

DEFERRED ACTION ON CHILDHOOD ARRIVALS IN REVIEW

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Now, more than six months into President Obama's Deferred Action for Childhood Arrivals (DACA) program the impact of this alteration to the US immigration system is starting to take shape. The program itself is amorphous and politically charged, but it has attracted an important number of applicants. While interest in the program appears to be waning, the DACA program offers a unique insight into politics and realities of reforming the current immigration system and addressing the undocumented population in the United States. Understanding the DACA program requires asking several questions, including: What exactly is being offered and to whom? How are individuals reacting to this program? How is the government responding to these applicants? What are the near- and mid-term implications for this program? What are the political consequences for immigration reform? However, perhaps the most important question of all is: What will happen to the people who participate in this program over the long-term?

The logical point of departure is first to understand what DACA is as a legal instrument within larger US immigration policy. DACA is an administrative order presumably issued under the President's discretionary power to enforce national immigration laws. The program offers a short-term and temporary alternative to the DREAM Act which has stalled in Congress. DACA essentially provides undocumented youth protection from deportation and the ability to work legally in the US for a two-year period. The order, issued on June 15, 2012 by Secretary of Homeland Security, Janet Napolitano, allows the federal agencies that enforce immigration law, namely US Immigration and Customs Enforcement (ICE), US Customs and Border Protection (CBP), and US Citizenship and Immigration Services (USCIS), to exercise "prosecutorial discretion" with regard to a certain class of undocumented people.¹ In essence, the order intends to prevent the deportation of "low priority individuals." The memo defines these individuals as currently undocumented immigrants who came to US as children. The legal reasoning put forth in the memo is that these young people "lacked the intent to violate the law" and as such should not be held to same standard as other undocumented individuals.

The prioritization (or de-prioritization in this case) of classes of immigrants reflects a relatively recent trend in immigration enforcement. Despite massive increases in enforcement spending² the government has tried focusing enforcement efforts in order to reduce costs while addressing major political concerns, namely the association of immigrants with crime. In 2008 a pilot program, Secure Communities, was launched under President George W. Bush to enlist local law enforcement in referring immigrant detainees to federal authorities based on the type of crime for which they were being held. The program was expanded under President

¹ Napolitano, Janet. US Department of Homeland Security. Memorandum. June 15, 2012. <<http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>> Consulted 1/7/13

² Meissner, Dorris et al. *Immigration Enforcement in the United States: Rise of a Formidable Machinery*. Migration Policy Institute. January 2013.

Barak Obama and is currently activated in 97% of US jurisdictions³. By parsing out criminals from the larger undocumented immigrant population, the stage was set to address policy to individuals at the other end of the spectrum. Deferred Action is just that. People under 31, who arrived in the US before they were 16, and have resided permanently in the US for the past five years are potentially eligible for DACA. DACA focuses on young people who are educating themselves or who have served in the military. Thus, while Secure Communities seeks to single out convicted or suspected criminals, DACA seeks to separate out young people deemed to be positive contributors to society.

The educational requirement of the DACA program reflects the language in the DREAM Act. This proposed legislation, sponsored by Senator Orin Hatch (R) and Senator Richard Durbin (D), would offer a conditional path to citizenship for undocumented people who are in, or have completed, college or two years of military service. DACA, on the other hand, only requires applicants to be “in school.” By relaxing the educational requirement, DACA reaches a much younger cohort than the DREAM Act because it includes students in high school and junior high as well as those in the process of obtaining their General Education Degree (GED). However, DACA also defines “in school” as attending “an education, literacy, or career training program (including vocational training).”⁴ This rather vague requirement reaches a much broader population and may pose problems with respect to fraud. The USCIS will judge any outlying institutions on their “demonstrated effectiveness” and places the burden of proof on the applicant. Another interesting twist is that only current enrollment is required to apply and thus far there has been no indication of what will be expected of DACA applicants with respect to graduation or completion of these degrees. One concern is that an important fraction of DACA applicants may not graduate from these programs. According to a study by the National Center for Education Statistics, 31.3% of Hispanics born outside of the US were classified as drop-outs in 2009.⁵ The focus on Hispanic students is warranted due to the overwhelming Latino participation in DACA.

