AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Presidential Power to Execute the Law

*Kirstjen M. Nielsen*, **On the Rescission of Deferred Action for Childhood Arrivals** (2018)[[1]](#footnote-1)

*The Development, Relief, and Education for Alien Minors (DREAM) Act was unsuccessfully introduced in Congress several times since 2001, and in 2010 President Barack Obama endorsed the proposal as a key component of comprehensive immigration reform. At its core, the DREAM Act would grant amnesty to illegal aliens who arrived in the United States as children and are either in school or have graduated from high school and would authorize states to provide in-state tuition for public colleges and would extend eligibility to federally funded scholarships to illegal aliens. When Congress failed to pass the bill, President Obama announced in 2012 that the Department of Homeland Security would no longer take deportation action against individuals who met the criteria that would have been adopted in the DREAM Act (a program known as the Deferred Action for Childhood Arrivals, or DACA). In November 2014, after a televised address on the subject, the president further amended that policy with a guidance statement to prosecutors indicating that they should exercise prosecutorial discretion so as not to “defer action” on pursuing deportation of many of the adults who would have been covered by the DREAM Act. Notably, the statement indicated that “the Department’s limited enforcement resources” should “be focused on those who represent threats to national security, public safety, and border security,” not “children and long-standing members of American society.” The 2014 program was known as Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA. By the end of 2014, nearly three-quarter of a million individuals had applied for deferred action from the government, of which roughly 95 percent were accepted (primarily rejecting those who used the wrong form).*

*In 2017, the Trump administration announced that it would gradually end DACA. Attorney General Jefferson Sessions sent a letter to Acting Secretary of Homeland Security Elaine Duke advising an “orderly and efficient wind-down” of DACA as an unlawful program. Duke in turn issued a memorandum to that effect. Several months later, in response to litigation, Department of Homeland Security Secretary Kirstjen Nielsen issued a new memorandum providing a more elaborate rationale for ending DACA, including some policy reasons for ending the program. The administration eventually lost a suit before the U.S. Supreme Court regarding its handling of DACA. The Court ruled that although the administration had ample authority to rescind DACA and that the initial process of establishing DACA was itself problematic, the administration had violated the Administrative Procedures Act in how it had attempted to rescind the DACA program. Notably, the Court refused to use the Nielsen memo as the administration’s formal basis for its actions but instead relied on the earlier Duke memo. The dissenting justices in* Department of Homeland Security v. Regent of the University of California *(2020) pointed out that the administration could simply restart the process of rescinding DACA with the Nielsen memo as its basis. On July 28, 2020, Department of Homeland Security Acting Secretary Chad Wolf issued a new memo rescinding the earlier directives and beginning the process of ending DACA.*

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On September 5, 2017, Acting Secretary of Homeland Security Elaine C. Duke issued a memorandum (the "Duke memorandum") rescinding the enforcement policy known as Deferred Action for Childhood Arrivals (DACA). Acting Secretary Duke concluded that, "[t]aking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation [over the enforcement policy known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)], and the September 4, 2017letter from the Attorney General [concerning DACA], it is clear that the June 15, 2012 DACA program should be terminated." Accordingly, "in the exercise of [her] authority in establishing national immigration policies and priorities," she "rescind[ed] the June 15, 2012 memorandum," subject to certain exceptions.

On April 24, 2018, the U.S. District Court for the District of Columbia held that the Duke memorandum was subject to judicial review under the Administrative Procedure Act and that it provided insufficient justification for rescinding the DACA policy. . . .

. . . . This explanation reflects my understanding of the Duke memorandum and why the decision to rescind the DACA policy was, and remains, sound.

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First, as the Attorney General concluded, the DACA policy was contrary to law. The Fifth Circuit ruled that DAP A should be enjoined on a nationwide basis on the ground, among other things, that it likely was contrary to the statutory scheme of the Immigration and Nationality Act (INA). As the Fifth Circuit held, "the INA does not grant the Secretary discretion to grant deferred action and lawful presence on a class-wide basis to 4.3 million otherwise removable aliens." . . . Any arguable distinctions between the DAPA and DACA policies are not sufficiently material to convince me that the DACA policy is lawful.

