



2013

The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions

Shoba S. Wadhia
Penn State Law

Follow this and additional works at: http://elibrary.law.psu.edu/fac_works



Part of the [Administrative Law Commons](#), and the [Immigration Law Commons](#)

Recommended Citation

source:https://works.bepress.com/shoba_wadhia/27

This Article is brought to you for free and open access by the Faculty Works at Penn State Law eLibrary. It has been accepted for inclusion in Journal Articles by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

THE IMMIGRATION PROSECUTOR AND THE JUDGE: EXAMINING THE ROLE OF THE JUDICIARY IN PROSECUTORIAL DISCRETION DECISIONS

*Shoba Sivaprasad Wadhia**

TABLE OF CONTENTS

I. INTRODUCTION	39
II. PRIMER ON IMMIGRATION STRUCTURE AND ADJUDICATIONS	44
III. MAKING THE CASE FOR APA REVIEW OVER PROSECUTORIAL DISCRETION DECISIONS	47
A. <i>The Administrative Procedure Act Provides Broad Review Over Agency Actions</i>	50
B. <i>Scope of APA Review Over Agency Actions</i>	53
C. <i>Agency Actions that are “Committed to Agency Discretion”</i>	55
D. <i>Examining Preclusions to Judicial Review within the Immigration and Nationality Act</i>	63
IV. DESIGNING PROSECUTORIAL DISCRETION REVIEW AND WHY IT MATTERS	68
V. RECENT DEVELOPMENTS: DEFERRED ACTION FOR CHILDHOOD ARRIVALS	74
VI. CONCLUSION	77

I. INTRODUCTION

Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times, it has been his property that has been invaded; at times, his privacy; at times, his

* Clinical Professor of Law and Director of the Center for Immigrants’ Rights at Pennsylvania State University Dickinson School of Law. See SHOBA SIVAPRASAD WADHIA, http://law.psu.edu/faculty/resident_faculty/wadhia (last visited January 17, 2013). I recognize Hiroshi Motomura, Michael Ovias, Jill Family, Deborah Smith, Mary Kenney, Rachel E. Rosenbloom, David A. Martin, Lenni Benson, Stephen Manning, and Marisa Taney for providing comments on an earlier draft of this Article. My appreciation goes to scholars at the Immigration Law Teachers Workshop held at Hofstra School of Law for commenting on an earlier draft of this Article. I thank Dean Phillip McConnaughay for his continues support for my professional development and to Stephen Coccorese and Ria Pereira for their excellent research assistance. I am grateful for the greatest sources of my happiness—Hemal, Devyani and Neelesh.

liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions. — *United States v. Wunderlich*, 342 U.S. 98, 101 (1951).

Consider Sara Martinez, 47, whose daughter is an American citizen. Since arriving from Ecuador, Ms. Martinez has paid her taxes, learned English, and never broken a law, according to the New York Immigration Coalition, which has taken up her case. In January 2011, she was on a bus in Rochester with her daughter when three border patrol agents asked her for identification. She could produce only her Ecuadorean passport, and was arrested. She has applied to Immigration and Customs Enforcement for prosecutorial discretion three times and been denied, without explanation, even though she meets new criteria for such discretion: she has close ties to the community and is not a threat to public safety. Ms. Martinez's six-year-old daughter has suffered from nightmares, had trouble sleeping and eating and expressed fear that the "police" will come again and take away her mother (who is not in detention while the case is pending) for good.¹

For Sara, and for the unknown number of individuals "denied" prosecutorial discretion by the Department of Homeland Security (DHS),² the conventional legal conclusion has been that such decisions are committed to the agency's absolute "discretion" under the Administrative Procedures Act (APA), are barred by the Immigration and Nationality Act, and, for both of these reasons, are immune from judicial review. Judicial review authorizes courts to review both legislation and executive actions for compliance with the law.³ Two important principles that emerge from the judicial review function are: the "rule of law," or the extent to which judges are charged with examining whether particular actions are in compliance with the law; and "separation of powers," which is itself recognized by the limits placed on the issues judges will hear and the standards they will apply even with such review.

¹ Hirokazu Yoshikawa & Carola Suárez-Orozco, *Deporting Parents Hurts Kids*, N.Y. TIMES, Apr. 20, 2012, available at http://www.nytimes.com/2012/04/21/opinion/deporting-parents-ruins-kids.html?_r=1&ref=opinion.

² As described in greater detail in the Introduction, the Department of Homeland Security is the immigration agency responsible for enforcing the nation's immigration laws. Pursuant to section 103(a) of the immigration code, also known as the Immigration and Nationality Act, "The Secretary of Homeland Security shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens" INA § 103(a), 8 U.S.C. § 1103(a) (2010).

³ See ROBERT L. GLICKSMAN & RICHARD E. LEVY, ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT 146-47 (Foundation Press, 1st ed. 2010).

Building upon my research on the role of prosecutorial discretion in immigration law,⁴ this Article examines the role of the judiciary in prosecutorial discretion decisions. This Article argues that as a normative (and possibly a legal) matter, certain prosecutorial decisions made by the DHS should be afforded judicial review under the standards promulgated under the APA. These decisions may include pursuing an appeal, joining in a motion to reopen removal proceedings, joining in a motion to recalendar removal proceedings, cancelling a detainer, cancelling a Notice to Appear and releasing an individual from detention. This Article begins with an overview of prosecutorial discretion in immigration matters. Part II provides a primer on the organization of the immigration agency. Part III analyzes the relevant statutory sections within the Administrative Procedures Act (APA) and the Immigration and Nationality Act (INA) and the formative case law applying such sections, and argues that APA review is available for certain prosecutorial discretion decisions. Part IV considers the normative benefits of prosecutorial discretion review and explores potential designs for such review.

The role of prosecutorial discretion in immigration matters is well established,⁵ and generally refers to the agency's determination of whether or not the immigration laws should be enforced against a particular individual

⁴ See Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010) [hereinafter *The Role of Prosecutorial Discretion*]; Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 NEW HAMP. L. REV. 1 (2011) [hereinafter *Sharing Secrets*].

⁵ Since 1975, the immigration agency has published documents on the use of prosecutorial discretion in immigration matters. Following a lawsuit by music legend John Lennon, the Immigration and Naturalization Service (INS) published an "Operations Instruction" on the use of prosecutorial discretion and publicly introduced the agency's authority to "defer" enforcement in cases involving "(1) advanced or tender age; (2) many years' presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States- effect of expulsion; and/or (5) criminal, immoral or subversive activities or affiliations- recent conduct." (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii) (1975). The O.I. was tweaked in 1981 to "clarify" that decisions by the agency to exercise prosecutorial discretion were a matter of administrative convenience, as opposed to being a substantive benefit. The various memoranda issued by DHS on prosecutorial discretion have been summarized in previous articles and will not be repeated here. See, e.g., Wadhia, *The Role of Prosecutorial Discretion*, *supra* note 4. For a history of the litigation leading up to the changes in the O.I., see Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 101 (1980). While the O.I. was eventually repealed by the agency, the standard continued to be applied by the agency. See, e.g., Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, on Exercising Prosecutorial Discretion (Nov. 17, 2000), available at <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf>; INS STANDARD OPERATING PROCEDURES FOR ENFORCEMENT OFFICERS: ARREST, DETENTION, PROCESSING, AND REMOVAL, Part X (1997); (Legacy) Immigration and Naturalization Service, Operations Instructions, former O.I. § 242.1(a)(22) (withdrawn June 24, 1997) (stating that deferred action is "an act of administrative choice to give some cases lower priority and in no way an entitlement").

or group of persons.⁶ The agency making a “favorable” exercise of prosecutorial discretion means that the immigration agency is *refraining* from enforcing the full scope of the law against a person or group of persons. Prosecutorial discretion may be exercised by DHS at any stage of immigration enforcement, including, but not limited to, interrogation, arrest, charging, detention, removal proceedings, appeals, or after a removal order has become final.⁷

The theory of prosecutorial discretion rests on both humanitarian and economic grounds. First, prosecutorial discretion recognizes that certain noncitizens bearing positive attributes and qualities have no formal relief available under the immigration laws. Second, prosecutorial discretion acknowledges that the number of noncitizens who are technically “deportable” under the immigration laws is much larger than the immigration agency can successfully handle with its available resources. Estimates suggest that the Immigration and Customs Enforcement agency has the resources to remove about 400,000 people per year, or about 4% of the deportable population living in the United States.⁸ Thus, prosecutorial discretion is an important tool that enables the agency to manage and prioritize the more than 11 million noncitizens who are unauthorized and residing in the United States. While it is important to understand the relationship between legislative reforms (i.e. legalization) and prosecutorial discretion policy, the relationship should not be overstated. Even with broad statutory reforms, prosecutorial discretion is critical to ensuring that individuals with compelling equities and qualities that society finds desirable are protected from removal while

⁶ See, e.g., Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens to all Field Office Directors, all Special Agents in Charge, and all Chief Counsel, U.S. Immigration and Customs Enforcement (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>. For a broader discussion about the role of prosecutorial discretion in immigration law, and relevant lessons one can draw from the administrative and criminal law contexts, see Wadhia, *The Role of Prosecutorial Discretion*, supra note 4. See also, Leon Wildes, *The United States Immigration Service v. John Lennon: The Cultural Lag*, 40 BROOK. L. REV. 279 (1974); Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42 (1977).

⁷ See Memorandum from John Morton, supra note 6, at 5. For a discussion about discretion beyond the decision to “prosecute,” see Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1842 (2011) (“First, the discretion that matters in immigration enforcement has not been the discretion to prosecute, but the discretion to arrest. Second, arrests for civil or criminal violations do not lead separately to two systems of prosecution. Though arrests for criminal immigration violations can lead to criminal prosecution, the federal government may choose to initiate only civil removal proceedings.”).

⁸ Memorandum from John Morton, Assistant Secretary, ICE, on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens to all ICE employees (June 30, 2010), available at <http://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf>.

the individuals who present true dangers to the community or risks to national security are targeted for removal.⁹

The increased exposure of prosecutorial discretion in immigration matters since 2010 was triggered by a stalemate in Congress over legislative immigration reform, a library of associated policies and procedures by ICE,¹⁰ and increased monitoring and advocacy by the private bar and noncitizens seeking tools for avoiding deportation and related consequences.¹¹ Meanwhile, select members of Congress and commentators labeled the agency's use of prosecutorial discretion as an "administrative amnesty" and interrogated the DHS Secretary about the agency's use of prosecutorial discretion.¹² The final clause of the memorandum issued by ICE on June 17, 2011, states:

As there is no right to the favorable exercise of discretion by the agency, nothing in this memorandum should be construed to prohibit the apprehension, detention or removal of any alien unlawfully in the United States or to limit the legal authority of ICE or any of its personnel to enforce federal immigration law. Similarly, this memorandum, which may be modified, superseded or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil or criminal matter.¹³

⁹ See Wadhia, *The Role of Prosecutorial Discretion*, *supra* note 4.

¹⁰ DHS issued several memoranda and documents in 2010 and 2011 to reaffirm its authority to exercise prosecutorial discretion, clarify its "civil enforcement priorities," and outline the kinds of factors immigration officers and attorneys should consider when deciding whether prosecutorial discretion is appropriate. For a summary of the prosecutorial discretion documentation issued in the year 2011, and related links, see Shoba Sivaprasad Wadhia, *Prosecutorial Discretion in Immigration Agencies: A Year in Review*, 2012 EMERGING ISSUES 6173 (Jan. 2012), available at <http://www.lexisnexis.com/community/immigration-law/blogs/emergingissues/archive/2012/01/12/prosecutorial-discretion-in-immigration-agencies-a-year-in-review.aspx>.

¹¹ AILA, PROSECUTORIAL DISCRETION SURVEY (2011), <http://www.surveymonkey.com/s/LMMTBSG>; AILA/AIC JOINT REPORT, HOLDING DHS ACCOUNTABLE ON PROSECUTORIAL DISCRETION (Nov. 2011), available at <http://www.aila.org/content/default.aspx?docid=37615>; AMERICAN BAR ASSOCIATION: COMMISSION ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (2001), available at http://www.americanbar.org/content/dam/aba/migrated/media/nosearch/immigration_reform_executive_summary_012510.authcheckdam.pdf.

¹² See "Dear Colleague," Letter from Lamar Smith, House Judiciary Committee Chairman, to members of Congress (June 23, 2011), available at http://big.assets.huffingtonpost.com/Smith_DearColleague.pdf; H.R. 2497, 112th Cong. (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr2497ih/pdf/BILLS-112hr2497ih.pdf>; S. 1380, 112th Cong. (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s1380is/pdf/BILLS-112s1380is.pdf>. See also Letter from Lamar Smith, House Judiciary Committee Chairman, & Robert Aderholt, Homeland Security Subcommittee Chairman, to Janet Napolitano, DHS Secretary (July 5, 2011), available at <http://judiciary.house.gov/news/pdfs/Administrative%20Amnesty.pdf>.

