

MEMORANDUM FOR THE COMMISSIONER

THROUGH: THE DEPUTY COMMISSIONER

FROM: Bo Cooper
General Counsel

SUBJECT: INS Exercise of Prosecutorial Discretion

I. Summary

This memorandum sets out the legal basis upon which, and the extent to which, the Immigration and Naturalization Service (INS) may exercise prosecutorial discretion in its enforcement activities, including placing aliens in removal proceedings by serving them with Notices to Appear (NTAs). The structure of the memorandum is a series of questions and answers about prosecutorial discretion and the application of the doctrine to INS operations. It is our opinion that the INS has prosecutorial discretion to place a removable alien in proceedings, or not to do so, but it does not have prosecutorial discretion to admit an alien into the United States who is inadmissible under the immigration laws, or to provide any immigration benefit to any alien ineligible to receive it.

The memorandum is intended to be the first step in the INS' examination of its use of prosecutorial discretion. As such, the analysis is confined to laying out the legal basis for guidelines or other policy action that may be considered or undertaken in the future. It is not intended to serve as policy guidance itself on the use of prosecutorial discretion. Instead, this memorandum will provide the agency with a foundation to develop such guidance after consultation among the appropriate INS components. In particular, our legal conclusion that the INS has prosecutorial discretion to determine not to put a removable alien in proceedings is not intended to suggest that in any particular case such a determination should be made as a policy matter, or to supersede any current INS policy or procedures for charging removable aliens.

II. Discussion of INS Prosecutorial Discretion

Question 1. What is "prosecutorial discretion?"

Prosecutorial discretion is a decision by an individual or law enforcement agency charged with enforcing a law to enforce -- or not to enforce -- that law against someone; in other words, to decide to proceed against person A, but not person B, even though the law would authorize action against both. Although prosecutorial discretion is sometimes viewed solely as the decision of a prosecutor whether or not to bring charges against an individual, the term also can apply to a broad spectrum of discretionary enforcement decisions taken by a law enforcement agency, including: the decision to focus investigative resources on particular offenses or conduct; the decision of an investigating officer whether to stop or arrest a suspect; the decision of a prosecutor whether to charge an individual believed to have broken the law; the selection of what charge to bring in the very frequent situations in which more than one is available; the decision to drop some or all charges in an ongoing case; and the decision whether or not to seek to settle a case by plea bargain. Often, an individual who is not actually a prosecutor has broad "prosecutorial" discretion; for example, police officers have broad prosecutorial authority to charge minor offenses such as traffic violations.

For these reasons, the term "prosecutorial discretion" can be something of a misnomer, unless the focus is specifically on the decision of a prosecutor to bring a charge. Other applicable terms could include "enforcement discretion" or "administrative discretion" (generally), or "investigative discretion" (the discretion to focus investigative resources on particular priorities or targets).

Question 2: Why do law enforcement agencies have prosecutorial discretion?

The idea that the prosecutor is vested with broad discretion in deciding when to prosecute, and when not to prosecute, is firmly entrenched in American law. W. LaFare and J. Israel, Criminal Procedure § 13.2 (2d ed. 1992). Reasons for discretionary enforcement include (1) legislative "overcriminalization," such as the continued existence of crimes on the statute books that society does not wish to enforce, or does not wish to enforce as broadly as they are written (for example, morals offenses such as adultery); (2) limitations in available enforcement resources that make it impossible for a law enforcement agency to prosecute all offenses that come to its attention; and (3) the need to address the equities of individual cases in a way that rigid application of a broadly-drawn statute often cannot do.

The courts have recognized that attempting to review the discretionary enforcement decisions that prosecutors necessarily must make is a task "particularly ill-suited to judicial review." Wayte v. United States, 470 U.S. 598, 607 (1985). As the Supreme Court has stated, "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake . . . Examining the basis of a prosecution delays the criminal proceeding, threatens to

chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." Id. at 607-08.

Question 3: How does the general concept of prosecutorial discretion apply in the immigration enforcement context?

