Supreme Court's Tie Decision Leaves Intact Ruling Against Obama Amnesty Plan

The Supreme Court's tie 4-4 vote on June 23 in the case of *United States v. Texas* left intact a lower-court ruling that blocked the Obama administration from implementing its plan to shield millions of illegal immigrants from deportation and grant them the right to work legally in the United States.

A report in the *Washington Examiner* on June 21 provided details indicating that — had the court overturned the lower court decision — an estimated 4,948,000 illegal aliens would have been eligible for the Obama deportation deferral (amnesty) programs, including Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).

President Obama was quick to comment on the decision and found a way to blame it on Republicans in the Senate who for have refused to consider his nominee to the Supreme Court, Merrick Garland, the chief judge of the United States Court of Appeals for the District of Columbia Circuit. By this statement, Obama displayed a high level of confidence that Garland would have voted to overturn *United States v. Texas*, thereby allowing the administration amnesty plans to proceed.

"The court's inability to reach a decision in this case is a very clear reminder of why it's so important for the Supreme Court to have a full bench," Obama said on June 23 at the White House.

In fact, the 4-4 vote was a decision, but not the decision that Obama wanted.

United States v. Texas began as a lawsuit filed by Texas and 16 other states in December 2014 against the federal government after President Obama's November 20, 2014, announcement that he would unilaterally suspend immigration law as applied to four million illegal immigrants who would otherwise face deportation. Nine other states later joined in the suit against the administration.

On February 16, 2015, U.S. District Judge Andrew S. Hanen of the U.S. District Court for the Southern District of Texas in Brownsville ruled on the states' lawsuit, issuing an order of temporary injunction blocking the federal government from implementing the Obama administration's use of executive actions to grant relief from deportation, legal status, and permission to apply for work permits to illegal aliens who are the parents of a U.S. citizen or a lawful permanent resident.

Hanen's injunction blocked 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, 2014 memorandum. That memorandum expanded DACA (Deferred Action for Childhood Arrivals), which was initiated in 2012 by a policy memorandum sent from former DHS

Secretary Janet Napolitano. It removed DACA's age cap and also extended work authorization for some illegal aliens who have been granted legal status to three years.

Following a series of subsequent appeals, a three-judge panel from the U.S. Court of Appeals for the Fifth Circuit in New Orleans upheld Hanen's injunction on November 9, 2015. Soon afterwards, a DOJ spokesman stated that the administration would file a petition asking the Supreme Court to review the case, and on January 19, 2016, the High Court agreed to review the case.

The High Court's 4-4 vote lets the original decision issued by Judge Hanen and upheld by the Fifth Circuit Court to stand. The court did not issue an opinion but stated simply: "The judgment is affirmed by an equally divided Court."

While the June 23 decision is a victory for the states that brought the lawsuit against the federal government, it could be a temporary victory. Should Hillary Clinton be elected president in November, she would undoubtedly nominate a justice to the Supreme Court who would vote the way Obama anticipated his nominee would have voted in this case.

When states place their hopes for protection of their rights in the hands of the federal courts, almost anything can happen. In the future, the states may want to consider a more effective strategy known as nullification. A prime example of this concept was explored in an article in *The New American* last February that observed how the state legislature of Tennessee was considering a pair of companion bills that would amend the Tennessee state code to prohibit "state and local governments from enforcing, administering, or cooperating with the implementation, regulation, or enforcement of any federal executive order or U.S. supreme court opinion unless the general assembly first expressly implements it as the public policy of the state."

As the writer of that article noted:

> Beyond the potential protections this bill affords for the right of citizens of the Volunteer State to keep and bear arms (as guaranteed by the Second Amendment and threatened by President Obama's flurry of fiats), it could stop at the state borders enforcement of numerous unconstitutional programs and policies of the federal government.

The Obama administration's DACA and DAPA programs would certainly come under that category.

The article went on to discuss nullification as explained by James Madison in *Federalist*, No. 45, where he counseled states to "refuse to cooperate with officers of the Union" when those officers are trying to carry out federal mandates not within the narrow purview of the central government.

This act of refusal by states to cooperate in violating the Constitution is called nullification.

Nullification is, as Thomas Jefferson wrote, the "rightful remedy" to federal overreach. The article provides as an example the following resolution adopted by the Kentucky state legislature on November 10, 1798, regarding the legitimate scope of federal authority and the power of the states to keep the former within its appropriate, constitutionally delegated boundaries:

> That the several states composing the United States of America, are not united on the principle of unlimited submission to their general government; but that by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no

> force: That to this compact each state acceded as a state, and is an integral party, its co-states forming as to itself, the other party: That the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions, as of the mode and measure of redress.

While the states that joined in *United States v. Texas* received temporary relief from the decision rendered by Judge Hanen, upheld by the Fifth Circuit in New Orleans, and allowed to stand by the Supreme Court, future judges and a future Supreme Court could just as easily reverse this decision. The states might employ nullification as a sounder strategy than litigation for protecting states' rights from federal overreach.

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