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Presidential Power and Enjoining the Obama Immigration Plan

By Peter Margulies  Wednesday, February 18, 2015, 11:00 AM

Monday’s district court decision enjoining President Obama’s immigration plan, Deferred Action for Parents of Americans (DAPA), was a strong rebuke of presidential overreaching, although it was framed as a decision on the Administrative Procedure Act (APA). (Full disclosure: I was co-counsel on an amicus brief by the Cato Institute; see here for Cato’s take on the decision, and here for the take of co-counsel Josh Blackman). While the APA issue may have been as far as the court wanted (or needed) to go, the presidential power aspects of the opinion will frame the debate about the legality of the President’s program. Since that program is perhaps the biggest single unilateral move of the Obama presidency, the presidential power issue is well worth a look.

For those who have been in a cave for the last three months, DAPA (see my article here) grants substantial immigration benefits, including work authorization and a 3-year reprieve from removal, to undocumented foreign nationals who have been here for at least 5 years and have U.S. citizen children. Because Congress resisted creating what immigration opponents crudely call “anchor babies,” Congress made unlawful entrants with post-entry U.S. citizens run a daunting obstacle course. Potential DAPA recipients have to wait until their children are 21 to even apply for legal status, and even then have to leave the U.S. and wait for the completion of a ten-year bar on their readmission. Moreover, Congress has repeatedly said that work authorization is a powerful “magnet” for undocumented migrants. Unilaterally granting work authorization to folks with a deliberately obstacle-ridden path to legal status seems to undercut Congress’s intent.

Judge Andrew Hanen, in his opinion enjoining DAPA, referred repeatedly to the unilateral nature of DAPA’s operation. Judge Hanen explained DAPA by observing that “because Congress did not change the law” to opt for immigration reform, the President “changed [the law] unilaterally.” The court also cited the argument by Texas and the other state plaintiffs that DAPA “constitutes a significant change in immigration law that was not implemented by Congress.” In addition, the court cited the plaintiffs’ assertion that, “only Congress can create or change laws, and... the creation of the DAPA program violates the Take Care Clause of the Constitution and infringes upon any notion of separation of powers.” In enjoining DAPA, Judge Hanen acknowledged that, “The Court is mindful of its constitutional role to ensure that the powers of each branch are checked and balanced.”

The court’s holding that DAPA had to undergo the APA’s notice and comment procedures – a recipe for delay that the administration desperately wished to avoid – also owed much to this skepticism about unilateral exercises of presidential power. At several key junctures, the court interpreted the APA to require searching judicial review of presidential action. First, the government had contended (see the Justice Department Office of Legal Counsel (OLC) opinion justifying DAPA), that DAPA was merely regulatory inaction, which is presumptively reviewable under the 1985 Supreme Court case, Heckler v. Chaney. The district court read inaction narrowly, as referring only to agencies setting enforcement priorities and making ad hoc judgments not to prosecute in individual cases. In contrast, the district court said Monday, DAPA involved not merely tacit enforcement priorities, but “affirmative action:” the categorical grant of benefits such as work authorization and a reprieve from removal to a huge cohort of undocumented foreign nationals. Under the government’s theory, the court warned, there was no limiting principle governing the award of such benefits, which conceivably could extend to the United States’ entire undocumented population. Congress could not have intended to give the government such “unlimited” discretion, the court inferred. A limiting principle was called for, as Jonathan Turley noted in his recent Senate Judiciary Committee testimony, and the government had failed to provide one.

Reinforcing this inference, the district court stated, Congress never expressly gave the government such unbounded power over immigration. Congress permitted discretion only in limited areas, such as delaying the removal of foreign nationals who were entitled to U visas as victims of serious crime. Outside of such narrow areas, the court reasoned, it would be incongruous to impute to Congress the wish “to delegate to the Secretary the right to ignore what would otherwise be his statutory duty.”

