sup> U.S. Dep’t of Justice, *United States Attorneys’ Manual*, §9-27.110(B) (2002), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcr.htm#9-27.110](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcr.htm#9-27.110).

<sup>2</sup> See, e.g., Julie L. Myers, Assistant Secretary, U.S. Immigration and Customs Enforcement (ICE), Prosecutorial and Custody Detention, Nov. 7, 2007, available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Myers-Memo-Custody-Discretion-11-7-07.pdf> (“This memorandum serves to highlight the importance of exercising prosecutorial discretion when making administrative arrest and custody determinations for aliens who are nursing mothers.”); Doris Meissner, Commissioner, INS, Exercising Prosecutorial Discretion, Nov. 7, 2000, available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf> [hereinafter “2002 INS Guidance”] (“This memorandum describes the principles with which the INS exercises prosecutorial discretion and the process to be followed in making and monitoring discretionary decisions.”). INS was abolished in 2002, and most of its functions were transferred to the newly created Department of Homeland by the Homeland Security Act of 2002 (P.L. 107-296).

<sup>3</sup> See, e.g., *Crane v. Napolitano*, No. 3:12-cv-03247-O, Amended Complaint (filed N.D. Tex., Oct. 10, 2012), at ¶¶ 88-89 (“U.S. Citizenship and Immigration Services is not a law enforcement agency. A non-law-enforcement agency cannot exercise prosecutorial discretion.”); Robert J. Delahunty & John C. Yoo, *The Obama Administration, the DREAM Act, and the Take Care Clause*, at 3, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2144031](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144031) (noting that immigration laws are primarily enforced civilly).

<sup>4</sup> See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“[W]e recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”).

<sup>5</sup> See, e.g., Lynda J. Oswald, *Extended Voluntary Departure: Limiting the Attorney General’s Discretion in Immigration Matters*, 85 MICH. L. REV. 152, 158 n.40 (1986).

<sup>6</sup> U.S. Dep’t of Homeland Security, Press Release, Notice Regarding I-9 Documentation Requirements for Hiring Hurricane Victims, Sept. 6, 2005, available at [http://v2011.nilc.org/disaster\\_assistance/FINAL\\_I-9\\_Press\\_Release.pdf](http://v2011.nilc.org/disaster_assistance/FINAL_I-9_Press_Release.pdf).

<sup>7</sup> The Obama Administration has also cited prosecutorial discretion in abstaining from prosecutions for contempt of Congress and violations of the Controlled Substances Act relating to the possession of marijuana. See Letter from (continued...)

Morton, then Director of U.S. Customs and Immigration Enforcement (ICE), issued two memoranda addressing prosecutorial discretion, one of which identified ICE's priorities for the apprehension, detention, and removal of aliens,<sup>8</sup> and the other of which discussed how ICE personnel may exercise prosecutorial discretion consistent with ICE's enforcement priorities.<sup>9</sup> Subsequently, in June 2012, then Secretary of Homeland Security Janet Napolitano issued a memorandum "setting forth how, in the exercise of [its] prosecutorial discretion, the Department ... should enforce the Nation's immigration laws against certain young people who were brought to this country as children and know only this country as home."<sup>10</sup> As implemented, this initiative has come to be known as Deferred Action for Childhood Arrivals (DACA). Most recently, ICE has directed its personnel to exercise discretion in "ensur[ing] that the agency's immigration enforcement activities do not unnecessarily disrupt the parental rights of both alien parents or legal guardians of minor children."<sup>11</sup>

These initiatives have been challenged by some Members of Congress and commentators on the grounds that they are tantamount to "amnesty" for unauthorized aliens and are contrary to the President's constitutional responsibility to "take Care" that the laws be enforced.<sup>12</sup> In particular, some Members have suggested that DACA exceeds the President's authority because "it was issued after Congress specifically rejected legislation"—the Development, Relief, and Education for Alien Minors (DREAM) Act—"embodying that policy."<sup>13</sup> In addition, several ICE agents and the State of Mississippi filed suit in federal district court for the Northern District of Texas

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James M. Cole, Deputy Attorney General, to John Boehner, Speaker of the House, June 28, 2012; Memorandum for Selected U.S. Attorneys from David W. Ogden, Deputy Attorney General, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, Oct. 19, 2009; CRS Legal Sidebar, *Obama Administration Will Not Challenge State Marijuana Laws That Do Not Undermine Federal Enforcement Priorities*, by Brian T. Yeh and Todd Garvey, available at <http://www.crs.gov/LegalSidebar/details.aspx?ID=664&Source=search>.

<sup>8</sup> John Morton, Director, ICE, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens, Mar. 2, 2011, at 1-2, available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> (aliens who have been convicted of crimes, are at least 16 years of age and participate in organized criminal gangs, are subject to outstanding criminal warrants, or "otherwise pose a serious risk to public safety" constituting the highest priorities for removal).

<sup>9</sup> John Morton, Director, ICE, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, June 17, 2011, available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [hereinafter "2011 DHS Guidance"].

<sup>10</sup> 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 1, available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>11</sup> U.S. ICE, Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities, No. 306-112-002b, Aug. 23, 2013, available at [http://www.ice.gov/doclib/detention-reform/pdf/parental\\_interest\\_directive\\_signed.pdf](http://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf).

<sup>12</sup> See, e.g., "Does Administrative Amnesty Harm Our Efforts to Gain and Maintain Operational Control of the Border?" Hearing Before the House Committee on Homeland Security, Subcommittee on Border and Maritime Security, Oct. 4, 2011; "U.S. Immigration and Customs Enforcement: Priorities and the Rule of Law," Hearing Before the House Committee on the Judiciary, Oct. 12, 2011.

<sup>13</sup> See, e.g., Testimony of Senator Michael S. Lee Before the House Committee on the Judiciary, "The Obama Administration's Abuse of Power," Sept. 12, 2012, at 5, available at <http://judiciary.house.gov/hearings/Hearings%202012/Lee%2009122012.pdf>; The Obama Administration, the DREAM Act, and the Take Care Clause, *supra* note 3, at 5 (noting that the DREAM Act, "in one form or other, has been before Congress since 2001").

alleging that the DACA initiative violates certain statutory requirements and impinges upon Congress's legislative powers, among other things.<sup>14</sup>

This report begins by discussing the sources of federal power to regulate immigration and, particularly, the allocation of power between Congress and the President in this area. It next addresses the constitutional and other foundations for the doctrine of prosecutorial discretion, as well as the potential ways in which prosecutorial discretion may be exercised in the immigration context. It concludes by addressing potential constitutional, statutory, and administrative constraints upon the exercise of prosecutorial discretion. The report does not address other aspects of discretion in immigration law, such as the discretion exercised by immigration officers in granting benefits (e.g., asylum), or by immigration judges in non-enforcement contexts (e.g., cancellation of removal).<sup>15</sup>

## Federal Power to Regulate Immigration

The Constitution does not directly address the sources of federal power to regulate which non-U.S. nationals (aliens) may enter and remain in the United States, or to establish the conditions of their continued presence within the country. However, several of the enumerated powers of the federal government have been construed as authorizing such regulation. The powers to establish a uniform rule of naturalization and regulate commerce are arguably the most commonly cited provisions, particularly in recent years.<sup>16</sup> Various authorities related to foreign affairs have also been routinely cited as providing support for particular enactments and activities in the field of immigration.<sup>17</sup> In addition, in some cases, the Supreme Court has suggested that federal

<sup>14</sup> See *Crane*, Amended Complaint, *supra* note 3. For further discussion of this litigation, see *infra* notes 119-120 and accompanying text. Two other suits challenging DACA were dismissed because the plaintiffs lacked standing. See *Peterson v. President of the United States*, No. 1:2012cv00257, Order Granting Motion to Dismiss (D.N.H., Oct. 22, 2012); *Dutkiewicz v. Napolitano*, No. 8:2012cv01447, Order Granting Motion to Dismiss (M.D. Fla., Nov. 9, 2012).

<sup>15</sup> See, e.g., *Restrepo v. Holder*, 676 F.3d 10 (1<sup>st</sup> Cir. 2012) (cancellation of removal pursuant to 8 U.S.C. §1229b(a) is solely within the Attorney General's discretion absent a colorable constitutional claim or a question of law); Bo Cooper, General Counsel, INS, INS Exercise of Prosecutorial Discretion, July 11, 2000, at 4, *available at* <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Bo-Cooper-memo%20pros%20discretion7.11.2000.pdf> ("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.").

<sup>16</sup> See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*,—U.S.—, 132 S. Ct. 2566, 2600 (2012) (describing regulation of immigration as among Congress's powers under the Commerce Clause); *Arizona v. United States*,—U.S.—132 S. Ct. 2492, 2498 (2012) (authority to regulate immigration resting, in part, on the power to establish a uniform rule of naturalization); *Henderson v. Mayor of New York*, 92 U.S. 259 (1876) (striking down New York and Louisiana laws that required shipmasters to pay fees or post bonds to indemnify states if immigrants ended up on public assistance on the grounds that the laws interfered with Congress's power to regulate interstate commerce); *Chy Lung v. Freeman*, 92 U.S. 275 (1875) (striking down a California law regulating the entry of "lewd and debauched women" on the grounds that it interfered with Congress's power to regulate the admission of noncitizens); *The Passenger Cases*, 48 U.S. 283 (1849) (striking down New York and Massachusetts laws that levied fees on arriving immigrant passengers, in part, on the grounds that such fees constituted unconstitutional regulations of foreign commerce).

<sup>17</sup> See, e.g., *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889) (listing the powers to "declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship" as authorizing Congress to enact legislation excluding Chinese laborers); *Fong Yue Ting v. United States*, 149 U.S. 698, 705-09 (1893) (relying on the same sources to affirm Congress's power to deport noncitizens). See also *Arizona*, 132 S. Ct. at 2514 (Scalia, J., dissenting) (citing the Migration or Importation (continued...))



regulation of immigration is grounded in the federal government's "inherent power as a sovereign to control and conduct foreign relations."<sup>18</sup>

Many, although not all, of these powers belong exclusively to Congress,<sup>19</sup> and courts and commentators have sometimes used language which implies that Congress is preeminent in the field of immigration. For example, it has frequently been said that Congress has "plenary power" over immigration,<sup>20</sup> and that "over no conceivable subject is the legislative power of Congress more complete than it is over" immigration.<sup>21</sup> In some cases, courts have even suggested that the executive branch's authority over immigration arises from a delegation of congressional power, as is the case with other Article I powers, although Article I does not give Congress clear supremacy over immigration, as previously noted.<sup>22</sup> In *Sale v. Haitian Centers Council, Inc.*, for example, the Supreme Court rejected a challenge which alleged that the executive branch's procedures for screening Haitian migrants at sea, without allowing them to disembark in the United States, did not comply with statutory and treaty-based protections that enable aliens to apply for refugee status and avoid repatriation.<sup>23</sup> The Court did so, in part, on the grounds that "[t]he laws that the Coast Guard is engaged in enforcing when it takes to the seas under orders to prevent aliens from illegally crossing our borders are laws whose administration has been assigned to the Attorney General by Congress."<sup>24</sup> Similarly, in other cases, the Court has described Congress's power to exclude aliens from the United States, or prescribe the terms and conditions upon which they may enter, as being "enforced exclusively through executive officers,"<sup>25</sup> or opined that executive branch officials "exercise[] delegated legislative power" in taking specific actions.<sup>26</sup>

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Clause as a source of federal power over immigration). This clause, which pertains directly to slavery, can be seen as addressing federal power to control the entry of certain persons into the United States.

<sup>18</sup> *Arizona*, 132 S. Ct. at 2498; *Nishimara Ekiu v. United States*, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.").

