

# The Rights of Undocumented Immigrants: DACA Arguments in US Supreme Court Leave Outcome in Doubt

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*After the arguments before the Supreme Court in the Deferred Action for Childhood Arrivals (DACA) case, it is difficult to predict the outcome. Justices often play devil's advocate when questioning the lawyers, so reading the tea leaves about how a case will ultimately be decided can be a dicey proposition. But the justices' questions appeared to indicate that right-wing **Justices Alito, Gorsuch and Kavanaugh** favor affirming **Donald Trump's** termination of DACA, and liberal **Justices Kagan, Ginsburg and Sotomayor** want to uphold DACA. Justice Thomas, who almost never asks a question during arguments, invariably sides with the right-wingers. **Chief Justice Roberts**, who generally takes the conservative position, and Justice Breyer, who more often votes with the liberals, were harder to read. Roberts, who appeared to lean toward the government's position, will likely cast the deciding vote.*

On November 12, the justices heard arguments in [Department of Homeland Security v. Regents of the University of California](#), a case that is testing whether Trump's rescission of DACA was lawful.

DACA was created by **Barack Obama** in 2012 to encourage undocumented people who arrived in the U.S. as children to come out of the shadows and register for temporary protection from deportation. They are called "Dreamers," inspired by the Development, Relief, and Education for Alien Minors (DREAM) Act, which Congress has failed to pass. Nearly 800,000 Dreamers have work permits and other benefits. Many are lawyers, doctors, engineers and military officers. [According to one study](#), over 90 percent of them are employed and 45 percent are enrolled in school.

To qualify for DACA, a person must be a current student, a high school graduate, have a GED or an honorable discharge from the military. Applicants cannot have prior convictions of serious crimes or be considered a national security threat. The program provides a renewable two-year period of deferred immigration action for people who came to the U.S. as children and continuously lived in the U.S. for at least five years before June 15, 2012.

In September 2017, **then-Attorney General Jeff Sessions** [announced](#) that the Trump administration would rescind DACA, saying, "Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch."

Several states, DACA recipients and organizations challenged the termination of DACA in the federal courts, successfully arguing it was unlawful. The repeal of DACA was put on hold pending the Supreme Court's decision.

The two issues facing the Supreme Court are: (1) whether the courts have jurisdiction to review the decision to end DACA; and (2) whether the rescission of DACA was legal.

### **Do Courts Have Authority to Review Legality of DACA Rescission?**

The government is arguing that the decision of whether to enforce the immigration laws is solely within agency discretion of the Department of Homeland Security (DHS) and not subject to judicial review. Ginsburg pointed out the contradiction in that position: On the one hand, the government says the decision is not subject to judicial review because DHS has sole discretion to end DACA, but on the other hand, it claims that DHS had no discretion because it was illegally established.

Kagan [cited](#) another contradiction in the government's argument, in which it "suggest[s] that the original DACA is reviewable, but the rescission of DACA is not." She called that "an asymmetry in what's reviewable."

Gorsuch said, "I hear a lot of facts, sympathetic facts," and "they speak to all of us," but like Alito, he did not seem to think the case was reviewable.

Breyer appeared to be on the fence. "I'm saying honestly I am struggling," he said. But Breyer also challenged the government's argument that it has prosecutorial discretion to decide whether to enforce the immigration laws. Breyer distinguished a prosecutor's decision whether to charge an individual from the policies of an agency.

### **Is Trump's Rescission of DACA Lawful?**

If the Supreme Court finds it has authority to review the government's decision to rescind DACA, it must then decide whether the rescission was lawful.

Those challenging the DACA rescission argued that DHS did not sufficiently consider the Dreamers' reliance interests when it decided to terminate DACA. People outed themselves as undocumented to apply for DACA in reliance on its promise of protection from deportation. Theodore Olson, the lawyer for the individual challengers, said, "Those reliance interests were engendered by the decision of the government that caused people to come forward."

Breyer cited a Justice Scalia opinion saying that when an agency's "prior policy has engendered serious reliance interests, it must be taken into account." Breyer added, "That's this case, I think." He mentioned 66 health care organizations, three labor unions, 210 educational institutions, six military organizations, three home builders, five states, 108 municipalities and cities, 129 religious organizations and 145 businesses, most of which, Breyer said, listed reliance interests. In other words, these groups are relying on the Dreamers whose study and work they depend upon.

There was also discussion of the Dreamers' reliance on Trump's statements that they would be protected. Trump praised the Dreamers in February 2017, calling most of them "absolutely incredible kids." He [promised](#), "We are gonna deal with DACA with heart."

Last fall, Trump [tweeted](#), "Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military? Really!"

When Sessions announced that DACA would be repealed, Trump delayed enforcement for six months, giving Congress time to act to protect the Dreamers. But immigration reform has eluded Congress for years.

“There’s a whole lot of reliance interests that weren’t looked at, including ... the current president telling DACA-eligible people that they were safe under him and that he would find a way to keep them here,” Sotomayor noted. But the administration’s position is tantamount to “I’ll give you six months to destroy your lives,” Sotomayor said.

Roberts told Olson, however,

“the whole thing was about work authorization and these other benefits. Both administrations have said they’re not going to deport the people. So, the deferred prosecution or deferred deportation, that’s not what the focus of the policy was.”

When questioning **Michael Mongan**, an attorney for the state challengers, Roberts mentioned the 2016 case in which he voted with right-wing justices to block another Obama order, Deferred Action for Parents of Americans (DAPA). Since Scalia had just died, the case deadlocked 4 to 4, leaving in place a Fifth Circuit Court of Appeals decision ending DAPA.

“Look,” Roberts said, “I’ve got a decision from the Fifth Circuit that tells me this is illegal, it’s been affirmed by the Supreme Court by an equally divided vote.”

In 2017, **Elaine Duke**, acting director of the DHS, issued a cursory memo announcing the end of DACA. It included no policy reasons. The following year, **Kirstjen Nielsen**, the new DHS director, issued another memo affirming the Duke memo and stating policy reasons.

Breyer cited “a foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action,” concluding therefore that the court should only consider the Duke memo. By contrast, Kavanaugh invoked the Nielsen memo, which he said contains “sound reasons of enforcement policy to rescind the DACA policy.”

Ginsburg called the Nielsen memo “infected” by the view that the program was illegal, arguing that Nielsen would not necessarily have come to the same conclusion if there had been “a clear recognition that there was nothing illegal about DACA.”

### **Roberts Will Likely Be the Swing Vote**

Roberts, who cast conflicting votes in two recent immigration cases, is the wild card here. Together with the four other right-wing justices, he provided the fifth vote to uphold Trump’s Muslim Ban. But he sided with the four liberals to halt Trump’s use of the citizenship question on the 2020 census, writing for the majority that the government’s stated reason for including it was “contrived.”

Roberts [wrote](#), “Altogether, the evidence tells a story that does not match the explanation the [Commerce] Secretary gave for his decision.” He could adopt the same reasoning in the

DACA case and agree with Olson and Mongan that the case should be sent back to DHS to determine the actual cost of ending DACA and provide a reasoned legal analysis.

The chief justice must be mindful of the legacy of his court, which would include stripping DACA protection from nearly a million members of society if he votes with the right-wing justices.

The Supreme Court will announce its decision by the end of June 2020.

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