The INS is often involved, as the investigating agency that presents suspected criminal offenses involving the immigration laws to U.S. Attorneys for possible prosecution, in questions of prosecutorial discretion in the classic context of a criminal prosecutor's decision to charge. However, this answer focuses on the INS' exercise of discretion in the administrative context, when the INS itself is the decisionmaker. Because the INS is simultaneously in removal and detention matters the investigating agency, the prosecuting agency, the custodian, and the removing agency, the administrative enforcement discretion generally deferred to by courts extends far more broadly to a wide variety of INS decisions than the strictly "prosecutorial" decision to institute removal proceedings.

The concept of prosecutorial discretion applies in the civil, administrative arena as much as it does in criminal law. 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 decision generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. 821, 831 (1985). Courts have long recognized that the INS may exercise prosecutorial discretion in its enforcement activities. E.g., Johns v. Department of Justice, 653 F.2d 884, 890 (5th Cir. 1981); Matter of Geronimo, 13 I & N 680, 681 (BIA 1971). In a case decided last term, the Supreme Court specifically reaffirmed that the concept of prosecutorial discretion applies to INS enforcement activity such as a decision to place a particular alien in deportation proceedings. Reno v. American-Arab Anti-Discrimination Committee, 119 S. Ct. 936 (1999) ("AADC"). In AADC, the Court stated that the IIRIRA provision (section 242(g) of the INA) at issue in the case "was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." Id. at 944 n. 9.

Because -- like other law enforcement agencies -- the INS does not have the resources fully and completely to enforce the immigration laws against every violator, it exercises prosecutorial discretion thousands of times every day. INS enforcement priorities, including the removal of criminal aliens and the deterrence of alien smuggling, are examples of discretionary enforcement decisions on the broad, general level that focus INS enforcement resources in the areas of greatest need. When illegal border crossers are voluntarily returned to Mexico, or removable aliens are allowed to withdraw their applications for admission at a port of entry, without being placed in removal proceedings, those are exercises of prosecutorial discretion. Similarly, an INS grant of deferred action is an act of prosecutorial discretion. AADC, 119 S. Ct. at 943.

Agencies may exercise enforcement discretion in individual cases based on the particular facts or on enforcement priorities, or prosecutorial discretion may be more formalized and

generalized through agency regulations or procedures, such as those that govern decisions to place aliens in deferred action status or to grant them voluntary departure.

Question 4: What are the limits on INS prosecutorial discretion?

Under the Supreme Court's decision in Chaney, there is a rebuttable presumption that an agency's discretionary decision not to take enforcement action is not reviewable by the courts under the Administrative Procedure Act (APA), 5 U.S.C. § 501 et seq. Chaney, 470 U.S. at 832-33; see Texas v. United States, 106 F.2d 661, 667 (5th Cir. 1997) (rejecting "out-of-hand" Texas' argument that the INS failed to enforce the INA adequately, and that the alleged breach was reviewable under the APA for abuse of discretion). AADC confirms that affirmative discretionary decisions to select an individual violator for enforcement proceedings are also generally unreviewable. In other words, unlike discretionary decisions that are reviewable for abuse of discretion based on the facts of the case -- such as a grant or denial of a waiver by an immigration judge -- courts will not review an exercise of prosecutorial discretion for abuse of discretion. There are significant limitations to prosecutorial discretion, however.

First, in order to be a nonreviewable exercise of prosecutorial discretion, the decision must be a decision to enforce, or not to enforce, the law. An enforcement decision must be distinguished from an affirmative act of approval, or grant of a benefit, under a statute or other applicable law that sets guidelines for determining when the approval should be given. Chaney, 470 U.S. at 831. An enforcement decision is an exercise -- or nonexercise -- of an agency's coercive power over an individual's liberty or property. Id. at 832.