<sup>19</sup> In particular, the Constitution grants the treaty power to the President. *See* U.S. Const., art. II, §2 ("[The President] shall have [the] Power, by and with the Advice and Consent of the Senate to make Treaties ...").

<sup>20</sup> *See, e.g., Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 201 (1993) ("Congress ... has plenary power over immigration matters."); *INS v. Chadha*, 462 U.S. 919, 940-41 (1983) ("The plenary authority of Congress over aliens under Art. I, §8, cl. 4, is not open to question."); *Boutilier v. INS*, 387 U.S. 118, 123 (1967) ("The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens.'").

<sup>21</sup> *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909). This passage has been quoted in numerous other cases. *See, e.g., Reno v. Flores*, 507 U.S. 292, 305 (1993); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972); *Hana v. Gonzales*, 503 F.3d 39, 43 (1<sup>st</sup> Cir. 2007).

<sup>22</sup> Some commentators have suggested that the language in these cases may have been partially motivated by a desire to enforce a more robust conception of the nondelegation doctrine. *See, e.g., Adam B. Cox and Cristina M. Rodriguez, The President and Immigration Law*, 119 *YALE L.J.* 458, 474 n.46 (2009).

<sup>23</sup> 509 U.S. 155 (1993).

<sup>24</sup> *Id.* at 201.

<sup>25</sup> *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895) (finding that the Act of 1894, which declared that the decisions of the appropriate immigration or custom officers regarding the right of aliens to enter this country are generally final, took away the court's authority to review such decisions). *See also Galvan v. Press*, 347 U.S. 522, 531 (1954) ("In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissue of our body politic as any aspect of our government.").

<sup>26</sup> *Mahler v. Eby*, 264 U.S. 32, 43-45 (1924) (finding that certain deportation orders issued by the Secretary of Labor were void because the orders did not indicate that the Secretary had made certain findings required by statute). *See also Kleindienst*, 408 U.S. at 769 ("[W]e think the Attorney General validly exercised the plenary power that Congress (continued...)

Few courts or commentators have, however, directly addressed the separation of powers between Congress and the President in the field of immigration,<sup>27</sup> and in some cases, the Court has also suggested that the executive branch shares plenary power over immigration with Congress as one of the “political branches.”<sup>28</sup> While some such cases could potentially be construed as referring to powers delegated to the executive branch by Congress, in other cases, the President has been expressly said to have inherent authority over at least some immigration-related matters. For example, in *United States ex rel. Knauff v. Shaughnessy*, the Court upheld the executive branch’s decision to exclude a German “war bride,” in part, on the grounds that

The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.... When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.<sup>29</sup>

Similarly, in *Hampton v. Mow Sung Wong*, the Court indicated that certain rules adopted by the U.S. Civil Service Commission barring resident aliens from employment in the federal civil service impermissibly deprived these aliens of due process of law, but that such rules would be

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delegated to the Executive by [certain provisions of the INA.]”); *Ng Fung Ho v. White*, 259 U.S. 276, 280 (1922) (“Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful; and may do so by appropriate executive proceedings.”); *The Japanese Immigrant Case*, 189 U.S. 86, 98 (1903) (“As to [aliens outside the United States], the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.”); *Nishimura Ekiu*, 142 U.S. at 659 (“The supervision of the admission of aliens into the United States may be entrusted by Congress either to the Department of State, having the general management of foreign relations, or to the Department of the Treasury, charged with the enforcement of the laws regulating foreign commerce; and Congress has often passed acts forbidding the immigration of particular classes of foreigners, and has committed the execution of these acts to the Secretary of the Treasury, to collectors of customs and to inspectors acting under their authority.”).

<sup>27</sup> Cf. *The President and Immigration Law*, *supra* note 22, at 510 (“[M]odern courts and commentators have largely ignored the question of power allocation between the President and Congress.”); The Obama Administration, the DREAM Act, and the Take Care Clause, *supra* note 3, at 3 (noting that the Constitution does not explicitly allocate authority over immigration among the political branches). Only in the case of *INS v. Chadha* did the Supreme Court confront a separation of powers question touching upon immigration. 462 U.S. 919 (1983). At issue in *Chadha* was the permissibility of a statutory provision which authorized either house of Congress, by resolution, to invalidate the executive branch’s determination to suspend deportation and adjust the status of aliens whose deportation would result in “extreme hardship” to the alien or the alien’s family. The Court struck the statute down on separation of powers grounds, finding that it violated the constitutional requirement that legislative acts be passed by both houses of Congress and presented for the President’s approval. In reaching this conclusion, the Court noted both Congress’s “plenary authority” over aliens, and that the “Attorney General acts in his presumptively Article II capacity when he administers the [INA].” *Id.* at 940, 953 n.16. It is unclear, however, whether the reference to the Attorney General’s “Article II capacity” means prosecutorial discretion under the Take Care Clause, or some other authority of the executive.

<sup>28</sup> See, e.g., *United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1982) (“The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government.”); *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (“[T]he relationship between the U.S. and our alien visitors has been committed to the political branches of the federal government. Since decisions in these matters may implicate our relations with foreign powers ... such decisions are frequently of a character more appropriate to either the Legislature or the Executive branches than to the Judiciary.”); *The Chinese Exclusion Case*, 130 U.S. 581, 607-09 (1889) (rejecting the alien’s assertion that the federal government lacked the power to regulate immigration, in part, because the “political department” of the United States had the responsibility for determining “who shall compose [society’s] members”).

<sup>29</sup> 338 U.S. 537, 542 (1950).



permissible if they “were expressly mandated by the Congress or the President.”<sup>30</sup> Here, Congress had delegated authority to the President to prescribe regulations for the admission of individuals to the civil service. Accordingly, it is possible that when the *Hampton* Court referred to the President’s power to limit alien eligibility for federal employment, it intended to refer only to the power which had been conferred to him by Congress. On the other hand, the Court’s discussion of the interests of the President that might be sufficient to justify the exclusion of noncitizens from the civil service focused upon the President’s power to negotiate treaties, suggesting recognition of some independent constitutional basis for executive branch activity in the field of immigration.<sup>31</sup>

The possibility of independent executive branch authority over immigration is significant in that any such authority could potentially help justify certain actions taken by the executive branch (although actions taken in reliance on such authority could also potentially raise issues if they were arguably within Congress’s purview).<sup>32</sup> However, the executive branch’s authority to exercise prosecutorial or enforcement discretion has traditionally been understood to arise from the Constitution,<sup>33</sup> as discussed below.

Courts have historically not required that the executive branch have specific statutory authorization for particular exercises of prosecutorial discretion. Thus, immigration officials would not necessarily be precluded from granting deferred action, or taking certain other actions that could permit otherwise removable aliens to remain in the United States, just because federal immigration statutes do not expressly authorize such actions.<sup>34</sup> On the other hand, Section

<sup>30</sup> 426 U.S. 88, 103 (1976). Following the Court’s decision, President Ford issued an executive order reestablishing these employment restrictions. Exec. Order No. 11, 935, 41 Fed. Reg. 37301 (Sept. 2, 1976). When challenged, this order was found to be within the President’s authority. *Vergara v. Hampton*, 581 F.2d 1281 (7<sup>th</sup> Cir. 1978). However, in so finding, the reviewing court emphasized the President’s statutory authority under 5 U.S.C. §3301(1), not any inherent authority over immigration or aliens.

<sup>31</sup> *Hampton*, 426 U.S. at 104 (“In this case the petitioners have identified several interests which the Congress or the President might deem sufficient to justify the exclusion of noncitizens from the federal service. They argue, for example, that the broad exclusion may facilitate the President’s negotiation of treaties with foreign powers by enabling him to offer employment opportunities to citizens of a given foreign country in exchange for reciprocal concessions.”).

<sup>32</sup> Any assertion of inherent, independent, or implied constitutional presidential authority in the field of immigration may be evaluated under the rubric established by Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The *Youngstown* framework, which the Court has characterized as bringing “together as much combination of analysis and common sense as there is in this area,” has generally been applied when a President seeks to take action within an area generally considered to be within Congress’s purview. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 661-62 (1981). Importantly, the scope of executive authority under the Jackson analysis is judged in direct relation to congressional action in the field. When the President acts pursuant to an authorization from Congress, his power is “at its maximum.” To the contrary, when the President seeks to take action that conflicts with Congress’s expressed will, his power is at its “lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” Where Congress is silent, “there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.” *Youngstown*, 343 U.S. at 635-37. Any claimed constitutional authority justifying executive action in the field of immigration would, therefore, likely be evaluated in relation to the policies established by Congress in the INA and other pertinent statutes.

<sup>33</sup> *See, e.g., United States v. Armstrong*, 517 U.S. 456, 464 (1996) (noting that the Attorney General and the United States Attorneys have wide latitude in enforcing federal criminal law because “they are designated by statute as the President’s delegates to help him discharge his constitutional duty to ‘take Care that the Laws be faithfully executed’”); *Heckler*, 470 U.S. at 831 (“[W]e recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”).

<sup>34</sup> An argument could also potentially be made that Congress has impliedly delegated the authority to exercise certain (continued...)

103(a)(3) of the INA authorizes the Secretary of Homeland Security to “perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter,” and has been construed by some as “commit[ting] enforcement of the INA to [the Secretary’s] discretion.”<sup>35</sup> The federal government recently noted its discretion under Section 103(a)(3) in seeking dismissal of a lawsuit challenging the DACA initiative.<sup>36</sup> The Secretary’s authority under Section 103(a)(3) of the INA is, however, an authority granted to the executive branch by Congress and, as such, is distinguishable from the President’s constitutional authority to “take Care” that the laws be enforced. Congress could, for example, potentially limit the discretion granted to the Secretary by Section 103(a)(3) of the INA, including by prohibiting particular exercises of discretion. In contrast, Congress probably could not directly limit the President’s authority under the Constitution to “take Care” that the laws be enforced.

The INA also grants the Secretary other types of discretion which are sometimes mentioned in connection with exercises of prosecutorial or enforcement discretion, but do not themselves involve determinations regarding when, whom, how, and even whether to prosecute apparent violations of the law. In some cases, the INA expressly provides that certain determinations are within the discretion of immigration officials, such as the determination to waive the bar upon admissibility for alien spouses or children of U.S. citizens or lawful permanent residents (LPRs) who have been present in the United States without authorization for more than 180 days.<sup>37</sup> In other cases, the INA does not expressly mention the discretion of executive branch officials, but effectively affords them such discretion by leaving certain details of the statutory scheme to be implemented by the executive branch. Thus, the INA affords the Secretary discretion to determine which aliens are granted employment authorization by prohibiting the employment of unauthorized aliens, and defining “unauthorized alien,” in part, as an alien who has not been “authorized to be ... employed by the [Secretary].”<sup>38</sup> Because it is conferred by Congress, this discretion, like the Secretary’s discretion under Section 103(a)(3), could also be limited by Congress.

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(...continued)

types of discretion to the executive branch since it has been aware of the practice, and could be said to have acquiesced. *See, e.g.,* *Johns v. Dep’t of Justice*, 653 F.2d 884, 890 (5<sup>th</sup> Cir. 1981) (“Deportation is not, however, the inevitable consequence of unauthorized presence in the United States. The Attorney General is given discretion by express statutory provisions, in some situations, to ameliorate the rigidity of the deportation laws. In other instances, as the result of implied authority, he exercises discretion nowhere granted expressly.”).

<sup>35</sup> *Texas v. United States*, 106 F.3d 661, 667 (5<sup>th</sup> Cir. 1997) (rejecting allegations that the Attorney General had breached his nondiscretionary duty under the INA to control immigration, in part, on the grounds that enforcement of the INA is committed to the Attorney General’s discretion). *See also* *Hotel & Rest. Employees Union Local 25 v. Smith*, 846 F.2d 1499, 1510 (D.C. Cir. 1988) (citing Section 103(a)(3) to support the proposition that the then-Attorney General enjoyed “broad latitude in enforcing the immigration laws,” and that the decision to grant or withhold extended voluntary departure “falls within this broad mandate”), *aff’g*, 563 F. Supp. 157 (D.D.C. 1983).

