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The Obama Administration's November 2014 Immigration Initiatives: Questions and Answers

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Summary

On November 20, 2014, President Obama delivered a televised address wherein he broadly described the steps that his administration is taking to “fix” what he has repeatedly described as a “broken immigration system.” Following the President’s address, executive agencies made available intra-agency memoranda and fact sheets detailing specific actions that have already been taken, or will be taken in the future. These actions generally involve either border security, the current unlawfully present population, or future legal immigration.

The most notable of these actions, for many commentators, are the initiatives to grant “deferred action”—one type of relief from removal—to some unlawfully present aliens who were brought to the United States as children and raised here, or who have children who are U.S. citizens or lawfully permanent resident (LPR) aliens. Previously, in June 2012, then Secretary of Homeland Security Janet Napolitano announced a program—commonly known as Deferred Action for Childhood Arrivals (DACA)—whereby unlawfully present aliens who had been brought to the United States as children and met other criteria could receive deferred action and, in many cases, employment authorization. The eligibility criteria for DACA expressly excluded unlawfully present aliens who were over 31 years of age, or who had entered the United States on or after June 15, 2007. However, aliens who are over 31 years of age, or entered between June 15, 2007, and January 1, 2010, could receive deferred action as part of the 2014 initiative.

Similarly, unlawfully present aliens who have children who are U.S. citizens or LPRs could also receive deferred action and employment authorization pursuant to the November 2014 initiatives, provided they meet specified criteria. These criteria include “continuous residence” in the United States since before January 1, 2010; physical presence in the United States both on the date the initiative was announced and on the date when they request deferred action; and not being an enforcement priority (e.g., not a threat to national or border security).

The announced executive actions—particularly the granting of deferred action and employment authorization to unlawfully present aliens—have revived debate about the President’s discretionary authority over immigration like that which followed the announcement of DACA in 2012. In the case of DACA, some argued that the initiative violates the Take Care Clause of the U.S. Constitution, runs afoul of specific requirements found in the Immigration and Nationality Act (INA), or is inconsistent with historical precedents. Others, however, asserted that DACA involves a valid exercise of the executive’s prosecutorial or enforcement discretion, is consistent with the INA, and has ample historical precedent. Similar arguments will likely be made as to the November 2014 actions, which affect a significantly larger number of aliens than DACA.

Legal challenges to DACA have generally failed on standing grounds, because the plaintiffs bringing these challenges were not seen as the proper parties to seek judicial relief from a federal court. The one exception to this—the litigation in *Crane v. Napolitano*—resulted in the reviewing federal district court finding that DACA runs afoul of provisions in Section 235 of the INA which some assert require the executive to place unlawfully present aliens in removal proceedings. However, this same federal district court subsequently found that it lacked jurisdiction because the plaintiff immigration officers alleged that they faced discipline by their employer, DHS, if they refused to implement DACA, and such claims are within the jurisdiction of the Merit Systems Protection Board (MSPB), not the court.

The 113th Congress has also considered legislation to defund DACA (e.g., H.R. 5272, H.R. 5316).

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On November 20, 2014, President Obama delivered a televised address wherein he broadly described the steps that his administration is taking to “fix” what he has repeatedly described as a “broken immigration system.”¹ Following the President’s address, executive agencies made available intra-agency memoranda and fact sheets detailing specific actions that have already been taken, or will be taken in the future.² These actions generally involve either border security, the current unlawfully present population, or future legal immigration.

The announced executive actions—particularly the granting of deferred action and employment authorization to some unlawfully present aliens, discussed below (see “Unlawfully Present Population”)—have revived debate about the executive’s discretionary authority over immigration like that which followed the Administration’s June 2012 announcement of the Deferred Action for Childhood Arrivals (DACA) initiative.³ DACA has permitted some unlawfully present aliens who were brought to the United States as children and raised here to obtain temporary relief from removal and, in many cases, employment authorization. Some have argued that DACA constitutes an abdication of the executive’s duty to enforce the laws and runs afoul of specific requirements found in the Immigration and Nationality Act (INA),⁴ among other things. Others, however, have maintained that the DACA initiative is a lawful exercise of the discretionary authority conferred on the executive by the Constitution and federal statute.⁵ Similar arguments will likely be made as to the November 2014 actions, which affect a significantly larger number of aliens than DACA.

This report provides the answers to key legal questions related to the various immigration-related actions announced by the Obama Administration on November 20, 2014. Because the various documents outlining these actions have been available for a limited period of time, and additional information is expected to be released in the future, these answers are necessarily preliminary. It is anticipated that the report will be updated to reflect further developments.

Other reports discuss related issues, including CRS Report R43782, *Executive Discretion as to Immigration: Legal Overview*, by Kate M. Manuel and Michael John Garcia; CRS Report

¹ For a transcript of the President’s address, see <http://www.whitehouse.gov/issues/immigration/immigration-action#> (last accessed: Nov. 22, 2014).

² See generally Dep’t of Homeland Security (DHS), Fixing Our Broken Immigration System Through Executive Action - Key Facts, Nov. 21, 2014, available at http://www.dhs.gov/immigration-action?utm_source=hp_feature&utm_medium=web&utm_campaign=dhs_hp; Dep’t of Labor (DOL), Immigration Fact Sheets, available at <http://www.dol.gov/dol/fact-sheet/immigration/> (last accessed: Nov. 21, 2014).

³ See DHS Secretary Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 15, 2012 (copy on file with the author).

⁴ See, e.g., Crane v. Napolitano, Amended Complaint, No. 3:12-cv-03247-O, filed Oct. 10, 2012 (N.D. Tex.) (lawsuit challenging DACA and arguing that the initiative is, among other things, contrary to specific provisions of the INA and the Executive’s constitutional responsibility to “take care” that the laws are faithfully executed); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013) (arguing that the DACA initiative is inconsistent with the Executive’s constitutional duties, and that the President may not purposefully refrain from enforcing federal statutes against broad categories of persons “in ordinary, noncritical circumstances”).

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

R42924, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, by Kate M. Manuel and Todd Garvey; CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by Todd Garvey; and CRS Report R43747, *Deferred Action for Childhood Arrivals (DACA): Frequently Asked Questions*, by Andorra Bruno.

What actions are being taken by the Obama Administration?

Following the President's televised speech, executive branch agencies and, in two cases, the White House announced dozens of specific actions as to immigration. These actions can be broadly divided into the same three categories noted by the President in his speech: (1) border security, (2) the current unlawfully present population, and (3) future legal immigration.

Border Security

Among the Administration's actions is "implement[ing] a Southern Border and Approaches Campaign Strategy to fundamentally alter the way in which we marshal resources to the border."⁶ This will involve the Department of Homeland Security (DHS) commissioning three task forces made up of various law enforcement agencies. These task forces will focus on the southern maritime border, the southern land border and West Coast, and investigations to support the other two task forces. Among the objectives of the new strategy are increasing the perceived risk of engaging in or facilitating "illegal transnational or cross-border activity" (a term which could include the migration of persons); interdicting people who attempt to enter illegally between ports of entry; and preventing the "illegal exploitation of legal flows" (which could include things such as alien smuggling at ports of entry).⁷

Unlawfully Present Population

The Administration also proposes several actions affecting the current population of unlawfully present aliens, which is widely estimated to include some 11 million persons.⁸ Arguably the most notable of these actions are the initiatives to grant deferred action—one type of relief from removal—to some unlawfully present aliens who were brought to the United States as children and raised here, or who have children who are U.S. citizens or lawfully permanent resident (LPR) aliens.⁹ Previously, in June 2012, then-Secretary of Homeland Security Janet Napolitano announced a program—commonly known as Deferred Action for Childhood Arrivals (DACA)—whereby unlawfully present aliens who had been brought to the United States as children and met other criteria could receive deferred action and, in many cases, employment authorization.¹⁰ The

⁶ DHS Secretary Jeh Charles Johnson, Memorandum, *Southern Border and Approaches Campaign*, Nov. 20, 2014, at 1 (copy on file with the author).

⁷ *Id.* at 2.

⁸ See, e.g., *Unauthorized Immigrants: How Pew Research Counts Them and What We Know about Them*, Pew Research Center, Apr. 17, 2013, available at <http://www.pewresearch.org/2013/04/17/unauthorized-immigrants-how-pew-research-counts-them-and-what-we-know-about-them/>.

⁹ DHS Secretary Jeh Charles Johnson, Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Parents [sic] Are U.S. Citizens or Permanent Residents*, Nov. 20, 2014 (copy on file with the author).

¹⁰ See DHS Secretary Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 15, 2012, at 2 (copy on file with the author).

eligibility criteria for DACA expressly excluded unlawfully present aliens who were over 31 years of age, or who had entered the United States on or after June 15, 2007.¹¹ However, aliens who are over 31 years of age, or entered the United States between June 15, 2007, and January 1, 2010, could receive deferred action as part of the November 2014 initiative.¹² The 2014 initiative would also extend the duration of grants of deferred action (and work authorization) received by DACA beneficiaries from the current two years, to three years.¹³

In addition, unlawfully present aliens who have children who are U.S. citizens or LPRs will also be eligible for deferred action (and employment authorization) pursuant to the November 2014 initiatives, provided they meet specified criteria.¹⁴ These criteria include (1) “continuous residence” in the United States since before January 1, 2010; (2) physical presence in the United States both on the date the initiative was announced (i.e., November 20, 2014) and when they request deferred action; (3) not being an enforcement priority under the Administration’s newly announced priorities, discussed below; and (4) “present[ing] no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.”¹⁵

Aliens granted deferred action pursuant to these initiatives—or otherwise¹⁶—are eligible for employment authorization upon showing “an economic necessity for employment.”¹⁷

Other notable actions as to the current population of unlawfully present aliens include

- revising DHS’s priorities for civil immigration enforcement by, among other things, narrowing the scope of aliens who are considered “highest priority” for removal.¹⁸ Under the revised priorities, aliens without legal immigration status who have been in the United States since 2013, and who have not engaged in specified criminal activity or violated a prior order of removal, seem unlikely to be considered a removal priority.
- ending the Secure Communities program and replacing it with another program, known as the Priority Enforcement Program (PEP).¹⁹ PEP will resemble Secure Communities in that Secure Communities also utilized information sharing between various levels and agencies of government to identify potentially

¹¹ *Id.*

¹² *Exercising Prosecutorial Discretion*, *supra* note 9. See also DHS, USCIS, *Executive Actions on Immigration*, last updated: Nov. 20, 2014, available at <http://www.uscis.gov/immigrationaction>.

