

Answer for the Record

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Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts

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Senator Amy Klobuchar asked the following question for the record:

For Professor Family:

In your testimony, you discussed how *Texas v. United States* involves interpretation of both immigration law and administrative law. What relevance does the case-by-case review process for Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and Deferred Action for Childhood Arrivals (DACA) have on your analysis under these two areas of law?

Answer:

Implementing enforcement priorities through deferred action is a longstanding practice in immigration law.¹ In his opinion in *Texas v. United States*, Judge Hanen concluded that the Department of Homeland Security (DHS) did not appropriately use a policy memorandum under the Administrative Procedure Act (APA) when it announced the DAPA program and the extension of the DACA program in November 2014. This would amount to an agency procedural error. In his view, DHS chose the wrong procedure; Judge Hanen concluded that DHS should have used notice and comment rulemaking instead.

The APA provides for notice and comment rulemaking, but also provides exceptions for when notice and comment rulemaking is required. An agency policy statement is one such exception. All types of administrative agencies use policy memoranda

¹ For more information on the legal authority for deferred action, see Open Letter from Immigration Law Professors, <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/executive-action-law-prof-letter.pdf>; Open Letter from Immigration Law Professors <https://pennstatelaw.psu.edu/file/LAWPROFLTRHANENFINAL.pdf> .

frequently; policy memoranda are a common feature of administrative law. Also common is the type of challenge raised in *Texas v. United States*, that an agency did not properly invoke the policy memorandum exception to notice and comment rulemaking. To determine whether an agency properly invoked the policy memorandum exception, courts ask whether the policy memorandum is binding on its face or whether the agency treats the memorandum as binding.

Here is where what the agency's policy memorandum says and how the agency implements the memorandum becomes important. Because the DAPA November 2014 memorandum instructs adjudicators to engage in case-by-case evaluation and to exercise discretion, it is not binding on its face.² The language in the memorandum demands case-by-case adjudication.

Regarding how the agency treats the memorandum in practice, it should be emphasized that the existence of factors for adjudicators to consider does not doom a policy memorandum.³ DHS has not yet implemented DAPA, so it is too early to know how the agency will treat the memorandum. It is speculation to conclude that DHS adjudicators will disobey the explicit instructions to exercise discretion. Judge Hanen projected his interpretation of how DHS has implemented the 2012 DACA memorandum to conclude that he knows how DHS will implement DAPA. This projection is inappropriate, and even if it was appropriate, Judge Hanen mischaracterized DHS' implementation of DACA.⁴ DHS provided to Judge Hanen examples of cases where it had denied DACA in the exercise of discretion even when all the threshold criteria had been met, and DHS emphasized that several of the threshold criteria are themselves discretionary.⁵

Also, a court may question an agency's choice of procedural mechanism only if there is judicial review of the agency action under the APA (and whether there is judicial review becomes relevant only if there is standing). As I explained in my testimony, I do not believe that Judge Hanen should have reached the question of the APA procedural violation because establishing enforcement priorities is committed to the agency's discretion.

Please see my written testimony for elaboration.

² The memo states that "the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis." DAPA Memo at 5, available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

³ *Professionals and Patients for Customized Care v. Shalala*, 56 F.3d 592, 597-98, 600 (5th Cir. 1995).

⁴ On April 7, 2015, the US Court of Appeals for the Fifth Circuit dismissed, on standing grounds, a lawsuit brought by Immigration and Customs Enforcement (ICE) agents and by the state of Mississippi challenging the implementation of DACA. *Crane v. Johnson*, No. 14-10049 (5th Cir. April 7, 2015). The ICE agents argued they had standing because they had been threatened with employment sanctions as a result of noncompliance with the 2012 DACA memorandum. In rejecting that argument, the Fifth Circuit concluded that the DACA memorandum, and the 2014 DAPA memorandum, explicitly leave room for discretion, and that ICE agents may decline to exercise deferred action.

⁵ Testimony of Stephen H. Legomsky before House Judiciary Committee at 12-13 (Feb. 25, 2015), available at <http://lawprofessors.typepad.com/files/legomsky-testimony.pdf>.