

Using All the Tools in the Toolbox:

HOW PAST ADMINISTRATIONS HAVE
USED EXECUTIVE BRANCH AUTHORITY
IN IMMIGRATION

By Mary Giovagnoli Esq.

September 2011

USING ALL THE TOOLS IN THE TOOLBOX:

HOW PAST ADMINISTRATIONS HAVE USED EXECUTIVE BRANCH AUTHORITY IN IMMIGRATION

BY MARY GIOVAGNOLI

SEPTEMBER 2011

ABOUT PERSPECTIVES ON IMMIGRATION

The Immigration Policy Center's *Perspectives* are thoughtful narratives written by leading academics and researchers who bring a wide range of multi-disciplinary knowledge to the issue of immigration policy.

ABOUT THE AUTHOR

Mary Giovagnoli is the Director of the Immigration Policy Center. Prior to joining the IPC, Mary served as Senior Director of Policy for the National Immigration Forum and practiced law as an attorney with the Departments of Justice and Homeland Security; serving first as a trial attorney and associate general counsel with the INS, and—following the creation of DHS—as an associate chief counsel for U.S. Citizenship and Immigration Services (USCIS). Mary specialized in asylum and refugee law, focusing on the impact of general immigration laws on asylees. During that time, she served as the staff attorney for implementation of NACARA Section 203. In 2005, Mary became the senior advisor to the Director of Congressional Relations at USCIS. She was also awarded a Congressional Fellowship from USCIS to serve for a year in Senator Edward M. Kennedy's office, where she worked on comprehensive immigration reform and refugee issues.

ABOUT THE IMMIGRATION POLICY CENTER

The Immigration Policy Center, established in 2003, is the policy arm of the American Immigration Council. IPC's mission is to shape a rational conversation on immigration and immigrant integration. Through its research and analysis, IPC provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy on U.S. society. IPC reports and materials are widely disseminated and relied upon by press and policymakers. IPC staff regularly serves as experts to leaders on Capitol Hill, opinion-makers, and the media. IPC is a non-partisan organization that neither supports nor opposes any political party or candidate for office. Visit our website at www.immigrationpolicy.org and our blog at www.immigrationimpact.com

Executive Summary

While it is true that Congress makes the laws and the President executes them, it is also true that the President, the Cabinet, and a host of regulatory agencies spend countless hours interpreting and implementing the laws. Congress can never foresee all of the myriad details that must be worked out to actually turn a law into a functioning process. It falls to the executive branch to carry out that work through the regulatory process—the system of rulemaking and public comment that generally takes place after a law is enacted.

However, it is often the case that Members of Congress do not agree with how the executive branch has interpreted and implemented a law. Disputes of this nature can quickly escalate from simple disagreement to frenzied hyperbole. Consider the over-the-top political rhetoric which has characterized much of the immigration debate for many years, with any act of generosity towards an immigrant quickly labeled “amnesty” by some lawmakers. Such rhetoric quickly turns into a pitched battle between Congress, as the maker of the law, and the Administration, as implementer of the law.

For example, on July 5, 2011, Congressmen Lamar Smith (R-TX), Chairman of the Committee on the Judiciary, and Robert B. Aderholt (R-AL), Chairman of the Appropriations Subcommittee on Homeland Security, wrote to Department of Homeland Security (DHS) Secretary Janet Napolitano, warning her against subverting the will of Congress. The six-page letter recounts an alleged history of DHS attempts to “open the door to mass administrative legalization” representing a “rejection of Congress’s constitutional prerogatives and an utter disdain towards the wishes of the American people as expressed by their elected representatives.”

The Congressmen were referring to several memos drafted in 2010 by U.S. Citizenship and Immigration Services (USCIS) and DHS staff and later leaked to the public—memos that were never implemented—as well as two memos released June 17, 2011, by John Morton, Director of Immigration and Customs Enforcement, on the use of prosecutorial discretion. In response to these memos, Congressman Smith and Senator Vitter (R-LA) introduced the “Hinder the Administration’s Legalization Temptation Act” (HALT Act), an extraordinarily political piece of legislation that suspends virtually all of the Administration’s discretionary immigration relief until January 21, 2013—the day after the next inauguration.

This conflict between the Obama Administration and some Members of Congress is likely to escalate when Congress returns from its August recess, given the August 18, 2011, announcement that DHS would put muscle behind its prosecutorial discretion guidelines. The plan to review 300,000 immigration cases to assess whether they fall within the Administration’s enforcement priorities has already inflamed critics. Because the Administration may close some cases and grant work authorization, critics are immediately yelling “amnesty.” But the DHS announcement is about using executive branch authority—in this case, prosecutorial discretion—to carry out its policy priorities.

Congressman Smith has already taken issue with the new plan. It is worth noting, however, that he himself made a case for the use of prosecutorial discretion when interpreting certain

provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). Smith and several other Congressmen asked the Clinton Administration to use its prosecutorial discretion generously in interpreting the new law, stating: “We write to you because many people believe that you have the discretion to alleviate some of the hardships, and we wish to solicit your views as to why you have been unwilling to exercise such authority in some of the cases that have occurred.”

It is also worth noting that, following the failure of the 2007 comprehensive immigration reform (CIR) bill, the Bush Administration publicly commented on its executive authority to enforce immigration laws. DHS Secretary Michael Chertoff and Department of Commerce Secretary Carlos Gutierrez announced a [26-point plan](#) to use administrative measures to “sharpen the tools” available to them:

We had hoped that immigration reform on a comprehensive basis would give us a much wider set of tools; we don’t have that. We still think Congress can act on it. But until the laws change, we are enforcing the laws as they are to the utmost of our ability, using every tool that we have in the toolbox, and we’re going to sharpen some of those tools.