The doctrine of prosecutorial discretion applies to enforcement decisions, not benefit decisions. For example, a decision to charge, or not to charge, an alien with a ground of deportability is clearly a prosecutorial enforcement decision. By contrast, a grant of an immigration benefit, such as naturalization or adjustment of status, is a benefit decision that is not a subject for prosecutorial discretion. See Chaney, 470 U.S. at 831 (distinguishing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)). An agency must grant or deny a benefit based on its application of the criteria established by statute and implementing regulations. For example, if the INS selectively applied the naturalization requirements by granting some applications filed by aliens who had been lawful permanent residents less than five years, but denying others, it would be difficult to defend that action on the ground that the agency had "prosecutorial discretion" not to "enforce" the five-year requirement; rather, its application of the law would be vulnerable to a claim that it was arbitrary and capricious in violation of the APA.

It is important not to confuse the discretion that the INS has with respect to many benefit decisions with unreviewable prosecutorial discretion. For example, a grant of asylum under section 208 of the INA to an applicant meeting the statutory requirements is a discretionary action, but an applicant denied asylum by the INS will be given the opportunity to have his or her claim considered by an immigration judge, and an immigration judge's exercise of the Attorney General's discretionary authority to deny asylum is reviewable for abuse of discretion

on appeal to the Board of Immigration Appeals and a Circuit Court of Appeals. This type of discretion is not prosecutorial discretion. There are also situations in which the INS' discretionary grant or denial of an immigration benefit is not reviewable. For example, 8 C.F.R. § 274.13(c) provides that a denial of an application for employment authorization may not be appealed, but that unreviewability does not make such a denial an act of prosecutorial discretion.

Chaney's distinction between decisions involving the exercise of coercive power over liberty or property, and those involving administrative systems for the adjudication of affirmative approvals or benefits, provides substantial assistance in attempting to define the scope of the INS' prosecutorial discretion. This distinction is not always an easy, bright-line rule to apply, however. The distinction between an enforcement decision and an affirmative act of approval is often blurred. A decision not to enforce the immigration laws by placing an alien present in the United States in proceedings will (although it is not a grant of an immigration benefit per se) result in the alien's continued presence in violation of law, and in some cases to the eventual grant of a benefit such as adjustment of status. In some situations, the exercise of INS prosecutorial discretion serves directly as the basis for benefit eligibility. For example, aliens who are the beneficiaries of deferred action are considered "lawfully present" for the purpose of eligibility for Title II Social Security benefits under 8 C.F.R. § 103.12(a)(4)(vi), and are eligible for employment authorization under 8 C.F.R. § 274a.12(c)(14). Furthermore, a removal proceeding often combines both an affirmative adjudication of a benefit (such as a request for asylum) and the exercise of the coercive power of the agency.

There are also situations in which the INS cannot as a practical matter exercise its legal authority to refrain from placing an alien in proceedings, because alternatives to proceedings are not reasonably available. For example, a lawful permanent resident alien seeking admission at a port-of-entry who is found to be inadmissible with no available waiver cannot be admitted, so there is no satisfactory alternative to removal proceedings (this topic is discussed further in the answers to questions 7 and 8 below).

Second, the presumption that agency prosecutorial discretion is unreviewable may be rebutted where the substantive statute has provided clear guidelines for the agency to follow in exercising its enforcement powers. Chaney, 470 U.S. at 832-33. "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." Id. at 833. Although extreme examples of legislative control of executive enforcement activity -- such as, to take a hypothetical example, a statute directing an agency to commence an enforcement action against a specific individual -- would raise Constitutional concerns regarding the separation of powers, Congress may as a general matter direct and guide agency action by statute. Because a decision not to take enforcement action is presumptively unreviewable, however, only Congress' clear legislative intention to circumscribe agency enforcement discretion, and its provision of "meaningful standards for defining the limits of that discretion," will overcome the presumption against judicial review of a decision not to enforce the law. Id. at 834.

Section 242(g) of the INA, as interpreted by the Supreme Court in AADC, provides that INS enforcement decisions whether or not to commence proceedings or execute removal orders against any alien are not judicially reviewable. AADC, 119 S. Ct. at 943-44. With respect to those discretionary enforcement decisions, then, not only has Congress not clearly circumscribed the INS' enforcement discretion while providing meaningful standards defining the limits of that discretion, but it has firmly and specifically preserved INS discretion in this area.

