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Legal Sidebar

# Supreme Court: DACA Rescission Violated the APA

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On June 18, 2020, in the case *Department of Homeland Security v. Regents of the University of California,* the Supreme Court held in a five-to-four decision that the reasoning the Department of Homeland Security (DHS) offered in support of its decision to rescind the Deferred Action for Childhood Arrivals (DACA) initiative was inadequate and therefore violated the Administrative Procedure Act (APA). The Supreme Court's decision means that, at least for the time being, the DACA initiative will remain in place, offering the prospect of continued relief from removal and work authorization to the approximately 650,000 current DACA recipients and apparently also to eligible childhood arrivals who have not previously enrolled in the program. The decision, however, is limited in particular respects. It does not prevent the Trump Administration from taking new action to rescind DACA—indeed, the decision reaffirms that the Administration has power to do so, so long as it supplies adequate justification under the APA. The decision also does not address whether DACA itself is legal; instead, it goes no further than to hold that, in rescinding DACA, DHS failed to think through important issues about the available policy options and the interests of current DACA recipients.

## Background

The Obama Administration created DACA in 2012. The program allows certain, unlawfully present non-U.S. nationals (aliens) who arrived in the United States as children to obtain deferred action (i.e., an assurance that they will not face removal) and work authorization, among other benefits, in renewable two-year periods. To be eligible for DACA, aliens must meet certain criteria, including that they came to the United States under the age of 16, have continuously resided in the United States since June 15, 2007, were under the age of 31 on June 15, 2012, and meet other requirements related to education and lack of criminal history.

On September 5, 2017, acting DHS Secretary Elaine Duke issued a memorandum announcing her decision to rescind DACA. The Duke memorandum relied upon a letter from then-Attorney General Jeff 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." The Duke memorandum and the Attorney General letter also relied upon *Texas v. United States*, a 2015 decision by the U.S. Court of Appeals for the Fifth Circuit. *Texas* held

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that another 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 Immigration and Nationality Act (INA) and the APA. DAPA would have offered relief to certain unlawfully present aliens with children who are U.S. citizens or lawful permanent residents. The circuit court reasoned that the blanket relief afforded by DAPA and expanded DACA undermined "the INA's intricate system of immigration classifications and employment eligibility." An equally divided Supreme Court affirmed *Texas* without opinion in 2016. *Texas* did not decide the legality of DACA itself, only a planned expansion of it that never went into effect. However, the Duke memorandum and Attorney General letter reasoned that DACA is "substantially similar" to the initiatives at issue in *Texas* and that the case supported the conclusion that DACA is illegal.

The Duke memorandum of September 2017 was not DHS's final statement about why it rescinded DACA. On June 22, 2018, in response to an order from the U.S. District Court for the District of Columbia (D.D.C.), then-DHS Secretary Kirstjen Nielsen issued a memorandum to supplement the explanation in the Duke memorandum. Importantly, the Nielsen memorandum did not constitute a new decision to rescind DACA, but instead "decline[d] to disturb" the original decision while providing further explanation to support it. The Nielsen memorandum, like the Duke memorandum, relied on the Fifth Circuit's decision in *Texas* and the Attorney General letter to conclude that "the DACA policy was contrary to law." But the Nielsen memorandum offered additional justifications. It took the position that *questions* about DACA's illegality—as opposed to illegality itself—supported rescinding it to avoid litigation and other negative consequences of maintaining "legally questionable" initiatives. Further, the Nielsen memorandum articulated "reasons of enforcement policy" that supported the rescission, including that the need for deterrence of immigration violations makes it "critically important for DHS to project a message that leaves no doubt regarding the clear, consistent, and transparent enforcement of the immigration laws against all classes and categories of aliens."