<sup>36</sup> *Crane v. Napolitano*, No. 3:12-CV-3247-O, Defendants’ Motion to Dismiss and Memorandum in Support (filed N.D. Tex., Nov. 13, 2012). The INS had previously expressed the view that Section 242(g) of the INA meant that it had discretion not to pursue removal against an alien because such decisions are not judicially reviewable. *See* *INS Exercise of Prosecutorial Discretion*, *supra* note 15, at 9. However, DHS does not appear to rely upon this argument at present.

<sup>37</sup> INA §212(a)(9)(B); 8 U.S.C. §1182(a)(9)(B). Any such waivers may only be granted where certain conditions are met (e.g., the refusal of admission to the alien would result in “extreme hardship” to his or her citizen or LPR relatives).

<sup>38</sup> INA §274a(h)(3); 8 U.S.C. §1324a(h)(3).

## Prosecutorial Discretion Generally

The judicial branch has traditionally accorded federal prosecutors “broad” latitude in making a range of investigatory and prosecutorial determinations, including when, whom, and whether to prosecute particular violations of federal law.<sup>39</sup> This doctrine of “prosecutorial discretion” has a long historical pedigree—the early roots of which can be traced at least to a Sixteenth Century English common law procedural mechanism known as the *nolle prosequi*.<sup>40</sup> In the early English legal system, criminal prosecutions were generally initiated by private individuals rather than public prosecutors. The *nolle prosequi*, however, allowed the government, generally at the direction of the Crown, to intervene in and terminate a privately initiated criminal action it viewed as “frivolous or in contravention of royal interests.”<sup>41</sup> The discretionary device was later adopted into American common law and has been used by prosecutors to terminate criminal prosecutions that are determined to be unwarranted or which the prosecuting authority chooses not to pursue.<sup>42</sup>

Notwithstanding this historical background, the modern doctrine of prosecutorial discretion derives more from our constitutional structure than English common law. However, the exact justification for the doctrine does not appear to have been explicitly established. Generally, courts have characterized prosecutorial discretion as a function of some mixture of the separation of powers, the Take Care Clause,<sup>43</sup> or the duties of a prosecutor as an appointee of the President.<sup>44</sup> Moreover, both federal and state courts have ruled that the exercise of prosecutorial discretion is

<sup>39</sup> See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“In our criminal justice system, the Government retains ‘broad discretion’ as to whom to prosecute.”) (citing *United States v. Goodwin*, 457 U.S. 368, 380 (1982)); *United States v. Nixon*, 418 U.S. 683, 693 (1974) (“[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case...”) (citing the *Confiscation Cases*, 74 U.S. 454 (1869)).

<sup>40</sup> See, e.g., Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 19-26 (2009) (describing the English use of the *nolle prosequi* and its “absorb[ti]on” by American law).

<sup>41</sup> *Id.* at 20.

<sup>42</sup> See, e.g., *Confiscation Cases*, 74 U.S. 454 (1869); *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (“Most recently, the issue of the United States Attorney’s ‘discretionary control of criminal prosecutions has arisen in connection with the filing of a *nolle prosequi*, and the Courts have regularly refused to interfere with these voluntary dismissals of prosecution.”) (citing Louis B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors’ Discretion*, 13 LAW & CONTEMP. PROB. 64, 83 (1948)). Today, judicial approval is generally required before a prosecutor may dismiss an ongoing prosecution. See FED. R. CRIM. P. 48(a) (“The government may, with leave of court, dismiss an indictment, information, or complaint.”).

<sup>43</sup> U.S. Const. Art. II, §3 (“[H]e shall take Care that the Laws be faithfully executed....”).

<sup>44</sup> See, e.g., *Armstrong*, 517 U.S. at 464 (“They have this latitude because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’”); *Confiscation Cases*, 74 U.S. at 458 (“Appointed, as the Attorney General is, in pursuance of an act of Congress, to prosecute and conduct such suits, argument would seem to be unnecessary to prove his authority to dispose of these cases in the manner proposed....”); *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922) (“The Attorney General is the head of the Department of Justice. He is the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offences be faithfully executed.”); *United States v. Cox*, 342 F.2d 167, 171 (5<sup>th</sup> Cir. 1965) (“The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed. Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.”) (internal citations omitted).

an executive function necessary to the proper administration of justice. Given these precedents, prosecutorial discretion may be appropriately characterized as a constitutionally based doctrine.

Regardless of its precise textual source, courts generally will neither review nor question discretionary prosecutorial decisions, nor “coerce” the executive branch to initiate a particular prosecution. In acknowledging the discretion possessed by enforcement officials, courts have recognized that the “decision to prosecute is particularly ill-suited to judicial review,” as it involves the consideration of factors—such as the strength of evidence, deterrence value, and existing enforcement priorities—“not readily susceptible to the kind of analysis the courts are competent to undertake.”<sup>45</sup> Moreover, the executive branch has asserted that “because the essential core of the President’s constitutional responsibility is the duty to enforce the laws, the Executive Branch has *exclusive* authority to initiate and prosecute actions to enforce the laws adopted by Congress.”<sup>46</sup>

An agency decision to initiate an enforcement action in the *administrative* context “shares to some extent the characteristics of the decision of a prosecutor in the executive branch” to initiate a prosecution in the *criminal* context.<sup>47</sup> Thus, just as courts are hesitant to question a prosecutor’s decisions with respect to whether to bring a criminal prosecution, so too are courts cautious in reviewing an agency’s decision not to bring an enforcement action. In the seminal case of *Heckler v. Cheney*, the Supreme Court held that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”<sup>48</sup> The Court noted that agency enforcement decisions, like prosecution decisions, involve a “complicated balancing” of agency interests and resources—a balancing that the agency is “better equipped” to evaluate than the courts.<sup>49</sup> The *Heckler* opinion proceeded to establish the standard for the reviewability of agency non-enforcement decisions, holding that an “agency’s decision not to take enforcement action should be presumed immune from judicial

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<sup>45</sup> *Wayte*, 470 U.S. at 607. However, the U.S. Court of Appeals for the District of Columbia Circuit has observed that “the decisions of this court have never allowed the phrase ‘prosecutorial discretion’ to be treated as a magical incantation which automatically provides a shield for arbitrariness.” *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 673 (D.C. Cir. 1970).

<sup>46</sup> See *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 OP. OFF. LEGAL COUNSEL 101, 114 (1984) (emphasis added). This traditional conception may, however, have been qualified in some respects following the Supreme Court’s decision in *Morrison v. Olson*, in which the Court upheld a congressional delegation of prosecutorial power to an “independent counsel” under the Ethics in Government Act. In sustaining the validity of the statute’s appointment and removal conditions, the Court suggested that although the independent counsel’s prosecutorial powers—including the “no small amount of discretion and judgment [exercised by the counsel] in deciding how to carry out his or her duties under the Act”—were executive in that they had “typically” been performed by executive branch officials, the court did not consider such an exercise of prosecutorial power to be “so central to the functioning of the Executive Branch” as to require Presidential control over the independent counsel. 487 U.S. 654 (1988). While the ultimate reach of *Morrison* may be narrow in that the independent counsel was granted only limited jurisdiction and was still subject to the supervision of the Attorney General, it does appear that Congress may vest certain prosecutorial powers, including the exercise of prosecutorial discretion, in an executive branch official who is independent of traditional presidential controls. *But see Nixon*, 418 U.S. at 693 (“[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case....”).

<sup>47</sup> *Heckler*, 470 U.S. at 832. The Court also expressed concern that judicial review of agencies’ exercise of prosecutorial discretion could impose “systemic costs” by delaying criminal proceedings, chilling law enforcement, and undermining prosecutorial effectiveness. *Id.* at 833.

<sup>48</sup> *Id.* at 831. Accordingly, such decisions are generally precluded from judicial review under the Administrative Procedure Act (APA). 5 U.S.C. §701 (establishing an exception to the APA’s presumption of reviewability where “agency action is committed to agency discretion by law”).

<sup>49</sup> *Heckler*, 470 U.S. at 831.

review.”<sup>50</sup> However, the Court indicated that, in certain cases, that presumption may be overcome “where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers,”<sup>51</sup> as is discussed below.

## Prosecutorial Discretion in the Immigration Context

In *Reno v. American-Arab Anti-Discrimination Committee*, a majority of the Supreme Court found 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,”<sup>52</sup> which entails civil (rather than criminal) proceedings.<sup>53</sup> While the reasons cited by the Court for greater deference to exercises of prosecutorial discretion in the immigration context than in other contexts reflect the facts of the case, which arose when certain removable aliens challenged the government’s decision *not* to exercise prosecutorial discretion in their favor,<sup>54</sup> the Court’s language is broad and arguably can be construed to encompass decisions to favorably exercise such discretion. More recently, in its decision in *Arizona v. United States*, a majority of the Court arguably similarly affirmed the authority of the executive branch not to seek the removal of certain aliens, noting that “[a] principal feature of the removal system is the broad discretion entrusted to immigration officials,” and that “[r]eturning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission.”<sup>55</sup> According to the majority, such exercises of prosecutorial discretion may reflect “immediate human concerns” and the “equities of . . . individual case[s],” such as whether the alien has children born in the United States or ties to the community, as well as “policy choices that bear on . . . international relations.”<sup>56</sup>

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<sup>50</sup> *Id.* at 832.

<sup>51</sup> *Id.* at 833.

<sup>52</sup> 525 U.S. 471, 490 (1999). *See also Shaughnessy*, 338 U.S. at 543 (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”).

<sup>53</sup> *See, e.g., Padilla v. Kentucky*, —U.S.—, 130 S. Ct. 1473, 1481 (2010) (“We have long recognized that deportation is a particularly severe ‘penalty,’ but it is not, in a strict sense, a criminal sanction.”) (internal citations omitted); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39 (1984) (“A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry.... The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws.”).

<sup>54</sup> Specifically, the Court noted that any delays in criminal proceedings caused by judicial review of exercises of prosecutorial discretion would “merely . . . postpone the criminal’s receipt of his just desserts,” while delays in removal proceedings would “permit and prolong a continuing violation of United States law,” and could potentially permit the alien to acquire a basis for changing his or her status. *Reno*, 525 U.S. at 490. The Court further noted that immigration proceedings are unique in that they can implicate foreign policy objectives and foreign-intelligence techniques that are generally not implicated in criminal proceedings. *Id.* at 491. It also found that the interest in avoiding selective or otherwise improper prosecution in immigration proceedings, discussed below, is “less compelling” than in criminal proceedings because deportation is not a punishment and may be “necessary to bring to an end an ongoing violation of United States law.” *Id.* (emphasis in original).

<sup>55</sup> *Arizona*, 132 S. Ct. at 2498. Justice Scalia’s dissenting opinion, in contrast, specifically cited Secretary Napolitano’s memorandum regarding the exercise of prosecutorial discretion with respect to certain aliens who came to the United States as children when asserting that “there is no reason why the Federal Executive’s need to allocate *its* scarce enforcement resources should disable Arizona from devoting *its* resources to illegal immigration in Arizona that in its view the Federal Executive has given short shrift.” *Id.* at 2520 (Scalia, J., dissenting) (emphasis in original)).

<sup>56</sup> *Arizona*, 132 S. Ct. at 2499.



