

## Legal Sidebar

# What Does the Supreme Court's 4-4 Split in *Texas* Mean for Future Executive Action as to Immigration?

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The nominee or presumptive nominee for President of both major political parties has [expressed a willingness](#) to take certain actions as to immigration on his or her own, without waiting for Congress to enact further legislation (although the specific actions they would take vary, depending upon their policies on immigration and other issues). This has raised questions about whether and how the Supreme Court's recent 4-4 split in [Texas v. United States](#) might affect the Executive's ability to "go it alone" on immigration in the future. As is explained below, although the High Court's decision in *Texas* sets no binding national precedent, it could still constrain the Executive's ability to take certain actions, particularly as to "large-scale" grants of relief from removal that would result in aliens being deemed "lawfully present" and obtaining authorization to work legally in the United States. Other actions—such as changes in the Executive's enforcement priorities, the removal or non-removal of individual aliens, and the denial of entry to particular classes of aliens—are less impacted by the *Texas* decision.

### Grants of Relief from Removal Resulting in Lawful Presence and Work Authorization

The litigation in *Texas* concerned a specific executive action as to immigration: namely, a [proposal](#) that could have granted one type of relief from removal—[deferred action](#)—to [approximately five million aliens](#) who had entered or remained in the United States in violation of federal immigration law. Once granted deferred action, these aliens would have been deemed "[lawfully present](#)" for certain purposes of federal and state law, a designation which would have entitled them to receive some (although not all) federal, state, and local [public benefits and other assistance](#) under existing law and policy. They would also generally have been [eligible to work legally](#) in the United States pursuant to existing law and policy.

Texas and a number of other states [challenged](#) the proposed deferred action program, arguing, among other things, that the program violated the [Administrative Procedure Act](#) (APA) both procedurally and substantively because it was implemented through a policy memorandum, not notice-and-comment rulemaking, and exceeded the Executive's authority under the [Immigration and Nationality Act](#) (INA). After finding that the states had standing to challenge the deferred action program and that the program was subject to review by the courts, a [federal district court](#) barred its implementation on the grounds that it violated the APA procedurally. The U.S. Court of Appeals for the [Fifth Circuit affirmed](#) the district court by a vote of 2-1, and also found that the program violated the APA substantively. The Obama Administration appealed to the Supreme Court, which, [consistent with recent practice](#) in cases where the Justices are evenly divided, issued a [decision](#) that affirmed the Fifth Circuit's decision without any opinion or indicating of the Justices' voting alignment.

The High Court's decision sets no national precedent as to the permissibility of the challenged program. However, it leaves in place a [Fifth Circuit decision](#) that not only upheld a nationwide ban on the program's implementation, but also relies upon reasoning that could constrain certain executive actions as to immigration in the future by leaving them vulnerable to challenges in the Fifth Circuit. For example, the Fifth Circuit concluded that the [states have standing](#) to challenge the deferred action program based on the costs that Texas, in particular, would incur in issuing driver's licenses to aliens granted deferred action. It also took the view that granting deferred action is [not an unreviewable exercise](#) of enforcement discretion, but rather an "[affirmative action](#)" that "confers 'lawful presence' and associated

benefits on a class of . . . aliens.” In addition, the Fifth Circuit found that the challenged program is either [directly contrary to](#), or [constitutes an unreasonable interpretation](#) of, certain provisions of the INA, in part, because Congress could not have intended to delegate to the executive policy decisions of such “[economic and political magnitude](#)” as are involved in permitting up to five million aliens to remain and work in the United States. Such reasoning would seem to limit the Executive’s ability to grant deferred action, [parole in place](#), [extended voluntary departure](#), or other relief from removal which results in aliens being deemed lawfully present and obtaining work authorization to relatively large numbers of aliens by rendering such actions vulnerable to challenge in the Fifth Circuit.