In lawsuits filed by DACA recipients and other parties (including states and universities) challenging the rescission as unlawful, lower court decisions ruled against the government in significant respects. The decisions held that the rescission was unlawful or likely unlawful under the "arbitrary and capricious" standard of the APA—meaning, essentially, that DHS had not "adequately explained" the reasons for the rescission. The decisions required DHS to continue accepting DACA applications and requests for work authorization from people who had received DACA in the past, but not from people who would have been first-time DACA recipients. Thus, under the terms of these decisions, the DACA initiative has remained partly in place even after the September 2017 rescission.

The Supreme Court granted certiorari to consider three questions in a consolidated group of cases challenging the DACA rescission: (1) whether DHS's decision to rescind DACA is subject to judicial review under the APA; (2) whether the decision violated the APA; and (3) whether the decision violated the Fifth Amendment's equal protection guarantee.

# Supreme Court Decision

In a majority opinion authored by Chief Justice Roberts and joined by Justices Ginsburg, Breyer, Kagan, and Sotomayor, the Court held that the DACA rescission is subject to review under the APA and that it violated the APA. The Court also voted eight-to-one to reject the plaintiffs' claims that the rescission violated equal protection, with Justice Sotomayor as the lone dissenting vote.

The majority opinion began by emphasizing that DHS has undisputed authority to rescind DACA and that the case was "instead primarily about the procedure the agency followed in doing so." In other words, there is no question that DHS, as the agency charged with enforcing immigration laws, *can* rescind

DACA; the question in the case was simply whether the *way* that DHS rescinded DACA violated the APA or other laws.

On the judicial review question, the government had argued that the DACA rescission constitutes a "quintessential exercise of enforcement discretion" and therefore falls within a provision barring APA review of agency actions that are "committed to agency discretion by law." Just as courts generally cannot review exercises of prosecutorial discretion in the criminal context about which offenders to pursue, the government argued, this provision means that the APA bars judicial review of DHS's decision to terminate its discretionary policy of not pursuing the removal of some childhood arrivals. The Court rejected this argument. It reasoned that DACA is more than a non-enforcement policy. Beyond directing DHS officials to consider not pursuing the removal of some unlawfully present aliens, the DACA memorandum set up a system whereby childhood arrivals could apply to DHS for "affirmative immigration relief" that included deferred action, work authorization, and other benefits. Thus, by rescinding DACA, DHS did more than simply change its mind about how to enforce the removal provisions in the INA against a segment of the unauthorized population. The DACA rescission also took away a system for delivering and adjudicating immigration benefits. This action, the Court held, is subject to review under the APA. (The Court also rejected government arguments that two provisions of the INA barred review of the APA claims, reasoning in two paragraphs that the provisions do not reach issues unconnected to particular removal proceedings.)

The second question, about the legality of the rescission under the APA, essentially boiled down to whether DHS had provided sufficient supporting reasoning. The APA provides that agency actions are unlawful if they are "arbitrary and capricious"—a standard that requires federal agencies to provide satisfactory explanations for their decisions, including decisions to change existing policies. Agencies run afoul of this standard if they "fail[] to consider . . . important aspects" of the problems before them. The Court began its analysis of this issue by concluding that the additional justifications for the rescission in the Nielsen memorandum were impermissibly *post-hoc*. "An agency must defend its actions based on the reasons it gave when it acted," the Court reasoned. Because Secretary Nielsen opted to expand on Acting Secretary Duke's reasoning instead of taking new action to rescind DACA, the Court concluded that it could not consider Secretary Nielsen's conclusions that two factors not considered in the Duke memorandum—legal uncertainty and enforcement policy—justified the rescission. Rather, the Court limited itself to assessing the adequacy of the sole justification that Acting Secretary Duke offered for the rescission: that DACA was unlawful.

