

Trump's Repeal of the Deferred Action for Childhood Arrivals (DACA). Will the Courts Save the Dreamers?

By [Prof. Marjorie Cohn](#)

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The Trump administration's rescission of Deferred Action for Childhood Arrivals (DACA) has been met with widespread resistance by people across the political spectrum. Thousands have marched in the streets to save the "Dreamers" from deportation. Human rights and civil liberties organizations as well as legislators on both sides of the aisle condemned the ending of DACA.

Donald Trump's attorney general **Jeff Sessions** announced the impending termination of DACA on September 5, 2017, disingenuously claiming it was necessary to forestall a looming legal challenge by 10 state attorneys general. Sessions cited no legal authority for his assertion that DACA was unconstitutional. In fact, no court has ever found DACA to be unlawful.

Lawsuits were immediately filed against Trump's cruel targeting of the "Dreamers."

Apparently surprised at the level of opposition to his action, Trump tried to reassure the public that he might save DACA if Congress fails to act within the six-month period, tweeting:

"Congress now has 6 months to legalize DACA (something the Obama administration was unable to do). If they can't, I will revisit this issue!"

Two days later, at the urging of Minority Leader **Rep. Nancy Pelosi** (D-California), Trump issued another tweet, apparently in support of the Dreamers:

"For all of those (DACA) that are concerned about your status during the six month period, you have nothing to worry about - No action!"

Trump's tweet was not reassuring. In fact, it was not inconsistent with Sessions' announcement, which also said no action would be taken against the Dreamers for six months; then the axe will fall.

The White House Talking Points [memo](#) on the rescission of DACA advises,

"The Department of Homeland Security urges DACA recipients to use the time remaining on their work authorizations to prepare for and arrange their departure from the United States — including proactively seeking travel documentation — or to apply for other immigration benefits for which they may

be eligible.”

Trump’s “No action!” tweet indicates he is being pulled in different directions — by his right-wing nativist base, on the one hand, and by the majority of the population who oppose his heartless act, on the other.

So, what’s next? Will Congress save DACA? Will Trump reinstate it if Congress doesn’t? Or does the fate of DACA rest with the courts?

Will Congress Reinstate DACA?

Congress is now under pressure to reinstitute DACA within six months. Congressional action could take one of three forms. First, Congress might defy years of history and agree on comprehensive immigration reform.

Second, Congress could pass a stand-alone bill legalizing DACA. For example, the BRIDGE Act would enshrine DACA into law and extend it for three additional years to give Congress time to enact comprehensive immigration reform. The Dream Act of 2017 includes protections similar to DACA, but, unlike DACA and the BRIDGE Act, it would create a path for citizenship or permanent legal residency.

Finally, Congress members could engage in horse-trading, exchanging the legalization of DACA for stepped up “border security” measures. They could include cutbacks on legal immigration, withholding federal funds from “sanctuary cities,” hiring additional immigration enforcement agents and even appropriating money to build “The Wall.”

In any event, the chances of Congress acting in any meaningful way to save DACA in the next six months are slim to none. That leaves the fate of the Dreamers with the courts.

Litigating for the Dreamers

The day after Trump rescinded DACA, attorneys general from 15 states and the District of Columbia filed a lawsuit against Trump and his administration in the United States District Court for the Eastern District of New York.

They asked the court to declare that the rescission of DACA violated the Constitution and federal statutes. The plaintiffs also requested an injunction preventing Trump from rescinding DACA and forbidding him from using personal information the Dreamers provided in their DACA applications to deport them or their families.

The states signing on as plaintiffs in this lawsuit are New York, Massachusetts, Washington, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont and Virginia.

California, home to more than 240,000 DACA recipients, the largest number in the country, filed its own lawsuit on September 11.

“Rescinding DACA will cause harm to hundreds of thousands of the States’ residents, injure State-run colleges and universities, upset the States’ workplaces, damage the States’ economies, hurt State-based companies, and disrupt the States’ statutory and regulatory interests,” the complaint alleges.

It specified the number of DACA or DACA-eligible recipients, the amount of revenue each state would lose, and other injuries the rescission would cause.

The plaintiffs argue that Trump's DACA rescission violates the Constitution's Equal Protection and Due Process Clauses, the Administrative Procedure Act and the Regulatory Flexibility Act.

