PennState Law Center for Immigrants' Rights Clinic

Litigation on DACA Rescission: What We Know

Last Updated June 28, 2019

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 has 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 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.

Click here to view the USCIS Response to the court ruling. On November 8, 2018, the Ninth Circuit Court of Appeals upheld the California injunction after concluding that DACA is a lawful exercise of discretion and that the administration decision to end DACA was a mistake of law. Said the circuit court: "The government's decision to rescind DACA is subject to judicial review. And, upon review, we conclude that plaintiffs are likely to succeed on their claim that the rescission of DACA—at least as justified on this record—is arbitrary, capricious, or otherwise not in accordance with law. We therefore affirm the district court's grant of preliminary injunctive relief."

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 conclusion 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.

DISTRICT OF COLUMBIA

On April 24, 2018, the federal district court for the District of Columbia issued another order prohibiting DHS from moving forward with the rescission. The court considered many of the same factual and legal issues as the other two district courts. However, the remedy chosen by the court is different than the preliminary injunctions of California and New York.

Opinion
Like the other district courts, the court here based its decision on administrative law principles. The court cited to the same *Chenery* standard of arbitrary and capricious review. 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 also found that the Department's failure to explain its decision was "particularly egregious" in light of the reliance of hundreds of thousands of DACA beneficiaries.

Scope
The court issued a *vacatur* (set aside) the DHS decision to end DACA but delayed this decision by 90 days in order to allow DHS to better explain why DACA is unlawful. DHS will not have to implement any of the changes the vacatur will require until July. If the court effectuates its decision, then DHS would have to accept not only DACA renewal requests, but also new DACA applications from people who never previously had DACA.

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. court request for a more elaborate explanation for rescinding DACA. In the memo, Secretary Nielsen said, "I concur with and decline to disturb" the 2017 rescission memorandum.

Because of the June 22 Memo, the D.C. Circuit Court extended the 90-day deadline and gave the parties a deadline of July 27 for additional briefing. On August 3, 2018, the D.C. Circuit Court found that the June 22 Memo "fails to elaborate meaningfully on the agency's primary rationale for its decision." It further holds that, even if one of the rationales offered by the government could withstand scrutiny, the DACA rescission would still be arbitrary and capricious because it "fails to engage meaningfully with the reliance interests and other countervailing factors that weigh against ending the program."

On August 17, 2018, the D.C. Circuit Court issued a limited stay of its order. The court explained that the full scope of the order would magnify the confusion that already surrounds DACA. To maintain the status quo, the stay applies to those portions of the order that would have required the government to accept new DACA requests or grant Advanced Parole. The order still requires DHS to accept DACA renewal requests, like the injunctions from California and New York.

MARYLAND

On March 5, 2018, the federal district court in Maryland found that the administration's choice to end DACA was reasoned one and therefore *not* arbitrary and capricious under administrative law. The court also found that the procedural and substantive due process claims brought by plaintiffs lacked merit.

On May 17, 2019, the Fourth Circuit Court of Appeals reversed the decision of the federal district court regarding the APA claim. Said the court in part, "We affirm the district court's rulings that Plaintiffs' claims are justiciable and that DACA's rescission did not require notice and comment under the APA. We

reverse the district court's ruling sustaining the rescission of the policy as valid under 5 U.S.C. § 706(2)(A). DACA's rescission is vacated as arbitrary and capricious, and the matter is remanded for further proceedings consistent with this opinion."

TEXAS

In response to the court orders from California, New York, and Washington D.C., Texas and six other states filed a suit against the government challenging the 2012 DACA memorandum. On May 2, the plaintiffs filed a motion for a preliminary injunction which would halt DACA from operating during the pendency of the litigation. The case was assigned to Judge Hanen, the District Court judge who had decided the DAPA case in 2015.

Opinion
On August 31, 2018, Judge Hanen declined to grant the preliminary injunction the plaintiffs requested. Although he found that DACA likely violated the Administrative Procedure Act, he found that since the plaintiffs had delayed seeking relief for years, the "balance of private interests fell in favor of denial of the requested relief," and that issuing the injunction was not in the best interest of the public. Judge Hanen reasoned that this was an issue where reasonable minds could disagree about the appropriate application of the law. The court suggested that the issue could easily be put to rest by a definitive ruling from the Supreme Court.

WHAT COMES NEXT?

The court orders from California, New York, and Washington D.C. are still in effect. The Department of Justice asked the Supreme Court to take up the DACA case, and three times, the Court declined. However, on June 28, 2019, the U.S. Supreme Court agreed to hear arguments in the DACA case. The possible timeline is that oral arguments will be held in spring 2020 and a decision will be made in June 2020. Unless and until other courts rule differently, DHS will continue to accept DACA renewals.

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