While some of these administrative measures were aimed at increased policing of immigration violations—making E-verify mandatory for all federal contractors and using Social Security No-Match Letters as a way to hold employers liable for hiring unauthorized workers—many of the proposals involved changing regulations to make existing, legal worker programs more efficient, at least from the Administration’s perspective.

If DHS needs a historical reminder that common sense and good judgment can prevail despite hysterical cries of “amnesty,” it need only look to the recent past, during the implementation of the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA). That legislation, which provided relief from removal for certain Nicaraguans, Cubans, Salvadorans, and Guatemalans—but under differing standards—involved a pitched political battle during the implementation phase of the law. Some Members of Congress and the advocacy community lobbied heavily for using a “presumption of extreme hardship” to make the relief available to Salvadorans and Guatemalans more akin to the “amnesty” given to Nicaraguans and Cubans under the law. In contrast, Congressman Smith argued vehemently against any interpretation of the law that would simplify the eligibility requirements, arguing that it would be against the will of Congress.

Ultimately, despite raising the ire of Congressman Smith, the Clinton Administration produced regulations that interpreted the new law generously, but fairly, making it easier for more people to receive relief. Using the tools of executive branch authority, the Administration made the most of what the law had to offer, staying within the letter of the law, but opting for the most generous interpretation available. This lesson is worth recalling in the fight over the HALT Act and administrative relief today.

The debate is not whether the President has the authority to revisit existing interpretations of laws. As the Bush Administration made clear, an administration has a duty to carry out the law to the best of its ability, which includes its interpretive ability. The Obama Administration has taken a first step in laying out clear guidance on prosecutorial discretion and forming a review committee, but it can't stop there. Clear and transparent guidance on the implementation of the priority review process, and how that guidance will be implemented in making decisions about new cases, is needed and must be put out quickly. The much-maligned DHS memos, which looked at a range of options for re-interpreting existing guidance and regulations, still need to be revisited. If anything, the August 18 announcement opens the door for a more robust discussion of executive authority—one which the Obama Administration should embrace rather than hide from.

Unlike the case of NACARA, in which the Clinton Administration had the luxury of interpreting a new law, the Obama Administration—and the rest of us—are stuck with many laws that no longer work. Just like Secretary Chertoff when confronted by that realization, the answer is to use all the tools in your toolbox to make the best of the laws at your disposal. There will be disagreement, there will be political threats, but in the long run, the only way to really lose executive branch authority is through inaction based on fear of the consequences.

Introduction

Every American school child learns early on that the separation of powers between the executive, legislative, and judicial branches of the federal government is an important element of our Constitution. Congress makes the laws, the President executes them, and the judiciary resolves disputes over interpretation. As simple as that sounds, however, the reality of our federal system is far more complex. Congress may make the laws, but the President, his or her Cabinet, and a host of regulatory agencies spend countless hours interpreting and implementing them. Moreover, no law exists in a vacuum; the implementation of a law is constantly shaped by new legislation, new Supreme Court or other judicial determinations, new political players, new policy priorities, and the constantly shifting impact of current events and public opinion on the policy decisions made by our leaders.

It would be naïve to assume that the political pressures end when the President signs a bill into law. The regulatory process—the system of rulemaking and public comment that generally takes place after a law is enacted—can be highly political as different parties fight over what a law means, whether it should be interpreted broadly or narrowly, how it will be paid for, and who can benefit from it. Congress can never foresee all of the myriad details that must be worked out to actually turn a law into a functioning process. It falls to the executive branch to carry out that work, most often through the regulatory process, but also through other forms of executive action, ranging from executive orders to policy guidance.

Unfortunately, when Members of Congress don't like the interpretation of the executive branch, the temptation to go from simple disagreement to frenzied hyperbole is sometimes irresistible. This kind of over-the-top political rhetoric has characterized much of the immigration debate for many years, with any act of generosity towards an immigrant quickly labeled "amnesty" by some lawmakers. Such rhetoric quickly turns into a pitched battle between Congress, as the maker of the law, and the Administration, as implementer of the law.

For example, the day after the Fourth of July 2011, Congressmen Lamar Smith (R-TX), Chairman of the Committee on the Judiciary, and Robert B. Aderholt (R-AL), Chairman of the Appropriations Subcommittee on Homeland Security, wrote to Homeland Security Secretary Janet Napolitano, warning her against subverting the will of Congress.¹ The six-page letter recounts an alleged history of attempts by the Department of Homeland Security (DHS) to "open the door to mass administrative legalization," which represents a "rejection of Congress's constitutional prerogatives and an utter disdain towards the wishes of the American people as expressed by their elected representatives." The letter cites several draft memos² written in 2010 by U.S. Citizenship and Immigration Services (USCIS) and DHS staff, and leaked to the public—memos that were never implemented. The letter also cites two memos³ released June 17, 2011, by John Morton, Director of Immigration and Customs Enforcement (ICE), on the use of prosecutorial discretion, as evidence of the Administration's intent to "imply that immigration law should not be fully enforced." At another point in the letter, Smith alleges that these memos are the result of intense political pressure from people who want the Administration to "legalize countless illegal immigrants through administrative action."