According to government figures, 407,899 applications for deferred action have been received as of January 15, 2013.⁶ The same data set shows that at least⁷ 85% of these applicants are from Latin American countries of origin and 71% are from Mexico. This is not surprising as the Pew Research Hispanic Center estimates that 75% of undocumented

³ ICE. Activated Jurisdictions. <<http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>> Consulted 1/7/13

⁴ USCIS. DACA - Frequently Asked Questions. <<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD#education>> Consulted 1/7/13

⁵ Institute of Educational Sciences. National Center for Education Statistics. *Trends in High School Dropout and Completion Rates in the United States: 1972–2009 Compendium Report*. October 2011.

⁶ USCIS. Data on Individual Applications and Petitions. *Deferred Action on Childhood Arrivals Process*. January 15, 2013.

<<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=1b52d725f5501310VgnVCM100000082ca60aRCRD&vgnnextchannel=1b52d725f5501310VgnVCM100000082ca60aRCRD>> Consulted 1/8/13

⁷ The breakdown of numbers only lists the top ten countries and thus smaller Latin American populations fall into the “other” category.

immigrants are Hispanic and approximately 7 million (59%) are from Mexico.⁸ These figures bear out the predications made by the Immigration Policy Center about the nationalities of potential DACA recipients.⁹ This and other studies estimate the potential pool of DACA applicants at around 1.4 million. Of this estimated pool, some 69% may be currently eligible, while the remaining 31% may become eligible as they meet the minimum age requirement of 15. The heavy presence of Latinos in the undocumented population and the DACA process may have a significant impact on the political consequences of DACA and will be discussed in more detail below. Thus, in practice, the Deferred Action program appears to be geared toward young, undocumented Latinos who are either currently enrolled in some form of educational or vocational training or have graduated or who have served in the military. The vast majority of potential applicants will likely rely on meeting educational requirements as the number of non-citizens serving in the military was only 13,752 in 2009¹⁰ and the undocumented fraction is likely much smaller still. This is not to mention that 10 USC. § 504 bars individuals not legally present in the country from serving in the military unless authorized by the Secretary of State when deemed vital to the national interest. Presently no such order is in effect.

The reaction to President Obama's Deferred Action program has been nuanced. When it was first announced in June, the presidential campaign was being hotly contested. Some polls¹¹ at that time put Obama ahead of his rival, Mitt Romney, by only one point, well within the margin of error. Immigrant activists were hesitant to endorse participating in the program for fear of changes made by a potential Romney administration. On October 2, Mitt Romney made a statement to the Denver Post that he would not invalidate existing DACA visas if he became President.¹² However, because DACA does not actually grant visas, Romney's campaign was forced to clarify his position further. The next day Romney stated that he would honor deferred actions already granted but would not issue any more after he took office.¹³ These statements correspond with a significant tightening in the presidential race. During the first two-and-a-half months of the program, namely August 15 through October 30, DACA applications rose steadily. However, DACA applications fell off sharply in the month of November despite Obama's reelection. Graph 1 illustrates these concurrent trends.

⁸ Passel, Jeffrey and Cohn, D'Vera. *A Portrait of Unauthorized Immigrants in the United States*. Pew Reserach Hispanic Center. April 14, 2009.

⁹ Immigration Policy Center. *Who And Where The Dreamers Are: A Demographic Profile of Immigrants Who Might Benefit from the Obama Administration's Deferred Action Initiative*. July 2012.

¹⁰ Stock, Margaret D. *Essential to the Fight: Immigrants in the Military Eight Years After 9/11*. Immigration Policy Center Special Report. November 2009.

