PennState Law Center for Immigrants' Rights Clinic

Litigation on DACA: What We Know

Last Updated September 1, 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 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 more than 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.

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.

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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 TO CALIFORNIA CASE

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 argued that the writ was 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 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.

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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 held 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.

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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, and in a decision that runs 117-pages, Judge Hanen declined to grant the preliminary injunction the plaintiffs requested (which at this juncture includes the states of Texas, Alabama, Arkansas, Louisiana, Nebraska, South Carolina, West Virginia, Kansas and the governors of Mississippi and Maine). First, Judge Hanen concluded that the plaintiffs were likely to succeed on the merits at trial in showing that DACA violates the substantive provisions of the Administrative Procedure Act based on a position that DHS lacks the statutory authority to implement DACA. He did not reach a conclusion on whether DACA violates the Take Care Clause of the U.S. Constitution. Second, Judge Hanen concluded that the plaintiff states would suffer "irreparable injury" based on the costs associated with DACA recipients.

However, Judge Hanen found that the plaintiffs failed to meet its burden to show that the harm they would suffer is greater than what would be suffered by the enjoined party and that ending DACA would not be adverse to public interest. Said Judge Hanen "In this case, the factor concerning significant hardship to the parties has particular significance." He noted the delay by the plaintiff states to bring a legal challenge to DACA and the consequential interests at stake. In his critique of this delay, Judge Hanen remarked "Here, the egg has been scrambled. To try to put it back in the shell with only a preliminary injunction record, and perhaps at great risk to many, does not make sense nor serve the best interests of this country." Judge Hanen's decision is unexpected. Despite finding DACA to be unlawful, he ultimately concluded that the plaintiff-states could not meet the standard necessary for a preliminary injunction.

WHAT DOES THIS MEAN? The litigation surrounding DACA is not over and could end up in the Supreme Court. In the meantime, the court orders from California, New York, and Washington D.C. are still in effect. Unless and until other courts rule differently, DHS will continue to accept DACA renewals. Those who have never had DACA before are not eligible to request DACA now. Those who have had DACA should carefully consider whether to renew their status with the government.

Where can I find more resources? Penn State Law's Center for Immigrants' Rights Clinic

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