DACA RESCISSION: FIGHT PROCEDURE RATHER THAN CONSTITUTIONALITY

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On September 5, 2017, the Trump Administration announced it will end the Deferred Action for Childhood Arrivals (DACA) program,[1] a program established under the Obama Administration in 2012.[2] However, several states and DACA beneficiaries have already filed lawsuits alleging that President Trump's decision was "unconstitutionally motivated by anti-Mexican and anti-Latino animus."[3] The DACA program allows young, unauthorized immigrants who grew up in the United States to obtain work permits and driver's licenses while "effectively grant[ing] a 'stay' of deportation that is renewable . . . every two years."[4] Around 800,000 applicants, from nearly 25 countries,[5] to the DACA program have been approved for two-year work permits since DACA began in the summer of 2012, according to data from U.S. Citizenship and Immigration Services.[6]

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[1] Jefferson B. Sessions III, U.S. Att'y Gen, U.S. DEP'T OF JUSTICE, Attorney General Sessions Delivers Remarks on DACA (Sept. 5, 2017) [hereinafter Sessions Remarks], https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca.

[2] *See* Memorandum from Janet Napolitano, Sec'y, Dep't Homeland Sec., to David V. Aguilar, Comm'r, U.S. Customs & Border Prot., et al. 1-3 (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[3] Keshner, Andrew, *Lawyers fight to save Mexican native who lost work permit granted through DACA*, NY DAILY NEWS (Sept. 5, 2017, 8:06 PM), http://www.nydailynews.com/new-york/lawyers-fight-save-mexican-native-lost-daca-work-permit-article-1.3471816.

[4] Brief of Pamela Resendiz, Carolina Canizalez, and The University Leadership Initiative as Amici Curiae in Support of Defendants, Crane v. Napolitano, 920 F. Supp. 2d 724 (2013) (No. 3:12-CV-3247-0), at 13 [hereinafter *Crane* Amicus Brief], http://www.maldef.org/assets/pdf/AmicusBrief_050613.pdf.

[5] *See* OFFICE OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012-2017 (2017), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2017_qtr2.pdf.

[6] Uhrmacher, Kevin and Granados, Samuel, *What we know about nearly 800,000 'dreamers' in the U.S.*, THE WASHINGTON POST (Sept. 5, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/09/06/what-we-know-about-nearly-800000-dreamers-in-the-u-s/?utm_term=.7815e56b3779.

The participants in DACA, also known as DREAMers,[7] are enrolled in educational programs,[8] employed,[9] and purchase cars[10] and homes[11] in the United States, but now face the possibility of deportation. This threat could be the catalyst that sparks true consideration of several pending bills in Congress, led by both Republicans and Democrats, for immigration reform. While lawsuits aimed at blocking the rescission of DACA focus on a constitutionality argument, a procedural defect could be what saves DACA.

What is DACA?

DACA is a federal government program implemented in 2012 under the Obama Administration that encouraged young, illegal immigrants who were brought to the United States as children to apply for work permits and defer the possibility of deportation if they met a set of criteria.[12] The

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[7] Participants of the DACA program are often referred to as "DREAMers" because of many of the applicants meet the general requirements of the Development, Relief, and Education for Alien Minors (DREAM) Act. *See* Julia Preston, *A 'Dreamer' Addresses the Democratic Convention*, THE CAUCUS, THE POLITICS AND GOVERNMENT BLOG OF THE TIMES (Sept. 6, 2012, 12:44 PM), http://thecaucus.blogs.nytimes.com/2012/09/06/a-dreamer-addresses-the-democratic-convention/. The DREAM Act, or some variation, has been introduced in Congress many times. *See* Crane v. Napolitano, 2012 WL 5199509 at *18 (N.D.Tex. Oct. 10, 2012) (stating the DREAM Act was introduced in the following bills: S. 1291, 107th Cong. §§ 2, 3 (2001); S. 1545, 108th Cong. (2003); S. 2863, 108th Cong. §§ 1801-1813 (2004); S. 2075, 109th Cong. (2005); H.R. 5131, 109th Cong. (2006); S. 2611, 109th Cong. §§ 621-632 (2006); H.R. 1275, 110th Cong. (2007); H.R. 1645, 110th Cong. §§ 621-632 (2007); S. 774, 110th Cong. (2007); S. 1348, 110th Cong. §§ 621-632 (2007) (as amended by S.A. 1150 §§ 612-619); S. 1639, 110th Cong. §§ 612-620 (2007); S. 2205, 110th Cong. (2007); H.R. 1751, 111th Cong. (2009); S. 729, 111th Cong. (2009); H.R. 5281, 111th Cong. §§ 5-16 (2010); H.R. 6497, 111th Cong. (2010); S. 3827, 111th Cong. (2010); S. 3932, 111th Cong. §§ 531-542 (2010); S. 3962, 111th Cong. (2010); S. 3963, 111th Cong. (2010); *See also* H.R. 1842, 112th Cong. (2011); S. 952, 112th Cong. (2011); S. 1258, 112th Cong. §§ 141-149 (2011); H.R. 5869, 112th Cong. (2012)).