With respect to detention, however, Congress made it clear in IIRIRA that, in order to ensure the removal of certain aliens, it intended to limit the enforcement discretion previously provided by the INA to INS decisions not to detain certain aliens under the INA's detention authority. The subject of detention is discussed more thoroughly in the answer to question 9, below.

Third, prosecutorial discretion is subject to constitutional constraints. Equal protection prohibits a decision to prosecute that is based upon an unjustifiable standard such as race, religion, or other arbitrary classification. United States v. Armstrong, 517 U.S. 456, 464 (1996). Because of the broad discretion granted to prosecutorial decisions, however, a "selective prosecution" case is a very difficult one to make (selective prosecution is further discussed in the answer to question 5).

Fourth, prosecutorial discretion to enforce the law can extend only up to the substantive and jurisdictional limits of that law. Although a law enforcement agency can strictly enforce the law as written against every violator if it wishes to do so and has sufficient resources, it cannot go beyond the law. For example, the INS cannot pursue a removal case against someone it knows to be a U.S. citizen because removing that individual is not an action within the substantive limits of the INA. Nor may the INS pursue an enforcement action that might be entirely appropriate if done by some other agency, but is not within the legal jurisdiction of the INS.

We also emphasize the important distinction between prosecutorial discretion to enforce the law, and the legal requirements applicable to the enforcement proceeding itself. See Geronimo, 13 I & N at 681 (it is the district director's discretionary decision whether to institute deportation proceedings; the immigration judge's function is not to review the wisdom of the district director's initiation of the proceedings, but to determine whether the deportation charge is sustained by the requisite evidence). Those legal requirements must always be followed, and INS compliance with them may be reviewed by the appropriate court.

An example of this distinction is an INS arrest of an alien believed to be present in the United States in violation of the INA. The INS has the discretionary authority not to arrest such an alien, even if there is probable cause to believe he is in the United States unlawfully. If the INS encounters several aliens and has probable cause to believe all of them are present unlawfully, the INS has the discretionary authority to arrest some of them, but not others, and the arrested aliens do not have a cognizable claim that their arrests were illegal merely because they were singled out -- just as a speeder pulled over on the highway will not be heard to complain

that his ticket should be dismissed because others were speeding, but were not pulled over. What the INS does not have the authority to do, under prosecutorial discretion or any other rule of law, is to arrest someone without probable cause to do so.

Question 5: Who enforces the limitations on INS prosecutorial discretion?

Another way of examining the limitations on INS' prosecutorial discretion is to ask, who may question an INS decision to enforce, or not to enforce, the immigration laws with respect to an alien, or category of aliens? There are basically three possible sources of legal limitation on INS' discretion: The federal courts, Congress, and INS or the Department of Justice itself.

Court challenges to prosecutorial discretion come in two forms. First, and most common, is a claim by someone who is the subject of enforcement that the enforcement is illegal because he has been improperly singled out for prosecution. For example, in AADC, aliens who had failed to maintain lawful immigration status complained that the INS sought to deport them, as opposed to other similarly situated aliens not placed in proceedings, because of their exercise of First Amendment rights. The Supreme Court rejected the claim, holding that when an alien's continued presence in the United States is in violation of the immigration laws, the INS does not violate the Constitution by selecting his case for enforcement because it believes him to be a member of an organization that supports terrorist activity. AADC, 119 S. Ct. at 946. As a result of the broad discretion courts grant to prosecutors' exercise of discretion, selective enforcement claims very rarely succeed, and then only when the defendant is able to produce clear evidence displacing the presumption that the prosecutor has acted lawfully. Id.; Armstrong, 517 U.S. at 464. In order to prevail on a selective prosecution claim that he was singled out on the basis of his race, the defendant must prove that the government's prosecutorial policy declined to prosecute similarly situated suspects of other races, and that the policy was motivated by a discriminatory purpose. Armstrong, 517 U.S. at 465.

