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WHY OBAMA'S IMMIGRATION ORDER WAS BLOCKED

By Michael W. McConnell
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Late Monday night, a federal district court in Brownsville, Texas, entered an order prohibiting enforcement of the Obama administration's program granting lawful status to some four million or five million undocumented aliens. Administration supporters immediately filled the airwaves with claims that the decision was a political stunt by a George W. Bush -appointed judge and would quickly be reversed.

They should read U.S. District Judge Andrew Hanen 's order.

The 123-page memorandum opinion carefully lays out the legal case against the program, concluding that the Obama administration lacks statutory authority to change the law without congressional action, and that the administration did not comply with the minimal procedural requirements of public notice and comment under the Administrative Procedure Act.

The program, called "Deferred Action for Parents of Americans" (DAPA), grants work authorization, Social Security eligibility, and eligibility for important federal and state benefits to virtually all aliens who have been in the U.S. since 2010, had a baby in this country, and have not committed felonies. The program was to go into effect Wednesday.

Under the Immigration and Naturalization Act, undocumented-immigrant parents of U.S. citizens are required to wait until the child turns 21, and then must leave the country for 10 years before applying for a change of immigration status on account of that child. Those requirements have been part of statutory law for 60 years. DAPA dispensed with those requirements for an estimated 4.3 million persons.

The Obama administration argued that DAPA is a routine application of "prosecutorial discretion" – the authority of executive officials to set priorities for enforcement of the law and to refrain from enforcement in cases where the public interest is least urgent. The district court recognized, however, that prosecutorial discretion is limited to nonenforcement and doesn't entitle the executive branch to grant affirmative benefits such as work permits and welfare without statutory authority and notice-and-comment rule-making.

As the court explained, "DHS has not instructed its officers to merely refrain from arresting, ordering the removal of, or prosecuting unlawfully-present aliens." Instead the department "has enacted a wide-ranging program that awards legal presence, to individuals Congress has deemed deportable or removable, as well as the ability to obtain Social Security numbers, work authorization permits, and the ability to travel."

Despite misleading claims by administration supporters that the order interferes with executive discretion to set enforcement priorities, the district court narrowly crafted its order not to touch on prosecutorial discretion. The administration remains free to decide which illegal aliens to deport and which to permit to remain in this country. The court order is explicitly confined to the grant of work authorization and affirmative benefits, which has never been part of prosecutorial discretion.

Administration lawyers pointed to five prior instances when presidents from Ronald Reagan to George W. Bush granted temporary status to certain classes of aliens without statutory authority. The district court noted, however, that none of these instances was reviewed in court and that past executive actions cannot serve as precedent for future expansions of executive power. Perhaps more important, each of those prior instances involved small categories of aliens to whom Congress had granted special status and who merely needed a brief temporary bridge to enable them to take advantage of the status Congress had provided – not, as here, millions of aliens ineligible for a change in status under any provision enacted by Congress.

The morning after the court's decision, the White House press secretary issued this statement: "The district court's decision wrongly prevents these lawful, commonsense policies from taking effect and the Department of Justice has indicated that it will appeal that decision." As a legal matter, however, the question isn't whether DAPA reflects "commonsense policies" but whether the president has the power to "create a new law" – as President Obama himself described the action.

If this president can create a new legal status for aliens unlawfully present under the terms of the Immigration Act, future presidents will have the same authority to employ broad notions of "prosecutorial discretion" to gut the enforcement of whichever laws they dislike – using the excuse that "Congress has failed to act."

The supporters of DAPA may well rue the day that presidents seized this kind of extralegal authority. Whatever immigration policy any of us may favor – and I, for one, would like to see major reform – we should all be able to agree that the executive branch must follow the law until it has been amended by Congress.

The district court order is a preliminary injunction, meaning that it isn't the final word in the case. The court expressly declined to base its decision on constitutional grounds or even on substantive administrative law grounds, but solely on the Obama administration's failure to go through proper procedures. That doesn't make the decision any less significant. It means that the administration cannot implement its unilateral DAPA program unless and until the decision is reversed on appeal by the Fifth Circuit Court of Appeals or by the Supreme Court. It will not be easy for the administration's lawyers to persuade those courts that Judge Hanen got the law wrong.

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