

Legal Sidebar

The End of the Deferred Action for Childhood Arrivals Program: Some Immediate Takeaways

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On September 5, 2017, the Trump Administration [announced](#) that the Deferred Action for Childhood Arrivals (DACA) program would be phased out over a six-month period. Established in 2012 under the Obama Administration, [DACA](#) permits qualifying unlawfully present aliens who came to the United States as children to obtain a form of relief known as [deferred action](#) and, typically, work authorization for a renewable two-year period. While DACA provides for the *deferral* of any immigration enforcement action (e.g., removal) against a relief recipient, it does [not confer](#) any legal immigration status upon relief recipients.

In 2015, a group of states and government officials obtained a [preliminary injunction](#) preventing implementation of a 2014 [expansion](#) of DACA and a related Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) [initiative](#). The U.S. Court of Appeals for the Fifth Circuit [affirmed](#) the injunction and an equally divided Supreme Court [upheld](#) this decision without opinion. In June 2017, prior to the district court rendering a final decision on the challenge to the lawfulness of DAPA and the DACA expansion, the Department of Homeland Security (DHS) largely [rescinded](#) the memorandums authorizing these initiatives, but announced that the original DACA program “will remain in effect.” Possibly prompted by the plaintiffs’ notice that they would likely amend their complaint to bring a [challenge](#) to the original DACA program, when Attorney General Sessions [publicly announced](#) the wind-down of DACA, he declared that the initiative “is vulnerable to the same legal and constitutional challenges that the courts recognized with the DAPA program.”

Below are a few immediate takeaways from the announcement.

Are DACA recipients now subject to removal? Although the Trump Administration announced a wind-down of the DACA program, including by generally ending its processing of new requests for DACA relief, the Administration indicated that it would delay termination of the program for six months to give Congress a [window](#) to consider legislation allowing DACA recipients to remain in the United States. In addition, the Department of Homeland Security (DHS) [announced](#) that it will not terminate previous DACA grants for the duration of their validity periods, and will consider during the six-month [wind-down](#) period certain DACA requests that are filed by specified deadlines. Consequently, the announced wind-down contemplates that current DACA recipients could remain in the United States for the remainder of time authorized by their previous DACA grants and renewals.

Upon the expiration of their period of relief, DACA recipients generally could be subject to removal on account of their presence in the United States without legal authorization. The Trump Administration, however, indicated in January [its intent to prioritize](#) immigration enforcement resources towards the removal of aliens who have committed crimes; engaged in fraud or willful misrepresentation; abused any public benefits program; pose a risk to public safety or national security; or are subject to a “final order of removal, but have not complied with their legal obligation to depart the United States.” Many DACA recipients would not fall under these removal priorities (indeed, DACA’s [eligibility requirements](#) bar aliens convicted of certain offenses or who pose a threat to the public or national security from obtaining relief). However, DACA recipients who were subject to a final order of removal before obtaining relief might be deemed, at least in some cases, to be a priority for removal if they do not comply “with their legal obligation to depart” the country once their deferred action status is terminated.

Provided that DACA relief is terminated, some former recipients may nevertheless meet certain statutory requirements for other forms of relief, including [asylum](#), [withholding of removal](#), [cancellation of removal](#), [adjustment of status](#), and [Temporary Protected Status](#). Eligibility for these forms of relief depends on an alien's particular circumstance, however, and most likely would not be available to many DACA recipients.

Will information about DACA recipients be used for immigration enforcement purposes? On the same day as the DACA wind-down announcement was made, DHS [indicated](#) that information in DACA applications will not be provided to the immigration enforcement components of DHS for enforcement purposes unless the DACA recipient meets certain [criteria](#) (e.g., has engaged in fraud or specified kinds of criminal activity) or presents a risk to national security or public safety. DHS, however, has advised DACA recipients that this policy “may be modified, superseded, or rescinded at any time without notice, [and] is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable by law by any party in any administrative, civil, or criminal matter.” This policy largely mirrors that stated policy of DHS since DACA was initiated in 2012, including in [instructions to applicants](#) requesting consideration for DACA relief.

