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# State Challenges to Federal Enforcement of Immigration Law: Historical Precedents and Pending Litigation

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December 31, 2014

**Congressional Research Service**

7-5700

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

R43839

## Summary

States and localities can have significant interest in the manner and extent to which federal officials enforce provisions of the Immigration and Nationality Act (INA) regarding the exclusion and removal of unauthorized aliens. Some states and localities, concerned that federal enforcement disrupts families and communities, or infringes upon human rights, have adopted “sanctuary” policies limiting their cooperation in federal efforts. Other states and localities, in contrast, concerned about the costs of providing benefits or services to unauthorized aliens, or such aliens settling in their communities, have adopted measures to deter unauthorized aliens from entering or remaining within their jurisdiction. In some cases, such states or localities have also sued to compel federal officials to enforce the INA and other relevant laws.

In the mid-1990s, suits were filed by six states—Arizona, California, Florida, New Jersey, New York, and Texas—which were then home to over half the unauthorized aliens in the United States. Although somewhat different claims were made in each suit, the states generally asserted that federal officials’ alleged failure to check unauthorized migration violated the Guarantee and Invasion Clauses of the U.S. Constitution, the Tenth Amendment, and various provisions of the INA. Concerns regarding standing—or who is a proper party to seek judicial relief from a federal court—were noted in some cases. However, even when standing was assumed, states’ constitutional claims were seen to involve nonjusticiable “political questions,” or to fail on their merits. The states’ statutory claims were similarly seen to involve matters that were committed to agency discretion by law and, thus, not reviewable by the courts. In three cases, the courts also noted that federal officials’ alleged failure to control unauthorized migration did not constitute a judicially reviewable “abdication” of their statutory responsibilities.

Over a decade later, in 2011, Arizona asserted counterclaims challenging the federal government’s alleged failure to stop unauthorized migration in the litigation over the S.B. 1070 measure enacted into law by Arizona. Although the court presumed that Arizona had standing, it rejected Arizona’s claims regarding purported violations of the Invasion and Domestic Violence Clauses, the Tenth Amendment, and federal immigration laws. Some claims were seen to be precluded or otherwise settled by the litigation in the 1990s. Others were seen to involve nonjusticiable political questions, or to fail on their merits. The court also rejected the argument that the federal officials had abdicated their statutory responsibilities.

Subsequently, in 2012, Mississippi, along with some U.S. Immigration and Customs Enforcement (ICE) agents, challenged the Obama Administration’s Deferred Action for Childhood Arrivals (DACA) initiative on the grounds that it runs afoul of the Take Care Clause, separation of powers, INA, and Administrative Procedure Act (APA). The ICE agents, at least initially, prevailed in their claim that DACA is contrary to the INA (although their case was ultimately dismissed on other grounds and is currently on appeal). However, Mississippi was found to lack standing because it could not show that those granted deferred action through DACA would have been removed but for the Administration’s actions.

Most recently, in December 2014, over 20 states challenged the Obama Administration’s new initiatives to expand DACA and create another DACA-like program. The states allege that these actions violate the Take Care Clause and the APA. One federal district court has already opined that the actions are unconstitutional. However, the court considered the question *sua sponte* when sentencing an alien prosecuted for illegal reentry and did not cite legal precedent for its conclusion. Other challenges to the Administration’s 2014 actions have also been filed.

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States and localities can have significant interest in the manner and extent to which federal officials enforce provisions of the Immigration and Nationality Act (INA) regarding the exclusion and removal of unauthorized aliens.<sup>1</sup> Some states and localities, concerned that federal enforcement disrupts families and communities, or infringes upon human rights, have adopted “sanctuary” policies limiting their cooperation in federal efforts.<sup>2</sup> Other states and localities, in contrast, concerned about the costs of providing benefits or services to unauthorized aliens, or such aliens settling in their communities, have adopted measures to deter unauthorized aliens from entering or remaining within their jurisdiction.<sup>3</sup> In some cases, such states or localities have also sued to compel federal officials to enforce the immigration laws, or to compensate them for costs associated with unauthorized migration.<sup>4</sup>

This report provides an overview of prior and pending challenges by states to federal officials’ alleged failure to enforce the INA or other provisions of immigration law. It begins by discussing (1) the lawsuits filed by six states in the mid-1990s; (2) Arizona’s counterclaims to the federal government’s suit to enjoin enforcement of S.B. 1070; and (3) Mississippi’s challenge to the Deferred Action for Childhood Arrivals (DACA) initiative. It then describes the challenge brought by over 20 states in 2014 to the recently announced expansion of DACA and the creation of a similar program for unlawfully present aliens whose children are U.S. citizens or lawful permanent resident aliens (LPRs).<sup>5</sup> The report concludes by exploring how the pending litigation resembles, and differs from, the prior litigation.

The report does not address challenges to the federal government’s alleged failure to enforce the immigration laws that have been made by other parties, including private individuals, municipal officials, or, in one case, the people of a state (although not the state itself).<sup>6</sup>

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<sup>1</sup> Among other things, the INA provides that aliens who enter or remain in the United States without authorization are subject to removal. *See* INA §212(a)(6), 8 U.S.C. §1182(a)(6) (prescribing the inadmissibility of illegal entrants and immigration violators); INA §237(a)(1), 8 U.S.C. §1227(a)(1) (prescribing the deportability of aliens who violate their immigration status or conditions of admission). The INA also provides for the initiation and conduct of removal proceedings, addresses whether aliens are to be detained pending removal, and expressly authorizes several types of relief from removal. *See, e.g.*, INA §236, 8 U.S.C. §1226 (apprehension and detention of aliens); INA §239, 8 U.S.C. §1229 (initiation of removal proceedings); INA §240, 8 U.S.C. §1229a (formal removal proceedings); INA §240a, 8 U.S.C. §1229b (cancellation of removal).

<sup>2</sup> For further discussion of “sanctuary” policies and the legal issues that may be raised by them, see generally CRS Report R43457, *State and Local “Sanctuary” Policies Limiting Participation in Immigration Enforcement*, by Michael John Garcia and Kate M. Manuel.

<sup>3</sup> States and localities have generally been seen to be preempted or otherwise barred from adopting measures that would deter unauthorized aliens from settling or remaining in their jurisdiction by “paralleling” federal immigration laws. *See generally* CRS Report R42719, *Arizona v. United States: A Limited Role for States in Immigration Enforcement*, by Kate M. Manuel and Michael John Garcia. *But see* CRS Report R41991, *State and Local Restrictions on Employing Unauthorized Aliens*, by Kate M. Manuel (finding that states and localities are generally not preempted from revoking the licenses of businesses that employ unauthorized aliens, or requiring employers within their jurisdiction to check employees’ work authorization in the federal government’s E-Verify database).

<sup>4</sup> States and localities are sometimes said to have been “forced” to bring such suits because they are seen to be preempted from enforcing federal immigration law on their own behalf. *See, e.g.*, *Texas v. United States*, No. 1:14-cv-254, Plaintiffs’ Motion for Preliminary Injunction and Memorandum in Support, at 26 (filed S.D. Tex., Dec. 4, 2014).

<sup>5</sup> Department of Homeland Security (DHS) Secretary Jeh Charles Johnson, Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Children Are U.S. Citizens or Permanent Residents*, Nov. 20, 2014 (copy on file with the author).

<sup>6</sup> *See, e.g.*, *Arpaio v. Obama*, No. 14-01966, 2014 U.S. Dist. LEXIS 176758 (D.D.C., Dec. 23, 2014) (dismissing, for lack of standing, a challenge to the Obama Administration’s deferred action initiatives brought by Sheriff Joe Arpaio of Maricopa County, Arizona, in both his personal and official capacities); *People of the State of Colorado ex rel. Suthers* (continued...)

## Litigation in the Mid-1990s

In the mid-1990s, six states which were then home to over half the unlawfully present aliens in the United States<sup>7</sup>—Arizona, California, Florida, New Jersey, New York, and Texas—each challenged the federal government’s “fail[ure] to control illegal immigration.”<sup>8</sup> Each case raised somewhat different issues.<sup>9</sup> However, all resulted in losses for the states both before the reviewing federal district court and on appeal. Limitations on standing—or who is a proper party to seek judicial relief from a federal court—were noted in some cases.<sup>10</sup> However, even when standing was assumed,<sup>11</sup> the states’ constitutional and statutory claims failed, as discussed below.