DACA Rescission Violates Equal Protection

More than 78 percent of DACA recipients are of Mexican origin. During the presidential campaign, Trump repeatedly made disparaging and racist comments about Mexicans.

When he announced he was running for president, Trump said,

“When Mexico sends its people, they're not sending their best.... They're bringing drugs. They're bringing crime. They're rapists.”

Candidate Trump tweeted that anti-Trump protesters who carried the Mexican flag were “criminals” and “thugs.”

And Trump denounced **Gonzalo Curiel**, a well-respected federal judge of Mexican heritage who presided in a lawsuit filed by people claiming they were scammed by Trump University. After Curiel unsealed documents, Trump declared that Curiel had “an absolute conflict” that should disqualify him from the case. Trump's reason:

“He is a Mexican,” adding, “I'm building a wall. It's an inherent conflict of interest.”

Trump reiterated his racist comments about Curiel in a June 2016 interview with CBS News, stating,

“[Judge Curiel]'s a member of a club or society, very strongly pro-Mexican, which is all fine. But I say he's got bias.”

In a presidential debate, Trump said,

“We have some bad hombres here and we're going to get them out.”

And two weeks before rescinding DACA, Trump pardoned the notorious racist, former Maricopa County **Sheriff Joe Arpaio**, whom Trump called “an American patriot.” Arpaio had been convicted of criminal contempt for refusing to comply with a court order to stop racially profiling Latinos.

The complaint in *State of New York et al v. Donald Trump et al* states that the September 5, 2017, Department of Homeland Security (DHS) [memorandum](#) rescinding DACA, together with Trump's statements about Mexicans, “target individuals for discriminatory treatment based on their national origin, without lawful justification.” That memo, the complaint alleges, was motivated, “at least in part, by a discriminatory motive.”

Thus, the complaint says, defendants violated the Equal Protection Clause of the Fifth Amendment.

A similar allegation has been leveled against Trump's Muslim Ban, which singles out Muslims for discriminatory treatment. As in *State of New York et al v. Donald Trump et al*, equal protection challenges to the ban cite several anti-Muslim statements Trump made. The Supreme Court will decide the constitutionality of the ban when its new term begins in October.

Using Personal Information to Deport Dreamers Violates Due Process

Since the DACA program's launch in 2012, the DHS repeatedly promised applicants that the information they provided in their applications would "not later be used for immigration enforcement purposes." This reassurance encouraged applications.

The *State of New York et al v. Donald Trump et al* complaint avers,

"The government's representations that information provided by a DACA recipient would not be used against him or her for later immigration enforcement proceedings were unequivocal and atypical."

However, the complaint notes, the September 5th DHS memo "provides no assurance to DACA grantees, or direction to USCIS [US Citizenship and Immigration Services] and ICE [Immigration and Customs Enforcement] that information contained in DACA applications or renewal requests cannot be used for the purpose of future immigration enforcement proceedings."

Using information such as names, addresses, social security numbers, fingerprints, photographs and dates of entry into the United States for immigration enforcement would be "fundamentally unfair" and thus would violate due process, according to the complaint.

DACA Rescission Violates Administrative Procedure Act and Regulatory Flexibility Act

The complaint also alleges that in rescinding DACA with "minimal formal guidance," federal agencies acted "arbitrarily and capriciously," in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2).

In addition, 5 U.S.C. §§ 553 and 706(2)(D) of the APA require federal agencies to "conduct formal rule making before engaging in action that impacts substantive rights." Defendants did not go through the notice-and-comment rulemaking required by the APA.

Finally, the complaint claims that defendants violated the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612, which requires federal agencies to analyze the impact of rules they promulgate on small entities and publish initial and final versions of those analyses for public comment.

Deferred Action Is a Well-Established Form of Prosecutorial Discretion

The complaint states that deferred action, such as the DACA program, is a well-established form of prosecutorial discretion.

More than 100 immigration law teachers and scholars signed a letter to Trump in August stating that the Constitution's Take Care Clause is the primary source for prosecutorial discretion in immigration cases. Article II, Section 3 of the Constitution states that the president "shall take care that the laws be faithfully executed."