¹³ Memorandum from John Morton, *supra* note 6, at 6.

The language above reflects the agency's position that no prosecutorial discretion decision should be seen as a right or a legally enforceable benefit granted by U.S. law.

II. PRIMER ON IMMIGRATION STRUCTURE AND ADJUDICATIONS

Created by Congress after the attacks of September 11, 2001, the Department of Homeland Security (DHS) is a cabinet-level agency responsible for a diversity of functions including the processing of affirmative immigration benefits applications, border enforcement, and interior immigration enforcement.¹⁴ The three DHS units responsible for these immigration functions are Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and United States Citizenship and Immigration Services (USCIS).¹⁵ CBP, ICE and USCIS all have jurisdiction to issue charging documents or Notices to Appear (NTA).¹⁶

Removal proceedings are triggered when DHS files the NTA with an immigration court. These courts are adjudicatory bodies for the Executive Office for Immigration Review (EOIR), an agency within the Department of Justice (DOJ).¹⁷ Under this system, immigration judges preside over removal proceedings and enforce federal immigration laws. In fiscal year 2011, these immigration judges oversaw 330,756 removal proceedings.¹⁸

¹⁴ U.S. DEP'T OF HOMELAND SECURITY, <http://www.dhs.gov/index.shtm> (last visited July 19, 2012).

¹⁵ U.S. CUSTOMS AND BORDER PROTECTION, <http://cbp.gov/xp/cgov/about/> (last visited July 19, 2012); U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/> (last visited July 19, 2012); U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/> (last visited July 19, 2012).

¹⁶ See, e.g., Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002); Memorandum from William J. Howard, Principal Legal Advisor to All Office of the Principal Legal Advisor General Counsel, on Prosecutorial Discretion (Oct. 24, 2005) (on file with author); Memorandum from Doris Meissner, *supra* note 5, at 2. See also INA § 239, 8 U.S.C. § 1229 (2006). Some noncitizens are administratively removed from the United States without formal removal proceedings. For example, under the INA § 235, arriving noncitizens who enter an airport without proper documents or false documents can be summarily removed by the DHS, and do not have a legal right to review by an immigration judge or federal court. Similarly, under the INA § 217, individuals who enter the United States under the "visa waiver program" (VWP) are required to "waive" their right to appeal or review in a court as a condition of their admission under the VWP. An interesting point is how prosecutorial discretion impacts individuals like the VWP entrant or the individual subject to expedited removal, especially if such persons possess the kinds of equities and qualities that are worthy of a favorable grant of prosecutorial discretion.

¹⁷ U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, <http://www.justice.gov/eoir/> (last visited July 19, 2012). See also 8 C.F.R. § 1003.14 (2003) ("Jurisdiction and commencement of proceedings. (a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed."). It should be noted that DHS also may exercise prosecutorial discretion by cancelling an NTA even before it is filed with the Immigration Court.

¹⁸ U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2011 STATISTICAL YEARBOOK, C3 (Feb. 2012), available at <http://www.justice.gov/eoir/statspub/fy11syb.pdf>.

While this Article is limited to the review of prosecutorial discretion decisions made by DHS, a description of the immigration courts aids in understanding how prosecutorial discretion decisions fit within the overall immigration structure.

Discretion is often pivotal in determining whether an individual is placed in removal proceedings. In removal proceedings, most cases revolve not around whether the noncitizen is removable as charged, but rather around whether she is eligible for one of the various forms of relief from removal, such as asylum, cancellation of removal, or adjustment of status.¹⁹ Most of these statutory pardons include a discretionary component and, as a practical matter, enable the immigration judge to deny relief even when a noncitizen meets all of the statutory criteria for such relief.²⁰ At the removal hearing, an immigration judge will normally sustain or dismiss charges made by DHS against the noncitizen, and, if appropriate, will determine if a noncitizen is eligible for formal relief from removal.²¹

Once removal proceedings have begun, an immigration judge may also adjudicate certain procedural requests such as motions to administratively close, postpone, dismiss or reopen a removal proceeding.²² Undoubtedly, DHS's decision to commence removal proceedings by filing an NTA with the immigration court represents the defining moment during which prosecutorial discretion can be exercised to save the government the resources of administrative hearings and possible appeals. The decision not to file the NTA also recognizes the equities and humanitarian concerns of noncitizens who are ineligible for formal immigration relief.²³ Decisions by

¹⁹ See INA §§ 245, 8 U.S.C. § 1255 (2006); INA § 240A, 8 U.S.C. § 1229b (2006); 208, 8 U.S.C. § 1158 (2006).

²⁰ Outside of the removal context, a DHS officer may engage in a similar exercise of "adjudicatory discretion" when considering a waiver of inadmissibility or application for immigration benefit. 8 C.F.R. § 212.18 (2008).

²¹ *Office of the Chief Immigration Judge*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/eoir/ocijinfo.htm> (last updated April 2011).

²² See, e.g., 8 C.F.R. § 1003.23 (1997); 8 C.F.R. § 1239.2 (2004); *Matter of Gutierrez*, 21 I&N Dec. 479, 484 (BIA 1996), available at www.justice.gov/eoir/vll/intdec/vol21/3286.pdf; *Matter of GNC*, 22 I&N Dec. 281, 308 (BIA 1998), available at www.justice.gov/eoir/vll/intdec/vol22/3366.pdf.

²³ See, e.g., Memorandum from John Morton, *supra* note 6; ABA Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, 1-18 (2010), available at http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf. Notably, the ABA Commission on Immigration has recommended that DHS attorneys review NTAs issued by the ICE, CIS, and CBP to determine if removal proceedings are appropriate. The ABA Commission on Immigration has issued a related resolution and, in an accompanying report to this resolution, has stated:

Notices to Appear are issued in a variety of agency contexts by CBP, USCIS and ICE and are subject to substantial discretion. Apart from NTAs required by regulation, there appears to be no consistent policy guidance outlining factors to be considered in exercising discretion in the issuance of NTAs. Consequently, discretion is exercised with disparate results. We recommend that, in DHS local offices with sufficient attorney resources, the approval of a DHS lawyer be required for the issuance of all discretionary NTAs, and that the DHS lawyer's approval be granted on a case-by-case basis. This should help produce more consistent outcomes and would

immigration judges may be appealed by either the government or the noncitizen by filing a Notice to Appeal with another EOIR body known as the Board of Immigration Appeals (BIA).²⁴ Certain decisions by the BIA are published as “precedent” and are binding on all immigration judges and Board members.²⁵

Noncitizens generally have a right to pursue judicial review following a final order of removal unless one of the statutory exceptions applies. Under the immigration statute, noncitizens are barred from seeking review in immigration cases involving most crimes, many discretionary decisions, and expedited removal orders.²⁶ Legal scholars and judges have long examined the role of judicial review in immigration matters, and also criticized the impacts of the “plenary power” doctrine²⁷ and statutory deletions of judicial review for certain immigration cases.²⁸ Absent from this scholarship is a serious examination of the judiciary’s role in immigration decisions involving prosecutorial discretion. I attribute this absence primarily to two factors. First, there seems to be a silent concession that prosecutorial discretion decisions are automatically barred from judicial review because of the plain language of the Immigration and Nationality Act and because of the judicial review “exceptions” in the Administrative Procedures Act and the cases that analyze these sections. Second, I see this acquiescence as the effect of reading more than a decade’s worth of memoranda by the immigration agency declaring that no prosecutorial discretion provides a procedural or substantive benefit or a right.

help to ensure that decisions about the issuance of NTAs would take into account developments in the applicable law.

See ABA COMMISSION ON IMMIGRATION REPORT TO HOUSE OF DELEGATES, 114A (Feb. 2010), available at <http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/114A.authcheckdam.pdf>.

²⁴ 8 C.F.R. § 1003 (2003).

²⁵ See 8 C.F.R. § 1103.3(c) (2003).

²⁶ See INA § 242(a)(2)(A-C), 8 U.S.C. § 1252 (2006).

²⁷ Defined simply to illustrate the Legislative and Executive Branches’ “plenary” authority over immigration law. For a broader explanation, see Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1616 (2000).

²⁸ See, e.g., Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 18 IMMIGR. & NAT’LTY L. REV. 137 (1997) [hereinafter *Surrounding the Hole*]; Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the “Rule” of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161, 163 (2006); Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINNESOTA L. REV. 1205, 1208 (1989) [hereinafter *Political Asylum*]; Jill Family, *A Broader View Of The Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 608-09 (2009); Lenni Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 39 (2006); Legomsky, *Fear and Loathing*, *supra* note 27, at 1616.

III. MAKING THE CASE FOR APA REVIEW OVER PROSECUTORIAL DISCRETION DECISIONS

On the basis of what the courts know today about leaving administration to administrators but at the same time providing an effective check to protect against abuses, should the courts not take a fresh look at the tradition that prevents them from reviewing the prosecuting function? KENNETH DAVIS, *DISCRETIONARY JUSTICE* 211 (1969).

For more than a decade, the immigration agency has relied on select provisions of the Immigration and Nationality Act, the Administrative Procedures Act, and court opinions applying these provisions to support its position that prosecutorial discretion decisions in immigration matters are immune from judicial review. Specifically, the immigration agency has depended on the conclusions in *Heckler v. Chaney* and *ADC v. Reno* to argue that prosecutorial actions are immune from judicial review.²⁹ To illustrate, the November 17, 2000, INS Memorandum on prosecutorial discretion stated:

Courts recognize that prosecutorial discretion applies in the civil, administrative arena just as it does in criminal law. Moreover the Supreme 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 design generally committed to an agency’s absolute discretion.” *Heckler v. Chaney*. Both Congress and the Supreme Court have recently reaffirmed that the concept of prosecutorial discretion applies to INS enforcement activities, such as whether to place an individual in deportation proceedings. INA section 242(g); *Reno v. American-Arab Anti-Discrimination Committee*. The “discretion” in prosecutorial

²⁹ See, e.g., Memorandum from Doris Meissner, *supra* note 5, at 3. Prior to *Heckler v. Chaney* and *ADC v. Reno*, several federal circuit courts took up the question of whether the former Operations Instruction governing “deferred action” operates as a substantive right of the noncitizen. See, e.g., *Pasquini v. Morris*, 700 F.2d 658, 662 (11th Cir. 1983); *Nicholas v. INS*, 590 F.2d 802, 807 (9th Cir. 1979). I do not review these cases in this Article because they do not factor in the impacts of *Heckler*, *AADC*, or the amendments to the INA and also because they have been summarized in previous scholarship. See, e.g., Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Cases*, 41 SAN DIEGO L. REV. 819, 821 (2004); Wadhia, *The Role of Prosecutorial Discretion*, *supra* note 4, at 280. In many, if not most, of these cases, there was little question about whether the petitioner noncitizens had a procedural right to review over their denials of deferred action. See, e.g., *Pasquini v. Morris*, 700 F.2d 658, 663 (11th Cir. 1983) (“Although the internal operating instruction confers no substantive rights on the alien-applicant, it does confer the procedural right to be considered for such status upon application. Zacharakis’s application was considered and denied on October 10, 1980. Pasquini’s application for deferred action status was considered and denied on June 24, 1980. Thus, both aliens’ procedural rights were met by the INS.”). For a broader account of how “deferred action” operates in the current immigration design, see Wadhia, *Sharing Secrets*, *supra* note 4.

discretion means that prosecutorial decisions are not subject to judicial review or reversal, except in extremely narrow circumstances.³⁰

This Article challenges the notion that every prosecutorial discretion decision is barred from federal court review. Once the immigration agency decides to publish policy guidance and publicly announces that it will not pursue particular kinds of enforcement actions against certain individuals, judicial review may be appropriate in situations where the agency has potentially abused its own standards. Moreover, this Article shows how the collection of guidance on prosecutorial discretion since *Reno* creates a highly meaningful standard by which federal judges could review unlawful decisions. The agency's guidance post-*Reno* is summarized below to illustrate the extent to which the prosecutorial discretion directives are far more developed than the directives governing other agency actions in which the courts have found APA review to be available. In 2000, former INS Commissioner Doris Meissner issued comprehensive guidance on prosecutorial discretion in a memorandum titled "Exercising Prosecutorial Discretion."³¹ The Meissner Memo instructed that "[s]ervice officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process—from planning investigations to enforcing final orders—subject to their chains of command and to the particular responsibilities and authority applicable to their specific position."³² The Meissner Memo outlined a generous list of humanitarian factors that officers should consider in making prosecutorial discretion decisions and made broad references to criminal law to explain the legality of such discretion.³³

After the INS was abolished by statute and replaced by the new, cabinet level DHS in 2003, Congress transferred the authority to exercise prosecutorial discretion to ICE, CBP, and USCIS components.³⁴ During the first several years of its tenure, ICE and USCIS issued a few documents relating to the agency's exercise of prosecutorial discretion with respect to certain cases, such as those involving widows and widowers of U.S. citizens or their unmarried children under 21 years old, as well as with respect to arrest and custody decisions made for nursing mothers who are without a legal immigration status.³⁵ Similarly, ICE issued a memorandum in 2005

³⁰ Memorandum from Doris Meissner, *supra* note 5, at 3.