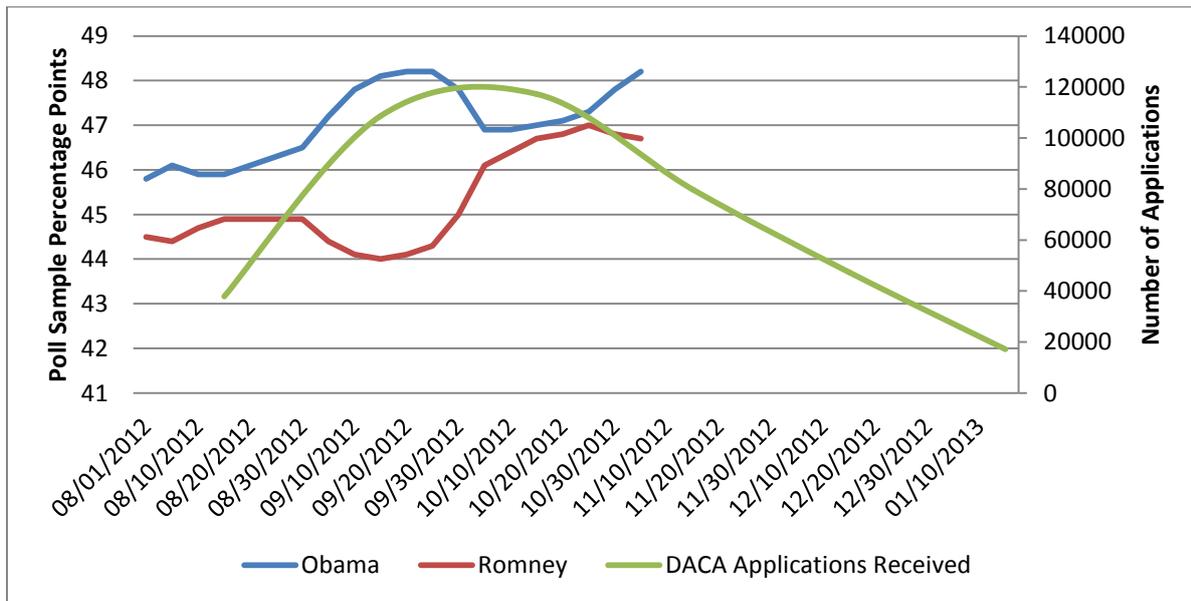
¹¹ Ipsos Poll. June 2012. Reuters.

<http://www.realclearpolitics.com/docs/2012/reuters_ipsos_0612.pdf> Consulted 1/8/13

¹² Sherry, Allison. "Mitt Romney would honor Obama administration's illegal immigrant work permits." The Denver Post. October 1, 2012.

¹³ Borchers, Callum. "Mitt Romney would honor deportation exemptions issued to young illegal immigrants under President Obama's executive action but would not grant new ones." The Boston Globe. October 2, 2012.

Graph 1: Number of DACA Applications Received by USCIS & Poll Sample Numbers (Aug – Jan 2013)



Source: USCIS. Data on Individual Applications and Petitions. *Deferred Action on Childhood Arrivals Process*. December 14, 2012 & HuffPost Elections Dashboard < <http://elections.huffingtonpost.com/pollster/2012-general-election-romney-vs-obama#!>>.