The following sections discuss the most notable arguments made in the 1990s litigation, including those based on the Naturalization, Guarantee, and Invasion Clauses of the U.S. Constitution; the Tenth Amendment; and certain statutory provisions of the INA; as well as the response from the courts.

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(...continued)

v. Gonzales, 558 F. Supp. 2d 1158 (D. Colo. 2007) (dismissing, in part, on standing grounds a challenge to the federal government’s alleged failure to “secure the nation’s borders against illegal immigration and to implement all of the requirements of the Intelligence Reform and Terrorism Prevention Act”); *Sadowski v. Bush*, 293 F. Supp. 2d 15 (D.D.C. 2003) (dismissing, in part, on standing grounds a challenge to the Executive’s failure to “close” the U.S.-Mexico border and remove “suspected terrorists” from the country).

<sup>7</sup> See, e.g., Rebecca L. Cook, et al., The Urban Institute, *Fiscal Impacts of Undocumented Aliens: Selected Estimates for Seven States* (1994).

<sup>8</sup> *Texas v. United States*, 106 F.3d 661, 664 (5<sup>th</sup> Cir. 1997).

<sup>9</sup> For example, New Jersey, alone among the states, maintained on appeal a claim that federal officials’ alleged failure to enforce the immigration laws constituted a “taking” of state property in violation of the Fifth Amendment to the U.S. Constitution. See *State v. New Jersey*, 91 F.3d 463, 468 (3d Cir. 1996) (finding that New Jersey’s alleged interests in tax revenues were not “sufficiently bound up with the reasonable expectations of the claimant to constitute ‘property’ for Fifth Amendment purposes”).

<sup>10</sup> See *Texas*, 106 F.3d at 664 (noting that the district court had dismissed Texas’s suit, in part, on standing grounds); *Padavan v. United States*, 82 F.3d 23, 25 (2d Cir. 1996) (noting questions as to standing); *Chiles v. United States*, 69 F.3d 1094, 1096 (11<sup>th</sup> Cir. 1995) (noting that the district court did not address the federal government’s argument that Florida lacked standing), *aff’g* 874 F. Supp. 1334 (S.D. Fla. 1994). Standing requirements derive from Article III of the Constitution, which confines the jurisdiction of federal courts to actual “Cases” and “Controversies.” U.S. Const., art. III, §2, cl. 1. The case-or-controversy requirement has long been construed to restrict Article III courts to the adjudication of real, live disputes involving parties who have “a personal stake in the outcome of the controversy.” *Baker*, 369 U.S. at 186. Parties seeking judicial relief from an Article III court must generally show three things in order to demonstrate standing: (1) they have suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) the injury is likely to be redressed by a favorable decision. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Additional requirements involving so-called “prudential standing” could also present issues. These requirements are reflected in the rule that plaintiffs must be “within the ‘zone of interests to be protected or regulated by the statute or constitutional guarantee” that they allege to have been violated. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982); *Assoc. of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

<sup>11</sup> See *Texas*, 106 F.3d at 664 n.3 (“For purposes of today’s disposition we assume, without deciding, that the plaintiffs have standing.”); *Padavan*, 82 F.3d at 25 (“We assume, without deciding, that these plaintiffs have the requisite standing to bring this action ...”); *Chiles*, 69 F.3d at 1096 (court “[a]ssuming ... standing,” as well as the justiciability of Florida’s claims).

## Naturalization Clause

Several states claimed that the federal government’s alleged failure to enforce the immigration laws imposed disproportionate costs upon them, which the federal government was obligated to reimburse pursuant to the Naturalization Clause.<sup>12</sup> This clause—which has been recognized as one source of the federal government’s authority to regulate immigration<sup>13</sup>—expressly grants Congress the “Power ... [t]o establish a uniform Rule of Naturalization.”<sup>14</sup> The states’ reasoning appears to have been that, insofar as the rule of naturalization is to be “uniform,” the effects of immigration upon the states must also be uniform and, if they are not, the federal government has an affirmative duty to compensate those states that can be seen as disproportionately affected by immigration.<sup>15</sup> However, ignoring the question of whether Congress’s power over immigration is, in fact, co-extensive with its power over naturalization,<sup>16</sup> the U.S. Courts of Appeals for the Second, Third, and Ninth Circuits found that the Naturalization Clause imposes no obligation upon the federal government to reimburse the states for any costs arising from an alleged “invasion” by unlawfully present aliens, or to protect the states from harm by “non-governmental third parties.”<sup>17</sup> To the contrary, as the Second Circuit noted, the Supreme Court has upheld the federal government’s exercise of its “plenary powers”—which include immigration<sup>18</sup>—“even though the effects of such exercises of power may be onerous to the states.”<sup>19</sup>

## Guarantee Clause

The courts similarly rejected the states’ claims that the federal government violated the Guarantee Clause by failing to compensate them for their “immigration-related expenditures.”<sup>20</sup> The Guarantee Clause provides that the “United States shall guarantee to every State in this Union a Republican Form of Government,”<sup>21</sup> and the states’ argument was essentially that the federal

<sup>12</sup> See *Texas*, 106 F.3d at 664-65; *New Jersey*, 91 F.3d at 467; *Padavan*, 82 F.3d at 26-28.

<sup>13</sup> See, e.g., *Arizona v. United States*,—U.S.—, 132 S. Ct. 2492, 2498 (2012) (viewing federal authority to regulate immigration as deriving, in part, from Congress’s power to establish a uniform rule of naturalization).

<sup>14</sup> U.S. Const., art. I, §8, cl. 3.

<sup>15</sup> Cf. *New Jersey*, 91 F.3d at 467 (“[Because power over immigration matters has ... been delegated to the federal government, ‘the State of New Jersey is powerless to effectively resolve the economic problems caused by the invasion of illegal immigrants into the State,’ ... [and the] defendants, in failing to implement their laws and policies have ‘forced the State of New Jersey[] to bear the burden of a responsibility which is that of the Nation as a whole pursuant to the Naturalization Clause.’”).

<sup>16</sup> *Naturalization* refers to the process whereby aliens become U.S. citizens, and some have questioned whether Congress’s power over naturalization is to be seen as the basis for federal regulation of immigration. See, e.g., *The Passenger Cases*, 48 U.S. 283, 526-27 (1849) (Taney, C.J., dissenting).

<sup>17</sup> *New Jersey*, 91 F.3d at 467 (“[W]e see no ground on which we could read into the Naturalization Clause an affirmative duty on the part of the federal government ...”). See also *Texas*, 106 F.3d at 665 (“[W]e perceive no basis for reading into the [Naturalization] clause an affirmative duty ...”); *Padavan*, 82 F.3d at 26-27 (similar).

<sup>18</sup> For further discussion as to plenary power over immigration, see CRS Report R42924, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, by Kate M. Manuel and Todd Garvey, at 4-5.

<sup>19</sup> *Padavan*, 82 F.3d at 26-27 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819) (“It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.”)).

<sup>20</sup> *Texas*, 106 F.3d at 664, 666-67. See also *California v. United States*, 104 F.3d 1086, 1091 (9<sup>th</sup> Cir. 1997); *Arizona v. United States*, 104 F.3d 1095, 1096 (9<sup>th</sup> Cir. 1997) (adopting the reasoning set forth in the *California* decision, previously cited); *New York*, 82 F.3d at 27-28; *Chiles*, 69 F.3d at 1097.