As the Supreme Court noted in *Heckler v. Chaney*,

[W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict — a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed."

Congress and the Supreme Court have acknowledged that the executive branch has the authority to grant deferred action for humanitarian reasons. That has included certain categories of people, including victims of crimes and human trafficking, students affected by Hurricane Katrina and widows of US citizens.

In 1999, **Justice Antonin Scalia** wrote for the majority in *Reno v. American-Arab Anti-Discrimination Committee*, an immigration case, that presidents have a long history of "engaging in a regular practice ... of exercising [deferred action] for humanitarian reasons or simply for its own convenience."

Presidents from both parties [have deferred immigration action to protect certain groups](#). **Dwight D. Eisenhower**, **John F. Kennedy** and **Lyndon B. Johnson** permitted Cubans to remain in the United States before Congress enacted legislation to allow them to stay. **Ronald Reagan** allowed about 200,000 Nicaraguan immigrants to remain in the US even though Congress had not passed authorizing legislation. And **George H.W. Bush** permitted almost 200,000 Salvadorans fleeing civil war to stay in the US.

University of California vs. Trump

Janet Napolitano created the DACA program in 2012, while serving as secretary of homeland security in the Obama administration. Now, as president of the University of California (UC), she has filed a lawsuit in the US District Court in Northern California against Trump to save DACA, alleging violations of due process and the APA.

"Defendants compound the irrationality of their decision by failing to acknowledge the profound reliance interests implicated by DACA and the hundreds of thousands of individuals, employers, and universities who will be substantially harmed by the termination of the program," the UC complaint states.

It accuses the Trump administration of "failing to provide the University with any process before depriving it of the value of the public resources it invested in DACA recipients, and the benefits flowing from DACA recipients' contributions to the University." The complaint adds,

"More fundamentally, they failed to provide DACA recipients with any process

before depriving them of their work authorizations and DACA status, and the benefits that flow from that status.”

Napolitano promised that UC campuses will continue to provide undocumented immigrant students with free legal services, financial aid and loans, and will order campus police to refrain from contacting, detaining, interrogating or arresting people solely on the basis of their immigration status.

How Would the Supreme Court Rule?

If Congress or Trump were to reinstate DACA, these legal challenges may become moot. But if the lawsuits proceed and ultimately reach the Supreme Court, what are the justices likely to do?

After Scalia’s death, but before Neil Gorsuch joined the Court, the justices split 4-to-4 in *United States v. Texas*. That tie left in place a circuit court decision striking down the Obama program called Deferred Action for Parents of Americans (DAPA) and an expanded version of DACA. Gorsuch would likely have broken the tie by voting against DAPA.

But the core of DACA has never been litigated. A lawsuit challenging DACA was thrown out of court for lack of jurisdiction.

The Muslim Ban case could serve as a bellwether of DACA’s fate in the high court. In a temporary order, the Court left parts of the ban in place pending its decision on the merits. Three justices — Alito, Thomas and Gorsuch — would have allowed the ban to continue in its entirety. They would also probably defer to Trump in the DACA case.

It remains to be seen how the remaining justices would rule. Chief Justice Roberts is generally conservative but is very concerned about the legacy of the Roberts Court, which led him to side with the liberals in upholding the Affordable Care Act.

Will the DACA case be remembered like *Brown v. Board of Education*, the most significant civil rights case in US history? Or will Roberts’s legacy be tarnished by a result that looks more like the infamous *Korematsu v. United States*, in which, under the guise of national security, the Supreme Court upheld the president’s power to lock up people of Japanese descent in internment camps during World War II?

The bottom line is that if Trump has the opportunity to appoint one or more additional justices to the high court, DACA may well be struck down.

Stay tuned.

Marjorie Cohn is professor emerita at Thomas Jefferson School of Law, former president of the National Lawyers Guild and deputy secretary general of the International Association of Democratic Lawyers. Her books include *The United States and Torture: Interrogation, Incarceration, and Abuse*; *Cowboy Republic: Six Ways the Bush Gang Has Defied the Law* and *Drones and Targeted Killing: Legal, Moral, and Geopolitical Issues*. Visit her website: MarjorieCohn.com. Follow her on Twitter: [@MarjorieCohn](https://twitter.com/MarjorieCohn).

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