As a follow up to this letter, Congressman Smith and Senator David Vitter (R-LA) introduced the “Hinder the Administration’s Legalization Temptation Act” (HALT Act), an extraordinarily political piece of legislation that suspends virtually all of the Administration’s discretionary immigration relief until January 21, 2013—the day after the next presidential inauguration. The HALT Act attacks not only the notion of prosecutorial discretion laid out in the Morton memos, but suspends existing immigration benefits in which discretion plays a role. Lost in all of the rhetorical outrage is any mention of the consistent legal analysis supporting executive action in immigration matters, and a history of such action in Republican and Democratic administrations alike. Routinely, immigration restrictionists have attempted to undermine any attempts by the Obama Administration to use its executive authority by arguing that only Congress can define and interpret the law. Not only is this contrary to the fundamental constitutional principles of checks and balances, it is also a sort of bait and switch tactic, designed to draw attention away from substantive policy analysis and into the world of conspiracy theory.

On August 18, 2011, the Obama Administration announced that it would put some muscle behind the Morton memo, instituting a review process of 300,000 immigration cases to determine whether the cases were consistent with the administration’s enforcement priorities. Those cases that are low priority, and that involve significant equities like strong family connections or community ties, would be administratively closed. Immigration restrictionists swiftly labeled the plan—what else?—a back-door amnesty.

No doubt the over-blown rhetoric will continue, with restrictionists in Congress demanding that the Obama Administration defend its new policies. Immigration restrictionists will scream “amnesty” at the same time the community calls for accountability. More likely than not, to do the right thing, the Obama Administration may find itself disappointing friends and foes alike as it seeks to balance the heavy task of responsibly exercising its discretion. The use of executive branch authority always carries with it the risk that someone will say you are overstepping your authority.

If DHS needs a historical reminder that common sense and good judgment can prevail despite hysterical cries of “amnesty,” it need only look to the recent past, during the implementation of the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA).⁴ That legislation, which provided relief from removal for certain Nicaraguans, Cubans, Salvadorans, and Guatemalans—but under differing standards—involved a pitched political battle during the implementation phase of the law. Ultimately, despite raising the ire of Congressman Smith, the Clinton Administration produced regulations that interpreted the new law generously, but fairly, making it easier for more people to receive relief. Using the tools of executive branch authority, the Clinton Administration made the most of what the law had to offer, staying within the letter of the law, but opting for the most generous interpretation available. This lesson is worth recalling in the fight over the HALT Act and administrative relief that continues today.

This essay looks at the development of the NACARA regulations—the legislative history, the political fights internally and externally, and the gradual realization of regulators that a new

interpretation of the law was possible—to highlight the challenges and opportunities available to the Obama Administration today.

The “Ameliorative” Effect of NACARA as a Response to Harsh Immigration Reform

On September 30, 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA),⁵ one of the most sweeping and draconian overhauls of immigration law ever, went into effect. The law eliminated or restricted many of the forms of immigration relief available to persons without legal status, including imposing much higher and more onerous standards for suspension of deportation. Prior to IIRAIRA, suspension of deportation was a form of relief designed to exempt from removal persons who had been in the country for at least seven years, had good moral character, and could demonstrate that deportation would result in extreme hardship to the applicant or an immediate family member (spouse, parent, child) if the family member was a Lawful Permanent Resident (LPR) or U.S. citizen. Under IIRAIRA, suspension of deportation was replaced with “cancellation of removal,” a form of relief which requires at least 10 years in the U.S. and dramatically increases the standard for proving hardship. Under IIRAIRA, an applicant had to establish exceptional and *extremely unusual hardship* to an LPR or U.S.-citizen family member. Proving hardship to the applicant was no longer sufficient. A separate provision of the law also prohibited counting any time in the U.S. that occurred following the issuance of the charging document.

These provisions hit a lot of people hard, but were particularly devastating to a group known as the “ABC class.”⁶ These individuals—Salvadorans and Guatemalans who might have been eligible for asylum during the height of the wars in El Salvador and Guatemala—were members of a class action lawsuit filed on their behalf by the American Baptist Church (ABC) that challenged the asylum procedures of the Immigration and Naturalization Service (INS). Ultimately, the case settled with an agreement that stayed the deportation of class members and allowed them to apply for asylum under a new procedure. In the meantime, many of the Salvadoran class members were granted Temporary Protected Status (TPS), and then Deferred Enforced Departure (DED). This led the INS to delay completion of the asylum interviews until these other forms of protection ended. Concurrently, the wars in both countries came to a close, and the changed conditions in their home countries meant that many ABC class members might no longer qualify for asylum, even if their claims in the early 1990’s had been legitimate. They had been in the U.S. long enough, however, that an independent claim for suspension of deportation (under the pre-1996 system) was a genuine possibility for class members.

