After Judge Refuses to Lift Anti-amnesty Injunction, All Eyes Turn to New Orleans

U.S. District Judge Andrew S. Hanen of the U.S. District Court for the Southern District of Texas in Brownsville gained nationwide attention when he issued an injunction on February 16 blocking President Obama's executive action to grant amnesty to four million illegal aliens. On Tuesday, he refused the administration's request to lift the injunction.

However, the Obama administration's Department of Justice, apparently anticipating that Hanen would deny their request to limit the injunction only to Texas, also filed an appeal with the Fifth Circuit Court of Appeals in New Orleans. In its March 12 appeal, the DOJ attorneys stated that the federal government "seeks an immediate stay pending appeal of a nationwide preliminary injunction against the Department of Homeland Security (DHS)."

The court of appeals in New Orleans will hear oral arguments from both sides in the case on April 17, when each side will have an hour to present their arguments for or against the injunction.

Since appeals in the Fifth Circuit Court take an average of nine months to be resolved, the setting of the April date represents a fast-tracking of the case, something that the DOJ has sought.

Hanen's injunction was issued at the request of 26 plaintiff states, who charged in the suit (*State of Texas et al v. United States of America et al*): "The President candidly admitted that, in [suspending enforcement of deportation by means of executive actions], he unilaterally rewrote the law: 'What you're not paying attention to is, *I just took an action to change the law*.' " (Emphasis in original.)

The states' argument is based on the constitutional separation of powers that reserves the law-making powers to the legislative branch — Congress.

A number of states have filed *amicus*(*i*) *curiae* (friend[s] of the court) briefs in support of either the Department of Justice or the states that brought the suit against the Obama administration. Fourteen states (and the District of Columbia) sympathetic to the Obama administration's plan to grant amnesty to millions of illegal aliens filed an amicus brief with the Fifth Circuit Court on March 12 in support of the DOJ's motion to stay the Southern District of Texas court's injunction. Joining Washington (the lead state) and the District of Columbia in the amicus curiae were California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, Massachusetts, New Mexico, New York, Oregon, Rhode Island, and Vermont.

Several other states filed an amici curiae brief with the Fifth Circuit Appeals Curt defending Hanen's preliminary injunction. On March 23, the governors of Texas, Louisiana, New Jersey, and South Dakota filed their brief and offered as their reasons:

"First, the injunction protects the executive branches in the Governors' States from irreparable injuries."

And, "Second, the Amici Governors have an interest in rebutting the arguments offered by the State of Washington on behalf of 13 other States."

The New Orleans *Times-Picayune* reported on April 8 that the Fifth Circuit Court of Appeals has been inundated with briefs on both sides of the challenge to the Obama executive order program, including members of Congress, city and state officials, and others with strong opinions pro and con Hanen's ruling.

The *Times-Picayune* counted 15 separate "amicus" briefs that were filed on April 6 alone in the New Orleans-based appeals court, including:

• A brief filed by lawyers on behalf of three illegal aliens in Texas that asserted that deportation had a damaging impact of on families:

> Deportation devastates families and is particularly scarring for children, who are often placed in foster care or are raised by single parents, with a corresponding increase in poverty levels.
>
> Nationwide, children in single-parent homes are more than four times more likely to live in poverty than children with married parents. And in 2012 alone, there were 5,100 children in foster care who could not be reunited with their families because a parent had been deported or detained.

• A brief filed by Senators Richard Blumenthal (D-Conn.), Chris Coons (D-Del.), Mazie Hiron (D-Hawaii), and Sheldon Whitehouse (D-R.I.) that argued that the federal government can't deport all 11 million undocumented immigrants and therefore has to set priorities. They wrote:

> Deferred action is a long-standing instrument in the…enforcement toolkit, and it has consistently enjoyed congressional acquiescence and approval.

• A brief filed by Senators John Cornyn (R-Texas), Ted Cruz (R-Texas), and Representative Lamar Smith (R-Texas) argued that the Obama administration's executive order goes against clear congressional intent, writing:

> The Department of Homeland Security directive defies Congress's exclusive authority over immigration with the intention, as President Obama has admitted, of setting a new policy and creating new law.