³¹ *Id.*

³² *Id.* at 1.

³³ *Id.* at 7.

³⁴ See Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002); INA § 103, 8 U.S.C. § 1103 (2006).

³⁵ Press Release, U.S. Dep't of Homeland Security, DHS Establishes Interim Relief for Widows of U.S. Citizens (June 9, 2009), available at http://www.dhs.gov/ynews/releases/pr_1244578412501.shtm; Memorandum from Julie L. Myers, Assistant Secretary, Prosecutorial and Custody Discretion (Nov. 7, 2007) (on file with author). For a lengthier analysis of these early memos, see Wadhia, *The Role of Prosecutorial Discretion*, *supra* note 4, at 295; MARY KENNEY, AMERICAN IMMIGRATION COUNCIL, PROSECUTORIAL DISCRETION: HOW

targeted at its legal advisors and underscoring the breadth of the “universe of opportunities” for ICE to exercise prosecutorial discretion.³⁶

Beginning in June 2010, ICE published comprehensive memoranda about its civil enforcement priorities.³⁷ On June 17, 2011, ICE Chief John Morton issued the agency’s most comprehensive guidance on prosecutorial discretion since the inception of DHS (“June 17 Morton Memo”).³⁸ The guide included an expanded list of factors the agency should consider when rendering prosecutorial discretion decisions, described the various actions that constitute prosecutorial discretion, and stated a preference for such discretion to be exercised as early in the process as possible.³⁹ The June 17 Morton Memo stated:

While ICE may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing the enforcement proceeding. As was more extensively elaborated on in the Howard Memorandum on Prosecutorial Discretion, the universe of opportunities to exercise prosecutorial discretion is large. It may be exercised at any stage of the proceedings.⁴⁰

As a companion to the June 17 Morton Memo, the Secretary of DHS and the White House “announced” a prosecutorial discretion policy (“August 18 policy”) in which DHS and DOJ would work together to review some 300,000 cases pending removal before EOIR.⁴¹ Following several months of silence, ICE issued additional documentation to implement the August 18 policy and throughout these documents identified the June 17 Morton Memo as the “cornerstone” document providing guidance to ICE

TO ADVOCATE FOR YOUR CLIENT, (June 24, 2011), available at <http://www.aila.org/content/default.aspx?docid=33749>.

³⁶ Memorandum from William J. Howard, *supra* note 16, at 2.

³⁷ See Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, on Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens to all ICE Employees (Mar. 2, 2011), available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

³⁸ Memorandum from John Morton, *supra* note 6. ICE issued a second memorandum on June 17 specific to certain plaintiffs, victims, and witnesses. See Memorandum from John Morton, *Prosecutorial Discretion: Certain Crime Victims, Witnesses and Plaintiffs* (Jun. 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>. For a detailed summary of the June 17 Morton Memo, see Shoba Sivaprasad Wadhia, *The Morton Memo and Prosecutorial Discretion: An Overview*, IMMIGRATION POLICY CENTER (July 20, 2011), <http://www.immigrationpolicy.org/special-reports/morton-memo-and-prosecutorial-discretion-overview>.

³⁹ Memorandum from John Morton, *supra* note 6.

⁴⁰ *Id.* at 5.

⁴¹ Letter from Janet Napolitano, Secretary of the Dep’t of Homeland Security, to Sen. Dick Durbin, at 3 (Aug. 18, 2011), available at http://durbin.senate.gov/public/index.cfm/files/serve?File_id=1180a746-c6d4-4fe9-b11f-cf9be50b6226.

attorneys.⁴² ICE's decision to move or join a party in a motion to administratively close a case is one form of prosecutorial discretion and has been singled out in many of the ICE documents implementing the August 18 policy. For example, one memorandum from the ICE Office for the Principal Legal Advisor (OPLA) states:

The criteria set forth in the Guidance should prompt particular care and consideration and are intended to aid attorneys in identifying the cases most likely to be either eligible or ineligible for a favorable exercise of discretion. Based on this review, ICE attorneys should review whether the proceedings before EOIR should continue or whether prosecutorial discretion in the form of administrative closure is appropriate.⁴³

“Administrative closure” is a procedure by which an IJ or the BIA removes a case from its docket as a matter of “administrative convenience.”⁴⁴

A. *The Administrative Procedure Act Provides Broad Review Over Agency Actions*

The APA is a federal statute that allows an individual to sue a federal agency based on an unlawful agency action. An APA lawsuit is normally filed in federal district court. The APA provides review to “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.”⁴⁵ Section 704 identifies the actions reviewable as “[a]gency action made re-

⁴² See, e.g., Memorandum from Peter Vincent, Principal Legal Advisor, U.S. Immigration and Customs Enforcement, on Case-By-Case Review of Incoming and Certain Pending Cases to all Chief Counsel and Office of the Principal Legal Advisor, at 2 (Nov. 17, 2011), available at <http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf>; U.S. DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, GUIDANCE TO ICE ATTORNEYS REVIEWING THE CBP, USCIS, AND ICE CASES BEFORE THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (2011), available at <http://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf>; DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, NEXT STEPS IN THE IMPLEMENTATION OF THE PROSECUTORIAL DISCRETION MEMORANDUM AND THE AUGUST 18TH ANNOUNCEMENT OF IMMIGRATION ENFORCEMENT PRIORITIES (2011), available at <http://www.ice.gov/doclib/about/offices/ero/pdf/pros-discretion-next-steps.pdf>; Wadhia, *Prosecutorial Discretion in Immigration Agencies*, *supra* note 10; THE LEGAL ACTION CENTER AND ALEXSA ALONZO, AMERICAN IMMIGRATION COUNCIL, DHS REVIEW OF LOW PRIORITY CASES FOR PROSECUTORIAL DISCRETION (updated Feb. 13, 2012), available at http://www.legalactioncenter.org/sites/default/files/DHS_Review_of_Low_Priority_Cases_2-13-12.pdf.

⁴³ Vincent, *supra* note 42, at 2. “Administrative closure” is a procedure by which an IJ or the BIA removes a case from its docket as a matter of “administrative convenience.”

⁴⁴ See *Matter of Avetisyan*, 25 I&N Dec. 688, 690 (BIA 2012), available at <http://www.justice.gov/eoir/vll/intdec/vol25/3740.pdf>. Administrative closure is not specified in the INA or in federal regulations, though it has long been used by the EOIR to regulate its docket. The OPLA Memorandum notifies ICE attorneys that a “template” joint motion to administratively close proceedings is available.

⁴⁵ Administrative Procedure Act (APA), 5 U.S.C. § 702 (2006).

viewable by statute and final agency action for which there is no other adequate remedy in a court”⁴⁶ Enacted by Congress in 1946, the APA had four central purposes: (1) to require agencies to keep the public informed of their organization, procedures, and rules; (2) to provide for public participation in the rulemaking process; (3) to establish uniform standards for the conduct of formal rulemaking and adjudication; and (4) to define the scope of judicial review.⁴⁷ The judicial review provisions of the APA are codified at 5 U.S.C. §§ 701-706.

The breadth of judicial review under the APA is illustrated by the seminal Supreme Court case of *Abbott Laboratories v. Gardner*.⁴⁸ *Abbott* involved thirty-seven individual drug manufacturers and one pharmaceutical association challenging regulations requiring that labels and advertisements for prescription drugs bearing proprietary names for the drugs or the ingredients carry the corresponding “established name” every time the name is used.⁴⁹ The petitioners argued that the regulations exceeded the Commissioner’s authority under the statute and were subject to judicial resolution.⁵⁰ The Government argued that, pursuant to the first APA exception, no review was available because the governing food and drug statute includes a special review procedure for some regulations and therefore excluded review of the others.⁵¹ The Court held that judicial review was available under the APA, and that the impact of the food and drug regulations on the petitioners was “sufficiently direct and immediate.”⁵² The Court noted that “[t]he legislative material elucidating that seminal act [the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the . . . ‘generous review provisions’ must be given a ‘hospitable’ interpretation.”⁵³

APA review has further received a “hospitable” interpretation in immigration cases involving a motion to “reopen.” A motion to “reopen” a removal case is a discretionary decision ordinarily made by an immigration court or the BIA in order to consider new facts or evidence in a removal case where a decision has already been rendered.⁵⁴ The details about motions to reopen are specified in the immigration regulations, and generally require the applicant to file a written motion and attach supporting documentation.⁵⁵ The BIA has rendered several decisions pertaining to the scope and jurisdiction of motions to reopen.⁵⁶ The Supreme Court has concluded that federal

⁴⁶ *Id.* § 704.

⁴⁷ See Gary J. Edles, *The Continuing Need for an Administrative Conference*, 50 ADMIN. L. REV. 101, 107 (1998).

⁴⁸ 387 U.S. 136 (1967).

⁴⁹ *Id.* at 137-38.

⁵⁰ *Id.* at 139.

⁵¹ *Id.* at 140-141.

⁵² *Id.* at 152.

⁵³ *Id.* at 140.

⁵⁴ 8 CFR §§ 1003.2(c)(2), 1003.23.

⁵⁵ See *id.* § 1003.23(3).

⁵⁶ See, e.g., *Matter of Velarde-Pacheco*, 23 I&N Dec. 253 (BIA 2002); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997); *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996).

courts have jurisdiction to review denials of motions to reopen deportation proceedings and that such review will be based on an “abuse of discretion” standard.⁵⁷

In 2010, in *Kucana v. Holder*, the Court held that motions to reopen decisions, made discretionary by the Attorney General, remain subject to judicial review.⁵⁸ The petitioner, Agron Kucana, moved to reopen his removal proceedings based on new evidence in support of his asylum claim.⁵⁹ The Board of Immigration Appeals denied his motion to reopen and the Seventh Circuit Court of Appeals held that it lacked jurisdiction to review his case because the INA precludes such review.⁶⁰ The Supreme Court granted certiorari to decide whether the preclusion language within INA § 242(a)(2)(B) applied only to determinations made by statute or also to decisions made discretionary through regulations.⁶¹ In concluding that the regulation governing motions to reopen may be judicially reviewed, the Court relied upon the longstanding “presumption favoring interpretations of statutes [to] allow judicial review of administrative action,”⁶² stating:

Any lingering doubt about the proper interpretation of 8 U. S. C. § 1252(a)(2)(B)(ii) would be dispelled by a familiar principle of statutory construction: the presumption favoring judicial review of administrative action. When a statute is “reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review.”⁶³

⁵⁷ *INS v. Abudu*, 485 U.S. 94, 105 (1988).

⁵⁸ 130 S. Ct. 827, 840 (2010).

⁵⁹ *Id.* at 831. *Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008).

⁶⁰ *See* INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (2006) (“Denials of Discretionary Relief.—Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this title to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.”).

⁶¹ 130 S. Ct. at 831.

⁶² *Id.* at 839.

⁶³ *Id.* at 829-30. The Court went on:

Finally, we stress a paramount factor in the decision we render today. By defining the various jurisdictional bars by reference to other provisions in the INA itself, Congress ensured that it, and only it, would limit the federal courts’ jurisdiction. To read § 1252(a)(2)(B)(ii) to apply to matters where discretion is conferred on the Board by regulation, rather than on the Attorney General by statute, would ignore that congressional design. If the Seventh Circuit’s construction of § 1252(a)(2)(B)(ii) were to prevail, the Executive would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing

B. *Scope of APA Review Over Agency Actions*

Even if a federal court assumes jurisdiction over DHS prosecutorial discretion decisions, the scope and standard of review are pivotal. If review in a federal court is a means to a favorable outcome for the noncitizen, this assumption of jurisdiction barely matters if courts apply too high a standard of review. Section 706 of the APA instructs a reviewing court to set aside agency actions that are “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.”⁶⁴ Notably, the Supreme Court recently applied this standard in *Judulang v. Holder*, and held that the “[t]he BIA’s policy for applying §212(c) in deportation cases is ‘arbitrary and capricious’ under the Administrative Procedure Act”⁶⁵ Though *Judulang* dealt with an agency’s interpretation of a statute as opposed to a discretionary decision, the case highlights the fundamental role of the judiciary and gives meaning to the standard of review outlined in the APA.

Federal courts have also reviewed whether an immigration adjudicator’s denial of a “continuance” was arbitrary and capricious. A “continuance” is a request that is normally made in writing to an immigration judge with information about the time and date of a removal hearing, preferred dates that a party is available to re-schedule such hearing, and reasons why a continuance is desired. The decision to grant or deny a continuance is discretionary and is governed by a regulation that states, “[t]he Immigration Judge may grant a motion for continuance for good cause shown.”⁶⁶ There

a regulation declaring those decisions “discretionary.” Such an extraordinary delegation of authority cannot be extracted from the statute Congress enacted.

