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Justices Tie on Immigration: What Now?

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July 5 — Undocumented immigrants who might have benefited from the Obama administration's deferred action programs are likely in for another long wait now that the U.S. Supreme Court has effectively put the brakes on the initiative.

There are a handful of next steps the administration could pursue following the June 23 4-4 decision in *United States v. Texas*, 2016 BL 201458, U.S., No. 15-674, 6/23/16, Greg Siskind of Siskind Susser said July 5. One would be to petition the justices for a rehearing of the case, followed up by a request that the rehearing be postponed until a ninth justice is confirmed, he said during an ImmigrationWorks USA teleconference.

Meanwhile, the Supreme Court decision involved a preliminary injunction that temporarily blocked the deferred action for parents of Americans and lawful permanent residents program and expanded deferred action for childhood arrivals program.

Case Goes Back to District Court

That means the case now goes back to the U.S. District Court for the Southern District of Texas for a trial on the merits, which will likely result in a permanent injunction, Siskind said.

That decision could be appealed, he said, for “round two” before the U.S. Court of Appeals for the Fifth Circuit, which last November sided with the lower court.

An aggressive—albeit unlikely—strategy the administration could pursue would be to attempt to implement the blocked programs in parts of the country not covered by the Fifth Circuit, Siskind said.

Slogging Through Rulemaking

Finally, the administration could try a relaunch of the programs after going through the lengthy process of issuing a proposed rule, seeking public comment and then releasing a final rule, Siskind said.

“All along in this case there was strong differing views within the administration of whether they should’ve done a rulemaking at the outset and whether they should’ve done it via policy guidance,” Lynden Melmed of Berry Appleman & Leiden said.

The entire rulemaking process takes six months to a year at the fastest, according to Melmed, who formerly served as chief counsel at U.S. Citizenship and Immigration Services.

“The only issue that the district court ruled on” was that the administration should have gone through that process rather than releasing a more informal memorandum, Melmed said.

Attorney Says Goal Was ‘Quick Win.’

The administration “went for the quick win” by claiming that Texas and the other plaintiff states didn’t have standing to sue, but now the USCIS is going to have to do formal rulemaking “to take that issue off the table,” he said.

And that process likely could bleed into the next administration, the speakers said. However, they said they were doubtful that presumptive Republican presidential nominee Donald Trump would go that route.

But that process “shouldn’t stop Congress,” and in fact the pressure will be back on the Capitol after the election in November, Melmed said.

What About Congress?

The prospects for congressional action on immigration aren’t bad, Chandler Morse, chief of staff for Sen. Jeff Flake (R-Ariz.), said. Flake was a member of the “gang of eight” that crafted S. 744, the comprehensive immigration bill that passed the Senate in 2013 but stalled in the House.

Morse said he had some “angst” that Republicans would “jump the shark on immigration” and issue statements that would make a compromise with Democrats on the issue difficult. But he said he was “pretty pleased with the reaction” from members of the party, who generally said the deferred action programs went beyond the president’s authority, but Congress still needs to pass immigration legislation.

ImmigrationWorks USA President Tamar Jacoby, herself a Republican, said “that could be a good sign of where the party is.” Several Republican politicians, at least on the immigration issue, are “a quiet example showing that we’re going to differentiate ourselves from that guy,” she said, referring to Trump. Trump is known for his hard stance on immigration during campaign speeches.

On the other hand, Republicans could just be taking a step back and saying “they just don’t want to deal” with the issue at the moment, Morse said.

The prospects for congressional action could be harmed if the continuing litigation over DAPA and expanded DACA becomes “a circus in a courtroom in Texas,” Morse said. In that instance, congressional Republicans may not want to tackle immigration, he said.

Could Clinton Forge a Deal?

The outcome of the presidential election also could affect Congress's willingness to pass immigration legislation, the speakers said.

Congress doesn't trust Hillary Clinton, and “we're in for more toxic politics” unless the Democrats win a “filibuster-proof majority” in the Senate, Cato Institute senior fellow Ilya Shapiro said. “That's not a healthy development.”

With about 2 million more Latino voters in 2016 than in the 2012 election—when that demographic was credited with President Barack Obama's re-election—Clinton is likely to make immigration a major campaign issue, Siskind said. “I would be shocked if she’s not talking about the case, and about immigration reform more generally, at every opportunity,” he said.

Siskind said he was “more optimistic” than Shapiro that Clinton could cut a deal with a Republican Congress, especially if immigration winds up being a big campaign issue and Clinton wins by a large margin.

“She does have the benefit of actually having served in the Senate,” giving her an advantage over Trump in terms of deal making, Morse added.

Siskind also reassured the undocumented immigrants who would have benefited from the programs, saying “it's not all bad news for them.”

There are many other elements of the president's 2014 executive action that aren't affected by the Supreme Court decision—including new immigration enforcement priorities—he said. That means anyone who isn't a criminal, a security risk or a repeat immigration violator isn't likely to be deported anytime soon, he said.

“They'll be in a limbo state,” but the Supreme Court really just preserved the status quo, Siskind said.