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Legal Sidebar

DACA Rescission: Legal Issues and Litigation Status

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On September 5, 2017, the Department of Homeland Security (DHS) issued a memorandum announcing its decision to rescind the Deferred Action for Childhood Arrivals initiative (DACA), which the Obama Administration implemented in 2012 to provide temporary relief from removal and work authorization, among other benefits, to certain unlawfully present aliens who arrived in the United States as children. As justification for the rescission, DHS relied upon a letter from Attorney General Sessions concluding that DACA was illegal—specifically, that it lacked "proper statutory authority," was "an unconstitutional exercise of authority by the Executive Branch," and would likely be enjoined in "potentially imminent litigation."

Litigation has ensued at cross purposes. DACA recipients and other parties, including states and universities, filed lawsuits in four federal district courts challenging the rescission as unlawful. Two of those district courts have issued nationwide preliminary injunctions that currently require DHS to continue processing applications for DACA relief from individuals who have obtained DACA relief in the past (renewal applicants), but not applications from individuals who would be first-time DACA enrollees. The order of a third district court—which will go into effect on July 23, 2018, unless DHS provides new reasoning that adequately justifies the rescission in the court's view—would require DHS to process both first-time and renewal applications for DACA relief. After these district court decisions, Texas and six other states filed a separate lawsuit seeking to bar DHS from continuing to grant DACA relief. That lawsuit could result in a preliminary injunction that contradicts the preliminary injunctions already in place in the rescission cases. The case is before a federal district judge in Texas who in 2015 barred the Obama Administration from implementing a different deferred action initiative to protect certain unlawfully present aliens with U.S. citizen or lawful permanent resident children.

Collectively, the lawsuits to preserve DACA and to force its termination raise the related issues of whether DHS offered an adequate justification for the DACA rescission and whether DHS lacks, as Attorney General Sessions concluded, statutory and constitutional authority to administer DACA.

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Enactment of statutory protections for certain childhood arrivals would likely moot the lawsuits in substantial part or entirely, but a range of legislative proposals to this effect—including those considered during open debate on the Senate floor in February 2018 in the wake of a government shutdown over the childhood arrivals issue—have not resulted in new law. Some Members have continued to pursue similar legislative efforts, however.

Litigation Overview: Tables of Ongoing Cases

Cases Challenging DACA Rescission

Federal District Court	Case	Relief Granted	Status
Northern District of California (N.D. Cal.)	Regents of the University of California v. DHS, No. C 17-05211 WHA	Jan. 9, 2018: Nationwide preliminary injunction requiring DHS to continue processing DACA renewal applications.	DHS appeal pending before the Ninth Circuit, which held oral argument on May 15, 2018. Previously, the Supreme Court denied a DHS petition for direct Supreme Court review of the preliminary injunction.
Eastern District of New York (E.D.N.Y.)	Batalla Vidal v. Nielsen, 16-CV-4756 (NGG) (JO)	Feb. 13, 2018: Nationwide preliminary injunction requiring DHS to continue processing DACA renewal applications.	DHS appeal pending before the Second Circuit. A proposed calendaring order would set oral argument for the end of June 2018.
District of Maryland (D. Md.)	Casa de Maryland v. DHS, RWT-17-2942	March 5, 2018: The court ruled primarily in DHS's favor, denying plaintiffs' request for a preliminary injunction against the DACA phase-out but granting them an injunction that bars DHS from using DACA application information for enforcement purposes.	Recently filed cross-appeals pending before the Fourth Circuit.
District of Columbia (D.D.C.)	NAACP v. Trump, 17-1907 (JDB)	April 24, 2018: The court granted summary judgment substantially in plaintiffs' favor, vacating the DACA rescission memo and remanding it to DHS. The vacatur order is stayed for 90 days (i.e., until July 23, 2018) to give DHS "an opportunity to better explain its rescission decision." If the order goes into effect on that date, it will require DHS to process initial and renewal applications for DACA relief.	Case docket reflects no activity since the April 24, 2018 decision.