Id. at 839-40.

⁶⁴ Administrative Procedure Act (APA), 5 U.S.C. § 706 (2006). The governing section of APA reads in full:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings and conclusions found to be –
 - (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege or immunity;
 - (C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court

Id.

⁶⁵ 132 S. Ct. 476, 477 (2011).

⁶⁶ 8 CFR § 1003.29 (1992). Some courts have analogized continuances to “administrative closure.” See *Garza-Moreno v. Gonzales*, 489 F.3d 239, 242 (6th Cir. 2007).

is no form for such motions, but the EOIR has published information about continuances in its Immigration Court Practice Manual.⁶⁷ Similarly, the BIA has interpreted the “good cause” standard.⁶⁸

Although a grant of continuance is within the discretion of the immigration judge, it is well established that the BIA and federal courts do have jurisdiction to review continuance decisions.⁶⁹ In *Hashmi v. Attorney General of the U.S.*, removal proceedings were continued several times for petitioner Ajmal Hussain Shah Hashmi while his marriage-based petition (I-130 application) was pending.⁷⁰ After eighteen months, the immigration judge (IJ) denied another continuance because the case had been pending far longer than the eight-month period suggested by the “case-completion goals” set by the DOJ.⁷¹ The circuit court found that the IJ’s denial of a motion for a continuance based on case-completion goals rather than on the facts and circumstances of Hashmi’s case was arbitrary and an abuse of discretion.⁷²

The foregoing case law illuminates how courts might apply “arbitrary,” “capricious,” and “abuse of discretion” standards to prosecutorial decisions in immigration matters. Tempting as it is to identify any prosecutorial discretion denial as an “abuse” where the noncitizen meets some or several of the positive factors identified in the DHS memoranda about prosecutorial discretion, the directives themselves offer enough flexibility for the immigration officer to reject seemingly strong cases.⁷³ On the other hand, some

⁶⁷ EOIR, IMMIGRATION COURT PRACTICE MANUAL 96 (Apr. 1, 2008), available at http://www.justice.gov/eoir/vll/OCIJPracManual/Practice%20Manual%20Final_compressedPDF.pdf (“(a) *Motion to continue*.—A request for a continuance of any hearing should be made by written motion. Oral motions to continue are discouraged. The motion should set forth in detail the reasons for the request and, if appropriate, be supported by evidence. See Chapter 5.2(e) (Evidence). It should also include the date and time of the hearing, as well as preferred dates that the party is available to re-schedule the hearing. However, parties should be mindful that the Immigration Court retains discretion to schedule continued cases on dates that the court deems appropriate.”).

⁶⁸ See *Matter of Hashmi*, 24 I&N Dec. 785, 788 (BIA 2009) (“In determining whether good cause exists to continue such proceedings, a variety of factors may be considered, including, but not limited to: (1) the Department of Homeland Security’s response to the motion to continue; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent’s statutory eligibility for adjustment of status; (4) whether the respondent’s application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and any other relevant procedural factors.”); see also *Matter of Rajah*, 25 I&N Dec. 127, 130 (BIA 2009).

⁶⁹ See, e.g., *Masih v. Mukasey*, 536 F.3d 370, 376 (5th Cir. 2008); *Hashmi v. Att’y Gen. of U.S.*, 531 F.3d 256, 262 (3rd Cir. 2008); *Biwot v. Gonzales*, 403 F.3d 1094, 1099 (9th Cir. 2005); *Herbert v. Ashcroft*, 325 F.3d 68, 72 (1st Cir. 2003).

⁷⁰ 531 F.3d at 257.

⁷¹ *Id.* at 257-58.

⁷² *Id.* at 258.

⁷³ See, e.g., Memorandum from John Morton, *supra* note 6, at 4. Following a listing of the positive factors that offices may utilize in making prosecutorial decisions, the June 17 Morton Memo advises that “[t]his list is not exhaustive and no one factor is determinative. ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE’s enforcement priorities.” *Id.*

directives, such as the June 17 Morton Memo, caution that no one factor is determinative.⁷⁴ The Morton Memo further identifies the following positive and negative factors that warrant “particular care and consideration”:

- veterans and members of the U.S. armed forces;
- long-time lawful permanent residents;
- minors and elderly individuals;
- individuals present in the United States since childhood;
- pregnant or nursing women;
- victims of domestic violence, trafficking or other serious crimes;
- individuals who suffer from a serious mental or physical disability;
- individuals with serious health conditions;
- individuals who pose a clear risk to national security;
- serious felons, repeat offenders or individuals with a lengthy criminal record of any kind;
- known gang members or other individuals who pose a clear danger to public safety; and
- individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.⁷⁵

At the very least, denials of prosecutorial discretion are based upon only one factor or fail to take into account those factors that warrant “particular care and concern,” APA review seems appropriate.

C. Agency Actions that are “Committed to Agency Discretion”

Despite the APA’s strong presumption in favor of judicial review,⁷⁶ the APA itself contains an exception to judicial review where “agency action is committed to agency discretion by law.”⁷⁷ Scholars historically have wrestled with the tension that lies between Section 706 of the APA, which apparently requires a court to set aside agency actions that are found to be “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law,” and the second exception under section 701, which limits judicial review to the extent that the agency action is “committed to agency discretion by law.”⁷⁸ Raoul Berger has argued that the “committed to agency

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993); see also *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) (“[O]nly upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review.”); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474 (3d Cir. 2003) (“here is a strong presumption that Congress intends judicial review of administrative action.”).

⁷⁷ Administrative Procedure Act (APA), 5 U.S.C. § 701 (2006).

⁷⁸ *Id.* at §§ 701, 706; see John C. Moore, *Judicial Review under the APA of Agency Action Committed to Agency Discretion by Law*, 29 WASH. & LEE L. REV. 360 (1972); K. DAVIS, ADMINISTRATIVE LAW TREATISE 28: 6 (1984); Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 58 (1965); Harvey Saferstein, *Nonreviewability: A Functional Analysis of “Committed to Agency Discretion,”* 82 HARV. L. REV. 367, 373 (1968).

discretion” doctrine does not apply and that the APA instead directs the courts to review *all* claims of abuse of discretion.⁷⁹ To reach this conclusion, Berger “would in effect read the introductory phrase ‘committed to agency discretion’ as ‘committed to a reasonably exercised discretion.’”⁸⁰ On the other hand, Harvey Saferstein has argued that the language of the APA, however confusing, would have to be more definitive to reach a conclusion that Congress intended to overturn non-reviewability when it passed the APA, especially when the APA itself contains exceptions to judicial review.⁸¹ In an early but oft-cited federal case from the Second Circuit, Judge Henry Jacob Friendly narrowed the concept of “abuse of discretion” and then advanced review for cases that meet the narrow criteria.⁸² The case law has developed since the Berger-Saferstein debates, and the Supreme Court has concluded that the “committed to agency discretion” language precluding review can function simultaneously with a general standard of judicial review. Following this decision, the tension among scholars and courts has shifted to how “committed to agency discretion” should be interpreted or, put more simply, where the line of review and no review should be drawn.

Below are some of the seminal decisions analyzing the APA’s “committed to agency discretion” exception. In *Citizens to Preserve Overton Park v. Volpe*, the U.S. Supreme Court considered whether the petitioners had a right to judicial review under Section 701 of the APA.⁸³ The petitioners, a group of private citizens and some local and national conservation organizations, argued that the Secretary of Transportation had violated two statutes (the Department of Transportation Act and the Federal-Aid Highway Act) by approving the construction of a six-lane highway through a 342-acre city park in Memphis known as Overton Park.⁸⁴ These statutes prohibited the use of federal funds to build highways through public parks if a “feasible and prudent” alternative route existed.⁸⁵ The Court held that the Secretary’s action was subject to judicial review under the APA and, with respect to the second exception, determined that the “committed to agency discretion” limitation applies only in those rare instances when the particular statutes are so broad that “no law” can be found to apply.⁸⁶ “Law to apply” may include not only statutory language, but also regulations, policy statements, and memoranda.⁸⁷ Following the language of the APA, the Court held that the proper standard of review was whether the action was “‘arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law,’ or if the action failed to meet statutory, procedural or constitutional requirements.”⁸⁸

⁷⁹ Saferstein, *supra* note 77, at 373 (citing Raoul Berger, *supra* note 77).

⁸⁰ *Id.* (citing Raoul Berger, *supra* note 77).

⁸¹ *Id.* at 374.

⁸² See *Hang v. INS*, 360 F.2d 715, 717-18 (2d Cir. 1966).

⁸³ 401 U.S. 402, 410 (1971).

⁸⁴ *Id.* at 404-06.

⁸⁵ *Id.* at 405.

⁸⁶ *Id.* at 410 (internal citation omitted).

⁸⁷ *Heckler v. Chaney*, 470 U.S. 821, 826 (1985).

⁸⁸ *Overton Park*, 401 U.S. at 414 (internal citations omitted).

Adopting this new standard, the Court held that the “committed to agency discretion” exception did not apply and remanded the case back to the district court.

Heckler v. Chaney involved a group of death row inmates challenging the Food and Drug Administration’s (FDA) failure to take various enforcement actions in connection with drugs being used for human execution.⁸⁹ The Supreme Court construed the exception narrowly, suggesting that review is precluded “in those rare instances” where “the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.”⁹⁰ The Court found that the FDA’s decision not to prosecute violations under the Federal Food, Drug and Cosmetic Act (FDCA) was unreviewable because such exercises of prosecutorial discretion are “committed to the agency’s discretion.”⁹¹ It held that an agency’s “decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise.”⁹² The Court also found that the agency’s refusal to act is “only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.”⁹³ *Heckler* is distinguishable from the sorts of cases I believe may be reviewable because *Heckler* focused largely on the agency *refusing* to take an enforcement action, as opposed to the agency denying prosecutorial discretion

⁸⁹ *Heckler*, 470 U.S. at 823-25.

⁹⁰ *Id.* at 830. This passage has been affirmed and cited by the Court in subsequent decisions including, but not limited to, *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993). Justice Thurgood Marshall issued a concurrence, criticizing the majority’s “presumption of unreviewability” and detailing the jurisprudence in support of judicial review over prosecutorial discretion. *Heckler*, 470 U.S. at 840 (Marshall, J., concurring in the judgment). Justice Marshall stated:

And in rejecting on the merits of a claim of improper prosecutorial conduct in [citation omitted] we clearly laid to rest any notion that prosecutorial discretion is unreviewable no matter what the basis is upon which it is exercised: “There is no doubt that the breadth of discretion that our country’s legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there is undoubtedly constitutional limits upon its exercise.

Id. at 846-47 (Marshall, J., concurring in the judgment) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978)).

⁹¹ *Id.* at 837-38.

⁹² *Id.* at 831. The Court further noted that:

[T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.

Id.

⁹³ *Id.* at 832-33.

and *taking* an enforcement action.⁹⁴ The Court took great care in pointing out this distinction when it stated:

In addition to these administrative concerns, we note that when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner.⁹⁵

Notably, *Heckler* has been singled out by the immigration agency as the basis for *shielding* immigration decisions involving prosecutorial discretion from judicial review.⁹⁶ Such a reading, however, does not account for the agency's amassing of standards around prosecutorial discretion over the past decade, nor does it address situations where the agency diverges from these standards and acts to enforce the law. Today, the standards outlined in *Overton Park* and *Heckler* support the premise of this Article, that many of the guidelines identified in directives like the June 17 Morton Memo contain "more than enough law" under which a federal court could review prosecutorial decisions that are contrary to the agency's own guidance. To illustrate, the June 17 Morton Memo elucidates nineteen factors that ICE employees and attorneys should take into account when deciding whether or not to exercise prosecutorial discretion favorably:

- the agency's civil immigration enforcement priorities;
- the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
- the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degree at a legitimate institution of higher education in the United States;
- whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- the person's criminal history, including arrests, prior convictions or outstanding arrest warrants;

⁹⁴ Admittedly, there are some agency decisions that are technically "inactions" that I would like to see reviewable under the APA, but most of the situations I envision for my argument involve prosecutorial discretion "denials" that result in the agency taking an enforcement action against the individual.

⁹⁵ *Heckler*, 470 U.S. at 832.

⁹⁶ *See, e.g.*, Memorandum from Doris Meissner, *supra* note 5, at 3.