<sup>21</sup> U.S. Const., art. IV, §4.

government deprived them of a republican form of government by “forcing” them to spend money on unlawfully present aliens that they would not have had to spend if these aliens had been excluded or removed from the United States.<sup>22</sup> This argument was, however, uniformly rejected by the Second, Third, Fifth, Ninth, and Eleventh Circuits. In some cases, the courts did so by noting that the Supreme Court has generally viewed alleged violations of the Guarantee Clause as involving nonjusticiable “political questions,”<sup>23</sup> or questions which are committed to the executive and/or legislative branches, and which lack judicially discoverable and manageable standards for resolving.<sup>24</sup> In other cases, the courts noted that nothing in the state’s complaint suggested that the state had been deprived of a republican form of government because the state’s “form [and] method of functioning” remained unchanged, and the state’s electorate had not been “deprived of the opportunity to hold state and federal officials accountable at the polls for their respective policy choices.”<sup>25</sup>

## Invasion Clause

Claims that the federal government’s alleged failure to enforce the immigration laws violated the Invasion Clause—which requires the federal government to protect the states “against Invasion”<sup>26</sup>—were similarly rejected by the Second, Third, Ninth, and Eleventh Circuits.<sup>27</sup> Most commonly, this was because the courts viewed the legislative and executive branches as having been tasked with determining how the immigration laws are to be enforced, while the judicial branch was seen to lack manageable standards for determining whether or when the entry of unauthorized aliens constituted an “invasion.”<sup>28</sup> Several courts also found, in the alternative, that the Invasion Clause was inapplicable because the states were not threatened by incursions of foreign or domestic states.<sup>29</sup>

## Tenth Amendment

The states’ claims that the federal government violated the Tenth Amendment by “forcing” them to provide public benefits and services to unlawfully present aliens were also uniformly rejected by the Second, Third, Fifth, Ninth, and Eleventh Circuits.<sup>30</sup> Here, the courts relied upon

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<sup>22</sup> See, e.g., *California*, 106 F.3d at 1091.

<sup>23</sup> See *Texas*, 106 F.3d at 666 (“The State suggests no manageable standards by which a court could decide the type and degree of immigration law enforcement that would suffice to comply with [the Guarantee Clause’s] strictures.”); *California*, 104 F.3d at 1091; *Padavan*, 82 F.3d at 28; *Chiles*, 69 F.3d at 1097.

<sup>24</sup> See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it [among other things].”).

<sup>25</sup> *Texas*, 106 F.3d at 666. See also *California*, 104 F.3d at 1091; *New Jersey*, 91 F.3d at 468; *Padavan*, 82 F.3d at 28.

<sup>26</sup> U.S. Const., art. IV, §4.

<sup>27</sup> *California*, 104 F.3d at 1091; *New Jersey*, 91 F.3d at 468; *Padavan*, 82 F.3d at 28; *Chiles*, 69 F.3d at 1097.

<sup>28</sup> *California*, 104 F.3d at 1091; *Padavan*, 82 F.3d at 28; *Chiles*, 69 F.3d at 1097.

<sup>29</sup> *California*, 104 F.3d at 1091 (basing this conclusion, in part, on James Madison’s statement in *The Federalist* No. 43 that the Invasion Clause serves to protect a state from “foreign hostility” and “ambitious or vindictive enterprises” on the part of other states or foreign nations); *New Jersey*, 91 F.3d at 468; *Padavan*, 82 F.3d at 28; *Chiles*, 69 F.3d at 1097.

<sup>30</sup> *Texas*, 106 F.3d at 665-66; *California*, 104 F.3d at 1091-93; *New Jersey*, 91 F.3d at 466-67; *Padavan*, 82 F.3d at 28-29; *Chiles*, 69 F.3d at 1097. The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const., amend. X.

somewhat different reasoning as to each of the three main types of benefits and services which the states alleged that the federal government had “commandeered.” First, as to Medicaid spending, the courts found that the states had agreed to provide certain emergency medical services to unlawfully present aliens as a condition of states’ receipt of federal funds.<sup>31</sup> Such conditions, in the courts’ view, represented a permissible exercise of Congress’s spending power, rather than impermissible commandeering.<sup>32</sup> Second, as to the costs of incarcerating unlawfully present aliens, the courts noted that these aliens were jailed pursuant to state law, rather than any dictates of the federal government and, thus, they found no commandeering.<sup>33</sup> Third, and finally, as to elementary and secondary education, the courts noted that the states were obligated to provide such education to unlawfully present children as a result of the Constitution, as construed by the Supreme Court in *Plyler v. Doe*, not a command of the federal government.<sup>34</sup> Thus, in the courts’ view, this, too, did not represent commandeering.

## Statutory Provisions

The states’ statutory claims—alleging that federal officials violated specific provisions of the INA or other statutes by failing to exclude or remove unlawfully present aliens, or compensate the states for the costs associated with such aliens—were no more successful than their constitutional arguments. The states cited a number of provisions in support of these claims, including

- INA §103(a)(5), which at that time tasked the Attorney General with the “duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens”;<sup>35</sup>
- then-8 U.S.C. §1252(a)(2)(A), which called for the Attorney General to take any alien convicted of an aggravated felony into custody upon the alien’s release from state custody or supervision;<sup>36</sup>

<sup>31</sup> See, e.g., *California*, 104 F.3d at 1092.

<sup>32</sup> *Id.* (citing *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987) (upholding a statute wherein Congress conditioned access to highway funds on states establishing 21 years of age as the drinking age)). The Supreme Court’s 2012 decision in *National Federation of Independent Business (NFIB) v. Sebelius* elaborated upon the Court’s earlier holding in *South Dakota* by finding that compelling the states to participate in a “new grant program” or else face the possible loss of all federal funds under a current program was coercive and unconstitutional under the Tenth Amendment. See generally CRS Report R42367, *Medicaid and Federal Grant Conditions After NFIB v. Sebelius: Constitutional Issues and Analysis*, by Kenneth R. Thomas. However, the mid-1990s challenges did not claim that the federal government threatened the states with the loss of existing funding if the states did not adopt a new program, and the 2014 challenge does not allege commandeering at all.

<sup>33</sup> *California*, 104 F.3d at 1092-93.

<sup>34</sup> *Id.* at 1093. In *Plyler*, the Court found that Texas deprived unlawfully present alien children of equal protection by denying them elementary and secondary education. The Court’s decision in *Plyler* is generally understood to reflect the unique facts of the case (i.e., denying “basic education” to minor children who were seen to be lawfully present as a result of their parents’ actions, not their own), rather than a view that unlawfully present aliens constitute a “suspect classification” for equal protection purposes. See generally CRS Report R43447, *Unlawfully Present Aliens, Higher Education, In-State Tuition, and Financial Aid: Legal Analysis*, by Kate M. Manuel.

<sup>35</sup> *Texas*, 106 F.3d at 667; *Padavan*, 82 F.3d at 29-30; *Chiles*, 69 F.3d at 1096. This responsibility has since been transferred to the Secretary of Homeland Security. See INA §103(a)(5), 8 U.S.C. §1103(a)(5) (“[The Secretary] shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper.”)

<sup>36</sup> *California*, 104 F.3d at 1094. INA §238, 8 U.S.C. §1228, currently makes similar provisions for the “expedited removal” of aliens convicted of aggravated felonies, whose removal proceedings shall, among other things, be (continued...)

- then-8 U.S.C. § 1252(c), which established a six-month period following the issuance of a final order of removal for federal officials to effectuate the alien's departure from the United States;<sup>37</sup>
- then-8 U.S.C. § 1252(I), which directed the Attorney General to begin deportation proceedings for aliens convicted of deportable offenses "as expeditiously as possible after the date of conviction";<sup>38</sup>
- INA § 276, which establishes criminal penalties for "illegal reentry" (i.e., unlawfully re-entering the United States after having been removed),<sup>39</sup> and
- 8 U.S.C. § 1365, which provides for the reimbursement of costs incurred by the states for the imprisonment of unlawfully present aliens or Cuban nationals who have been convicted of felonies.<sup>40</sup>

However, all the states' claims were seen to involve matters that were committed to agency discretion as a matter of law and, thus, not reviewable by the courts.<sup>41</sup> Interestingly, all the statutes cited by the states in making these claims included the word "shall."<sup>42</sup> In no case, though, did an appellate court specifically address the statute's use of this word, or whether "shall" could be construed to indicate mandatory agency action, in its published decision. This was so even when the provision of immigration law in question did not, in itself, include language which clearly evidenced that federal officials had some discretion in enforcing the law.<sup>43</sup>

It should also be noted that, in three of the six cases, the appellate court expressly rejected the suggestion that federal officials' alleged failure to enforce the immigration laws could be seen as

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(...continued)

conducted in a "manner which eliminates the need for additional detention at any [DHS] processing center ... and in a manner which assures expeditious removal following the end of the alien's incarceration for the underlying sentence."

