



A Coordinated Attack

JUDGE HANEN AND THE NATIVIST LAWSUIT AGAINST DAPA AND DACA

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INTRODUCTION

In late 2014, 25 state governors and attorney generals -- led by Texas Attorney general and Governor-elect, Greg Abbott -- filed a lawsuit to block implementation of the President's immigration enforcement programs including Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parental Accountability (DAPA). The judicial strategy is an organized, concerted effort led by the same cast of characters that drafted and passed SB 1070 and other notorious anti-immigrant legislation. It follows the [model](#) embraced by Republicans after passage of the Affordable Care Act.

As of January 15, 2015, the following states have signed on to the Texas lawsuit: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Maine Michigan, Mississippi, Montana, Nebraska, North Carolina, South Carolina, North Dakota Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin.

The architects of the legal strategy choose to file their lawsuit in Brownsville, TX with the hope that Judge Andrew Hanen would oversee the case. Hanen is the ideal judge for the anti-immigrant movement. He garnered national attention in 2013 for [statements](#) against the Department of Homeland Security that went well beyond the scope of the case before him. The Washington Times' Stephen Dinan recently declared, "the states challenging President Obama's deportation amnesty have already won the first round in court" when reporting that Judge Hanen was assigned the case.

Immediately after its filing, the lawsuit received wide criticism from lawyers and Constitutional experts, Governors, public safety officials, and community advocates. It's not yet clear if the plaintiffs even have "standing" to proceed in federal court.

ORIGIN AND CRITICISM OF THE LAWSUIT

In November 2014, President Barack Obama announced a series of actions his administration would begin taking to better target the enforcement of our nation's immigration laws on high priority individuals. Part of these reforms included expansion of the 2012 Deferred Action for Childhood Arrivals program and the creation of a similar program targeting the parents of U.S. citizens: Deferred Action for Parental Accountability. These are the two programs that these Republican Governors and Attorneys General object to.

Although every President since Eisenhower--both Republican and Democrat--has taken executive action on immigration, President Obama knew that his actions would come under intense fire from the right. Anticipating this, he took the unusual extra step of publishing the Department of Justice [Office of Legal Counsel](#) extensive memorandum outlining the legal underpinnings of these actions. Their conclusions were bolstered by more than [130 legal experts](#) and scholars who have asserted that President Obama is acting well within his legal authority.

It is widely [believed](#) that the Texas lawsuit was authored by Kris Kobach, the notorious anti-immigrant lawyer and Kansas Secretary of State who authored Arizona's SB 1070 and advised Mitt Romney to run on the platform of "self-deportation." A [Washington Post article](#) published shortly after the President's announcement noted Kobach was already drafting a lawsuit and that Texas was interested in being a plaintiff. On December 3, Kobach said to "watch the news in the next month or so and you'll see the cases being filed [...] the pieces are being put into place to bring litigation against the Obama administration in various courts around the country." While Kobach is not a named counsel in the litigation, the case is part of the core strategy of nativist groups he has worked with—such as the [Immigration Reform Law Institute](#).

Immediately after its filing, the lawsuit received a barrage of criticism. David Leopold, former President of the American Immigration Lawyers Association, [said](#) the legal complaint "reads more like a factually challenged press release than a well-reasoned legal complaint." Lynne H. Rambo, Professor of Law, Texas A&M University School of Law recently [wrote](#) that the states bringing this lawsuit have larger obstacles to clear before the judge should even address the merits. Namely, they do not have "standing" to proceed in federal court. Here's what she said:

Standing requires an injury, and the states claimed injury is the increased law enforcement supposedly made necessary because the president's directives have caused more people to cross the border. This theory, however, blames the president for this summer's influx of Central Americans on an extremely speculative theory of "[chain of causation](#)." At one point, plaintiffs lay at the president's feet all upcoming increases in immigration. On another page, plaintiffs acknowledge substantial increases that predated the president's directive. Most noticeably, the plaintiffs completely ignore the recent [political turmoil and violence in Central America](#) that motivated [high numbers of arrivals](#).

Professor Rambo points out that the plaintiffs cannot show the “redressability” necessary for standing, which requires that the plaintiffs’ requested relief be able to [repair their alleged injury](#).

Even assuming the court struck down the president’s directive, all that would happen is that the implementation of the deferred action programs might be delayed in certain parts of the country. Other immigrants will keep coming to escape violence and lack of opportunity just as they were the day before the judge’s ruling, and states will be affected—or not—as they are now.

Mississippi Attorney General Jim Hood [described](#) the lawsuit as “governor-driven litigation which involves policy and drags us into litigation we might not initiate on our own.” And while North Carolina Gov. Pat McCrory joined the lawsuit, Attorney General Roy Cooper has so far refused to join him, saying “I am concerned that a partisan lawsuit adds to the divisiveness that has prevented meaningful immigration reform in the first place.” Hood, Cooper, and [16 other attorneys general](#) signed a letter in January 2015, urging Congress to enact permanent immigration reforms. Seven of the signees hail from one of the twenty-five states listed as plaintiffs in the Texas-led lawsuit.