- the person’s immigration history, including any prior removal, outstanding order of removal, prior denial of status or evidence of fraud;
- whether the person poses a national security or public safety concern;
- the person’s ties and contributions to the community, including family relationships;
- the person’s ties to the home country and conditions in the country;
- the person’s age, with particular consideration given to minors and the elderly;
- whether the person has a U.S. citizen or permanent resident spouse, child or parent;
- whether the person is the primary caretaker of a person with a mental or physical disability, minor or seriously ill relative;
- whether the person or the person’s spouse is pregnant or nursing;
- whether the person or the person’s spouse suffers from severe mental or physical illness;
- whether the person’s nationality renders removal unlikely;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking or other crime; and
- whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S. Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.⁹⁷

The limitations of the outcome in *Heckler* are also illustrated by the body of decisions surrounding the review of “affirmances without opinions” (AWO) by the Board of Immigration Appeals (BIA). The Board of Immigration Appeals is the highest administrative appellate body in the Department of Justice’s Executive Office for Immigration Review (EOIR).⁹⁸ In 1999, the DOJ issued regulations that enable the BIA to issue truncated decisions in the form of an “affirmance without opinion” for particular cases raised on appeal.⁹⁹ The BIA’s authority to issue AWOs was expanded in 2002 by a regulation issued by former Attorney General John Ashcroft.¹⁰⁰

⁹⁷ Memorandum from John Morton, *supra* note 6, at 4-5.

⁹⁸ U.S. Dep’t of Justice, *Board of Immigration Appeals*, JUSTICE.GOV, <http://www.justice.gov/eoir/biainfo.htm> (last updated Nov. 2011).

⁹⁹ 64 Fed. Reg. 56135 (Oct. 18, 1999).

¹⁰⁰ See 67 Fed. Reg. 54878 (Aug. 26, 2002). 8 C.F.R. § 1003(e)(4) (2012) (“Affirmance without opinion. (i) The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or

Following the promulgation of the regulations, the federal circuit courts grappled with whether judicial review was available for decisions in which an AWO was issued. In many of these cases, the government relied on *Heckler* to argue that the BIA's decision to streamline a particular case is committed to agency discretion and was not subject to judicial review.¹⁰¹ Rejecting the government's position, the First, Third and Ninth Circuits have found that federal courts have jurisdiction to review AWO procedures in immigration cases.¹⁰² To illustrate, in *Haoud v. Ashcroft*, the First Circuit held:

Here, the Board's own regulation provides more than enough "law" by which a court could review the Board's decision to streamline. As 8 C.F.R. § 1003.1(e)(4) sets out *supra*, the Board cannot affirm an IJ's decision without opinion if the decision is incorrect, errors in the decision are not harmless or immaterial, the issues on appeal are not squarely controlled by Board or federal court precedent and involve the application of precedent to a novel fact situation, or the issues raised on appeal are so substantial that a full written opinion is necessary.¹⁰³

Federal courts have also considered the standards outlined in *Heckler* to analyze whether the decision to "administratively close" an immigration case is "committed to agency discretion by law."¹⁰⁴ Administrative closure is not included in the INA or the governing regulations, but rather has been guided historically by the following passage from *Matter of Gutierrez*: "Administrative closure of a case is used to temporarily remove the case from an immigration judge's calendar or from the Board of Immigration Appeal's docket. A case may not be administratively closed if opposed by either of the parties."¹⁰⁵ Significantly, *Matter of Gutierrez* confused the prosecutorial role of the DHS attorney and the independent discretion of the immigration judge by giving DHS unilateral power over the administrative closure decisions. On January 31, 2012, the BIA issued another important decision,

(B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

(ii) If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: 'The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 § CFR 1003.1(e)(4) (2012).' An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial.')

¹⁰¹ See, e.g., *Haoud v. Ashcroft*, 350 F.3d 201, 206 (1st Cir. 2003); *Smriko v. Ashcroft*, 387 F.3d 279, 292 (3d Cir. 2004); *Chen v. Ashcroft*, 378 F.3d 1081, 1087 (9th Cir. 2004).

¹⁰² See *id.*

¹⁰³ *Haoud v. Ashcroft*, 350 F.3d at 206.

¹⁰⁴ See, e.g., *Haoud*, 350 F.3d 201; *Smriko*, 387 F.3d 279; *Chen*, 378 F.3d 1081.

¹⁰⁵ 21 I&N Dec. 479, 480 (BIA 1996), available at <http://www.justice.gov/eoir/vll/intdec/vol21/3286.pdf>; see also *Matter of Peugnet*, 20 I&N Dec. 233 (BIA 1991); *Matter of Munoz-Santos*, 20 I&N Dec. 205, 206 (BIA 1990).

Matter of Avetisyan, to clarify the bounds of permissible discretion for the immigration judge and to evaluate the assertion that immigration judges may “administratively close [removal proceedings], even if a party opposes, if it is otherwise appropriate.”¹⁰⁶ Specifically, the BIA held that:

In determining whether administrative closure of proceedings is appropriate, an immigration judge or the BIA should weigh all relevant factors, including, but not limited to: (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is re-calendared before the Immigration Judge or the appeal is reinstated before the BIA.¹⁰⁷

In the case of *Alcaraz v. Immigration and Naturalization Service*, the Ninth Circuit considered whether the BIA erred by failing to administratively close *sua sponte* their removal proceedings because they were eligible for “repapering.”¹⁰⁸ The petitioners were married, had entered the United States without inspection in 1989, were both employed, and had a U.S. citizen-daughter.¹⁰⁹ Though the directives governing repapering were sub-regulatory in that INS and the EOIR issued them in the form of memoranda, the court found that the petitioners were potentially eligible for repapering and remanded the cases for further consideration.¹¹⁰ The court highlighted the legal position that agencies may be required to comply with internal memoranda.¹¹¹

The court disagreed with the government’s argument that the court lacked jurisdiction to review the agency actions because the INS’s repapering decision was either statutorily precluded by INA § 242(g) or “committed

¹⁰⁶ *Matter of Avetisyan*, 25 I&N Dec. 688, 690 (BIA 2012), available at <http://www.justice.gov/eoir/vll/intdec/vol25/3740.pdf>.

¹⁰⁷ *Id.* at 688.

¹⁰⁸ 384 F.3d 1150, 1158-62 (9th Cir. 2004). “Repapering” is a form of a relief because it enables certain non-citizens to become eligible for removal relief by postponing or “repapering” the date of their removal proceedings. The court cited to a series of memoranda issued by INS and EOIR regarding the procedures by which cases should be administratively closed for persons eligible for repapering. *Id.*

¹⁰⁹ *Id.* at 1156.

¹¹⁰ *Id.* at 1162-63.

¹¹¹ *Id.* at 1150 (recognizing that “[t]he legal proposition that agencies may be required to abide by certain internal policies is well-established”). For a detailed discussion of case law regarding agencies’ internal guidelines, see *id.* For a nice analysis about the role of subregulatory guidance in immigration law, see Jill Family, *Administrative Law Through the Lens of Immigration Law*, Widener Law School Legal Studies Research Paper No. 12-04 (February 22, 2012), available at SSRN: <http://ssrn.com/abstract=2009436> or <http://dx.doi.org/10.2139/ssrn.2009436>.

to the agency's discretion by law" under the APA.¹¹² As to the judicial exemption outlined in section 701(a)(2) of the APA, the court made a reference to *Heckler v. Chaney* when noting that the jurisdictional bar "is applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply."¹¹³ The court found, however, that the discretion by the agency had been legally prescribed by the repapering memoranda and guidance issued by the INS, and for this reason the statute was not drawn in such broad terms that there was "no law to apply."¹¹⁴ The court affirmed that the "law" in *Heckler's* "no law to apply" corresponds not only to the statute but also to policy memoranda and guides from the agency.¹¹⁵

Indeed, the standards outlined in the June 17 Morton Memo are more developed than many of the documents that judges have previously concluded contain "more than enough law" to warrant APA review. Together, the intent of the APA to create a judicial review scheme by which agency actions may be "checked," the jurisprudence in support of judicial review over agency action, and the body of circuit case law that interprets narrowly "committed to agency discretion" all show that federal courts should have jurisdiction to review select prosecutorial discretion decisions under the APA.¹¹⁶

Distinguishable from this jurisprudence and the ample agency guidance on prosecutorial discretion are a few notable decisions by the Supreme Court that have found that an action was "committed to agency discretion under law," and therefore precluded APA review. *Webster v. Doe* involved an em-

¹¹² *Id.* at 1160-61.

¹¹³ *Id.* at 1161 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

¹¹⁴ *Id.* The court also cites to *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868 (9th Cir. 2003) (stating that the "no law to apply" rule is applicable where there are "no statutes, regulations, established agency policies or judicial decisions that provide a meaningful standard against which to assess" the agency's actions).

¹¹⁵ *Id.* Note that the Ninth Circuit came down with a different position in *Diaz-Covarrubias v. Mukasey*, 551 F.3d 1114, 1120 (9th Cir. 2009) (finding that judicial review is precluded in general administrative closure decisions because courts have no legal standard to apply). In *Garza-Moreno v. Gonzales*, 489 F.3d 239, 242 (6th Cir. 2007), the court also found that it had jurisdiction to review a denial of administrative closure by the BIA. The court reasoned:

The decision to administratively close a case is, in this context, not distinguishable from a continuance. Following *Abu-Khaliel*, we hold that § 1252 does not strip us of jurisdiction to review the denial of an administrative closure. Having jurisdiction, we review for abuse of discretion, disturbing the BIA's decision only if the refusal to administratively close the case "was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination."

Id. (citing *Abu-Khaliel v. Gonzales*, 436 F.3d 627, 630-31 (6th Cir. 2006)). The court did not discuss the application of *Heckler v. Chaney* and the APA exemption for decisions "committed to agency discretion."

¹¹⁶ Some of the scenarios identified above involve the review of adjudicatory decisions by immigration judges as opposed to the prosecutorial judgments of DHS officers and attorneys. This distinction, however, is largely irrelevant to this Article's examination of whether federal judges have "enough law" against which to analyze and review prosecutorial discretion decisions for abuse, arbitrariness or whatever the standard of review may be.

ployee terminated under a provision of the National Security Act of 1947 (NSA) allowing the Central Intelligence Agency (CIA) Director, “in his discretion,” to terminate any employee “whenever he shall deem such termination necessary or advisable in the interests of the United States.”¹¹⁷ The employee was a covert electronics technician and was terminated from his employment after voluntarily informing the CIA that he was a homosexual.¹¹⁸ The employee (respondent) filed a lawsuit in the federal district court seeking declaratory and injunctive relief alleging violations under the APA and the U.S. Constitution.¹¹⁹ Deciding against the fired employee, the Court found that the decision by the CIA was “committed to agency discretion” because the NSA provision was drawn in such broad terms that it provided no meaningful standard for reviewing the reasons for termination.¹²⁰ For comparison, the language contained in the NSA statute allowing for termination of an employee “whenever [the Director] shall deem such termination necessary or advisable in the interests of the United States” stands in marked contrast to the language of the June 17 Morton Memo, which expressly lays out numerous factors that should be considered when making prosecutorial discretion decisions.

Lincoln v. Vigil revolved around the termination of a bundle of services known as the “Indian Children’s Program,” which were provided by the Indian Health Service, an arm of the Department of Health and Human Services.¹²¹ The issue in *Lincoln* was whether the Indian Health Service’s decision to terminate the children’s program was reviewable under the APA.¹²² Reasoning that the children’s program was financed by a Congressional “lump-sum appropriation,” as opposed to legally binding restrictions as to how the sum should be spent, the Court found that the decision was “committed to agency discretion by law” and therefore immune from judicial review under section 701(a)(2) of the APA.¹²³

D. Examining Preclusions to Judicial Review within the Immigration and Nationality Act

The APA restricts judicial review not only for decisions that are “committed to the agency’s discretion,” but also in situations where “statutes preclude judicial review.”¹²⁴ As such, it is important to examine the Immigration and Nationality Act (INA) for indications that prosecutorial discretion decisions by the immigration agency are foreclosed from judicial review.

¹¹⁷ 486 U.S. 592, 594 (1988) (quoting National Security Act of 1947, 50 U.S.C. § 403(c)).

¹¹⁸ *Id.* at 594-95.

¹¹⁹ *Id.* at 596.

¹²⁰ *Id.* at 599-601.

¹²¹ 508 U.S. 182, 185 (1993).

¹²² *Id.* at 189.

¹²³ *Id.* at 192-93.

¹²⁴ Administrative Procedure Act (APA), 5 U.S.C. § 701 (2006).

A plain reading of the APA would suggest that if a section of the INA precludes judicial review for a particular action, then such actions are unreviewable under the APA as well. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA).¹²⁵ This legislation amended the INA and modified the statutory scheme for judicial review in immigration matters. Within this scheme, IIRAIRA included a provision governing judicial review over specific prosecutorial discretion decisions; INA § 242(g) expressly states that no court has “jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision . . . to commence proceedings, adjudicate cases or execute removal orders against any alien under this Act.”¹²⁶

In *Reno v. ADC*, the Supreme Court interpreted INA § 242(g) to mean that prosecutorial discretion decisions are immune from judicial review.¹²⁷ Writing for the majority, Justice Scalia clarified that the bar to judicial review is limited to the three acts included in the statute—“to commence proceedings, adjudicate cases or execute removal orders”—and made a specific reference to the then-regular practice of “deferred action.”¹²⁸

Similarly, the *Alcaraz* court (discussed above) considered the statutory prohibitions outlined in INA § 242(g) and clarified in *Reno* to conclude:

¹²⁵ 8 U.S.C.A. § 1103 (2008).