Going beyond such general affirmations of the executive branch’s prosecutorial discretion in the immigration context, other cases have specifically noted that certain decisions are within the prosecutorial discretion of INS and, later, the immigration components of DHS. These decisions include

- whether to parole an alien into the United States;<sup>57</sup>
- whether to commence removal proceedings and what charges to lodge against the respondent;<sup>58</sup>
- whether to pursue formal removal proceedings;<sup>59</sup>
- whether to cancel a Notice to Appear or other charging document before jurisdiction vests with an immigration judge;<sup>60</sup>
- whether to grant deferred action or extended voluntary departure;<sup>61</sup>
- whether to appeal an immigration judge’s decision or order, and whether to file a motion to reopen;<sup>62</sup>
- whether to invoke an automatic stay during the pendency of an appeal;<sup>63</sup> and
- whether to impose a fine for particular offenses.<sup>64</sup>

As used here, *deferred action* is “generally an act of prosecutorial discretion to suspend [taking action] against a particular individual or group of individuals for a specific timeframe; it cannot resolve an individual’s underlying immigration status.”<sup>65</sup> It is generally granted on a case-by-case

<sup>57</sup> *Assa’ad v. U.S. Attorney General*, 332 F.3d 1321, 1339 (11<sup>th</sup> Cir. 2003); *Matter of Artigas*, 23 I. & N. Dec. 99 (BIA 2001) (Filppu, J., dissenting). DHS grants an alien parole when it permits the alien to physically enter the United States and to remain as a matter of sufferance only, and without having made an “entry,” for “urgent humanitarian reasons or significant public benefit.” INA §212(d)(5)(A); 8 U.S.C. §1182(d)(5)(A).

<sup>58</sup> *Hanggi v. Holder*, 563 F.3d 378, 383 (8<sup>th</sup> Cir. 2009); *Rodrigues v. Attorney General of the United States*, 414 Fed. App’x 484, 488 (3d 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).

<sup>59</sup> *Matter of Lujan-Quintana*, 25 I. & N. Dec. 53 (BIA 2009). *But see* *Flores-Ledezma v. Gonzales*, 415 F.3d 375, 382 (5<sup>th</sup> Cir. 2005) (“Although we decline at this juncture to equate the Attorney General’s discretion to choose which proceeding a non-LPR will receive with prosecutorial discretion, it is fully convincing that the Government has highlighted a rational basis for the Attorney General’s exercise of such discretion.”). Section 240 of the INA provides for formal removal proceedings. However, “expedited removal,” without formal proceedings, is also possible in the case of certain aliens seeking admission to the United States. INA §235(b); 8 U.S.C. §1225(b).

<sup>60</sup> *Matter of G-N-C*, 22 I. & N. Dec. 281 (BIA 1998). *See also* *Akhtar v. Gonzales*, 450 F.3d 587, 591 (5<sup>th</sup> Cir. 2006) (whether to terminate removal proceedings to allow the alien to apply for immigration benefits that may potentially be available).

<sup>61</sup> *Hotel & Rest. Employees Union Local 25*, 846 F.2d at 1510-11; *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1119 n.3 (9<sup>th</sup> Cir. 2001); *Johnson v. INS*, 962 F.2d 574, 579 (7<sup>th</sup> Cir. 1992); *Carmona Martinez v. Ashcroft*, 118 Fed. App’x 238, 239 (9<sup>th</sup> 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).

<sup>62</sup> *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).

<sup>63</sup> *Matter of Joseph*, 22 I. & N. Dec. 660 (BIA 1999).

<sup>64</sup> *Matter of M/V Saru Meru*, 20 I. & N. Dec. 592 (BIA 1992); *Matter of M/V Solemn Judge*, 18 I. & N. Dec. 186 (BIA 1982).

<sup>65</sup> *Shoba Sivaprasad Wadhia, The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 263 (2010) (quoting a 2009 DHS press release on relief for widows of U.S. citizens). Individual aliens may request that (continued...)



basis, although the executive branch has sometimes provided that individuals who share certain characteristics (e.g., advanced or young age) are to be given particular consideration for deferred action.<sup>66</sup> In contrast, *extended voluntary departure*—sometimes also referred to as *deferred departure* or *deferred enforced departure*—generally involves “blanket relief” from removal to particular countries.<sup>67</sup>

Many of the actions that judicial and administrative tribunals have noted are within the prosecutorial discretion of immigration officers have also been mentioned in INS and, later, DHS, guidance regarding the exercise of prosecutorial discretion. Memoranda or other documents providing such guidance have been issued intermittently since at least 1976, and have suggested that officers may generally exercise discretion in

- deciding whether to issue or cancel a notice of detainer;
- deciding whether to issue, reissue, serve, file, or cancel a Notice to Appear;
- focusing administrative resources on particular violations or conduct;
- deciding whom to stop, question, or arrest for a violation;
- deciding whether to detain aliens who are not subject to “mandatory detention” pending removal, or whether to release them on bond, supervision, personal recognizance, or other conditions;
- seeking expedited removal or removal by means other than formal proceedings in immigration court;
- settling or dismissing a proceeding;
- granting deferred action or parole;
- staying a final order of removal;
- agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of a formal order of removal;
- pursuing an appeal;
- executing a removal order; and
- responding to or joining in a motion to reopen removal proceedings, or joining in a motion to grant relief or a benefit.<sup>68</sup>

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(...continued)

they be granted deferred action (formerly known as non-priority status), or immigration officials may decide, *sua sponte*, to defer action.

<sup>66</sup> See, e.g., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, *supra* note 10; John Morton, Director, ICE, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, June 17, 2011, available at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>; Prosecutorial and Custody Detention, *supra* note 2.

<sup>67</sup> See, e.g., *Extended Voluntary Departure*, *supra* note 5, at 155-59.

<sup>68</sup> See, e.g., 2011 DHS Guidance, *supra* note 9, at 2-3; Civil Immigration Enforcement, *supra* note 8, at 3; Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, *supra* note 66, at 2; William J. Howard, Principal Legal Advisor, ICE, Prosecutorial Discretion, Oct. 24, 2005, at 2, available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092975-ICE-Guidance-Memo-Prosecutorial-Discretion-William-J-Howard-10-24-05.pdf>; 2002 INS Guidance, *supra* note 2.

Often, this executive branch guidance has highlighted resource constraints,<sup>69</sup> as well as humanitarian considerations,<sup>70</sup> that may warrant a favorable exercise of prosecutorial discretion, although such guidance has generally also indicated that determinations as to whether to exercise discretion in particular cases are to be based on the “totality of the circumstances”<sup>71</sup> and whether a “substantial federal interest” is present.<sup>72</sup> The guidance may also suggest when in the process such discretion is to be exercised (generally as early in the process as possible, so as to avoid wasting government resources),<sup>73</sup> as well as which officers may exercise particular forms of discretion.<sup>74</sup> While personnel are generally instructed that they should “always consider prosecutorial discretion on a case-by-case basis,”<sup>75</sup> classes of individuals warranting consideration for favorable—or unfavorable—exercises of discretion have sometimes been identified (e.g., minors and elderly individuals, known gang members).<sup>76</sup>

## Potential Limits on the Exercise of Discretion

While prosecutorial discretion is broad, it is not “unfettered,”<sup>77</sup> and particular exercises of discretion could potentially be checked by the Constitution, statute, or agency directives.<sup>78</sup> In practice, however, persons who are neither aliens nor otherwise subject to the requirements of the INA could lack standing to challenge alleged abuses of prosecutorial discretion in the immigration context. Standing is generally limited to persons who allege a “personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”<sup>79</sup> Those whose sole injury is the government’s alleged failure to follow the law

<sup>69</sup> See, e.g., Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships, *supra* note 11 (“This and other memoranda related to prosecutorial discretion are designed to ensure that agency resources are focused on our enforcement priorities, including individuals who pose a threat to public safety, are recent border crossers, or repeatedly violate our immigration laws.”); Civil Immigration Enforcement, *supra* note 8, at 1 (“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 68 (noting demands created by the establishment of DHS and the increasing number of immigration cases being litigated in federal courts).

<sup>70</sup> See, e.g., 2011 DHS Guidance, *supra* note 9, at 4 (noting that factors to consider include the alien’s length of presence in the United States; the circumstances of the alien’s arrival in the United States; the alien’s pursuit of education in the United States; the alien’s ties and contributions to the community; whether the alien or the alien’s spouse is pregnant or nursing, or suffers from a severe mental or physical illness; and conditions in the alien’s home country); Prosecutorial Discretion, *supra* note 68 (aliens who are immediate relatives of members of the U.S. military; aliens who have citizen children with serious medical conditions or disabilities; aliens who are undergoing treatment for a potentially life-threatening illness).

<sup>71</sup> See, e.g., 2011 DHS Guidance, *supra* note 9, at 2.

<sup>72</sup> See, e.g., 2002 INS Guidance, *supra* note 2, at 4.

<sup>73</sup> See, e.g., *id.* at 6.

<sup>74</sup> See, e.g., 2011 DHS Guidance, *supra* note 9, at 3. One particular area where such policies have shifted over time is whether immigration attorneys have the authority to cancel Notices to Appear issued by immigration officers.

<sup>75</sup> 2011 DHS Guidance, *supra* note 9, at 4. See also Civil Immigration Enforcement, *supra* note 8, at 4.

<sup>76</sup> 2011 DHS Guidance, *supra* note 9, at 5; Prosecutorial and Custody Detention, *supra* note 2; 2002 INS Guidance, *supra* note 2, at 11.

<sup>77</sup> *United States v. Batchelder*, 442 U.S. 114, 125 (1979).

<sup>78</sup> See, e.g., *Nader v. Saxbe*, 497 F.2d 676, 679 (D.C. Cir. 1974) (“It would seem to follow that the exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review.”).

<sup>79</sup> *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). The requirements as to injury, causation, and redressibility refer to Article III standing. Some courts have also found that (continued...)

will generally be found to lack standing because this injury is not personal and particularized.<sup>80</sup> Even government officers and employees, who have taken an oath to uphold the law, will 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.<sup>81</sup> 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.”<sup>82</sup> Courts have imposed these limitations, in part, on the grounds that recognizing standing in such cases would allow persons to sue “merely ... to ensure [that federal] law conforms to [their] *opinion* of what federal law requires,” and such personal opinions could change at any time.<sup>83</sup>

In addition, even where standing to challenge particular exercises of prosecutorial discretion exists, plaintiffs could potentially have difficulty obtaining relief given that actions by Congress or the President in the immigration context are generally subject to a “narrow standard of

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(...continued)

plaintiffs challenging certain actions in the immigration context lack prudential standing to enforce the INA. *See, e.g.,* Fed’n for Am. Immigration Reform v. Reno, 93 F.3d 897, 900 (D.C. Cir. 1996) (plaintiffs were not within the zone of interests protected by the INA for purposes of their claim that a “rush of immigrants adversely affects the welfare of the Federation’s members by generating unemployment and wage reductions”). Recently, one federal district court did find that the ICE agents challenging the DACA initiative satisfy the prudential standing requirements because the statutory provisions which they claim are violated by DACA also govern their conduct in managing investigations and initiating removal proceedings. *See* Crane v. Napolitano, 920 F. Supp. 2d 724, 740-41 (N.D. Tex. 2013). However, this court subsequently found that the ICE agents’ claims are within the exclusive jurisdiction of the Merit Systems Protection Board (MSPB), because their alleged injury was “being compelled to violate a federal statute upon pain of adverse employment action.” *Crane*, No. 3:12-cv-03247-O, Order (N.D. Tex., July 31, 2013), *available at* [http://www.crs.gov/analysis/legalsidebar/Documents/Crane\\_DenialofMotionforReconsideration.pdf](http://www.crs.gov/analysis/legalsidebar/Documents/Crane_DenialofMotionforReconsideration.pdf).