Twelve [states in favor of executive action](#) (representing [half the population](#) of eligible immigrants) filed an amicus curiae (“friend of the court”) brief for consideration by Judge Hanen as part of the Abbot suit. The effort was spearheaded by Washington States’s Attorney General Bob Ferguson, and co-signed by the Attorneys General of California, Connecticut, Hawaii, Illinois, Iowa, Maryland, Massachusetts, New Mexico, New York, Oregon, Vermont and the District of Columbia. The brief argues that Obama’s executive action presents a boon rather than a burden, allowing immigrant families to participate more fully in American society and increasing the amount of tax revenue for states.

As Washington Governor Jay Inslee said in a [press statement](#):

“The President took necessary and humane steps to help keep families together and provide relief to law-abiding Washington families. He acted because Congress has not, and Washington state and the rest of the country should not have to wait any longer for sensible immigration reform. I applaud the Attorney General’s effort to set the record straight about the President’s authority to pursue commonsense executive action.”

The state amicus brief was bolstered by a separate brief filed by the Major Cities Chiefs Police Association, the Police Executive Research Forum, and fourteen police chiefs ([see here for their brief and list of signers](#)). According to these law enforcement leaders:

“The ability of millions of individuals to obtain identification, including a federal employment authorization document, a social security number and card, and a driver’s license under state law, through the Deferred Action Initiative will greatly benefit local law enforcement officers’ ability to conduct their jobs effectively, and a preliminary injunction would cause significant harms and would injure the public interest.”

Civil rights and labor groups including National Immigration Law Center, American Immigration Council, American Immigration Lawyers Association, Define American, National Immigrant Justice Center, New Orleans Workers’ Center for Racial Justice, Service Employees International

Union, Southern Poverty Law Center, and United We Dream joined the legal effort to defend the Administration's recent executive action on immigration by filing their own [amicus \("friend-of-the-court"\) brief](#) in the case. The brief argues that blocking the new enforcement programs by issuing an injunction would create real economic and societal harm.

BACKGROUND ON JUDGE HANEN

Judge Andrew Hanen is an [Article III federal judge](#) for the [United States District Court for the Southern District of Texas](#). He joined the court in 2002 after being nominated by President [George W. Bush](#).

Judge Hanen earned national attention on immigration once before when his commentary on an immigration-related case far exceeded the issue before him. Although the case before Judge Hanen involved prosecution of a human trafficker, the judge sounded off well beyond the scope of the case before him.

Hanen, who was appointed by George W. Bush, was upset at DHS officials for simply following enforcement protocols outlined by the [William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008](#). The bill was passed by the Bush Administration and specifically gives protections for unaccompanied alien minors that the government followed.

Ian Millhiser of Think Progress [writes](#):

"Hanen handed down a strongly worded order claiming that the federal government engaged in a 'dangerous course of action' because it allowed an undocumented mother to be united with her child without having criminal charges brought against her. Though it is theoretically possible to draw a narrow legal distinction between the arguments Hanen raised in his December order and the arguments against President Obama's broader policy [today], the order leaves little doubt about how Hanen will decide the case currently pending before his court. The Obama Administration might as well attempt to defend its policy before Judge Ted Cruz."

When ruling on the case Hanen said, "This Court takes no position on the topic of immigration reform, nor should one read this opinion as commentary on that issue. That is subject laced with controversy and is a matter of much political debate which is not the province of the judicial branch." Hanen should heed that advice with the Texas case, as it is an attempt by Republican officials to achieve a political decision from the Courts.

Following is greater detail on three cases that illustrate Judge Hanen's penchant for opining on issues outside his scope of jurisdiction, as well as his restrictionist bent on immigration issues.

May 4, 2010: After a defendant pled guilty and the "outcome was no longer a pending question," Judge Hanen felt "compelled" to write a [4-page opinion](#) criticizing federal immigration policy, without ordering anything involving the defendant.

(Source: [U.S. v. Cabrera, 711 F.Supp.2d 736 \(S.D. Tex. May 4, 2010\)](#))

- “If a private individual were to give a person who may be evading capture by law enforcement the means to help them escape, they might very well be prosecuted. This policy does the same thing. **The Citizenship and Immigration Service under this policy might well qualify under some laws as accessories after the fact. It purposefully hinders law enforcement officers** from doing their job. It intentionally erases, or at least hides the dots, so that law enforcement officials cannot connect them in a timely fashion and it should be amended or abandoned before it causes the United States or an innocent bystander to suffer dire consequences.”
- “The DHS should enforce the laws of the United States—not break them.”
- It “would be much cheaper to apprehend these co-conspirators [i.e. the parent of an unaccompanied child] and reunite them at the children’s location.”

