

Forbes

Did Scalia's Death Just Win The Texas Immigration Case For Obama?

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Justice Scalia, father of nine and one of the longest-serving Supreme Court justices in history, was found dead on Saturday at the age of 79 in a West Texas ranch. His death could spell the end for the long-time power balance on the Supreme Court of four conservative justices, four liberal justices and a moderate. But does it also spell the end for the states' arguments in *United States v. Texas*, the immigration case pending before the Court? Cato Institute legal associate Randal Meyer explains:

Jared Meyer: What is at stake in *Texas*? From what I understand, this goes far beyond immigration policy.

Randal Meyer: In *Texas*, the Court took up the federal government's appeal of a case that 26 states brought against President Obama's executive actions on immigration. They allege that President Obama exceeded his executive authority by granting temporary legal status of a sort to certain classes of immigrants under the Deferred Action for Parents of Americans (DAPA). Note that the lawsuit does not challenge the president's ability to establish policy priorities regarding whom to deport, which guidance was announced at the same time in November 2014. It also doesn't challenge the Deferred Action for Childhood Arrivals (DACA) from two years before.

Without a solid showing from the conservative wing of the Court, the decision in *U.S. v. Texas*, if made on constitutional grounds, would give the president unilateral authority to suspend and rewrite statutes at his pleasure.

Indeed, the Court added to the appeal the question of whether the president's Article II duty to "take care that the laws be faithfully executed" allow him to provide relief without congressional approval to certain classes of aliens illegally present in the country. The very reason for including this clause in the Constitution was to counter the practices of King James II, who

suspended enforcement of the England's religious penal laws to the ire of Parliament. Parliament amended the English Bill of Rights specifically to forbid that exercise of executive authority.

But even before getting to that constitutional question, there are important issues of standing (do the states have a legally cognizable beef?), administrative law (did Homeland Security comply with the Administrative Procedure Act in implementing DAPA?), and statutory interpretation (does the executive have discretion under the relevant immigration laws to do what he did?).

JM: [Is it possible that the Supreme Court will still rule against President Obama's executive actions on immigration?](#)

RM: Dan Stein on SCOTUSBlog [notes](#) that "Even those Justices on the Court who might agree with the president's views on immigration policy generally should appreciate the precedent-setting decision they would be making by allowing the president to run roughshod over the constitutional separation-of-powers doctrine." So there is some chance that at least some of the liberal justices will "switch sides" to reign in presidential lawlessness, as executive authority can be wielded by both parties. For example, the 2014 decision in *National Labor Relations Board v. Noel Canning*, which voided President Obama's so-called recess appointments, was unanimous.

But as of now, the four liberal justices are expected to side with the federal government and permit the president to unilaterally rewrite the law. If none of the conservatives join them—Chief Justice Roberts and Justice Kennedy are possible targets for the government's arguments—the best that can be expected is a 4-4 outcome, which creates no new law and affirms the lower court's decision that sustained the injunction against DAPA. But even if the Court decides to hold this case over until there's a ninth justice, that still means that the injunction stands into the next administration—at which point a Republican president would presumably scrap the plan, while a Democratic one would change it in some way that moots the case.

JM: Do you anticipate that President Obama will nominate another justice before his term is over? If so, what are the chances that justice will be confirmed by the Senate?

RM: If the president nominates a justice who is friendlier to his views on executive power over immigration enforcement, and that Justice is seated before the case is heard, the case would likely result in a 5-4 decision in the president's favor. But this is unlikely to happen because the Senate is in Republican hands and both the majority leader and Judiciary Committee chairman have announced that they have no intention of confirming any nominee until after the election.

JM: It seems that [Scalia's death does not necessarily spell the end for the states' arguments in U.S. v. Texas](#), but it certainly makes a meaningful decision on restraining presidential powers all the less likely without a liberal justice defying political expectations. But regardless, we're unlikely to find out the contours of executive power this term—by the end of June—because the Court will either affirm 4-4 without opinion or push the case into the next administration.