<sup>80</sup> *See, e.g.,* Lance v. Coffman, 549 U.S. 437, 439 (2007) (“A plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in [the] proper application of the Constitution and laws, and seeking relief that no more directly [or] tangibly benefits him than it does the public at large—does not state an Article III case or controversy.”) (internal quotations omitted); Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (“[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily ‘substantially more difficult’ to establish.”). 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 congressional seat, or an institutional injury that amounts to vote nullification, which requires that no other legislative remedy exists to redress the alleged injury. *See* 521 U.S. 811 (1997).

<sup>81</sup> *See, e.g.,* Donelon v. La. Div. of Admin. Law ex rel. Wise, 522 F.3d 564 (5<sup>th</sup> Cir. 2008) (Louisiana Commissioner of Insurance lacked standing to challenge the constitutionality of a state law which he alleged violated the Constitution); Finch v. Miss. State Med. Ass’n, Inc., 585 F.2d 765, 773-75 (5<sup>th</sup> Cir. 1978) (governor of Mississippi lacked standing to challenge a state law whose enforcement, he believed, would cause him to violate his oath to uphold the federal and state constitutions).

<sup>82</sup> *Compare* Drake v. Obama, 664 F.3d 774, 780 (9<sup>th</sup> Cir. 2011) (“The notion that [the plaintiff] will be disciplined by the military for obeying President Obama’s orders is entirely speculative. He might be disciplined for *disobeying* those orders, but he has an ‘available course of action which subjects [him] to no concrete adverse consequences’—he can obey the orders of the Commander-in-Chief.”) (emphasis in original)) and *Crane*, 920 F. Supp. 2d at 738 (finding that the ICE agents challenging DACA have “suffered an injury-in-fact by virtue of being compelled to violate a federal statute upon pain of adverse employment action,” and otherwise satisfy the requirements for standing). After finding that the plaintiffs have standing, and are likely to prevail on the merits of their claim that DACA violates the INA, the court in *Crane* ultimately found that it lacks jurisdiction because the ICE agents’ claims are within the exclusive jurisdiction of the MSPB. *Crane*, Order, *supra* note 79.

<sup>83</sup> *Donelon*, 552 F.3d at 568 (emphasis in original).

review,”<sup>84</sup> particularly in cases where such decisions implicate foreign affairs or national security. For example, in its recent decision in *Arizona v. United States*, a majority of the Supreme Court noted that “[s]ome discretionary decisions involve policy choices that bear on this Nation’s international relations” when explaining the basis for the “broad discretion” immigration officers have in determining whether to remove unauthorized aliens.<sup>85</sup> The Court has similarly emphasized the potential “diplomatic repercussions” of certain decisions made by immigration officers (e.g., determining whether to grant withholding of removal or an alien’s petition to reopen deportation proceedings).<sup>86</sup> Moreover, in some cases, courts have found that challenges to the alleged nonenforcement of immigration laws involve nonjusticiable political questions because they fundamentally entail disagreements about the proper extent of immigration enforcement.<sup>87</sup>

## Constitution

The U.S. Constitution can be seen as imposing two potential limitations upon the executive branch’s exercise of prosecutorial discretion, one in cases where the Executive decides to enforce the law against particular individuals because of their race, religion, exercise of a constitutional right, or other impermissible factors; and the other in cases where the Executive adopts a general policy of non-enforcement “which is in effect an abdication of its statutory duty.”<sup>88</sup>

## Selective Prosecution

In discussing the scope of the executive branch’s prosecutorial discretion, courts have repeatedly noted that the determination as to whether to prosecute may not be “deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,”<sup>89</sup> including the exercise of protected statutory and constitutional rights.<sup>90</sup> Prosecutions (or other enforcement actions) that are based upon these factors could potentially be found to be impermissible, as was

<sup>84</sup> See, e.g., *Miller v. Albright*, 523 U.S. 420, 434 n.11 (1998) (plurality opinion); *Fiallo*, 430 U.S. at 796; *Mathews*, 426 U.S. at 82.

<sup>85</sup> See, e.g., *Arizona*, 132 S. Ct. at 2499.

<sup>86</sup> *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (“The Attorney General’s decision to bar an alien who has participated in persecution ‘may affect our relations with [the alien’s native] country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.”); *INS v. Abudu*, 485 U.S. 94, 110 (1988) (“Although all adjudications by administrative agencies are to some degree judicial and to some degree political ... INS officials must exercise especially sensitive political functions that implicate foreign relations.”).

<sup>87</sup> *Texas*, 106 F.3d at 665 (dismissing a state’s suit alleging that the federal government had violated the constitution and the INA by failing to control illegal immigration, in part, on the grounds that it was a political question). The political question doctrine is based on the notion that courts should refrain from deciding questions that the Constitution has entrusted to other branches of government. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cr.) 137, 170 (1803). In determining whether a case entails a political question, courts consider whether there is “[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it,” among other things. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>88</sup> *Adams*, 480 F.2d at 1162. See also *Heckler*, 470 U.S. at 832-33 n.4 (finding that judicial review of exercises of enforcement discretion could potentially be obtained in cases where an agency has adopted a general policy that is an “abdication of its statutory responsibilities”).

<sup>89</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1977) (finding that a state prosecutor’s decision to indict the defendant as habitual offender after he refused to plead guilty of a felony did not violate the defendant’s constitutional rights).

<sup>90</sup> *Goodwin*, 457 U.S. at 372.

the case in *Yick Wo v. Hopkins*. There, the Supreme Court found that prosecutors' practice of enforcing a state law prohibiting the operation of laundries against only persons of Chinese descent ran afoul of the Equal Protection Clause.<sup>91</sup> In practice, however, defendants generally find it difficult to maintain a claim of selective prosecution because of the executive branch's prosecutorial discretion. Because such claims are seen as "invad[ing] a special province of the Executive," courts generally require defendants to introduce "clear evidence" displacing the presumption that the prosecutor has acted lawfully.<sup>92</sup> Specifically, they must show that (1) they were singled out for prosecution on an impermissible basis; (2) the government had a policy of declining to prosecute similarly situated defendants of other races, religions, etc.; and (3) the policy was motivated by a discriminatory purpose.<sup>93</sup>

Claims of selective prosecution can be even more difficult to maintain in an immigration context because the various prudential concerns that prompt deference to the executive branch's determinations as to whether to prosecute particular criminal offenses are "greatly magnified in the deportation context."<sup>94</sup> In fact, in *Reno v. American-Arab Anti-Discrimination Committee*, discussed above, the Supreme Court effectively foreclosed many claims of selective prosecution in removal proceedings by finding that "[a]s a general matter . . . an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation."<sup>95</sup> The petitioners in *Reno* had alleged that they were targeted for deportation because of the exercise of their First Amendment rights. All belonged to a group that the government characterized as an "international terrorist and communist organization," and they asserted that the INS did not enforce "routine status requirements," such as were enforced against them, against aliens who were not members of similarly disfavored groups.<sup>96</sup> However, a majority of the Court rejected the petitioners' arguments, in part, because it viewed "selective prosecution" as unusual even in the criminal context<sup>97</sup> and, in part, because it considered the exercise of prosecutorial discretion to be particularly significant in the immigration context, as previously noted. However, the *Reno* Court did leave open the possibility that a decision to remove an alien could potentially be struck down in a "rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome,"<sup>98</sup> and subsequent cases continue to recognize the possibility of selective prosecution claims in the immigration context.<sup>99</sup>

### "Take Care" Clause

Article II, Section 3 of the U.S. Constitution could also potentially constrain the executive branch's prosecutorial discretion in certain cases. When discussing the scope of such discretion, some courts have suggested that situations could potentially arise where the executive branch

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<sup>91</sup> 118 U.S. 356 (1886).

<sup>92</sup> *Reno*, 525 U.S. at 489 (quoting *Armstrong*, 517 U.S. at 463).

<sup>93</sup> *Armstrong*, 517 U.S. at 465.

<sup>94</sup> *Reno*, 525 U.S. at 490. It should be noted, however, that the *Reno* Court did not hold that discriminatory enforcement of the immigration laws does not offend the Equal Protection Clause, only that Section 242(g) of the INA (8 U.S.C. §1252(g)) deprives the courts of jurisdiction over such claims.

<sup>95</sup> *Reno*, 525 U.S. at 488.

<sup>96</sup> *Id.* at 473.

<sup>97</sup> *Id.* at 489 ("Even in the criminal-law field, a selective prosecution claim is a *rara avis* [rare bird].").

<sup>98</sup> *Reno*, 525 U.S. at 491.

<sup>99</sup> See, e.g., *Matter of E-R-M & L-R-M*, 25 I. & N. Dec. at 522.

“expressly adopt[s] a general policy which is in effect an abdication of its statutory duty” by implementing a blanket ban on enforcement of a duly enacted statute.<sup>100</sup> In such situations, by refusing to enforce certain aspects of a statute, the executive branch could potentially be said to have exceeded the permissible scope of prosecutorial or enforcement discretion, and violated the President’s duty that the “laws be faithfully executed.”<sup>101</sup> However, no court appears to have invalidated a policy of non-enforcement founded upon prosecutorial discretion on the grounds that the policy violated the Take Care Clause, and one federal appellate court has opined that “[r]eal or perceived inadequate enforcement ... does not constitute a reviewable abdication of duty.”<sup>102</sup> Rather, according to this court, to prove such an abdication, plaintiffs must show that the Executive either is “doing nothing to enforce the ... laws,” or has “consciously decided to abdicate” its enforcement responsibilities.<sup>103</sup>

Some commentators have suggested that prosecutorial discretion policies which could result in the executive branch not enforcing the law against a large number of people constitute an abdication of statutory duty and, thus, violate the Take Care Clause.<sup>104</sup> This point has recently been made by some commentators with respect to the potentially 1.76 million individuals eligible to receive deferred action under DACA.<sup>105</sup> However, even if the INA were construed to impose a statutory duty to remove all unauthorized aliens, the fact that a large number of persons are favorably affected by a prosecutorial discretion policy might not, *per se*, suffice to prove a violation of the Take Care Clause. 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. ... The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted.<sup>106</sup>

Thus, in the case of DACA, for example, a reviewing court might note that DACA-eligible aliens represent a fraction of the estimated 11.5 million aliens who are present in the United States

<sup>100</sup> *Adams*, 480 F.2d at 1162.

<sup>101</sup> U.S. Const. art. II, §3. *See also* *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 613 (“To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.”).

<sup>102</sup> *Texas*, 106 F.3d at 667.

<sup>103</sup> *Id.*

<sup>104</sup> *See, e.g., Crane*, Amended Complaint, *supra* note 3, at ¶ 101 (“The application of ‘deferred action’ to approximately 15% of aliens who are in the United States without authorization is not an exercise of executive branch discretion permitted by the Constitution.”); *The Obama Administration, the DREAM Act, and the Take Care Clause*, *supra* note 3, at 2 (“[I]f a President can refuse to enforce a federal law against a class of 800,000 to 1.76 million, what discernible limits are there to prosecutorial discretion?”).

<sup>105</sup> Jeanne Batalova and Michelle Mittelstadt, Migration Policy Institute, Relief from Deportation: Demographic Profile of DREAMers Potentially Eligible under the Deferred Action Policy, Aug. 2012, *available at* [http://www.migrationpolicy.org/pubs/FS24\\_deferredaction.pdf](http://www.migrationpolicy.org/pubs/FS24_deferredaction.pdf), at 1.