Given the reduced likelihood that ABC class members would qualify for asylum, and IIRAIRA’s sudden elimination of an alternate form of prospective relief for thousands of people, there was intense pressure on the Clinton Administration to address the plight of Central Americans in the United States. Advocates argued that the Administration should restore eligibility for the more lenient standard of “suspension of deportation” to many Central Americans, including those covered by the ABC litigation—as well as Nicaraguans left without status following the

expiration in 1995 of the Nicaraguan Review Program, a special administrative relief program created by Attorney General Edwin Meese that delayed or suspended the deportation of Nicaraguans who had been denied asylum.⁷ On July 24, 1997, President Clinton transmitted The Immigration Reform Transition Act of 1997 to Congress, in which he proposed legislation that would allow Salvadorans, Guatemalans, and Nicaraguans to make use of the more lenient suspension of deportation standard. Clinton noted in his transmittal statement that he was prepared to work with Congress to enact this legislation, but if he and Congress were “unsuccessful in this goal, I am prepared to examine any available administrative options for granting relief to this class of immigrants.”⁸

As the proposal worked its way through Congress—especially through the House Immigration Subcommittee—it morphed into an entirely different framework. Ultimately, Congressmen Lamar Smith and Lincoln Diaz-Balart (R-FL) worked out a deal that permitted Nicaraguans and Cubans to apply for adjustment of status, but retained the original requirements for Salvadorans and Guatemalans. When the provision came before the Senate, according to a White House staff report, Senator Edward Kennedy (D-MA) initially blocked the package unless it included a reduced extreme hardship standard for Salvadorans and Guatemalans, as well as relief for Haitians.⁹ Ultimately, neither of Kennedy’s proposals made it into NACARA, which became law on November 19, 1997—Lamar Smith’s birthday.

Under the provisions of the bill as enacted, NACARA Section 202 permitted Nicaraguans and Cubans who entered the country before December 1, 1995, and were otherwise admissible to the U.S. to apply for adjustment of status, allowing them to immediately qualify for green cards without going through any kind of merit-based analysis. In contrast, NACARA Section 203 permitted Salvadorans, Guatemalans, and nationals of former Soviet bloc countries to apply for “cancellation of removal.” However the criteria used would be the same as those for “suspension of deportation,” a pre-1996 form of relief that was available to persons who had resided in the U.S. for seven years, could establish good moral character, and could show that deportation would result in extreme hardship to the individual or a U.S.-citizen or LPR family member. In short, Cubans and Nicaraguans could apply for lawful permanent resident status under far easier standards than their Salvadoran and Guatemalan counterparts. As the Salvadoran American Action Network noted in a press statement, the impending legislation offered “amnesty” to Nicaraguans, but left Salvadorans and Guatemalans subject to the uncertainty of immigration court.¹⁰

Many immigration advocates called “foul,” arguing that the law represented a double standard, favoring those who had fled governments the U.S. opposed over those from governments it supported. President Clinton, in his signing statement, acknowledged the disparity and urged the Department of Justice (DOJ) to draft regulations that took into account the “ameliorative” nature of NACARA:

[t]he bill makes important changes to last year’s immigration bill regarding its treatment of Central Americans. During my trip to Central America in May, I pledged to address the circumstances of Central Americans who were treated

unfairly. In July, I sent Congress a legislative proposal that offered relief to these people. I am very pleased that this bill includes provisions that do just that.

Most Central Americans who sought refuge in the United States did so because of the civil war and human rights abuses that plagued that region for many years. As I noted during my trip, I believe that the United States has a particular obligation to help these people—not only because they and their families have now established deep roots in our communities—but also because sending them home at this time would very likely disrupt the important progress these countries have made towards peace, democracy, and economic reform.

Nevertheless, I am concerned about several aspects of this legislation as passed by Congress. First, I am troubled by the fact that it treats similarly situated people differently. The Central Americans covered by this bill fled similar violence and persecution; they have established similarly strong connections to the United States; and their home countries are all fledgling democracies in need of our assistance. The relief made available to these people should be consistent as well.

I believe, however, that the differences in relief offered by the legislation can be minimized. I am asking the Attorney General to consider the history and circumstances of the people covered by this legislation and its ameliorative purposes in implementing its provisions.

I am also concerned about the plight of certain Haitians who are not covered by this legislation. Many Haitians were also forced to flee their country because of persecution and civil strife and they deserve the same treatment that this legislation makes possible for other groups.

We will seek passage of legislation providing relief to these Haitians early in the next session of congress, and take appropriate administrative action while we pursue this solution.

Finally, I believe that Congress should not have continued to permit the application of new, harsher immigration rules to other persons with pending cases. Changing the rules in the middle of the game is unfair, unnecessary, and contrary to our values. We intend to revisit this issue at the earliest opportunity.¹¹

From Public Law to Regulation: Shaping the Interpretation of NACARA Section 203

Political battles over legislation do not end on the day the President signs a bill into law. As President Clinton's signing statement suggests, the stage was already set for a battle over the interpretation of NACARA, in which the President chastised Congress for failing to go far enough to help some groups, and indicated that his Administration would "consider the history and circumstances of the people covered by this legislation and its ameliorative purposes in implementing its provisions." In other words, the President told the Attorney General (who oversaw the INS) to draft regulations to implement the law that would take into account, as much as possible, the disparities between different provisions of NACARA. The Administration would use its executive branch rule-making authority to minimize those disparities where it could.

NACARA itself was a highly complex and technical law that could not simply be applied by reading it. As a general matter, agencies implement laws of such complexity through the regulatory process, which is itself governed by the Administrative Procedures Act, a set of procedures which ensure that the public has ample opportunity to comment upon the proposed interpretation of a law.¹² Generally, an agency proposes a rule and makes it available for public comments. After the comment period ends, agency officials review the comments received and make changes to the regulations, justifying their reasons for those changes—or their reasons for refusing to make changes—in a supplemental statement that accompanies the next publication of the rule. Sometimes this rule is interim, meaning that more comments are solicited, while in other cases the agency goes from a proposed rule to a final rule. Such rules are often amended over time, based on other legislative changes, new judicial decisions, identification of problems that weren't obvious before the rule was in effect, or because a new Administration believes a different interpretation of the law is warranted. Those amendments are also subject to the public notice and comment process. And while the public voice is critical to this process, ultimately the agency has broad discretion to implement a law as it sees fit.