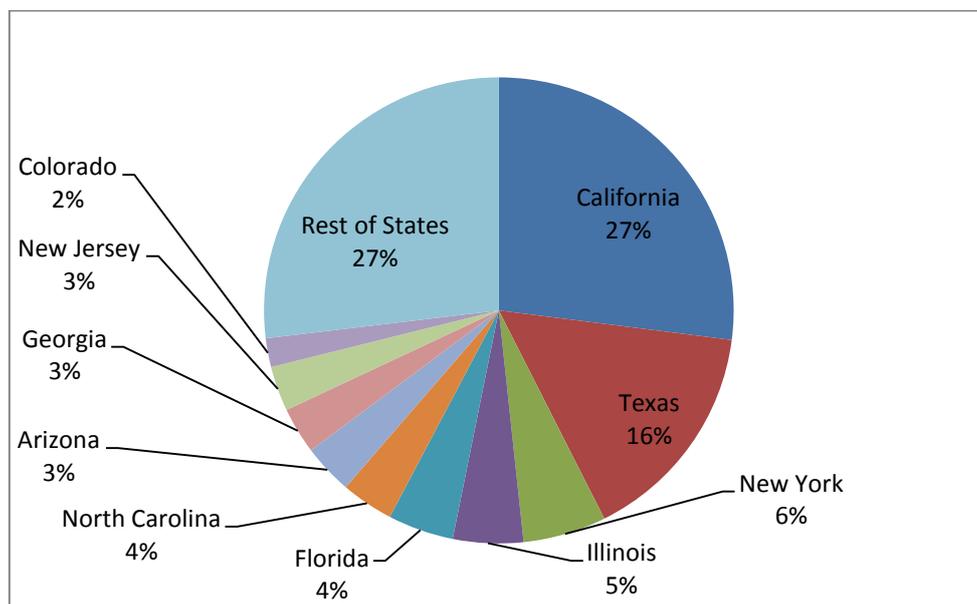
A sharp and sustained drop off in DACA applications is clearly illustrated during the months of November, December and the first half of January. Thus, despite the highly political nature of the Deferred Action program, application trends appear to be relatively politically immune. That is, application numbers rose steadily even in the face of a potential Republican presidential victory and then numbers fell despite an assured four more years of an Obama administration. However, it is possible that numbers jumped in October as candidates sought to have their deferred action approved before a change of administration and thus be grandfathered in based on Romney’s campaign promise. Without field survey data it is impossible to know. The figures released in January demonstrate that the number of DACA applications have reached their lowest ebb. The reason for this sustained decline in interest in the DACA program is unclear.

The current total of applications represents less than 29% of the total estimated population eligible for deferred action. With total approvals at 154,404 only a tiny fraction of potential candidates have so far benefitted from deferred action. Since politics do not appear to be driving interest or disinterest in the program, other factors must be at work. Certainly the cost of applying for deferred action is an important consideration. The \$465 fee cannot be waived and therefore families must bear this financial cost for each child who may be eligible. It may not be too speculative to assert that slow economic growth and the holiday season with its concomitant expenses have played some part in depressing the overall interest in deferred action. Additional expense can be found in attorney’s fees as potential DACA candidates seek out help with the opaque application process. Another possible factor may be the actual enrolment status of potential candidates. USCIS has not released any breakdown of the educational level of DACA applicants, but one theory is that this program will motivate individuals who are not in school and have not completed their GED to do so. Due to the scheduling of the academic year, this means that any potential reservoir of DACA candidates

will not have met the educational requirement until sometime in January 2013, after they have enrolled in classes. However, if application numbers continue to fall or remain depressed these seasonal factors can be discounted.

With regard to regional participation in the program, DACA application appears to be reflecting the estimated dispersion of undocumented individuals in the US. Graph 2 illustrates the clear weight of California and Texas among received application totals, together accounting for 43% of all applications. These figures are reflective of the heavy Latino participation in the deferred action program. Perhaps the only noteworthy variance between this breakdown and the estimated distribution of the Latino community is absence of New Mexico among the top ten states sending applications.

Graph 2: Percentage of Deferred Action Applications Received by USCIS as of January 15, 2013



Source: USCIS. Data on Individual Applications and Petitions. *Deferred Action on Childhood Arrivals Process*. December 14, 2012 & HuffPost Elections Dashboard < <http://elections.huffingtonpost.com/pollster/2012-general-election-romney-vs-obama#!>>.