Case Challenging DACA Implementation

Texas v. United States, 1:18-cv-00068	Southern District of Texas (S.D. Tex.)	No ruling issued yet on relief.	Plaintiffs' motion for a preliminary injunction barring new grants of DACA relief pending before the district court, which has ordered the parties to propose a briefing schedule by May 25, 2018.

DHS's Justification for the DACA Rescission

The DHS rescission memo relied on two sources to support the conclusion that DACA "should be terminated" due to concerns about its legality: the Attorney General letter described above, and *Texas v. United States*, a 2015 decision by the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit). *Texas* held that an Obama Administration initiative with two parts—(1) a planned expansion of DACA, which would have covered more childhood arrivals and extended the term of relief from two years to three, and (2) a planned implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents initiative (DAPA)—likely violated the Administrative Procedure Act. An equally divided Supreme Court affirmed *Texas* without opinion in 2016. DAPA would have offered relief to certain unlawfully present aliens with children who are U.S. citizens or lawful permanent residents. DAPA had potential to protect many more aliens than DACA. Whereas DACA has provided relief at some point to approximately 800,000 childhood arrivals out of a potentially eligible population of 1.3 million, DHS estimated in 2014 that DAPA could have offered relief to as many as four million unlawfully present parents. Although *Texas* did not concern DACA itself (only a planned expansion of it that never went into effect), the DHS memo suggested that aspects of the case cast doubt on DACA's legality.

Primary Legal Issues in Cases Challenging the DACA Rescission

The salient issue in the four rescission lawsuits is whether the DACA rescission is substantively valid under § 706(2)(A) of the APA, which directs courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This standard requires DHS to provide a "satisfactory explanation" showing that "good reasons" support its decisions, including decisions to change existing policies. Two district courts—the U.S. District Court for the Eastern District of New York (E.D.N.Y.) and the U.S. District Court for the Northern District of California (N.D. Cal.)— held that the DHS rescission memo fails this test because the courts rejected the Attorney General's conclusions about DACA's illegality. DACA is a lawful exercise of executive branch statutory and constitutional authority, these courts concluded, and DHS's reliance upon the Attorney General's advice to the contrary to justify the rescission was therefore legally erroneous and inadequate under the "arbitrary and capricious" standard. A third district court, the U.S. District Court for the District of Columbia (D.D.C.), held the DACA rescission arbitrary and capricious under a different rationale. Instead of rejecting DHS's underlying legal conclusion about DACA's illegality, the D.D.C. rejected the supporting reasoning that DHS and the Attorney General offered for that conclusion as "scant," "barebones," and therefore unsatisfactory under § 706(2)(A). All three courts also rejected DHS's contention that "litigation risk" associated with DACA constituted an independent and satisfactory justification for the rescission. In contrast, the U.S. District Court for

Maryland (D. Md.) determined that DHS had a "reasonable basis" to conclude that DACA is illegal, given the outcome of the DAPA litigation and the advice from the Attorney General, and that the rescission memo therefore satisfies § 706(2)(A).

For the two district courts that issued preliminary injunctions, then, the issue of the substantive validity of the DACA rescission under § 706(2)(A) of the APA boiled down to whether DACA was legal in the first place. Did the Executive contravene the immigration restrictions in the Immigration and Nationality Act (INA), or the Executive's constitutional duty under the Take Care Clause to pursue faithful execution of those restrictions, by implementing a program with potential to provide temporary relief from removal and other benefits to more than one million aliens whose presence violates the INA? Or does DACA fall within the scope of the enforcement discretion that DHS, like all federal enforcement agencies, enjoys to allocate its prosecutorial resources in the manner that the agency determines best serves the national interest, particularly in light of the fact that the number of unlawfully present aliens in the United States far exceeds DHS's capacity to remove them? These questions do not yet have authoritative answers. A 2014 opinion by the Office of Legal Counsel at the Department of Justice—heavily relied upon in the E.D.N.Y. and N.D. Cal. decisions—concluded that DAPA was legal even though it might have offered protections to roughly four times as many unlawfully present aliens as DACA and even though DAPA arguably trenched more directly upon the statutory scheme (given that the INA contains a mechanism for parents of U.S. citizens and lawful permanent residents to acquire lawful immigration status). The Fifth Circuit concluded to the contrary in *Texas.* The Supreme Court has endorsed immigration authorities' practice of granting deferred action to unlawfully present aliens in individual cases "for humanitarian reasons or simply for [the authorities'] own convenience," but other than its split affirmance without opinion in *Texas*, the Supreme Court has not addressed the scope of DHS's authority to grant deferred action on a programmatic basis.

