

NATIONAL REVIEW

The Supreme Court Should End DACA

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President Obama created an illegal policy for the executive branch to follow. President Trump decided to stop that policy. And in a bizarre case the Supreme Court will be hearing November 12, activist groups are suing to force the executive branch to *keep* acting illegally.

At the heart of the case is the Deferred Action for Childhood Arrivals (DACA) program, through which Obama made legal status and work authorization available to more than a million illegal-immigrant “Dreamers” who arrived in this country as minors. Trump decided to end the program and was, unsurprisingly, promptly sued.

If the year were 2016 and the lawsuit were about whether the Court itself should strike down DACA — instead of whether it should stop the executive from ending it — you could at least have a sliver of a debate. Federal immigration laws do grant the executive branch broad enforcement discretion, and the executive branch has used deferred action, albeit on a much narrower basis, to avoid deporting sensitive groups in the past.

However, even in that hypothetical case, the program would not have much of a chance before a conservative Court. A similar program for the illegal-immigrant parents of citizen children (“DAPA”) was enjoined in court and never implemented, and the [appeals-court ruling](#) against the program spelled out an argument that would obviously apply to DACA as well.

The appeals court pointed out that, as vague as U.S. immigration laws can be, they lay out an elaborate process for granting legal status to immigrants. In lieu of that system, the Obama administration’s interpretation of the law would allow the executive “to grant lawful presence and work authorization to any illegal alien in the United States — an untenable position in light of the [law’s] intricate system of immigration classifications and employment eligibility.”

The court also stressed that “previous deferred-action programs are not analogous to DAPA.” They were typically used to help people from a specific country in the wake of a disaster, or to help immigrants move from one legal status to another.

The Supreme Court confronted the DAPA case in the wake of Antonin Scalia’s death, split 4–4, and thereby let the appeals-court ruling be the final word. The Court has moved to the right since then, so the four votes supporting the appeals-court ruling likely represent the views of the new five-justice conservative majority.

And there’s a big difference between the old DAPA case and the new DACA one: In the previous case, the courts were asked to stop the executive branch from acting illegally, raising

the age-old quandary of how aggressive the judicial branch should be when it comes to reining in the abuses of the executive. This time, the courts are asked to *refuse to let the executive branch end the illegal program on its own*, on the idea that the administration failed to adequately explain and defend its reasons for doing so. Such *i*-dotting and *t*-crossing is required under the Administrative Procedures Act.

As Josh Blackman and Ilya Shapiro — who both support DACA as a policy — explained in a recent brief for the Cato Institute, the argument just doesn't hold water. Even if the short letter laying out the administration's objections wasn't a "model of clarity," it explained that DACA lacked "proper statutory authority" and suffered from the same problems that had gotten DAPA killed in court on "multiple legal grounds." The letter also alluded to a deeper constitutional problem: If current immigration law *does* allow the executive branch to change policy so drastically on its own, it's arguably an illegal delegation of Congress's lawmaking power, and the executive branch can and should avoid this problem by winding down the policy.

But most to the point, Blackman and Shapiro write that "the Administrative Procedure Act (APA) cannot be read to force the executive branch to continue implementing a policy that is contrary to law, regardless of how it chooses to rescind the policy."

Something like DACA will almost certainly be part of any long-term compromise on immigration policy. I'm sure most congressional Republicans would be happy to preserve it in exchange for a smarter immigration system. But the executive had no right to enact DACA on its own, and the courts have no right to stop the Trump administration from correcting course.