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5th Circ. Dissent Targets Politics Of Obama Immigration Suit

By **Allissa Wickham**

Law360, New York (May 27, 2015, 9:51 PM ET) -- While a Fifth Circuit panel declined to stay a block on the president's immigration executive actions Tuesday, Judge Stephen Higginson's dissent laid bare the political nature of the dispute, highlighted the lack of evidence in the case and pointed to key precedent that may provoke an en banc review, according to attorneys.

In a 2-1 decision authored by Circuit Judge Jerry Smith, the panel refused to pause a Texas court's injunction on two major immigration policies created by President Barack Obama's executive actions: the expansion of the Deferred Action for Childhood Arrivals program and the formation of a similar program for certain immigrant parents.

On the crucial issue of whether the 26 states bringing the case had standing, the majority found that Texas had likely shown that the cost of issuing driver's licenses to beneficiaries of the program for parents — called the Deferred Action for Parents of Americans and Lawful Permanent Residents — was a concrete injury.

The majority also ruled that the U.S. government hadn't made a strong case that judicial review is barred on this issue and refused to find that it was clearly wrong for U.S. District Judge Andrew Hanen to rule that DAPA wouldn't allow U.S. Department of Homeland Security employees to exercise case-by-case discretion.

In his dissent, Judge Higginson laid into the reasoning of Judge Hanen and the majority, and he stated that the issue of prioritizing deportations is one that must be decided by Congress and the executive branch.

"The political nature of this dispute is clear from the names on the briefs," Judge Higginson wrote, pointing out that mayors, governors and 298 members of Congress had all signed onto various amicus briefs.

William Stock of Klasko Immigration Law Partners LLP, who serves as the first vice president of the American Immigration Lawyers Association, said the dissent showed a "more healthy respect for the political branches."

"The thing that strikes me about [the decision] is the way it is an unusual mixing of the judiciary into a dispute between one house of Congress and the president," Stock said. "It's very unusual for the judiciary to sort of jump in and take sides in what is really a policy fight between the political branches

of government."

But several attorneys told Law360 on Tuesday they were unsurprised by the appeals court's ruling because of the general difficulty of lifting a preliminary injunction.

Paul Virtue of Mayer Brown LLP said he's always felt that the federal government had an extremely high burden to meet in order to secure a stay, since the new immigration policies hadn't gone into effect yet.

"Usually, a stay would be imposed to maintain the status quo, and that's not what the government was asking here; they were asking for a stay to allow them to go forward," Virtue said. "They were starting in a hole, from that perspective."

In his dissent, Judge Higginson started off by citing Supreme Court precedent, saying the executive action memo couldn't be reviewed in court under the justices' 1985 ruling in Heckler v. Chaney, which held that an agency's decision not to prosecute is generally up to its own discretion.

Although Judge Higginson contended that he wouldn't need to decide the issue of the states' standing, since he felt that the memo wasn't reviewable, the dissenting judge used a footnote to address the majority's reliance on Massachusetts v. EPA, which Judge Smith had said during oral arguments might be the key to the stay issue.

In that case, the Supreme Court held that a state had standing to challenge the Environmental Protection Agency's failure to regulate greenhouse gases from new cars, based on erosion of its shoreline. The case offered critical support to whether the states' injury was traceable to the executive action memo, according to the majority.

"Although Texas would not be directly regulated by DAPA, the program would have a direct and predictable effect on the state's driver's license regime, and the impact would be significant because at least 500,000 potential beneficiaries live in the state," Judge Smith wrote.

Judge Higginson, however, said Massachusetts may not apply to the present appeal and pointed out that there has been little guidance from lower courts on whether that ruling's logic reaches beyond its own case.

He also took issue with Judge Hanen's finding that the executive action memo was actually binding, instead of allowing for case-by-case discretion. While Judge Hanen based his finding on the fact that most DACA applications have been approved, he failed to consider the government's claims that the new DAPA program has major differences, or that self-selection may have impacted DACA's approval rate, Judge Higginson said.

Steve Kinnaird of Paul Hastings LLP, who helped author a brief supporting the federal government in the appeal on behalf of several Democratic senators, said he found this to be a particularly powerful part of Judge Higginson's dissent, as it should come as no surprise that extremely low-priority individuals were granted deferred action.

"What will come out in discovery, who knows, for the permanent injunction," Kinnaird said. "But right now, I don't think that there was a basis for him to grant a preliminary injunction."

The dissent also argued that Judge Hanen hadn't recognized the difference between lawful status, which

provides rights, and lawful presence, which only allows immigrants to stay in the U.S. as a temporary, and revocable, exercise of discretion by the government.

Anil Kalhan, a professor at the Drexel University Thomas R. Kline School of Law, argued that the panel majority misunderstood the idea of “lawful presence,” as it essentially lumped the idea of prosecutorial discretion together with the legal authority that allows immigrants to be eligible for work permits and other benefits.

“They sort of just roll it all into one,” Kalhan said. “As if by labeling what these programs do as giving lawful presence — which isn't really a thing in the way that they describe it — they're just acting as if this is somewhat different from the form of deferred action that individuals have been getting for a long time.”

Kalhan also highlighted the dissent’s emphasis of the Fifth Circuit’s recent ruling in Crane v. Johnson, in which the court found that the DACA directive allowed discretion on a case-by-case basis, and noted that the differences between the opinions might be enough to spur a full review of the present appeal.

“Whether it's flatly inconsistent or not, there is some tension,” Kalhan said of Crane and the panel’s stay denial. “And that might be a reason why the full circuit sitting en banc might want to hear this case."

The case is Texas et al. v. U.S. et al., case number 15-40238, in the U.S. Court of Appeals for the Fifth Circuit.

--Editing by Jeremy Barker and Kelly Duncan.
