LEGAL CONSEQUENCES OF DACA RESCISSION

By: Geoffrey A. Hoffman

President Trump announced the rescission of Deferred Action for Childhood Arrivals (DACA) on September 5, 2017. The program began under the previous administration on June 15, 2012. DACA was not ended immediately. President Trump announced a six-month period ostensibly to provide Congress time to consider a legislative fix to protect DACA recipients, known as “Dreamers.” Based on the terms of the DACA Rescission memorandum and FAQs, for DACA recipients whose permits expire between September 5, 2017 and March 5, 2018, the Department of Homeland Security (DHS) must receive their DACA renewal applications by October 5, 2017. Unfortunately, those whose DACA applications expired before September 5, 2017, or will expire after March 5, 2018, are unable to file for renewals and will lose DACA when their current period of authorization terminates. In addition, no new applications for DACA would be accepted after September 5, 2017, the date of the rescission announcement.

1 Director, University of Houston Law Center Immigration Clinic; Clinical Associate Professor of Law, University of Houston Law Center. The author wishes to thank Ira J. Kurzban, Michael A. Olivas and Shoba S. Wadhia for reviewing a draft of this article and providing their insightful comments.
2 White House, President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration (2017); Department of Justice, Attorney General Sessions Delivers Remarks on DACA (2017).
3 White House, supra note 2; Letter from Jefferson Sessions, Attorney General, United States, to Elaine Duke, Acting Secretary of Dept. of Homeland Security.
5 Id. (highlighting that renewal applications must be “received by” and not sent by that date.)

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reflecting the abruptness of the decision.\textsuperscript{7} The administration’s decision affected over 800,000 current DACA recipients, not to mention the estimated 700,000 additional individuals who were eligible for DACA but never applied, and their families who will be affected if their loved ones are deported.\textsuperscript{8} 

Ending DACA raises a host of legal issues. Beyond the legal consequences are also crucial non-legal issues flowing from President Trump’s decision to end the program. These include, but are not limited to, the psychological harm to individuals and their families; the social, health, welfare, and educational effects; the job prospects and careers that will be derailed; and the economic impact to the country as a whole. Some commentators already have noted some of these concerns and have written about them.\textsuperscript{9} Less well-documented are the legal ramifications. This article will focus upon two categories of legal issues: (1) overarching issues concerning the legality of ending the program as a whole; and (2) issues having to do with individual DACA recipients and how ending the program may impact future opportunities for relief.

\textit{Background of DACA and its Origins}

DACA arose out of the movement started by so-called “Dreamers,” immigration advocates and immigrants themselves, who sought comprehensive immigration reform

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\textsuperscript{8} Jens Manuel Krogstad, \textit{Key Facts about Immigrants Eligible for Deportation Relief under Obama’s Expanded Executive Actions} 2, Pew Research Center (2016); Kenya Downs & Tania Karas, \textit{The Deadline to Renew DACA is Here, but 36,000 people still have not applied}, Public Radio International, Oct. 5, 2017.
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including, among other proposals, the “DREAM Act,” which stood for the “Development, Relief, and Education for Alien Minors Act.”\(^\text{10}\) The Act, first proposed by Senators Durbin and Hatch in 2001, would have granted qualifying minors in the U.S. conditional residency, and then permanent residency upon meeting further requirements.\(^\text{11}\) Due to the frustration with the failures of various instantiations of the DREAM Act through the years between 2001 and 2011, former President Obama announced DACA as an executive policy to protect Dreamers in June 2012.\(^\text{12}\) The DACA program, hailed by advocates as a step in the right direction, simultaneously drew harsh criticism as allegedly an executive overreach according to some on the right and anti-immigrant, nativist organizations.\(^\text{13}\) A group of states’ attorneys general, led by Texas, sued the Obama administration after an expansion of the original DACA 2012 program was announced in 2014.\(^\text{14}\) President Obama had also announced the Deferred Action for Parents of American and Legal Residents (DAPA), which differed from DACA in that it attempted to protect undocumented parents whose children are U.S. citizens or lawful permanent residents as opposed to children who had entered unlawfully or overstayed a visa.\(^\text{15}\) The expanded DACA would have removed the age cap and provided for a 3-year period of employment authorization.\(^\text{16}\) That litigation resulted in an injunction of the expanded DACA.

\(^{10}\) **American Immigration Council**, *The Dream Act, DACA, and Other Policies Designed to Protect Dreamers*.

