Judge Hanen's Misconceptions and the Legality of Deferred Action

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Guest Post

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Decades ago, the late constitutional scholar Charles Black offered an important functional justification for giving federal courts the power to say "no" to unconstitutional laws and executive actions: It is the judicial power to say "no" that gives the judicial power to say "yes" its legitimating force. Government benefits mightily when a judicial opinion upholding official action puts at rest, if not an underlying policy debate, then at least the public's interest in prolonging a constitutional battle about whether the challenged action is at least lawful. Such seems to have been the result in 2011when the Supreme Court upheld the Affordable Care Act. A judicial imprimatur can have this beneficial impact, however, only if the public understands that courts make independent judgments.

For this reason, despite powerful legal arguments that U.S. District Court Judge Andrew Hanen should not have reached the merits of any issue regarding the Department of Homeland Security's program of "Deferred Action for Parents of Americans and Lawful Permanent Residents" (DAPA), the country may be better off once a court does so. My difficulty with Judge Hanen's massively overwritten 123-page opinion in Texas v. United States is not that Texas got past threshold procedural barriers to judicial review. It is that, in an ideologically driven opinion, Judge Hanen simply gets the law wrong.

As a formal matter, Judge Hanen grants Texas the preliminary injunction it seeks because he deems Texas likely to succeed in challenging the DAPA policy on a procedural basis, namely, publication of the policy without an opportunity for public comment under the Administrative Procedure Act. His conclusion on this point is wrong, as I discuss below, but perhaps foreordained by a more glaring error. Although Judge Hanen purports to rule only on procedural grounds, his opinion makes crystal clear that he thinks DAPA exceeds the DHS Secretary's legal authority. His analysis is framed by an overarching narrative about how a supposedly feckless federal government is victimizing the helpless states by simultaneously hoarding to itself all authority over immigration and then abandoning a constitutional duty to protect the states from the burdens imposed by the presence in the U.S. of millions of undocumented immigrants. (If you want to see what judicial empathy for a plaintiff looks like, reading Judge Hanen's 47-page analysis of Texas's standing to sue would make a good start.)

Judge Hanen's framing is doubly unfortunate. First, it ignores the ways in which the DAPA program would boost state economies and accompanying tax revenues. As 14 states and the District of Columbia have argued in an amicus brief supporting DAPA: "When immigrants are able to work legally—even for a limited time—their wages increase, they seek work compatible with their skill level, and they enhance their skills to obtain higher wages, all of which benefits State economies by increasing income and growing the tax base." Moreover, Judge Hanen's narrative of states as victims leads him to four outright mischaracterizations of DAPA.

To see these misconceptions starkly, it is helpful to consider that the measures DHS Secretary Jeh Johnson implemented through two memoranda on November 20, 2014 effectively accomplish three things. First, they establish national immigration enforcement priorities, instructing all immigration agencies within DHS as to the highest priorities for detention and removal, as well as the criteria for a new program of deferred action for parents of U.S. citizens and other legally permanent residents. With or without DAPA, DHS's immigration components would be free to follow these priorities in their law enforcement activities.

Second, they direct U.S. Citizen and Immigration Services to develop an application process for administering the deferred action program. This is the one aspect of its policy in which DHS is going beyond the more familiar and concededly lawful exercise of case-by-case discretion on an ad hoc basis.

Third, by creating the deferred action program, DHS holds out the prospect that successful applicants may take advantage of other statutory provisions and longstanding, concededly lawful regulations under which recipients of deferred action may qualify for work permits and limit the number of days when they are present in the U.S. that count as "unlawful presence" in determining their eligibility for future lawful admission. (Marty Lederman provides an excellent analysis of this aspect of DAPA here.)

Judge Hanen can find these measures unlawful only by seriously misrepresenting them.

Misconception 1: Abdication. First, although it is pretty much Orwellian to do so, Judge Hanen deems these measures to constitute an abdication of the federal government's enforcement responsibilities. This is flat-out nonsense. As his opinion recognizes, DHS has been deporting and continues to deport well over 300,000 undocumented immigrants a year – a higher volume than prior administrations – and it has the resources to deport only about 400,000, including those apprehended close to a border. Nothing about DAPA implies a change in this pattern, which results directly from the limitations of enforcement funding. DHS's highest priority targets for apprehension, detention and removal are undocumented immigrants who threaten national security, border security, and public safety, including felons and persons who have committed serious or repeated misdemeanors. For this reason, such individuals are highly unlikely to received deferred action under DAPA, and DAPA will not reduce the actual rate of apprehension, detention and removal. There is no statutory responsibility that DHS is failing to fulfill.