If DACA is terminated, can DACA recipients still receive deferred action? When announcing the phase-out of DACA, Attorney General Sessions [characterized](#) it as “an unconstitutional exercise of authority by the Executive” (a conclusion that departed from the [earlier view](#) of the Justice Department). But the Executive has not indicated any revision to its longstanding position that it retains the authority to grant [deferred action](#) to aliens on a case-by-case basis as an exercise of [prosecutorial discretion](#). The establishment of the large-scale DACA initiative did not end DHS's practice of granting deferred action in other circumstances. An alien who has received deferred action is legally permitted to remain in the United States during the deferred action period and, by regulations, may be eligible to receive [work authorization](#). As is the case with deferred action granted through the DACA program, however, a grant of deferred action in a less programmatic manner does not confer any legal immigration status on the alien. DHS also has the discretion to terminate or renew deferred action at any time.

Can DACA recipients continue to receive work authorization? As noted above, DHS has indicated that it will not terminate previous grants of DACA and employment authorization for the duration of their validity periods. In addition, DHS has indicated that it will [continue to adjudicate](#) initial requests for DACA and associated applications for employment authorization that were filed by September 5, 2017 (but the agency will [not accept](#) first-time requests for DACA and employment authorization filed *after* that date). DHS will also adjudicate DACA [renewal requests](#) and associated applications for employment authorization from current recipients that were filed by September 5, 2017. And in the case of current DACA recipients whose benefits will expire between September 5, 2017 and March 5, 2018, DHS [will adjudicate](#) requests to renew DACA and employment authorization if they are filed by October 5, 2017.

Can DACA recipients still travel outside of the United States? In the past, DHS has adjudicated applications for [advance parole](#) to DACA recipients who sought [travel abroad](#) for emergency, educational, or employment reasons. In phasing out DACA, DHS has announced that it will [not approve](#) new applications for advance parole, but will “generally honor the stated validity period for previously approved applications.”

Is the decision to rescind DACA susceptible to legal challenge? On September 6, 2017, fifteen states and the District of Columbia filed a [lawsuit](#) in the Eastern District of New York challenging the Trump Administration's decision to wind down the DACA program. Specifically, the plaintiffs [allege](#) that the decision violates the [Administrative Procedure Act](#) because it is “arbitrary and capricious,” and DHS did not go through the [notice and comment](#) procedures for proposed rulemaking before it made its decision.

Alternatively, the plaintiffs [argue](#) that the DACA decision violates due process because the government has provided no “concrete assurances” that it will not use the information from DACA applications for immigration enforcement purposes; and that the decision violates equal protection by discriminating against Mexican nationals who comprise a substantial portion of DACA recipients. Plaintiffs also [claim](#) that the DACA decision violates the Regulatory Flexibility Act because DHS did not consider the economic impact on businesses that the DACA rescission would allegedly have. Further analysis of these challenges will be forthcoming. (Note: Shortly before this Sidebar was published, both the Regents of the University of California and University of California President Janet Napolitano [filed suit](#) challenging the DACA wind-down on similar grounds as the suit described above; while suing in her official capacity as

university president, Napolitano had, in her former position as Secretary of DHS, [issued](#) the memorandum authorizing the DACA initiative.)

What can Congress do? As noted above, the Trump Administration indicated that it planned to delay complete termination of the DACA program to give Congress the opportunity to consider legislation that would permit DACA beneficiaries to remain in the United States lawfully. In previous years, a number of [bills](#) have been introduced and, in some cases, considered, that would have allowed unlawfully present aliens who came to the United States at a young age to adjust to a legal immigration status (similar bills have been [introduced](#) in the current Congress). But thus far Congress has chosen not to act on such legislation. And it remains to be seen whether or how Congress may respond to the Administration's invitation to consider legislation affording DACA recipients with legal status. Moreover, even if Members of Congress believe that legislation is appropriate to enable DACA recipients to remain in the United States, the nature of the rights and privileges that might be conferred by such legislation – e.g., whether or not persons granted statutory relief should receive legal immigration status or be eligible for public benefits – could be subject to differing views and debate.

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