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Order Blocking Deportation Stays Starts Legal Maneuvers

By Marcia Coyle

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In a U.S. Supreme Court term remarkable for the number and variety of emergency requests by states and groups seeking to delay federal court orders, one more is likely in the near future, thanks to a federal judge in Brownsville, Texas.

U.S. District Judge Andrew Hanen on Monday issued a temporary injunction blocking implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. The initiative would stay deportation proceedings for between 4 million and 5 million undocumented immigrants.

The judge's order in State of Texas v. United States, a challenge brought by 26 states, also halted the Obama administration's expansion of the 2012 Deferred Action for Childhood Arrivals (DACA) program, which allows teenagers and young adults born outside of the United States, but raised here, to seek deferral of any government action against themselves.

The U.S. Department of Justice will appeal that temporary injunction to the U.S. Court of Appeals for Fifth Circuit, said Jeh Johnson, secretary of the Department of Homeland Security, which administers the programs. "In the meantime, we recognize we must comply with it," Johnson said in a statement.

But the Fifth Circuit will be only a "pit stop" on the way to the Supreme Court, predicted Josh Blackman of the South Texas College of Law, who wrote an amicus brief supporting the states on behalf of the Cato Institute.

"This is going to go up fast," regardless of what the circuit court rules, Blackman said. "I don't think the Fifth Circuit will spend a too much time on this. It is a massive federal policy that affects 5 million people."

Erwin Chemerinsky, dean of the University of California, Irvine School of Law, agreed that the challenge to the president's executive order will get to the Supreme Court. A second challenge is now on appeal in the D.C. Circuit. A federal district court on Dec. 23 dismissed a suit brought by Maricopa County, Arizona, sheriff Joe Arpaio. That judge ruled that Arpaio lacked standing to challenge the order, and also that because it was a dispute between Congress and the executive branch, the lawsuit was not eligible for court review.

Arpaio has appealed to the D.C. Circuit, which has granted expedited briefing.

Chemerinksy noted that the Supreme Court, in its 2012 decision in Arizona v. United States, stressed the executive's authority to decide whether to deport someone. "On the other hand, this is so intensely partisan, and the court may see it through that partisan context," he added.

Blocking an executive order

In his 123-page ruling, Hanen (left) found that Texas had standing to sue the government because of the direct economic damages the DAPA program would cause. He based his temporary injunction on his finding that adoption of the program violated the notice-and-comment requirements of the Administrative Procedures Act and that the states had "clearly proven" a likelihood of success on the merits.

He rejected the government's arguments that the states lacked standing to challenge the program; that the executive branch enjoys "complete prosecutorial discretion" over illegal immigrants; and that discretionary decisions like the deferred actions under DAPA and DACA are not subject to review under the Administrative Procedures Act.

There is a certain urgency to action by the appellate court, according to immigration scholar Stephen Legomsky of Washington University in St. Louis School of Law. The Department of Homeland Security is "already well into planning and implementation of this program," he said.

"It does require the hiring of a large number of adjudicators and training before any applications come in. That means a very large layout of funds of uncertain benefit if the injunction is upheld. The government needs to know right away. So, based on that, I would think the Fifth Circuit would decide very quickly whether to issue a stay."

The Fifth Circuit is not "typically considered pro-immigrant," said Stephen Yale-Loehr, an immigration scholar at Cornell Law School. "It usually upholds deportation orders."

However, that court in 2013 did strike down an ordinance in Farmers Branch, Texas, that would have prohibited landlords from renting to immigrants that the city considered illegal and authorized arrest and prosecution of landlords and tenants for violations. The court's vote was 9-5.

Bold statements

The Supreme Court, Yale-Loehr said, generally defers to both Congress and the executive branch on immigration. The standard for approving such agency decisions is quite low. "The theory is that one of the plenary powers of the government is to control our borders, so we judges are not going to step in to overrule those decisions," Yale-Loehr said.

And the Supreme Court has made "some pretty bold statements" affirming the use of prosecutorial discretion in immigration, said Shoba Wadhia, director of Pennsylvania State University Dickinson School of Law's immigrant-rights clinic.

In Arizona v. United States, she said, "The justices said a principle feature of the removal system is broad discretion exercised by immigration officials, deciding as an initial matter whether to pursue removal at all."

Even earlier, in 1999, the high court issued another well-known decision—Reno v. Anti-Arab American Discrimination Committee—in which it specifically mentioned deferred action. That ruling referred to a section of immigration law that precludes judicial review over three types of prosecutorial-discretion decisions.

If the main basis for Hanen's injunction was that the administration violated the Administrative Procedures Act, then there is a potential quick fix for the administration, Cornell's Yale-Loehr suggested.

"The government could put out a notice tomorrow for comments and a week from now issue a final rule," he said. "The government could get around this fairly simply, if push came to shove. If they don’t get an emergency stay from the Fifth Circuit—and it may be several months before that court rules—they may consider a notice-and-comment rule."

For the immediate future, the legal battle will be over a stay of the district court order, either by the Fifth Circuit or the Supreme Court. But South Texas' Blackman believes the merits of the states' challenge will go before the high court sooner rather than later.

"We're now at Feb. 17," he said. "I could see arguments in May and a decision by June. I don't see [the justices] leaving this until next term. I think they have to do it now."