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Executive Power and the SCOTUS Argument on President Obama's Immigration Plan

By Peter Margulies Tuesday, April 19, 2016, 11:57 AM

If the Supreme Court in *United States v. Texas* finds that Texas has standing to challenge President Obama's immigration plan (Deferred Action for Parents of Americans (DAPA)), the Court will have to address the quantum of discretion that the Immigration and Nationality Act (INA) delegated to immigration officials. Addressing that question will require the Court to distinguish between 1) discretion under the INA, and 2) presidential foreign affairs power under Article II of the Constitution. At Monday's argument, Solicitor General Donald Verrilli conflated these two forms of presidential authority. That strategy is misleading, because the Department of Homeland Security (DHS) relies solely on the INA to support DAPA, making the Article II examples inapposite. Unfortunately, Justices Ginsburg, Kagan, and Sotomayor—three liberal Justices whose opinions I usually admire—seemed receptive to this misleading strategy. As a result, the Court could leave even more uncertainty about the scope of presidential power over immigration.

That precision about sources of executive power is central to the pro-Texas *amicus* brief I filed on behalf of former DHS officials (and *Lawfare* contributors) Stewart Baker and Paul Rosenzweig, along with former Deputy Assistant Attorney General Rick Valentine and former NSC Legal Adviser Nick Rostow. Our brief argues that executive discretion under the INA to find undocumented noncitizens eligible for work permits entails one of two conditions: 1) express authority granted under the INA (as is the case for asylees, see 8 U.S.C. §1158(d)(2)), or, 2) a clear-cut path to a legal status under the statute (such as a U visa available for victims of crime). In the second situation, deferred action that includes a work permit and a reprieve from deportation is a bridge to a legal status. Building that bridge actually promotes efficient adjudication; for example, U visa applicants who stay in the U.S. can attend required interviews at local U.S. immigration offices. Those interviews would be far more difficult if the applicants were deported to their country of origin while their applications were pending.

Similarly, the Bush 41 "Family Fairness" program stayed deportation for spouses and children of individuals granted legalization under the 1986 Immigration Reform and Control Act (IRCA). As Adam Cox and Cristina Rodriguez conceded in a recent *Yale Law Journal* article, Family Fairness recipients already had a path to a legal status under the INA, once their IRCA beneficiary relatives became lawful permanent residents (LPRs). Shortly after Family Fairness was announced, the 1990 Immigration Act greatly accelerated that legal process. Family Fairness merely obviated the risk that persons soon eligible for a visa would have their lives needlessly disrupted by removal from the United States.

The executive branch can't make this "bridge" argument about potential DAPA recipients, since as Cox and Rodriguez concede in their *Yale* piece, the INA imposes special obstacles on unlawful entrants seeking a legal status through post-entry U.S. citizen children. Congress did this deliberately, to neutralize the largely spurious risk of "anchor babies" that opponents of legislative immigration reform notoriously invoke. That's why, as professors Rodriguez and Cox note, DAPA recipients can only obtain law permanent resident (LPR) status "far in the future."

In contrast, presidents since Bush 41 have bypassed the INA and claimed executive power under Article II of the Constitution to protect foreign nationals in a different context: when foreign nationals would face the risk of harm if they had to return to tumultuous situations in their countries of origin caused by government repression, civil strife, or natural disasters. President Obama cited this power in permitting to Liberians to stay in the United States even though the Liberians' statutory Temporary Protected Status (TPS) had lapsed. President Obama took this action even though Congress has declared that TPS is the "exclusive" remedy for country-specific immigration relief. 8 U.S.C. §1254a(g).

While our *amicus* brief takes no position on these Article II forays by successive administrations, what should be clear is that any such power is irrelevant to DAPA. DAPA does not involve country-specific relief. Any foreign national is eligible if he or she meets DAPA's criteria, such as parenting a U.S. citizen and continuous residence in the U.S. since January 1, 2010. Recognizing this, DHS has never sought to invoke Article II in support of DAPA. Nevertheless, the Justice Department, in defending DAPA, has cited the Liberian example and other Article II exercises of discretion as precedents. DOJ is trying to have it both ways: DAPA is either supported by Article II, in which case the Liberian and similar cases are relevant, or it rests solely on the INA (as DOJ asserts), in which case the Liberian example has no bearing on the legality of executive action. As Texas Solicitor General Scott Keller implied, perhaps the real reason that DOJ has repeatedly tried to invoke the Liberian example is that, without it, the overwhelming majority of exercises of statutory discretion are either expressly authorized by the INA or (like Bush 41's Family Fairness) are bridges to a legal status.