¹³ *Id.* The Administration has, however, noted that a grant of deferred action through DACA could be revoked. See U.S. Citizenship & Immigr. Servs. (USCIS), *Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions*, last updated Oct. 23, 2014, available at <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions>.

¹⁴ *Exercising Prosecutorial Discretion*, *supra* note 9.

¹⁵ *Id.*

¹⁶ See DHS, ICE, *How to Seek Prosecutorial Discretion from ICE*, available at <http://www.ice.gov/immigrationaction> (last accessed: Nov. 21, 2014).

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

¹⁸ DHS Secretary Jeh Charles Johnson, Memorandum, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, Nov. 20, 2014 (copies on file with the author). Two earlier memoranda by then-Director of ICE John Morton articulating civil immigration enforcement priorities were expressly rescinded and superseded. *Id.*

¹⁹ DHS Secretary Jeh Charles Johnson, Memorandum, *Secure Communities*, Nov. 20, 2014 (copies on file with the author).

removable aliens.²⁰ However, unlike Secure Communities, PEP will focus on aliens who have been convicted of felonies or “significant” misdemeanors, and generally will not entail states and localities holding aliens after they would have otherwise been released for the state or local offense that prompted their initial arrest so that DHS can take custody of them.²¹

- ensuring uniform recognition of grants of “advance parole” by immigration agencies, so that aliens without legal status who depart the United States for another country pursuant to a grant of advance parole are not excluded from the United States upon their return on the grounds that they “departed” the United States and, thus, triggered the 3- and 10-year bars upon the admission of aliens who have accrued more than 180 days of unlawful presence in the United States, discussed below.²² (Parole is a device which permits an alien to enter the United States without satisfying the criteria for admissibility set forth in INA §212(a). With advance parole, an alien without legal status who is present in the United States is effectively granted a limited assurance, prior to departing the United States for another country, that s/he will be permitted to re-enter the United States upon his/her return.)
- granting “parole in place” or deferred action to some immediate relatives of U.S. citizens and LPRs who “seek to enlist in the Armed Forces,” instead of just to qualifying relatives of active Armed Service personnel, the standing Reserves, or veterans of the Armed Services or standing Reserves.²³ (While parole is typically granted to aliens outside the United States who are ineligible for admission under INA §212(a), parole in place entails granting parole to unlawfully present aliens within the United States.)²⁴

Legal Immigration

In addition, the Obama Administration announced several actions which it characterizes as “support[ing] our country’s high-skilled businesses and workers.”²⁵ Included among these actions

²⁰ Cf. DHS, ICE, *Secure Communities: The Basics*, available at http://www.ice.gov/secure_communities (last accessed: Nov. 23, 2014).

²¹ The primary means that DHS had relied upon to request such holds by states and localities—so-called “immigration detainers” (Form I-247)—have recently been the subject of extensive litigation. In March 2014, the U.S. Court of Appeals for the Third Circuit ruled that federal law does not require states and localities to hold aliens who are subject to immigration detainers, and that any attempt to require states and localities to do so would run afoul of the “anti-commandeering” principles of the Tenth Amendment. *See Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014). More recently, in April 2014, a federal district court found that states and localities must have probable cause to hold an alien pursuant to a detainer; the mere filing of a detainer does not provide the requisite legal authority for such holds. *See Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 U.S. Dist. LEXIS 50340 (D. Or., Apr. 11, 2014). For more information, see generally CRS Report R42690, *Immigration Detainers: Legal Issues*, by Kate M. Manuel.

²² DHS Secretary Jeh Charles Johnson, Memorandum, *Directive to Provide Consistency Regarding Advance Parole*, Nov. 20, 2014, available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_arrabally.pdf.

²³ DHS Secretary Jeh Charles Johnson, Memorandum, *Families of U.S. Armed Forces Members and Enlistees*, Nov. 20, 2014 (copy on file with the author).

²⁴ A grant of parole in place could potentially entitle such aliens to other types of relief from removal. *See, e.g.*, INA §245(a), 8 U.S.C. §1255(a) (permitting adjustment to LPR status for certain aliens who have been admitted or paroled).

²⁵ DHS Secretary Jeh Charles Johnson, Memorandum, *Policies Supporting U.S. High-Skilled Businesses and Workers*, Nov. 20, 2014, at 1 (copy on file with the author). The memorandum also directs USCIS to continue with the promulgation of a proposed rule extending work authorization to the spouses of H-1B visa holders who have been (continued...)

are as yet-to-be-determined steps to ensure that all immigrant visas authorized by Congress for issuance in a particular year are issued (assuming demand).²⁶ Previously, delays in processing applications for immigrant visas resulted in some visas going unused (less than 5% of all available immigrant visas in recent years).²⁷ This, in turn, prompted calls for Congress or the executive to “recapture” unused visas (i.e., to identify unused visa numbers from earlier years and make them available for current use).²⁸ The Obama Administration’s November 20, 2014, action does not purport to recapture previously unused visas. However, it can be seen as an attempt to avoid the perceived need for visa recapture in the future by ensuring that all immigrant visas available for issuance in a year are used. Relatedly, the Administration proposes as-yet-unspecified steps to “improve the system for determining when immigrant visas are available to applicants during the fiscal year,” as well as consideration of “other regulatory or policy changes” to “better assist and provide stability” to be beneficiaries of employment-based immigrant visa petitions, including by ensuring that visa petitions remain valid when the alien beneficiary of the petition seeks to change employers or jobs.²⁹

Another action involves expanding the duration of any “optional practical training” (OPT) engaged in by foreign nationals studying science, technology, engineering, and mathematics (STEM) fields at institutions of higher education in the United States on non-immigrant F-1 student visas, as well as “expand[ing] the degree programs” eligible for OPT.³⁰ Foreign nationals studying in the United States on F-1 visas have long been able to request an additional 12 months of F-1 visa status for temporary employment—known as OPT—in their field of study.³¹ Regulations promulgated in 2008 permitted students in STEM fields to request an additional 17 months of OPT, for a total of 29 months of OPT.³² However, only students in STEM fields are eligible for this 17 month extension, and these students can participate in OPT for no more than 29 months. Because any expansion of OPT can be seen, at least by some, as affecting employment opportunities for U.S. persons,³³ the Administration also proposes to “improve” the

(...continued)

approved for an employment-based immigrant visa, as well as the development of proposed guidance to “strengthen and improve” processing of various employment-based non-immigrant visas. *Id.*

²⁶ *Id.* at 2. Ways to ensure that all available immigrant visas are used each year are also to be explored by the newly established interagency task force on modernizing and streamlining the immigrant visa system, discussed below. See President Barack Obama, Memorandum, *Modernizing and Streamlining the U.S. Immigrant Visa System for the 21st Century*, Nov. 21, 2014 (copy on file with the author).

²⁷ See, e.g., USCIS, *Responding to Your Comments on Visa Numbers, Preference Categories, and Spillover*, Mar. 30, 2010, available at <http://blog.uscis.gov/2010/03/visa-numbers.html>.

²⁸ See, e.g., Patrick Thibodeau, *Obama's Options for Tech Immigration Take Shape*, COMPUTERWORLD, Aug. 20, 2014, available at <http://www.computerworld.com/article/2598332/technology-law-regulation/obama-s-options-for-tech-immigration-take-shape.html>. The INA provides that any unused employment-based immigrant visas from one year are available for use as family-based immigrant visas the following year, and vice versa. INA §201(c) & (d), 8 U.S.C. §1151(c) & (d). Thus, some have questioned the significance of “recapture” proposals. See, e.g., Numbers USA, Visa “Recapture,” available at <https://www.numbersusa.com/content/files/pdf/Fact%20Sheet%20Visa%20Recapture.pdf> (last accessed: Nov. 22, 2014).

²⁹ *Policies Supporting U.S. High-Skilled Businesses and Workers*, *supra* note 25, at 2.

³⁰ *Id.* at 3.

³¹ See, e.g., Immigration and Naturalization Service (INS), Nonimmigrant Classes: F-1 Academic Students, 52 Fed. Reg. 13223 (Apr. 22, 1987).

³² See DHS, ICE, Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions, 73 Fed. Reg. 18944 (Apr. 8, 2008).

³³ See cases discussed *infra* note 125 and accompanying text.