[8] Tom K. Wong, UNITED WE DREAM, NATIONAL IMMIGRATION LAW CENTER, AND CENTER FOR AMERICAN PROGRESS, National [hereinafter *United We Dream National Survey*] (showing that 46 percent of respondents are currently in school), https://cdn.americanprogressaction.org/content/uploads/2016/10/21111136/2016-daca_survey_draft_updated-FINAL2.pdf.

[9] *Id.* (finding that eighty-seven percent of respondents to the 2016 survey are currently employed).

[10] *Id.* (showing that fifty-four percent of respondents purchased their first car after receiving DACA in 2016 with an average cost of $10,637 for used cars, and an average cost of $24,307 for new cars).

[11] *Id.* (finding that 12 percent of respondents purchased their first home after receiving DACA, at an average cost of $167,596).

[12] *See* Memorandum from Janet Napolitano, Sec'y, Dep't Homeland Sec., to David V. Aguilar, Comm'r, U.S. Customs & Border Prot., et al. 1-3 (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

applicants were required to go through a significant vetting process which included disclosing any criminal history and analyzing potential threats to national security.[13] If they pass vetting, action to deport DACA participants is deferred for two years, with a chance to renew. Additionally, the participants become eligible for documentation such as driver's licenses, school enrollment, and work permits.[14]

Rescission of DACA

Attorney General Jeff Sessions stated that the implementation of DACA was "an unconstitutional exercise of authority by the executive branch" because the policy circumvented immigration laws, supplanted Congress's authority, and violated the constitutional separation-of-powers doctrine.[15] According to Sessions, the Department of Justice concluded that DACA's flaws were similar to those of the Deferred Action for Parents of Americans and Lawful Permanent Residents program (*DAPA*),[16] which was rescinded in June by the Department of Homeland Security,[17] and likely to be enjoined if it were challenged in court.[18] In his announcement, Sessions referenced the 2015 ruling by the United States Court of Appeals for the Fifth Circuit, *Texas v. United States,*[19] that struck down DAPA.[20] The Court of Appeals in *Texas* held that the Obama administration did not properly follow administrative procedures to implement the DAPA program.[21]

Ironically, the same argument against DAPA could be used against the Trump Administration's rescission of DACA. In *Texas*, the majority held

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13 1-ILPE1 Immigration Law Practice Expediter § 20.02 (2017).

14 *See Crane* Amicus Brief, *supra* note 4, at 3.

15 Sessions Remarks, *supra* note 1.

16 Kevin Penton, *Ex-DHS Head Napolitano, Educators Urge DACA Extension*, Law360 (Aug. 14, 2017) ("Texas Attorney General Ken Paxton and nine allied states have told the Trump administration that if it nixes the DACA program by Sept. 5, they will drop a lawsuit pending in Texas federal court that initially challenged a related program, Deferred Action for Parents of Americans and Lawful Permanent Residents. If not, the states vow to amend the suit to target DACA."), https://www.law360.com/articles/953954/ex-dhs-head-napolitano-educators-urge-daca-extension.

17 *See* Memorandum from John F. Kelly, Sec'y, Dep't Homeland Sec., to Kevin K. McAleenan, Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2017) [hereinafter Kelly Memorandum], https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf.

18 Sessions Remarks, *supra* note 1.

19 Texas v. United States (*Texas I*), 86 F. Supp. 3d 591, 669-70 (S.D. Tex.), *aff'd*, 809 F.3d 134 (*Texas II*), 171-86 (5th Cir. 2015), *aff'd by equally divided Court*, 136 S. Ct. 2271 (*Texas III*) (2016) (holding that the Obama administration did not follow the proper administrative procedures to implement the DAPA program).