¹²⁶ Immigration and Nationality Act (INA) § 242(g), 8 U.S.C. § 1252 (2006).

¹²⁷ 525 U.S. 471, 492 (1999). The facts involved a group of noncitizens who believe they were selectively charged with violating the immigration laws based on their affiliation with a politically unpopular group. The respondents argued that the doctrine of constitutional doubt required the Court to interpret section 242(g) to permit the immediate review of selective enforcement claims because of the potential “chilling effect” on First Amendment rights. Writing for the majority, Justice Scalia disagreed with the respondents and concluded that “an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.” *Id.* at 488. Though Justice Scalia read section 242(g) to preclude review of prosecutorial discretion decisions involving the commencement of removal proceedings, adjudication of cases, and execution of removal orders, he stated that “[t]o resolve the present controversy, we need not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome.” *Id.* at 491.

¹²⁸ *Id.* at 484. Specifically, the Court stated:

The provision applies only to three discrete actions that the Attorney General may take: her “decision or action” to “commence proceedings, adjudicate cases, or execute removal orders.” (Emphasis added.) There are of course many other decisions or actions that may be part of the deportation process—such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsideration of that order. It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings.

Id. at 482. Historically “deferred action” was a term used to describe any action the agency took to refrain from enforcement of the immigration laws. The concept has evolved over the years, however; currently, deferred action is understood as one among several possible decisions that involve prosecutorial discretion by the immigration agency. Deferred action is among the more generous remedies insofar as individuals granted deferred action are eligible to apply for work authorization and, moreover, are considered to be in a status that will be considered “lawful” for purposes of calculating unlawful presence. For a fuller study on deferred action, see Wadhia, *Sharing Secrets*, *supra* note 4.

Under [INA § 242](g), we lack jurisdiction to consider “to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders” [INA § 242](g) (emphasis added). While the second step in the repapering process involves a decision to commence (or “reinitiate”) proceedings, the first step, the administrative closure of proceedings, does not implicate [INA § 242](g). The Alcarazes’ repapering claim only raises the issue of administrative closure. Therefore, we are not barred from hearing this claim by [INA § 242](g).¹²⁹

Applying the narrow reading of section 242(g) to the full range of actions that encompass prosecutorial discretion supports the assertion that decisions lying outside the three acts listed in 242(g) may be subject to APA review. The analysis below demonstrates that in spite of the statutory preclusions of review over a few discrete decisions involving prosecutorial discretion, there are a number of decisions that remain subject to APA review. The June 17 Morton Memo describes the following discretionary enforcement decisions to illustrate the scope of prosecutorial discretion, many of which fall outside the actions outlined in 242(g):

- deciding to issue or cancel a notice of detainer;
- deciding to issue, reissue, serve, file or cancel a Notice to Appear (NTA);
- focusing enforcement resources on particular administrative violations or conduct;
- deciding whom to stop, question or arrest for an administrative violation;
- deciding whom to detain or to release on bond, supervision, personal recognizance or other condition;
- seeking expedited removal or other forms of removal by means other than a formal removal proceeding in immigration court;
- settling or dismissing a proceeding;
- granting deferred action, granting parole or staying a final order of removal;
- agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal;
- pursuing an appeal;
- executing a removal order; and
- responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit.¹³⁰

¹²⁹ Alcaraz v. INS, 384 F.3d 1150, 1160-61 (9th Cir. 2004).

¹³⁰ Memorandum from John Morton, *supra* note 6, at 2-3. See also Wadhia, *The Morton Memo and Prosecutorial Discretion*, *supra* note 38.

A notable fact, but not necessarily critical to the analysis, is that regulations govern some of the examples furnished by the Morton Memo, such as the cancellation of a Notice to Appear and motions to dismiss removal proceedings.¹³¹ The BIA has further distinguished the scope of DHS's prosecutorial authority before the initiation of removal proceedings and similar decisions made after such proceedings.¹³²

¹³¹ See, e.g., 8 C.F.R. § 239.2 (2003). This statute provides that: ("Any officer authorized by § 239.1(a) to issue a notice to appear may cancel such notice prior to jurisdiction vesting with the immigration judge pursuant to § 3.14 of this chapter provided the officer is satisfied that:

(a) Any officer authorized by § 251.1(a) to issue a notice to appear may cancel such notice prior to jurisdiction vesting with the immigration judge pursuant to § 3.14 of this chapter provided the officer is satisfied that:

- (1) The respondent is a national of the United States;
- (2) The respondent is not deportable or inadmissible under immigration laws;
- (3) The respondent is deceased;
- (4) The respondent is not in the United States;
- (5) The notice was issued for the respondent's failure to file a timely petition as required by section 216(c) of the Act, but his or her failure to file a timely petition was excused in accordance with section 216(d)(2)(B) of the Act;
- (6) The notice to appear was improvidently issued; or
- (7) Circumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government . . .

(c) Motion to dismiss. After commencement of proceedings pursuant to 8 CFR 1003.14, ICE counsel, or any officer enumerated in paragraph (a) of this section, may move for dismissal of the matter on the grounds set out under paragraph (a) of this section.

(d) Motion for remand. After commencement of the hearing, ICE counsel or any officer enumerated in paragraph (a) of this section may move for remand of the matter to district jurisdiction on the ground that the foreign relations of the United States are involved and require further consideration."

¹³² See, e.g., *Matter of Avetisyan*, 25 I&N Dec. 688, 694 (BIA 2012), available at <http://www.justice.gov/eoir/vll/intdec/vol25/3740.pdf>; *Matter of GNC*, 22 I&N Dec. 281, 284 (BIA 1998), available at www.justice.gov/eoir/vll/intdec/vol22/3366.pdf. In *Matter of GNC*, the Board held:

We recognize that the decision to institute deportation proceedings involves the exercise of prosecutorial discretion and is not a decision which the Immigration Judge or the Board may review. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980). Likewise, a service officer authorized to issue a Notice to Appear has complete power to cancel such notice prior to jurisdiction vesting with the Immigration Judge. 8 C.F.R. § 239.2(a). However, after commencement of proceedings in the Immigration Court, Service counsel may move for dismissal of the matter on the grounds set out [in] this section. 8 C.F.R. § 239.2(c). This language marks a clear boundary between the time prior to commencement of proceedings, where a Service officer has decisive power to cancel proceedings, and the time following commencement, where the Service officer merely has the privilege to move for dismissal of proceedings. By this distinction, the regulation presumably contemplates not just the automatic grant of a motion to terminate, but an informed adjudication by the Immigration Judge or this Board based on an evaluation of the factors underlying the Service's motion. See *Matter of Vizcarra-Delgado*, 13 I&N Dec. 51, 54 (BIA 1968); see also *Matter of Wong*, 13 I&N Dec. 701, 703 (BIA 1971) (stating that Service officials may move the Immigration Judge for termination of proceedings as a matter of prosecutive discretion); cf. *Matter of Andrade*, 14 I&N Dec. 651, 652

Beyond the scope of this section is INA § 242(a)(2)(B), which precludes judicial review of many of the formal immigration decisions involving a discretionary component, such as the criminal waiver of inadmissibility, cancellation of removal, adjustment of status and “any other decision or action . . . specified under this title to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 208(a).”¹³³ These decisions involve formal immigration remedies that include a discretionary component and are, depending on the jurisdiction, adjudicated by DHS or EOIR. This situation differs from prosecutorial discretion, which is an action that is informal, cabined in the jurisdiction of the DHS, and located outside the subchapter INA § 242(a)(2)(B).¹³⁴

(BIA 1974) (finding that the Service motion to terminate, if granted, would benefit the alien, and assuming there would be no opposition from the alien’s attorney).

22 I&N Dec. 281, 284 (BIA 1998), *available at* www.justice.gov/eoir/vll/intdec/vol22/3366.pdf. Also relevant to the prosecutorial decisions governed by regulation is the BIA standard that regulatory violations can invalidate removal proceedings if the procedure or regulation benefits the noncitizen and the violation of the regulation prejudiced the noncitizen. *Matter of Hernandez*, 21 I&N Dec. 224, 228 (BIA 1996), *available at* <http://www.justice.gov/eoir/vll/intdec/vol21/3265.pdf>.

¹³³ INA § 242(a)(2)(B), 8 U.S.C. § 1252 (2006) .

¹³⁴ Another section worthy of analysis is INA § 242(a)(2)(D), 8 U.S.C. § 1252 (2006). This section was enacted by Congress in 2005 as part of the REAL ID Act and provides an exception to many of the statute’s judicial review bars: “Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.” INA § 242(a)(2)(D), 8 U.S.C. § 1252 (2006).

While this provision has expanded review for certain claims previously barred from judicial review, such as crime-related removals, it is unlikely that INA § 242(a)(2)(D) created a new judicial review forum for prosecutorial discretion decisions. First, the plain language of the statute cabins the exception to any provision of the INA “other than this section,” which suggests that the exception does not override other subsections in § 242 that bar judicial review. INA § 242(a)(2)(D), 8 U.S.C. § 1252 (2006). Second, the language limits claims based on constitutional claims or questions of law raised upon a “petition for review,” a document traditionally filed after the noncitizen has been ordered removed. INA § 242(b), 8 U.S.C. § 1252 (2006). By contrast, the actions barred by INA § 242(g) are broader than the review available upon a filing of a petition to review. INA § 242(g), 8 U.S.C. § 1252 (2006).

One normative question and counterargument to my proposal is whether Congress would have intended to support judicial review of decisions involving prosecutorial discretion when it went out of its way to preclude it for more formal discretionary forms of relief from removal. I am not particularly persuaded by the argument, given the ordinary rules of statutory construction, *see, e.g.*, *Kucana v. Holder*, 130 S. Ct. 827 (2010), and the reasonable case that without APA review prosecutorial discretion decisions are immune from review before any administrative or judicial form. Contrast this with INA § 242(a)(2)(B), 8 U.S.C. § 1252 (2006), where the decisions themselves are legally reviewable by an immigration judge and the Board of Immigration Appeals.

IV. DESIGNING PROSECUTORIAL DISCRETION REVIEW
AND WHY IT MATTERS

*[T]he case for judicial review does not rest on charity. It rests on procedural justice. When the individual interests at stake are potentially large as they are in immigration disputes, tailoring the precise contours of procedural justice to the nationality of the litigant is a troubling notion. Pinning the availability of the litigant is more troubling still. It is a notion that a society built on a rule of law and on the egalitarian freedom from arbitrary government interference should forcefully disavow.*¹³⁵

The literature on the role of judicial review over formal immigration decisions is illuminating, and also relevant to understanding the normative benefits of federal court review over prosecutorial discretion decisions.¹³⁶ These benefits of judicial review are well summarized by immigration scholar Stephen H. Legomsky:

The judicial attributes discussed up to this point, independence and generalist legal knowledge, effectively improve the quality of the decisions that actually are reviewed in court. But judicial review also serves another function, one that operates even in cases that never reach court. The mere *possibility* that an alien will seek judicial review of an asylum decision encourages the various administrative authorities to study the case carefully and to state their reasoning intelligibly As a final benefit, judicial review in federal court provides a structure for the gradual development of legal doctrine.¹³⁷

Lenni Benson argues that judicial review may have its “own efficiency value” to the extent that federal courts clarify the meaning of vague statutory terms such as the definition of “aggravated felony.”¹³⁸ Moreover, Benson describes how federal circuit review over immigration cases provide

greater clarity in the changing strategies of the agency prosecutors, the procedural behaviors of the IJs, and the institutional reforms of the administrative process. When courts refine the interpretive

¹³⁵ Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1632 (2000).

¹³⁶ See, e.g., *id.*; Lenni B. Benson, *You Can't Get There from Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405 (2007) [hereinafter *You Can't Get There*]; Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997) [hereinafter *Back to the Future*]; Nancy Morawetz, *Back to Back to the Future? Lessons Learned from Litigation over the 1996 Restrictions on Judicial Review*, 51 N.Y.L. SCH. L. REV. 113 (2006-2007); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369 (2006); Wadhia, *The Role of Prosecutorial Discretion*, *supra* note 4.

¹³⁷ Legomsky, *Political Asylum*, *supra* note 28, at 1210-11; see also, Legomsky, *Fear and Loathing*, *supra* note 27, at 1628; Wadhia, *Sharing Secrets*, *supra* note 4, at 1631.