It is this very kind of discretion that has been so much at issue over the last few years. The leaked DHS memos involved analysis by agency officials of whether existing interpretations of law warranted re-examination. Could more be done administratively either through changes in policy or regulation to provide relief to more people? Many of these changes, if they were ever implemented, would likely be subject to this very kind of notice and comment—or at least some form of public dialogue about the changes. This makes the history of that dialogue in the NACARA context highly relevant to today.

Dueling Legislative Interpretations

Once NACARA was signed into law, advocacy groups quickly shifted their emphasis from the legislative to the administrative rule-making battle. Advocates were demanding that the regulations for NACARA Section 203 (the provision dealing with Salvadorans, Guatemalans, and former nationals of the Soviet Union) include a “presumption of extreme hardship” for those covered by the legislation, meaning that applicants would be presumed to meet the criteria for extreme hardship. Advocates also wanted administrative adjudication of cancellation of removal decisions rather than having the cases go to immigration judges.¹³ Meanwhile, White House officials explained that they could not, by regulation, do what Congress had failed to do by legislation—that is, “provide amnesty” to Guatemalans and Salvadorans. Nor was the White House comfortable creating a standard of extreme hardship different from that of the 1996 law. However, training materials and guidance could be developed that emphasized the special factors which might affect an extreme hardship decision.¹⁴

DOJ, particularly INS officials, were also skeptical of advocates’ proposals, arguing that case law precluded a presumption of extreme hardship. The Executive Office for Immigration Review (EOIR) argued against giving INS any role in adjudicating suspension of deportation cases, arguing that settled case law and past practice made this purely the province of the Immigration Courts. Moreover, a briefing memo from EOIR argued that creating a new procedure singling out the NACARA beneficiaries as special could lead to equal protection lawsuits. The memo also raised the possibility that making this move would lead to criticism from Congress:

If the asylum office grants a higher percentage of suspension cases, than the Immigration Court, our oversight committee will... charge that INS is not taking adequate care with these cases. If the Asylum Office grants fewer suspensions than the Immigration Court, both the Administration and the NGOs will be upset.¹⁵

The House and Senate weighed in as well. Senators Abraham (R-MI), Kennedy(D-MA), Graham (D-FL), and Mack (R-FL) argued in a letter that the clear legislative intent of the NACARA legislation was to cushion the impact of the 1996 law, giving a special exemption to those people who were technically eligible for suspension of deportation before the law went into effect. Thus, the Senators argued, implementation of the law required both greater leniency and creative solutions. Consequently, the Senators argued that not only should DOJ consider an administrative procedure for adjudicating these cases within INS, but that Salvadorans and Guatemalans deserved a “presumption of extreme hardship.”¹⁶ Congressman Lincoln Diaz-Balart (R-FL) concurred.¹⁷ But Congressman Smith was equally adamant that NACARA was designed to do nothing more than give Salvadorans and Guatemalans the opportunity to have their cases heard under the old standards. He frequently warned the Administration against doing anything to weaken the legislation or trying to get around Congressional intent.¹⁸

Ultimately, DOJ recommended creating a new adjudicative process, which the asylum program would administer. Because many of the ABC class members already had cases pending or were eligible to apply for asylum before the INS Asylum Office, the new process could be simpler and less costly than a full-blown hearing in immigration court, and it was anticipated that cases could be resolved with greater speed. While advocates applauded that decision, they continued to push for additional concessions, particularly a presumption of extreme hardship.¹⁹

Getting it Right

Once the preliminary decisions were made about how the Section 203 program itself would be implemented, INS staff took on the task of writing the regulations, laying out every aspect of the process from definitions to eligibility requirements to application procedures. Of particular concern was the treatment of “extreme hardship” in the regulations. While many within the INS and DOJ argued for leaving the definitions to case law (there were numerous Board of Immigration Appeals decisions outlining the scope of extreme hardship), others—particularly among the advocacy community—wanted the clarity and certainty that regulations offered. The Administration met with numerous groups, which repeatedly asked for a categorical waiver of extreme hardship. In other words, they asked that the rule grant relief from extreme hardship to all Salvadorans and Guatemalans who otherwise qualified for NACARA. This would mean that no one would have to individually prove that removal would cause extreme hardship; instead, that would be assumed. The White House, DOJ, and the INS all continued to resist this suggestion, arguing that a blanket presumption of extreme hardship was contrary to the need for individual case-by-case determinations. What was clear, however, was that the request for a blanket presumption was in essence a stand-in for fears over uneven adjudication. Advocates worried that without a bright-line rule, the determination of extreme hardship would be too subjective.

To address these concerns, the proposed rule offered a list of factors that should be considered and advised adjudicators to take the following into account:

Under this proposed rule, asylum officers will be required to consider suspension of deportation and special rule cancellation of removal applications under the same legal standards that govern adjudication by the Immigration Court. Because of the breadth of the case law governing the “extreme hardship” standard, the Department has concluded that a regulatory compilation of the relevant factors and standards identified within this body of law would provide a more uniform and focused source for evaluating extreme hardship claims. This proposed rule is not intended, however, to overturn or modify existing case law. Nor does it intend to limit the development through case law of other relevant factors. Instead, codification is intended to assist adjudicators, attorneys, and applicants to identify factors that may be relevant to an extreme hardship determination in the context of an application for suspension of deportation or special rule cancellation of removal.