Although federal courts generally have upheld INS prosecutorial discretion by rejecting selective prosecution arguments in immigration cases, Pasquini v. Howerton, 700 F.2d 658, 662 (11th Cir. 1983), they have on occasion been receptive to such arguments. Lennon v. INS, 527 F.2d 187, 195 (2d Cir. 1975). AADC's firm rejection of a selective prosecution argument raises the bar for such arguments in removal cases, however, even higher than the already extremely deferential Armstrong standard applicable to criminal cases. AADC, 119 S.Ct at 946-47. For several reasons, the concerns that make courts properly hesitant to examine the decision whether to prosecute are "greatly magnified in the deportation context." Id. Consequently, although the Supreme Court did not rule out the possibility of "a rare case in which the alleged basis of discrimination is so outrageous" that these concerns can be overcome, AADC has made selective prosecution claims in immigration cases substantially more difficult to prevail upon than was previously the case.

Less common than a selective prosecution claim, but not unknown, is a judicial claim by someone asking a court to order an agency to take enforcement action against someone else. For example, in Chaney, death row inmates sought an order requiring the FDA to enforce the drug

laws in ways that would make it essentially impossible for states to use any drugs for lethal injections. Chaney, 470 U.S. at 823. These claims likewise usually fail, if not for threshold grounds of judicial standing (i.e., that the claimant does not have a sufficient personal stake in the issue to raise the claim), then as a result of courts' deference to an agency decision not to enforce.

Congress may also limit an agency's prosecutorial discretion by a variety of means, ranging from changes in the substantive law of the offense to channeling funding through the budget process to particular areas of concern. A basic legal question common to prosecutorial discretion issues, then, is whether the relevant statute limits discretion with respect to a particular enforcement activity. As prosecutorial discretion is an authority inherent in the law enforcement function, a statutory limitation must be clear and specific. If prosecutorial discretion is specifically limited by law, that limitation is likely to be enforceable in court by a person aggrieved by its violation, returning the question to a judicial forum. If the law does not limit discretion, however, then the only question for the Executive agency -- and it is not a legal one -- is whether the manner in which it exercises its enforcement authority is likely to invite future statutory limitations.

The third source of limitation on prosecutorial discretion comes from within the law enforcement agency itself, or from higher Executive Branch authorities (such as, in the case of INS, the Attorney General or the President). Whether by regulation or policy directive, an agency may channel and guide the discretion of its employees entrusted with the responsibility of making discretionary enforcement decisions in order to ensure that such decisions are made fairly and judiciously. Indeed, appropriate policy guidance, reinforced by training, is necessary in order for a law enforcement agency to carry out an enforcement function properly. Such guidance serves a variety of policy goals, including promoting public confidence in the fairness and consistency of the agency's enforcement action; ensuring that employees carrying out the agency's discretionary functions are delegated the degree of discretionary authority appropriate to their position, training, qualifications and experience; maintaining proper chains of command and accountability; removing potential opportunities for corruption or misconduct; and protecting employees from false accusations of corruption or misconduct.

The INS has provided a variety of materials, of differing legal formality, to instruct and guide its officers on how and when removal proceedings should be instituted, and who has authority to institute them. For example, INS regulations at 8 C.F.R. § § 239.1 and 239.2 identify which INS officers are authorized to issue NTAs, and describe who may cancel them and on what grounds. INS enforcement priorities that focus INS prosecutorial resources where they will do the most good, such as removing criminal aliens and deterring alien smuggling, are examples of informal guidance that broadly govern the exercise of prosecutorial discretion. (By "informal" we mean only that enforcement priorities are not legally codified and binding substantive law -- nor are they required to be under the APA -- not that they are unimportant, or need not be adhered to by INS personnel.) The INS also provides field manuals and other enforcement procedure documents for detention and deportation officers, special agents, and others who must make investigative and prosecutorial decisions. See, e.g., Interim Enforcement

Procedures (June 5, 1997) (discussing, among other things, factors to be considered in granting voluntary departure or deferred action).

