



## ***DACA Litigation and DHS Memo***

*Updated June 23, 2018*

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” and a work permit. On September 5, 2017, Attorney General Jeffrey Sessions announced a decision to end DACA. Following the September 5 announcement, several lawsuits were filed to challenge the rescission of DACA.

### **LITIGATION IN THE D.C. DISTRICT COURT**

On April 24, 2018, the federal district court for the District of Columbia [issued an order](#) prohibiting DHS from moving forward with the rescission. The court considered many of the same factual and legal issues [two other district courts](#) in New York and California (those cases had the practical effect of ordering the United States Citizenship and Immigration Services (USCIS) to accept and process renewal applications). Like the other district courts, the D.C. court based its decision on administrative law principles. The court found that the DHS decision to end DACA was insufficiently explained. DHS had not identified any part of the Immigration and Nationality Act (INA) that conflicted with DACA, nor had it explained how DACA conflicted with the President’s duties under the Take Care clause of the Constitution. The court held that the “scant legal reasoning” could not satisfy the Department’s obligation to explain its departure from its prior stated view that DACA was lawful, because an “unexplained inconsistency” in agency policy is a reason for finding that policy to be arbitrary and capricious.

The court issued a *vacatur* of the DHS decision to end DACA. A vacatur requires the DHS decision to be set aside. The effect would be that DHS would have to continue to accept DACA applications as they did before the rescission went into effect. DHS would have to accept not only DACA renewal requests, but also new DACA applications from people who never previously had DACA. DHS will also be required to process requests for advanced parole for people who have DACA. However, the court stayed its vacatur for 90 days to allow DHS to better explain its decision. This means that DHS will not have to implement any of the changes the vacatur will require until July.

### **DHS RESPONSE TO D.C. DISTRICT COURT**

On June 22, 2018, DHS Secretary Nielsen issued “[Memorandum from Secretary Kirstjen M. Nielsen](#)” in response to the D.C. request for a more elaborate explanation for rescinding DACA. In the memo, Secretary Nielsen declined to [change the memorandum from former Secretary Elaine Duke](#) rescinding DACA and in her memo elaborated with legal and policy reasons for ending DACA. Below are excerpts from the Nielson memorandum:

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- *First, as the Attorney General concluded, the DACA policy was contrary to law. The Fifth Circuit ruled that DAPA should be enjoined on a nationwide basis on the ground, among other things, that it likely was contrary to the statutory scheme of the Immigration and Nationality Act (INA). As the Fifth Circuit held, "the INA does not grant the Secretary discretion to grant deferred action and lawful presence on a class-wide basis to 4.3 million otherwise removable aliens." (citations omitted)*
- *Second, regardless of whether the DACA policy is ultimately illegal, it was appropriately rescinded by DHS because there are, at a minimum, serious doubts about its legality. A central aspect of the exercise of a discretionary enforcement policy is a judgment concerning whether DHS has sufficient confidence in the legality of such policy. Like Acting Secretary Duke, I lack sufficient confidence in the DACA policy's legality to continue this non-enforcement policy, whether the courts would ultimately uphold it or not.*
- *Third, regardless of whether these concerns about the DACA policy render it illegal or legally questionable, there are sound reasons of enforcement policy to rescind the DACA policy.*
- *In addition, DHS should only exercise its prosecutorial discretion not to enforce the immigration laws on a truly individualized, case-by-case basis. ...Moreover, considering the fact that tens of thousands of minor aliens have illegally crossed or been across our border in recent years and then have been released into the country owing to loopholes in our laws- and that pattern continues to occur at unacceptably high levels...*
- *I do not come to these conclusions lightly. I am keenly aware that DACA recipients have availed themselves of the policy in continuing their presence in this country and pursuing their lives. Nevertheless, in considering DHS enforcement policy, I do not believe that the asserted reliance interests outweigh the questionable legality of the DACA policy and the other reasons for ending the policy.*

## WHAT COMES NEXT?

The D.C. Circuit Court will have to decide whether Secretary Nielsen's memo is sufficient within 90 days of his April 24 order. If DHS does not satisfy the court with its explanation, then DHS will have to accept both renewal and new DACA requests.

USCIS should continue to accept DACA renewals in accordance with nationwide injunctions issued by the district courts in New York and California. How and if the Nielsen Memo impacts these injunctions in the future is unknown.

Beyond the lawsuits challenging DACA's rescission is one [filed by the state of Texas and six other states](#) challenging the legality of DACA.

## WHERE CAN I FIND MORE RESOURCES?

[Penn State Law's Center for Immigrants' Rights Clinic](#)

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