

Obama's Executive Actions Face Supreme Reaction

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President Obama, an avid basketball player, has run a fast break to sidestep Congress by using sweeping executive actions on immigration, health care and more. But now he faces a full Supreme Court press.

Thus far, the high court has been pretty friendly terrain for the White House. But a series of recent lower-court defeats and justices' increasingly nondeferential attitude toward executive-branch rulemaking suggest that big parts of Obama's legacy could be undone. The first casualty could be the de-facto legal status promised to millions of undocumented immigrants and the workings of his signature ObamaCare law.

Executive Branch Trimming

Reversals of Obama administration actions wouldn't simply scramble the policy status quo and give Congress greater leverage over contentious policy debates. It might also alter broad perceptions about Obama's go-it-alone attitude and public tolerance of a power-hungry executive branch.

On Monday, the 5th Circuit Court of Appeals refused the Obama administration's request to lift an injunction and let Homeland Security begin providing 4.3 million undocumented parents of children born in the U.S. the right to stay — and work. The Justice Department said Tuesday it would appeal to the Supreme Court. A decision could come around the end of June, just as the general election battle for the White House heats up.

A second big test of Obama's authority looks likely to come by mid-2017. That's when the court may rule in House Republicans' lawsuit arguing that the Department of Health and Human Services hijacked Congress' constitutional power of the purse to fund ObamaCare subsidies.

'Manifestly Contrary'

On Monday, an appeals court panel rejected Obama administration arguments that Texas lacked standing to sue to block the immigration order. The 2-1 ruling said that Obama's Deferred Action

for Parents of Americans and Lawful Permanent Residents flouted the will of Congress set out in the Immigration and Nationality Act.

DAPA is "manifestly contrary to the statute," the judges wrote.

The Obama administration argued that DAPA was similar to prior broad-based grants of relief from deportation, including a Family Fairness program under the George H.W. Bush administration.

But the appeals court ruling embraced arguments laid out in a January brief from the Cato Institute characterizing those prior actions as "a bridge" to legal residence, for which the groups were soon to be eligible, even if there was no relief.

'Undermines' The Law

By contrast, Obama's program is "a tunnel that undermines the legislative structure," wrote the Cato Institute's Ilya Shapiro, Leif Olson and law professors Josh Blackman, Jeremy Rabkin, and Peter Margulies.

They argued that some granted legal status could otherwise have to wait up to 21 years to petition for a visa and spend 10 of those years outside the U.S.

While the authors of the brief personally support granting relief to the parents of U.S. citizens, they argue that doing so via executive-branch action is prohibited.

In its appeal to the Supreme Court, the Obama administration might not find the justices as accommodating this time.

Even in the last big victory for ObamaCare, Chief Justice John Roberts signaled the court would be less willing to grant wide discretion to executive branch agencies.

The King v. Burwell case hinged on whether the IRS had authority to provide tax subsidies in states that had never set up their own health insurance exchange. Conservatives argued that the plain text authorizing subsidies via an "exchange established by the state" meant that the federal Healthcare.gov couldn't disperse them.

While Roberts ruled out that interpretation, he also rejected the White House argument that the IRS must be granted deference to determine what the law intends.

Roberts said that the availability of billions in subsidies was "a question of deep 'economic and political significance'; had Congress wished to assign that question to an agency, it surely would have done so expressly."

The judicial branch, not the executive branch, is the ultimate arbiter of what a law means when it comes to such weighty questions, Roberts said.

Monday's appeals court ruling asserts that the breadth of Obama's grant of deferred deportation certainly qualifies for such treatment.

Power Of The Purse Snatching

The next ObamaCare case with broad implications for the exchanges involves the House Republican-led lawsuit. It charges the Obama administration with spending billions that Congress never appropriated on cost-sharing subsidies to reduce out-of-pocket expenses for low-income insurance customers.

The case is unprecedented: The House argues the administration isn't just spending money without authority, but plans to do so on a permanent basis — including \$136 billion over 10 years.

Federal district judge Rosemary Collyer ruled in September that the House had standing to sue to protect its constitutional power of the purse. She'll hear oral arguments early next year.

The merits of the case seem to favor the House GOP.

In its 2014 appropriation request, the Department of Health and Human Services sought \$4 billion for these cost-sharing subsidies.

The Congressional Research Service concluded that, "unlike the refundable (premium) tax credits, these payments to health plans do not appear to be funded through a permanent appropriation."

Eventually, the Obama administration decided that cost-sharing subsidies needn't be funded by annual appropriations, yet the reversal makes it much harder to discredit the GOP position.

Defeat May Hike Premiums

If the House wins its suit and there are no government funds to pay those extra subsidies, which insurers will still be required to provide, the only option will be to raise premiums.

Exchange premiums might jump 6%-12%, with higher increases in poorer states more dependent on cost-sharing subsidies. That would only add more problems on top of ObamaCare's shaky foundation, leading more relatively young and healthy people to forgo coverage.

As the new Supreme Court term began last month, just 18% of Republicans viewed the court favorably. But by the time the next term wraps up in June 2017, there's a strong chance that the GOP will be celebrating the Roberts court's newly cemented legacy of reversing President Obama's executive overreach.