<sup>37</sup> *California*, 104 F.3d at 1094-95. INA § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A) currently states that "[e]xcept as otherwise provided in this section, when an alien is ordered removed, the [Secretary of Homeland Security] shall remove the alien from the United States within a period of 90 days."

<sup>38</sup> *California*, 104 F.3d at 1094. Similar language is currently codified in INA § 239(d)(1), 8 U.S.C. § 1229(d)(1) ("In the case of an alien who is convicted of an offense which makes the alien deportable, the [Secretary of Homeland Security] shall begin any removal proceeding as expeditiously as possible after the date of the conviction.")

<sup>39</sup> *California*, 104 F.3d at 1094. *See, e.g.*, 8 U.S.C. § 1326(b)(1) (prescribing that aliens who illegally re-enter the United States after having been removed subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony) "shall be fined under title 18, imprisoned not more than 10 years, or both").

<sup>40</sup> *California*, 104 F.3d at 1093-94; *New Jersey*, 91 F.3d at 470. *See also* U.S.C. § 1365(a) ("Subject to the amounts provided in advance in appropriation Acts, the Attorney General shall reimburse a State for the costs incurred by the State for the imprisonment of any illegal alien or Cuban national who is convicted of a felony by such State.")

<sup>41</sup> *See Texas*, 106 F.3d at 667; *California*, 104 F.3d at 1094-95; *New Jersey*, 91 F.3d at 470; *Padavan*, 82 F.3d at 29-30; *Chiles*, 69 F.3d at 1096.

<sup>42</sup> As discussed later in this report (see "Mississippi's Claims in *Crane v. Napolitano*"), *shall* has been construed to indicate mandatory agency action in some cases. *See, e.g.*, *Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("Congress' use of the permissive 'may' in § 3621(e)(2)(B) contrasts with the legislators' use of a mandatory 'shall' in the very same section."). However, in other cases, agencies have been seen to have discretion in determining whether to enforce particular statutes that use the word *shall*. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 835 (1985) (describing a statute which stated that certain food, drugs, or cosmetics "shall be liable to be proceeded against" as "framed in the permissive").

<sup>43</sup> For example, INA § 103(a) expressly provides that the appointment of employees for purposes of controlling and guarding U.S. borders is at the Secretary of Homeland Security's discretion. *See supra* note 35.

an “abdication” of their statutory responsibilities. The Supreme Court’s 1985 decision in *Heckler v. Chaney* recognized an exception to the presumption that agency decisions not to undertake enforcement actions are “committed to agency discretion by law” and, thus, immune from judicial review under the Administrative Procedure Act (APA).<sup>44</sup> This exception would permit review when “the agency has ‘consciously and expressly adopted a general policy’ [of non-enforcement] that is so extreme as to amount to an abdication of its statutory responsibilities.”<sup>45</sup> However, the federal courts of appeals found that the federal government’s immigration enforcement policies in the mid-1990s did not constitute such an abdication,<sup>46</sup> apparently because the states could not allege that the federal government was “doing nothing” to enforce the immigration laws.<sup>47</sup> Instead, in the courts’ view, the states’ questioned the effectiveness of federal policies and practices, and “[r]eal or perceived inadequate enforcement of immigration law does not constitute a reviewable abdication of duty.”<sup>48</sup>

## Arizona’s Counterclaims in the S.B. 1070 Litigation

In 2011, over a decade after the mid-1990s litigation, Arizona asserted counterclaims challenging the federal government’s alleged failure to enforce the immigration laws in the litigation over Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act (commonly known as “S.B. 1070”).<sup>49</sup> Arizona had adopted S.B. 1070 in 2010 in an attempt to deter unlawfully present aliens from settling in the state by requiring that state and local police check the immigration status of all persons whom they stop, arrest, or detain, and by criminalizing certain conduct thought to facilitate the presence of unauthorized aliens within the state.<sup>50</sup> The federal government sought to enjoin enforcement of S.B. 1070 on the grounds that it was preempted by federal law. Arizona responded, in part, by alleging that federal policies and practices as to immigration enforcement ran afoul of various provisions of the Constitution and federal statute. In particular, Arizona alleged that federal officials had violated the Invasion and Domestic Violence Clauses, as well as the Tenth Amendment, by, respectively, failing to protect Arizona from “invasion” by aliens unlawfully entering the United States and “refusing” to reimburse the state for the “costs and damages associated with illegal immigration in Arizona.”<sup>51</sup> Arizona also alleged that federal officials had failed to comply with statutory mandates to achieve and maintain “operational control” of the Arizona-Mexico border, pursue and effectuate the removal of unlawfully present

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<sup>44</sup> *Heckler*, 470 U.S. at 838 (quoting and discussing 5 U.S.C. §701(a)(2)). Agency action is, in turn, generally seen as committed to agency discretion where there are “no judicially manageable standards ... available for judging how and when an agency should exercise its discretion.” *Id.* at 830.

<sup>45</sup> *Id.*, 470 U.S. at 833 n.4.

<sup>46</sup> *See Texas*, 106 F.3d at 667 (“We reject out-of-hand the State’s contention that the federal defendants’ alleged systemic failure to control immigration is so extreme as to constitute a reviewable abdication of duty.”); *California*, 104 F.3d at 1094 (“[T]he allegations asserted in the instant Complaint do not rise to a level that would indicate such an abdication.”); *Childs*, 69 F.3d at 1096 n.5 (“The part of the statute relied on by Florida would not justify even an allegation of complete abdication of statutory duties to go to trial.”).

<sup>47</sup> *Texas*, 106 F.3d at 667.

<sup>48</sup> *Id.*

<sup>49</sup> For further discussion of this litigation, *see generally* CRS Report R42719, *Arizona v. United States: A Limited Role for States in Immigration Enforcement*, by Kate M. Manuel and Michael John Garcia.

<sup>50</sup> S.B. 1070, as amended by H.B. 2162 (copy on file with the author).

<sup>51</sup> *See United States v. Arizona*, No. 2:10-cv-01413-SRB, The State of Arizona and Governor Janice K. Brewer’s Answer and Counterclaims, at 16-17 (filed D. Az., Feb. 10, 2011) (copy on file with the author).

aliens who are found within the interior of the United States, and reimburse states for the costs of detaining “criminal aliens” pursuant to the State Criminal Alien Assistance Program (SCAAP).<sup>52</sup>

The federal government challenged Arizona’s standing to raise all of these claims other than that as to reimbursement pursuant to SCAAP.<sup>53</sup> However, the reviewing federal district court “presum[ed]” that Arizona had standing because (1) the federal government did not question whether “illegal immigration” constituted an injury in fact; (2) Arizona had alleged facts indicating that unlawfully present aliens’ conduct and choices in crossing into Arizona were directly influenced by federal policies and practices; and (3) ordering the federal government to “deploy ... temporary measures” to secure the border would provide Arizona “some relief.”<sup>54</sup>

Arizona did not fare as well on the merits of its arguments. The reviewing federal district court first found that Arizona’s claims as to the Invasion Clause and the Tenth Amendment were precluded by the litigation in the mid-1990s,<sup>55</sup> or, alternatively, settled in the federal government’s favor by Ninth Circuit precedent.<sup>56</sup> The court similarly found that Arizona’s remaining constitutional claim—alleging a violation of the Domestic Violence Clause that had not been raised in the mid-1990s litigation—was also settled by Ninth Circuit precedent finding that the clause applies only to “insurrections, riots, and other forms of civil disorder,” not “ordinary crimes,”<sup>57</sup> and implicates nonjusticiable political questions.<sup>58</sup>

The reviewing federal district court then found that Arizona’s various statutory claims involved actions that were committed to agency discretion by law and, thus, were not subject to review by the courts. In so finding, the court specifically looked at provisions of immigration law which

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<sup>52</sup> *Id.* at 16-17. See especially *id.* at 17 (“The federal government is not enforcing the immigration laws within the United States. The current policy of the Executive Branch of the United States government is to take *no* action regarding the vast majority of aliens who are unlawfully present in the United States.”). For more on the meaning of the term “criminal alien,” see CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by Marc R. Rosenblum and William A. Kandel, at 2-3.