OPT program by requiring “stronger ties” to degree-granting institutions, and “tak[ing] steps” to ensure that OPT employment is consistent with U.S. labor market protections.³⁴

Other actions announced by the Obama Administration include

- making greater use of provisions in INA §203(b)(2)(B), which permit aliens with advanced degrees or “exceptional ability” to obtain an immigrant visa without a sponsoring employer—as is generally required for immigrants who are not sponsored by family members—if their admission is in the “national interest.”
- using the authority granted to the Executive in INA §212(d)(5)(A) to “parole” aliens into the United States when there is a “significant public benefit” to permit some inventors, researchers, and founders of start-up enterprises to enter and lawfully remain in the United States without a visa (or counting against the visa caps).³⁵
- clarifying and standardizing the meaning of “specialized knowledge” for purposes of the L-1B visa program, which allows companies to transfer certain employees who are executives or managers, or have “specialized knowledge” of the company or its processes, to the United States from the company’s foreign operations.
- clarifying what is meant by the “same or similar job” for purposes of INA §204(j), which provides that employment-based immigrant visa petitions remain valid when the alien employee changes jobs or employers so long as the new job is in the “same or similar occupational classification” as the job for which the petition was filed.
- reviewing the so-called PERM program, whereby the Department of Labor (DOL) certifies that the issuance of an employment-based immigrant visa will not displace U.S. workers, or adversely affect the wages or working conditions of similarly employed U.S. workers, to identify methods for aligning domestic worker recruitment requirements with demonstrated occupational shortages and surpluses.
- DOL “certifying”³⁶ applications for nonimmigrant T visas for aliens who have been victims of human trafficking, as well as certifying applications for nonimmigrant U visas for eligible victims of extortion, forced labor, and fraud in foreign labor contracting that DOL detects in the course of its workplace investigations.

³⁴ *Policies Supporting U.S. High-Skilled Businesses and Workers*, *supra* note 25, at 2.

³⁵ While the Executive has generally based determinations as to whether to parole aliens into the United States on “urgent humanitarian reasons,” also noted in INA §212(d)(5)(A), there have instances when the Executive considered labor-related factors when granting parole. *See* “A Brief History of the Executive Branch’s Parole of Aliens into the United States,” in CRS Report R43782, *Executive Discretion as to Immigration: Legal Overview*, by Kate M. Manuel and Michael John Garcia.

³⁶ The issuance of U visas is generally conditioned, in part, on a designated law enforcement agency “certifying” or corroborating that aliens who are victims of specified criminal offenses have assisted law enforcement or other government officials in the investigation or prosecution of those crimes. Such certification is not required with T visas, but can be helpful in obtaining a T visa.

- establishing an interagency working group to “streamline” the immigrant visa system, in part, by improving services and reducing employers’ burdens.³⁷

Other

Other announced actions do not neatly fall into any of the foregoing categories or, in one case, could be said to involve multiple categories. Arguably key among these is the expansion of a preexisting Obama Administration program that provides for “provisional waivers” of the 3- and 10-year bars on the admission of aliens who have accrued more than 180 days of unlawful presence in the United States. Initially, this program reached only spouses, sons, or daughters of U.S. citizens. It will now be expanded to include qualifying relatives of LPRs.³⁸

As a general matter, unlawfully present aliens whose spouses or parents are U.S. citizens or LPRs may be eligible for an immigrant visa and adjustment to legal status. Obtaining such an immigrant visa typically requires the alien to leave the United States so that his/her visa application can be processed by U.S. consular officers overseas.³⁹ However, leaving the country generally triggers the application of the 3- and 10-year bars if the alien has been unlawfully present in the United States for more than 180 days (as most unlawfully present aliens have been).⁴⁰ These bars can be waived if denial of the alien’s admission would result in “extreme hardship” to the alien’s spouse or parents.⁴¹ However, the time required to obtain a waiver after leaving the country and triggering the bar has historically kept many unlawfully present aliens who could “legalize their status” under current law (see “Does granting deferred action to unlawfully present aliens legalize their status?”) from doing so. In 2013, the Obama Administration began allowing spouses or children of U.S. citizens to request and obtain provisional waivers of the 3- and 10-year bars to their admission while they are in the United States (they generally still must travel outside the United States for processing).⁴² However, the spouses and children of LPRs were ineligible for such provisional waivers until the 2014 actions.

Other actions announced in November 2014 include certain personnel reforms involving immigration and customs officers;⁴³ promoting naturalization by eligible LPRs;⁴⁴ establishing an

³⁷ See generally *Policies Supporting U.S. High-Skilled Businesses and Workers*, supra note 25; *Modernizing and Streamlining the U.S. Immigrant Visa System for the 21st Century*, supra note 26; DOL Secretary Thomas E. Perez, Fact Sheet, *Department of Labor to Pursue Modernized Recruitment and Application Requirements for the PERM Program* (copy on file with the author); DOL Secretary Thomas E. Perez, Fact Sheet, *The Department of Labor’s Wage and House Division Will Expand Its Support of Victims of Human Trafficking and Other Crimes Seeking Immigration Relief from DHS* (copy on file with the author).

³⁸ DHS Secretary Jeh Charles Johnson, Memorandum, *Expansion of the Provisional Waiver Program*, Nov. 20, 2014 (copy on file with the author).

³⁹ See generally CRS Legal Sidebar WSLG385, *Provisional Waivers of the Three- and Ten-Year Bars to Admissibility to Be Granted to Certain Unlawfully Present Aliens*, by Kate M. Manuel.

⁴⁰ INA §212(a)(9)(B)(i)(I)-(II), 8 U.S.C. §1182(a)(9)(B)(i)(I)-(II). The 3-year bar applies to aliens who have been unlawfully present for more than 180 days but less than 1 year. The 10-year bar applies to aliens who have been unlawfully present for 1 year or longer. Longer or permanent bars could apply to certain aliens, depending upon their circumstances. See, e.g., INA §212(a)(9)(A), 8 U.S.C. §1182(a)(9)(A) (certain aliens barred from entry for 20 years).

⁴¹ INA §212(a)(9)(B)(v), 8 U.S.C. §1182(a)(9)(B)(v).

⁴² See DHS, USCIS, *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, 78 Fed. Reg. 536, 542 (Jan. 3, 2013) (noting that DHS initially limited eligibility for provisional waivers to immediate relatives of U.S. citizens “not only because the immigrant visas for this category are always available, but also because it is consistent with Congress’ policy choice to prioritize family reunification of immediate relatives of U.S. citizens”).

⁴³ DHS Secretary Jeh Charles Johnson, Memorandum, *Personnel Reforms for Immigration and Customs Enforcement* (continued...)

interagency task force on “New Americans” to “increase meaningful engagement” between immigrants and the communities where they settle,⁴⁵ and establishing an interagency working group to address the interplay of immigration and employment law.⁴⁶

Did the President issue an executive order?

As of November 24, 2014, the President has not issued an executive order regarding these immigration-related actions; nor has he given any indication that he will issue such an order. With the exception of several specific actions announced in two presidential memoranda,⁴⁷ all other actions to date—including the granting of deferred action to some unlawfully present aliens—have been announced in intra-agency memoranda or fact sheets made available by executive agencies after the President’s televised address. This is arguably consistent with prior actions in the field of immigration and, particularly, prior exercises of discretion in enforcing federal immigration law. For example, the 1990 “Family Fairness” program, discussed below—which gave certain unlawfully present aliens temporary relief from deportation (later known as removal)—was announced in a memorandum from the head of the Immigration and Naturalization Service (INS) to regional officials.⁴⁸ Similarly, President Clinton relied on a memorandum to the Attorney General when authorizing deferred enforced departure (DED)—another type of temporary relief from removal—for some unlawfully present aliens from Liberia.⁴⁹

The fact that these actions were announced by means other than an executive order generally would not affect their permissibility. In other words, whether the deferred action initiatives, for example, are permissible depends upon whether the executive has the legal authority to grant this relief, not whether the initiatives were announced by means of an executive order or a memorandum from the Secretary of Homeland Security.

What is the legal authority for the Administration’s actions?

Although each specific Administration action involves somewhat different legal authorities, three broad types of legal authority can be said to underlie all these actions: (1) prosecutorial or enforcement discretion; (2) express delegations of authority to the executive by Congress; and (3)

(...continued)

Officers, Nov. 20, 2014 (copy on file with the author).

⁴⁴ DHS Secretary Jeh Charles Johnson, Memorandum, *Policies to Promote and Increase Access to U.S. Citizenship*, Nov. 20, 2014 (copy on file with the author) (directing USCIS to begin accepting credit cards for paying naturalization fees; consider the feasibility of partial waivers of naturalization fees in its next biennial fee study (currently only total waivers are granted); and launch a “comprehensive media campaign” to promote naturalization).

⁴⁵ President Barack Obama, Memorandum, *Creating Welcoming Communities and Fully Integrating Immigrants and Refugees*, Nov. 21, 2014 (copy on file with the author).

⁴⁶ DOL Secretary Thomas E. Perez, Fact Sheet, *Establishment of Interagency Working Group for the Consistent Enforcement of Federal Labor, Employment and Immigration Laws* (copy on file with the author).

⁴⁷ See *supra* notes 26 and 45 and accompanying text.

⁴⁸ See INS, Office of the Commissioner, Memorandum, *Family Fairness: Guidelines for Voluntary Departure under 8 C.F.R. 242.5 for the Ineligible Spouses and Children of Legalized Aliens*, Feb. 2, 1990 (copy on file with the author).

⁴⁹ See President William J. Clinton, Memorandum for the Attorney General, *Measures Regarding Certain Liberians in the United States*, Sept. 28, 2000 (copy on file with the author).

the executive's discretion in interpreting and applying immigration law when congressional enactments are "silent or ambiguous" on specific issues.

