



A Legal Victory on DACA Will Be Terrible Political News for Trump

Shikha Dalmia

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The Supreme Court will rule this month, possibly Thursday, on whether President Donald Trump acted legally in scrapping Deferred Action for Childhood Arrivals (DACA), an Obama-era program that gave some 650,000 eligible Dreamers a temporary reprieve from deportation, along with work permits. (Dreamers are folks who have grown up in this country as Americans even though they were brought here without proper authorization as minors.) Trump is likely to win the legal fight, but that's not necessarily good news for him since this will put him in a political trap of his own making: Having squandered the opportunity to pass legislation to give them legal status, he will anger his hardline restrictionist base if he fails to deport these people when he has the green light. If he does deport, he will anger many Americans.

The administration is claiming that it didn't act illegally in scrapping DACA but that President Barack Obama acted illegally in creating it. It is arguably right about the first and certainly wrong about the second, although it's possible that the Court's conservative majority will agree with it on both counts. So why is it wrong to claim that DACA is illegal?

DACA does *not* hand anyone permanent legal status; that would be illegal. All it does is give Dreamers who arrived in the U.S. before they turned 16 *and* were under 30 *and* had lived in the country crime-free *and* were either high school graduates *or* working toward that goal *or* were honorably discharged veterans a reprieve from deportation on a two-year renewable basis. In legal parlance, this means they've been paroled from enforcement action. Paroled immigrants are automatically entitled to Social Security numbers, work permits, and driver's licenses under provisions in the Immigration and Nationality Act (INA), which Congress included decades ago in an attempt to ensure these folks would not starve or go on the dole. Although there are around 5.5 million Dreamers in the country—about half of the total unauthorized immigrant population—only 800,000 availed themselves of DACA. That number has dropped to 625,000 over the last three years as some have either become ineligible or were too afraid to renew their status under this administration.

The reason that the Trump administration is wrong in claiming that DACA is illegal is that standing immigration law hands the president near-complete prosecutorial discretion to set enforcement priorities, as *The Volokh Conspiracy's Ilya Somin* and I have argued repeatedly. Moreover, Congress has stipulated no fixed penalties for any particular immigration infraction, so it's not like throwing Dreamers out of the country is the only enforcement action consistent with the rule of law, as restrictionists insist. A president can require unauthorized immigrants to cough up fines or choose from a whole host of other remedies. In fact, the Congressional

Research Service has pointed out that the INA is chock-full of huge grants of statutory authority to the president on immigration enforcement.

However, Cato Institute's Ilya Shapiro and Somin's *Volokh* co-blogger Josh Blackman disagree. They claim that setting immigration policy is Congress's, not the president's, job. Therefore creating DACA without congressional authorization—a goal they wholeheartedly support—means that the executive is assuming powers expressly delegated to Congress. Nor could Congress delegate them away even if it wanted to. Hence, they maintain that DACA is illegal.

The trouble with that position is that every president since at least 1956 has granted temporary immigration relief or parole to one or more groups—including, as the American Immigration Council, an immigration research and advocacy outfit, notes, to 600,000 Cubans in the 1960s and over 300,000 Southeast Asians in the '70s.

Shapiro and Blackman argue that in all past cases such deferrals have served as a "temporary bridge" for people whose permanent legalization Congress had already authorized or was in the process of authorizing. By contrast, Obama implemented DACA even though Congress had declined to pass an amnesty bill.

But The Federalist Society's Margaret Stock, an immigration lawyer and the recipient of the MacArthur Fellowship, said in an interview that this is not true either. She points to the Family Fairness program that was created by President Ronald Reagan in 1987 and expanded by President George H.W. Bush. This program handed temporary deportation relief to the unauthorized spouses and children of a class of immigrants who had received amnesty under the 1986 Immigration Reform and Control Act (IRCA). Without such relief, hundreds of thousands of families would have had to wait in line until the originally-eligible applicant had acquired permanent residency or citizenship and could sponsor them. In the interim, families would be in legal limbo, something that neither Reagan nor Bush wanted. Though Congress did ultimately pass a law legalizing these folks, Stock claims neither president could have been sure of that and there is no reason to believe that future Congresses won't legalize Dreamers.

If the Supreme Court buys the argument that DACA is illegal, it'll make it harder for future presidents to reinstate the program. But that does not mean that the Court has to rule against the administration. Why? Because prosecutorial discretion means that what one president giveth, another can taketh away.

Immigration advocates don't necessarily dispute this. They argue the issue is not that Trump eliminated the program, but rather how he went about it. He yanked it suddenly, without offering a notice and comment period as required by the Administrative Procedure Act.

Interestingly, Obama didn't submit DACA for notice and comment before implementing the program either. However, two wrongs don't make a right. Moreover, *The Atlantic's* Garrett Epps explains that the two moves are not analogous because before DACA, its beneficiaries had formed no "reliance interests" in the program but now they have. They and their loved ones, many of them American, stand to lose something now and should have been given an opportunity to weigh in on Trump's decision. More to the point, DACA recipients shared their personal information with the government, including names, addresses, and employers. That same information could now be used to deport them. If the Trump administration had put its decision up for feedback as required, it would have had to at least put in place safeguards barring

Immigration and Customs Enforcement (ICE) from using this information for deportation purposes.

It is possible that this argument will give conservative justices some pause. Chief Justice John Roberts expressed a lot of sympathy for Dreamers during past oral arguments. However, he also indicated that the administration was on a solid legal footing in eliminating the program and suggested that the Court would instruct the administration to minimize the hardship when doing so.

But the Supreme Court might be delivering Trump terrible political news by handing him a legal victory. Trump's restrictionist base will demand that he deport Dreamers en masse if there are no legal impediments to doing so. However, the brutal killing of George Floyd has sensitized the country to the excessive use of state violence against vulnerable minorities. A Politico/Morning Consult poll today showed that 69 percent of Americans who voted for Trump want Dreamers protected.

The general public has little appetite for scenes of ICE agents yanking away Dreamers, who have built lives in this country and committed no crime of their own, from their loved ones.