The government response to DACA applications appears to indicate an increasing trend in approval rates up until January. Of the total applications received by the USCIS, 97% of them have been accepted, meaning that the forms appear to be correctly submitted on an initial review. Given that the DACA application and the accompanying Work Authorization forms total only five pages and require only basic data such as name, birthplace and prior residences, this is not surprising. The difficulty in submitting a successful DACA application lies in the supporting documentation, which is reviewed after the application has been accepted. Applicants are asked to provide evidence of their presence in the US since 2007 as well as on June 15, 2012. For applicants who are not in school, and even for those who are, this can be a challenging task. Documents must show the applicant's name as well as a date and clearly locate the applicant within the US during the periods in question. Showing presence on June 15, 2012, the date of the memo initiating the deferred action program, can be especially challenging as many schools had let out for the summer and many young people do not have bills of other official documents in their names. Those who did not make a fortuitous visit to

the doctor on that date for example, may be required to seek more creative means of showing their presence, including using social media postings or letters from family or community leaders. So far, USCIS data show that 38% of DACA applications have been approved. This low figure almost certainly reflects a lag between applications and final approval as opposed to a high rejection rate. In fact, some attorneys working with DACA applicants estimate that nearly 90% of applications are approved based simply on the documentation presented in the applications without requiring any additional interview. The same January figures showing a 38% approval rate also indicate that 36% of accepted applications are still under review and 94% have scheduled the biometric appointment. This appointment is the final step to approval in which applicants report to a USCIS center to have their fingerprints taken where they are cross-referenced with national criminal databases. The assumption is, that pending a clear biometrics review applicants will then be awarded deferred action status.

In the near- to mid-term it seems likely that the DACA program will continue to expand despite the recent slowdown. As more applicants receive their deferred action approvals and word of the program continues to spread, a building inertia will likely spur continued, if not increased, application. Political opposition appears to have died away as the larger immigration debate and other issues have distracted the attention of lawmakers in Congress. The only significant legal challenge to the program also appears unlikely to have any impact on the operation and processing of deferred action approvals. On August 23, 2012, a group of ten ICE agents and officers filed suit against DHS Secretary Janet Napolitano and ICE Director John Morton seeking to enjoin the DACA program. The case, *Crane v. Napolitano*, will likely be dismissed for lack of jurisdiction because federal employees may not have standing to sue their superiors¹⁴ and the agents will have difficulty asserting that they have “suffered [a] legal wrong” or were “adversely affected or aggrieved.”¹⁵ Further legal challenges to DACA notwithstanding, the Presidential order itself does not establish any expiration date or final deadline for application. Thus, as a rolling program, DACA could theoretically continue until a future president rescinds the order or it is subsumed into a larger immigration reform law.

The temporary and uncertain nature of the DACA program lends itself to other difficulties and inconsistencies in the mid-term. Currently, USCIS is revising the I-131 Application for Travel Document procedure to allow DACA recipients to travel abroad for emergencies and re-enter the United States legally. Unfortunately, it is unclear how any absence from the US by these individuals will be construed when and if they apply for a renewal of their deferred action status. Another issue is that by assigning social security cards with expiration dates of two years, DACA recipients will be able to contract for services that could potentially exceed this two-year period. Driver’s licenses offer an illuminating example of this possibility. Three states, Arizona, Michigan and Nebraska, have refused to issue driver’s licenses to DACA recipients, while others, such as Texas, are issuing temporary licenses. However, in other states, such as California, normal driver’s licenses are apparently being issued. A California driver’s license is valid for five years, meaning that DACA recipients could

¹⁴ Herz, Michael. “United States v. United States: When Can the Federal Government Sue Itself?” *William & Mary Law Review*. 32, 1991.

¹⁵ 5 USC.A. § 702

potentially find themselves in three years with a valid driver's license, but no social security number.

Other inconsistencies abound. For example, deferred action students are barred from applying for federal student loans. Thus, DACA paradoxically encourages recipients to study while failing to afford them all of the tools necessary to meet this goal. Enlistment in the armed services will still be prohibited, but as residents in the US, DACA recipients who are male and over the age of 18 are required to register with selective services. With regard to other federal benefits, DACA recipients have been denied access to affordable healthcare under the Affordable Care Act.