This proposed rule maintains the flexibility of the existing standard by identifying broad factors that have been cited in existing precedent decisions as relevant to the evaluation of whether deportation would result in extreme hardship to the alien or to his or her qualified relative. These factors are (1) the age of the alien, both at the time of entry to the United States and at the time of application for suspension of deportation; (2) the age, number, and immigration status of the alien's children and their ability to speak the native language and adjust to life in another country; (3) the health condition of the alien or the alien's child, spouse, or parent and the availability of any required medical treatment in the country to which the alien would be returned; (4) the alien's ability to obtain employment in the country to which the alien would be returned; (5) the length of residence in the United States; (6) the existence of other family members who will be legally residing in the United States; (7) the financial impact of the alien's departure; (8) the impact of a disruption of educational opportunities; (9) the psychological impact of the alien's deportation or removal; (10) the current political and economic conditions in the country to which the alien would be returned; (11) family and other ties to the country to which the alien would be returned; (12) contributions to and ties to a community in the United States, including the degree of integration into society; (13) immigration history, including authorized residence in the United States; and (14) the availability of other means of adjusting to permanent resident status. Ultimately, "extreme hardship" must be evaluated on a case-by-case basis after a review of all the circumstances in the case, and none of the listed factors alone, or taken together, automatically establishes a claim of extreme hardship.²⁰

Behind the scenes, it had taken countless meetings and arguments for government officials to agree on this point. Institutionally, government agencies don't like to codify standards for discretionary determinations for fear that it will tie their hands. So merely to record and expect adjudicators to consider this list was an accomplishment from the drafters' perspective. Not everyone agreed—Congressman Smith slammed the Administration for going too far to the left, while advocates held a bitter press conference on Capitol Hill, criticizing the Administration for failing to go far enough to make things better for Salvadorans and Guatemalans.²¹

The INS received over 400 comments arguing for the presumption of extreme hardship and one comment against. Congressman Smith's was the lone voice criticizing the extreme hardship provisions that had been crafted—although he was pleased that the agency hadn't created the presumption called for by the advocates. At the time, 400 public comments was quite large, and the message from them was extremely clear: the public wanted the agency to create a presumption of extreme hardship for Salvadorans and Guatemalans. This was not simply a matter of 399 comments in favor of a presumption to Congressman Smith's sole voice against it. The legal analysis in these comments offered a different approach, more outside the box than what had thus far been considered by the government regulations. In addition to legal justifications, commenters pushed for practical implementation issues as well. The more complex an adjudication, the more government resources and time it takes. Presuming that

hardship existed would streamline the process and bring a speedier end to the decade of limbo that many of the ABC class had been living in.²²

Ultimately, DOJ concluded that the presumption proposed by many of the commenters would not meet the strict letter of the law, but that there was a compromise that would dramatically streamline the process without going outside the boundaries. When the interim regulations were published in May 1999, they included a new kind of presumption—a rebuttable presumption of extreme hardship. The supplemental statement accompanying the new rule explained:

While each application must be assessed on its own merits, and each applicant must be found statutorily eligible before being considered for this discretionary form of relief, neither NACARA nor the Act limits the Attorney General’s authority to create appropriate rules and procedures for determining eligibility for suspension of deportation or special rule cancellation of removal. The Attorney General may elect to create a rebuttable presumption of extreme hardship as part of the adjudication of such cases. Initially, the Department believed that including a list of relevant factors and general guidance regarding a determination of extreme hardship would be sufficient to address concerns raised by the public. The concerns outlined in comments to the proposed rule have led the Department to assess whether further measures, consistent with the statute, are appropriate based on the unique circumstances of NACARA beneficiaries. The Department has concluded that such measures would be appropriate and would further an interest in greater administrative efficiency.

Further examination of the issue yields two conclusions. First, certain factors routinely noted in evaluations of extreme hardship may serve as strong predictors of the likelihood of extreme hardship in a given case... Second, the unique immigration history and circumstances of the ABC class has given rise to a group of approximately 240,000 NACARA eligible individuals who share the general predictors of extreme hardship...as well as other predictors that are unique to this class...²³

The discussion goes on to note that these strong predictors gave the Department the confidence that extreme hardship could be presumed for this subset of NACARA applicants, but that adjudicators could nonetheless determine that the presumption was rebutted in individual cases, if the application failed to contain evidence of the characteristics laid out in the rule or evidence in the application itself indicated that the person would not suffer extreme hardship.

Even with this compromise, the political pressure didn’t end. Republicans, for example, were split on the implementation of extreme hardship. Senators Hatch and Abraham joined several Democrats in a letter to the Attorney General urging the adoption of a final rule that presumes “extreme hardship” for this group. Representative Lamar Smith and other Republican members of Congress sent a letter to the President opposing such an approach.²⁴ The advocates, although pleased, still weren’t really happy. Salvadorans and Guatemalans were still going to

have to provide more evidence and go through more hoops to get LPR status than their Cuban and Nicaraguan counterparts. Ultimately, while the two processes were made as similar as possible, the Administration could not and did not change the laws that Congress had passed.

Almost 200,000 people have become LPRs under section 203 of NACARA; most, if not all, would have been able to make the case for extreme hardship without the rebuttable presumption. By recognizing the broader goals of NACARA and simplifying the process as much as possible, the Clinton Administration used its rule-making authority to ensure that it maximized the potential of the law to do good.