Misconception 2: Changing the Law. Judge Hanen further buys into the argument that DAPA somehow rewrites the immigration laws. It does not. It is not a criminal offense now to be present in the United States without documentation, nor would it be once DAPA is implemented. But DAPA does not legalize unlawful entry or erase the number of days between the expiration of a valid visa and the grant of deferred action that count as "unlawful presence." Like other forms of deferred action, DAPA would not confer on its recipients a lawful immigration status or give them a new path to legal residency or naturalization. Judge Hanen's assertion to the contrary seems to be based largely on what Professor Stephen Legomsky, in superb February 25, 2015 testimony to Congress, aptly calls President Obama's "casual spontaneous oral responses" to informal questioning. The president said he changed "the law," when he presumably meant he changed DHS "policy." The absurdity of Judge Hanen's stance is betrayed

by the weight he attaches to DHS's web site references to its policy changes as "initiatives." At page 107 of his opinion, Judge Hanen actually quotes the Black Law Dictionary definition of "initiative" – "[a]n electoral process by which a percentage of voters can propose legislation and compel a vote on it" -- to support his conclusion that "[a]n 'initiative,' by definition, is a legislative process." This supposedly implies that DAPA is lawmaking. Such silliness rebuts itself. "Initiative," as used by DHS, means nothing other than a "measure" or "strategy." An "initiative" of the kind defined in Black's Law Dictionary has no more connection to DHS's "initiative" than Judge Hanen's "court" has to the floor of Madison Square Garden.

Misconception 3: No Limiting Principle. What arguably makes the executive branch's supposed law-changing abdication of duty especially worrisome to Judge Hanen is that he sees in the government's argument no limiting principle: "While the Government would not totally concede this point in oral argument, the logical end point of its argument is that the DHS, solely pursuant to its implied authority and general statutory enforcement authority, could have made DAPA applicable to all 11.3 million immigrants estimated to be in the country illegally" (p. 94). The reality, however, is that the administration has not only stated an effective limiting principle, it has acted upon it.

In its opinion supporting DAPA, the Justice Department's Office of Legal Counsel actually sets out four limits on the executive branch's powers of discretionary nonenforcement. The most potent is this: "[A]n agency's enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering." DHS told OLC that DAPA "would serve an important humanitarian interest in keeping parents together with children who are lawfully present in the United States, in situations where such parents have demonstrated significant ties to community and family in this country." OLC, for its part, proceeds to verify that "Congress . . . has repeatedly enacted legislation appearing to endorse . . . programs" of deferred action, and that "[n]umerous provisions of the [Immigration and Naturalization Act] reflect a particular concern with uniting aliens with close relatives who have attained lawful immigration status in the United States." Congress is especially solicitous of family unity when the law has also "provided a path to lawful status" for the persons unlawfully present. Thus, because existing law does "provide[…] a path to lawful status for the parents of U.S. citizens and LPRs," DAPA's concern on their behalf for family unity is consonant with Congress's policies. As OLC recognizes, "[t]he process of obtaining [legal] status [for DAPA parents] 'takes time.' The proposed program would provide a mechanism for families to remain together, depending on their circumstances, for some or all of the intervening period."

Having identified this limited justification for DAPA, OLC then proceeds to determine that DHS would not have authority to implement another proposed program – deferred action for the parents of individuals who have already received deferred action under the Deferred Action for Childhood Arrivals ("DACA") program. That's because the beneficiaries of DACA do not themselves have lawful residency status – DACA, like DAPA, does not change the law. Protecting DACA parents would thus go beyond the boundaries of Congress's demonstrated concern for family unity and could not be defended as consonant with legislative policy. Unlike the justification for DAPA, "[t]he logic underlying [deferred action for DACA parents] does not have a clear stopping point." Judge Hanen's assertion about the "logical end point" of the Government's position simply ignores the Government's actual position.

