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Rewriting law via executive action

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The only surprise from the Supreme Court's 4-4 deadlock regarding President Barack Obama's executive actions on immigration was that it took two months to announce. The conventional wisdom that *United States v. Texas* would be one of the handful of 4-4 ties in the post-Scalia era looked pretty strong coming out of oral argument.

Two months ago, after an hour and a half of presentations by four different lawyers, plus a huge masses of demonstrators outside the courthouse — more people than I've ever seen — most commentators expected an anticlimactic affirmance of the lower-court injunction by an equally divided court. Chief Justice John Roberts clearly wanted to avoid that, even though he personally didn't seem swayable on either the 26 states' standing to challenge the Deferred Action for Parents of American Citizens and Lawful Permanent Residents (DAPA) or the merits of the administrative- and statutory-law issues. He had successfully managed to avoid a tie in the Obamacare-contraceptive-mandate case, *Zubik v. Burwell* — which the unanimous court remanded to the lower courts so they could essentially facilitate a settlement — but there was no compromise possible here: Either the injunction stayed in place or would be vacated.

Still, Roberts probably prefers that this result was achieved without opinions that would no doubt have contained strong language on both sides. In that sense, the high-court vacancy was certainly felt in a way that depoliticizes the court itself even as it ratchets up the importance of judicial nominations as an issue in the presidential election. Still, this is yet another case where the practical result of having an eight-justice court is the same as it would have been with Justice Antonin Scalia's participation, with the injunction still in place. (And Obama was disingenuous in using this 4-4 split as an argument for why the Senate needs to act on his nomination; he knows well that Merrick Garland could not have been confirmed to hear *any* cases this term.)

In any event, that DAPA is blocked is a good thing for at least two reasons. First, Obama's executive action goes beyond his executive discretion in enforcing the immigration laws. As U.S. District Judge Andrew Hanen wrote back in February 2015, DAPA doesn't merely set deportation priorities, but engages in the "affirmative action" of granting benefits to a large class of illegal immigrants. The president himself had boasted that he "took an action to change the

law," contradicting his earlier protestations that he's not a king and undermining the government's argument that this was all mere policy guidance. That we came one vote from ratifying this royal lawmaking speaks volumes to the poverty of our constitutional jurisprudence.

But second, this result correctly throws the issue of immigration reform back to the political process. The next president will almost certainly rescind the program (if a Republican) or expand it (if a Democrat), as well as appointing the next justice to decide any resulting legal issues. And regardless, any lasting reform will have to be undertaken by Congress.

Moreover, even though we didn't get a real decision from the Supreme Court, the case raised key separation-of-powers issues that go beyond the immigration context. Even Justice Anthony Kennedy — no hard-core originalist — asked at oral argument about the government's limiting principle for its expansive theory of executive power, echoing past arguments over Obamacare.

With respect to immigration, the challenging states astutely boiled down the case to a matter of transforming deferred action — a non-binding decision not to seek removal — into a grant of legal status. That's the nub: Much as we would want an immigration system that makes sense, that allows peaceful people to be productive members of society, that's not what we have, and the president can't just use his pen and phone to fix it.

As Justice Robert Jackson put it in his canonical statement about constitutional structure in the 1952 Steel Seizure Case, courts must be last, not first, in giving up on the separation of powers. Just because we might like a policy or think that its costs outweigh its benefits, doesn't mean that it's constitutional.

In any case, DAPA is now dead and so is any chance for immigration legislation for the foreseeable future. That's why those of us favoring reform in this area counseled against the president's attempt to rewrite the law via executive action. This country's immigration system is a mess — not serving anyone's interests, let alone national security — but changing the law requires a new law.

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