December 13, 2013: After sentencing a human trafficker to a criminal sentence, Judge Hanen issued a [10-page “Order”](#) that again criticized federal immigration policy without ordering anything involving the defendant.

(Source [U.S. v. Nava-Martinez, No. 13-cr-441, 2013 WL 8844097 \(S.D.Tex. Dec. 13, 2013\)](#) and <http://bigstory.ap.org/article/135858ccf309405abcbe0589b001a7f2/judge-immigration-case-had-criticized-us-policy>)

- “This Court takes no position on the topic of immigration reform, nor should one read this opinion as commentary on that issue. That is subject laced with controversy and is a matter of much political debate which is not the province of the judicial branch.”
- Hanen accused the government of “completing the criminal mission” of human traffickers “who are violating the border security of the United States” and assisting a “criminal conspiracy in achieving its illegal goals.” The judge called the administration’s behavior “dangerous and unconscionable” and said that “DHS should cease telling the citizens of the United States that it is enforcing our border security laws because it is clearly not. Even worse, it is helping those who violate these laws.”
- Hanen criticizes the policy of reuniting unaccompanied children with their parents regardless of the parents’ immigration status, under the 2008 TVPRA Amendments and *Flores v. Reno*, and accuses DHS of assisting a “criminal conspiracy.”
- DHS reunification of the child with the parent is “as logical as taking illegal drugs or weapons that it has seized from smugglers and delivering them to the criminals who initially solicited their illegal importation/exportation.”
- The Convention Against Torture is “incredible” and “border[ing] on the absurd.” (Judge Hanen appears unaware of the Trafficking Victims Protection and Reauthorization Act of 2008, which incorporated many of the protections for children under the *Flores v. Reno* settlement.
- The “law enforcement agents on the front line here on the border... with no small risk to their own safety, do their best to enforce our laws and protect the citizens of the United States. It seems shameful that some policymaker in their agency institutes a course of inaction that negates their efforts.”

August 1, 2014: When a Salvadoran criminal defendant who received Convention Against Torture (CAT) protection against deportation applied to Judge Hanen to relocate within the United States, a routine matter, Judge Hanen issued a 24-page opinion criticizing the US’ implementation of CAT, while conceding he had “no jurisdiction” over the policy.

(Source: U.S. v. Ramirez, No. 07-cr-041, 2014 WL 3843853 (S.D.Tex. Aug. 1, 2014))

- The motion before the judge was from the defendant, to relocate from California to Louisiana. The defendant had been sentenced to illegal re-entry by Judge Hanen, and had been convicted of other crimes.
- It will “cost the taxpayers billions of dollars” (without citing to evidence).
- This “Court is happy to envision Main Street America as a melting pot of races, religions, creeds, and ethnic backgrounds.... That picture of diversity, however, [will be] much different... if the Government's current brush strokes continue to color the canvas.... [T]he picture being painted will include a diverse variety of felons and violent criminals.”
- “The Court has not seen any official, or even unofficial, estimates of the number of drug dealers, armed robbers, murderers and terrorists who also entered the country while the Border Patrol was distracted by the problems caused by the influx of these children. Obviously, the Government has no way of knowing.”
- Under ICE supervised release policies, says there is no “form of active supervision.” A defendant is “essentially free to do whatever he wants, wherever he wants.”
- Judge Hanen criticized DHS’ change to the “limited material support bar” to asylum, to allow those who had provided food to terrorist organizations without an option to qualify for asylum.[9] He says, “Clearly those who are terrorists... will get asylum/deferral.”
- He again issued sweeping statements regarding the “failure of the Government to enforce the laws of this country.”
- “The officers and agents who patrol the streets, back roads, rivers, and borders are doing their best to perform that duty, sometimes at great risk and sometimes against overwhelming odds, but their hard work and dedication goes for naught when those in charge create policies that tie their hands.”
- The influx of Central American children is evidence that the “failure of the Government to enforce the laws of this country is reaping what it sowed,” by allowing unaccompanied children to reunite with parents.

In his piece on Judge Hanen titled “Judge Hearing Challenge To Obama’s Immigration Policy Has Already Given Us A Good Idea How He’ll Rule,” Ian Millhiser explains how Judge Hanen has consistently “intruded upon ‘a core executive constitutional function’” in his legal opinions. “The fact that he did so in a case where he does not appear to have jurisdiction over the party that the government chose not to prosecute makes his decision to weigh in on this question even more bizarre,” writes Millhiser. “None of this bodes well for the men and women who benefit from the Obama Administration’s immigration policy.”

We may already know how Judge Hanen is likely to rule, but his courtroom is just the first stop for this political maneuver on behalf of twenty-five states. Hopefully, judicial activism will not trump the law and Constitution when it comes to the final result.