Immigration Law Update:
The Battle Between the States and the Federal Government

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I. Some States Add to the Enforcement of Immigration Laws During the Obama Administration.

A. E-Verify and the Lawful Arizona Workers Act

The I-9 paper-based system (1986) fails to stop employment of unauthorized aliens.

The E-Verify System (formerly the "Basic Pilot Program") has existed for over 20 years, but has never been mandated by the federal government.

In 2007, Arizona passed the LAWA, prohibiting the hiring of unauthorized aliens and requiring all businesses in the state to enroll in E-Verify; those that violated the law were subject to loss of business license.

B. *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011)

5-3 decision upholding the Arizona law with Roberts, Scalia, Alito, Thomas, and Kennedy in the majority (Kagan recused):

> At its broadest level, the Chamber's argument is that Congress "intended the federal system to be exclusive," and that any state system therefore necessarily conflicts with federal law. … But Arizona's procedures simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws. Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority.
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> And here Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects. The Arizona law begins by adopting the federal definition of who qualifies as an "unauthorized alien."
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> Not only that, the Arizona law expressly provides that state investigators must verify the work authorization of an allegedly unauthorized alien with the Federal Government, and "shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States." §23–212(B).

> What is more, a state court "shall consider *only* the federal government's determination" when deciding "whether an employee is an unauthorized alien." §23–212(H) (emphasis added). As a result, there can by definition be no conflict between state and federal law as to worker authorization, either at the investigatory or adjudicatory stage.
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> …
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> From this basic starting point, the Arizona law continues to trace the federal law. … The Arizona law provides that " '[k]nowingly employ an unauthorized alien' means the actions described in 8 United States Code §1324a," and that the "term shall be interpreted consistently with 8 United States Code §1324a and any applicable federal rules and regulations." §23–211(8).
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> -Roberts majority opinion

Now, 7 states require all or almost all private companies to use E-Verify (Alabama, Mississippi, Georgia, North Carolina, South Carolina, Tennessee).

And another 9 states require only state agencies or recipients of state contracts to use E-Verify (Idaho, Utah, Colorado, Nebraska, Oklahoma, Texas, Louisiana, Florida, Virginia).

C. Local police and Arizona's SB1070

ICE doesn't do regular patrols. State and local police are the essential eyes and ears of the agency, as well as a force multiplier.

In 2010, Arizona's SB 1070 required police officers to contact ICE via the 24-7 LESC hotline to confirm the immigration status of any person the officers have reasonable suspicion is not lawfully present in the United States.

It also contained 3 additional provisions that (1) required aliens to carry the same documents that federal law requires them to carry, (2) penalized the unauthorized alien for working illegally, and (3) authorized Arizona law enforcement officers to arrest illegal aliens without a warrant.

The Obama Department of Justice responded by suing Arizona, as well as three other states that were trying to help stop illegal immigration: Alabama, South Carolina, and Utah.

D. *United States v Arizona*, 567 U.S. 387 (2012)
5-3 decision with Kennedy, Roberts, Ginsburg, Breyer, and Sotomayor in the majority (Kagan recused); holds that the provision requiring police to verify aliens' status with ICE is not preempted, but that the three additional provisions are preempted:

Consultation between federal and state officials is an important feature of the immigration system. Congress has made clear that no formal agreement or special training needs to be in place for state officers to "communicate with the [Federal Government] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States." 8 U. S. C. §1357(g)(10)(A). And Congress has obligated ICE to respond to any request made by state officials for verification of a person's citizenship or im- migration status. See §1373(c); … LESC responded to more than one million requests for information in 2009 alone. …

The United States argues that making status verification mandatory interferes with the federal immigration scheme. It is true that §2(B) does not allow state officers to consider federal enforcement priorities in deciding whether to contact ICE about someone they have detained. …

Congress has done nothing to suggest it is inappropriate to communicate with ICE in these situations, however. Indeed, it has encouraged the sharing of information about possible immigration violations. See 8 U. S. C. §1357(g) (10)(A). A federal statute regulating the public benefits provided to qualified aliens in fact instructs that "no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from [ICE] information regarding the immigration status, lawful or unlawful, of an alien in the United States." §1644.

-Kennedy majority opinion

What this case comes down to, then, is whether the Arizona law conflicts with federal immigration law—whether it excludes those whom federal law would admit, or admits those whom federal law would exclude. It does not purport to do so. It applies only to aliens who neither possess a privilege to be present under federal law nor have been removed pursuant to the Federal Government's inherent authority.

…

The Government complains that state officials might not heed "federal priorities." Indeed they might not, particularly if those priorities include willful blindness or deliberate inattention to the presence of removable aliens in Arizona. The State's whole complaint—the reason this law was passed and this case has arisen—is that the citizens of Arizona believe federal priorities are too lax. The State has the sovereign power to protect its borders more rigorously if it wishes, absent any valid federal prohibition. The Executive's policy choice of lax federal enforcement does not constitute such a prohibition.

-Scalia concurring/dissenting opinion

II. DACA

A. Deferred Action for Childhood Arrivals

Enacted by policy memorandum from the DHS Secretary in June 2012.

793,000 signed up to receive the benefit.

B. The Statutory and Constitutional Problems with DACA

1. 8 USC 1225(b)(2). This statute requires that any alien an ICE officer determines to be inadmissible "shall" be placed in removal proceedings. DACA orders ICE agents to break this law.

2. The Administrative Procedure Act (APA). Even if there weren't a statutory barrier to a president issuing the DACA directive, the Department of Homeland Security would still have to promulgate a formal rule, with notice and public comment, under the requirements of the APA.