. . . . [The Firth Circuit decision] turned on the incompatibility of such a major non-­enforcement policy with the INA's comprehensive scheme. The Attorney General concluded that the DACA policy has the same statutory defects that the Fifth Circuit identified with DAPA – a determination and ruling by the Attorney General that, in any event, I am bound by pursuant to [federal law].

Second, regardless of whether the DACA policy is ultimately illegal, it was appropriately rescinded by DHS because there are, at a minimum, serious doubts about its legality. A central aspect of the exercise of a discretionary enforcement policy is a judgment concerning whether DHS has sufficient confidence in the legality of such policy. Like Acting Secretary Duke, I lack sufficient confidence in the DACA policy's legality to continue this non-enforcement policy, whether the courts would ultimately uphold it or not.

There are sound reasons for a law enforcement agency to avoid discretionary policies that are legally questionable. Those reasons include the risk that such policies may undermine public confidence in and reliance on the agency and the rule of law, and the threat of burdensome litigation that distracts from the agency's work. The fact that some courts have recently held or suggested that the DACA policy is legal does not change my view that the DACA policy's legality is too questionable to warrant continuing the policy. . . .

Third, regardless of whether these concerns about the DACA policy render it illegal or legally questionable, there are sound reasons of enforcement policy to rescind the DACA policy. To start, DHS should enforce the policies reflected in the laws adopted by Congress and should not adopt public policies of non-enforcement of those laws for broad classes and categories of aliens under the guise of prosecutorial discretion-particularly a class that Congress has repeatedly considered but declined to protect. Even ifa policy such as DACA could be implemented lawfully through the exercise of prosecutorial discretion, it would necessarily lack the permanence and detail of statutory law. DACA recipients continue to be illegally present, unless and until Congress gives them permanent status.

Accordingly, I agree with Acting Secretary Duke and the Attorney General that if a policy concerning the ability of this class of aliens to remain in the United States is to be adopted, it should be enacted legislatively.

In addition, DHS should only exercise its prosecutorial discretion not to enforce the immigration laws on a truly individualized, case-by-case basis. While the DACA policy on its face did allow for individual considerations, a categorical deferred-action policy, at the very least, tilts the scales significantly and has the practical effect of inhibiting assessments of whether deferred action is appropriate in a particular case. Without the DACA policy, DHS may consider deferred action on a case-by-case basis, consistent with the INA. Moreover, considering the fact that tens of thousands of minor aliens have illegally crossed or been smuggled across our border in recent years and then have been released into the country owing to loopholes in our laws-and that pattern continues to occur at unacceptably high levels to the detriment of the immigration system-it is critically important for DHS to project a message that leaves no doubt regarding the clear, consistent, and transparent enforcement of the immigration laws against all classes and categories of aliens. All of those considerations lead me to conclude that Acting Secretary Duke's decision to rescind the DACA policy was, and remains, sound as a matter of both legal judgment and enforcement policy discretion.

I do not come to these conclusions lightly. I am keenly aware that DACA recipients have availed themselves of the policy in continuing their presence in this country and pursuing their lives. Nevertheless, in considering DHS enforcement policy, I do not believe that the asserted reliance interests outweigh the questionable legality of the DACA policy and the other reasons for ending the policy discussed above. That is especially so because issues of reliance would best be considered by Congress, which can assess and weigh a range of options. In contrast, the DACA policy was announced as a temporary stopgap measure, not a permanent fix; it was expressly limited to two-year renewal periods, it expressly conferred no substantive rights, and it was revocable at any time. In my judgment, neither any individual's reliance on the expected continuation of the DACA policy nor the sympathetic circumstances of DACA recipients as a class overcomes the legal and institutional concerns with sanctioning the continued presence of hundreds of thousands of aliens who are illegally present in violation of the laws passed by Congress, a status that the DACA non-enforcement policy did not change. And in all events, the rescission of the DACA policy does not preclude the exercise of deferred action in individual cases if circumstances warrant.

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1. Excerpt taken from Kiestjen M. Nielsen, Memorandum from Department of Homeland Security Secretary Kirstjen M. Nielsen (June 22, 2018). [↑](#footnote-ref-1)