The paucity of examples that support DOJ's position prove, as Justice Kennedy put it Monday, that in this case DOJ has placed statutory interpretation "upside down." As the Court has said repeatedly, most recently in 2015's *King v. Burwell* (upholding federal exchanges under the Affordable Care Act), the legality of administrative action is measured with reference to the "context and structure" of the statute. Courts

have therefore required the executive branch to show fidelity to Congress's overall plan, including the history of shared legislative-executive understandings regarding statutory implementation.

DOJ's position here would replace this time-tested contextual model with a rigid clear statement test. To meet the test, Congress would have to predict and expressly preclude every conceivable executive exercise of discretion. Failing that arduous test, Congress's only remedy would be new legislation passed by a veto-proof majority in both legislative chambers. That expansive model of administrative discretion would tempt even the most diligent Executive into excess, and up-end Justice Jackson's canonical approach to the separation of powers. Congress would become the Executive's servant in matters of statutory interpretation, rather than the Executive remaining faithful to Congress's intent.

Solicitor General Verrilli, usually a careful and conscientious advocate, compounded this confusion about the scope of executive power in his rebuttal (Transcript pp. 88-89) with an errant citation to an Article II-rooted 1988 D.C. Circuit decision, *Hotel & Restaurant Employees Union v. Smith*, 846 F.2d 1499. According to the SG, in *Smith*, Judge Laurence Silberman described the Bush 41 Family Fairness program as "extra-statutory" but nonetheless permissible under the INA. The SG wielded Judge Silberman's opinion like a cudgel, contending that it showed Texas was "just flat wrong" in its narrow characterization of the Bush 41 Family Fairness program as a bridge to an already existing legal status.

There are two major problems with SG Verrilli's argument. As Josh Blackman notes, *Smith* was decided in 1988, well over a year prior to Family Fairness's announcement. Indeed, *Smith* involved a completely different issue: the reviewability of the Reagan administration's *denial* of country-specific relief to Salvadorans. In this connection, Judge Silberman spoke the language of Article II, citing "considerations of foreign relations" and "executive power to control... foreign affairs." In citing *Smith*, SG Verrilli again confounded the President's Article II authority with executive discretion under the INA.

In a particularly troubling exchange at Monday's argument, the usually careful Justice Sotomayor partnered with the usually careful SG in a confused *pas de deux*. Seeking to ground DAPA's sweeping relief in accepted practice, Justice Sotomayor observed (Tr. 90) that, "[p]eople who have asylum don't have a pathway to citizenship," but are still eligible for work permits. "Exactly," the SG seconded. But in reality, asylees *do* have a pathway to citizenship: they can apply for adjustment to LPR status one year after getting asylum (8 U.S.C. §1159(b)) and apply for naturalization five years after getting LPR status. Moreover, as described above, Congress has expressly authorized work permits, even for *applicants* for asylum. (Id. at §1158(d)(2).) This served the statutory scheme: Congress wished to allow bona fide refugees-in-waiting to keep body and soul together while their applications are processed. Granting work permits to asylees or even asylum applicants thus requires no special discretion under the INA; in marked contrast to DAPA, it merely entails following what Congress expressly authorized.

As a longtime immigration lawyer and advocate for Congress's enactment of comprehensive immigration reform, I know from experience that the INA is a detailed and complex statute that can trip up even seasoned practitioners. However, Monday's argument featured at least one misstep too many. The INA's detailed scheme is not served by analogies to inapposite sources of law, such as Article II of the Constitution, by misplaced reliance on earlier judicial decisions such as *Hotel & Restaurant Employees Union v. Smith*, or by imprecise interpretation of the INA's asylum provisions. Precisely because the scope of executive power over immigration is so important, analysis of the Constitution and the INA deserves a higher standard. A ruling on the merits for Texas or a 4-4 tie would serve both the INA and separation of powers, and leave immigration reform where it belongs: to Congress, where voters tired of gridlock will eventually hold their elected congressional representatives accountable.

Topics: Immigration

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