The disagreement among district courts in the DACA rescission cases also stems in part from a difference in opinion about the appropriate standard of review of an agency action that is premised upon a legal justification. Whereas the E.D.N.Y. and N.D. Cal. reviewed DHS's legal conclusion about DACA's illegality de novo—that is, without according it deference—the D. Md. asked only whether DHS had a "reasonable basis" for the legal conclusion. (The D.D.C. rejected the sufficiency of DHS's supporting reasoning and did not reach an assessment of the adequacy of the legal conclusion itself.) All three courts would appear to agree that, had DHS justified the rescission on policy instead of legal grounds, then a narrow standard of review would apply that would not allow the courts "to substitute [their] judgment for that of [DHS]." For example, if DHS had reasoned that DACA did not comport with the agency's policy of applying "the immigration laws . . . against all removable aliens" or that DACA undermined the deterrent effect of the INA's removal provisions, then the narrow standard of review would likely govern. But DHS proffered a primarily legal justification (concerns about DACA's illegality) for the rescission, not a classic policy justification. The E.D.N.Y. and N.D. Cal. relied on two Supreme Court precedents for the proposition that such a legal justification should trigger judicial review of the ultimate correctness of the agency's legal conclusion and not merely of whether the conclusion has a reasonable basis in law. Whether the appellate courts and, perhaps ultimately, the Supreme Court agree with this interpretation of those precedents could bear heavily on the outcome of the DACA rescission litigation.

The rescission cases present a number of other legal issues. DHS argues that two statutes bar judicial review of the rescission, including one statute that precludes review of "agency action [that] is committed to agency discretion by law," but all four district courts disagreed. The D.D.C., which devoted considerable analysis to the reviewability issue, reasoned that an agency cannot avoid judicial review of an enforcement policy that the agency portrays to the public as legally required; the agency "may escape political accountability or judicial review, but not both." The Ninth Circuit signaled interest in this issue by ordering supplemental briefing on it. Other legal issues include whether the rescission is procedurally invalid under the APA because DHS did not subject it to notice and comment procedures, and whether the rescission violates DACA recipients' constitutional rights to equal protection and procedural due process.

All four district courts either resolved these issues in favor of the government or found it unnecessary to assess their merits in resolving the challengers' requests for injunctive relief.

Primary Legal Issues in Texas's Challenge to DACA

Texas and six other states contend in their complaint that DACA is unlawful on statutory and constitutional grounds, so the merits of the lawsuit will likely turn upon the same issues about DACA's legality that are at the center of the rescission cases. A threshold issue exists as to whether the states have suffered an injury from DACA adequate to establish their standing to sue, but the Fifth Circuit resolved that issue in favor of the states that challenged DAPA in the 2015 *Texas* case and the outcome is unlikely to change in the DACA lawsuit. The states' challenge to DACA's legality does, however, raise a unique and thorny issue about remedies. The states seek a nationwide preliminary injunction that bars DHS "from implementing the 2012 DACA memo by issuing or renewing DACA permits." In other words, the states ask the court to order DHS *not* to do something (continue administering the DACA initiative for renewal applicants) that other courts have already ordered DHS to do. The case thus raises the prospect of conflicting nationwide injunctions directed at the same federal agency. There is some authority for the position that federal courts confronted with this prospect should apply principles of judicial comity and equitable relief to fashion remedies that avoid direct conflict. But nationwide injunctions have become increasingly common only in recent years, as another Sidebar explains, and the law governing potential conflicts is not well developed. One scholar analyzing the recent trend in nationwide injunctions observed that "[c]onflicting injunctions can be avoided with judicial restraint and good luck, but neither one is sure to last forever." The federal government, for its part, told the Ninth Circuit during oral argument concerning the validity of one nationwide injunction that the government is "still figuring out" what it would do if DHS becomes subject to conflicting injunctions.