<sup>53</sup> See *United States v. Arizona*, No. CV 10-1413-PHX-SRB, Order (filed D. Az., Oct. 21, 2011). The United States did not dispute that “Arizona had alleged an injury in fact arising from illegal immigration,” given Arizona’s claims that it faced increased costs as a “direct result” of unauthorized migration into the state. *Id.* at 3. However, the federal government did contest whether Arizona’s alleged injury is fairly traceable to the challenged actions of federal officials, and whether any remedy is available. *Id.* For further discussion of the requirements for standing, see *supra* note 10.

<sup>54</sup> See Order, *supra* note 53, at 4-5. For the specific types of injunctive relief requested by Arizona, see Answer and Counterclaims, *supra* note 51, at 40-55.

<sup>55</sup> Order, *supra* note 53, at 5-8. The doctrine of issue preclusion, also known as collateral estoppel, bars relitigation “of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,” even if the issue recurs in the context of a different claim.” *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2011)). While issue preclusion may not apply to bar relitigation where “controlling facts or legal principles have changed significantly since the prior judgment,” or where “other special circumstances warrant an exception,” the federal district court reviewing Arizona’s counterclaims found no such changes or special circumstances. Order, *supra* note 53, at 6-7 (quoting *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9<sup>th</sup> Cir. 2000)).

<sup>56</sup> Order, *supra* note 53, at 8-13.

<sup>57</sup> Under the INA, unlawful entry is a crime. INA §275, 8 U.S.C. §1325. Unlawful presence, absent additional factors, is not a crime, although it is a ground for removal. INA §212(a)(6)(A)(i), 8 U.S.C. §1182(a)(6)(A)(i).

<sup>58</sup> Order, *supra* note 53, at 10. The Domestic Violence Clause provides that “The United States shall ... on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) [protect each State] against domestic Violence.” U.S. Const., art. IV, §4.

- direct the Secretary of Homeland Security to “take all actions the Secretary determines necessary and appropriate to achieve and maintain operational control” over the U.S. border within 18 months after the enactment of the Secure Fence Act of 2006;<sup>59</sup>
- prioritize the incarceration of unlawfully present “criminal aliens” and reimburse states through SCAAP for the costs of incarcerating such aliens;<sup>60</sup>
- establish procedures for removing unlawfully present aliens apprehended in the interior of the United States; and
- bar federal, state, and local officials from restricting the sharing of information regarding persons’ citizenship or immigration status.<sup>61</sup>

However, the court concluded that each provision involved actions that are committed to agency discretion by law.<sup>62</sup> In some cases, the court reached this conclusion because the statute provided no standard by which the court could judge the propriety of federal officials’ actions, as with the construction of the border fence, where “no deadline mandates completion of the fencing and infrastructure developments or any required discrete action by a specified time.”<sup>63</sup> In other cases, the court noted that the statutes themselves grant federal officials “substantial discretion,” as was the case with “determining where to build fencing, where to use alternative infrastructure improvements rather than fencing, and how best to develop a comprehensive program to prevent illegal immigration.”<sup>64</sup> In no case did the court, in its published opinion, note the use of “shall” in any of these statutes, or discuss whether this word could be construed to indicate mandatory action.

The court further found the specific actions challenged by Arizona—which included prioritizing certain enforcement efforts and “considering changes in the interpretation and enforcement of immigration laws that would ‘result in meaningful immigration reform absent legislative action’”—did not constitute an abdication of the Executive’s statutory responsibilities. The court did so, in part, because Arizona conceded that federal officials “continue to enforce federal immigration laws in accordance with priorities established by the federal government.”<sup>65</sup> Thus, according to the court, while Arizona “disagrees” with federal enforcement priorities, its “allegations do not give rise to a claim that [federal officials] have abdicated their statutory responsibilities.”<sup>66</sup>

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<sup>59</sup> Order, *supra* note 53, at 14-17.

<sup>60</sup> *Id.* at 19-33.

<sup>61</sup> *Id.* at 17-19.

<sup>62</sup> See, e.g., *id.* at 16 (“[T]he Acts [regarding border fencing] do not mandate any discrete agency action with the clarity to support a judicial order compelling agency action ...”); *id.* at 18 (“The Court cannot properly review the enforcement decisions challenged by Arizona in [its claims regarding interior immigration enforcement.]”); *id.* at 20 (“Under SCAAP, the calculation of the average cost of incarceration is explicitly committed to the discretion of the Attorney General.”).

<sup>63</sup> *Id.* at 16.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 19. The court also noted, in discussing the allegations of abdication, that it “cannot properly review the enforcement decisions challenged by Arizona” because these decisions are committed to immigration officials’ discretion by law. This perhaps suggests that this court, at least, would be disinclined to find abdication where an agency’s actions—however “extreme” they might be said to be—could be seen as within the agency’s discretion.

<sup>66</sup> *Id.* Arizona also appears to have asserted that federal enforcement policies were reviewable because they had been (continued...)

## Mississippi's Claims in *Crane v. Napolitano*

One year later, in 2012, Mississippi raised similar claims about federal officials' alleged failure to enforce the immigration laws when it joined a challenge brought by some U.S. Immigration and Customs Enforcement (ICE) agents to the Obama Administration's Deferred Action for Childhood Arrivals (DACA) initiative.<sup>67</sup> This challenge arose from the Administration's decision to grant some unlawfully present aliens who had been brought to the United States as children and raised here deferred action—one type of relief from removal—and, in many cases, work authorization.<sup>68</sup> The ICE agents and Mississippi asserted that this initiative violates the Take Care Clause, impinges upon Congress's legislative powers, and contradicts certain provisions in INA §235 which some assert require that unlawfully present aliens be placed in removal proceedings.<sup>69</sup> They also alleged that it runs afoul of the Administrative Procedure Act (APA) because the Administration did not promulgate regulations before making deferred action—which the plaintiffs view as a benefit, not an exercise of prosecutorial discretion—available to unlawfully present aliens who had been brought to the United States as children.<sup>70</sup>

The ICE agents were found to have standing to raise these challenges<sup>71</sup> and, at least initially, prevailed before the reviewing federal district court on their claim that DACA runs afoul of three purportedly “interlocking” provisions in INA §235 which state that

1. any alien present in the United States who has not been admitted *shall* be deemed an applicant for admission;

(...continued)

modified. However, the reviewing district court took the view that this change in policy, per se, did not permit review where agency enforcement decisions—“including the decisions to prioritize agency resources and act on agency determined priorities”—are committed to agency discretion as a matter of law. *Id.* at 19 n.6.

<sup>67</sup> See *Crane v. Napolitano*, No. 3:12-cv-03247-O, Amended Complaint (filed N.D. Tex., Oct. 12, 2012) (copy on file with the author). Subsequently, Arizona also alleged that the DACA initiative was beyond the Executive's authority in defending its own policy of denying driver's licenses to aliens granted deferred action through DACA. See generally CRS Report R43452, *Unlawfully Present Aliens, Driver's Licenses, and Other State-Issued ID: Select Legal Issues*, by Kate M. Manuel and Michael John Garcia. The federal government was not a party to this litigation, although it did, at the Ninth Circuit's request, file an amicus brief in which it supported the plaintiffs' argument that Arizona may not deny driver's licenses to DACA beneficiaries. See *Brewer v. Az. Dream Act Coalition*, No. 14A625, Application to Stay the Mandate of the United States Court of Appeals for the Ninth Circuit Pending Disposition of a Petition for Writ of Certiorari, at 13 (filed S. Ct., Dec. 11, 2014). The Supreme Court denied this application for a stay, in an order which did not address the Obama Administration's deferred action initiatives. See *Brewer v. Az. Dream Act Coalition*, No. 14A625, Order in Pending Case (S. Ct., Dec. 17, 2014) (copy on file with the author).