20 Sessions Remarks, *supra* note 1.

21 *Texas II*, 809 F.3d at 182-84.

that the DAPA Memorandum[22] was more than a general statement of policy, which constituted a substantive rule[23] under the Administrative Procedure Act and as such, was not exempt from notice-and-comment requirements.[24] Notice-and-comment rulemaking is a procedural process in which “the public is given an opportunity to comment on a proposed version of the rule and the agency responds to the comments.”[25] Therefore, the court in *Texas* upheld the lower court’s nationwide preliminary injunction because appellees[26] established a “substantial likelihood of success on the merits of their procedural claim”[27] by arguing that the DAPA Memorandum violated the Administrative Procedure Act because it was not preceded by any notice-and-comment process.[28] The Trump administration’s rescission of DACA, without engaging in a formal notice-and-comment process, could similarly be seen as violating the Administrative Procedure Act if the rescission constitutes a substantive rather than an interpretive rule.

The Administrative Procedure Act directly exempts "general policy statements" from notice-and-comment rulemaking,[29]however, if the policy constitutes a substantive rule, the notice-and-comment requirement “attaches both to the initial promulgation of a substantive rule and to the amendment or repeal of a previously promulgated rule.”[30] The Supreme Court has not offered much guidance on what constitutes a substantive rule, but district

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22 *See generally* Kelly Memorandum, *supra* note 17.

23 *But see Texas II*, 809 F.3d at 202 (King, J. dissenting) (noting that prosecutorial discretion doesn't require notice and comment under the Administrative Procedure Act and the DAPA Memo "facially purports to confer discretion").

24 *Id.* at 170-71 (citing 5 U.S.C. § 553(b)(A); Prof'ls & Patients for Customized Care v. Shalala, 56 F.3d 592, 595 (5th Cir. 1995); United States v. Picciotto, 875 F.2d 345, 347, 277 U.S. App. D.C. 312 (D.C. Cir. 1989)).

25 Brian Wolfman and Bradley Girard, *Argument preview: The Administrative Procedure Act, notice-and-comment rule making, and “interpretive” rules*, SCOTUSBLOG (Nov. 26, 2014 10:13 AM), http://www.scotusblog.com/2014/11/argument-previewthe-administrative-procedure-act-notice-and-comment-rule-making-and-interpretive-rules/.

26 State of Texas; State of Alabama; State of Georgia; State of Idaho; State of Indiana; State of Kansas; State of Louisiana; State of Montana; State of Nebraska; State of South Caroline; State of South Dakota; State of Utah; State of West Virginia; State of Wisconsin; Paul R. Lepage, Governor, State of Maine; Patrick L. McCrory, Governor, State of North Carolina; C. L. "Butch" Otter, Governor, State of Idaho; Phil Bryant, Governor, State of Mississippi; State of North Dakota; State of Ohio; State of Oklahoma; State of Florida; State of Arizona; State of Arkansas; Attorney General Bill Schuette; State of Nevada; State of Tennessee. *See Texas II,* 809 F.3d at 134.

27 *Id.* at 178.

28 *Id*. at 177.

29 *See* 5 U.S.C. § 553 (b)(A) (2012).

30 Daniel Hemel, *Trump Can’t Revoke DACA Without Going Through Notice and Comment*, TAKE CARE BLOG (Sept. 5, 2017) (citing generally 5 U.S.C. § 551(5)), https://takecareblog.com/blog/trump-can-t-revoke-daca-without-going-through-notice-and-comment.

courts have held that there are two criteria to distinguish general statements of policy, or interpretive rules, from substantive rules: whether the rule (1) imposes any rights and obligations and (2) genuinely leaves the agency and its decision makers free to exercise discretion.[31] Another way of analyzing the distinction is by using the "practically binding" test: under the "practically binding test," if a policy is "present[ly] binding," then it requires the notice-and-comment process.[32] The United States Court of Appeals for the District of Columbia Circuit, in defining "binding," has held:

> If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding."[33]

Additionally, a rule can be binding if it is "applied by the agency in a way that indicates it is binding."[34] Therefore, if an agency legally binds another by imposing rights and obligations and can be enforced "in the same manner as it treats a legislative rule,"[35] the rule is substantive.