<sup>106</sup> *Myers v. United States*, 272 U.S. 52, 291-92 (1926) (Brandeis, J., dissenting). *See also Heckler*, 470 U.S. at 831 (noting that, among the factors that make agency decisions to refuse enforcement generally unsuitable for judicial review, are questions as to “whether agency resources are best spent on this violation or another, ... whether the particular enforcement action requested best fits the agency’s overall policies, and ... whether the agency has enough resources to undertake the action at all”).



without authorization,<sup>107</sup> and ICE has the resources to remove annually less than 4% of the unauthorized alien population.<sup>108</sup>

The specific form of discretion exercised could also potentially play a role in a reviewing court's analysis of whether particular nonenforcement policies or practices constitute an abdication of a statutory duty. For example, a court could potentially distinguish between determinations to *delay enforcement actions* (e.g., granting deferred action or extended voluntary departure for a particular duration of time), and *determinations not to take enforcement actions* (e.g., determining whether to commence removal proceedings or cancel a notice for an alien to appear at removal proceedings), on the grounds that the Executive contemplates taking action in the future in the former cases.<sup>109</sup> Relatedly, a reviewing court might note whether the executive branch exercises its discretion on a case-by-case basis, taking into consideration the specific circumstances of the offense and the individual who committed it, or whether it has indicated its intention not to enforce particular offenses at all or against large groups of people. Such distinctions might, however, be difficult to draw with practices like the DACA initiative, in which exercises of discretion could be characterized as either individualized or categorical, depending upon how the initiative is viewed. DHS has repeatedly noted that determinations regarding whether to grant deferred action are to be made on a case-by-case basis for DACA-eligible individuals.<sup>110</sup> However, DHS has also established a broad category of individuals (e.g., those who came to the United States when they were under the age of 16, and are either currently in school or have graduated from high school) who are eligible to request deferred action pursuant to DACA.<sup>111</sup>

The existence of multiple—sometimes inconsistent—enforcement mandates from Congress might also factor into a court's analysis of whether particular nonenforcement policies or practices constitute an abdication of duty, particularly in situations where an agency elects to concentrate limited resources upon offenders (or offenses) that Congress has recently indicated are a priority. For example, following the enactment of the Illegal Immigration Reform and Immigrant

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<sup>107</sup> See, e.g., Michael Hofer, Nancy Rytina, and Bryan Baker, DHS Office of Immigration Statistics, Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011, *Population Estimates* (Mar. 2012), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2011.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf).

<sup>108</sup> Civil Immigration Enforcement, *supra* note 8, at 1 (“ICE ... only has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States.”); Defendants’ Motion to Dismiss and Memorandum in Support, *supra* note 36, at 19 (“Deferring action for certain childhood arrivals means nothing more than that the Department will shift its limited resources to focus on its highest removal priorities, which include, per Congress’s directive, a focus on criminal aliens and other aliens who threaten public safety.”).

<sup>109</sup> The Executive could also potentially still take enforcement action in the latter cases by, for example, commencing removal proceedings against aliens whom it had previously decided not to bring proceedings against. There is no statute of limitations for the removal of unlawfully present aliens, so those who currently are removable on the grounds that they are present without authorization would generally still be removable on these grounds in the future. However, by remaining in the country for a longer period of time, aliens who are present without authorization could potentially acquire new bases for adjusting status (e.g., marrying a U.S. citizen or lawful permanent resident), as the Court noted in *Reno*. 525 U.S. at 490. In addition, at least at some times previously, the immigration agencies had policies of not taking action against persons whom they had previously determined warranted favorable exercises of prosecutorial discretion unless the alien’s circumstances had changed. See 2002 INS Guidance, *supra* note 2, at 11-12 (noting that favorable exercises of discretion are to be “clearly documented” in the alien’s file, and that an INS office should generally abide by a favorable decision taken by another office on a matter, absent new or changed circumstances).

<sup>110</sup> Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, *supra* note 10, at 2 (“No individual should receive deferred action under this memorandum unless they first pass a background check and requests for relief pursuant to this memorandum are to be decided on a case by case basis. DHS cannot provide any assurance that relief will be granted in all cases.”).

<sup>111</sup> Individuals who do not meet these criteria could still request or be granted deferred action outside of DACA.

Responsibility Act (IIRIRA), which some commentators 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.”<sup>112</sup> DHS has emphasized that its diminished focus on the removal of DACA-eligible individuals corresponds to an increased focus on criminal aliens,<sup>113</sup> 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).

## Statute

Another potential constraint upon the executive branch’s exercise of prosecutorial discretion was noted by the Supreme Court in *Heckler v. Cheney*. There, the Court rejected a challenge to the Food and Drug Administration’s (FDA’s) decision not to exercise its enforcement authority over the use of certain drugs on the grounds that “an agency’s decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)” of the Administrative Procedure Act (APA).<sup>114</sup> Section 701(a)(2) of the APA generally bars review of “agency action [that] is committed to agency discretion by law,”<sup>115</sup> and the Court’s statement here would suggest that it views exercises of prosecutorial discretion as generally committed to agency discretion by law. However, the *Heckler* Court also noted that this presumption of nonreviewability “may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.”<sup>116</sup>

Determining whether a statute provides “guidelines” so as to make an agency’s determination not to take enforcement action reviewable generally implicates questions of statutory interpretation. Such questions are not necessarily easily answered, though, as is illustrated by the argument that

<sup>112</sup> See, e.g., Department of Homeland Security Appropriations Act, 2012, P.L. 112-74, Div. D., tit. ii, 125 Stat. 950 (Dec. 23, 2011) (“[T]he Secretary of Homeland Security shall prioritize the identification and removal of aliens convicted of a crime by the severity of that crime.”); Department of Homeland Security Appropriations Act, 2010, P.L. 111-83, Div. D., tit. III, 123 Stat. 2142 (Oct. 28, 2009) (same); Department of Homeland Security Appropriations Act, P.L. 110-329, Div. D, tit. ii, 122 Stat. 3659 (Sept. 30, 2008) (same); Consolidated Appropriations Act, 2008, P.L. 110-161, 121 Stat. 2050-51 (Dec. 26, 2007) (funding to “improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable, and remove them from the United States”); H.R. REPT. 111-157, at 6 (2009) (“[R]ather than simply rounding up as many illegal immigrants as possible, which is sometimes achieved by targeting the easiest and least threatening among the undocumented population, DHS must ensure that the government’s huge investments in immigration enforcement are producing the maximum return in making our country safer.”).

<sup>113</sup> See, e.g., Civil Immigration Enforcement, *supra* note 8, at 1-2 (aliens who have been convicted of crimes, are at least 16 years of age and participate in organized criminal gangs, are subject to outstanding criminal warrants, or “otherwise pose a serious risk to public safety” constituting the highest priorities for removal). Relatedly, Secretary Napolitano’s announcement of the DACA initiative expressly excluded from consideration for deferred action under DACA persons who have been convicted of a felony, a “significant misdemeanor,” or multiple misdemeanors. See Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, *supra* note 10, at 1.

<sup>114</sup> *Heckler*, 470 U.S. at 832.

<sup>115</sup> 5 U.S.C. §701(a)(2). This presumption is an exception to the general rule that the APA “embodi[es] a ‘basic presumption of judicial review.’” *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)).

<sup>116</sup> 470 U.S. at 832-33. See also *id.* at 833 (“[I]n establishing this presumption [of nonreviewability] in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency’s exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.”).

the executive branch lacks the discretion to grant deferred action to DACA beneficiaries because the INA requires the removal of aliens who entered the United States unlawfully.<sup>117</sup> This argument, which has recently been made by some commentators and litigants, rests upon three “interlocking provisions” in Section 235 of the INA that were added or amended by IIRIRA. Briefly summarized, these provisions state that

1. any alien present in the United States who has not been admitted shall be deemed an applicant for admission;
2. applicants for admission shall be inspected by immigration officers; and
3. in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for removal proceedings.<sup>118</sup>

Those who view these provisions as requiring the removal of aliens who entered the United States unlawfully would appear to construe “shall” as indicating mandatory agency action, and all “applicants for admission” as “aliens seeking admission.”

The federal district court reviewing ICE agents’ challenge to the DACA initiative initially adopted this interpretation, finding that the INA’s “use of the word ‘shall’ imposes a mandatory duty on immigration officers to initiate removal proceedings whenever they encounter ‘applicants for admission’ who are not ‘clearly and beyond a doubt entitled to be admitted.’”<sup>119</sup> However, the court subsequently found that the same alleged injury that gave the plaintiffs standing to bring their challenge—namely, their “being compelled to violate a federal statute upon pain of adverse employment action”—means that their case is within the exclusive jurisdiction of the Merit Systems Protection Board (MSPB), and cannot be heard by a federal district court.<sup>120</sup>

No other court has addressed the construction of these three provisions of the INA as an “interlocking” whole. Another court, if it found that it had jurisdiction, could potentially adopt an alternate interpretation, particularly given prior decisions distinguishing between aliens within the United States who have not been admitted, and aliens seeking admission at ports of entry.<sup>121</sup> The Supreme Court’s decision in *Arizona v. United States* could also potentially be said to support an alternate construction.<sup>122</sup> While the majority in *Arizona* did not directly address the DACA initiative, it expressly noted the “broad discretion exercised by immigration officials” in the

<sup>117</sup> See, e.g., *Arizona v. United States*, No. 11-182, *Amicus Curiae* Brief of Secure States Initiative in Support of Petitioners, at 8-9; *Crane*, Amended Complaint, *supra* note 3, at ¶¶ 38-40.

<sup>118</sup> INA §235(a)(1), (a)(3), and (b)(2)(A); 8 U.S.C. §1225(a)(1), (a)(3), and (b)(2)(A).

<sup>119</sup> *Crane*, No. 3:12-cv-03247-O, 2013 U.S. Dist. LEXIS 57788, at \*28-\*29 (N.D. Tex., Apr. 23, 2013).

<sup>120</sup> *Crane*, Order, *supra* note 79.

<sup>121</sup> See, e.g., 8 C.F.R. §236.1(c) & (d); *Matter of Oseiwusu*, 22 I. & N. Dec. 19 (BIA 1998) (“According to the regulations, an Immigration Judge has no authority over the apprehension, custody, and detention of arriving aliens and is therefore without authority to consider the bond request of an alien returning pursuant to a grant of advance parole.”).

<sup>122</sup> See *Arizona v. United States*, —U.S.—132 S. Ct. 2492 (2012). Moreover, even if a reviewing court construed Section 235 of the INA as statutorily compelling DHS to place aliens who unlawfully entered the United States into removal proceedings, DHS would not necessarily be barred from exercising certain forms of prosecutorial discretion as to DACA beneficiaries *after* these individuals have been placed into removal proceedings. See generally *Crane*, Amended Complaint, *supra* 3, at ¶ 71 (“[A]ny ‘prosecutorial discretion’ that Defendants exercise must be consistent with 8 U.S.C. § 1225 and can only occur after an alien has been placed into removal proceedings as required by 8 U.S.C. §1225, or under a provision of federal law expressly authorizing such ‘prosecutorial discretion.’”).

removal process.<sup>123</sup> Because such discretion would arguably be inconsistent with a statutory requirement to place in removal proceedings all aliens who entered the United States unlawfully, the majority's decision suggests that the Court does not construe the INA as legally compelling immigration officers to place all aliens who entered the United States unlawfully in removal proceedings.

Courts could also potentially construe other provisions of the INA that use "shall" differently than the district court reviewing the ICE officers' challenge to DACA construed the three provisions noted above.

## Whether "Shall" Means Agencies Lack Discretion

The argument that Section 235 of the INA requires that aliens who unlawfully entered the United States be placed in removal proceedings appears to rest on the use of "shall" in Section 235, and the view that "shall" indicates mandatory agency action. "Shall" frequently indicates required action, particularly when used in contexts that do not implicate an agency's enforcement discretion.<sup>124</sup> However, the use of "shall" in Section 235, or elsewhere in the INA, would not, in itself, necessarily be construed to mean that DHS is required to take particular actions, because courts have found that agencies may retain discretion even when a statute uses "shall."<sup>125</sup> 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.<sup>126</sup>

<sup>123</sup> *Arizona*, 132 S. Ct. at 2499 ("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. Discretion in the enforcement of immigration law embraces immediate human concerns. ... Some discretionary decisions [also] involve policy choices that bear on this Nation's international relations. ... The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.") (internal citations omitted).