<sup>68</sup> DHS Secretary Janet Napolitano, Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 15, 2012 (copy on file with the author). The determination as to whether to grant deferred action to individual aliens has historically been seen as within immigration officials' prosecutorial or enforcement discretion. See, e.g., *Hotel & Rest. Employees Union Local 25 v. Smith*, 846 F.2d 1499, 1510-11 (D.C. Cir. 1988); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1119 n.3 (9<sup>th</sup> Cir. 2001); *Johnson v. INS*, 962 F.2d 574, 579 (7<sup>th</sup> Cir. 1992); *Carmona Martinez v. Ashcroft*, 118 Fed. App'x 238, 239 (9<sup>th</sup> Cir. 2004); *Matter of Yauri*, 25 I. & N. December 103 (BIA 2009); *Matter of Singh*, 21 I. & N. December 427 (BIA 1996); *Matter of Luviano-Rodriguez*, 21 I. & N. December 235 (BIA 1996); *Matter of Quintero*, 18 I. & N. December 348 (BIA 1982). DHS regulations further provide that aliens granted deferred action may be granted work authorization upon showing an “economic necessity for employment.” 8 C.F.R. §274a.12(c)(14). The INA bars employers from knowingly hiring or continuing to employ an alien who lacks such authorization. INA §274A, 8 U.S.C. §1324a.

<sup>69</sup> For further discussion of these INA provisions, see *infra* note 72 and accompanying text.

<sup>70</sup> Amended Complaint, *supra* note 67, at 15-23.

<sup>71</sup> *Crane v. Napolitano*, 920 F. Supp. 2d 724, 738-40 (N.D. Tex. 2013) [hereinafter “*Crane I*”].

2. applicants for admission *shall* be inspected by immigration officers; and
3. in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall* be detained for removal proceedings.<sup>72</sup>

In particular, the court noted that each of the three provisions includes the word “shall,” and took the view that “shall” indicates mandatory agency action.<sup>73</sup> (This same court later found that the Merit Systems Protection Board (MSPB), not the federal district court, has jurisdiction over the ICE agents’ claims.<sup>74</sup> This decision, as well as the court’s earlier finding that DACA is contrary to INA §235, has been appealed to the Fifth Circuit.)

Mississippi, in contrast, was found not to have standing because the reviewing court viewed its alleged injury as “conjectural and based on speculation” and, thus, insufficiently concrete to satisfy the constitutional requirements of standing.<sup>75</sup> This injury consisted of the fiscal costs associated with unlawfully present aliens residing in the state who were allegedly enabled to remain there as a result of DACA and Obama Administration guidance regarding the exercise of prosecutorial discretion in civil immigration enforcement.<sup>76</sup> The federal government did not contest that the expenditure of state funds could qualify as an invasion of a legally protected interest sufficient to establish standing under the “proper circumstances.”<sup>77</sup> Rather, the federal government argued that such circumstances were not present in the instant case because

<sup>72</sup> *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 U.S. Dist. LEXIS 57788 (N.D. Tex., Apr. 23, 2013) [hereinafter “*Crane II*”] (citing INA §235(a)(1), (a)(3), & (b)(2)(A), 8 U.S.C. §1225(a)(1), (a)(3), & (b)(2)(A)). It is important to note that, while the ICE agents and the reviewing federal district court interpreted these provisions as requiring immigration officials to place unlawfully present aliens in removal proceedings, federal officials have historically interpreted the relevant provisions of the INA in a somewhat different manner. Both federal officials and those who claim immigration officers lack discretion construe the first two provisions of INA §235 noted above—aliens present without admission being deemed applicants for admission, and applicants for admission being inspected—as applying to both (1) “arriving aliens” at a port-of-entry and (2) aliens who are present in the United States without inspection. However, federal officials have differed from proponents of the view that immigration officers lack discretion in that federal officials have construed the third provision—regarding detention of certain aliens seeking admission—as applicable only to arriving aliens, not aliens who are present without inspection. This difference appears to have arisen, in part, because federal officials have emphasized the phrase “aliens seeking admission” in the third provision, and reasoned that only arriving aliens at ports-of-entry can be said to be seeking admission. *See, e.g.*, Immigration and Naturalization Service (INS), Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10357 (Mar. 6, 1997) (codified at 8 C.F.R. §235.3(c)); INS, Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444, 444-46 (Jan. 3, 1997). The reviewing federal district court in *Crane*, however, rejected federal officials’ interpretation, in part, because the court viewed it as contrary to the statutory language. *Crane II*, 2013 U.S. Dist. LEXIS 57788, at \*21-\*27.

<sup>73</sup> *Crane II*, 2013 U.S. Dist. LEXIS 57788, at \*27-\*39.

<sup>74</sup> *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 U.S. Dist. Lexis 187005 (N.D. Tex., July 31, 2013) [hereinafter “*Crane III*”].

<sup>75</sup> *Crane I*, 920 F. Supp. 3d at 743, 746.

<sup>76</sup> *Id.* at 743. The guidance regarding civil enforcement priorities challenged in *Crane* was that given by then-ICE Director John Morton in two memoranda issued in 2011, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, and *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*. These memoranda were rescinded and superseded by new guidance issued by the Obama Administration on November 20, 2014. *See* DHS Secretary Jeh Charles Johnson, Memorandum, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, Nov. 20, 2014 (copies on file with the author).

<sup>77</sup> *Crane I*, 920 F. Supp. 3d at 743.

Mississippi relied upon a 2006 report—which pre-dated DACA—to show the costs it incurred as the result of the Obama Administration’s actions.<sup>78</sup> The court agreed, and also noted that Mississippi had offered only “conclusory allegations” that the unlawfully present aliens granted deferred action would have been removed but for the DACA initiative, or that DACA had resulted in a decrease in the total number of aliens removed by the federal government.<sup>79</sup>

## Challenge to the Obama Administration’s 2014 Actions

Most recently, in December 2014, over 20 states filed suit challenging the Obama Administration’s November 20, 2014, announcement that it is extending the DACA program to cover additional unlawfully present aliens who were brought to the United States as children, and creating a DACA-like program for unlawfully present aliens whose children are U.S. citizens or LPRs.<sup>80</sup> In this case, the states allege that the deferred actions programs and other Administration policies as to immigration enforcement “have had and continue to have dire consequences” for the plaintiff states by “substantially increas[ing]” the number of unlawfully present aliens in the state, “triggering” unauthorized migration, increasing human trafficking, and “requiring” states to provide various public benefits and services.<sup>81</sup> In particular, the states assert that the Administration’s actions violate the Take Care Clause and the APA.<sup>82</sup>

In the states’ complaint, the alleged Take Care Clause violation is specifically said to be based on the President’s “dispensing” with existing laws and “rewrit[ing] them under the guise of executive ‘discretion.’”<sup>83</sup> In support of this allegation, the states assert that DACA represents a “legislative action” because over 99% of applicants are granted deferred action through DACA, making deferred action through DACA a “de facto entitlement,” not an exercise of prosecutorial discretion.<sup>84</sup> The states also assert that the steps the Executive has taken to permit unlawfully present aliens whose children are U.S. citizens or LPRs to remain in the United States are contrary to the provisions that Congress has made for such aliens to remain in the United States, which, according to the states, call for these aliens to “(i) wait[] until their child turns 21, (ii) leav[e] the country, (iii) wait[] 10 more years, and then (iv) obtain[] a family-preference visa from a U.S. consulate abroad.”<sup>85</sup> In addition, in their motion to enjoin the new deferred action initiatives, the states assert that the Executive’s purported exercise of discretion here is judicially reviewable because it represents an abdication of the Executive’s statutory responsibilities.<sup>86</sup>

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<sup>78</sup> *Id.* at 744-45 (“[B]ecause it was written six years prior to the issuance of the Morton Memorand[a] and the [DACA] Directive, the report cannot provide any support for Mississippi’s contention that the Directive and the Morton Memorand[a] result in an *increased* fiscal burden on the state.”).

<sup>79</sup> *Id.* at 745.

<sup>80</sup> Other challenges to the Obama Administration’s November 20, 2014, actions have also been filed. *See, e.g.*, *Arpaio v. Obama*, No. 14-01966, 2014 U.S. Dist. LEXIS 176758 (D.D.C., Dec. 23, 2014).

<sup>81</sup> *Texas v. United States*, No. 1:14-cv-00254, Complaint for Declaratory and Injunctive Relief, at 11-15 (filed S.D. Tex., Dec. 3, 2014) (copy on file with the author).

