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Fifth Circuit Bolsters Obama Case for Immigration Order

By Marcia Coyle

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As the U.S. Department of Justice readies its defense of President Barack Obama's immigration executive order in the U.S. Court of Appeals for the Fifth Circuit, its arguments have drawn an unexpected boost from a panel of that same court.

A unanimous three-judge panel in Crane v. Johnson held on Tuesday that the state of Mississippi and several federal U.S. Immigration and Customs Enforcement agents lacked standing to challenge the 2012 Deferred Action for Childhood Arrivals program, known as DACA.

"This decision has major implications for the appeal pending before the same court in Texas v. United States," said immigration law scholar Stephen Legomsky of Washington University in St. Louis School of Law.

The government may find "slight" encouragement in the ruling, said Josh Blackman of South Texas College of Law. Still, he cautioned, the records in the two cases are very different.

The Mississippi decision refocused attention on Texas' immigration challenge, in which a flood of amicus briefs has emerged ahead of hearings on the administration's November executive order.

In February, U.S. District Judge Andrew Hanen temporarily blocked the administration from implementing the separate Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. That initiative would stay deportation proceedings for between 4 million and 5 million undocumented immigrants and offer them an opportunity to obtain work permits.

The judge's order, in a challenge by Texas and 25 other states, also halted the Obama administration's expansion of the 2012 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.

In issuing the preliminary injunction, Hanen held that adoption of the deferred parents' program failed to comply with notice-and-comment rulemaking required by the federal Administrative Procedure Act.

Such rulemaking was required, he said, because grants of deferred action under the DAPA program are mandatory—not, as the administration argued, discretionary on a case-by-case basis and thus exempt from the Administrative Procedure Act.

Hanen also found that Texas had standing to bring the lawsuit because the program would cost the state money by forcing it to use limited revenues in processing and issuing drivers' licenses to qualified immigrants.

Immigration law experts said the decision in the Mississippi challenge undercuts Hanen's rulings in the Texas case both on the states' standing and the Administrative Procedure Act.

The appellate panel, led by Judge W. Eugene Davis, said neither Mississippi nor the immigration agents had demonstrated the particularized and concrete injury required for standing to sue. The state failed show how the deferred childrens' program imposed increased costs on the state, the court said. It rejected "speculative" claims by the immigration agents that they would be disciplined if they did not comply fully with the program.

Referring to the DACA directive issued by then-Secretary Janet Napolitano of the Department of Homeland Security, the court said, "This brings us to a fundamental flaw in the agents' argument. The agents' reading of the directive—that they are always required to grant deferred action and cannot detain an alien who may meet the directive's criteria—is erroneous. The Napolitano directive makes it clear that the agents shall exercise their discretion in deciding to grant deferred action, and this judgment should be exercised on a case-by-case basis."

And, the court added, "The 2014 supplemental directive, which also supplements DACA, reinforces this approach to the application of deferred action."

Washington University's Legomsky, who joined an amicus brief supporting the administration in the Texas case, said, "This conclusion wipes out the entire premise—that DACA and DAPA are not discretionary—for Judge Hanen's determination that the APA required notice-and-comment rulemaking."

Mississippi's inability to show that the DACA program would decrease its net revenue rather than, as the administration claimed, increase it, applies to Texas' arguments on standing, he added.

However, South Texas' Blackman, who field an amicus brief in the district court supporting Texas on behalf of the Cato Institute, said, "I think the difference between the two cases is the record." Mississippi filed its DACA challenge a week after the program was announced in 2012, he said.

"The record is very sparse," Blackman said. "Mississippi had almost no evidence it would be injured by DACA. There was no track record. It relied on a 2006 study on the effect of illegal immigration on the state. It couldn't prove concretely what the impact would be."

Texas, to the contrary, has amassed a "huge file" establishing an impact, he said. The state had "very detailed affidavits from a number of state officials on the specific costs of applicants in terms of drivers' licenses, down to the penny."

On the alleged discretionary nature of the program, he added, "We've now had DACA for three years and almost everyone gets granted."

On the standing ruling in the Mississippi case, the administration "doesn't get much," he argued. The "most troubling portion" of the opinion for Texas is the panel's comments on the discretionary aspect of the program.

"Based on the record the court had before it, that was probably accurate, but the record before Hanen is different. Maybe the federal government has a slight benefit," he said.

Panel rulings bind other panels within the circuit court. On April 17, another panel will hear arguments on the government's emergency motion for a stay of Hanen's injunction pending a full appeal. The court has granted each side an unusual one hour for argument. No date has been set for hearing the full appeal, but the government already has filed its opening brief.

Amicus briefs supporting the government have been filed by more than 150 civil rights, labor and immigration advocacy groups; 15 states and the District of Columbia; 181 members of Congress; 109 law professors; law enforcement, faith and business leaders, and others.
The deadline for briefs supporting Texas is May 11.