

NATIONAL REVIEW

Obama's 'Complete Abdication' of the Law

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When Texas filed a constitutional challenge to President Obama's executive action on immigration, his supporters scoffed and ridiculed the suit as lacking any merit. First, they argued, states are not injured by the federal policy. Second, they contended that Congress had already given the president the discretion to halt the deportation of millions. Finally, they predicted that the courts would stay out of this important policy debate. The Justice Department's brief rebuked the suit, alleging that the claims "are based on rhetoric, not law." Judge Andrew S. Hanen in Brownsville, Texas, disagreed. In a massive 123-page opinion issued on Monday, Judge Hanen thoroughly rejected each of these arguments, vindicating Texas — and 25 other states that joined it — in this challenge to the president's disregard of the law.

On November 20, 2014, President Obama announced Deferred Action for Parental Accountability (DAPA). This executive action purported to rely on "prosecutorial discretion" to defer the deportations of up to 5 million aliens and grant them work authorization. Only two weeks later, former attorney general, and now-governor Greg Abbott challenged DAPA in federal court in Brownsville. On February 16 — only two days before the Department of Homeland Security would begin accepting new applicants — Judge Hanen ruled that DAPA was unlawful and must be stopped.

Judge Hanen's methodical opinion begins by explaining how DAPA injures Texas and warrants a remedy in federal court. Specifically, DAPA beneficiaries would be able to receive Texas driver's licenses. Providing licenses to the aliens comes at a financial cost to the state, only part of which is borne by the applicant. Although it might seem like a trivial cost, any burden, even as small as a dollar, is concrete enough to justify standing to sue. The government countered that Texas could simply change its laws to deny driver's licenses to DAPA beneficiaries, but Judge Hanen called their bluff. Earlier this year, the DOJ had told Arizona that it would be unconstitutional to deny driver's licenses to beneficiaries of the president's 2012 executive action. Texas chose to avoid this constitutional dilemma by challenging DAPA.

After establishing that Texas had standing to sue in federal court, Judge Hanen turned to the lawfulness of the executive action. DAPA was decreed on November 20, 2014, in a series of memorandums, without any opportunity for the public to comment beforehand. Judge Hanen found fatal the government's failure to comply with the notice-and-comment requirements of the Administrative Procedures Act (APA). But the court went further, finding that DAPA was not an exercise or prosecutorial discretion. Rather, DAPA amounted to a decision to “consciously and expressly adopt a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.” The president was willfully disregarding the laws of Congress that he did not agree with. Specifically, DAPA “does not simply constitute inadequate enforcement; it is an announced program of non-enforcement of the law that contradicts Congress’ statutory goals.” This policy, Hanen concluded, is unlawful and must be halted.

The court did not need to address the constitutional issue, and it did not address whether the president failed to comply with the Constitution’s requirement that he “take care that the laws be faithfully executed.” Judge Hanen, however, showed his hand by explaining that the president had engaged in a “complete abdication” of the law. Rather than enforcing the law, Hanen saw Obama’s actions as making law: The executive is “is not just rewriting the laws; he is creating them from scratch.” This is the role of Congress, not the president. Even if the administration complies with the notice-and-comment process of the APA — unlikely with only 20 months until the next election — such a broad policy of non-enforcement would still run afoul of the Take Care clause.

This case will soon be appealed by the DOJ to the Fifth Circuit Court of Appeals, and ultimately to the United States Supreme Court, but Judge Hanen’s thoughtful opinion has shifted the tenor of the debate. No longer can critics scoff at the argument that DAPA is unlawful. Hanen’s workmanlike decision has moved the arguments from “off the wall” to “on the wall.” The decision from Brownsville, on the literal and figurative border between the federal and state governments, is a first step toward restoring the separation of powers and ensuring that the president faithfully executes the laws.

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