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Written by **Warren Mass** on February 17, 2015

Federal Judge Stops Obama Executive Action Amnesty

U.S. District Judge Andrew S. Hanen of the U.S. District Court for the Southern District of Texas in Brownsville issued an order of temporary injunction on February 16 that blocks the federal government from implementing the Obama immigration's use of executive actions to grant amnesty to four million illegal aliens.

Hanen's ruling came in response to a lawsuit filed by Texas and 25 other states against the federal government following President Obama's November 20 announcement that he would unilaterally suspend immigration law as applied to four million illegal immigrants.

The plaintiffs charged: "The President candidly admitted that, in so doing, 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.)

Hanen's injunction temporarily (pending a final resolution of the case or its appeal to a higher court) enjoins the federal government, and specifically Homeland Security (DHS) Secretary Jeh Johnson, from implementing the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program described in Johnson's November 20 memorandum.

Johnson sent his memorandum to the heads of U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement; and U.S. Customs and Border Protection. The memorandum's subject was: "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents." Hanen's injunction also specifically restricts the above-noted federal agency heads to whom Johnson sent his memorandum.

The memorandum expanded Deferred Action for Childhood Arrivals (DACA), which was initiated in 2012 by a policy memorandum sent from former DHS Secretary Janet Napolitano. The memorandum removed DACA's age cap and extended work authorization to three years. Johnson's order also expanded "deferred action" (another name for amnesty) by stating:

> I hereby direct USCIS to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis, to those individuals who:
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> • have, on the date of this memorandum, a son or daughter who is a U.S. citizen or lawful permanent resident;
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> • have continuously resided in the United States since before January 1, 2010;
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> • are physically present in the United States on the date of the memorandum, and at the time of making a request for consideration of deferred action with USCIS.

In his Memorandum Opinion and Order accompanying his decision, Hansen wrote that "there are no executive orders or other presidential proclamations or communiqué that exist regarding DAPA. The DAPA memorandum issued by Secretary Johnson is the focus in this suit."

In his ruling, Hanen wrote that the reasons for the injunction were listed in detail in the memorandum opinion and order, but were "due to the failure of the defendants to comply with the Administrative Procedure Act."

The Administrative Procedure Act (APA), enacted in 1946, requires the executive department to publish notice of pending regulations in the *Federal Register* far enough in advance of their implementation to allow for comments from parties who have objections.

Hanen's memorandum opinion order listed several reasons why he believes the plaintiffs' arguments are valid and that temporary relief is justified. He noted:

> The Supreme Court has stated time and again that it is the duty of the federal government to protect the border and enforce the immigration laws. The Government has sought and obtained rulings that preempt all but token participation by the states in this area of the law. The basis for this preemption was that the states' participation was not wanted or required because the federal government was to provide a uniform system of protection to the states. The fact that DAPA undermines the INA statutes enacted to protects the states puts the Plaintiffs squarely within the zone of interest of the immigration statutes issue.
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> Further, Congress has entrusted the DHS with the duty to enforce these immigration laws. 8 U.S.C. § 1103(a)(i). The DHS's duties include guarding the border amd removing illegal aliens present in the country. 8 U.S.C. §§ 1103(a)(5), 1227. DAPA, however, is certainly at odds with these commands. These duties were enacted to protect the states because, under our federal system, they are forbidden from protecting themselves.

Hanen also wrote that without a preliminary injunction the states will "suffer irreparable harm in this case."

"The genie would be impossible to put back into the bottle," he continued, noting that he agreed with the plaintiffs' argument that the administration's legalization of the presence of millions of people is a "virtually irreversible" action.

CNN reported that Hanen concluded that among the 26 states that were co-plaintiffs in the case against the federal government, Texas, at least, has standing in federal court to pursue its lawsuit because it "stands to suffer direct damages from the implementation of DAPA."

In some points in his opinion Hanen very directly castigated Homeland Security for its non-enforcement of existing immigration law. He wrote:

> The DHS was not given any "discretion by law" to give 4.3 million removable aliens what the DHS itself labels as "legal presence." In fact, the law mandates that these illegally-present individuals be removed. The DHS has adopted a new rule that substantially changes both the status and employability of millions. These changes go beyond mere enforcement or even non-enforcement of this nation's immigration scheme.

Hanen also accurately summarized the argument made by the plaintiffs regarding the constitutional separation of powers:

> The states argue that the DAPA program constitutes a significant change in immigration law that

> was not implemented by Congress. Agreeing with the President's earlier declarations, the States argue that only Congress can create or change laws, and that the creation of the DAPA program violates the Take Care Clause of the Constitution and infringes upon any notion of separation of powers. Further, they assert that the President has effectuated a change in the law solely because he wanted the law changed and because Congress would not acquiesce in his demands.

Following Hanen's ruling, the office of White House Press Secretary Josh Earnest issued a statement asserting that "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."

The administration's appeal would be heard by the Fifth Circuit Court of Appeals in New Orleans. The Homeland Security Department had planned to begin accepting the first applications under the new amnesty program on February 18, but those plans are now placed on hold unless an appeals court overrules Hanen's order of injunction.

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