The need for suitable policy guidance must be balanced, however, with the realization that if the agency provides regulations or instructions on the exercise of prosecutorial discretion that are so strict, formalized, or rigid as to establish a substantive process conferring a benefit on an alien, the otherwise discretionary enforcement decisions in that process may be considered judicially reviewable, on the ground that the law now provides workable standards for a court to apply. See Nicholas v. INS, 590 F.2d 802, 805-08 (9th Cir. 1979). As Justice Scalia's opinion for the Court in AADC noted with respect to pre-IIRIRA litigation involving INS decisions regarding grant or denial of deferred action, "since no generous act goes unpunished . . . the INS's exercise of this discretion opened the door to litigation in instances where the INS chose not to exercise it." AADC, 119 S. Ct. at 944.

It sometimes is appropriate for the INS to bind itself with rules (such as 8 C.F.R. § 239.1) upon which the public reasonably may rely, even if those rules limit the exercise of prosecutorial discretion in a particular case. Generally, however, policies that affect prosecutorial discretion -- especially those that address the prosecutorial discretion of the agency as a whole -- are properly classified and issued as general statements of policy that do not impose rights and obligations on the public, and are not subject to the rulemaking requirements of the APA. See, e.g., Romeiro de Silva v. Smith, 773 F.2d 1021, 1024 (9th Cir. 1985); Pasquini, 700 F.2d at 662; J. Stein, G. Mitchell & B. Mezines, Administrative Law § 15.07[4] (1999). Therefore, they may be changed at any time, and do not legally bind the agency or provide any substantive or procedural rights to aliens. For example, it would not be in order for an alien to move to terminate his immigration proceeding on the ground that his case does not fall within one of the INS' enforcement priorities, or for an immigration judge to entertain such a claim.

Question 6: Does the INS have prosecutorial discretion not to pursue a removal proceeding against a removable alien?

Yes. Section 242(g) of the INA, as interpreted by the Supreme Court in AADC, provides that the INS' decision not to pursue a removal proceeding against an alien is an exercise of prosecutorial discretion that is not judicially reviewable.

Question 7: Does the INS have prosecutorial discretion to admit an inadmissible alien at a port-of-entry?

No. Inspection and admission of aliens involves elements of both enforcement and benefit adjudication. Admitting an alien with an authorized status and length of stay is an affirmative act of approval under the INA. Section 235(b)(2) of the INA prohibits an immigration officer from admitting an applicant for admission unless the alien is clearly and beyond a doubt entitled to be admitted. If there is any such doubt, section 240(a)(3) provides that (unless otherwise specified in the INA, such as expedited removal or stowaways) a removal

proceeding before an immigration judge is the sole and exclusive procedure for determining whether an alien may be admitted to the United States.

Serving an NTA on an inadmissible alien is an enforcement decision that is subject to prosecutorial discretion. In the exercise of prosecutorial discretion, the INS also may allow an alien applicant for admission to withdraw his or her application and depart immediately from the United States. What the INS may not do, however, is admit an inadmissible alien as an exercise of prosecutorial discretion. This is true both because the doctrine of prosecutorial discretion is limited under cases such as Chaney to decisions to exercise the enforcement power of the agency rather than affirmative acts that grant a status, and because the statutory provisions relating to admission clearly limit any such discretion on the part of the agency. If there is any doubt about the admissibility of an alien, the INS cannot admit the alien. At that point it has the discretionary option to allow the alien voluntarily to withdraw his application for admission, or to place him in proceedings. (Parole is also an option if the alien qualifies under section 212(d) of the INA, but is neither an admission nor a permanent answer to the question of the alien's admissibility.)

Question 8: What other concerns or practical difficulties are relevant to the exercise of the INS' prosecutorial discretion not to place removable aliens in proceedings?

First, the fact that a violation of the immigration laws is a continuing violation leads to practical difficulties with the exercise of prosecutorial discretion. In particular, an INS decision to forego placing an alien -- such as an LPR with a criminal record making him or her removable -- in proceedings does not cure the violation, and is likely to cause future problems. If the alien travels outside the United States and attempts to reenter, the alien will not be admissible. Admission to the United States as the result of immigration inspection is not a matter of prosecutorial discretion. An inadmissible alien for whom a waiver is not available may not be admitted.

