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SOME PRELIMINARY REACTIONS TO THE ORAL ARGUMENT IN UNITED STATES V. TEXAS

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As most readers of this blog will likely be aware, the Supreme Court heard oral argument today in the case now captioned *United States v. Texas*, regarding the lawsuit brought by Texas and a number of other states to stop implementation of DAPA (Deferred Action for Parents of Americans) and expanded DACA (Deferred Action for Childhood Arrivals). The transcript of the argument is now available online, although the audiotape will not be available until later in the week. There has been much media coverage of the argument, including by the always-insightful SCOTUSBlog, and a number of media organizations and commentators have suggested that the Court may divide 4 to 4, thus leaving the Fifth Circuit's decision intact and preventing DAPA and expanded DACA from going into effect at this time. While that is a possibility, however, there are also some reasons to be optimistic that it may not come to pass.

I do not wish to recap all of the voluminous coverage of the argument by the media and commentators, but will focus in this blog post primarily on one or two things that I have not seen highlighted by other commentators. However, there is one observation about the argument, not original to me, which does seem worth passing along, and which falls under the heading of reasons for optimism. As Chris Geidner has pointed out in his review of the oral argument on Buzzfeed, Justice Anthony Kennedy, who is often seen as a swing vote in cases where the Court is closely divided, raised the possibility that the more appropriate way for Texas to have proceeded would have been to challenge the application of the regulation granting employment authorization to deferred action beneficiaries, 8 C.F.R. §274a.12(c)(14), under the Administrative Procedure Act. Justice Sotomayor discussed with Solicitor General Verrilli on page 31 of the transcript the possibility that, if Texas had wanted to attack the 1986 regulation that allows employment authorization under many

circumstances including deferred action, they could have petitioned the agency for rulemaking under section 553(c) of the Administrative Procedure Act. If that failed, they could then have gone to court. Instead, Texas went directly into court without first raising its concerns with the agency—a procedural shortcut which a majority of the Court may not be willing to tolerate. This is separate from the constitutional concern, also discussed at length during the argument, that Texas may not have standing to attack DAPA where its asserted injury relates to its own decision to subsidize the issuance of driver's licenses to certain classes of individuals.

Another notable portion of the oral argument was the discussion of the outsized importance that the plaintiff States have attached to the brief mention in the DAPA memorandum of "lawful presence". As Marty Lederman explained in a post on the Balkinization blog prior to the oral argument, the significance of "lawful presence" in this context relates primarily to eligibility for certain Social Security and Medicare benefits, as well as to the tolling of unlawful presence for purposes of potential future inadmissibility under 8 U.S.C. §1182(a)(9)(B). Neither of these things, however, has anything to do with the injury that Texas alleges. Nor are they of particularly great significance in the context of DAPA as a whole. Professor Lederman had described the lawful-presence argument as "the smallest of tails wagging a very large dog", a phrase that Solicitor General Verrilli expanded upon (or should I say contracted upon?) on page 32 of the oral argument transcript by noting that the lawful-presence issue was "the tail on the dog and the flea on the tail of the dog." (He also returned to the basic "tail of the dog" formulation on page 88, in his rebuttal.) If necessary, he offered, the Court could simply take a "red pencil" and excise the offending phrase from the memo, and this would be "totally fine" with the government.

Just as the issue of "lawful presence" lacks a connection to the injury Texas alleges, it was also discussed at the oral argument how even the employment authorization that is a much more important component of DAPA as it would operate in practice, and which seems to be what Texas is in large part challenging, does not really relate to Texas's alleged injury. As Solicitor General Verrilli and also Thomas Saenz, arguing for intervenor prospective DAPA beneficiaries, pointed out, Texas, under its current policy, gives driver's licenses based on the granting of deferred action itself, rather than based upon employment authorization. Even if the federal government restricted itself to

deferring any removal action against the intended beneficiaries of DAPA – as Texas, in the person of its Solicitor General Scott Keller, seemed to concede on page 50 of the transcript that it would have the authority to do – and simply, as Justice Ginsburg suggested, gave out ID cards noting the low priority status of the beneficiaries, Texas would still, under its current policy, apparently have to give those beneficiaries subsidized driver's licenses. Thus, besides the other problems with Texas's claim that it is harmed sufficiently by DAPA to have standing to challenge it, there is the problem of redressability. A decision forbidding the federal government to give out employment authorization documents, or declare "lawful presence", under DAPA, while still permitting it to defer removal actions against DAPA's beneficiaries, would not actually solve the problem that Texas is claiming DAPA has caused. It is, instead, merely a convenient hook for what is actually a political dispute. Solicitor General Verrilli returned to this point in his rebuttal argument, noting that Texas had offered no response to it.