The Court held that that justification impermissibly failed to consider two aspects of the problem that DHS faced about DACA's future. First, although DHS may well have been bound by the Attorney General's conclusion that DACA in its current form was unlawful, this legal conclusion did not necessarily require DHS to rescind DACA in its entirety. Both the Attorney General letter and the *Texas* decision on which it relied concluded that DHS's conferral of eligibility for certain benefits, such as work authorization and eligibility for some Social Security programs, upon categories of unlawfully present aliens through DACA and DAPA violated the INA. Given this reasoning, the Court concluded, DHS should have at least explored the possibility of continuing to grant DACA recipients protection from removal while terminating their eligibility for benefits. Although the Court made clear that the APA did not require DHS to adopt this policy option, DHS's failure to even consider the option made the rescission arbitrary and capricious, in the majority's view. Similarly, when DHS decided to rescind DACA, it failed to consider the myriad ways in which DACA recipients and those connected to them have come to rely on the program for the educational, professional, and personal endeavors they have developed under its auspices. Although the APA did not require DHS to accommodate these reliance interests, it did require DHS to at least consider them before taking action to rescind the program, in the majority's view.

On the equal protection question, the Chief Justice wrote a plurality opinion for four Justices that concluded that the plaintiffs had not plausibly alleged that the rescission was motivated by an "invidious discriminatory purpose," as required to state an equal protection claim. The plaintiffs had alleged that discrimination against Latinos motivated the rescission, but the plurality deemed their supporting evidence inadequate. Four other Justices—Thomas, Alito, Gorsuch, and Kavanaugh—concurred in the Court's judgment on this issue but did not join the Chief Justice's opinion. Justice Sotomayor dissented on this issue and would have held that evidence of disparaging statements made by President Trump about Mexican immigrants, among other allegations by the plaintiffs, sufficed to allow the equal protection claims to move forward.

The principal dissent, authored by Justice Thomas and joined by Justices Alito and Gorsuch, argued that DACA is, in fact, illegal, because DHS lacks statutory authority to "grant relief from removal out of whole cloth" to a large category of aliens. "It defies all logic and common sense to conclude that a statutory scheme" as detailed as the INA, the dissent stated, "is simultaneously capacious enough for DHS to grant lawful presence to almost two million illegal aliens with the stroke of a Cabinet secretary's pen." The dissent would have held that DACA's unlawfulness adequately justified the rescission. The dissent also criticized the majority for requiring DHS to adhere to APA procedural requirements when rescinding a policy that (in the dissent's view) is illegal, opining that the majority's holding effectively requires agencies to "continue administering unlawful programs that [they] inherited from a previous administration." In individual dissents, Justice Alito opined that the majority and the lower courts had overstepped constitutional boundaries in blocking DHS from resolving a policy issue within its power, while Justice Kavanaugh argued that the majority erred in disregarding the Nielsen memorandum.

# Implications

The full effects of the Supreme Court's decision will only become clear with time, but at this point there are some immediate impacts to note. For DACA recipients, the Supreme Court decision means that the DACA initiative remains intact for now. Indeed, because the Court vacated DHS's rescission of DACA, it appears the decision restores the program fully to the form in which it existed before the rescission, at least for now. Lower court orders had allowed DHS to stop considering DACA recipients for advance parole and to stop considering applications for first-time DACA relief; those original aspects of the program would appear to be active again until and unless DHS takes some new action to terminate them.

The decision does not, however, resolve larger uncertainties about DACA. As mentioned above, DHS could still terminate the initiative by taking action that complies with APA requirements. And because the Supreme Court did not decide whether DACA itself is legal—that issue remains a subject of disagreement amongst lower courts—it is even possible that a future Administration could restore DACA if this Administration succeeds in rescinding it.

As with most immigration issues, Congress has ultimate authority to decide the future of DACA legislatively. Congress could terminate the program by defunding it or through substantive legislation that clearly prohibits DHS from granting the types of protections that the program provides. Alternatively, Congress could strip DHS of funding to take any action rescinding DACA or, substantively, enact a law clarifying that DHS has authority to run programmatic deferred action programs that confer collateral benefits. Or, along the lines of the American Dream and Promise Act of 2019 passed by the House, Congress could grant DACA recipients and perhaps other childhood arrivals statutory relief, which could include, among other possibilities, protection from removal, eligibility for specified benefits, and a pathway to lawful permanent resident status.

## Author Information

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