<sup>124</sup> *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.')).

<sup>125</sup> INS and, later, DHS has also taken the position that the use of "shall" in a statute does not, by itself, limit the ability of immigration officers to exercise prosecutorial discretion, and the agencies' views could potentially be entitled to some deference, as discussed below. *See, e.g.,* 2002 INS Guidance, *supra* note 2 ("[A] statute directing that the INS 'shall' remove removable aliens would not be construed by itself to limit prosecutorial discretion."); INS Exercise of Prosecutorial Discretion, *supra* note 15, at 8 (opining that any statutory limits on INS's prosecutorial discretion must be "clear and specific").

<sup>126</sup> 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 construed by the Court as “framed in the permissive.”<sup>127</sup> The Board of Immigration Appeals (BIA), the highest administrative body for construing and applying immigration law, has also rejected the view that “shall” means that immigration officials necessarily lack discretion as to whether to take particular actions. For example, in a 2011 decision, the BIA found that determinations as to whether to pursue expedited removal proceedings under Section 235 of the INA or formal removal proceedings under Section 240 of the INA are within DHS’s discretion, notwithstanding the fact that the INA uses “shall” in describing who is subject to expedited removal.<sup>128</sup> 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.<sup>129</sup>

In light of these precedents, the use of “shall,” in itself, might not suffice for a court to find that an agency lacks the discretion not to enforce particular statutory requirements against certain individuals. Rather, a reviewing court might also consider the overall “statutory scheme [and] its objectives.”<sup>130</sup> For example, in *Dunlop v. Bachowski*, the Court found that the Department of Labor’s alleged nonenforcement of a statute was reviewable, unlike with the statute at issue in *Heckler*. The statute in question used the word “shall,” but the Court does not appear to have accorded any special significance to this word. Instead, the Court emphasized that the statute directed the Secretary of Labor to investigate certain complaints brought by members of labor organizations challenging the validity of union elections, and bring a civil action against the labor organization within 60 days of the complaint’s filing if the Secretary finds probable cause to believe a violation occurred and has not been remedied.<sup>131</sup> Because of these provisions, the Court viewed the Secretary’s discretion as limited to determining whether there is probable cause to believe that a violation occurred.<sup>132</sup> Similarly, in *Adams v. Richardson*, the U.S. Court of Appeals for the District of Columbia Circuit noted that the statute in question was not “so broad” as to preclude judicial review, since it “indicates with precision the measures available to enforce the Act.”<sup>133</sup>

## Deference to Agencies’ Interpretations of Their Governing Statutes

Another potential issue that can arise in determining whether “shall” indicates mandatory agency action when used in particular statutory provisions is how the agency has construed the provision, and whether a court finds that the agency’s interpretation is entitled to deference under the

<sup>127</sup> *Id.* See also *id.* at 842 (Marshall, J., concurring) (indicating that the Food, Drug, and Cosmetics Act is “not a mandatory statute” and, thus, the Food and Drug Administration has “significant discretion” to choose which alleged violations to prosecute).

<sup>128</sup> *Matter of E-R-M & L-R-M*, 25 I. & N. Dec. 520, 523 (BIA 2011).

<sup>129</sup> *Id.* at 522.

<sup>130</sup> *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975) (also considering the legislative history and the “nature of the administrative action involved”).

<sup>131</sup> *Id.* at 563.

<sup>132</sup> *Id.* at 570.

<sup>133</sup> 480 F.2d at 1162. See also *id.* at 1163 (noting that “[t]he Act sets forth two alternative courses of action by which enforcement may be effected”).



precedent of *Chevron, USA v. Natural Resources Defense Council*.<sup>134</sup> In *Chevron*, the Supreme Court articulated a two-part test for review of an agency’s construction of a statute which it administers: (1) Has Congress directly spoken to the precise question at issue? and (2) If not, is the agency’s reasonable interpretation of the statute consistent with the purposes of the statute?<sup>135</sup> “[I]f the statute speaks clearly ‘to the precise question at issue,’” the tribunal “must give effect to the unambiguously expressed intent of Congress,”<sup>136</sup> regardless of what the agency regulation provides. However, where “the statute is silent or ambiguous with respect to the specific issue,” the tribunal “must sustain the [a]gency’s interpretation if it is ‘based on a permissible construction’ of the Act.”<sup>137</sup>

In the case of Section 235 of the INA, for example, the Department of Justice (DOJ) and, later, DHS have interpreted the relevant provisions of the INA in a somewhat different manner than those who argue that DHS lacks the discretion not to remove aliens who entered the United States unlawfully. Both DOJ/DHS and those who claim it lacks discretion construe the first two provisions of Section 235 of the INA noted above—aliens present without admission being deemed applicants for admission, and applicants for admission being inspected—as applying to both (1) “arriving aliens” at a port-of-entry and (2) aliens who are present in the United States without inspection. However, DOJ and DHS have differed from proponents of the view that DHS lacks discretion in that DOJ and DHS have construed the third provision—regarding detention of certain aliens seeking admission—as applicable only to arriving aliens, not aliens who are present without inspection.<sup>138</sup> This difference appears to have arisen, in part, because the agencies have emphasized the phrase “aliens seeking admission” in the third provision, and have reasoned that only arriving aliens at ports-of-entry can be said to be seeking admission.<sup>139</sup>

<sup>134</sup> 467 U.S. 837 (1984).

<sup>135</sup> 467 U.S. at 842-43.

<sup>136</sup> *Barnhart v. Walton*, 535 U.S. 212, 217 (2002) (quoting *Chevron*, 467 U.S. at 842-43).

<sup>137</sup> *Id.* at 218 (quoting, in part, *Chevron*, 467 U.S. at 843).

<sup>138</sup> Specifically, the regulation implementing the third INA provision noted above—regarding the detention of aliens seeking admission—applies only to arriving aliens, not to aliens who entered without admission. *See* 8 C.F.R. §235.3(c) (“[A]ny arriving alien who appears to the inspecting officer to be inadmissible, and who is placed in removal proceedings pursuant to section 240 of the Act shall be detained in accordance with section 235(b) of the Act”). This has been the agency’s interpretation of the provision since the initial final rule implementing this provision. *See* 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* 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’”). The term “arriving alien” is defined in the regulations as “an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States,” but does not include aliens who entered without inspection. *See* 8 C.F.R. §1.2.

<sup>139</sup> The position of DHS and DOJ may also reflect concerns that if Section 235(b)(2)(A) were construed to apply to all applicants for admission, the statutory language regarding “seeking admission” would be superfluous, and construing statutes so as to give effect to all of their provisions is one of the fundamental principles of statutory interpretation. *See, e.g.,* *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (Courts should “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”). Similarly, if detention were mandatory for all applicants for admission under INA 235(b)(2)(A), then the language including inadmissible aliens under the mandatory detention provision in Section 236(c)(1)(A) and (D) of the INA would arguably be superfluous as well, since the only aliens in the United States who are subject to the grounds of inadmissibility are applicants for admission. The agencies’ interpretation does not appear to have been directly adopted (continued...)



The district court reviewing ICE agents' challenge to the DACA initiative declined to grant any deference to DHS's interpretation here. The court found that this interpretation was not entitled to deference, in part, because it viewed the relevant provisions of the INA as unambiguously applying to both aliens coming (or attempting to come) into the United States at a port of entry, and aliens present in the United States without having been admitted.<sup>140</sup> It also found that DHS regulations did not support DHS's proposed interpretation because, while these regulations applied to arriving aliens, they were not limited to arriving aliens.<sup>141</sup> However, as previously noted, this court is the only court to have so reached this conclusion, and it subsequently found that it lacked jurisdiction over the ICE agents' claims.<sup>142</sup> It is unclear whether other courts would reach the same conclusion as to whether and how much deference should be accorded to DHS's interpretation of these three provisions of INA §235.

It should also be noted that the INS and, later, DHS have interpreted other provisions of the INA differently than §235, construing them as removing prosecutorial discretion as to certain determinations. For example, immigration authorities have long maintained that Section 236(c) of the INA—which states that immigration officials “shall take into custody” certain criminal aliens, and may release them only under narrow circumstances<sup>143</sup>—limits their discretion as to whether or not to release such aliens from custody.<sup>144</sup>

## Executive Branch Self-Regulation

An agency could also potentially be found to have imposed certain constraints upon its exercise of prosecutorial discretion through either (1) the promulgation of regulations or (2) the issuance of guidelines that the agency intends to be binding or which have been employed in such a way as to be binding as a practical matter.<sup>145</sup> For example, in a 1979 decision, the U.S. Court of Appeals

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(...continued)

by any court, although it arguably has been implicitly adopted in various court and BIA rulings that have applied a DHS regulation which provides that immigration judges have jurisdiction over bond determinations for aliens present without inspection, but not for arriving aliens. *See, e.g., Matter of Oseiwusu*, 22 I. & N. Dec. 19 (BIA 1998) (“According to the regulations, an Immigration Judge has no authority over the apprehension, custody, and detention of arriving aliens and is therefore without authority to consider the bond request of an alien returning pursuant to a grant of advance parole.”).

<sup>140</sup> *Crane*, 2013 U.S. Dist. LEXIS 57788, at \*23-\*24.

<sup>141</sup> *Id.*, at \*25.

<sup>142</sup> *See supra* note 120 and accompanying text.

<sup>143</sup> INA §236(c)(1)-(2); 8 U.S.C. §1226(c)(1)-(2).

<sup>144</sup> *See, e.g.*, 2002 INS Guidance, *supra* note 2, at 3 (indicating that detention pursuant to Section 236(c) is mandatory because Section 236(c) “evidences a specific congressional intention to limit discretion not to detain certain criminal aliens in removal proceedings that would otherwise exist”); INS Exercise of Prosecutorial Discretion, *supra* note 15, at 11. However, some commentators have noted that, notwithstanding this view, immigration agencies have released aliens subject to “mandatory detention” in order to moot lawsuits challenging the alien’s detention. *See, e.g.*, Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 534 (1999).

<sup>145</sup> *See, e.g.*, *Pacific Molasses Co. v. Fed. Trade Comm'n*, 356 F.2d 386, 389-90 (5<sup>th</sup> Cir. 1996) (“When an administrative agency promulgates rules to govern its proceedings, these rules must be scrupulously observed. This is so even when the defined procedures are ‘... generous beyond the requirements that bind such agency ...’ For once an agency exercises its discretion and creates the procedural rules under which it desires to have its actions judged, it denies itself the right to violate these rules.”). *But see* *Farrell v. Dep’t of the Interior*, 314 F.3d 584, 590 (Fed. Cir. 2002) (“The general consensus is that an agency statement, not issued as a formal regulation, binds the agency only if the agency intended the statement to be binding.”).

for the Ninth Circuit (“Ninth Circuit”) found that an INS Operations Instruction addressing deferred action against deportable aliens was binding upon the agency because of its “purpose and effect.”<sup>146</sup> In reaching this conclusion, the court emphasized that the Instruction more closely resembled a substantive provision for relief than an internal procedural guideline because it “exist[ed] out of consideration for the convenience of the petitioner, and not that of the INS.”<sup>147</sup> The court further noted that the Instruction ostensibly required INS district directors to recommend deferred or “non-priority” status in certain cases, and that this status was periodically reviewed and not subject to termination at INS’s convenience.<sup>148</sup> In short, the court distinguished the Instruction from other intra-agency guidelines that would create no substantive rights because the Instruction’s effects were “final and permanent, with the same force as that of a Congressional statute.”<sup>149</sup> Other courts reached different conclusions as to whether this particular Operations Instruction was binding,<sup>150</sup> and the INS subsequently amended to it to clarify that grants of deferred action were discretionary.<sup>151</sup> Later, the guideline was rescinded (although INS and, later, DHS continued to grant deferred action).<sup>152</sup> However, the 1979 case illustrates that certain types of “cabining of an agency’s prosecutorial discretion” could potentially “rise to the level of a substantive, legislative rule” in the immigration context.<sup>153</sup> Were that the case, DHS’s exercise of prosecutorial discretion could potentially be found to have been constrained by its own guidelines.