The Relevance of NACARA Today: A Reminder of the Strength of Administrative Action

The executive branch holds enormous power in its implementation and interpretation of our laws. Often, the same law can be interpreted and implemented either generously or restrictively. Much has been made recently of Chairman Smith's own attempts to pressure the Clinton Administration to act generously when interpreting certain provisions of IIRAIRA. As chief architect of IIRAIRA, he was responsible for the harsh consequences of the broadly expanded category of "aggravated felonies." But Smith and several other Congressmen asked the Administration to use its prosecutorial discretion generously in interpreting the new law:

Congress and the Administration have devoted substantial attention and resources to the difficult yet essential task of removing criminal aliens from the United States. Legislative reforms enacted in 1996, accompanied by increased funding, enabled the Immigration and Naturalization Service to remove increasing numbers of criminal aliens, greatly benefitting public safety in the United States.

However, cases of apparent extreme hardship have caused concern. Some cases may involve removal proceedings against legal permanent residents who came to the United States when they were very young and many years ago committed a single crime at the lower end of the "aggravated felony" spectrum, but have been law-abiding ever since, obtained and held jobs and remained self-sufficient, and started families in the United States. Although they did not become United States citizens, immediate family members are citizens.

There has been widespread agreement that some deportations were unfair and resulted in unjustifiable hardship. If the facts substantiate the presentations that have been made to us, we must ask why the INS pursued removal in such cases when so many other more serious cases existed.

We write to you because many people believe that you have the discretion to alleviate some of the hardships, and we wish to solicit your views as to why you

have been unwilling to exercise such authority in some of the cases that have occurred. In addition, we ask whether your view is that the 1996 amendments somehow eliminated that discretion. The principle of the prosecutorial discretion is well-established. Indeed, INS General and Regional Counsel have taken the position, apparently well-grounded in case law, that INS has prosecutorial discretion in the initiation or termination of removal proceedings²⁵

The dramatic shift from urging prosecutorial discretion to attacking it as amnesty demonstrates just how political the current debate is. But a far more interesting acknowledgement of executive branch authority occurred in 2007. In a press conference following the failure of the 2007 comprehensive immigration reform (CIR) bill, Secretary Chertoff and Commerce Secretary Carlos Gutierrez announced the Administration's post-CIR game plan. Chertoff [stated](#):

Let me be very clear about what we're doing here. I have said with absolute consistency, from before we started the immigration reform effort earlier this year, that I was determined to enforce the laws of this country to the utmost of my vigor. And we've done that since we've—at least since I've been Secretary. We had hoped that immigration reform on a comprehensive basis would give us a much wider set of tools; we don't have that. We still think Congress can act on it. But until the laws change, we are enforcing the laws as they are to the utmost of our ability, using every tool that we have in the toolbox, and we're going to sharpen some of those tools.²⁶

Chertoff and Gutierrez announced a [26 point plan](#)²⁷ to use administrative measures to “sharpen the tools” available to them. While some of these administrative measures were aimed at increased policing of immigration violations—making E-Verify mandatory for all federal contractors, using Social Security No-Match Letters as a way to hold employers liable for hiring workers illegally—many of the proposals involved changing regulations and re-interpreting provisions of the law regarding benefits. Secretary Gutierrez [said](#):

So we're going to do everything we can that is allowed by the law on an administrative basis, by the executive branch. And that includes security, but it also includes making these temporary worker programs workable. Today they're not being used because they are not workable. So we'll analyze them, review them, the Department of Labor will do that. And we'll see if we can make them more workable to help business have a legal path to hiring workers and have a legal work force.²⁸

This was not just about tweaking programs. The [list of planned actions](#) (many of which were sharply criticized) included revamping the H-2A Agricultural Seasonal Worker Program and H-2B Program for Non-Agricultural Seasonal Workers, extending visa terms for professional workers, and administrative reforms to visa programs for highly skilled workers. In other words, in the absence of Congressional action, both Secretary Chertoff and Gutierrez were saying that the Administration had to take matters into its own hands.

What does this mean for the Obama Administration? The debate is not—or it should not be—over whether the President has the authority to revisit existing interpretations of laws. As the Chertoff and Gutierrez announcements made clear, an administration has a duty to carry out the law to the best of its ability, which includes its interpretive ability. Moreover, as the NACARA case history illustrates, following through on that duty, despite pressure from both sides, reaps its own rewards. The Obama Administration has taken a first step in laying out clear guidance on prosecutorial discretion and forming a review committee, but it can't stop there. Clear and transparent guidance on the implementation of the priority review process, and how that guidance will be implemented in making decisions about new cases, is needed and must be put out quickly. The much-maligned DHS memos, which looked at a range of options for reinterpreting existing guidance and regulations, still need to be revisited. If anything, the August 18 announcement opens the door for a more robust discussion of executive authority—one which the Obama Administration should embrace rather than hide from.

Unlike the case of NACARA, in which the Clinton Administration had the luxury of interpreting a new law, the Obama Administration—and the rest of us—are stuck with many laws that no longer work. Just like Secretary Chertoff, when confronted by that realization, the answer is to use all the tools in your toolbox to make the best of the laws at your disposal. There will be disagreement, there will be political threats, but in the long run, the only way to really lose executive branch authority is through inaction based on fear of the consequences.

