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Democracy Dies in Darkness



The case for keeping DACA

By **Ilya Somin**

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President Trump has apparently decided to end the Deferred Action for Childhood Arrivals program (DACA), an Obama administration initiative that suspended deportation of over 800,000 undocumented immigrants who came to the United States as children. DACA allows such migrants (often referred to as “dreamers,” after the Dream Act, which failed to pass Congress) to stay in the U.S. long as they arrived in the U.S. when they were 15 years old or younger, were 30 or younger when the program began in 2012, have not been convicted of any crimes as of the time they apply for the program, and have either graduated from a U.S. high school, are currently enrolled in school, or have served in the armed forces.

If news reports are correct, Trump has decided to end DACA, subject to a six-month delay. That would be a terrible decision. The program has strong moral and policy justifications. The legal arguments against DACA are more substantial, but do not justify ending it either.

I. Why Ending DACA is Harmful and Unjust.

Subjecting DACA recipients to deportation would inflict great harm for no good reason. Even the deportation of adult immigrants to Third World poverty and oppression causes grave harm and injustice. But the cruelty and suffering is likely to be even greater in the case of most DACA recipients. Many have never really known life in their country of origin. As House Speaker Paul D. Ryan puts it, “these are kids who know no other country, who were brought here by their parents and don’t know another home.” A recent study found that the average age of DACA participants at the time they arrived in the U.S. was only 6.5 years old. The likely effect of deporting one of them to Mexico or Haiti is only modestly less harsh than deporting an otherwise comparable native-born American there. Some 25 percent of DACA recipients have U.S.-citizen children. For obvious reasons, those children are likely to suffer considerable harm if their parents are subject to deportation.

The standard argument for deporting undocumented immigrants is that they deserve that fate because they violated the law. In my view, the vast majority of undocumented migrants were justified in acting illegally because of the dire circumstances they are fleeing, and the deeply unjust nature of the law in question. But I can understand the argument that deliberate violations of the law should never be tolerated, regardless of circumstance. That theory, however, has no bearing on DACA recipients. In nearly all cases, they either did not come to the U.S. by their own choice, were not legally responsible for their actions at the time (because of their status as minors), or both. You don’t have to be a philosopher or a legal theorist to realize that a seven year old has little choice but to go wherever her parents or guardians take her.

In addition to the great harm inflicted on DACA participants themselves, ending the program would also damage the U.S. economy. Most DACA recipients are productive members of society. Getting rid of them would impose substantial costs on employers and consumers. Not surprisingly, protection from deportation has enabled program participants to earn higher incomes, establish more businesses, and otherwise make more contributions to the economy than they likely would have without it (see also [here](#)).

Ending DACA does not necessarily mean that all participants in the program will be deported. Many might not be, depending on how lower-level federal officials exercise their discretion. But even the threat of deportation is likely to upend the lives of many recipients, forcing them underground and making it difficult for them to plan for the long run. In addition, DACA recipients are more vulnerable to targeting by a hostile administration than most other undocumented immigrants, because they have turned over extensive personal information to the government as part of the process of applying for the program.

II. Legal Objections to DACA.

In part because the moral and policy case for DACA is so strong, many opponents of the program tend to focus on legal considerations. DACA does not in fact change any law or legalize any previously banned activity without congressional approval. It merely suspends enforcement of a law against a particular category of migrants. Nonetheless, critics claim that it was illegal for the executive to adopt DACA without congressional authorization. I [addressed this issue in some detail](#) back when DACA was first announced in 2012. Here is an excerpt:

Some critics ... attack the president's decision ... on the grounds that he lacks legal authority to choose not to enforce the law in this case.

This criticism runs afoul of the reality that the federal government *already* chooses not to enforce its laws against the vast majority of those who violate them. Current federal criminal law is so expansive that the majority of Americans are [probably federal](#)

criminals. That includes whole categories of people who get away with violating federal law because the president and the Justice Department believe that going after them isn't worth the effort, and possibly morally dubious. For example, the feds almost never go after the hundreds of thousands of college students who are guilty of using illegal drugs in their dorms. The last three presidents of the United States all have reason to be grateful for this restraint.

