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OBAMA'S IMMIGRATION REBUKE

By The Editorial Board
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That marvel of American self-government – the separation of powers – is once again frustrating President Obama's habit of suspending statutes that conflict with his political goals. This time a federal judge in Texas has rebuked and blocked his attempt to rewrite immigration law – potentially rewiring the debate in Washington.

Judge Andrew Hanen issued a preliminary injunction late Monday against Mr. Obama's order that awards quasi-legal status and work permits to some five million illegal immigrants. His meticulous 123-page ruling is a vindication of the 26 states that brought the challenge and, more significantly, for the rule of law.

Last November the Department of Homeland Security published memos instructing immigration enforcers to disregard federal laws that require deportation of the undocumented and place strict limits on who may work in the U.S. The White House and DHS claim this "deferred action" is nothing more than routine prosecutorial discretion, as if the department is merely conceding that its officers cannot hunt down and deport the millions of illegals in the country.

Judge Hanen dismantles that fiction. As he points out, the DHS memos amount to "a massive change in immigration practice" that reorders "the nation's entire immigration scheme." Instead of the historical norm of forbearance in individual cases, the memos devote 150 pages to detailing a blanket policy for whole classes of immigrants – meaning that discretion is "virtually extinguished," as Judge Hanen writes.

The memos also actively bestow benefits that Congress never granted, such as the right to work, obtain Social Security numbers, and travel to and from the U.S.

Judge Hanen made his narrow decision without ruling on the larger legal and constitutional questions in the case. He held instead that the DHS memos are regulatory decisions that should have been promulgated through the ordinary rule-making process of notice and comment. Yet as Mr. Obama put it last year, "I just took an action to change the law." This action therefore violates the Administrative Procedures Act, which among other things entitles those harmed by the actions of a federal agency to judicial review.

Relying on this due-process law sidesteps the question of "standing," or whether the states have suffered injuries that the courts can redress. Federal law on citizenship and borders is supreme under the Constitution, trumping state laws in most cases. Our own view is that under dual federal-state sovereignty, states consent to such pre-emption via their representation in Congress, but the executive isn't allowed to change the terms of this bargain except through duly enacted legislation under Article I.

While Judge Hanen implies that Mr. Obama is upsetting this balance of power, not to mention the duty to faithfully execute the laws, his only finding on the merits is that the DHS order is being implemented illegally. Of the 1.6 million illegal immigrants estimated to reside in Texas, about 500,000 will be made eligible for driver's licenses that cost the state \$198.73 each to process. Judge Hanen justifies his injunction on that mundane unfunded

mandate alone – not other harms to state tax revenues like uncompensated emergency-room care, education or jobless benefits.

The White House assailed the ruling and is promising a quick appeal to the Fifth Circuit Court of Appeals. The litigation is early days, and a higher court may eventually reach the larger merits.

Meantime, Judge Hanen's decision is an airlift for Republicans in Congress if they have the wit to accept the relief. Immigration hardliners are attempting to defund Mr. Obama's order but lack a legislative strategy whose end-game isn't shutting down all of DHS. If the injunction is sustained on appeal, the President's unilateralism will be a dead letter until the case is resolved, which should persuade the GOP's deportation caucus to stand down before another self-defeating flameout.

We support a generous immigration policy, but the Texas decision shows that Mr. Obama's political whims are the wrong way to get there. "If one accepts the Government's position," Judge Hanen observes, "then a lack of resources would be an acceptable reason to cease enforcing environmental laws, or the Voting Rights Act, or even the various laws that protect civil rights and equal opportunity. Its argument is that it has the discretion to cease enforcing an act as long as it does so under the umbrella of prosecutorial discretion."

This is constitutional quicksand, as even liberals who worry about the next Republican President should understand. Congratulations to the 26 states that are holding firm against Mr. Obama's abuses – so far successfully.