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## Analysts Find Restrictive Measures In New Trump Immigration Bill

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On January 19, 2019, Donald Trump proposed ending the government shutdown by trading new immigration measures in exchange for funding part of a border wall. A bill that puts the Trump proposal into legislative language has been introduced in the Senate. An analysis of the bill's provisions finds new restrictive measures on Deferred Action for Childhood Arrivals (DACA), Temporary Protected Status (TPS) and asylum that were not apparent from the president's remarks of January 19.

DACA: About a year ago, the Cato Institute's David Bier and I analyzed an earlier Senate bill featuring an administration proposal that it pledged would result in citizenship for 1.8 million Dreamers – individuals brought to the U.S. unlawfully as children by their parents. We found less than half, or about 877,000 would gain green cards under the bill, and “only approximately 587,650 should be expected to receive U.S. citizenship.” Fast-forward to the present and one finds a different White House proposal put into Senate bill language that also appears to overstate its generosity toward this population.

“The Senate bill that Senate Majority Leader Mitch McConnell introduced to implement his [Trump's] deal does not extend DACA but rather replaces it with a totally different program that will exclude untold thousands of Dreamers who would have been eligible under DACA,” notes David Bier in an analysis. “It is important to remember that all of these requirements are for less than 3 years of relief from deportation and work authorization, not a pathway to citizenship.” That means in addition to fewer people covered than the Senate bill from a year ago, the current legislation would not result in permanent residence or citizenship but 3 years of temporary protection (if the individuals qualify under the new bill's more restrictive criteria).

Bier explains why many of the current 700,000 individuals enrolled in DACA are unlikely to receive even the limited relief offered in the new Senate bill. The bill requires all DACA recipients to reapply under a higher evidentiary burden, pay double the application cost, and, in an “unprecedented” requirement in U.S. immigration law, repay any lawfully-obtained tax credits (the same provision applies to TPS recipients). Moreover, the bill utilizes the ideas behind the administration's controversial and yet-to-be approved “public charge rule,” which is likely to exclude many individuals who do not earn high salaries, and requires applicants to prove they will maintain an income of at least 125% of the poverty level.

The bill also includes provisions that exclude anyone without DACA from applying for the new form of relief. Those with DACA would be subject to deportation after 3 years (i.e., no renewals). Certain technical provisions in the bill appear designed to make it unlikely current

DACA recipients could ever gain permanent residence. “Commentators should not describe this bill as ‘extending DACA,’” writes Bier.

The Obama administration created DACA and the Trump administration announced the end of the program. However, as the *Washington Post* reported, “The Supreme Court on Tuesday weakened Trump’s hand, taking no action to review lower-court rulings that had blocked Trump from ending DACA. . . . That would probably keep the program in place until at least next year.”

DACA is likely to remain in effect for the time being and DACA participants are still allowed to have their applications renewed while litigation continues. Many individuals with DACA may believe it makes sense to wait and see what happens, potentially under a different administration, rather than support a new program that ends after 3 years and, from their perspective, contains several problematic features.

Temporary Protected Status: TPS is discretionary. In general, TPS protects an individual from deportation and grants work authorization. “The Secretary of Homeland Security may designate a foreign country for TPS due to conditions in the country that temporarily prevent the country’s nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately,” explains U.S. Citizenship and Immigration Services.

The Trump administration has used its discretion under the current statute to end TPS for approximately 300,000 people collectively from El Salvador, Honduras, Haiti, Nepal, Nicaragua and Sudan.

In his January 19, 2019, speech, Trump said, “Our proposal provides a three-year extension of Temporary Protected Status or TPS. This means that 300,000 immigrants whose protected status is facing expiration will now have three more years of certainty.” The reality in the new Senate bill is more complicated.