¹³⁸ Benson, *You Can't Get There*, *supra* note 135, at 431.

tools for applying statutes and implementing procedures, they provide guidance to the agency prosecutors and to the administrative officials. This conversation between the courts and the agencies can help answer the open questions and thus help the system operate more effectively.¹³⁹

Distinguishing the journey “from here to there,” she defines *there* as a “sound, effective, efficient and manageable method of judicial review.”¹⁴⁰

But the *here* of judicial review cannot be ignored and, according to Benson, represents the “expensive, time-consuming and exponentially expanding reservoir of cases that is our current system.”¹⁴¹ Beyond the monetary costs associated with judicial review is a concern about empowering appointed federal judges with limited immigration expertise to override the decisions made by experts who specialize in immigration.¹⁴² On the other hand, Legomsky has argued that federal courts have the benefit of reviewing the evidence and decisions made by the “expert” immigration agent and have the training to provide legally sound opinions.¹⁴³ Moreover, there is the concern that noncitizens utilize judicial review in order to delay their deportation.¹⁴⁴ However, without specific data about the motivations by noncitizens, any possible “intent to delay deportation” is merely speculative. It is plausible that most noncitizens choose judicial review in order to exercise a substantive or procedural right under the law. Arguably, cases reversed by the federal courts or remanded to the BIA would indicate that review is a means of achieving justice or a fair result, not an easy delay tactic. Legomsky also points to uniformity as a cost of judicial review, meaning that judges can rule differently on cases that present similar facts and, as a consequence, create inequality.¹⁴⁵

Judicial review can also have negative consequences on the administrator, especially when the challenge is based on an internal guidance or “sub-regulatory” guidance as opposed to a rule specified in the statute or regulations. Immigration scholar and former INS General Counsel David Martin argues that pushing for enhanced judicial review over subregulatory

¹³⁹ *Id.* at 432.

¹⁴⁰ *Id.* at 410.

¹⁴¹ *Id.*

¹⁴² *See, e.g.,* Legomsky, *Fear and Loathing*, *supra* note 27, at 1628.

¹⁴³ *Id.* at 1629.

¹⁴⁴ *See, e.g.,* Kanstroom, *Surrounding the Hole*, *supra* note 28; Legomsky, *Fear and Loathing*, *supra* note 27, at 1630.

¹⁴⁵ Legomsky, *Fear and Loathing*, *supra* note 27, at 1630. I am less persuaded that uniformity is a real problem when discussing review over prosecutorial discretion decisions, in part because the review I envision is founded on arbitrary decisions or abuse of discretion by the agency. A sampling of recent prosecutorial discretion decisions illustrates a lack of consistency from one region to the next, and further suggests that a review function over these decisions would only enhance uniformity. *See, e.g.,* AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND THE AMERICAN IMMIGRATION COUNCIL LEGAL ACTION CENTER, HOLDING DHS ACCOUNTABLE ON PROSECUTORIAL DISCRETION (Nov. 2011), available at <http://www.aila.org/content/default.aspx?bc=6755—25667—37615>.

guidance in immigration matters may cause a reduction of such guidance. As described in an informal e-communication by Martin:

Judicial review will inevitably reduce transparency by discouraging the promulgation and publication of such guidance. From my perspective as a former central office government lawyer, it's usually good management and good administration to publish careful guidance But if the price (from the agency's perspective) of written guidance is immediate or at least expanded exposure to judicial review, then the agency will cut back on the issuance of written guidance. Much more will be left to case-by-case decisions by individual adjudicators, which can simply obscure from view the important considerations or de facto policies We don't always have good administrators, of course, but then we don't always have good judges. It's important to structure reforms in a way that doesn't make life overly burdensome or inflexible (or impossible) for those who are good administrators and who try to change course or improve administration from the inside.¹⁴⁶

Professor Martin raises a good point about the negative impact that exposure to judicial review can have on an agency's future policymaking. Indeed, I too would be troubled by a situation where the fear of judicial review causes the agency to repeal its most substantial policies and replace them with something broad, like the statute at issue in *Webster v. Doe*, which allowed for termination of a CIA employee "whenever [the Director] shall deem such termination necessary or advisable in the interests of the United States."¹⁴⁷ I am not persuaded, however, that an agency's decision should be insulated from this kind of review in this case because of the possibility for less clear guidance in the future. As described in more detail below, it may also be the case that the prospect for court review can prompt the administrator to follow its guidance more carefully. Moreover, the focus of this Article is on the body of guidance the agency has actually produced around prosecutorial discretion and the possibility that judicial review is appropriate when such guidance is ignored or abused. The June 17 Morton Memo was released with great public fanfare, reaffirmed as the "cornerstone" guidance in subsequent policies issued by the agency, and raised in several public meetings with advocates and attorneys. Even if one accepts that "ordinary" internal guidance should be shielded from judicial review, the June 17 Morton Memo was no ordinary policy.

Today, prosecutorial discretion decisions are made each and every day without publicly available information about the facts behind cases approved, data about cases denied, or concern for the human implications in a regime where cases involving relevant humanitarian factors are denied with

¹⁴⁶ Posting of David Martin, dam3r@virginia.edu, to Immigration Law Professors List Serve, immprof@lists.ucla.edu (Feb. 16, 2012, 3:06 PM) (on file with author).

¹⁴⁷ *Webster v. Doe*, 486 U.S. 592, 594 (1988).

no vehicle for review. To the extent that many cases in which prosecutorial discretion is exercised involve situations where no formal relief is available under immigration law, the denial of prosecutorial discretion often leads to a noncitizen's deportation or "removal," which in turn has been equated to "banishment" and "exile."¹⁴⁸ In addition to the hardships faced by a noncitizen removed from the United States are potential hardships to the family or community she leaves behind in the United States or forcibly removes to her country of removal. Furthermore, absent a waiver, a removal order prevents the noncitizen from returning to the United States or applying for formal immigration benefits or relief from removal for a minimum of five years, and, in some cases, forever.¹⁴⁹

The policy and politics brought by the stalemate in Congress and sympathetic immigration cases involving desperate individuals who would ordinarily be protected through legislative reform, but instead take the risk to submit themselves to the DHS and apply for prosecutorial discretion slightly improved transparency around prosecutorial discretion. But the historic lack of transparency in prosecutorial discretion, reports of inconsistent application of such discretion from one region of the United States to the next, and the lack of incentive on the part of officers to exercise prosecutorial discretion in a judicious matter cannot be ignored.¹⁵⁰ In this way, the very prospect of judicial review can serve as an important incentive for strengthening the quality of a DHS officer's decision-making and thereby reduce the need for judicial review. Along these lines, the standard proposed in this Article is set high and limited to only certain decisions that are "arbitrary, capricious and an abuse of discretion." The standard for review could be "abuse of discretion" and, echoing the Second Circuit, could be articulated as encompassing decisions that were "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group."¹⁵¹

The importance of federal court review is not limited to a favorable outcome for the noncitizen; such review also assures that noncitizens denied prosecutorial discretion are given their "day in court." The efforts DHS has

¹⁴⁸ See, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473, 1484 (2010) ("When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all."); *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment or exile."). Notably, in a move somewhat distinguishable from the past, and starting in November 2011, ICE appears to have exercised prosecutorial discretion favorably (or offered to do so) in more cases in which the respondent appears to be eligible for relief from removal. See, e.g., E-mail from Mary Kenney to author (Apr. 3, 2012) (on file with author).

¹⁴⁹ INA § 212(a)(9)(A), 8 U.S.C. § 1182 (2006).

¹⁵⁰ Wadhia, *Sharing Secrets*, *supra* note 4; Wadhia, *The Role of Prosecutorial Discretion*, *supra* note 4, at 293; Wadhia, *Prosecutorial Discretion in Immigration Agencies*, *supra* note 10; Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions* (Apr. 3, 2012), Penn State Law Legal Studies Research Paper No. 2-2012, available at <http://ssrn.com/abstract=2033803> or <http://dx.doi.org/10.2139/ssrn.2033803>.

¹⁵¹ *Wong Wing Hang v. Immigration & Naturalization Serv.*, 360 F.2d 715, 719 (2d Cir. 1966).

made to ensure that prosecutorial discretion is exercised properly on the front end must be matched by a review process to protect individuals and families who present compelling equities.¹⁵² However, the opportunity for federal court review may itself expand the agency's desire to follow its own guidance on prosecutorial discretion and re-consider cases in which prosecutorial discretion was denied.¹⁵³

As an alternative to a judicial review scheme, DHS should consider an administrative review process outside of USCIS, CBP or ICE. The Office of the Secretary could create an office responsible for reviewing petitions by noncitizens denied prosecutorial discretion who present evidence that the various DHS memoranda on prosecutorial discretion were ignored or misapplied.¹⁵⁴ The review process could begin as a pilot, rely on electronic filings, and result in a body of published decisions. Published decisions can improve transparency about the prosecutorial discretion program and, among other benefits, enable noncitizens who proceed through the immigration process without counsel to understand the contours of prosecutorial discretion and the application process.¹⁵⁵

Since the authority of prosecutorial discretion rests with the DHS, and not with the immigration adjudicators at EOIR, the proposed judicial or administrative review schemes outlined above should be limited to the actions of the DHS officials exercising discretion, as opposed to the ultimate outcome by the immigration judge or BIA. Certainly, any form of review would increase costs to the U.S. government in the form of training, staff and related resources. On the other hand, some costs could be recovered by operating a pilot review program in one or two locations to assess costs. The

¹⁵² As a practical matter, it is difficult to imagine how such a claim would prevail without a substantial administrative record or robust "discovery" procedure whereby respondents could access the documents and paperwork utilized by an officer in rendering a prosecutorial decision, which in itself presumes that the officer has documented the rationale and details behind such a decision. Presumably, DHS can improve its recordkeeping on prosecutorial discretion decisions. For a more detailed analysis, see Wadhia, *Sharing Secrets*, *supra* note 4; Wadhia, *The Role of Prosecutorial Discretion*, *supra* note 4; Wadhia, *Prosecutorial Discretion in Immigration Agencies*, *supra* note 10. An important and related doctrine is the *Chenery* doctrine, which states:

[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

SEC v. *Chenery Corp.* (Chenery II), 332 U.S. 194, 196 (1947); see also SEC v. *Chenery Corp.* (Chenery I), 318 U.S. 80, 88 (1943).

¹⁵³ See Legomsky, *Political Asylum*, *supra* note 28, at 1209-12; Legomsky, *Fear and Loathing*, *supra* note 27, at 1615; Wadhia, *Sharing Secrets*, *supra* note 4.

¹⁵⁴ OFFICE OF THE SECRETARY, U.S. DEP'T OF HOMELAND SECURITY, <http://www.dhs.gov/xabout/structure/office-of-the-secretary.shtm> (last visited July 19, 2012).

¹⁵⁵ For a similar argument in favor of published decisions in deferred action cases, see Wadhia, *Sharing Secrets*, *supra* note 4.

feasibility of such a pilot is illustrated by similar pilots created by DHS in connection with a prosecutorial discretion review of cases pending removal in select immigration courts.¹⁵⁶ Moreover, such review could be accompanied by a form and related application fee that may be waived only in cases where an applicant is unable to afford such fees.

Beyond judicial review, federal judges can contribute in meaningful ways to the immigration agency's use of prosecutorial discretion. Notably, on February 6, 2012, the U.S. Court of Appeals for the Ninth Circuit published five cases that ordered the DOJ to "advise the court by March 19, 2012, whether the government intends to exercise prosecutorial discretion in [these cases] and, if so, the effect, if any, of the exercise of such discretion on any action to be taken by this court with regard to [these cases]."¹⁵⁷ The cases at issue involved a noncitizen filing a petition for rehearing or panel rehearing, and the facts of the cases revealed certain salient factors such as the existence of U.S. citizen children living in the United States, a lack of any criminal history, and a long-term presence in the United States.

Rather than review prosecutorial discretion, the Orders by the Ninth Circuit request that the government review the cases in light of the June 17 Morton Memo and its implementing guidance and return to the court with a decision on prosecutorial discretion. Notably, in all five cases, Judge O'Scannlain argued in dissent that the aforementioned memo was "internal guidance," that the judicial branch has limited review over prosecutorial discretion, and that the judiciary lacked authority to demand "a preemptive peek into whether and when (and no doubt, before long, why) the executive branch will exercise such discretion."¹⁵⁸

Another example of judges weighing in on the immigration agency's prosecutorial discretion guidance in judicial opinions was in the months following the White House's "announcement" that DOJ and DHS would be reviewing pending immigration cases for possible administrative closure under the prosecutorial discretion doctrine. Chief Judge McKee issued an important concurrence for the Third Circuit Court of Appeals about prosecutorial discretion.¹⁵⁹ The case involved a highly educated software engineer from India who was sponsored for a green card based on a petition from a U.S. employer but was nevertheless deemed to be subject to the immigration law's ten-year unlawful presence bar because of a visa overstay.¹⁶⁰

¹⁵⁶ See, e.g., IMMIGRATION AND CUSTOMS ENFORCEMENT, NEXT STEPS IN THE IMPLEMENTATION OF THE PROSECUTORIAL DISCRETION MEMORANDUM AND THE AUGUST 18TH ANNOUNCEMENT ON IMMIGRATION ENFORCEMENT PRIORITIES, available at <http://www.ice.gov/doclib/about/offices/ero/pdf/pros-discretion-next-steps.pdf> (last visited July 19, 2012).