Under this standard, the Trump Administration's rescission of DACA could be considered "practically binding" because rescinding deferred action status affects the rights of DACA participants.[36] Further, it will affect DREAMers' future financial interests because it revokes their eligibility for benefits under the Social Security insurance program as well as Medicare.[37] While the rescission is not "present[ly] binding"[38] now, come March 5, 2018,

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31 *Texas II*, 809 F.3d at 177 (citing *Prof'ls & Patients*, 56 F.3d at 595; Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987)).

32 Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec., 653 F.3d 1, 7 (D.C. Cir. 2011) (citing McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1320 (D.C. Cir. 1988)).

33 Appalachian Power Co. v. EPA, 208 F.3d 1015, 1021 (D.C. Cir. 2000) (citing generally Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like--Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1328-29 (1992)).

34 *Texas II*, 809 F.3d at 173 (citing Gen. Elec. Co. v. EPA, 290 F.3d 377, 383 (D.C. Cir. 2002). *Accord McLouth Steel Prods.*, 838 F.2d at 1321-22; Texas v. United States, No. B-14-254, 2015 WL 1540022, at *3 (S.D. Tex. Apr. 7, 2015)).

35 *Appalachian Power*, 208 F.3d at 1021.

36 Hemel, *supra* note 30.

37 *Id.* (citing generally 8 C.F.R. 1.3(a)(4)(vi); 42 C.F.R. 417.422(h); 42 C.F.R. 422.50(a)(7)).

38 *Electronic Privacy*, 653 F.3d at 7 (citing *McLouth Steel Prods.*, 838 F.2d at 1320).

the Trump Administration's decision will have a "present binding effect."[39] The Department of Homeland Security stated that it will not shut down the program until March 5, 2018, and this phase out was characterized by President Donald Trump as an "orderly transition and wind-down of DACA."[40] At this time, no current recipients will be affected before March 5, 2018, but no new initial applications filed after September 5, 2017, will be considered.[41] However, when DACA expires on March 5, 2018, the participants' work permits and driver's licenses will also expire or be revoked by the State.[42] When the decision becomes binding on "State permitting authorities to believe that it will declare permits invalid," it will become a substantive rule and the Administrative Procedure Act does not allow executive agencies like the Justice Department and the Department of Homeland Security to make substantive rules without a formal process.[43] Thus, challenging the rescission of DACA on procedural grounds has both a legal basis and case law support.

Tackling Challenges Going Forward

DACA participants are likely to challenge the rescission in court, and many states have joined together in filing a lawsuit attempting to block the rescission of DACA.[44] The lawsuit claims Trump's decision was "unconstitutionally motivated by anti-Mexican and anti-Latino animus."[45] While the constitutional challenge is emotionally provocative, according to the principles of constitutional avoidance, federal courts should refuse to rule

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[39] *Id.*

[40] Statement of President Donald J. Trump, (Sept. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/09/05/statement-president-donald-j-trump.

[41] *See* Memorandum from Elaine Duke Sec'y, Dep't Homeland Sec., to James W. McCament, Dir. U.S. Citizenship and Immigration Services, et al. (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca.

[42] *See* U.S. Dep't of Homeland Sec., Frequently Asked Questions: Rescission Of Deferred Action For Childhood Arrivals (DACA) (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca.

[43] 5 U.S.C. § 552(a)(1)(E) (2012).

[44] The lawsuit, filed September 6, 2017 in the Eastern District of New York, was brought by the attorneys general of Connecticut, Delaware, Hawaii, Illinois, Iowa, Massachusetts, New York, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia. Mica Rosenburg, *States file lawsuit challenging Trump decision Dreamers*, REUTERS (Sept. 6, 2017 6:36 AM), https://www.reuters.com/article/us-usa-immigration-ny/states-file-lawsuit-challenging-trump-decision-on-dreamers-idUSKCN1BH1HS.

[45] Keshner, *supra* note 3.

on a constitutional issue if the case can be resolved on other grounds.[46] Therefore, it is likely that the Trump Administration's decision would first be analyzed for procedure defects, rather than on issues of constitutionality. However, DACA supporters could meet further challenges even if courts agree that the Trump administration should have subjected its rescission of DACA to the notice-and-comment process; once the formal process is complete, the Trump Administration could still revoke DACA. Although, if a court orders the administration re-instate DACA until it satisfies procedural requirements, it would provide more time for Congress to gain support for several pending bills on immigration reform.

[46] Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *see also* Burton v. United States, 196 U.S. 283, 295 ("It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.").