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# IGNORING THE ELEPHANT IN THE ROOM: AN INITIAL REACTION TO JUDGE HANEN'S DECISION ENJOINING DAPA AND EXPANDED DACA

*Posted on February 19, 2015 by David Isaacson*

On February 16th, as the holiday weekend was coming to an end, Judge Andrew S. Hanen of the U.S. District Court for the Southern District of Texas issued a Memorandum Opinion and Order in the case of *State of Texas, et al., v. United States, et al.*, granting the motion of the plaintiff States for a preliminary injunction against the "Deferred Action for Parents of Americans and Lawful Permanent Residents" program, known as DAPA, and the expansion of Deferred Action for Childhood Arrivals, known as DACA, that were set out in a November 20, 2014 Memorandum from Secretary of Homeland Security Jeh Johnson. (The original DACA program, as instituted in 2012 by then-Secretary of Homeland Security Janet Napolitano, was not challenged by the plaintiff States, and is not affected by the injunction.) According to Judge Hanen, the plaintiff States have shown a likelihood of success on the merits of their claim that DAPA and the DACA expansion were authorized in violation of the Administrative Procedures Act (APA), as well as meeting the other requirements for a preliminary injunction.

The Memorandum Opinion and Order is more than 120 pages long, so a full analysis is not feasible in a blog post, especially one being published just two days after the Memorandum Opinion and Order itself. In this blog post, however, I will focus on what I think is one of the most important conceptual flaws in the Memorandum Opinion and Order. It appears to overlook key sources of statutory and regulatory authority for DAPA and expanded DACA, particularly the portions of DAPA and expanded DACA which relate to the grant of employment authorization and related benefits.

In the Memorandum Opinion and Order, Judge Hanen accepts that the

Department of Homeland Security (DHS), and in particular the Secretary of Homeland Security, Jeh Johnson, has the authority to set priorities regarding whom to remove from the United States. "The law is clear that the Secretary's ordering of DHS priorities is not subject to judicial second-guessing." Memorandum Opinion and Order at p. 69. "The States do not dispute that Secretary Johnson has the legal authority to set these priorities," Judge Hanen writes, "and this Court finds nothing unlawful about the Secretary's priorities." Memorandum Opinion and Order at 92.

Judge Hanen asserts in his Memorandum Opinion and Order, however, that DHS's statutorily granted authority to set enforcement priorities does not go so far as to authorize DAPA because of the affirmative benefits which are to be granted under the program. He similarly holds that the usual presumption against APA review of decisions not to enforce a statute, as set out by the Supreme Court in *Heckler v. Chaney*, 470 U.S. 821 (1985), does not apply in this case because DAPA is not merely a determination not to enforce:

Instead of merely refusing to enforce the INA's removal laws against an individual, the DHS has enacted a wide-reaching 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.

Memorandum Opinion and Order at 85-86. A similar theme is sounded later in the opinion when contrasting DHS's statutory authority to set priorities, of which Judge Hanen approves, with the benefits conferred under DAPA:

The 's delegation of authority may not be read, however, to delegate to the DHS the right to establish a national rule or program of awarding *legal presence*—one which not only awards a three-year, renewable reprieve, but also awards over four million individuals, who fall into the category that Congress deems removable, the right to work, obtain Social Security numbers, and travel in and out of the country.

Memorandum Opinion and Order at 92.

Setting aside for the moment the ability to travel internationally, which is offered only as part of a subsequent application by those already granted DAPA or DACA and is granted when appropriate pursuant to the discretionary parole authority of INA §212(d)(5)(A), 8 U.S.C. §1182(d)(5)(A), the core of Judge Hanen's

concern (or at least a key portion of it) appears to be with the grant of employment authorization and the related documentation, such as a Social Security number, for which one who is granted employment authorization becomes eligible. It is certainly true that those who receive Employment Authorization Documents (EADs), and are thereby able to receive Social Security numbers, become in an important sense "documented" where they were previously "undocumented". But it is not true that DHS has acted without statutory authority in giving out these important benefits.

It is at this point in the analysis that Judge Hanen appears to have overlooked a very important part of the legal landscape, what one might term the elephant in the room. The statutory authority for employment authorization under the INA is contained in section 274A of the INA, otherwise known as 8 U.S.C. §1324a. That section lays out a variety of prohibitions on hiring and employing an "unauthorized alien", and concludes by defining the term as follows:

As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

8 U.S.C. §1324a(h)(3).

That is, the Attorney General – whose functions have now been in relevant part taken over by the Secretary of Homeland Security – is statutorily empowered to authorize an alien to be employed, thus rendering the alien not an "unauthorized alien" under the INA. There are a few restrictions on this authority noted elsewhere in the INA: for example, 8 U.S.C. §1226(a)(3) states that an alien who is arrested and placed in removal proceedings may not be provided with work authorization when released from custody unless he or she is otherwise eligible for such work authorization "without regard to removal proceedings". But overall, the authority provided by 8 U.S.C. §1324a(h)(3) is quite broad.

Moreover, it is not as though this authority has gone unremarked upon in the context of DAPA and DACA expansion. The November 20, 2014 Memorandum from Secretary of Homeland Security Jeh Johnson regarding DAPA and DACA (or "Johnson DAPA Memorandum" for short) states that "Each person who applies for deferred action pursuant to the criteria above shall also be eligible to apply for work authorization for the period of deferred action, pursuant to my

authority to grant such authorization reflected in section 274A(h)(3) of the Immigration and Nationality Act." Johnson DAPA Memorandum at 4-5. Nonetheless, other than a quote from this section of the Johnson DAPA Memorandum at page 13 of the Memorandum Opinion and Order, Judge Hanen's Memorandum Opinion and Order does not appear to address the authority provided by INA §274A(h)(3), 8 U.S.C. §1324a(h)(3).

