

BACKGROUND

No. 3269 | DECEMBER 4, 2017

Why Congress Should Not Legalize DACA: The Myths Surrounding the Program

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Abstract

Congress should not provide amnesty to the beneficiaries of the Deferred Action for Childhood Arrivals (DACA) program at this time. This effort is fundamentally flawed and would only encourage even more illegal immigration—just as the 1986 amnesty in the Immigration Reform and Control Act did. Congress should instead concentrate on enhancing immigration enforcement and border security to reduce the flow of illegal aliens into the country. The U.S. should not reward law breaking, incentivize criminal behavior, or provide benefits or preferential treatment to illegal aliens ahead of legal immigrants to the United States.

Providing amnesty to the beneficiaries of the Deferred Action for Childhood Arrivals (DACA) program—as well as other illegal aliens brought to the U.S. as minors—is an action that Congress should not consider at this time. This effort is fundamentally flawed and will only encourage even more illegal immigration, just as the 1986 amnesty in the Immigration Reform and Control Act did.¹ Congress should instead concentrate on enhancing immigration enforcement and border security to stem the flow of illegal aliens into the country and reduce the number of illegal aliens already in the interior of the U.S. by returning them to their home countries.

DACA was the unilateral executive program implemented by President Barack Obama in June 2012—without legal authority or the approval of Congress. It was, as Attorney General Jeff Sessions said when he announced the six-month wind down of the program on September 5, 2017, “an unconstitutional exercise of authority by the Executive Branch.”²

KEY POINTS

- Providing DACA amnesty would simply attract even more illegal immigration and would not solve the myriad of enforcement problems we have along our borders and in the interior of the country.
- Congress should not be in the business of rewarding law breaking, incentivizing criminal behavior, or providing benefits and preferential treatment to illegal aliens ahead of legal immigrants who have followed the rules.
- Future chain migration is a particularly onerous aspect of any proposed DACA amnesty, because certain types of visas are not only numerically unlimited but would end by rewarding the very persons who originally broke the law by bringing minor children into the U.S.
- Enhancing border security, strengthening immigration enforcement, and improving the legal immigration process will ensure that the trends in illegal immigration change for the better.
- Only after such reforms have had their desired effects should Congress discuss possible solutions for other illegal aliens who remain here.

This paper, in its entirety, can be found at <http://report.heritage.org/bg3269>

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Although Congress has plenary authority under the Constitution to establish the rules regarding immigration, the President has only such authority as is delegated to him by Congress.³ As the courts ruled in the federal lawsuit filed by 26 states against a similar program President Obama tried to implement in 2014—the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)—providing what amounts to administrative amnesty and access to government benefits such as work authorizations is beyond a President’s constitutional and statutory authority.⁴ Federal immigration law “flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorization.”⁵

The DACA program has been constantly portrayed as benefitting illegal aliens who were merely a few years old when their parents brought them into the U.S., leaving them unable to speak the language of their native countries and ignorant of these countries’ cultural norms. Therefore (the reasoning goes), it would be a hardship to return them to the countries where they were born. Barack Obama himself gave this rationale when he announced DACA, claiming that the recipients were “Americans in their heart [sic], in their minds, in every single way but one: on paper. They were brought to this country by their parents” as infants and face “deportation to a country that [they] know nothing about, with a language” they do not even speak.⁶

While this may be true of some small portion of the DACA population, it certainly is not true of all

of the aliens who received administrative amnesty under that program.

Qualifications for DACA

Illegal aliens were able to qualify for the DACA two-year amnesty (which could be renewed) as long as they came to the U.S. before their 16th birthday; they had continuously resided in the U.S. since June 15, 2007; and were under the age of 31 as of June 15, 2012, the date of the original Department of Homeland Security (DHS) memorandum on DACA.⁷ In 2014, as it announced the DAPA program, the Obama Administration also attempted to change the DACA program by adjusting the original entry date from 2007 to January 1, 2010, and to remove the upper age maximum of 31.⁸ This change was enjoined along with the DAPA program.