[John] Yoo contends that there is a difference between using "prosecutorial discretion" to "choose priorities and prosecute cases that are the most important" and "refusing to enforce laws because of disagreements over policy." I don't think the distinction holds water. Policy considerations are inevitably among the criteria by which presidents and prosecutors "choose priorities" and decide which cases are "the most important." One reason the federal government has not launched a crackdown on illegal drug use in college dorms is precisely because they think it would be bad policy, and probably unjust to boot ...

Finally, Yoo also argues that prosecutorial discretion does not allow the president to refuse to enforce an "entire law," as opposed to merely doing so in specific cases. But Obama has not in fact refused to enforce the entire relevant law requiring deportation of illegal immigrants. He has simply chosen to do so with respect to people who fit certain specified criteria that the vast majority of illegal immigrants do not meet.

Most of the points I made in this 2016 article defending the legality of Obama's later DAPA policy (which was rescinded by Trump in June) also apply with even greater force to DACA, since the latter is a much more limited program. Wide-ranging presidential enforcement discretion is unavoidable in a system where there is so much federal law and so many violators that the executive can only target a small fraction of them. In the 2016 article, I explain why presidents have the power to exercise their discretion systematically as well as on a "case-by-case" basis. I also note there that the policy of giving DACA and DAPA recipients work permits actually does have congressional authorization, based on a 1986 law that specifically permits employment of aliens who are "authorized ... to be employed ... by the attorney general."

I do find it deeply troubling that so much depends on the discretion of the executive — discretion that is all too easily abused. But that problem cannot be addressed by ending DACA. Even if the policy ends, the executive will still have to make decisions about which lawbreakers he intends to target and which not, and he will still be able to go after only a small fraction of them.

The only way to really put an end to the danger of massive executive discretion is to cut back the scope of federal law, preferably limiting it to cases where there is a broad consensus that the activity in question should be illegal and that the federal government is the right entity to ban it. Then the president will have sufficient resources to target a high percentage of violators, and would be likely to suffer severe political backlash if he refuses to do so.

Even if you find the legal objections to DACA more compelling than I do, the right solution is not to end the program, but to get the congressional authorization for it that critics claim is essential. A good many congressional Republicans, including Ryan, support legislation that would do just that. So too do nearly all Democrats. Whether or not it is legally required, legislative authorization would have the great virtue of ending the state of affairs under which the fate of DACA recipients depends on the whim of whoever occupies the White House.

If Trump's objection to DACA is based on legal concerns, he could easily fix the problem by announcing that he supports congressional efforts to protect DACA recipients, thereby likely removing enough GOP opposition to enable Congress to pass a legislative DACA quickly. But if Trump both cancels executive DACA and continues to oppose legislation to protect dreamers, he cannot legitimately use legal arguments as a justification for his cruel policy.

UPDATE: Michael Ramsey responds to this post [here](#). He argues that DACA may be unconstitutional because it potentially goes beyond nonenforcement of a law and grants affirmative benefits without congressional authorization. However, the only such benefits he points to are work permits and the grant of “lawful presence.” As noted above, work permits do in fact have congressional authorization under a 1986 law. I addressed the lawful presence issue in [my 2016 article on DAPA](#) linked above. See also [this helpful discussion](#) by Marty Lederman. Despite the confusing terminology, “lawful presence” does not actually legalize any otherwise illegal conduct and does not prevent any undocumented migrant from being deported at any time the president might choose to order such deportation. And if the “lawful presence” issue is the true concern about DACA, Trump could easily have eliminated this part of the policy, while keeping the rest. Ramsey agrees that exemption from deportation – by far the most important part of the program – is within the legitimate discretion of the executive.

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