Prosecutorial or Enforcement Discretion

The judicial and executive branches have repeatedly recognized that the determination as to whether to grant deferred action to an individual alien is a matter of prosecutorial or enforcement discretion.⁵⁰ Such discretion has generally been seen as an independent attribute of the executive branch, and does not arise from—or require—an express delegation of authority by Congress.⁵¹ Thus, the fact that Congress has not authorized the executive to grant deferred action to aliens in the circumstances contemplated here (i.e., unlawfully present aliens brought to the United States as children or whose children are U.S. citizens or LPRs) does not, in itself, make such a grant impermissible.⁵²

Prosecutorial discretion is generally seen as affording the executive wide latitude in determining when, against whom, how, and even whether to prosecute apparent violations of federal law.⁵³ However, the Constitution or federal statutes could potentially impose certain constraints upon this discretion, as discussed below (see "Are there constitutional or related constraints upon the executive's discretionary authority over immigration enforcement?" and "What other legal issues might be raised by the Administration's actions?").

Express Delegations of Statutory Authority

In other cases, Congress has expressly granted certain authority to the executive that the Obama Administration would appear to rely upon for specific actions. For example, the definition of *unauthorized alien* in INA §274A(h)(3) has historically been seen to give the executive the authority to grant employment authorization documents (EADs) to aliens who are not expressly authorized to work by the INA. Section 274A(h)(3)'s definition describes an unauthorized alien as an alien who is not "authorized to be ... employed ... by the Attorney General [currently, the

⁵⁰ See, e.g., *Hotel & Rest. Employees Union Local 25 v. Smith*, 846 F.2d 1499, 1510-11 (D.C. Cir. 1988); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1119 n.3 (9th Cir. 2001); *Johnson v. INS*, 962 F.2d 574, 579 (7th Cir. 1992); *Carmona Martinez v. Ashcroft*, 118 Fed. App'x 238, 239 (9th Cir. 2004); *Matter of Yauri*, 25 I. & N. Dec. 103 (BIA 2009); *Matter of Singh*, 21 I. & N. Dec. 427 (BIA 1996); *Matter of Luviano-Rodriguez*, 21 I. & N. Dec. 235 (BIA 1996); *Matter of Quintero*, 18 I. & N. Dec. 348 (BIA 1982); ICE Director John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, June 17, 2011, at 2-3; ICE Director John Morton, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, Mar. 2, 2011, at 3; ICE Director John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, June 17, 2011, at 2; ICE Principal Legal Advisor William J. Howard, *Prosecutorial Discretion*, Oct. 24, 2005, at 2; INS Commissioner Doris Meissner, *Exercising Prosecutorial Discretion*, Nov. 7, 2000, at 2. (Copies of all of these memoranda are on file with the author).

⁵¹ For further discussion as to the basis for the Executive's prosecutorial discretion, see the section titled "Prosecutorial Discretion Generally," in CRS Report R42924, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, by Kate M. Manuel and Todd Garvey.

⁵² The INA uses the phrase "deferred action" three times, but only in very specific contexts, none of which are relevant to DACA or the November 20, 2014, initiatives. See 8 U.S.C. §1151 note (addressing the extension of posthumous benefits to certain surviving spouses, children, and parents); INA §204(a)(1)(D)(i)(IV), 8 U.S.C. §1154(a)(1)(D)(i)(IV) ("Any [victim of domestic violence] described in subclause (III) and any derivative child of a petition described in clause (ii) is eligible for deferred action and work authorization."); INA §237(d)(2), 8 U.S.C. §1227(d)(2) (denial of a request for an administrative stay of removal does not preclude the alien from applying for deferred action).

⁵³ See generally U.S. Department of Justice, *United States Attorneys' Manual*, §9-27.110(B) (2002).

Secretary of Homeland Security].”⁵⁴ The immigration agencies have relied upon this definition in promulgating regulations that permit aliens granted deferred action to receive EADs upon showing “an economic necessity for employment.”⁵⁵

Other actions that would appear to involve express delegations of statutory authority include (but are not limited to) (1) paroling into the United States some inventors, researchers, and founders of start-up enterprises on public interest grounds (INA §212(d)(5));⁵⁶ (2) granting provisional waivers of the 3- and 10-year bars upon the admissibility of aliens who have accrued more than 180 days of unlawful presence in the United States (INA §212(a)(9)(B)(v)); and (3) permitting aliens with advanced degrees or “exceptional ability” to obtain an immigrant visa without a sponsoring employer if their admission is in the “national interest” (INA §203(b)(2)(B)).

Any exercise of delegated authority must be consistent with the terms of the delegation, as discussed below (see “What other legal issues might be raised by the Administration’s actions?”). Questions could also be raised about whether particular exercises of authority are consistent with historical practice, other provisions of the INA, or congressional intent.⁵⁷

Executive Discretion When Statutes Are “Silent or Ambiguous”

In yet other cases, the Obama Administration would appear to be relying upon the deference generally given to the executive in interpreting and applying statutes in taking certain actions. As the Supreme Court articulated in its 1984 decision in *Chevron U.S.A. v. Natural Resources Defense Council*, when “Congress has directly spoken to the issue, ... that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁵⁸ However, where a statute is “silent or ambiguous with respect to a specific issue,” courts will generally defer to an agency interpretation that is based on a “permissible construction

⁵⁴ INA §274A(h)(3), 8 U.S.C. §1324a(h)(3).

⁵⁵ 8 C.F.R. §274a.12(c)(14). Under these regulations, the “basic criteria” for establishing “economic necessity” are the federal poverty guidelines. See 8 C.F.R. §274a.12(e). When first promulgated in 1987, these regulations were challenged through the administrative process on the grounds that they exceeded the INS’s authority. See *INS, Employment Authorization; Classes of Aliens Eligible*, 52 Fed. Reg. 46092 (Dec. 4, 1987). Specifically, the challengers asserted that the statutory language referring to aliens “authorized to be ... employed by this chapter or by the Attorney General” did not give the Attorney General authority to grant work authorization “except to those aliens who have already been granted specific authorization by the Act.” *Id.* Had this argument prevailed, the authority of the INS and, later, DHS to grant work authorization to beneficiaries of deferred action would have been in doubt, because the INA does not expressly authorize the grant of EADs to such persons. However, the INS rejected this argument on the grounds that the

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

⁵⁶ It should be noted, however, that the determination as to whether to grant parole to individual aliens has sometimes been characterized as an act of prosecutorial discretion. See, e.g., *Assa’ad v. U.S. Attorney General*, 332 F.3d 1321, 1339 (11th Cir. 2003); *Matter of Artigas*, 23 I. & N. Dec. 99 (BIA 2001) (Filppu, J., dissenting).

⁵⁷ For further discussion of constraints based on historical precedent and other factors, see CRS Report R43782, *Executive Discretion as to Immigration: Legal Overview*, by Kate M. Manuel and Michael John Garcia.

⁵⁸ 467 U.S. 837, 842-43 (1984).

of the statute,”⁵⁹ on the grounds that the executive branch must fill any “gaps” explicitly or implicitly left by Congress in the course of administering congressional programs.⁶⁰

Among the gaps that Congress could be said to have left in the INA for the executive to fill are (1) what constitutes “extreme hardship” for purposes of the 3- and 10-year bars upon the admission of aliens who have accrued more than 180 days of unlawful presence in the United States; (2) the duration of any OPT for F-1 student visas holders; (3) what steps are to be taken to ensure that all immigrant visas available for issuance in a given year are used; and (4) what constitutes “specialized knowledge” for purposes of the L-1B visa program. The Obama Administration’s November 20, 2014, actions can be seen to address all of these “gaps,” as well as others not specifically noted here.

Any construction advanced by the executive must, however, constitute a “permissible” and “reasonable” interpretation of the underlying statute in order to be afforded deference by the courts, as previously noted. Also, the executive has no discretion in interpreting or applying the law where Congress has spoken to the precise question at issue.⁶¹

Are there constitutional or related constraints upon the executive’s discretionary authority over immigration enforcement?⁶²

The Constitution confers upon the President the responsibility and obligation to “take Care that the Law is faithfully executed.”⁶³ Some of the Obama Administration’s immigration actions—including the identification of particular categories of aliens as priorities for removal, and the expanded use of deferred action to afford certain unlawfully present aliens with temporary relief from removal—are primarily premised upon executive assertions of independent constitutional authority.⁶⁴ As previously noted, the executive branch is understood to have substantial

⁵⁹ *Id.* at 843.

⁶⁰ *See, e.g.,* Morton v. Ruiz, 415 U.S. 199, 231 (1974) (“The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”). The degree of deference afforded to particular executive branch interpretations can vary depending upon the facts and circumstances of the case, including whether the interpretation is a “formal” one adopted through notice-and-comment rulemaking or case-by-case adjudication. *See, e.g.,* Christensen v. Harris County, 529 U.S. 576, 587 (2000) (“Interpretations such as those in opinion letters - like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law - do not warrant *Chevron*-style deference.”). Instead, such “informal” interpretations may be afforded a lesser degree of deference that depends upon various factors including “the degree of the agency’s care, its consistency, formality, and relative expertness, and ... the persuasiveness of the agency’s position,” as well as the “writer’s thoroughness, logic, and expertise, its fit with prior interpretations, and any other source of weight.” *United States v. Mead Corp.*, 533 U.S. 218, 228, 235 (2001); *see also* *Skidmore v. Swift*, 323 U.S. 134 (1944).

⁶¹ *See infra* note 88 and accompanying text.

⁶² CRS Legislative Attorney Michael John Garcia authored this section of the report, and questions about it should be directed to him. For a more extensive analysis of the parameters of executive discretion in the enforcement federal law, see CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by Todd Garvey.

