CRS Reports & Analysis

Legal Sidebar

Frequently Asked Questions Regarding the Supreme Court's 4-4 Split on Immigration

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On June 23, 2016, an evenly divided Supreme Court issued a decision that, consistent with recent practice, affirms without any opinion or indication of the Justices' voting alignment an earlier decision of the U.S. Court of Appeals for the Fifth Circuit barring the Obama Administration from implementing two initiatives that would potentially have granted relief from removal to millions of aliens who entered or remained in the United States in violation of federal immigration law and lack legal immigration status [hereinafter referred to as "unlawfully present aliens"]. One of these initiatives is known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) because of the population to which it would have granted deferred action (one type of relief from removal) and work authorization. The other initiative involved an expansion of the Obama Administration's earlier Deferred Action for Childhood Arrivals (DACA) program, which grants relief from removal and work authorization to certain unlawfully present aliens who were brought to the United States as children and raised here. The initial DACA program itself was not at issue in the Fifth Circuit decision before by the High Court.

This Sidebar provides answers to frequently asked questions regarding the effects of the Supreme Court's decision. Earlier Sidebar postings discuss the Fifth Circuit's decision, and address the nationwide reach of the ban upon the implementation of DAPA and the DACA expansion that the Court upheld. A forthcoming Sidebar will explore in greater detail the implications of the Supreme Court's split decision for future executive actions as to immigration.

What does the Supreme Court's decision mean for implementation of DAPA and the DACA expansion?

The affirmance by an equally divided Supreme Court of the Fifth Circuit's decision in *United States v. Texas* means that a district court order barring implementation of DAPA and the DACA expansion remains in effect. This order involves a prohibitory preliminary injunction, a legal device used to bar a party to litigation from taking challenged actions *before* a court has an opportunity to hear and rule on the merits of the challenge to the actions. It is not a permanent injunction, and the district court in this case continues to hear arguments on the merits (although it should be noted that one factor considered by courts in determining whether to grant a preliminary injunction is the likelihood that the party seeking the injunction will prevail on the merits). Once the district court rules on the merits in *Texas*, a party could then appeal to the Fifth Circuit, with a party in that forum potentially seeking review from the Supreme Court—which could have a full complement of nine Justices, instead of its current eight Justices, by that point. This latter scenario underlies the suggestion some have raised that the High Court could ultimately uphold the challenged deferred action programs, or similar programs, in the future despite its June 23, 2016, decision.

Will would-be beneficiaries of DAPA and the DACA expansion be removed?

In their opinions, the lower courts in *Texas* have made clear that they do not view the preliminary injunction currently barring implementation of DAPA or the DACA expansion as affecting the Obama Administration's immigration enforcement priorities. These priorities include aliens who threaten national security or public safety, as well as recent illegal entrants; and eligibility for DAPA, in particular, would have been limited to aliens who are not among the Administration's enforcement priorities. After the Supreme Court's decision was issued, President Obama reiterated that would-be beneficiaries of DAPA and the DACA expansion "remain low priorities for enforcement." Aliens who

are low priorities for enforcement are generally unlikely to be placed in removal proceedings. However, these aliens remain subject to removal because they are unlawfully present, and the Executive has discretion in setting its enforcement priorities. (Congress has, however, enacted legislation which prescribes that the Executive is to give priority to the removal of "criminal aliens.")

What does this mean for "Dreamers" and DACA?

Many "Dreamers"—who take their name from the various Development, Relief, and Education for Alien Minors bills that have been introduced over the years to grant this population of unlawfully present aliens a pathway to citizenship—are eligible for the initial DACA program, implemented in 2012. The injunction in *Texas* does not purport to bar implementation of this program. Instead, it bars a proposed expansion of DACA to cover aliens who were 31 years of age or older at the time when DACA was implemented, or who were brought to the United States at later dates than were covered by the initial DACA program. The proposed DACA expansion would also have provided for eligible aliens to be granted deferred action and work authorization for three years, instead of two years. Insofar as many Dreamers qualify for the initial DACA program, they are unlikely to be directly and immediately affected by the Supreme Court's decision in *Texas* in any way other than having to apply for renewal of their grants of deferred action and work authorization every two years, instead of every three years. However, it is possible that the Fifth Circuit's decision on DAPA and the DACA expansion, which remains binding precedent within that jurisdiction, could prompt future legal challenges to the initial DACA program that could affect Dreamers more directly, as noted in an earlier Sidebar posting.

