PennState Law Center for Immigrants' Rights Clinic

Litigation on DACA Rescission: What We Know

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DACA or Deferred Action for Childhood Arrivals was announced by former President Barack Obama on June 15, 2012, and implemented by then Secretary of Homeland Security Janet Napolitano. The policy enabled people who came to the United States before the age of 16 to apply for "deferred action" (a form of prosecutorial discretion) and a work permit. The program has protected nearly 800,000 people in the United States. On September 5, 2017, Attorney General Jeffrey Sessions announced a decision to end DACA. Secretary of Homeland Security Kirstjen M. Nielsen published the letter, the press release, and the Q&A stating that it will phase out DACA accordingly. Following the September 5 announcement, several lawsuits were filed to challenge the rescission of DACA.

On January 9, 2018, the federal district court for the Northern District of California issued a nationwide preliminary injunction and ordered DHS to continue the DACA program. The court first described the history of deferred action and use of discretion in immigration cases. Next, the court described the history of DACA and DAPA and the factors leading up to the rescission of DACA on September 5, 2017.

The impression by the court is summarized richly in the following excerpt from the decision:
"In short, what exactly is the part of DACA that oversteps the authority of the agency? Is it the granting of deferred action itself? No, deferred action has been blessed by both the Supreme Court and Congress as a means to exercise enforcement discretion. Is it the granting of deferred action via a program (as opposed to ad hoc individual grants)? No, programmatic deferred action has been in use since at least 1997, and other forms of programmatic discretionary relief date back to at least 1956. Is it granting work authorizations coextensive with the two-year period of deferred action? No, aliens receiving deferred action have been able to apply for work authorization for decades. Is it granting relief from accruing 'unlawful presence' for purposes of the INA's bars on reentry? No, such relief dates back to the George W. Bush Administration for those receiving deferred action. Is it allowing recipients to apply for and obtain advance parole? No, once again, granting advance parole has all been in accord with pre-existing law. Is it combining all these elements into a program? No, if each step is within the authority of the agency, then how can combining them in one program be outside its authority, so long as the agency vets each applicant and exercises its discretion on a case-by-case basis? Significantly, the government makes no effort in its briefs to challenge any of the foregoing reasons why DACA was and remains within the authority of the agency. Nor does the government challenge any of the statutes and regulations under which deferred action recipients obtain the foregoing benefits."

Reviewability: On reviewability, the court relied on administrative law principles to conclude that DACA rescission memo is both reviewable by a court and also based on a mistake of law. Citing *Overton Park* and *Chaney*, the court held that DACA is different from a situation where is "no meaningful standard against which to judge the agency's exercise of discretion." Also, the court noted that ending a program for more than 600,000 is distinguished from refusing to enforce the law. The court further held that the Immigration and Nationality Act does not prohibit the court to

review the decision to end DACA. While the court acknowledged the statutory preclusion of decisions "to commence proceedings, adjudicate cases, or execute removal orders," the court distinguished DACA by concluding that current recipients of DACA are not yet in the removal proceedings.

Standing: On standing, the court concluded that most of the plaintiffs had standing to bring a legal challenge both under Article III of the United States Constitution and under the Administrative Procedure Act's "zone of interests" test. The injuries claimed by the plaintiffs included the loss of resources of employers who invested in hiring and training, the reduced tax revenues, harms on university (UC), and negative impacts on public health.

Scope: The ruling is nationwide and means that DACA should continue as it was before the decision to end DACA, including allowing DACA enrollees to renew their applications. The court listed three exceptions: First, new application from applicants who have before received deferred action need not be processed. Second, the advance parole feature need not be continued for the time being for anyone. Third, defendants may take administrative steps to make sure fair discretion is exercised on an individualized basis for each renewal application. The court also stated that DACA recipients can still be subject to removal proceedings.

What Comes Next? The administration appealed the decision to the Ninth Circuit Court of Appeals on January 16, 2018. On January 18, 2018, the administration also filed a petition for writ of certiorari before judgment. This is a petition for the Supreme Court to hear the case before it has been decided by the Ninth Circuit. This is an unusual request only made in cases where it can be shown that the case is "of such imperative public importance as to justify deviation from normal appellate practice . . ." The administration argues that the writ is appropriate because the District Court's order mandates government action the administration believes is illegal, and because the ongoing litigation is contrary to the public interest. However, the administration did not ask the Court to stay the District Court's order while its appeal is pending, so the injunction mandating the continuation of DACA is still in force.

Where can I find more resources?

- Penn State Law's Center for Immigrants' Rights Clinic
- National Immigration Law Center
- Twitter Thread of Shoba Sivaprasad Wadhia