In its recent guidance regarding the exercise of prosecutorial discretion, DHS has consistently emphasized that “there is no right to a favorable exercise of prosecutorial discretion by the agency,” and that nothing in the guidelines should be construed to prohibit the apprehension, detention, or removal of aliens unlawfully present in the United States, or to limit any legal authority to enforce federal immigration law.<sup>154</sup> However, an agency’s characterization of its own policies as non-binding is not necessarily dispositive,<sup>155</sup> and certain parties challenging the DACA

<sup>146</sup> *Nicholas v. INS*, 590 F.2d 802, 805 (1979).

<sup>147</sup> *Id.* at 807.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *See, e.g., Vergel v. INS*, 536 F.2d 755, 757-80 (8<sup>th</sup> Cir. 1976) (upholding the deportation order, but staying its mandate for a period of time to allow the alien to apply for deferred action); *David v. INS*, 548 F.2d 219, 223 (8<sup>th</sup> Cir. 1977) (same); *Yoon v. INS*, 538 F.2d 1211, 1213 (5<sup>th</sup> Cir. 1976) (decision to grant or deny deferred action was within the “particular discretion of the INS,” and the agency had the power to create and employ a category “for its own administrative convenience without standardizing the category and allowing applications for inclusion in it”); *Lennon v. INS*, 527 F.2d 187, 191 n.7 (2<sup>nd</sup> Cir. 1975) (describing deferred action as an “informal administrative stay of deportation”).

<sup>151</sup> *See, e.g., Leon Wildes, The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 822 (2004).

<sup>152</sup> *See, e.g., Charles Gordon, Stanley Mailman, & Stephen Yale-Loehr, IMMIGR. L. & PROC.* §72.03(2)(h) n.120 (2009) (noting that the Operating Instruction addressing deferred action was rescinded in 1997).

<sup>153</sup> *Community Nutrition Institute v. Young*, 818 F.2d 943, 948 (1987) (finding that the FDA’s thresholds for aflatoxins in corn were legislative rules that should have been promulgated through notice-and-comment rulemaking because the levels “have a present effect and are binding,” and marketing any food not within the levels is viewed as unlawful). *But see Heckler*, 470 U.S. at 837 (rejecting a challenge to the Food and Drug Administration’s refusal to enforce alleged violations of the Food, Drug, and Cosmetic Act, in part, because the agency “policy statement” in question did not “arise in the course of discussing the agency’s discretion to exercise its enforcement power” and, thus, did not limit this discretion). The Court in *Heckler* expressly left open the possibility that certain agency rules might provide adequate guidelines for informed judicial review of decisions not to enforce them. *Id.* at 836.

<sup>154</sup> *See, e.g., 2011 DHS Guidance, supra* note 9, at 6.

<sup>155</sup> *See, e.g., Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 416 (1942) (“The particular label placed (continued...)”).

initiative have suggested that, in “implementing the Directive, DHS has treated the Directive as if it were a rule.”<sup>156</sup> No court appears to have addressed this argument, to date, but early in 2012—when DHS was conducting preliminary reviews of the dockets of the immigration courts in Baltimore and Denver for cases that might qualify for favorable exercises of prosecutorial discretion<sup>157</sup>—a panel of the Ninth Circuit ordered ICE to advise the court as to whether ICE planned to exercise prosecutorial discretion in five pending cases.<sup>158</sup> The court did so *sua sponte*, without such an order having been requested, and the dissenting judge expressed concern that the majority’s order could portend future scrutiny of why ICE made particular decisions.<sup>159</sup> The dissent also asserted that judicial review of ICE’s exercise of prosecutorial discretion is “sharply limited by the separation of powers.”<sup>160</sup>

## Conclusion

Regardless of whether it is characterized as “prosecutorial discretion” or “enforcement discretion,” immigration officers are generally seen as having wide latitude in determining when, how, and even whether to pursue apparent violations of the INA. This latitude is similar to that possessed by prosecutors in the criminal law enforcement context and enforcement officials in other federal agencies. Whether and how to constrain this discretion has been a recurring issue for some Members of Congress, particularly in light of the June 2011 DHS memorandum on prosecutorial discretion and the more recent DACA initiative.<sup>161</sup> While some Members have expressed support for the DACA initiative,<sup>162</sup> or called for expanded use of prosecutorial discretion by immigration authorities in other contexts,<sup>163</sup> others have sought to prohibit DHS

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upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive.”); *Guardian Fed. Savings & Loan Ass’n v. Fed. Savings & Loan Ins. Corp.*, 589 F.2d 658, 666-67 (D.C. Cir. 1978) (“If it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is—a binding rule of substantive law.”). The agency’s characterization could, however, potentially be entitled to some deference. *See, e.g., Community Nutrition Institute*, 818 F.2d at 946.

<sup>156</sup> *Crane v. Napolitano*, No. 3:12-cv-03247-O, Brief in Support of Plaintiffs’ Application for Preliminary Injunction, at 19 (filed N.D. Tex., Nov. 28, 2012). *See also* *Crane v. Napolitano*, No. 3:12-cv-03247-O, Affidavit of Christopher L. Crane, ¶ 8 (filed N.D. Tex., Nov. 27, 2012) (alleging that ICE has adopted a practice of not questioning individuals who assert that they could be eligible for deferred action as part of the DACA initiative, thereby effectively making all who claim deferred action entitled to it).

<sup>157</sup> *See, e.g.,* Julia Preston, U.S. to Review Cases Seeking Deportations, *New York Times*, Nov. 17, 2011, available at <http://www.nytimes.com/2011/11/17/us/deportation-cases-of-illegal-immigrants-to-be-reviewed.html>.

<sup>158</sup> *Rodriguez v. Holder*, 668 F.3d 670 (9<sup>th</sup> Cir. 2012); *Agustin v. Holder*, 668 F.3d 672 (9<sup>th</sup> Cir. 2012); *Jex v. Holder*, 668 F.3d 673 (9<sup>th</sup> Cir. 2012); *Pocasangre v. Holder*, 668 F.3d 674 (9<sup>th</sup> Cir. 2012); *Mata-Fasardo v. Holder*, 668 F.3d 674 (9<sup>th</sup> Cir. 2012).

<sup>159</sup> *Agustin*, 668 F.3d at 672 (O’Scannlain, J., dissenting).

<sup>160</sup> *Id.* Subsequently, in response to the DACA initiative, the U.S. Court of Appeals for the Second Circuit (“Second Circuit”) established a procedure whereby pending immigration cases are tolled while the government determines whether to remand the case to the BIA for administrative closure in light of DACA and related initiatives. *In Matter of Immigration Petitions for Review Pending in the United States Court of Appeals for the Second Circuit*, No. 12-4096, 2012 U.S. App. LEXIS 21555 (Oct. 16, 2012). However, unlike the Ninth Circuit, the Second Circuit did not order ICE to inform it regarding whether ICE plans to exercise discretion in particular cases.

<sup>161</sup> *See supra* note 12 and accompanying text.

<sup>162</sup> *See, e.g.,* Durbin Statement on DREAM Act and Administrative Action to Help Young Immigrants, June 15, 2012, available at <http://durbin.senate.gov/public/index.cfm/pressreleases?ID=070d1061-66c4-45ef-bb34-41da7e1e7d40>.

<sup>163</sup> *See, e.g.,* Pelosi, Nadler, Honda, and 81 Members of Congress Urge Department of Homeland Security Again To (continued...)

from granting deferred action or extended voluntary departure to removable aliens except in narrow circumstances,<sup>164</sup> or to “nullify” particular policies regarding prosecutorial discretion that have been articulated by the Obama Administration.<sup>165</sup>

The extent to which Congress can constrain the Administration’s exercise of discretion in the DACA context, in particular, may depend on whether a reviewing court characterizes the underlying authority for the implementation of the program as constitutionally or statutorily based. Congress has broad authority to restrict discretionary acts taken pursuant to statutory delegations, while arguably limited authority, under the doctrine of Separation of Powers, to restrict the President’s exercise of constitutionally based discretion. In addition, the degree of intrusion into executive enforcement decisions may also impact a court’s review of any congressional response. For example, legal precedent suggests that Congress probably cannot directly limit the President’s exercise of discretion by requiring that the executive branch initiate enforcement actions against particular individuals.<sup>166</sup> On the other hand, Congress would appear to have considerable latitude in establishing statutory guidelines for immigration officials to follow in the exercise of their enforcement powers, including by “indicat[ing] with precision the measures available to enforce the” INA, or by prohibiting DHS from considering certain factors in setting enforcement priorities.<sup>167</sup>

However, the existing judicial presumption that “an agency’s decision not to take enforcement action [is] immune from judicial review,”<sup>168</sup> and the deference potentially accorded to an agency’s interpretation of its governing statute,<sup>169</sup> suggests that such statutory guidelines would likely need to be clear, express, and specific. The use of “shall” in a provision of the INA may not, in itself, suffice for a statute to be construed as having provided enforceable guidelines for immigration officials to follow in exercising prosecutorial discretion. Absent a substantive legislative response, Congress may still be able to influence the implementation of DACA or other discretion-based policies by the immigration authorities, including by engaging in stringent

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Recognize LGBT Family Ties in Deportation Cases, (copy on file with the authors). The need for discretion in certain cases involving aliens in same-sex marriages may have been removed by DHS’s response to the recent Supreme Court decision in *United States v. Windsor*. *Windsor* struck down Section 3 of the Defense of Marriage Act (DOMA), which had precluded federal agencies from recognizing same-sex marriages. Following this decision, DHS began permitting U.S. citizens and lawful permanent residents to sponsor their same-sex spouses for family-based immigrant visas and adjustment of status. See DHS, Implementation of the Supreme Court Ruling on the Defense of Marriage Act, available at <http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>.

<sup>164</sup> Hinder the Administration’s Legalization Temptation (HALT) Act, H.R. 2497, §2(f), 113<sup>th</sup> Cong. (permitting the grant of deferred action or extended voluntary departure only for the purpose of maintaining an alien in the United States “(1) to be tried for a crime, or to be a witness at trial, upon the request of a Federal, State, or local law enforcement agency; (2) for any other significant law enforcement or national security purpose; or (3) for a humanitarian purpose where the life of the alien is imminently threatened”).

<sup>165</sup> Prohibiting the Back-Door Amnesty Act, H.R. 5953, §2(a), 113<sup>th</sup> Cong. (“nullifying” the 2011 Morton memoranda and the 2012 Napolitano memorandum).

<sup>166</sup> See *Heckler*, 470 U.S. at 833 (“... Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency’s exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.”).

<sup>167</sup> *Adams*, 480 F.2d at 1162.

<sup>168</sup> *Heckler*, 470 U.S. at 832.

<sup>169</sup> *Chevron*, 467 U.S. at 842-43.

oversight over the DHS program or by exercising its “power of the purse”<sup>170</sup> to prohibit DHS and its components from implementing particular policies related to the exercise of prosecutorial discretion that Congress does not support.<sup>171</sup>

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<sup>170</sup> See U.S. Const., art. I, §9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law....”).

<sup>171</sup> See, e.g., Department of Homeland Security Appropriations Act, 2013, H.R. 5855, as passed by the House, §581(a), 113<sup>th</sup> Cong. (“None of the funds made available in this Act may be used to finalize, implement, administer, or enforce the ‘Morton Memos.’”).