Although DACA required “continuous residence” in the U.S. five years prior to the 2012 implementation date, DHS did not consider trips to the aliens’ native countries as problematic, so long as those trips were “brief, casual, and innocent.”⁹ DACA also required that beneficiaries enroll in school, graduate from high school, obtain a GED certificate, or receive an honorable discharge from the military; have no conviction for a felony, significant misdemeanor, or three or more other misdemeanors; and not pose a threat to national security or public safety.¹⁰

However, the high school education (or its equivalent) requirement was apparently routinely waived by the Obama Administration as long as the illegal alien was enrolled in some kind of educational

1. See David Inserra, “Dreaming of Amnesty: Legalization Will Spur More Illegal Immigration,” Heritage Foundation *Issue Brief* No. 4777, October 30, 2017, <http://www.heritage.org/sites/default/files/2017-10/IB4777.pdf>.

2. News release, “Attorney General Sessions Delivers Remarks on DACA,” U.S. Department of Justice, Office of Public Affairs, September 5, 2017, <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca> (accessed November 18, 2017).

3. Art. I, Sec. 8, Cl. 4.

4. *Texas v. U.S.*, 86 F.Supp.3d 591 (S.D.TX 2015), affirmed 809 F.3d 134 (5th Cir. 2015), affirmed by equally divided court, 136 S.Ct. 2271 (2016).

5. *Texas v. U.S.*, 809 F.3d 134, 184.

6. “Transcript of Obama’s Speech on Immigration Policy,” *The New York Times*, June 15, 2012, <http://www.nytimes.com/2012/06/16/us/transcript-of-obamas-speech-on-immigration-policy.html> (accessed November 18, 2017).

7. Department of Homeland Security, U.S. Citizenship and Immigration Services, “How Do I Request Consideration for Deferred Action for Childhood Arrivals?” https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Deferred%20Action%20for%20Childhood%20Arrivals/daca_hdi.pdf (accessed November 18, 2017).

8. Jeh Johnson, “Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children and With Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents,” Department of Homeland Security *Memorandum*, November 20, 2014, https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf (accessed November 18, 2017).

9. Department of Homeland Security, “How Do I Request Consideration?”

10. *Ibid.*

program.¹¹ Only 49 percent of DACA recipients had attained a high school education—despite the fact that a majority of DACA beneficiaries were adults.¹²

How thorough was DHS vetting of DACA applicants to ensure they did not have criminal records? In February 2017 after the arrest of DACA beneficiary Daniel Ramirez-Medina for gang membership, DHS admitted that at least 1,500 DACA beneficiaries had their eligibility terminated “due to a criminal conviction, gang affiliation, or a criminal conviction related to gang affiliation.”¹³ By August 2017, that number had surged to 2,139.¹⁴

While that number may seem low in comparison to the number of DACA beneficiaries, “it confirms that the DACA screening process was woefully inadequate,” according to Jessica M. Vaughan of the Center for Immigration Studies. Apparently, “only a handful of the applicants were ever interviewed, and only rarely was the information on the application ever verified.”¹⁵ In fact, based on documents obtained by Judicial Watch through the Freedom of Information Act, it is apparent that the Obama Administration moved to a “lean and light” system of background checks in which only a few randomly selected DACA applicants were ever actually investigated.¹⁶

Additionally, DACA only excluded individuals for *convictions* for felonies and “significant” misdemeanors. Thus, even if a DHS background investigation—which apparently was almost never done—produced substantial evidence that an illegal alien may have committed multiple crimes to obtain employment or

government benefits, such as falsifying a social security number or forging identity documents; perjuring themselves on I–9 employment forms; engaging in identity theft; obtaining a driver’s license illegally; or registering to vote in violation of state and federal law, the alien would still be eligible for DACA *unless* DHS referred the violation to state or federal prosecutors *and* the alien was convicted.

As one commenter said, this gave a “total pass” to “Dreamer gang-bangers, Dreamer identity thieves, Dreamer sexual predators, Dreamers who haven’t paid income taxes, and Dreamers committing a wide range of other crimes”—as long as they had not actually been convicted.¹⁷

Knowing the Language and the Culture

DACA had no requirement of English fluency. In fact, the original application requested applicants to answer whether they could “read and understand English” and therefore read and understood the form or whether all of the questions, instructions, and answers on the form were “read” to the alien by a translator “in a language in which [the applicant is] fluent.”¹⁸

According to one estimate by a pro-immigration organization, almost 10 percent of DACA-eligible individuals spoke no English or only “a little,” while that number rose to 17 percent under the expanded DACA program that was never implemented after the courts enjoined it. Sixteen percent claimed they spoke English “well” and 75 percent claimed they spoke English “well or only English,” although 93

11. See U.S. Citizenship and Immigration Services, “Frequently Asked Questions: DHS DACA FAQs,” <https://www.uscis.gov/archive/frequently-asked-questions> (accessed November 21, 2017).

