THE NATIONAL LAW JOURNAL
APRIL 20, 2015
An ALM Publication

OPINION

DOJ's Argument in Immigration Case At Odds with the Law—and Obama

Brief before the Fifth Circuit contains an array of errors and inconsistencies.

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In its brief to the U.S. Court of Appeals for the Fifth Circuit on March 20, the Justice Department seeks to reverse a preliminary injunction against the administration's immigration policy issued on Nov. 20 to provide benefits to between 4 million and 5 million undocumented aliens. Describing the policy as a "guidance," the brief maintains that states lack standing to challenge federal authority over immigration. The government's brief also claims a scope of independent executive authority that cannot be curbed by the judiciary.

EXECUTIVE ACTION: President Barack Obama speaking at Del Sol High School in Law Vegas a day after announcing immigration policy reform.

The federalism argument offers reasonable points; the separation-of-powers position, argued by the DOJ, does not. Both sides presented oral arguments on April 17 to the Fifth Circuit on the government's proposed stay of the injunction.

The brief states that the injunction interferes with the administration's authority to remove aliens who threaten national security or public safety. In fact, however, the injunction does not prevent the secretary of Homeland Security from taking those actions. The Justice Department then goes further by describing the guidance as "a quintessential exercise of prosecutorial discretion, an executive function that is not subject to judicial review."

No judicial review? The tim-

ing here is interesting. In February, two district judges—Andrew Hanen in Texas and James Boasberg in the District of Columbia—struck down different immigration policies adopted by the administration. The brief also describes the guidance as an exercise of immigration authority that Congress "expressly granted" to the secretary of Homeland Security. That, too, is in error. Congress did not expressly authorize the policies announced in the guidance.

Hanen ruled that Texas had standing because of the costs of issuing driver's licenses to aliens granted deferred status under the guidance. The brief counters by saying Texas chose to pay part of that expense instead of placing the full cost on aliens. Therefore, any costs to Texas are "voluntarily assumed" and cannot be attributed to the federal government. Those points will be closely analyzed by the Fifth Circuit.

Throughout the brief, the Justice Department describes the guidance in terms that are dramatically different from public statements by President Obama. In his speech to the nation on Nov. 20, he made a pledge to undocumented aliens. If they resided in America for more than five years, have children who are American citizens or legal residents, register, pass a criminal background check and show a willingness to pay taxes, "you can come out of the shadows and get right with the law." Aliens who applied would be eligible for benefits that would last for three years without fear of deportation.

The brief presents an entirely different picture. Deferred action "does not give an alien any legal right to remain in this country." The Department of Homeland Security may revoke the deferred status and remove aliens "at any time." The deferred policy of Nov. 20 "confers no substantive rights." According to the brief, the guidance lacks "the force and effect of law" and "does not bind DHS." Under this interpretation, why would an alien be willing to come out of the shadows and accept these risks?

SIMPLY A PUBLIC STATEMENT

The brief states that the guidance "does not establish norms" for an alien's future conduct and provides "no rights or obligations." Instead, it is simply a public statement of how the DHS intends to exercise its discretionary powers. Other parts of the brief, however, explain that after aliens receive a Social Security number, they "may correct wage records to add prior covered employment within approximately three years of the year in which the wages were earned." Certainly that is a substantial benefit and a norm.

Why these inconsistent statements? Contrary to the position taken by Hanen, the DOJ argues that the guidance is not subject to notice and comment under the Administrative Procedure Act unless it has "a direct, coercive impact on regulated parties by establishing binding norms for their future conduct." By treating the Nov. 20 initiative as a mere "guidance," the administration may attempt to defend its decision not to follow Administrative Procedure Act notice-and-comment procedure.

The brief insists that the Immigration and Naturalization Act vests the administration "with exclusive authority" to establish national immigration enforcement policies and priorities, barring any judicial role. How could Congress, by statute, wholly shift to the secretary of Homeland Security the authority to establish national immigration policy?

The Justice Department objects that the injunction "obstructs a core executive prerogative" and "offends basic separation-of-powers principles, impinging on executive functions in the complex and sensitive field of immigration enforcement." In fact, this claim of independent executive power offends the American system of separation of powers. John Locke championed the prerogative as an executive action that is against the law but for the public good. That claim of presidential power describes what many consider the underlying justification behind the Nov. 20 initiative. In sanctioning the general framework of what became the guidance, the Office of Legal Counsel warned: "the executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences."

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