“The proposal fails to cover all TPS countries: The bill only protects TPS holders from Honduras, Nicaragua, El Salvador and Haiti,” said Jen Smyers, director of policy and advocacy for the immigration and refugee program of Church World Service, in an interview. “The individuals in those 4 countries get to apply for a 3-year, one-time temporary status at double the cost and under new standards.” Those new standards include, according to Smyers, “A burden of proof on immigrants to prove many unprovable things.” The bill also requires a TPS holder to maintain an income of at least 125% of the poverty level, which would strike many as an unusual requirement for a largely humanitarian program.

The Senate bill also makes a permanent, far-reaching change to immigration law not mentioned in the president’s January 19 speech. “The bill eliminates the availability of TPS for the future by fundamentally altering the current TPS statute,” explains Smyers. “It creates a requirement that a person has maintained lawful presence in the United States when his or her home country suffers, for example, a natural disaster or armed conflict. Current law does not require you maintain legal status to apply or benefit from TPS, which means this change would prevent any undocumented person in the future from ever applying or receiving Temporary Protected Status.”

The bill also contains a provision that could prevent anyone with TPS from being allowed to work in the United States. “TPS applicants would . . . have to prove – by clear and convincing

evidence – that their employment would not be ‘contrary to the national interest,’” notes David Bier. “This provision is bizarre since the purpose of authorizing their employment is that they need to be able to support themselves, which should be always in the national interest, but under the Trump administration, the government may not see it this way.”

Asylum: Someone brilliant likely once said that a common-sense idea can be twisted beyond recognition. The Obama administration set up the Central American Minors (CAM) program in 2014 to allow young people (and potentially their parents) from Honduras, Guatemala and El Salvador to apply for refugee protection in their home countries and be able to enter the United States legally as a refugee without a dangerous trek up to the U.S.-Mexico border. The program did not prevent individuals from applying for asylum in the United States, which is a right guaranteed under both U.S. and international law.

The Trump administration ended this modest program but it reappears in the Senate legislation under a different name. Moreover, its existence is used as a central mechanism to eliminate the ability of children from Central America to gain asylum by other means.

“This bill will bring an end to asylum for all minors from Honduras, El Salvador and Guatemala arriving at the U.S. border,” said Dree Collopy, a partner at Benach Collopy LLP, in an interview. “This historic change in asylum law would categorically block tens of thousands of children from ever applying for asylum.”

Collopy notes the only path to protection under the Senate bill for Central American children is a form of the Central American Minors program that is limited to 15,000 children each year, which she describes as a fraction of those in need. “There are no other nationality-based limits imposed on asylum seekers, and there shouldn't be,” said Collopy. “The purpose of asylum is to grant protection to those who need it, as determined by those who meet the definition of ‘refugee’ under U.S. law.”

The new program requires children to apply for protection at designated centers located outside the United States. Since almost all immigration processes takes months or years, this could require young people to remain near those they may fear could kill or harm them, according to Collopy and other asylum experts.

Collopy notes other humanitarian gaps in the Senate bill. For example, a young person must have a parent or guardian already in the United States to apply for asylum at one of the new centers. “It will not even be operational for 240 days, during which time these children will have no way to seek asylum,” she said.

The bill contains other permanent features to U.S. immigration law that will make it much more difficult for all individuals to gain asylum. The bill defines as potentially “frivolous” asylum claims in which individuals also seek employment. “Nearly everyone seeking asylum intends to work as their applications are processed,” said Collopy. “It is a necessity for survival – especially when the processing of asylum applications can take several years. Asylum law has never before excluded such individuals. Attorneys will not be allowed the opportunity to object or explain any concerns with the claim before a judge can enter a finding saying an asylum application is frivolous.”

In the final analysis, wise lawmakers should conclude that attempting to legislate new, far-reaching, even historic, changes to U.S. immigration policy in areas like asylum and Temporary

Protected Status in the middle of a government shutdown is an unlikely way to achieve a compromise. Deals involving numbers are much easier to achieve.

Confining the current discussion to money for border security and how many people to cover under DACA/Dreamer provisions and Temporary Protected Status, without large restrictive changes to those areas of the law, or to U.S. asylum law, would seem more likely to lead to an agreement.