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.

CALIFORNIA

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.

Opinion

The court relied on administrative law principles to conclude that the DACA rescission memo is both reviewable by a court and also based on a mistake of law. It cited to *Chenery*, which holds that agency action based on a mistake of law is not to be upheld. 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."

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.

USCIS Response
On January 13, 2018, the United States Citizenship and Immigration Services (USCIS) issued "Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction." According to the announcement, USCIS has resumed accepting requests to renew a deferred action under DACA. USCIS will also maintain the terms of DACA as it was in place before it was rescinded on September 5, 2017.

Petition to the Supreme Court
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. On February 26, 2018, the Supreme Court denied the petition for a writ of certiorari without prejudice. This means that the administration may still re-petition the Supreme Court to hear the case at a later date, or may petition the Supreme Court to grant a writ of certiorari in review of similar injunctions arising from other federal district courts, like the one in New York.

NEW YORK

On February 13, 2018, the federal district court for the Eastern District of New York issued a similar nationwide injunction prohibiting DHS from moving forward with the DACA rescission. The court considered many of the same factors and arguments discussed in the California case, and agreed with the California court's conclusions of fact and law.

Opinion
The court cited to the same *Chenery* case relied on by the California court, which states that an agency action cannot stand if the action is based on a mistake of law. It explained that the rule "ensures that agencies are accountable for their decisions. If an agency makes a decision on policy grounds, it must say so, not act as if courts have tied its hands." Reviewing the reasons DHS offered for the rescission, the court found that ending DACA was arbitrary and capricious for three reasons: (1) the decision rests on the erroneous that DACA is unlawful and unconstitutional; (2) the erroneous premise that courts have determined that DACA violates the Constitution; (3) the stated rationale for the decision is internally contradictory because DHS has continued to grant DACA renewal requests in spite of their contention that the program is unconstitutional. It also found that there would be irreparable harm if DACA were rescinded, and that a preliminary injunction preserving DACA is in the public interest.

Scope
The court issued a nationwide injunction with the same criteria and exceptions that were found in the California court's order.

WHAT COMES NEXT?

The order of the California district court will be heard on appeal by the Ninth Circuit Court of Appeals. Following a decision by the Ninth Circuit, the case may be appealed again by either party to the Supreme Court. The administration has also appealed to the Second Circuit Court of Appeals for review of the New York district court's order.

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