⁶³ U.S. Const., Art. II, §3.

⁶⁴ DOJ, Office of Legal Counsel, *The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, Nov. 20, 2014 (copy on file with the author) (characterizing components of the Administration’s immigration initiative primarily as an exercise of the Executive’s independent discretionary authority). It should be noted, however, that certain actions taken with respect to persons granted deferred action are based on express statutory authority, as previously discussed. *See* “What is the legal authority for the Administration’s actions?”

discretionary authority to determine when and whether to pursue sanctions against apparent violators of federal law, an authority generally referred to as prosecutorial or enforcement discretion.⁶⁵ Prosecutorial discretion is most closely associated with executive enforcement of federal criminal law.⁶⁶ But the concept of prosecutorial or enforcement discretion is often applicable in civil contexts as well, including with respect to immigration officers' decisions regarding whether to seek the removal of aliens who have entered or remained in the United States in violation of federal immigration law.⁶⁷

A decision not to pursue sanctions against a particular individual is generally understood to be largely shielded from judicial review.⁶⁸ Nonetheless, there are recognized limitations to the scope of this discretionary authority.⁶⁹ As an initial matter, a general enforcement policy that is promulgated by an agency may not enjoy the same degree of immunity from judicial review as individual determinations not to pursue sanctions in a particular case.⁷⁰ Moreover, courts have recognized that agency action must be consistent with congressional objectives underlying the statutory scheme it administers. When adopting a general enforcement policy, an agency may not rely on factors "which Congress has not intended it to consider"⁷¹ and substitute its own policy judgment for that which has been made by Congress. In particular, a general policy of non-

⁶⁵ See generally DOJ, *United States Attorneys' Manual*, §9-27.110(B) (2002).

⁶⁶ See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."); *U.S. Attorneys' Manual*, *supra* note 65 (discussing prosecutorial discretion in the criminal context and citing numerous court rulings recognizing the Executive as possessing broad discretionary authority in deciding whether to pursue criminal charges).

⁶⁷ See *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) ("A principal feature of the removal system is the broad discretion entrusted to immigration officials."); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 490 (1999) (finding that the various prudential concerns that prompt deference to the executive branch's determinations as to whether to prosecute criminal offenses are "greatly magnified in the deportation context"). See also *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (noting that immigration is a "field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program").

⁶⁸ See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (finding that agency's non-enforcement decision was committed to agency discretion and not reviewable under the Administrative Procedure Act, and observing that "This Court has recognized on several occasions over many years 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.... This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement."). A court's determination that agency action is not subject to judicial review does not necessarily constitute an endorsement of the lawfulness of executive action, but may simply be due to the court finding that it lacks a manageable standard or is otherwise ill-equipped to assess the propriety of the action. See CRS Report RL30352, *War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution*, by Michael John Garcia (discussing instances where courts have dismissed on procedural grounds legal challenges to military action conducted without statutory authorization).

⁶⁹ See, e.g., *Heckler*, 470 U.S. at 831-833 (identifying factors informing the scope of enforcement discretion available to the Executive); *Smith v. Meese*, 821 F.2d 1484, 1492 n.4 (11th Cir. 1987) ("[T]he exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review ...") (*quoting* *Nader v. Saxbe*, 497 F.2d 676, 679 n.19 (D.C. Cir.1974)); *OLC Opinion on Executive Immigration Action*, *supra* note 64, at 4 ("Immigration officials' discretion in enforcing the laws is not, however, unlimited. Limits on enforcement discretion are both implicit in, and fundamental to, the Constitution's allocation of governmental powers between the two political branches.").

⁷⁰ See *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994) (distinguishing the non-reviewability of a "single-shot non-enforcement decision" from a "general enforcement policy," which may be reviewable in some contexts).

⁷¹ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

enforcement by an agency could potentially be reviewable by a court and found to be an impermissible “abdication” of the agency’s statutory responsibilities.⁷²

Whether the Obama Administration’s November deferred action initiatives constitute a permissible exercise of enforcement discretion will be the subject of heated debate. This debate will likely center upon the Administration’s identification of large numbers of unlawfully present aliens as non-priorities for removal, as well as the expansion of its earlier deferred action initiative to additional aliens.⁷³ On one hand, it could be argued that aspects of these initiatives functionally constitute a blanket policy of non-enforcement of federal immigration statutes, and that this non-enforcement policy represents an abdication of DHS’s statutory responsibilities to enforce federal immigration law.⁷⁴ The INA contains several grounds of removal which are potentially applicable to aliens who may receive deferred action under the Administration’s initiative.⁷⁵ Moreover, while federal statute grants immigration authorities the power to provide some unlawfully present aliens with relief from removal, these statute-based forms of relief are limited in scope.⁷⁶ It could be argued that the Administration’s decision to focus enforcement resources almost exclusively on certain categories of removable aliens, while declining to pursue the removal of a substantial portion of the unauthorized population which does not fall within those categories, constitutes an abdication of its responsibilities under the INA. It might also be argued that, by enabling a sizeable portion of the unlawfully present population to request deferred action (a form of relief that is not expressly authorized by federal statute, except in narrow circumstances⁷⁷) and work authorization, the executive branch is impermissibly substituting its own judgment as to whom should be legally allowed to remain in the United States for that of Congress.

⁷² See *Heckler*, 470 U.S. at 833 n.4 (distinguishing agency non-enforcement decisions which are presumed to be shielded from judicial review from those where “the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities,” and suggesting that judicial review of the latter type of actions could be available under the Administrative Procedure Act because such a decision had not been committed to agency discretion) (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).

⁷³ See *OLC Opinion on Executive Immigration Action*, *supra* note 64, at 30 (Administration officials estimating that nearly 4 million unlawfully present alien parents of U.S. citizens or LPRs could receive deferred action under the new initiative); Alicia Patterson, *Graphic: What Is President Obama’s Immigration Plan?*, N.Y. TIMES, available at http://www.nytimes.com/interactive/2014/11/20/us/2014-11-20-immigration.html?_r=0 (last accessed Nov. 23, 2014) (citing 2012 data from the Migration Policy Institute, and estimating that 4.5 million unlawfully present aliens could be eligible for deferred action under the Administration’s new initiative, in addition to 1.2 million persons already eligible to obtain deferred action under DACA).

⁷⁴ See, e.g., *Crane v. Napolitano*, Amended Complaint, No. 3:12-cv-03247-O, filed Oct. 10, 2012 (N.D. Tex.) (lawsuit challenging DACA and arguing that the initiative is contrary to certain provisions of the INA and the Executive’s constitutional responsibility to that the laws are faithfully executed); *Dream On*, *supra* note 4 (arguing that the DACA initiative is inconsistent with the Executive’s constitutional duties, and that the President may not purposefully refrain from enforcing federal statutes against broad categories of persons “in ordinary, noncritical circumstances”).

⁷⁵ INA §§212(a)(6)(A), 8 U.S.C. §1182(a)(6)(A) (aliens present without admission or parole are generally removable; INA §237(a)(1), 8 U.S.C. §§ 1182(a)(6)(A), 1227(a)(1) (aliens who obtained admission through fraud or misrepresentation, or who overstay or otherwise violate the terms of a nonimmigrant visa, are removable).

⁷⁶ For example, under INA §240A, certain removable aliens may obtain cancellation of removal and adjust immigration status if their removal would cause “exceptional and extremely unusual hardship” to certain family members who are U.S. citizens or LPRs. No more than 4,000 aliens may be granted such relief in any fiscal year. 8 U.S.C. §1229b. Some inadmissibility grounds may be waived on account of “hardship” caused to immediate family members who are U.S. citizens or LPRs. See generally CRS Report R43782, *Executive Discretion as to Immigration: Legal Overview*, by Kate M. Manuel and Michael John Garcia, at “Waivers of Grounds of Inadmissibility.”

⁷⁷ See *supra* note 52.

On the other hand, it could be argued that resource constraints preclude DHS from pursuing the removal of all unlawfully present aliens in the United States,⁷⁸ and that the decision to focus resources primarily upon the removal of those who have engaged in criminal activity, pose a threat to public safety, or recently entered the United States is consistent with applicable statutory enactments.⁷⁹ Additionally, while the Administration's initiative would grant some unlawfully present aliens legal permission to remain in the United States for a specified period, it would not provide them with legal immigration status, or enable them to acquire benefits they are statutorily barred from receiving.⁸⁰ The executive might further dispute arguments that the initiative constitutes a blanket policy of non-enforcement, and note that immigration officers retain ultimate discretion to grant deferred action on a case-by case basis, and that they are not barred from seeking the removal of unlawfully present aliens who have not been identified by DHS as enforcement priorities.⁸¹ It might also be argued that, particularly in light of the long-standing executive practice of granting deferred action and other forms of relief from removal, that Congress has implicitly signaled its approval or acquiescence to the executive's use of these forms of administrative relief, and the INA should not be interpreted to preclude the executive from granting such relief in certain instances.⁸² Accordingly, it could be argued that the executive branch's action, while affecting a substantial number of unlawfully present aliens, does not constitute a legally impermissible abdication of its statutory duties.

What other legal issues might be raised by the Administration's actions?

In some cases, specific actions taken by the Obama Administration could potentially be seen to run afoul of the provisions of the INA, in which case the executive action could be found to be impermissible (provided a plaintiff with standing to challenge the executive action were found (see "Who has standing to challenge the Administration's initiatives?")).⁸³ For example, one federal district court recently found that DACA is contrary to three purportedly "interlocking

⁷⁸ See *OLC Opinion on Executive Immigration Action*, *supra* note 64, at 1, 9 (noting that DHS claims to have the resources to remove fewer than 400,000 unlawfully present aliens—out of a population of approximately 11 million—from the United States each year).