Endnotes

¹ Lamar Smith and Robert B. Aderholt, Letter to Secretary Janet Napolitano, July 5, 2011, available at <http://judiciary.house.gov/news/pdfs/Administrative%20Amnesty.pdf>.

² For a discussion of these draft memos, see Mary Giovagnoli, "More Right-Handed Pot Stirring, Internal USCIS Memo Exploited for Political Gain," *Immigration Impact*, July 30, 2010, available at <http://immigrationimpact.com/2010/07/30/more-right-handed-pot-stirring-internal-uscis-draft-memo-exploited-for-political-gain/>; Royce Bernstein, et. al., *Second Annual DHS Progress Report* (Washington, DC: Immigration Policy Center, American Immigration Council, April 2011), pp. 24-25, available at <http://www.immigrationpolicy.org/special-reports/second-annual-dhs-progress-report>.

³ See John Morton, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," U.S. Immigration and Customs Enforcement, June 17, 2011, available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; John Morton, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs," U.S. Immigration and Customs Enforcement, June 17, 2011, available at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

⁴ Title II of Pub. L. No. 105-100, 111 Stat. 2160, 2193 (1997)(as amended by Technical Corrections to the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-139, 111 Stat. 2644, (1997), November 19, 1997.

⁵ Pub. L. 104-208, Sep. 30, 1996.

⁶ See Larry Eig, *The Nicaraguan and Central American Relief Act: Hardship Relief and Long-Term Illegal Aliens* (Washington, DC: Congressional Research Service, July 15, 1998), available at http://assets.opencrs.com/rpts/98-3_19980715.pdf; Trina Realmuto, "ABC v. Thornburgh: 20 years Later," National Immigration Project of the National Lawyers Guild (Boston, MA: January 31, 2011), available at http://www.nationalimmigrationproject.org/legalresources/practice_advisories/cd_pa_ABC%20-%2020%20Years%20Later%20-%20amended.pdf.

⁷ Ruth Ellen Wassem, *Central American Asylum Seekers: Impact of 1996 Immigration Law* (Washington, DC: Congressional Research Service, November 21, 1997), pp. 7-8, available at <http://www.ilw.com/immigrationdaily/news/2010,0921-crs.pdf>.

⁸ William J. Clinton, *Public Papers of the Presidents of the United States*, 1997, Book 2 (Washington, DC: U.S. Government Printing Office, 1999), p. 997.

⁹ Memorandum from Leanne Shimabukuro to Elena Kagan, November 5, 1997. On file with the author.

¹⁰ Salvadoran American Action Network, "Salvadoran and Guatemalan Immigrants Demand Equal Treatment from the Republican Congress," October 26, 1997. On file with the author.

¹¹ William J. Clinton, Statement on the Signing of the Nicaraguan Adjustment and Central American Relief Act, White House Press Office, November 19, 1997.

¹² Administrative Procedures Act, Title 5 U.S. Code Chapter 5, sections 511 to 599.

-
- ¹³ Memorandum from Julie Fernandes to Elena Kagan, December 12, 1997. On file with the author.
- ¹⁴ *Ibid.*
- ¹⁵ Executive Office for Immigration Review Briefing Paper, undated, faxed to White House on 12/11/1997. On file with the author.
- ¹⁶ Letter to Attorney General Janet Reno from Senator Spencer Abraham, et. al, December 15, 1997. On file with the author.
- ¹⁷ Frank Davies, "Diaz-Balart: Let 240,000 Salvadorans and Guatemalans Stay," *Miami Herald*, March 11, 1999. On file with author.
- ¹⁸ *Ibid.*
- ¹⁹ Steven A. Holmes, "Damage in Central America Stirs Debate on Immigrants," *New York Times*, November 25, 1998; Patrick J. McDonnell, "New Rules Call for Deportation Unless Applicants Can Show Extreme Hardship," *Los Angeles Times*, November 24, 1998.
- ²⁰ U.S. Department of Justice, "Suspension of Deportation and Special Rule Cancellation of Removal for Certain Nationals of Guatemala, El Salvador, and Former Soviet Bloc Countries," 63 FR 64895, November 24, 1998.
- ²¹ *Supra*, n. 24.
- ²² 63 FR at 64902-04
- ²³ U.S. Department of Justice, "Suspension of Deportation and Special Rule Cancellation of Removal for Certain Nationals of Guatemala, El Salvador and Former Soviet Bloc Countries," Interim Rule, 64 FR 27856, 27864-867, May 21, 1999.
- ²⁴ Memo to Chief of Staff from Bruce Reed, Elena Kagan, "Long-term Priorities," March 3, 1999, p. 15. On file with the author.
- ²⁵ Henry Hyde, Lamar Smith, et al., Re: Guidelines for Use of Prosecutorial Discretion in Removal Proceedings, November 4, 1999, in 76 *Interpreter Releases* 1730, December 3, 1999, available at <http://www.immigrationpolicy.org/sites/default/files/docs/Hyde%20letter%20to%20Reno%20and%20Meissner%201999.pdf>.
- ²⁶ "Remarks by Secretary of Homeland Security Michael Chertoff and Commerce Secretary Gutierrez at a Press Conference on Border Security and Administrative Immigration Reforms," August 10, 2007, available at http://www.dhs.gov/xnews/releases/pr_1186781502047.shtm.
- ²⁷ "Fact Sheet: Improving Border Security and Immigration Within Existing Law," August 10, 2007, available at http://www.dhs.gov/xnews/releases/pr_1186757867585.shtm.
- ²⁸ *Supra* note 33.