In framing DAPA as DHS ignoring its sworn duty, the Court set up the second part of its presidential power subtext: DAPA as an “abdication” of executive responsibility. The Supreme Court in Heckler v. Chaney had excepted an abdication of law enforcement from the presumption of reviewability. In conferring a neat bundle of valuable immigration benefits that is functionally equivalent to legal status on 4.5 million undocumented foreign nationals, the President was not merely “rewriting the laws,” which OLC had conceded would be improper. "Rewriting the laws” did not do justice to DAPA’s vast ambition, the court said: the President was actually “creating [the law] from scratch.” This is a legislative function, the court said, not a job for the executive.

Finally, the court did not drink the Kool-Aid that the administration had offered on how DAPA was actually an exercise in unreviewable “case-by-case” discretion. Here the court looked to DAPA’s predecessor, Deferred Action for Childhood Arrivals (DACA). That program had resulted in a 95% acceptance rate, the court found, based on the government’s own sources. Officials evaluated eligibility with a “check the box” mentality, the court observed – if applicants met the criteria, they received the program’s benefits. Claims of discretion, the court gleaned from DACA’s track record, were merely a “pretext” for pervasive approvals. Put another way, suppose TV mobster Tony Soprano had advised one of his associates that “it would be a good idea” to whack Joey “Boots” Napoli. Tony’s associate might have discretion in the means to do the deed: shooting, stabbing, or that old stand-by, strangulation. But the hapless Joey would indeed get whacked. So, too, with DAPA: the fix was in. Any discretion in DAPA, the district
court noted, was "already exercised by [DHS] Secretary Johnson in enacting the DAPA program and establishing the criteria within." Since DAPA was intended to bind DHS officials, Judge Hanen concluded, it was a "legislative rule" that required DHS to proceed through the APA's laborious notice and comment process.

More broadly, the court's ruling served two ends dear to the Framers when they crafted the separation of powers. First, by enjoining DAPA, the court (assuming its ruling holds up on appeal) diffused future showdowns in Congress over DHS's budget. While Congress has constitutional power to limit appropriations, the Framers would have viewed such brinksmanship as the antithesis of what Justice Jackson in the Steel Seizure Case called a "workable government." The Framers did not want the U.S. to lurch from crisis to crisis – that aversion was perhaps the single most important factor in the Constitution's enactment. Limiting executive unilateralism limits congressional retaliation in an era of divided government. Promoting dialogue and curbing such polarizing "self-help" (see David Pozen's study of the latter) thereby furthers the Framers' design.

Second, although the Framers were not bashful in using rhetoric when it served their ends, they warned of rhetoric's adverse effects when wielded by an ambitious executive (or a political majority in the legislature). The administration has permitted rhetoric to supplant reality in its glib touting of DAPA's illusory case-by-case discretion, and in its efforts to obscure President Obama's previous doubts about DAPA's legality. One does not have to buy into the florid rhetoric of President Obama's political opponents to recognize that on executive power and other matters of public concern, the late Senator Daniel Patrick Moynihan said it best: the executive branch, like any political actor, is entitled to its own opinions, but not its own facts. As one who believes this administration has generally been mindful of the difference, I regarded DAPA as a major disappointment, despite its soundness as policy.

The pre-DAPA President Obama would have gamely shouldered the constitutional burden of demonstrating DAPA's soundness to a recalcitrant Congress. Instead of doing that, the administration will now appeal to the Fifth Circuit, although it may not seek to stay Judge Hanen's order (see DHS's statement here and later ABC News report on prospects for stay). The decision to forego seeking a stay would be wise. Since a party seeking a stay must show irreparable harm, the government would face a formidable task. As Judge Hanen noted, the limbo in which undocumented immigrants live has been with us for some time. Congress should act to address it. But the administration will have a hard time demonstrating that this limbo is something new, or that facts on the ground will adversely affect the appellate court's jurisdiction. Without a stay, the injunction against DAPA will remain in place until Judge Hanen or another court rules otherwise, which could take several months or more. That result may ease the way for a deal in Congress on DHS funding. For now, it will also put immigration back in Congress's court, where it belongs.

Topics: Immigration, Executive Power, Homeland Security

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