⁷⁹ *Id.* at 10-11 (characterizing DHS's announced enforcement priorities as consistent with various provisions of the INA, as well as with recent funding measures, including a provision of the Department of Homeland Security Appropriations Act, 2014, which directs DHS to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime.").

⁸⁰ See *supra* "What is the legal authority for the Administration's actions?" (discussing, among other things, DHS's statutory authority to grant work authorization to aliens present in the United States without legal immigration status).

⁸¹ The memorandum outlining the expanded deferred action initiative expressly states that, although "immigration officers will be provided with specific eligibility criteria for deferred action, ... the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis." *Exercising Prosecutorial Discretion*, *supra* note 9, at 5. Similarly, the memorandum outlining DHS's enforcement priorities does not prohibit enforcement action against aliens not categorized as priorities for removal. *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, *supra* note 18, at 4 ("Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities herein.").

⁸² See *OLC Opinion on Executive Immigration Action*, *supra* note 64, at 12-20 (discussing historical use of deferred action and claiming that "Congress has long been aware of the practice of granting deferred action, including in its categorical variety, and of its salient features; and it has never acted to disapprove or limit the practice"). See also *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) ("Past practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent....'") (*quoting* *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)).

⁸³ See *supra* notes 58-60 and accompanying text.

provisions” in INA §235 which some assert require that unlawfully present aliens be placed in removal proceedings.⁸⁴ 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.⁸⁵

Thus, the district court concluded that DACA runs afoul of the INA because many of the aliens granted deferred action through DACA had never been placed in removal proceedings as required, in the court’s view, by INA §235. (This same court, however, later ruled that it lacked jurisdiction over the case.⁸⁶ That decision has been appealed, and it is presently unclear whether and how the court’s earlier decision construing INA §235 could be seen to restrain any future grants of deferred action.⁸⁷)

Similar statutory constraints could potentially be also be implicated in other Obama Administration actions, particularly as executive agencies take action to clarify the meaning and application of certain statutory language. For example, INA §212(a)(9)(B)(v) would appear to preclude DHS—in issuing guidance regarding waivers of the 3- and 10-year bars upon the admission of aliens who have been unlawfully present in the United States for more than 180 days—from granting waivers based on mere “hardship,” as opposed to “extreme hardship,” or from considering hardship to U.S. citizen or LPR children, as opposed to U.S. citizen or LPR spouses or parents. This is because INA §212(a)(9)(B)(v) expressly refers to waivers

⁸⁴ Crane v. Napolitano, No. 3:12-cv-03247-O, 2013 U.S. Dist. LEXIS 57788, *27-*39 (N.D. Tex., Apr. 23, 2013). Others, however, have argued that this interpretation misreads Section 235 and misunderstands the legislative history of these provisions of the INA. See *A Defense of Immigration-Enforcement Discretion*, supra note 5. DHS has also attempted to counter this view by noting the Executive has historically not construed Section 235 in this way. Both DOJ/DHS and those who claim it lacks discretion construe the first two provisions of Section 235—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/DHS have differed from proponents of the view that DHS lacks discretion in that DOJ/DHS have construed the third provision—regarding detention for removal proceedings—as applying only to arriving aliens, not aliens who are present without inspection. See generally 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)); 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). This difference appears to have arisen, in part, because the agencies have emphasized the phrase “aliens seeking admission” in the third provision, and reasoned that only arriving aliens at ports-of-entry can be said to seek admission.

⁸⁵ See INA §235(a)(1), (a)(3), & (b)(2)(A), 8 U.S.C. §1225(a)(1), (a)(3), & (b)(2)(A). *Shall* has been construed to indicate mandatory agency action in some cases. 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.”). However, in other cases, agencies have been seen to have discretion in determining whether to enforce particular statutes that use the word *shall*. See, e.g., Heckler, 470 U.S. at 835 (describing a statute which stated that certain food, drugs, or cosmetics “shall be liable to be proceeded against” as “framed in the permissive”).

⁸⁶ Crane v. Napolitano, No. 3:12-cv-03247-O, 2013 U.S. Dist. LEXIS 187005 (July 31, 2013).

⁸⁷ Moreover, even if the district court’s interpretation were adopted, an argument could be made that the provisions of the INA discussed by the district court require only that arriving aliens be placed in removal proceedings, not that removal proceedings be pursued to a decision on the merits or until the alien is removed, if s/he is found removable.

in the case of an immigrant who is the *spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence*, if it is established ... that the refusal of admission to such [an] alien would result in extreme hardship to the *citizen or lawfully resident spouse or parent* of such alien.⁸⁸

Does granting deferred action to unlawfully present aliens legalize their status?

A grant of deferred action does not constitute “legalization,” as that term is generally understood. In the immigration context, the term *legalization* is widely used to describe a process whereby persons who are unlawfully present are able to acquire legal status, typically as LPRs.⁸⁹ LPRs may generally acquire U.S. citizenship after a period of time if certain conditions are met.⁹⁰

Aliens granted deferred action are generally seen as “lawfully present” for purposes of federal law.⁹¹ This means that they do not acquire additional unlawful presence for application of the 3- and 10-year bars on the admissibility of aliens who have been unlawfully present in the United States for more than 180 days. Aliens granted deferred action may also be eligible for certain things—like the issuance of driver’s licenses—that are made available, pursuant to federal, state, or local law, to persons who are “lawfully present” (or “legally residing”) in the United States.⁹² (See “Will aliens granted deferred action be eligible for public benefits?”).

However, lawful presence is not the same as lawful status, and aliens granted deferred action lack lawful status.⁹³ As such, a grant of deferred action, in itself, will not result in an alien obtaining LPR status, a “green card,” or citizenship, or the ability to sponsor family members for immigration benefits. Aliens granted deferred action could potentially have their status legalized by Congress in the future, though, as happened with earlier “groups” of aliens granted temporary relief from removal.⁹⁴

Will aliens granted deferred action be eligible for public benefits?

As a general matter, aliens granted deferred action are not eligible for federal, state, or local public benefits because of the provisions of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, as amended.⁹⁵ PRWORA established a definition of

⁸⁸ 8 U.S.C. §1182(a)(9)(B)(v) (emphases added).

⁸⁹ Cf. Merriam-Webster Online, *Legalize*, available at <http://www.merriam-webster.com/dictionary/legalize> (last accessed: Nov. 22, 2014).

⁹⁰ See INA §311, 8 U.S.C. §1422.

⁹¹ See, e.g., *Frequently Asked Questions*, *supra* note 13 (“An individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present.”).

⁹² See generally CRS Report R43452, *Unlawfully Present Aliens, Driver’s Licenses, and Other State-Issued ID: Select Legal Issues*, by Kate M. Manuel and Michael John Garcia; CRS Legal Sidebar WSLG1057, *9th Circuit Decision Enables DACA Beneficiaries—and Other Aliens Granted Deferred Action—to Get Arizona Driver’s Licenses*, by Kate M. Manuel.

⁹³ See *Frequently Asked Questions*, *supra* note 13 (“[D]eferred action does not confer lawful status ...”).

⁹⁴ See, e.g., Cuban Refugees Adjustment of Status Act, P.L.89-732, 80 Stat. 1161 (Nov. 2, 1966) (providing for certain Cuban parolees to become LPRs); Hungarian Refugees Relief Act, P.L. 85-559, 72 Stat. 419 (July 25, 1958) (similar).

⁹⁵ P.L. 104-193, tit. IV, §§401-435, 110 Stat. 2261-2276 (Aug. 22, 1996) (generally codified, as amended, in 8 U.S.C. §§1601-1646). For more on PRWORA, see generally CRS Report R43221, *Noncitizen Eligibility for Public Benefits*: (continued...)

qualified alien that does not include aliens granted deferred action,⁹⁶ and generally barred aliens who are not qualified aliens from receiving federal, state, and local public benefits.⁹⁷

Nonetheless, aliens granted deferred action could potentially be eligible for certain benefits—or things sometimes perceived as benefits—because aliens granted deferred action are seen as “lawfully present” (or “legally residing”) in the United States. This is, in part, because one Congress cannot bind future Congresses.⁹⁸ Thus, despite PRWORA’s restrictions upon the receipt of public benefits by aliens who are not included within its definition of “qualified aliens,” subsequent Congresses have enacted legislation that provides for aliens’ receipt of public benefits that is inconsistent with—and does not use the language of—PRWORA. For example, Section 214 of the Children’s Health Insurance Program Reauthorization Act of 2009 (CHIPRA) gives states the option to provide Medicaid and Children’s Health Insurance Program (CHIP) coverage to otherwise eligible children and pregnant women “who are lawfully residing in the United States,”⁹⁹ a phrase which has been taken to include aliens granted deferred action.¹⁰⁰ The Patient Protection and Affordable Care Act (ACA) of 2010 similarly permits persons who are “lawfully present” to participate in certain health care programs established under the act.¹⁰¹ However, while *lawfully present* for purposes of ACA has generally been construed in the same way as *lawfully residing* for purposes of CHIPRA,¹⁰² those granted deferred action through DACA have been deemed ineligible for certain benefits under ACA.¹⁰³ (As of the date of this report, the Administration does not appear to have formally addressed how aliens granted deferred action through the November initiatives will be treated for purposes of ACA.)