3. "Prosecutorial discretion" cannot be used to confer federal benefits. Prosecutorial discretion is a decision not to prosecute; it is not a legally-permissible mechanism for granting lawful presence or the valuable benefit of employment authorization. Federal law lays out the only avenues for obtaining either.

4. The Constitutional Separation of Powers. The granting of the right to remain in the United States, plus employment authorization, to a large number of aliens is a legislative action, not an executive action. The "DREAM Act" legislative amnesty, which DACA mimics, has been introduced and has failed in Congress more than twenty times since 2001.

5. Article 2, section 3, of the U.S. Constitution. The president is required to "take care that the laws be faithfully executed." The DACA amnesty is an order *not* to execute the multiple federal laws that render relevant aliens unlawfully present.

C. *Crane v. Napolitano*, 920 F.Supp.2d 724 (N.D. Tex. 2013)

District Court finds likely violation of 8 U.S.C. 1225(b)(2).

However, Fifth Circuit panel finds that ICE officers confronted with the choice of breaking federal law or facing discipline for disobeying orders lack standing.

D. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015)

Texas and 25 other states sued to stop the Obama Administration's 2014 expansion of DACA: DAPA.

The 5th Circuit rules that DAPA (1) violates the APA by imposing a de facto "rule" without notice and comment, and that it (2) unlawfully confers a federal immigration benefit (work authorization) under the guise of "prosecutorial discretion." Supreme Court affirms 4-4 per curiam (2016).

E. Rescinding DACA and *DHS v. Regents of the Univ. of California*, 591 U.S.___ (2020).

5-4 decision with Roberts, Ginsburg, Breyer, Kagan and Sotomayor in the majority, holding that the 2017 DHS decision to rescind DACA was arbitrary and capricious under the APA.

> Even if it is illegal for DHS to extend work authorization and other benefits to DACA recipients, that conclusion supported only "disallow[ing]" benefits…. It did "not cast doubt" on the legality of forbearance or upon DHS's original reasons for extending forbearance to childhood arrivals. … Thus, given DHS's earlier judgment that forbearance is "especially justified" for "productive young people" who were brought here as children and "know only this country as home," … the DACA Memorandum could not be rescinded in full "without any consideration whatsoever" of a forbearance-only policy….
>
> -Roberts majority opinion

> DHS created DACA during the Obama administration without any statutory authorization and without going through the requisite rulemaking process. As a result, the program was unlawful from its inception. The majority does not even attempt to explain why a court has the authority to scrutinize an agency's policy reasons for rescinding an unlawful program under the arbitrary and capricious microscope. The decision to countermand an unlawful agency action is clearly reasonable. So long as the agency's determination of illegality is sound, our review should be at an end.
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> -Thomas concurring/dissenting opinion

III. The Travel Ban Case.

A. The Travel Ban.

8 U.S.C. 1182(f): "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens …."

A September 2017 Trump executive order placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate. Foreign states were selected for inclusion based on a review undertaken according to one of President Trump's earlier executive orders. The foreign states were: Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen.

Lawful permanent residents (green card holders) were exempted from the restrictions.

Hawaii and three of its residents sued, claiming the executive order violated federal immigration law and the Establishment Clause of the First Amendment.

B. Trump v. Hawaii, 585 U.S. _ (2018)
5-4 decision with Roberts, Alito, Thomas, Kavanaugh, and Gorsuch in majority; sustaining President Trump's executive order:

> By its plain language, §1182(f) grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest. And plaintiffs' attempts to identify a conflict with other provisions in the INA, and their appeal to the statute's purposes and legislative history, fail to overcome the clear statutory language.
> …
> On plaintiffs' reading, those orders were beyond the President's authority. The entry restrictions in the Proclamation on North Korea (which plaintiffs do not challenge in this litigation) would also be unlawful. *Nor would the President be permitted to suspend entry from particular foreign states in response to an epidemic* confined to a single region, or a verified terrorist threat involving nationals of a specific foreign nation, or even if the United States were on the brink of war.
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> -Roberts majority opinion (emphasis added)

IV. The Citizenship Question on the Census.

A. The History of the Issue.

B. The Trump Administration Decision.

The Justice Department issues memorandum explaining that the citizenship question would facilitate better enforcement of the Voting Rights Act.

The Commerce Department proceeds to direct the Census Bureau to add the question, "Are you a citizen of the United State?"

New York, plus 17 other states and the District of Columbia, sue under the APA and the Census Act.

C. *Department of Commerce v. New York*, 588 U.S. ___ (2020).
Highly fractured decision. 5-justice majority (Roberts, Ginsburg, Breyer, Sotomayor, and Kagan) holds that census citizenship question cannot be added without further explanation.

> [V]iewing the evidence as a whole, we share the District Court's conviction that the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA. Several points, considered together, reveal a significant mismatch between the decision the Secretary made and the rationale he provided.
>
> -Roberts majority opinion

> In March 2018, the Secretary of Commerce exercised his broad discretion over the administration of the decennial census to resume a nearly unbroken practice of asking a question relating to citizenship. Our only role in this case is to decide whether the Secretary complied with the law and gave a reasoned explanation for his decision. The Court correctly answers these questions in the affirmative. …That ought to end our inquiry.
> The Court, however, goes further. For the first time ever, the Court invalidates an agency action solely because it questions the sincerity of the agency's otherwise adequate rationale.
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> -Thomas concurring/dissenting opinion

V. Conclusions

A. Red States v. Obama; Blue States v. Trump.

B. 5-4 Decisions.

C. Standing of the States Now Established with Minimal Injury-in-Fact.

D. Expansion of the Scope of the APA.