### **Changes in Enforcement Priorities and Non-Removal of Aliens**

The *Texas* decision would not, however, appear to limit the Executive’s discretion to establish which aliens are priorities for removal, or to require the removal of particular aliens. To the contrary, both the district court and the Fifth Circuit emphasized that Texas and the other plaintiff-states [had not challenged](#) the Obama Administration’s enforcement priorities, or its “[mere failure to \(or decision not to\) prosecute and/or remove](#)” aliens. However, even had the states done so, the lower courts in *Texas* suggested that such a challenge would [likely be unavailing](#) as such actions [have historically been seen](#) to be within the Executive’s prosecutorial or enforcement discretion and, as such, exempt from judicial review.

A President who wanted to permit certain removable aliens to remain in the United States would thus appear to have considerable discretion to do so either by revising the Executive’s immigration enforcement priorities, or by declining to execute removal orders in individual cases. Such actions would be subject to certain constraints under existing law. For example, the Executive generally cannot not [impound](#) funds appropriated to it by Congress for the purpose of removing aliens from the United States (and there are also generally constraints on agencies’ ability to [transfer and reprogram](#) funds). In addition, certain statutes require the Executive to give priority to removing [specific categories of aliens](#), such as “[criminal aliens](#).” However, such constraints may not be particularly limiting, even if they were seen to be judicially enforceable, since the [Executive asserts](#) that Congress has recently appropriated only enough “resources” to remove approximately [400,000 aliens per year](#), and “criminal aliens” are generally not among those aliens whom the Executive has wanted to permit to remain in the United States.

Conversely, a President who wished to target additional or different classes of aliens for removal, or who adopted a policy of seeking and executing removal orders against as many aliens as possible, would also appear to have considerable ability to do so. There are certain statutory provisions that would bar the removal of individual aliens to particular countries, such as aliens whose “[life or freedom would be threatened](#)” in a country on account of the alien’s race, religion, nationality, political opinion, or membership in a particular social group. However, comparatively few of the approximately 11 million aliens who are currently unlawfully present in the United States are subject to such [mandatory \(as opposed to discretionary\)](#) forms of relief from removal.

### **Denying Entry to Particular Classes of Aliens**

The decision in *Texas* also did not purport to address, and would not appear to restrict, whatever authority the Executive might have to deny entry to particular aliens or classes of aliens not expressly targeted for exclusion by Congress. Certain classes of aliens are “[inadmissible](#)”—or subject to exclusion from the United States—on grounds expressly prescribed in the INA (e.g., aliens who have specified diseases or have committed particular offenses). However, [INA §212\(f\)](#) expressly contemplates the President excluding aliens on other grounds, not specified by Congress, insofar as it authorizes him to “suspend the entry of all aliens or any class of aliens,” or to “impose . . . any restrictions he may deem to be appropriate” upon aliens’ entry, whenever he determines that the aliens’ entry would be “detrimental to the interests of the United States.” (Other provisions of the INA similarly permit the Executive to exclude aliens on grounds that have not been expressly specified by Congress on the basis that their entry into the United States would have “potentially serious [adverse foreign policy consequences](#),” or is not in accordance with any “[limitations or exceptions](#) . . . the President may prescribe.”)

The exact scope of the Executive’s discretion under these provisions is somewhat unclear, as few challenges to executive actions under INA §212(f), in particular, have been litigated. However, as a general rule, whatever discretion the Executive has could more easily be exercised to exclude particular aliens or classes of aliens who are physically

outside the United States than to remove aliens who have already entered the country. Aliens outside the United States have generally not been seen to have a [constitutional right to be admitted](#) to the country (although their family members or other persons in the United States could potentially be seen to have [constitutional rights affected by the alien's exclusion](#)); and the [doctrine of consular nonreviewability](#) generally shields the denial of visas to aliens outside the United States from judicial review. In contrast, once aliens enter the United States—either lawfully or unlawfully—they may be legally entitled to [certain relief from removal](#), and they have greater ability to challenge their removal on constitutional or other grounds in administrative and/or judicial proceedings.

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