<sup>82</sup> *Id.* at 26-28.

<sup>83</sup> *Id.* at 26.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 26-27.

<sup>86</sup> Plaintiffs’ Motion for Preliminary Injunction, *supra* note 4, at 9.

The states' complaint similarly alleges that the APA violations include both procedural ones, arising from the Executive's provision of "benefits" without promulgating regulations, *and* substantive ones, arising from the Executive's "rewriting [of] the immigration laws and contradicting the priorities adopted by Congress."<sup>87</sup> The states' motion for a preliminary injunction clarifies that they view the intra-agency memorandum directing the establishment of the new deferred action initiatives as a "legislative rule" since it

1. "affect[s] individual rights and obligations" insofar as it establishes "eligibility 'criteria'" for deferred action;
2. "is binding on [immigration] officials," as applied, if not on its face;
3. "puts a stamp of approval or disapproval on a given type of behavior" by providing that unlawfully present aliens may avoid removal by participating in the deferred action initiatives; and
4. "cannot ... be construed as an *interpretative* rule" because it does not interpret anything.<sup>88</sup>

This motion also clarifies that the states view the Executive actions as not "in accordance with the law" because INA §235 requires, in their view, that unlawfully present aliens be placed in removal proceedings, as previously discussed (see "Mississippi's Claims in *Crane v. Napolitano*").<sup>89</sup>

## Pending Litigation as Compared to Earlier Litigation

It remains to be seen how the reviewing federal district court will view the claims raised by the states in their 2014 challenge to federal officials' alleged failure to enforce the immigration laws. The prior litigation described in this report may provide some clues as to how a reviewing court could analyze these claims, although there are important distinctions between the current litigation and prior cases that could affect their outcomes. Accordingly, this report concludes by exploring certain similarities and dissimilarities between the current litigation and prior cases with respect to several issues that seem worth noting as threshold matters.

**Standing:** The states' standing to assert the claims raised in the 2014 litigation is likely to be contested by the federal government, which actively contested standing in prior challenges.<sup>90</sup> The court's decision as to Mississippi's challenge in *Crane* further suggests that the states could face some difficulty in showing the requisite injury for standing.<sup>91</sup> Many of the aliens granted deferred action as a result of the Obama Administration's 2014 actions were arguably unlikely to have

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<sup>87</sup> Complaint for Declaratory and Injunctive Relief, *supra* note 81, at 27-28.

<sup>88</sup> Motion for Preliminary Injunction, *supra* note 86, at 21-22.

<sup>89</sup> *Id.* at 23. The states also claim that the Executive's decision to grant work authorization to all these deferred action beneficiaries is "arbitrary and capricious" because it exceeds any discretion to issue work authorization that the Executive has been granted by statute. *Id.* at 24.

<sup>90</sup> See *supra* notes 10, 53, and 75 and accompanying text.

<sup>91</sup> The redressibility component of standing could also present issues. See *Chiles*, 69 F.3d at 1096 ("supposing" that Florida has standing, but noting that "the level of illegal immigration is dependent on many factors outside the control of the Attorney General").

been removed *prior* to the Administration's actions,<sup>92</sup> and the *Crane* court essentially required Mississippi to show that DACA resulted in aliens remaining in the state who would otherwise have been removed.<sup>93</sup>

Arizona's counterclaims in the litigation over S.B. 1070, in contrast, fared differently in, part, because the federal government did not question whether "illegal immigration" constituted an injury in fact.<sup>94</sup> Arizona's counterclaims also generally involved federal policies and programs that could be seen as ongoing (e.g., an alleged failure to complete construction of the border fencing dating back to 2006), rather than changes in federal programs and policies like that marked by the initiation of DACA.

**Take Care Clause:** The early state challenges to federal officials' alleged failure to enforce the immigration laws asserted violations of other constitutional provisions (e.g., Naturalization Clause, Tenth Amendment), not the Take Care Clause.<sup>95</sup> This seems to have been, at least in part, because, at that time, the states viewed *both* the legislative and executive branches as responsible for the federal government's alleged failure to enforce the immigration laws.<sup>96</sup> It was not until *Crane* that the states began to frame the alleged failure to enforce the immigration laws in terms of the Executive's failure to execute the statutes as they were written and intended by Congress and, thus, make claims regarding violations of the Take Care Clause.<sup>97</sup>

It is also worth noting that the *Crane* court found for the ICE agent plaintiffs (if not for the state of Mississippi) only on their statutory claim, not on their claim regarding the Take Care Clause.<sup>98</sup> In fact, the December 16, 2014, decision by the U.S. District Court for the Western District of Pennsylvania in *United States v. Juarez-Escobar* appears to be the first case in which a reviewing court invalidated a federal policy of not enforcing the immigration laws in certain cases, in part, on Take Care Clause grounds.<sup>99</sup> However, this decision arose in the context of a criminal

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<sup>92</sup> See, e.g., Department of Justice, Office of Legal Counsel, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, Nov. 20, 2014, at 9 (copy on file with the author) ("DHS has informed us that there are approximately 11.3 million undocumented aliens in the country, but that Congress has appropriated sufficient resources for ICE to remove fewer than 400,000 aliens each year, a significant percentage of whom are typically encountered at or near the border rather than in the interior of the country.").

<sup>93</sup> See *Crane* I, 920 F. Supp. 3d at 743-45.

<sup>94</sup> See Order, *supra* note 53, at 4-5.

<sup>95</sup> See *supra* "Litigation in the Mid-1990s" and "Arizona's Counterclaims in the S.B. 1070 Litigation."

<sup>96</sup> See, e.g., *Texas*, 106 F.3d at 665 ("We are not aware of and have difficulty conceiving of any judicially discoverable standards for determining whether immigration control efforts by Congress are constitutionally adequate."); *California*, 104 F.3d at 1093 ("California contends that the costs of educating alien children stems from the *Federal Government's* ineffective policing of national borders."); *New Jersey*, 91 F.3d at 467 ("Neither the state's incarceration of illegal aliens nor its obligation to educate illegal aliens results from any command by Congress."); Padavan, 82 F.3d at 26 ("[T]he plaintiffs plead seven causes of action, claiming that the *federal government* had violated various statutory and constitutional provisions in carrying out its immigration policy.") (emphases added).

<sup>97</sup> See *supra* "Mississippi's Claims in *Crane v. Napolitano*."

<sup>98</sup> The *Crane* court did not directly address the merits of the ICE agents' claims regarding the Take Care clause, instead "begin[ing] with analysis of what Section [235] of the Immigration and Nationality Act ... requires, because that statute is central to all of Plaintiffs' cause of action." *Crane* II, 2013 U.S. Dist. LEXIS 57788, at \*15. The court did, however, suggest in a footnote that it was skeptical of the Executive's argument that Congress might be unable, "as a constitutional matter," to require that every immigration officer who encounters an unlawfully present alien put that alien in removal proceedings because doing so "might infringe on the Executive's ability to use its discretion in the immigration law context to 'take Care that the Laws be faithfully executed.'" *Id.* at \*43 n.10.

<sup>99</sup> 2014 U.S. Dist. LEXIS 173350, at \*33 (W.D. Pa., Dec. 16, 2014) ("President Obama's unilateral legislative action (continued...)

sentencing proceeding, where no party had raised the question of whether the federal policy is permissible, not a state challenge to federal actions. Moreover, the decision may have limited influence because it does not cite legal precedents for its holding.