What about the parents of "Dreamers"?

Some advocates have called for the parents of Dreamers to be granted deferred action and work authorization. However, no such initiative has been implemented for them, as a group, to date. Dreamers are not U.S. citizens or lawful permanent residents (LPRs), so their parents would not have been eligible for DAPA, even had that initiative been implemented, *unless* the parents also have a child who is a U.S. citizen or LPR. Some parents of Dreamers could, however, be granted deferred action on an individual case-by-case basis, outside of any broader deferred action initiative. They could also potentially qualify for other relief from removal, as discussed below.

Are there other avenues for providing relief from removal to the aliens covered by DAPA and DACA?

Other statutory or non-statutory avenues of relief from removal may exist, particularly for individual aliens, on a case-by-case basis. The Immigration and Nationality Act (INA) provides for certain types of relief from removal that may be made available to individual aliens who qualify for them under the statutory and regulatory criteria. For example, Section 212(a)(9)(B)(v) of the INA permits the Executive to waive certain bars that can serve to block the adjustment to LPR status of aliens who are eligible for a family- or employment-based visa, but have been unlawfully present in the United States for more than 180 days. Similarly, Section 240A(b) of the INA permits the Executive to grant cancellation of removal and adjustment to LPR status to aliens who show that their removal would result in "exceptional and extremely unusual hardship" to a spouse, parent, or child who is a U.S. citizen or LPR. Other avenues of potential relief for individual aliens are not expressly noted in the INA, but have historically been seen to be within the prosecutorial or enforcement discretion of immigration authorities. These include: not initiating removal proceedings against aliens who are "low priorities" for removal; seeking to have removal proceedings administratively closed; and not executing final orders of removal.

Implementation of any large-scale, "class-based," relief programs, like DAPA, could, however, be limited insofar as the Fifth Circuit's decision in *Texas* remains precedent within that jurisdiction. In that decision, the Fifth Circuit took the view that the provisions of the INA which the Executive cited as the basis for DAPA, in particular, cannot reasonably be construed to authorize this program because Congress could not have intended to delegate to the Executive "a policy decision of such economic and political magnitude" as would be involved in permitting approximately 5 million unlawfully present aliens to remain in the United States indefinitely and work here. Similar logic could potentially be invoked if the Executive were to purport to grant parole in place or extended voluntary departure to a large group of aliens (e.g., potential DACA beneficiaries). Indeed, the preliminary injunction in *Texas* extends to "all aspects or phases [of the challenged programs] (including any and all changes)," although it is unclear what might be

encompassed by the term "changes."

Could a court in another jurisdiction issue an order requiring the implementation of the challenged programs?

It is unclear how a court in another jurisdiction, outside the Fifth Circuit, might come to issue an order that directly or effectively requires implementation of DAPA or the DACA expansion, notwithstanding the nationwide ban on their implementation affirmed by the Fifth Circuit. Cases where individual aliens seek relief from removal may be unlikely to result in such an outcome, as the aliens would have to show that their inability to obtain deferred action was in violation of some legal right or responsibility. However, in establishing DAPA and DACA, the Obama Administration declared that these programs "confer no substantive right," and the Executive retains the discretion to determine whether to deny deferred action in specific cases. In addition, with DAPA, the Administration has prescribed that aliens' eligibility for deferred action depends upon the alien not being an enforcement priority, something which has also been as within the Executive's discretion. The Supreme Court's 1999 decision in *Reno v. Arab-American Anti-Discrimination Committee* suggests that statutory provisions restricting judicial review of certain Executive determinations as to immigration may pose a further obstacle to any such challenge by an individual alien. The *Reno* Court rejected several aliens' claims that they had been improperly denied deferred action, in part, on the grounds that the Executive's decision to commence removal proceedings—and, thus, not to grant deferred action—is among the decisions that Congress intended to shield from judicial review. There recently have been cases where a court has ordered that removal proceedings be suspended so that the Executive could consider *whether* to grant deferred action to an individual alien. However, such action is distinguishable from ordering the Executive to grant deferred action. Limitations on who has standing to bring legal challenges in federal court could also restrict the ability of states that favor the implementation of DAPA and the DACA expansion to obtain a court order to this effect. (Injunctions requiring a party to take action are also more difficult to obtain than injunctions prohibiting a party from taking action.)

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