Policy and law in a politically charged case

Influence on Both Sides of DACA

The Cato Institute is no stranger to the Supreme Court, regularly appearing at or near the top of lists of most-cited amicus curiae (friend of the court) briefs. Less usual was the result in *Department of Homeland Security v. Regents of the University of California*, decided in June. In this case, which involves the Trump administration's efforts to end the Obama-era immigration policy known as Deferred Action for Childhood Arrivals (DACA), Cato's influence could be seen in both the majority and the dissent.

As a policy matter, there is widespread support for extending some kind of amnesty to DACA recipients, who were brought to the United States illegally as children but have since grown up and established their lives here. Approximately 750,000 people have participated in the program, which offers work permits and defers possible deportation for those who meet certain criteria.

The majority opinion in the 5–4 case by Chief Justice Roberts, through a chain of citations to the brief filed by the plaintiffs, pointed to a Cato estimate that the fiscal cost of immediately deporting those currently in the DACA program would be over $60 billion, along with a $215 billion reduction in economic growth over the next decade (Cato Working Paper no. 49, by Logan Albright, Ike Brannon, and M. Kevin McGee). The decision also cited, through a brief by 143 businesses, the calculation by David J. Bier on the Cato blog that hiring and training replacement workers would cost employers $6.3 billion. The substantial costs at stake were a factor in the majority's decision that the Trump administration's attempt to rescind DACA ran afoul of the Administrative Procedures Act and its process for establishing new rules and policies through executive action.

Fred Schilling, Collection of the Supreme Court of the United States

In contrast, the legal basis for the Obama administration's original action has been criticized as an example of executive overreach. Even if DACA is good policy, Congress must act and the president cannot unilaterally rewrite immigration laws. This was the focus of Cato's own amicus brief in the case, which advanced several arguments picked up by Justice Clarence Thomas in his dissent.

The dissent agreed that Congress must provide some intelligible limiting principle to guide the use of executive discretion to not run afoul of the nondelegation doctrine. Thomas also incorporated similar arguments about the major questions doctrine, which requires Congress to be clear and unambiguous in delegating decisions of substantial consequence to the executive branch. Thomas's dissent cited the same precedent as Cato's brief to affirm the rejection of an "adverse possession" theory of executive power. Lastly, both Cato's brief and Thomas's dissent emphasized the Constitution's Take Care Clause, which requires that the president "take care that the laws be faithfully executed."

Immigration reform is desperately needed, and the case of DACA recipients is especially sympathetic. Ultimately, the matter could be made moot if Congress acted. Until then, even on a divided court, Cato's influence can be seen in both the majority's emphasis on negative policy consequences and the minority's adherence to the separation of powers. ■

Cato News Notes

CATO WELCOMES LINCICOME

Scott Lincicome, one of the nation's leading experts on trade policy and international trade law, has joined the Cato Institute as a senior fellow in economic studies, where he will specialize in trade and economic dynamism. Before joining Cato, he practiced international trade law at White & Case LLP, where he litigated major trade disputes, in addition to teaching as a visiting lecturer at Duke University Law School. He was also previously an adjunct scholar for Cato, but now he will be applying his expertise full time to Cato policy work.

RAVE REVIEWS

The Radio Right: How a Band of Broadcasters Took On the Federal Government and Built the Modern Conservative Movement, by Libertarianism.org's Paul Matzko, has attracted several positive reviews. *Patheos*, the *New Republic*, and former *National Review* editor Jonah Goldberg praised the book for its exploration of how the Kennedy administration used the Federal Communications Commission and the Internal Revenue Service to suppress right-wing radio shows.

EKINS SURVEY WIDELY HAILED

The Cato Institute Summer 2020 National Survey, by director of polling Emily Ekins, has received widespread notice for its finding that 62 percent of Americans feel that they must withhold political opinions for fear of giving offense. *The Economist* published an article on the results, which were also discussed by David Brooks in the *New York Times*, Cass R. Sunstein in Bloomberg Opinion, Jeff Jacoby in the *Boston Globe*, and Rush Limbaugh.