Misconception 4: DAPA as Nondiscretionary. The fourth fatal misrepresentation of DAPA is Judge Hanen's insistence that the new policies do more than guide the exercise of prosecutorial discretion with threshold criteria. In his view, they create binding norms that effectively obligate enforcement officials to confer deferred action on anyone meeting the DAPA criteria. This conclusion flies in the face of what Professor Legomsky notes are the Secretary's "clear, careful, explicit, repeated commands to officers to make individualized, case-by-case discretionary judgments." Judge Hanen disregards those explicit commands on the basis of what turn out to be inaccurate data purporting to show that the case-by-case judgments rendered under the DACA program are, in fact, rubber stamps. The Legomsky testimony explains in detail why Judge Hanen's reading of the record is wrong. But it must also be said, even if DACA proves not to be the exercise of case-by-case discretion it purports to be, Texas v. United States is not about DACA. It seems highly irregular to treat the Secretary's express instructions for DAPA – a program not yet implemented – as an exercise in bad faith because of untested allegations about how a different program is operating.

Notice and Comment. Judge Hanen's disregard for the discretionary nature of DAPA produces his erroneous disposition of the notice-and-comment issue. It is only Texas's supposed likelihood of success on this issue that Judge Hanen cites as legal support for a nationwide preliminary injunction. Success on the APA issue, however, is unlikely. Yes, the November 20 memo on prosecutorial discretion qualifies as an APA "rule." It is "an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe . . . policy." But not all rules require notice and comment. One set of rules exempt from notice and comment comprises "general statements of policy." DAPA falls squarely within this exception.

In one respect, case law is not completely clear about the borderline between substantive rules and policy statements. The touchstone is the degree to which an agency's statement is binding, but it is uncertain whether a statement has to be binding on the public in order to count as a substantive rule, or whether it is sufficient that the statement be binding on agency decision makers. As the Government argues, however, DAPA is neither. It creates no new public rights or obligations; nor does it bar immigration officers from exercising case-by-case discretionary judgment.

Judge Hanen disagrees. But he is simply wrong to conflate DAPA's specification of threshold criteria with the elimination of case-by-case discretion. The DAPA memo instructs that "immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis." Indeed, after considering specific criteria relating to family status, duration of residence, physical presence, and status under DHS's enforcement priorities, individuals will be eligible for DAPA only if they "present no other factors that, in the exercise of discretion, make the grant of deferred action inappropriate." Case-by-case discretion is yet more pronounced because some of the specified criteria – for example, whether an individual poses a threat to national security or public safety – themselves entail discretionary judgment.

An unfortunate implication of Judge Hanen's opinion is that, from a rule of law point of view, DAPA's rule-like character somehow makes it suspect in a way that ad hoc decision making is not. In other

words, the administration of deferred action pursuant to a regularized application process subject to discretion-preserving, but still meaningful threshold criteria is portrayed as a greater threat to the "faithful execution of the laws" than would be standard-less, entirely ad hoc conferral of deferred action, even if the same number of people benefit. But the opposite is true. In terms of fairness and accountability, a program like DAPA is preferable to innumerable exercises of prosecutorial discretion that proceed in complete obscurity. Judge Hanen himself recognizes that barring DAPA is unlikely to result in any greater number of removals. It just means that millions of persons unlawfully present in the United States will be earning less than they might, paying fewer taxes than they could, and hiding from government authorities, instead of making their identities and whereabouts known. It's hard to see how that world makes the states – or anyone – better off.

The threshold barriers to reaching the merits in this case are hardly trivial. Texas's claim of cognizable injury is open to serious challenge. Likewise, the Government has powerful arguments that DAPA is not judicially reviewable on either of two grounds. A court might conclude that DAPA represents an exercise of unreviewable prosecutorial discretion under Heckler v. Chaney. Alternatively, in vesting the DHS Secretary with responsibility for "establishing national immigration enforcement policies and priorities," Congress might be read as intending to commit the Secretary's priority setting to his or her unreviewable discretion. Nonetheless, I would worry, as did Justice Marshall in his Heckler v. Chaney concurrence, about not "subjecting enforcement discretion to rational and principled constraint." When an agency crystallizes its enforcement policies in the form of a rule – even a rule that preserves case-by-case discretion for the relevant decision makers – it seems consistent with rule of law values that such a rule be judicially reviewable.

DAPA deserves to be upheld on its merits, and, for that reason, I concur in Judge Hanen's generous treatment of standing and constrained view of nonreviewability. But agencies should not be discouraged through the imposition of onerous public comment-and-response requirements from casting their nonenforcement policies as clear public statements of enforcement priority and implementation strategy. DAPA is a plainly lawful exercise of the DHS Secretary's responsibility to set national enforcement priorities and his authority to make rules appropriate to implementing our immigration laws. A court with a more clear-eyed view of DAPA should say so on the merits.