

Will *United States v. Hansen* Come Back to Bite Trump?

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Former President Trump was indicted on August 1, 2023 by Special Counsel Jack Smith for his efforts to overturn the 2020 elections. Although Trump believes his actions were protected by the First Amendment, a recent Supreme Court case involving an immigration statute, *United States v. Hansen*, held that speech constituting fraud does not protected under the First Amendment. Will *Hansen* come back to bite Trump?

In two previous blogs, [here](#) and [here](#), we have discussed the *United States v. Hansen* case, the central question of which was whether INA §274(a)(1)(A)(iv), or the “encouragement provision”, which prohibits individuals from “encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law” is unconstitutionally overbroad. Helaman Hansen, who ran an organization called Americans Helping America Chamber of Commerce (“AHA”) purporting to help undocumented immigrants become U.S. citizens through adult adoption, had been convicted of violating INA §274(a)(1)(A)(iv) because he encouraged or induced individuals who participated in his program to overstay their visas on two occasions.

Hansen’s convictions eventually were vacated by the Ninth Circuit, which held that the encouragement provision is overbroad and unconstitutional, as it prohibits a broad range of protected speech. Hansen and amici argued that the encouragement provision could punish even a lawyer who provides certain types of legal advice to a noncitizen, or an aide worker who advises an undocumented immigrant to take shelter in the U.S. during a natural disaster. The government sought review by the Supreme Court, asserting among other arguments, that INA §274(a)(1)(A)(iv) is not facially overbroad because the terms “encourage” and “induce” in the encouragement provision are terms of art borrowed from criminal law that refer to specific and egregious conduct, namely facilitation and solicitation. The Supreme Court granted certiorari and, in its decision issued on June 23, 2023, held that the encouragement provision is not unconstitutionally overbroad because it uses “encourage or induce” “in its specialized, criminal-law sense—that is, as incorporating common law liability for solicitation and facilitation”.

In our previous blogs, we noted the troubling implications that *Hansen* could have for immigration lawyers and their ability to effectively advise their clients, as the plain language of the statute could be read to prohibit an immigration lawyer from advising an undocumented client to remain in the U.S. to avail of an immigration benefit that would be unavailable to the

client if he left the country. We also noted that immigration lawyers might choose to adopt a practice of advising clients only about the risks and benefits of remaining in the U.S., though giving elliptical advice of this kind might not always constitute competent representation. In its decision, however, the Supreme Court read the encouragement provision to narrowly apply only to intentional facilitation and solicitation. By making it clear that the encouragement provision “stretches no further than speech integral to unlawful conduct, which is unprotected”, the Supreme Court’s decision may alleviate, at least in part, concerns that upholding the provision would have a chilling effect on competent legal advice.

Hansen has recently come back into the spotlight in relation to Donald Trump’s August 1, 2023 indictment on four charges under federal statutes – conspiracy to defraud the United States, conspiracy to obstruct an official proceeding, obstruction and attempt to obstruct a federal proceeding, and conspiracy against rights – stemming from the administration’s efforts to overturn the results of the 2020 presidential election. Trump’s supporters, including his lawyer John Lauro, have portrayed the indictment as an attack on Trump’s First Amendment right to engage in political speech. As Walter Olson points out in a Cato Institute essay, the indictment itself outlines many of the false claims that Trump made in the context of the 2020 presidential election, but does not explicitly “punish the former president for speech or advocacy as such”. Moreover, the Constitution’s generous protections of political speech do not extend to all types of speech, including speech constituting fraud, as analyses of the indictment have noted. The Supreme Court’s holding in *Hansen* makes clear that the First Amendment does not protect speech that facilitates the commission of crimes under federal statutes. Helaman Hansen, too, had been charged with criminal solicitation under INA §274(a)(1)(A)(iv) and the Supreme Court ultimately rejected the idea that his conduct was protected by the First Amendment. The Supreme Court in *Hansen*, quoting *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612 (2003), clearly noted that “the First Amendment does not shield fraud[.]” In an Election Law Blog post, Ciara Torres-Spelliscy observes that “...the Supreme Court [...] treats fraud as a different and unprotected category that is outside of the First Amendment’s protections.”

The Trump administration was characterized by overwhelming negative views on immigrants and the promulgation of draconian immigration policies, many of which are analyzed in our prior blogs. In his remarks to the Executive Office for Immigration Review in 2017, then-Attorney General Jeff Sessions once made a reference to “dirty immigration lawyers”, indicating that the administration held immigration lawyers in contempt, as well. It is thus ironic that the same Supreme Court decision that could leave immigration lawyers vulnerable to prosecution has the potential to snare Trump himself, as well. *Hansen* is a rather double-edged decision – although it could have problematic aspects for immigration lawyers, it may by the same token prove useful in striking down any claims by Trump that the misinformation he spread in an attempt to fraudulently overturn the 2020 election is protected as First Amendment speech.