In other words, the fact that the INS can forego commencing a removal proceeding does not mean that the INS can grant a status for which an alien is not eligible, so the alien remains in a continuing, difficult state of limbo and illegality. Unlike criminal law, immigration law does not contain generally applicable statutes of limitation that grant repose to past violators of law to go on with their lives without fear of prosecution after sufficient time has elapsed.

Second, unlike a typical criminal prosecution decision that involves making the decision whether an individual should be punished for past, completed misconduct, a decision not to bring a removal proceeding perpetuates a continuing violation of the immigration laws. Removal from the United States is not a punishment; rather, it is a civil correction of an ongoing violation. AADC, 119 S. Ct. at 947. This is a factor the INS should consider when it declines to place in proceedings an alien whom Congress has declared by law to be removable.

Third, INS prosecutors lack much of the flexibility that criminal prosecutors possess to make, as a discretionary matter, the consequences of misconduct fit the offense. For example, as removal from the United States is not a punishment, immigration law does not contain criminal

law concepts of gradualized sentencing based upon the specific facts of the individual's offense or, for the most part, different consequences based upon the specific ground of removability. This gives INS prosecutors little of the discretion criminal prosecutors have to select appropriate charges from a range of offenses covering the defendants' misconduct, or to "plea bargain" a case.

Question 9: How does the concept of prosecutorial discretion relate to detention questions such as mandatory detention?

Section 236(a) of the INA provides the INS with the general authority -- and the discretion -- to detain an alien pending a decision on whether the alien is to be removed from the United States. As detaining aliens is an exercise of the coercive authority of a law enforcement agency over liberty, legal concepts of enforcement discretion apply despite the fact that detention is not a strictly "prosecutorial" decision. Detention decisions (whether in individual cases or collectively as a matter of agency policy) typically involve consideration of factors not dissimilar from those a prosecutor considers in deciding whether to prosecute, including the adequacy of agency resources available for the task, competing agency mandates or priorities, and other relevant legal or policy considerations (such as, in the case of detention, ensuring that detainees are not subjected to unlawful overcrowding or other conditions adversely affecting their health and safety). The INS traditionally has had the discretion to choose not to detain a removable alien. That discretion has been tempered with other legal authority and policies, such as bond determinations, designed to ensure that such decisions have been made based on a determination that the alien is not a threat to public safety and is likely to appear for further proceedings. Whether an alien should be detained without bond, and conditions of release such as the appropriate amount of bond, are INS and/or immigration judge determinations reviewable by the Executive Office for Immigration Review.

In short, an INS determination to exercise its detention authority over an alien is reviewable on the merits, just as an INS decision to seek the removal of an alien by placing him or her in proceedings will be adjudicated on the merits in most categories of cases by the immigration judge. An INS decision to release an alien whom the agency otherwise might seek to detain was, until the enactment of IIRIRA, an unreviewable act of enforcement discretion under the INA in the same way a decision not to charge a removable alien was, and is, an unreviewable discretionary act.

In IIRIRA, however, Congress expressly limited the INS' administrative discretion under the INA not to detain criminal aliens, once the decision is made to place them in removal proceedings. The mandatory detention provisions, sections 236(c) and 241(a)(2) of the INA, require the INS (with limited exceptions) to detain criminal aliens during the pendency of their removal proceedings, and during the 90-day removal period following the entry of their removal order.

Thus, although Congress reaffirmed in IIRIRA the INS' prosecutorial discretion to commence removal proceedings against an alien, it did the opposite with respect to the agency's

enforcement discretion to release criminal aliens once the INS has determined to institute proceedings, and the proceeding is pending or has concluded with the entry of a removal order. Congress stated a clear intention expressly to limit the discretion the INS otherwise would presumptively have had to make discretionary determinations regarding the need to detain a criminal alien, and provided meaningful standards regarding mandatory detention categories.

III. Conclusion

The INS has broad prosecutorial discretion in its law enforcement activities, although that discretion is not unlimited. This authority includes the prosecutorial discretion not to place a removable alien in proceedings, but the INS does not have prosecutorial discretion to admit an inadmissible alien into the United States. The INS does not have prosecutorial discretion to provide any benefit under the INA to an alien who is not eligible to receive it.