12. Steven Camarota, “Time to End DACA,” *National Review Online*, August 3, 2017,

<http://www.nationalreview.com/article/450080/obamas-illegal-amnesty-trump-should-end-daca> (accessed November 18, 2017).

13. News release, “DHS Statement on Arrest of Alien Gang Member in Washington,” Department of Homeland Security, Office of the Press Secretary, February 15, 2017, <https://www.dhs.gov/news/2017/02/15/dhs-statement-arrest-admitted-alien-gang-member-washington> (accessed November 18, 2017).

14. Paul Bedard, “Feds: 30 Percent Surge in Illegals Losing DACA Freedom for Crimes, Gang Violence,” *Washington Examiner*, August 29, 2017, <http://www.washingtonexaminer.com/feds-30-surge-in-illegals-losing-daca-freedom-for-crimes-gang-violence/article/2632820> (accessed November 18, 2017).

15. *Ibid.*

16. David Inserra, “Homeland Security Abandons Amnesty Background Checks,” *Daily Signal*, June 20, 2013, <http://dailysignal.com/2013/06/20/homeland-security-abandons-amnesty-background-checks> (accessed November 18, 2017).

17. Ronald W. Mortensen, “DACA: Granting Amnesty to Dreamers Committing Crimes While Abandoning Their Victims,” Center for Immigration Studies, March 10, 2017, <https://cis.org/Mortensen/DACA-Granting-Amnesty-Dreamers-Committing-Crimes-While-Abandoning-Their-Victims> (accessed November 18, 2017).

18. U.S. Citizenship and Immigration Services, “Form I–821D,” Part 4, Sections 1.a and 1.b, https://www.pdfFiller.com/en/project/144829435.htm?f_hash=17608c&reload=true (accessed November 18, 2017).

percent lived in a household in which a language other than English was “sometimes or always spoken.”¹⁹

However, the 17 percent of functionally illiterate in English DACA beneficiaries estimate is probably on the low end. Aliens tend to overstate their English ability:

When Hispanic immigrants, who make up some 80 to 90 percent of DACA recipients recently took an objective test of English literacy, 44 percent of those who said they speak English “well” or “very well” actually scored “below basic”—a level sometimes described as functional illiteracy.²⁰

Thus, “based on test-takers with the required age and residency,” the Center for Immigration Studies estimates that “perhaps 24 percent of the DACA-eligible population fall into the functionally illiterate category and another 46 percent have only ‘basic’ English ability.”²¹

As a result, aliens eligible for DACA included those who:

- May have had up to a decade of schooling in their home countries, making them fluent in their native language (and deeply inculcated into their home country’s culture);
- May have returned to their native countries to visit family or for other reasons; and

- May have extremely limited or nonexistent English fluency.²²

This is a far cry from the image of DACA beneficiaries as all children who are “Americans in their minds” and do not speak the language of—and know nothing about the culture of—their native countries. In fact, it seems that a significant percentage of DACA beneficiaries may have had serious limitations on their education, experience, and fluency that negatively affected their ability to function in American society. While 82 percent of DACA-eligible aliens were adults, their average income was only \$13,200,²³ placing them barely above the 2017 poverty level of \$12,060.²⁴ Providing amnesty to low-skilled, low-educated aliens with marginal English language ability would impose large fiscal costs on American taxpayers resulting from increased government payouts and benefits.²⁵

The Size of the DACA Population

Although 800,000 illegal aliens originally received benefits under the DACA program, that number was down to 690,000 beneficiaries by the time of the September 5, 2017, announcement that the Trump Administration was ending DACA.²⁶ It is estimated, however, that almost 1.26 million illegal aliens were eligible for the original DACA program and another 259,000 would have been added by the changes the Obama Administration attempted to implement in 2014.²⁷

Thus, any bill passed by Congress that provides amnesty to all illegal aliens who were eligible for the

19. Donald Kerwin and Robert Warren, “Potential Beneficiaries of the Obama Administration’s Executive Action Programs Deeply Embedded in U.S. Society,” *Journal on Migration and Human Security*, Center for Migration Studies, Vol. 4, No. 1 (2016), <http://jmhs.cmsny.org/index.php/jmhs/article/view/59> (accessed November 18, 2017).