Another reason why aliens granted deferred action may be eligible for state and local benefits, in particular, is that PRWORA expressly contemplates states enacting legislation, subsequent to PRWORA’s enactment, that “affirmatively provides” for “unlawfully present aliens” to receive

(...continued)

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⁹⁶ See 8 U.S.C. §1641(b)(1)-(7) (defining *qualified alien* to encompass: LPRs; aliens granted asylum; refugees; aliens paroled into the United States for a period of at least one year; aliens whose deportation is being withheld; aliens granted conditional entry; and Cuban and Haitian entrants). Certain aliens who have been subject to domestic violence are also treated as qualified aliens for purposes of PRWORA. See 8 U.S.C. §1641(c).

⁹⁷ See 8 U.S.C. §1611(a) (federal public benefits); 8 U.S.C. §1621(a) (state and local public benefits).

⁹⁸ See *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (quoting, in support of the proposition “that one legislature may not bind the legislative authority of its successors,” 1 W. Blackstone, *COMMENTARIES ON THE LAWS OF ENGLAND* 90 (1765) (“Acts of parliament derogatory from the power of subsequent parliaments bind not.... Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if it’s [sic] ordinances could bind the present parliament.”)).

⁹⁹ P.L. 111-3, §214(a), 123 Stat. 56 (Feb. 4, 2009) (codified at 42 U.S.C. §1396b(v)(4)(A)-(B)).

¹⁰⁰ Centers for Medicare & Medicaid Services, *Medicaid and CHIP Coverage of “Lawfully Residing” Children and Pregnant Women*, July 1, 2010 (copy on file with the author).

¹⁰¹ See, e.g., P.L. 111-148, §1101(d)(1), 124 Stat. 142 (Mar. 23, 2010) (temporary high risk health insurance pools for uninsured individuals with preexisting conditions); *id.*, at §1312(f)(3), 124 Stat. 184 (health care exchanges).

¹⁰² See, e.g., Department of the Treasury, Health Insurance Premium Tax Credit: Final Regulations, 77 Fed. Reg. 30377, 30387 (May 23, 2012) (“Lawfully present has the same meaning as in 45 CFR 155.20.”). Section 155.20 of Title 45, in turn, defines *lawfully present* as qualified aliens; nonimmigrants who have not violated the terms of their status; certain aliens paroled into the United States; and aliens granted deferred action or deferred enforced departure, among others.

¹⁰³ See, e.g., Department of Health & Human Servs., Center for Medicaid & CHIP Servs., *Individuals with Deferred Action for Childhood Arrivals*, Aug. 28, 2012 (copy on file with the author).

state and local public benefits.¹⁰⁴ Numerous states have exercised this authority to enact legislation that makes at least some state or local public benefits available to either unlawfully present aliens or aliens who are not qualified aliens for purposes of PRWORA.¹⁰⁵

In addition, it is important to note that PRWORA's definition of *public benefit* is limited to

(A) any grant, contract, loan, professional license, or commercial license provided by [a government] agency ... or by appropriated funds ...; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by [a government] agency ... or by appropriated funds.¹⁰⁶

Given this definition, PRWORA has not been seen as barring the provision of certain benefits or services that some might characterize as public benefits—such as driver's licenses¹⁰⁷ or admission to public institutions of higher education¹⁰⁸—but that are generally not seen as included within the definition of “public benefits” given by PRWORA.

Who has standing to challenge the Administration's initiatives?

The feasibility of legal challenges to the Obama Administration's actions will depend, in part, upon which specific actions are challenged and the legal bases for the challenge. However, regardless of the specifics of individual cases, standing requirements seem likely to pose a significant barrier for any legal challenge.

Standing requirements are concerned with who is a proper party to seek judicial relief from a federal court. They derive from Article III of the Constitution, which confines the jurisdiction of federal courts to actual “Cases” and “Controversies.”¹⁰⁹ The case-or-controversy requirement has long been construed to restrict Article III courts to the adjudication of real, live disputes involving parties who have “a personal stake in the outcome of the controversy.”¹¹⁰ Parties seeking judicial relief from an Article III court must generally show three things in order to demonstrate standing: (1) they have suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) the injury is likely to be redressed by a favorable decision.¹¹¹

¹⁰⁴ 8 U.S.C. §1621(d).

¹⁰⁵ See, e.g., *Pimentel v. Dreyfus*, 670 F.3d 1096, 1101 (9th Cir. 2012) (Washington statute extending food stamp benefits to aliens who lost their eligibility for federal food stamps due to PRWORA); *Ehrlich v. Perez*, 908 A.2d 1220 (Md. 2006) (Maryland statute providing comprehensive medical care to qualified aliens who had not been present in the United States in that status for the requisite period of time to receive federal means-tested public benefits).

¹⁰⁶ U.S.C. §1611(c)(1) (federal public benefits); 8 U.S.C. §1621(c)(1) (state and local public benefits).

¹⁰⁷ See sources cited *supra* note 92.

¹⁰⁸ See CRS Report R43447, *Unlawfully Present Aliens, Higher Education, In-State Tuition, and Financial Aid: Legal Analysis*, by Kate M. Manuel.

¹⁰⁹ U.S. Const., art. III, §2, cl. 1.

¹¹⁰ *Baker v. Carr*, 369 U.S. 186, 204 (1962).

¹¹¹ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Additional requirements—involving so-called “prudential standing” could also present issues. These requirements are reflected in the rule that plaintiffs must be “within the ‘zone of interests to be protected or regulated by the statute or constitutional guarantee’” that they allege (continued...)

"Taxpayer Standing"

Those whose sole injury is the government's alleged failure to follow the law are generally found to lack standing because this injury is not personal and particularized.¹¹² This is so regardless of whether the plaintiff alleges that his/her "tax dollars" can be seen as helping to fund the government's allegedly improper action or inaction.

Government Personnel

Government officers and employees, who have taken an oath to uphold the law, are generally 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.¹¹³ Instead, they must allege some separate and concrete adverse consequence that would flow from violating their oath, and courts have reached differing conclusions as to whether the possibility of being disciplined for obeying—or refusing to obey—allegedly unlawful orders suffices for purposes of standing, or whether such injury is "entirely speculative" and, therefore, lacking imminence.¹¹⁴ In the case of the ICE officers who challenged DACA, the reviewing district court found that the plaintiffs had standing because of the possibility of such discipline. However, because such discipline constitutes an adverse employment action, the same court subsequently found that the plaintiffs' case is within the jurisdiction of the Merit Systems Protection Board (MSPB), not the court's.¹¹⁵ (This decision has been appealed to the U.S. Court of Appeals for the Fifth Circuit, and it remains to be seen whether the district court's view as to jurisdiction is upheld.)

Members of Congress

Individual Members of Congress are generally seen to lack standing to challenge executive 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/her congressional seat, or an

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to have been violated in order to be found to have standing. *See, e.g.,* Valley Forge Christian College v. Am. United for Separation of Church and State, 454 U.S. 464 (1982); *Assoc. of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

¹¹² *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.")

¹¹³ *See, e.g.,* *Donelon v. La. Div. of Admin. Law ex rel. Wise*, 522 F.3d 564 (5th 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 (5th 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).

¹¹⁴ *Compare* *Drake v. Obama*, 664 F.3d 774, 780 (9th 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)) *with* *Crane*, 920 F. Supp. 2d at 738-40 (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).

¹¹⁵ *Crane*, 2013 U.S. Dist. LEXIS 187005.

“institutional injury” that cannot be addressed by an extant legislative remedy.¹¹⁶ It is presently unclear what might constitute the requisite “institutional injury,” as discussed in CRS Report R43712, *Article III Standing and Congressional Suits Against the Executive Branch*, by Alissa M. Dolan.

State Governments

In several prior cases, states sought to challenge the federal government’s alleged failure to enforce immigration law on the grounds that this “failure” imposes costs upon the states, which must provide public benefits and services to aliens who, under this argument, would not have been present within the state had the federal government enforced the INA.¹¹⁷ Some of these challenges have been rejected on standing grounds.¹¹⁸ In other cases, the court either “presumed” or did not address the standing requirements,¹¹⁹ but found that states’ challenges presented a nonjusticiable political question.¹²⁰ (The political question doctrine embodies the notion that courts should refrain from deciding questions that the Constitution has entrusted to other branches of government.¹²¹)

Economic Competitors

An argument has recently been advanced that U.S. workers whose wages or working conditions are adversely affected by increased competition from aliens permitted to work in the United States could show “competitor standing” and, thus, challenge the Obama Administration’s actions.¹²² This argument is, in part, based on a June 2014 decision wherein the U.S. Court of Appeals for the District of Columbia Circuit found that U.S. persons working as herders had standing to challenge the DOL’s decision to issue certain guidance as to the wages and hours of foreign herders without notice-and-comment rulemaking because DOL’s action caused “increased

¹¹⁶ 521 U.S. 811 (1997).

¹¹⁷ See, e.g., *Texas v. United States*, 106 F.3d 661, 664 (5th Cir. 1997) (“The [plaintiffs’] amended complaint alleges that hundreds of thousands of undocumented immigrants live in Texas as a direct consequence of federal immigration policy. The State alleges that federal defendants have violated the Constitution and immigration laws by failing to reimburse Texas for its educational, medical, and criminal justice expenditures on undocumented aliens. The State seeks an order enjoining federal defendants from failing to pay for these alleged financial consequences of federal immigration policy and requiring prospective payment as well as restitution for the State’s relevant expenditures since 1988. These expenditures are estimated at \$1.34 billion for 1993 alone.”). Other states also made similar claims in the mid-1990s. See *Arizona v. United States*, 104 F.3d 1095 (9th Cir. 1997); *California v. United States*, 104 F.3d 1086 (9th Cir. 1997); *New Jersey v. United States*, 91 F.3d 463 (3d Cir. 1996); *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996); *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995), cert. denied, 517 U.S. 1188 (1996).

