CITY JOURNAL

DACA in the Dock

Adam Freedman

November 12, 2019

The future of the Deferred Action for Childhood Arrivals (DACA) program comes before the Supreme Court today—more than two years after the Trump administration moved to terminate it. Regardless of the merits of DACA as policy, President Trump's decision to revoke the program ought to be legally unassailable. As a matter of law and logic, a unilateral executive action by one president can be undone by a future president. And yet, in *Department of Homeland Security* v. *Regents of the University of California*, and two related cases, the lower courts have blocked the president's action. In its review of these cases, the Supreme Court can—and should—swat away the too-clever-by-half arguments embraced by the courts below. But the justices should also take the opportunity to spell out a separation-of-powers standard that will prevent future sweeping executive actions like DACA.

The Obama administration created DACA in 2012 to grant temporary (but renewable) lawful status for the "Dreamers": illegal aliens who had been brought to the United States as children. The administration did not bother with the procedures normally required for agency rulemaking on the basis that DACA was merely an exercise of "prosecutorial discretion"—that is, the executive's inherent power to allocate finite enforcement resources. A subsequent effort to expand DACA and create a similar program, known as DAPA, for the parents of Dreamers, was blocked by the Fifth Circuit on the grounds that it exceeded the executive's powers. After an evenly divided Supreme Court affirmed the Fifth Circuit's decision, the Trump administration decided to terminate DACA because, among other things, it appeared likely that DACA would suffer the same fate as DAPA.

DACA's defenders were in a bind. Throughout the Fifth Circuit litigation, they had argued that matters squarely within an agency's discretion—like prosecutorial decisions—are exempt from judicial review under the Administrative Procedures Act. But under the same principles, the decision to rescind DACA should likewise be entirely within the administration's discretion. With logic worthy of a Scholastic medieval monk, the lower courts have ruled that Obama's *adoption* of DACA was a discretionary decision exempt from judicial review, but that Trump's *revocation* of DACA was not an exercise of discretion because the administration—laboring under the assumption that DACA is unlawful—did not think it had any choice in the matter. The courts then held that the administration's determination that DACA was likely to be struck down was "arbitrary and capricious," notwithstanding judicial precedent pointing to that conclusion.

The Supreme Court could reverse the lower courts on the narrow ground that the administration's decision to terminate DACA is a discretionary matter outside the scope of judicial review. But as several legal scholars have argued, the justices should go further and declare that, even if the decision to end DACA is reviewable, it is legally sound because DACA is an unlawful delegation of, or usurpation of, legislative power.

DACA is more than a mere expression of prosecutorial discretion. It is a full-fledged policy that gives recipients—some 800,000 so far—lawful status in the United States along with work authorization and access to various benefits such as health care and driver's licenses. It deals with matters already covered by federal statutes, principally the Immigration and Nationality Act, that can be amended only by act of Congress. It was intended to replicate the essential features of DREAM Act legislation that Congress had considered but failed to approve. Obama himself described DACA a "stopgap measure" to provide temporary relief while Congress came up with a "permanent fix"—implicitly conceding that the lawful status of the Dreamers is a matter of legislative policy.

Under the Constitution, "all legislative Powers herein granted shall be vested in a Congress of the United States." The Framers were acutely aware of the broad scope of legislative power: the ability to enact duties, rights, and rules of conduct for an entire nation. For that reason, they sought to channel legislative matters through a bicameral legislature representing various popular and sectional interests. The executive, by contrast, has no legislative authority, but rather the duty to ensure that "the Laws be faithfully executed."

Since the New Deal, the lines separating the three branches of government have blurred, with an expansive administrative state often promoting its own agenda and a Congress increasingly happy to let executive agencies make the hard choices inherent in policymaking. DACA is a case in point: Congress, having failed to address the plight of the Dreamers through legislation, has largely acquiesced in the executive's power grab. Indeed, a friend-of-the-court brief submitted by Democratic members of Congress and a bipartisan group of former members urges the Court to save DACA as a "permissible exercise of the broad discretion that Congress conferred on the executive branch to implement the federal immigration laws."

But if federal law grants the president "broad discretion" to make up his own rules for nearly 1 million Dreamers, then Congress has written itself out of immigration policy. Progressives should be equally concerned about the scope of this purported discretion. Under DACA's conception of prosecutorial discretion, there is no principled reason why Trump cannot direct the EPA to stop enforcing environmental laws against certain classes of industry, or to order the IRS to stop collecting capital-gains tax.

High Court precedent holds that Congress may not delegate power to the administration unless it provides, at minimum, an "intelligible principle" to guide the executive's discretion. Alas, it has been more than 80 years since the Court struck down a statute on separation-of-powers grounds. Recently, however, the Court's conservative bloc has shown a renewed interest in nondelegation. Earlier this year, in *Gundy* v. *United States*, Justice Neil Gorsuch argued that the Court should return to enforcing nondelegation principles under its more recent precedents holding that

administrative agencies are entitled to deference only when they are filling in "statutory gaps," but not when they seek to legislate on questions of deep "economic and political significance."

Though Gorsuch wrote in dissent in *Gundy*, he was joined by Chief Justice John Roberts and Justice Clarence Thomas, while Justice Samuel Alito wrote separately to express willingness to reconsider the nondelegation doctrine in a future case. The DACA controversy could be the right case for this reconsideration. Simply put: either Congress has unconstitutionally delegated control over immigration policy to the executive, or the Obama administration unconstitutionally seized Congress's power when it created DACA. Either way, the Trump administration was within its rights to end the program.