20. Camarota, “Time to End DACA,” and Jason Richwine, “Immigrant Literacy: Self-Assessment vs. Reality,” Center for Immigration Studies, June 21, 2017, <https://cis.org/Immigrant-Literacy-Self-Assessment-vs-Reality> (accessed November 18, 2017).

21. Ibid.

22. Mexico, which has consistently provided the largest number of illegal aliens in the U.S., provides primary and secondary education for grades one to 12, with an additional one year of free preschool education mandatory nationwide. Jessica Magaziner, “Education in Mexico,” *World Education News + Review*, August 16, 2016, <https://wenr.wes.org/2016/08/education-in-mexico> (accessed November 18, 2017).

23. Kerwin and Warren, “Potential Beneficiaries.”

24. U.S. Department of Health and Human Services, “Poverty Guidelines,” <https://aspe.hhs.gov/poverty-guidelines> (accessed November 18, 2017).

25. See Robert Rector and Jason Richwine, “The Fiscal Cost of Unlawful Immigrants and Amnesty to the U.S. Taxpayer,” Heritage Foundation *Special Report* No. 133, May 6, 2013, http://thf_media.s3.amazonaws.com/2013/pdf/sr133.pdf.

26. “690,000 Unauthorized Immigrants Are Currently Enrolled in DACA,” Pew Research Center, September 25, 2017, http://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/ft_17-09-21_daca_status/ (accessed November 18, 2017). Of the original 800,000, 70,000 did not renew, and 40,000 obtained a green card.

27. Kerwin and Warren, “Potential Beneficiaries.”

original DACA program and the expanded DACA program could apply to over 1.5 million illegal aliens, about 14 percent of the illegal alien population in the U.S. And that does not take into account the large number of extended family members that a newly minted DACA citizen could then sponsor. The last such amnesty authorized by Congress in the 1986 Immigration Reform and Control Act provided citizenship to 2.7 million illegal aliens. The House committee that crafted the legislation claimed (incorrectly) that a “one-time legalization program” was necessary to “an effective enforcement program.”²⁸

Yet by 1995, there were already another 5.7 million illegal aliens in the U.S.²⁹ The 1986 amnesty did not stop illegal immigration; analysis of government reports on illegal immigration after the amnesty found that it may have actually increased illegal immigration as aliens entered the U.S. illegally to join their newly legalized friends and family.³⁰ The amnesty may also have attracted more illegal aliens who thought that if the federal government had provided amnesty once, it might do so again.

Congressional Action and Chain Migration

Any DACA amnesty bill providing legal status as a permanent resident alien or citizenship that in any way expands the population of eligible aliens under President Obama’s original DACA program by, for example, raising the age of minors who can qualify to receive amnesty, could significantly increase the number of illegal aliens who will benefit from the bill. Furthermore, unless Congress amends the sponsorship rules under federal immigration law, providing lawful status to millions of so-called Dreamers will

also allow the extended families of those aliens to benefit from illegal conduct.

Under the Immigration and Nationality Act, U.S. citizens, including naturalized citizens, can sponsor their spouses, unmarried children under the age of 21, adopted orphans, and their parents to become citizens. The number of these sponsored immigrants is not limited each fiscal year.³¹ They can also sponsor married and unmarried sons and daughters and their spouses and children, as well as their brothers and sisters and their spouses and minor children. However, there are limits on the annual numbers of such sibling and in-law visas. Permanent residents can sponsor spouses, minor children, and unmarried sons and daughters, although this number is limited on a yearly basis.³²

The U.S. accepts about one million legal immigrants every year. According to a recent study, of the 33 million legal immigrants admitted to the U.S. over the past 35 years, “about 20 million were chain migration immigrants (61 percent).”³³ The average immigrant sponsored 3.45 additional immigrants, and the largest number of such chain or family-based migrants are “spouses and parents of naturalized citizens because these categories are unlimited by law.”³⁴

For DACA beneficiaries, however, it is likely that the number would be much higher. This is because, according to an analysis by DHS of the first year of the DACA program, 76 percent of the 514,800 DACA beneficiaries were from Mexico,³⁵ and Mexican immigrants sponsor an average of 6.38 additional legal immigrants—the highest rate of any nationality for chain migration. Therefore, providing citizenship to DACA beneficiaries could vastly increase the

28. Report to Accompany H.R. 3810 of the 99th Congress, the Immigration Reform and Control Act of 1986, Report 99-682 (Part 1), Committee on the Judiciary, U.S. House of Representatives, July 16, 1986, reprinted in 1986 U.S. Code Cong. & Ad. News 5649, 5653, 1986 WL 31950.

