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Immigration—Removal

Obama Administration Gets Pass On Immigration Program, For Now

Mississippi can't challenge President Obama's controversial Deferred Action for Childhood Arrivals—or DACA—program, at least not in the case the U.S. Court of Appeals for the Fifth Circuit decided April 7 (*Crane v. Johnson*, 5th Cir., No. 14-10049, 4/7/15).

DACA defers removal proceedings for some young undocumented aliens who were brought to the U.S. when they were children.

Judge W. Eugene Davis's opinion for the court said that Mississippi's alleged injury—the increased cost to the state associated with more undocumented aliens remaining in the country—was ''too speculative'' to show the ''concrete and particularized'' harm required for Article III standing.

Attorneys familiar with the case say that the Mississippi ruling could have implications for a separate, high-profile lawsuit currently pending before the Fifth Circuit: a challenge by the state of Texas and 25 other states—including Mississippi Gov. Phil Bryant (R)—to the expansion of DACA and the newly created Deferred Action for Parents of Americans and Lawful Permanent Residents—or DAPA—program.

In that case, *Texas v. United States*, 5th Cir., No. 15-40238, *filed* Feb. 23, 2015, the Obama administration has appealed a preliminary injunction against DAPA and the expanded version of DACA that was imposed in February by Judge Hanen from the U.S. District Court for the Southern District of Texas (*Texas v. United States*, 2015 BL 39832 (S.D. Tex. Feb. 16, 2015). The Fifth Circuit is scheduled to hear oral argument April 17.

Tipping Its Hat. Josh Blackman, who filed an amicus brief with The Cato Institute supporting the state in the Texas case, said that the Mississippi and Texas cases ''are quite different.''

Blackman, a law professor at the South Texas College of Law, Houston, told Bloomberg BNA via e-mail April 8 that the Mississippi ''case was filed in 2012 shortly after DACA was implemented. To show standing, [Mississippi] relied on an outdated 2006 report on the effect of illegal immigration on the state.''

The Fifth Circuit said that was insufficient to confer standing.

''Mississippi submitted no evidence that any DACA eligible immigrants resided in the state,'' the court said. ''Nor did Mississippi produce evidence of costs it would incur if some DACA-approved immigrants came to the state.''

''Mississippi was required to demonstrate that the state will incur costs because of the DACA program,'' the court said. ''Because Mississippi's claim of injury is not supported by any facts, we agree with the district court that Mississippi's injury is purely speculative.''

In contrast, Blackman said that the ''Texas case was filed in 2014, two years after DACA was implemented. To show standing, Texas (and 2 other states) offered detailed affidavits documenting specific cost to the state for providing driver's licenses to DAPA beneficiaries.''

He said that a concurring opinion by Judge Priscilla Richman Owen ''may have been tipping a hat'' to Texas on how it could do a better job showing standing.

But Elizabeth Wydra, of the Constitutional Accountability Center, Washington, told Bloomberg BNA in an e-mail April 9 that while ''Judge Owen's concurrence [in the Mississippi case] appears to be an attempt to leave options open for a finding of standing in a case where the state has put forth better evidence of injury than Mississippi did, it isn't clear that Texas has met that standard either.''

Wydra filed an amicus brief in the Texas case on behalf of former members of Congress in support of the federal government.

Blown Out of Water. ''More important, even if the 5th Circuit were to find standing in the Texas case, the suggestion in [the Mississippi case] that the deferred action programs are examples of case-by-case exercise of discretion blows Judge Hanen's substantive basis for issuing a preliminary injunction out of the water,'' Wydra said.

Describing the Mississippi case as ''a positive sign for the Obama Administration in the Texas case,'' she said the Mississippi opinion ''describes the Administration's broad discretion in immigration matters, and particularly with respect to setting enforcement priorities for removal.''

''It also notes that the DACA program sets up case-by-case exercises of discretion,'' Wydra added.

That's ''in stark contrast to Judge Hanen's cramped view,'' Wydra said.

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''Both of these aspects of the 5th Circuit ruling contradict assertions made by Judge Hanen, with important implications. Judge Hanen based his preliminary injunction blocking DAPA on the conclusion that the deferred action program was a 'binding norm' rather than an exercise of case-by-case discretion.''

The Mississippi decision ''seems to suggest that the 5th Circuit will take a different view, since DACA and DAPA work similarly in terms of discretion,'' she said.

But Blackman said that while the record in the Mississippi case ''had virtually no basis to assess whether DACA was discretionary,'' the record in the Texas case ''has a trove of information about how DACA has been implemented.''

''On the merits, the 5th Circuit will have a solid record to decide whether DAPA is in fact discretionary, or an 'abdication' of the law, as Judge Hanen found,'' Blackman concluded.

Both Wydra and Blackman said that the issue is likely to land in the Supreme Court.

But Blackman predicted that if the court did agree to hear the case, arguments wouldn't be heard until next fall.

Fundamental Flaw. In bouncing Mississippi's challenge, the Fifth Circuit also found that Immigration and Customs Enforcement Agents lacked standing to challenge DACA.

The agents claimed that DACA and ICE's new prosecutorial discretion policy violated immigration law, thus forcing agents to choose between breaking the law and being disciplined.

The court said that the three injuries alleged by the ICE agents—violation of their oath to uphold the laws of the U.S., the burden of complying with DACA and threats of employment sanctions for failing to adhere to DACA's requirements—were insufficient to confer standing.

The appeals court agreed with the district court that violation of one's oath, by itself, doesn't confer standing.

The court also agreed that the ICE agents failed to show an injury from altering their current enforcement processes in order to comply with DACA.

''First, the Agents do not point to, and we have not found, any case where a plaintiff has had standing to challenge a department policy merely because it required the employees to change their practices,'' the court said. ''Second, the Agents have not alleged with any specificity how their practices will change in a substantial way.''

''More importantly, there are no allegations that any change which may occur will make their employment duties significantly more difficult,'' the court said.

But unlike the district court, the Fifth Circuit held that the agents' threat of discipline wasn't sufficient to confer standing. While the threat of future harm can suffice, it must be ''certainly impending,'' the court said, quoting *Clapper v. Amnesty International USA*, 81 U.S.L.W. 4121 (U.S. Feb. 26, 2013) (81 U.S.L.W. 1227, 3/5/13).

The ''Plaintiffs have provided no evidence that any agent has been sanctioned or is threatened with employment sanctions for detaining an alien and refusing to grant deferred action under DACA,'' the court said.

It said the ''fundamental flaw'' in the ICE agents' argument is that DACA directs them to exercise their discretion on a case-by-case basis, rather than requiring them to grant deferred action in all cases.

''The fact that the directives give this degree of discretion to the agent to deal with each alien on a case by case basis makes it highly unlikely that the agency would impose an employment sanction against an employee who exercises his discretion to detain an illegal alien,'' Davis wrote.

Judge Carolyn Dineen King joined the opinion.

Judge Priscilla R. Owen wrote a separate concurrence.

Kris Kobach of the Immigration Reform Law Institute in Kansas City, Kan., and Peter Jung of Strasburger & Price in Dallas represented the ICE agents and the state of Mississippi. Jeffrey A. Clair, Adam Kirschner and Michael Singer of the Justice Department in Washington represented the federal government.

By Kimberly Robinson and Laura D. Francis

Full text at http://www.bloomberglaw.com/public/document/Crane_v_Johnson_No_1410049_2015_BL_98146_5th_Cir_Apr_07_2015_Cour.

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