What appears to be emerging from this scattered picture of half-rights and duties is the increasing formalization of a second-class citizenry in the US. The concept is best encapsulated in Blackstone's idea of the *denizen* who is in "a kind of middle state between an alien, and natural-born subject."¹⁶ The denizen has sharply curtailed rights, but is still not a complete outsider. This concept has been brought into the modern immigration lexicon¹⁷ and appears to be a fixture of modern migration regimes and citizenship systems. By affording certain young, undocumented immigrants a narrow band of quasi-legal rights, Obama's deferred action plan moves US immigration policies further toward formalizing this graded spectrum of citizenship rights.

Setting aside any deeper academic debate about citizenship and membership dynamics, the most imperative question to consider when assessing DACA is the long-term impact on the individual applicants and their families. The long-term political consequences of DACA, while highly speculative, seem to indicate the ultimate incorporation of these young people into the documented population. On one hand, the DACA program may be seen as a second step in a calculated policy campaign to usher in comprehensive immigration reform. By stepping up immigration enforcement and removals to unprecedented levels¹⁸ the Obama administration has attempted to immunize itself from politically motivated charges of being "soft" on undocumented immigration. Next, by issuing the DACA order, the President has side-stepped Congressional recalcitrance and set in motion a large-scale regularization process. Granted this process is only temporary, but it has laid the groundwork for future, permanent regularizations. DACA recipients who have come forward to seek official governmental assistance with deferred action will now have experience interfacing with the federal government. A certain degree of rapport may even be established, thus aiding any future programs. Potential regularization candidates will already have direct contacts with civil society and legal organizations that can assist them in a future process. Additionally, as a function of social networks, each DACA applicant will provide a point of contact for other undocumented people, namely their parents and other community members, who may wish to come forward when the time is right.

¹⁶ Blackstone, William. *Commentaries on the Laws of England*, Oxford: Clarendon Press, 1769.

¹⁷ Bosniak, Linda. *The Citizen and the Alien: Dilemmas of Contemporary Membership*, Princeton, N.J. ; Woodstock: Princeton University Press, 2006.

¹⁸ Since 2008, over 1.5 million people have been removed from the US according to Department of Homeland Security statistics. < <http://www.dhs.gov/yearbook-immigration-statistics>>

This represents one of possible positive outcomes in the long-term. However, if meaningful and comprehensive immigration reform remains elusive or political opponents succeed in scuttling the deferred action program, DACA may represent just one more half-measure that only muddies the waters of a Kafkaesque immigration system. Disenfranchised recipients will remain outside of the documented populace and distrust of government will deepen. A valid, if perhaps overly hysterical concern, is that by filling out deferred action applications, undocumented households are revealing their current addresses and points of entry to a government that may turn this information against them at some time in the future.

Clearly it is impossible to know in what direction immigration policy in the US will turn. Demographic and political realignment could become a critical juncture¹⁹ in the historical evolution of modern immigration policy in the US, but this is far from obvious at the present. What is apparent is that by protracting the heated political debate about undocumented individuals present in the US, social schisms will only deepen and potential economic benefits and human capital will be lost. If the culture of the denizen is allowed to become more firmly entrenched, the potential knock-on effects in the wider society are unpredictable. For now, DACA appears to be a step towards comprehensive immigration reform and the tone of policymakers in Washington DC seems to echo this contention. In the meantime however, young deferred action recipients will continue to exist in a precarious legal limbo with limited legal protections and no ability to plan more than two years in advance.

¹⁹ The concept of critical junctures or “punctuations” has been developed in the context of historical institutionalism theory and asserts that key political or social events create ruptures in institutional continuums and have the ability to redirect path dependent processes such as policy making. See: Baumgartner, Frank; Jones, Bryan. (1993) *Agendas and Instabilities in American Politics*. The University of Chicago Press.

Pierson, Paul. (2000) “Increasing Returns, Path Dependence and the Study of Politics”. *American Political Science Review*. Vol. 94 No. 2: 251-267