¹⁵⁷ See *Mata-Fasardo v. Holder*, 668 F.3d 675, 676 (9th Cir. 2012); *Pocasangre v. Holder*, 668 F.3d 674, 675 (9th Cir. 2012); *Jex v. Holder*, 668 F.3d 673, 673-74 (9th Cir. 2012); *San Agustin v. Holder*, 668 F.3d 672 (9th Cir. 2012); *Rodriguez v. Holder*, 668 F.3d 670, 671 (9th Cir. 2012).

¹⁵⁸ See *supra* note 156.

¹⁵⁹ See *Cheruku v. Attorney General of the United States*, 662 F.3d 198, 209 (3d Cir. 2011) (McKee, J., concurring).

¹⁶⁰ *Id.* at 200-01.

While the case itself was rejected under *Chevron* deference to the BIA's position that pending adjustment applicants who leave the United States and attempt to re-enter on "advance parole" are nevertheless subject to the unlawful presence bars, Judge McKee offered the following commentary:

I can only hope that Cheruku will be afforded such review and that the result will be favorable to her. My optimism in that regard is buttressed by a memorandum issued by U.S. Immigration and Customs Enforcement proving guidance to "ICE" law enforcement personnel and attorneys for the exercise of discretion in removing aliens. . . . Some of the discretionary factors that ICE will consider include the person's criminal history or lack thereof, whether the person is otherwise likely to be granted temporary or permanent status or other relief from removal, and the person's length of presence in the United States. Although it is certainly not our place to tell an administrative agency how to apply its policies, I do note that it appears that Cheruku would qualify for a favorable exercise of discretion under the new policy given her lack of criminal background, her employer's desire that she continue working as a software engineer, and her residence in the United States for the last 16 years.¹⁶¹

Judge McKee indeed has "enough law" by which to review how DHS applies its prosecutorial policies to people like Cheruku, but, leaving that point aside, the case itself should inspire federal judges to take positions on the DHS' use of prosecutorial discretion and question cases that are taking up federal court resources by landing in court after a removal order is issued by the agency. Moreover, Judge McKee's commentary should motivate the DHS to consider the importance of review and ensure that its officers follow the "should" directive embedded in its own prosecutorial discretion guidance.

V. RECENT DEVELOPMENTS: DEFERRED ACTION FOR CHILDHOOD ARRIVALS

This Article was completed in June 2012. Subsequently, on June 15, 2012, the Department of Homeland Security issued a memorandum in tandem with an announcement from the White House that allows certain young people living in the United States without legal status to receive prosecutorial discretion in the form of "deferred action."¹⁶² Formally known as "Deferred Action for Childhood Arrivals" or "DACA," the pro-

¹⁶¹ *Id.* at 211 (McKee, J., concurring).

¹⁶² Memorandum from Janet Napolitano, Secretary of Homeland Security, on Exercising Prosecutorial Discretion with Respect to Individuals who Came to the United States as Children (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>; see also, Shoba Sivaprasad Wadhia, *Deferred Action in Immigration Law: The Next Generation*, IMMIGRATIONPROF BLOG

gram allows individuals who meet the following criteria to affirmatively apply with USCIS:

1. Were under the age of 31 as of June 15, 2012;
2. Came to the United States before the age of 16;
3. Have continuously resided in the U.S. since June 15, 2007, up to the present time;
4. Were physically present in the U.S. on June 15, 2012, and at the time of applying for deferred action;
5. Entered without inspection before June 15, 2012, or lawful immigration status expired as of June 15, 2012;
6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
7. Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.¹⁶³

DACA has been heralded by immigration advocates as an important (but temporary) remedy, after young people turned out in the thousands to reveal their undocumented status and showcase their intellectual promise, and also pressured the White House and Obama Administration to exercise prosecutorial discretion favorably towards the same.¹⁶⁴ Since the program was implemented on August 15, the private bar, law school clinics, and not-for-profit organizations have mobilized in dramatic ways to serve the hundreds of thousands of individuals who may be eligible for DACA.¹⁶⁵ At the same time, DACA has been criticized by select members of Congress, some ICE officials, and the former advisor to Attorney General John Ashcroft

(June 28, 2012), <http://lawprofessors.typepad.com/immigration/2012/06/deferred-action-in-immigration-law-the-next-generation-by-.html>.

¹⁶³ One exception to the general policy of applying with USCIS pertains to those individuals who are in immigration detention. See *Frequently Asked Questions*, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnnextchannel=3a4dbc4b04499310VgnVCM1v000000082ca60aRCRD> (last visited Oct. 22, 2012).

¹⁶⁴ See, e.g., UNITED WE DREAM, <http://unitedwedream.org/> (last visited Oct. 13, 2012); DREAM ACTIVIST, UNDOCUMENTED YOUTH ACTION AND RESOURCE NETWORK, <http://www.dreamactivist.org/> (last visited Oct. 13, 2012); Jose Antonio Vargas, *Not Legal Not Leaving*, TIME MAGAZINE (June 25, 2012), available at <http://www.time.com/time/magazine/article/0,9171,2117243,00.html>.

¹⁶⁵ See, e.g., AILA Resources on Deferred Action, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, <http://www.aila.org/content/default.aspx?docid=40291> (last visited Oct. 13, 2012); *Dreamer Resource Hub*, NATIONAL IMMIGRANT JUSTICE CENTER, <http://www.immigrantjustice.org/DREAMers#Eligibility> (last visited Oct. 13, 2012); *DREAMer Resources*, NORTHWEST IMMIGRANT RIGHTS PROJECT, <http://www.nwirp.org/resources/dreamer> (last visited Oct. 13, 2012); *FAQ: Deferred Action for Certain Immigrant Youth*, NATIONAL IMMIGRATION LAW CENTER, <http://www.nilc.org/FAQdeferredactionyouth.html> (last visited Oct. 13, 2012); *About Deferred Action*, NYC MAYOR'S OFFICE OF IMMIGRANT AFFAIRS, <http://www.nyc.gov/html/imm/html/deferred/about-deferred.shtml> (last visited Oct. 13, 2012).

(now Secretary of State for Kansas) as an unlawful seizure of legislative power.¹⁶⁶ Building on this criticism is a constitutional challenge by law professors Robert Delahunty and John C. Yoo, who argue that the Obama Administration has breached its constitutional duty to enforce immigration laws against individuals eligible under DACA.¹⁶⁷ A formal response to the argument posted by Yoo and Delahunty will be featured in a forthcoming essay in the *Texas Law Review*.¹⁶⁸

While my earlier work on prosecutorial discretion goes into great depth about the history and role of prosecutorial discretion in immigration law, the instant article is devoted to the role of the judiciary in prosecutorial discretion decisions. In keeping with this focus, my brief description of the DACA program's requirements and the reaction to this program ends here.

USCIS has adopted the agency's historical position that prosecutorial discretion decisions, including DACA decisions, are immune from judicial review. It has provided its response publicly and in the form of "Frequently Asked Questions."¹⁶⁹ Specifically:

Q1: Can I appeal USCIS's determination?

A1: No. You cannot file a motion to reopen or reconsider, and cannot appeal the decision if USCIS denies your request for consideration of deferred action for childhood arrivals. USCIS will not review its discretionary determinations. You may request a review using the Service Request Management Tool (SRMT) process if you met all of the process guidelines and you believe that your request was denied due to one of the following errors:

- USCIS denied the request for consideration of deferred action for childhood arrivals based on abandonment and you claim that you did respond to a Request for Evidence within the prescribed time; or
- USCIS mailed the Request for Evidence to the wrong address, even though you had submitted a Form AR-11, Change of Address, or changed your address online at

¹⁶⁶ See, e.g., Elise Foley, *Kris Kobach Represents Immigration Agents In Lawsuit Against Obama Administration*, HUFFINGTON POST (Aug. 13, 2012), http://www.huffingtonpost.com/2012/08/23/kris-kobach-immigration-lawsuit-obama_n_1825272.html; Complaint, *Crane v. Napolitano*, No. 12CV03247 (N.D. Tex. Aug. 23, 2012), 2012 WL 3629252.

¹⁶⁷ John Yoo and Robert J. Delahunty, *The Obama Administration, the Dream Act, and the Take Care Clause*, 91 TEX. L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144031&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144031.

¹⁶⁸ See Shoba Sivaprasad Wadhia, *Response to Yoo and Delahunty*, TEX. L. REV. (forthcoming 2013) (working title) (on file with author).

¹⁶⁹ *Consideration of Deferred Action for Childhood Arrivals Process*, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES (Sept. 14 2012), available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD>.

www.uscis.gov before the issuance of the Request for Evidence.¹⁷⁰

Possibly, judicial review should be available under the APA for individuals denied under the DACA program who can meet the standard of abuse outlined above. But a thorough analysis about whether such review should apply is beyond the scope of this Article.

VI. CONCLUSION

This Article examined normative arguments about judicial review over immigration decisions, described the standards outlined in the APA and INA for judicial review of agency actions, and applied these standards to a portion of federal circuit court decisions involving administrative discretion to conclude that noncitizens possibly do have a procedural right to challenge a prosecutorial discretion decision by the agency under the APA because there exists “more than enough law” against which a judge can determine whether a decision was rationally made. The implications of an arbitrary denial of prosecutorial discretion are real:

[I]t visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.¹⁷¹

In closing, the impact of prosecutorial discretion decisions on Latinos is not merely theoretical. According to the DHS, of the roughly 11.5 million unauthorized noncitizens living in the United States, 6.8 million are from Mexico, making it the leading source of unauthorized immigration.¹⁷² After Mexico, the highest populations of unauthorized immigrants are from El Salvador (660,000), Guatemala (520,000), and Honduras (380,000).¹⁷³ Deferred action data collected informally from twenty-four different field offices by ICE between October 1, 2011, and June 30, 2012, reveals that nearly half of the 698 deferred action cases processed by ICE during this time period involved natives of Mexico (177), Guatemala (49), Honduras (47), El Salvador (42), and Columbia (21).¹⁷⁴ Similarly, DACA data published by USCIS

¹⁷⁰ *Id.*

¹⁷¹ *Bridges v. Wixon*, 326 U.S. 135, 162 (1945).

¹⁷² MICHAEL HOEFER, NANCY RYTINA, & BRYAN BAKER, UNITED STATES DEP'T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, (Mar. 2012), 5, available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf.

¹⁷³ *Id.*

¹⁷⁴ See E-mail from Grace Cheng, Acting Chief, Government Information Law Division Office of the Principal Legal Advisor, U.S. Immigration and Customs Enforcement, U.S. Dep't of Homeland Security, to author (Sept. 26, 2012, 1:55 P.M.) (on file with author); see also

shows that of the 82,361 DACA applications filed with the USCIS as of September 13, 2012, more than half of these applications (46,391) were filed by Mexican nationals, followed by El Salvador (3,950), South Korea (2,837), Honduras (2,265), Guatemala (2,010), and Peru (1,807).¹⁷⁵

Given the large proportion of Latinos within the demographic of undocumented immigrants residing in the United States, and considering that many exhibit a number of the characteristics explicitly discussed in the June 17 Morton Memo—e.g., long-time residence, enrollment in higher education or high school, or status as a primary caregiver or breadwinner in a family that may include a United States citizen—it is unsurprising that Latinos stand to benefit greatly from the DACA program and other forms of prosecutorial discretion.¹⁷⁶ Even without a detailed statistical analysis on the impact of prosecutorial discretion on the Latino population, the numbers above illustrate the significant impact a judicial review design can have on this population.

Letter from FOIA Officer Catrina M. Pavlik-Kennan to author (Sept. 26, 2012) (on file with author); *Wadhia v. Dep't of Homeland Security*, No. 1:2012cv00231 (D.D.C. filed Feb. 10, 2012) (settled on Oct. 1, 2012).

¹⁷⁵ *Deferred Action for Childhood Arrivals Process*, USCIS OFFICE OF PERFORMANCE AND QUALITY (Sept. 14, 2012), available at http://www.aila.org/content/default.aspx?docid=41320&utm_source=AILA+Mailing&utm_campaign=3403df0a29-AILA8_10_5_12&utm_medium=email. On a related high note, the statistics cited here reflect the first time when the agency has provided public information about prosecutorial discretion filings and outcomes. Having pursued data on prosecutorial discretion for several years through the Freedom of Information Act (FOIA) and also recommended that the agency provide statistical information about deferred action, see *Wadhia*, *Sharing Secrets*, *supra* note 4, I find the USCIS' increased transparency under the DACA program to be a promising first step to greater transparency about deferred action more generally.

¹⁷⁶ Historically, those individuals who stand to benefit from prosecutorial discretion are technically deportable under the immigration laws and lack formal relief under such laws.