***Abdication of statutory responsibilities:*** Allegations that federal officials have abdicated their statutory responsibilities, in contrast, have been raised and rejected in state challenges to federal immigration enforcement since the mid-1990s.<sup>100</sup> To date, the courts have taken the view that federal officials cannot be said to have “consciously and expressly adopted a general policy [of nonenforcement] that is so extreme as to amount an abdication” as long as they are “doing something” to enforce the immigration laws. “Real or perceived inadequate enforcement of immigration law does not constitute a reviewable abdication of duty.”<sup>101</sup> Such views could make the argument that the Obama Administration’s November 2014 actions represent a reviewable abdication of the Executive’s statutory responsibilities difficult to maintain, given reports that the Administration is removing the maximum number of aliens it can per year, given the resources available to it.<sup>102</sup> It could also be noted that the Obama Administration’s diminished focus upon the removal of “low priority” aliens from the interior of the United States is accompanied by an increased focus upon border security and the removal of “high priority” “criminal aliens” from the interior.<sup>103</sup>

On the other hand, some might note ways in which the Obama Administration’s initiatives could be said to differ from earlier policies and programs. For example, in no case prior to *Crane* had the Executive stated so openly its intention *not* to enforce the immigration laws against certain aliens. In the pre-*Crane* cases, while border enforcement was known to be limited, particularly in certain areas, federal officials did not announce they would be declining to patrol certain areas of

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(...continued)

violates the separation of powers provided for in the United States Constitution as well as the Take Care Clause, and therefore, is unconstitutional.”). The reasoning that supports this conclusion appears, however, to be primarily concerned with separation of powers issues (i.e., the Executive is “legislating,” rather than exercising prosecutorial discretion, by (1) providing for a “systematic and rigid process by which a broad group of individuals will be treated differently than others based on arbitrary classifications” and (2) allowing undocumented immigrants who fall within these categories “to obtain substantive rights”). It is unclear, from this discussion, whether the court sees a violation of the separation of powers as tantamount to a violation of the Take Care Clause, or relied on other considerations.

<sup>100</sup> See *supra* notes 45-48 and 65-66 and accompanying text.

<sup>101</sup> *Texas*, 106 F.3d at 667.

<sup>102</sup> See *Department of Homeland Security’s Authority*, *supra* note 92, at 9. See also *Myers v. United States*, 272 U.S. 52, 291-92 (1926) (Brandeis, J., dissenting) (“[T]he President cannot secure full execution of the laws, if Congress denies to him adequate means of doing so. ... The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted.”).

<sup>103</sup> The Executive could potentially also note a number of statutory enactments over the years wherein Congress has directed it to give priority to the removal of “criminal aliens.” See, e.g., Department of Homeland Security Appropriations Act, 2012, P.L. 112-74, Div. D., title ii, 125 Stat. 950 (Dec. 23, 2011) (“[T]he Secretary of Homeland Security shall prioritize the identification and removal of aliens convicted of a crime by the severity of that crime.”); Department of Homeland Security Appropriations Act, 2010, P.L. 111-83, Div. D., title iii, 123 Stat. 2142 (Oct. 28, 2009) (same); Department of Homeland Security Appropriations Act, P.L. 110-329, Div. D, title ii, 122 Stat. 3659 (Sept. 30, 2008) (same); Consolidated Appropriations Act, 2008, P.L. 110-161, 121 Stat. 2050-51 (Dec. 26, 2007) (funding to “improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable, and remove them from the United States”); H.REPT. 111-157, at 6 (2009) (“[R]ather than simply rounding up as many illegal immigrants as possible, which is sometimes achieved by targeting the easiest and least threatening among the undocumented population, DHS must ensure that the government’s huge investments in immigration enforcement are producing the maximum return in making our country safer.”).

the border. Relatedly, in pre-*Crane* cases, the states were challenging alleged failures that could be said to have permitted unauthorized aliens to enter or remain in the United States, but were generally not characterized, at least by some, as permitting unlawfully present aliens to receive an array of benefits and services, potentially including work authorization, social security, and driver's licenses.<sup>104</sup> Some might also note the relatively high percentage of the unlawfully present population—4 to 5 million of the estimated 11.3 million unlawfully present aliens in the United States—affected by the Obama Administration's initiatives.<sup>105</sup>

**Statutory violations:** Every state challenge to federal officials' alleged failure to enforce the immigration laws to date has asserted that specific failures (e.g., not securing the border, not reimbursing the states) ran afoul of statutory provisions.<sup>106</sup> These statutory provisions generally used the word "shall." However, despite this language, states' statutory claims were seen to involve matters that are committed to agency discretion by law and, thus, not reviewable by the courts in every case prior to *Crane*.<sup>107</sup> There, in the ICE officers' challenge to DACA, the reviewing federal district court found that three allegedly "interlocking" provisions in INA §235 require that immigration officials place unlawfully present aliens in removal proceedings,<sup>108</sup> because each provision uses the word "shall," and "shall" indicates mandatory agency action.<sup>109</sup> Thus, the court concluded that granting deferred action to unlawfully present aliens who have not been placed in removal proceedings runs afoul of the INA.<sup>110</sup> However, some have suggested that the *Crane* decision is inconsistent with the Supreme Court's recognition of the "broad discretion exercised by immigration officials" in *United States v. Arizona*,<sup>111</sup> and the federal government has appealed.

**Failure to promulgate regulations:** States did not allege that federal officials had violated the APA by providing "benefits" to unlawfully present aliens without promulgating regulations to this effect prior to the litigation in *Crane*.<sup>112</sup> This is arguably because, as previously noted, granting aliens deferred action can also be seen, at least by some, as permitting them to obtain work authorization and certain public benefits and services,<sup>113</sup> while not excluding inadmissible aliens at the border is generally not seen to have such collateral consequences. This apparent distinction would not, however, necessarily be dispositive in the states' challenge, since the granting of deferred action to unlawfully present aliens has historically been seen as an exercise of

<sup>104</sup> See, e.g., Complaint, *supra* note 81, at 21 ("[D]eferred action carries legal benefits beyond non-enforcement, such as the right to seek employment authorization."); Plaintiffs' Motion for Preliminary Injunction, *supra* note 4, at 5 ("Here, Defendants have created an enormous program that will guarantee open toleration and legal benefits to millions of undocumented immigrants ...").

<sup>105</sup> See, e.g., *id.* at 1.

<sup>106</sup> See *supra* notes 35-40, 59-61, and 73 and accompanying text.

<sup>107</sup> See *supra* "Litigation in the Mid-1990s: Statutory Provisions" and "Arizona's Counterclaims in the S.B. 1070 Litigation."

<sup>108</sup> See *supra* notes 72-74 and accompanying text.

<sup>109</sup> See *Crane II*, 2013 U.S. Dist. LEXIS 57788, at \*27-\*39.

<sup>110</sup> The *Crane* plaintiffs are, however, generally seen to have conceded that INA §235 would not bar immigration officials from exercising prosecutorial discretion *after* removal proceedings have been initiated. *Id.* at \*16-\*17.

<sup>111</sup> See, e.g., *Department of Homeland Security's Authority*, *supra* note 92, at 11 n.4 ("The district court's conclusion is, in our view, inconsistent with the Supreme Court's reading of the INA as permitting immigration officials to exercise enforcement discretion at any stage of the removal process, including when deciding whether to initiate removal proceedings against a particular alien.") (referencing *Arizona*, 132 S. Ct. at 2499).

<sup>112</sup> See "Mississippi's Claims in *Crane v. Napolitano*."

<sup>113</sup> See *supra* note 104.

prosecutorial discretion, not requiring regulations,<sup>114</sup> and the various benefits and services that are made available to aliens granted deferred action are already provided for in statutes or regulations.<sup>115</sup> It is also worth noting that the court in *Crane* found that the plaintiff ICE agents lacked standing to challenge the Administration’s “conferring the legal benefit of employment authorization without any statutory basis and under the false pretense of ‘prosecutorial discretion’” on the grounds that the ICE agents have “no connection to the employment-authorization process” and, thus, raise only a “generalized grievance.”<sup>116</sup>

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<sup>114</sup> *See supra* note 68.

<sup>115</sup> *See, e.g.*, 26 U.S.C. §3304(a)(14)(A) (including, among those eligible for employment compensation, aliens who are lawfully present for purposes of performing the services or permanently residing in the United States under color of law (PRUCOL) at the time the services were performed); 8 C.F.R. §274a.12(c)(14) (providing for the granting of employment authorization to aliens granted deferred action).

<sup>116</sup> *Crane I*, 920 F. Supp. 2d at 730-31, 742-73. The ICE agents had been found to have standing, at least for certain claims, because they faced potentially adverse employment consequences if they declined to implement Obama Administration policies which they viewed as contrary to the INA. ICE has no role in processing applications for employment authorizations, however, and so the agents were found to lack standing for their claim as to work authorization.