In his order denying the federal government's "Emergency Expedited Motion to Stay" (filed on February 23 and supplemented on March 12) his injunction, Hanen wrote:

> In its Motion, the Government has essentially asked this Court to reconsider its decision to issue a preliminary injunction. The Court has reviewed the Government's Motion and Supplemental Motion, as well as the States' response. The Court also held a hearing on March 19, 2015, at which these issues were discussed. Having considered the positions of all parties and the applicable law, this Court remains convinced that its original findings and rulings in the Order of Temporary Injunction and Memorandum Opinion and Order issued on February 16, 2015 (hereinafter referred to jointly as the "February Opinion") were correct. In fact, for many of the reasons stated below, the decisions reached previously by this Court have been reinforced.

An AP report noted that before ruling on the injunction on April 7, Hanen said he first wanted to hear from DOJ attorneys concerning allegations that they had misled him about the implementation of the Obama administration's executive orders protecting some illegal aliens from deportation.

When Hanen issued his initial injunction, he believed that those orders had not taken effect. However, a month later, the Justice Department confirmed that more than 108,000 people had already received three-year reprieves from deportation and had been issued work permits. In defending their actions, DOJ attorneys claimed the moves were made under 2012 guidelines that weren't blocked by the

injunction.

In his April 7 ruling, Hanen referenced what he believes were "misleading" statements by Obama administration attorneys and noted that the plaintiff states had made the same charge. He noted:

> In their discovery motion, Plaintiffs complain that the Government misled them and the Court by making certain representations concerning when and how parts of the 2014 DHS Directive would be implemented. The Court finds that the Government's multiple statements on this subject were indeed misleading.... It also finds that the remedial measure taken by counsel for the Government through the filing of an "advisory" on March 3, 2015, was neither prompt nor fully candid.

However, continued Hanen, even though he believed that some sanctions against the federal government were justified, he would not "strike [dismiss] the government's pleadings" because it was in the national interest that further hearings continue. He wrote:

> Despite this, a sanction as severe as striking the Government's pleadings, while perhaps merited based upon the Government's misconduct, would not at this juncture be in the interests of justice or in the best interest of this country. The issues contested in this case are of national importance, and the outcome will affect millions of individuals.... Consequently, while this Court may impose some other sanction in response to the misrepresentations made to the Court, it will not strike the Government's pleadings.

AP reported that in a separate order Hanen told the government it has until April 21 to file to the court and plaintiffs detailed information about its March advisory about the 108,000 three-year reprieves from deportation.

The showdown between the 26 plaintiff states and the Obama executive branch in New Orleans on April 17 may not settle this issue for good. Whichever side loses may be expected to appeal to the Supreme Court. And in addition to what the federal courts may decide to do, other questions include whether Congress will continue to allow the president to rule by decree in violation of the U.S. Constitution, and if states exercise the authority they possess to protect their own borders.

Photo: Fifth Circuit Court of Appeals in New Orleans

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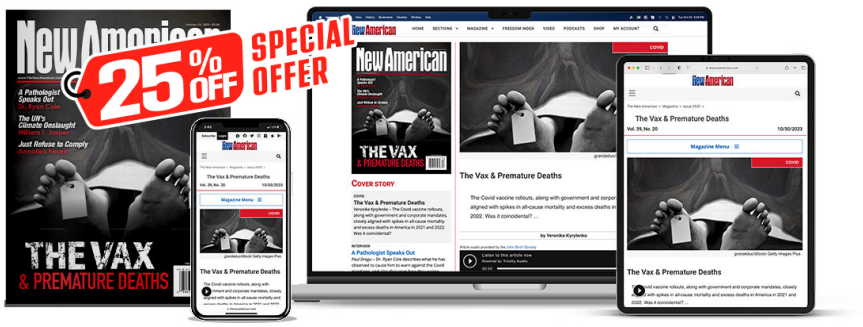

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