29. Jens Manuel Krogstad, Jeffrey S. Passel, and D’Vera Cohn, “5 Facts About Illegal Immigration in the U.S.,” Pew Research Center, April 27, 2017, <http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/> (accessed November 18, 2017).

30. “New INS Report,” Center for Immigration Studies, October 12, 2000, <https://cis.org/New-INS-Report> (accessed November 18, 2017).

31. Department of State, Bureau of Consular Affairs, “Family-Based Immigrant Visas,” <https://travel.state.gov/content/visas/en/immigrate/family/family-preference.html#1> (accessed November 18, 2017).

32. *Ibid.*

33. Jessica Vaughan, “Immigration Multipliers: Trends in Chain Migration,” Center for Immigration Studies, September 2017, https://cis.org/sites/default/files/2017-09/vaughan-chain-migration_1.pdf (accessed November 18, 2017).

34. *Ibid.*

35. Department of Homeland Security, U.S. Citizenship and Immigration Services, “Characteristics of Individuals Requesting and Approved for Deferred Action for Childhood Arrivals (DACA),” <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Deferred%20Action%20for%20Childhood%20Arrivals/USCIS-DACA-Characteristics-Data-2014-7-10.pdf> (accessed November 18, 2017).

number of aliens who eventually receive citizenship. That would include the parents of the DACA beneficiary—who were responsible for violating U.S. immigration laws in the first place by entering the U.S. illegally with their minor child.

No congressional bill dealing with DACA beneficiaries should allow such sponsorship since it would allow illegal aliens to benefit from their own illegal conduct.

Conclusion

Providing amnesty would simply attract even more illegal immigration and would not solve the myriad of enforcement problems we have along our borders and in the interior of the country. The federal government, with the assistance and help of state and local governments, should concentrate on enforcing existing immigration laws to reduce the illegal alien population in the U.S. and stem entry into the country. Until those goals are accomplished, it is premature to consider any DACA-type bill.

Among the steps that should be taken are:

- **Enhancing border security.** The U.S. southern border would benefit from judicious increases in Customs and Border Protection agents; additional technological assets and infrastructure, including drones, cameras, sensors, and various barriers where appropriate; and more facilities to process (and turn back) incoming illegal immigrants or asylum seekers.
- **Strengthening immigration enforcement.** U.S. laws must be enforced if additional illegal immigration is to be deterred. The U.S. should judiciously increase the number of Immigration and Customs Enforcement (ICE) agents; expand the 287(g) program that trains and deputizes state and local law enforcement officers to assist ICE in enforcing U.S. immigration laws; curb sanctuary cities; expedite removals of illegal immigrants caught at U.S. borders; streamline the removal process; increase resources to immigration courts; ensure that aliens show up at

court hearings by maximizing the use of detention facilities and the expanded use of cost-effective alternatives to detention (such as GPS-tracking anklets); and increase enforcement against employers who knowingly hire illegal aliens.

- **Improving the legal immigration process.** Legal immigration is a distinct issue from illegal entry and overstays—and the two should not be conflated. Through legal immigration, the U.S. can welcome individuals from across the globe who seek to enter this nation—and do so in a way that serves U.S. security and economic interests. These interests are best served through highly skilled immigration and guest-worker programs that are truly temporary in nature.³⁶

Improving enforcement and the legal immigration system will ensure that the trends in illegal immigration change for the better. Only after such reforms have had the desired effects should Congress discuss possible solutions for other illegal aliens who remain here.

In any event, however, consideration of DACA should not be based on mythical views of the illegal alien population that received benefits under President Obama's program, but on a realistic, targeted assessment of the actual make-up of that population, including factors such as English-language fluency, involvement in criminal activity, educational background, tenure in the U.S., and extent of contacts in their native countries, among others.

The bottom line is that Congress should not be in the business of rewarding law breaking, incentivizing criminal behavior, or providing benefits and preferential treatment to illegal aliens ahead of legal immigrants who have followed the rules to come to the United States and become citizens of this great republic.

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36. See Inserra, "Dreaming of Amnesty."