Another notable portion of the oral argument relating to employment authorization was the discussion of how, as Justice Alito asked on page 28 of the transcript, it is "possible to lawfully work in the United States without lawfully being in the United States?" As Solicitor General Donald B. Verrilli attempted to explain, while this may seem peculiar, employment authorization based on a mere pending application for lawful status, such as an application for adjustment of status or cancellation of removal, is quite common. Many, many people receive such authorization pursuant to the administrative authority recognized by 8 U.S.C. §1324a(h)(3), as discussed in my prior blog post Ignoring the Elephant in the Room: An Initial Reaction to Judge Hanen's Decision Enjoining DAPA and Expanded DACA. The suggestion that such authorization cannot exist would wreak havoc on our immigration system as we now know it. As Solicitor General Verrilli pointed out on page 31 of the transcript, reading the §1324a(h)(3) authority as narrowly as suggested by the plaintiffs would eliminate well over a dozen of the current regulatory categories of employment authorization. It would, to quote from Solicitor General Verrilli's rebuttal argument at page 89, "completely and totally upend the administration of the immigration laws, and, frankly, it's a reckless suggestion."

Indeed, as I pointed out in a blog post several years ago, there are many circumstances under which even someone subject to a removal order can be lawfully granted work authorization. Those whose asylum applications were

denied in removal proceedings but who are seeking judicial review of that denial, for example, may obtain employment authorization under 8 C.F.R. §274a.12(c)(8). An applicant for adjustment of status under INA §245 or cancellation of removal for nonpermanent residents under INA §240A(b) who has his or her application denied by an immigration judge and the BIA, is ordered removed, and petitions for judicial review of the order of removal under 8 U.S.C. § 1252(a)(2)(D) on the ground that a legal or constitutional error has been made in adjudicating the application, may also renew employment authorization. Even outside the context of judicial review, an applicant for adjustment who was ordered removed as an arriving alien, and who is nonetheless applying to USCIS for adjustment of status pursuant to *Matter of Yauri*, 25 I&N Dec. 103 (BIA 2009), can be eligible for employment authorization.

The anomaly of concurrent authorization to work in the United States and lack of authorization to be here, paradoxical though it may have seemed to Justice Alito, can exist even with respect to some of the forms of employment authorization authorized by very specific statutory provisions, rather than under the general authority of 8 U.S.C. §1324a(h)(3)—the forms of employment authorization that even Justice Alito and Texas acknowledge should exist. In 8 U.S.C. §1158(d)(2), for example, Congress specifically indicated that while "an applicant for asylum is not entitled to employment authorization . . . such authorization may be provided under regulation by the Attorney General." The implementing regulations at 8 C.F.R. §208.7(b) and 8 C.F.R. § 274a.12(c) make clear that such employment authorization is renewable pending the completion of administrative and judicial review of a denial of the asylum application. Thus, an asylum applicant whose application was denied, resulting in an order of removal, and who is seeking judicial review of that order, can obtain renewed employment authorization.

Admittedly, in some cases, a court of appeals can grant a stay of the order of removal for an asylum applicant in this situation, pending adjudication of the petition for review—which one might consider a form of authorization to be in the United States. But a stay of removal is not a precondition for a grant of employment under 8 U.S.C. §1158(d)(2) and 8 C.F.R. §274a.12(c)(8), either in theory or in practice. It is fairly common for asylum applicants who are not detained to pursue judicial review without a stay of removal and to renew their employment authorization while doing so. They are authorized to work in the United States, even though in theory they are not authorized to be here. As

long as they are here, because the government has not thought it worth removing them during the pendency of their court case, they can lawfully work.

Given Justice Alito's follow-up question about whether the categories of persons who had employment authorization without lawful presence were "statutory categories", however, it is also worth emphasizing that other kinds of employment authorization besides those specifically authorized by statute can persist even in the face of a removal order. Employment authorization based on a pending application for adjustment of status or cancellation of removal, under 8 C.F.R. §274a.12(c)(9) and 8 C.F.R. §274a.12(c)(10), does not stem from the sort of type-specific statutory authorization at 8 U.S.C. §1158(d)(2). Nonetheless, these types of employment authorization, which have been granted for many years in significant volume with little controversy, can be obtained by someone with a final removal order who is seeking judicial review of that order, or who is seeking adjustment of status under *Matter of Yauri*. To the extent Justice Alito meant to imply that the seeming paradox of authorized employment without authorized presence could only be justified by a specific statutory authorization, this too was an inaccurate description of the world of immigration law since long before DAPA.

While the discussion at oral argument of employment authorization separate from lawful status did not go so far as to address this issue of employment authorization for those subject to orders of removal, it did seem that the Solicitor General's emphasis on the sheer scale of those grants of employment authorization may have made an impact on Chief Justice Roberts. The Chief Justice, at the end of Solicitor General Verilli's rebuttal, returned to the question of how many of these sorts of employment authorization documents are issued, and the answer on page 90 that there were 4.5 million in the context of adjustment of status since 2008 and 325,000 for cancellation of removal was the last substantive portion of the argument transcript. This was potentially a strong closing argument, which may be a hopeful sign.

Attempting to predict the outcome of a case from oral argument is always a risky endeavor, and we will have to wait and see what the Court actually does. Nonetheless, it is my hope that the above observations may perhaps provide some additional insight.