Pursuant to the authority contained in 8 U.S.C. §1324a(h)(3), the Attorney General and then the Secretary of Homeland Security have promulgated regulations for many years listing various categories of people who are authorized to accept employment by virtue of their status, or who can apply (initially to the INS, and now to USCIS) for authorization to accept employment. The list is currently contained in 8 C.F.R. §274a.12, and as noted in earlierversionsof that regulatory section, it has existed in substantively similar form since at least 1987, when it was put in place by 52 Fed Reg. 16221. Included on the list are not only such obvious categories as Lawful Permanent Residents, asylees, and refugees, but also those with various sorts of pending applications for relief, certain nonimmigrants, and many other categories.

One subsection of the 8 C.F.R. §274a.12 list that is particularly relevant here is 8 C.F.R. §274a.12(c)(14), the existence of which is acknowledged in passing by the Memorandum Opinion and Order at page 15 and footnote 66 of page 86 but is not discussed elsewhere. That provision has long included among the list of those who may apply for employment authorization: "An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment."

As noted in footnote 11 of the Office of Legal Counsel memorandum regarding the legal basis for DAPA, which also addresses much of the authority discussed in the foregoing paragraphs, a prior version of this regulation authorizing employment for deferred-action recipients actually dates back to 1981. But for present purposes, it is sufficient to point out that the 1987 version of the employment-authorization regulations has continued in force, with various modifications not relevant here, for over 35 years. The validity of 8 C.F.R. §274a.12(c)(14) as it has been in effect for over three decades does not appear to have been challenged by the plaintiff States or by Judge Hanen, nor is it clear how it could be, given the broad authority provided by 8 U.S.C. §1324a(h)(3).

This long-existing regulation, grounded firmly in explicit statutory authorization, clearly states that an alien beneficiary of "an act of administrative convenience to the government which gives some cases lower priority," 8 C.F.R. §274a.12(c)(14), which is called "deferred action," *id.*, may be granted employment authorization upon a showing of economic necessity. (Such a showing of economic necessity is, in fact, required when seeking employment authorization under DACA, the instructions for which require the filing of the Form I-765 Worksheet regarding economic necessity; the instructions for DAPA, when they are published, will presumably have the same requirement.) Thus, the regulation at 8 C.F.R. §274a.12(c)(14) authorizes the very features of DAPA and DACA which so troubled Judge Hanen as explained in the Memorandum Opinion and Order: the jump from the setting of enforcement priorities to the granting of affirmative benefits. The notion that those whose cases are given lower priority as a matter of administrative convenience to the government, should potentially be granted employment authorization as a consequence, is not some new idea created for DAPA and DACA without notice and comment, but has been set out in regulations for many years.

One might say that DAPA and DACA are composed of two logically separable components: first, the designation of certain cases as lower priority, and second, the tangible benefits, principally employment authorization and related benefits, which flow from that designation. Judge Hanen has found the designation of certain cases as lower priority to be unobjectionable, and has held the provision of tangible benefits in those cases to be in violation of the APA. But according to a long-existing regulation which no one has challenged, the second component of DAPA and DACA may permissibly flow from the first.

It is therefore logically problematic to say, as Judge Hanen has done in his Memorandum Opinion and Order, that the provision of benefits under DAPA violates the APA even though the prioritization of cases would not. The bridge from the first step to the second was, as it were, installed a long time ago. Although Judge Hanen refers to "a new rule that substantially changes both the status and employability of millions," Memorandum Opinion and Order at 112, it is in fact a very oldrule that has provided that those who are treated, as a matter of convenience, as being lower priority, should be made employable if they can demonstrate economic necessity. Since the prioritization is concededly acceptable, it follows that the employment authorization and related benefits should be acceptable as well.

The only thing which Secretary Johnson's November 2014 Memorandum really added to the pre-existing rules governing deferred action and its consequences was a set of criteria for DHS officers to use in determining whether to grant deferred action. But since the grant of deferred action, as it has long been described in regulation, is merely "an act of administrative convenience to the government which gives some cases lower priority," 8 C.F.R. §274a.12(c)(14), it can hardly be less permissible under the APA, or for that matter under the Constitution (the basis of another challenge which Judge Hanen did not reach), to grant deferred action than it is to give certain cases lower priority. If DHS is indeed free to give certain cases lower priority, a proposition which is difficult to seriously dispute given basic background norms of prosecutorial discretion, then pursuant to 8 C.F.R. §274a.12(c)(14) as promulgated under the authority of 8 U.S.C. §1324a(h)(3), DHS is also free to grant employment authorization to those whose cases it has given lower priority and who can show economic necessity for employment.

In a world of finite resources, deciding which cases are worth pursuing necessarily implies deciding which cases are not worth pursuing. Every dollar of funding or hour of officer time that DHS were to spend seeking to remove someone who meets the DAPA criteria would be a dollar of funding or hour of time that it could not spend seeking to remove a more worthy target. The DAPA criteria are flexible by their nature, including a final criterion of "present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate," Johnson Memorandum at 4. But where no such negative factors exist, DHS has reasonably determined that parents of U.S. citizens and Lawful Permanent Residents who meet the other DAPA criteria are likely to be appropriate candidates for deferred action—which is, to repeat, simply "an act of administrative convenience to the government which gives some cases lower priority," 8 C.F.R. §274a.12(c)(14). Having made that determination, DHS is authorized by both statute and regulation to confer employment authorization on those whose cases it has given this lower priority. In ruling otherwise, without addressing either 8 C.F.R. §1324a(h)(3) or the implications of 8 C.F.R. §274a.12(c)(14) promulgated under its authority, Judge Hanen appears to have overlooked the proverbial elephant in the room.