¹¹⁸ See, e.g., *Texas*, 106 F.3d at 664 (noting that the district court had found the plaintiffs lacked standing); *Crane*, 920 F. Supp. 2d at 745-46 (finding that Mississippi’s “asserted fiscal injury is purely speculative because there is no concrete evidence that the costs associated with the presence of illegal aliens in the state of Mississippi have increased or will increase as a result of the Directive or the Morton Memorandum”).

¹¹⁹ See, e.g., *Texas*, 106 F.3d at 664 n.2 (“For purposes of today’s disposition we assume, without deciding, that the plaintiffs have standing.”); *Florida*, 69 F.3d at 1096 (appellate court noting that the district court did not address the standing issue, and that the appellate court would “suppose” the state has standing to raise its claims).

¹²⁰ See, e.g., *Texas*, 106 F.3d at 665; *New Jersey*, 91 F.3d at 469; *Padavan*, 82 F.3d at 27-28; *Chiles*, 69 F.3d at 1097.

¹²¹ See, e.g., *Baker v. Carr*, 369 U.S. 186, 217 (1962) (“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it, [among other things].”).

¹²² See, e.g., Josh Gerstein, *White House Readies Immigration Legal Defense*, POLITICO, Nov. 19, 2014, available at <http://www.politico.com/story/2014/11/barack-obama-executive-order-immigration-113051.html>.

competition for jobs in their industry.”¹²³ However, this case could potentially be distinguished from a challenge to the Obama Administration's deferred actions, in particular, because the INA expressly requires the executive branch to take certain steps to protect U.S. workers from foreign competition when issuing certain types of nonimmigrant visas, like those at issue in the June decision.¹²⁴ There do not appear to be any such requirements as to the executive's determination to issue employment authorization documents to aliens who do not hold employment-based visas.¹²⁵

Is there historical precedent for the Administration's actions?

Competing arguments have been made as to whether there is historical precedent for the Obama Administration's actions, particularly in granting deferred action to certain aliens brought to the United States as children and to the parents of U.S. citizen or LPR children.¹²⁶ Such arguments are shaped, in part, by which historical actions are viewed as analogous to the current ones.

The executive has historically exercised its prosecutorial or enforcement discretion, delegated discretion, and/or discretion in interpreting and applying statutes to provide certain relief from removal to individual aliens who share certain characteristics and could, thus, be said to form a group or category.¹²⁷ At different times, such relief has been made available under the rubric of parole (or refugee parole), extended voluntary departure (EVD), indefinite voluntary departure (IVD), deferred enforced departure (DED), temporary protected status (TPS), and deferred action. However, the shared name given to such actions can mask important differences in the legal basis for particular grants of discretion, among other things. For example, not all grants of parole to aliens in the 1960s should be seen as exercises of prosecutorial or enforcement discretion since Congress enacted legislation in 1960 that temporarily provided the executive with express statutory authority to parole “refugees” into the United States.¹²⁸ Likewise, in some cases,

¹²³ *Mendoza v. Perez*, 754 F.3d 1002, 1011 (D.C. Cir. 2014), *rehearing en banc denied*, 2014 U.S. App. LEXIS 15437 (Aug. 11, 2014). *See also* *Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.3d 798 (D.C. Cir. 1985) (finding that plaintiffs had standing where they alleged three instances wherein aliens were admitted under B-1 visas (for temporary business visitors) to “perform work of which the union members are said to be capable”).

¹²⁴ *See generally* CRS Report R43223, *The Framework for Foreign Workers' Labor Protections Under Federal Law*, by Margaret Mikyung Lee and Jon O. Shimabukuro.

¹²⁵ Thus, the current situation could potentially be said to resemble earlier litigation in which the plaintiffs alleged improper competition from foreign workers, but were found to lack standing to challenge executive actions not involving employment-based visas whose issuance involves protections for U.S. workers. *See, e.g.,* *Programmers Guild v. Chertoff*, 338 Fed. App'x 239 (3d Cir. 2009) (finding that the plaintiffs lacked standing to challenge the 17-month extension of OPT because nothing in the INA conditioned the entry of aliens into the United States on an F-1 visa “on noninterference with domestic labor conditions”), *cert. denied sub nom. Guild v. Napolitano*, 559 U.S. 1067 (2010); *Fed. for Am. Immigr. Reform, Inc. v. Reno*, 93 F.3d 897, 899 (D.C. Cir. 1996) (finding that the plaintiffs lacked standing to challenge the Executive's paroling of Cuban nationals into the United States because the INA imposes no employment-related restrictions upon the parole of aliens into the United States).

¹²⁶ *Compare* Drew Desilver, *Executive Actions on Immigration Have a Long History*, Pew Research Center, Nov. 21, 2014, available at <http://www.pewresearch.org/fact-tank/2014/11/21/executive-actions-on-immigration-have-long-history/> with David Frum, *Reagan and Bush Offer No Precedent for Obama's Amnesty Order*, THE ATLANTIC, Nov. 18, 2014, available at <http://www.theatlantic.com/politics/archive/2014/11/the-weak-argument-defending-executive-amnesty/382906/>.

¹²⁷ *See* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 675 (2004) (prosecutorial discretion not extending to “entire categories” of aliens); *Dream On*, *supra* note 4, at 846 (similar).

¹²⁸ *See* Refugee Resettlement Act of 1960, P.L. 86-648, §1, 74 Stat. 504 (July 14, 1960) (providing that, “under the terms of section 212(d)(5) of the Immigration and Nationality Act[,] the Attorney General may parole into the United States, pursuant to such regulations as he may prescribe, an alien refugee-escapee,” subject to certain conditions).

Congress has expressly adopted legislation encouraging the executive to exercise particular forms of prosecutorial or enforcement discretion in certain cases, which could potentially be said to indicate congressional “approval” of the executive’s exercise of this authority.¹²⁹

The temporary relief from removal granted to unlawfully present aliens that some have asserted most closely resembles the Obama Administration’s deferred action initiatives¹³⁰—particularly in terms of the percentage of the unauthorized alien population affected—are the so-called “Family Fairness” initiatives of 1987 and 1990. In those cases, the Reagan and George H.W. Bush Administrations, respectively, granted indefinite voluntary departure (IVD) and employment authorization to certain immediate relatives of aliens who had legalized their status pursuant to IRCA.¹³¹ (These relatives were themselves ineligible for legalization under IRCA for various reasons.) The Obama Administration’s 2014 deferred action initiatives can be likened to the Family Fairness initiatives in that they involve the granting of temporary relief from removal and work authorization to certain unlawfully present aliens based, in part, on humanitarian factors. However, certain differences could also be noted between the current and earlier initiatives, including that (1) the Reagan and Bush Administrations did not establish a centralized process whereby aliens could apply for relief from removal, instead permitting regional officials to grant relief; (2) some aliens who were denied relief through the Family Fairness initiatives were reportedly placed in removal proceedings,¹³² something that has not been reported with DACA;¹³³ and (3) the Family Fairness initiatives were preceded (and followed) by the enactment of legislation legalizing certain unlawfully present aliens, whereas Congress has enacted no such legislation here.¹³⁴ How much weight is given to these similarities or dissimilarities may ultimately depend upon one’s views as to the permissibility and/or desirability of the current initiatives.

¹²⁹ See, e.g., Department of State Authorization Act, FY1984-1985, P.L. 98-164, §1012, 97 Stat. 1062 (Nov. 22, 1983) (expressing the “sense of the Congress” that the Executive ought to consider persons from El Salvador for EVD).

¹³⁰ But see Glenn Kessler, *Obama’s Claim that George H.W. Bush Gave Relief to “40 percent” of Undocumented Immigrants*, Wash. Post, Nov. 24, 2014, available at <http://www.washingtonpost.com/blogs/fact-checker/wp/2014/11/24/did-george-h-w-bush-really-shield-1-5-million-illegal-immigrants-nope/>.

¹³¹ See 1990 Family Fairness memorandum, *supra* note 48; INS, Office of the Commissioner, Family Fairness: Guidelines for Voluntary Departures under 8 C.F.R. 242.5 for the Ineligible Spouses and Children of Legalized Aliens, Nov. 1987 (copy on file with the author).

¹³² See, e.g., IMMIGRATION REFORM AND CONTROL ACT OF 1986 OVERSIGHT: HEARINGS BEFORE THE SUBCOMMITTEE ON IMMIGRATION, REFUGEES, AND INTERNATIONAL LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, 101ST CONG., 1ST SESS., May 10 & 17, 1989, at 48 (noting that some spouses and children of legalized aliens who applied for relief were “issued Orders to Show Cause ..., which initiate deportation proceedings”).

¹³³ DHS has left open the possibility that aliens who apply, but are ineligible for, relief through DACA could be subject to immigration enforcement actions. See *Frequently Asked Questions*, *supra* note 13 (“Information provided in this request is protected from disclosure ... for the purpose of immigration enforcement proceedings unless the requestor meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria set forth in USCIS’ Notice to Appear guidance.”) However, it is unclear whether any such actions have been taken.

¹³⁴ Both of the Family Fairness initiatives were adopted after the Immigration Reform and Control Act (IRCA) of 1986, P.L. 99-603, 100 Stat. 3359 (Nov. 6, 1986), was enacted, and both preceded the Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990).

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