\(^{11}\) *Id.*


\(^{15}\) *Id.*

2014 and DAPA by the federal court.\textsuperscript{17} Importantly, DACA 2012 was never enjoined and neither was it the subject of the states’ lawsuit.\textsuperscript{18}

DACA 2012 contained several strict requirements, including entry into the U.S. before age 16, physical presence in the U.S. on June 15, 2012 (the date of announcement), being under the age of 31 on the date of announcement, continuously residing in the U.S. for at least 5 years (i.e. since June 15, 2007), as well as having no lawful status as of June 15, 2012.\textsuperscript{19} The applicant had to have been currently in school, graduated, or obtained a GED, or have been honorably discharged from the military.\textsuperscript{20} Furthermore, the applicant could not have any convictions for a felony, significant misdemeanor, or three or more other misdemeanors.\textsuperscript{21} Although always a discretionary program, the federal government always made clear that the information obtained from the program would \textit{not} be used to target applicants or family members for deportation with a few important exceptions for fraud, public safety or national security.\textsuperscript{22} This assurance was reiterated in the September 5th DHS Rescission FAQs, which spelled out under what circumstances such information could be shared with Immigration and Customs Enforcement (ICE).\textsuperscript{23} To understand the legal effects of DACA rescission, it is necessary to first review what exactly DACA conferred on its recipients.

\textsuperscript{17} \textit{Texas v. United States}, 86 F. Supp.3d 591, 671-676 (S.D. Tex. 2015).
\textsuperscript{18} \textit{Id.} at 606; \textit{Texas v. United States}, 809 F.3d 134 (2015).
\textsuperscript{19} U.S. Citizenship and Immigration Services, \textit{Frequently Asked Questions} (2012)
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} Department of Homeland Security, \textit{supra} note 4.
\textsuperscript{23} \textit{Id.} The September 5, 2017 DACA FAQs from DHS provided that, “Generally, information provided in DACA requests will not be \textit{proactively} provided to other law enforcement entities (including ICE and CBP) for the purpose of immigration enforcement proceedings \textit{unless} the requester poses a risk to national security or public safety, or meets the criteria for the issuance of a Notice to Appear. . . .” (emphasis added). Reference to the “criteria” for issuance of a Notice to Appear reveals that if the requester is found to have engaged in “fraud” or if the referral to the immigration court is mandated by statute then the information may be share by USCIS with ICE.
DACA never purported to provide legal “status” but instead only “lawful presence” during the time of the grant, a temporary reprieve from deportation.\textsuperscript{24} Although no formal regulations on DACA were ever promulgated by the Obama administration, applicants and their attorneys could go to the USCIS.gov website and view the FAQs or Frequently Asked Questions.\textsuperscript{25} These questions and answers became the touchstone for how DACA was implemented and interpreted. In the words of the government’s answer on the USCIS.gov website, “Although action on your case has been deferred . . . you do not accrue unlawful presence (for admissibility purposes) during the period of deferred action, [and] deferred action does not confer any lawful status.”\textsuperscript{26} The FAQs further provided that, “The fact that you are not accruing unlawful presence does not change whether you are in lawful status while you remain in the United States. However, although a deferred action does not confer a lawful immigration status, \textit{your period of stay is authorized by the Department of Homeland Security} while your deferred action is in effect and, for admissibility purposes, you are considered to be lawfully present in the United States during that time.”\textsuperscript{27}

Despite criticisms by some Republicans and anti-immigrants lobbed against the DACA program, attorneys with the Obama-era DOJ, as well as law scholars and advocates, effectively

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\textsuperscript{24} U.S Citizenship and Immigration Services, \textit{supra} note 19. Lawful presence is important in its own right because of provisions enacted in 1996 that provide for three- and ten-year bars for people unlawfully present in the U.S. who depart the country. 8 U.S.C. § 1182(a)(9)(B). The effect of the “Three and Ten-Year Bar” is to prevent people who otherwise could become lawful permanent residents by departing the U.S. from doing so. Thus, granting lawful presence to DACA recipients in some cases will prevent the application of the 3/10-year bar if the applicants did not accrue six months or one year of unlawful presence prior to DACA status.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} U.S. Citizenship and Immigrations services, \textit{supra} note 19.
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argued that then-President Obama was well within his power to roll out DACA in 2012.\textsuperscript{28} DACA advocates argued that the new policy was meant to implement an appropriate prioritization of immigration enforcement as a function of the well-settled and long-recognized principle of prosecutorial discretion.\textsuperscript{29} A letter from scholars on August 14, 2017 spelled out many of the legal bases for the DACA program.\textsuperscript{30} In short, the letter pointed to the fact that INA § 103 provides for the delegation of authority from Congress to the Secretary of DHS to administer and enforce the immigration laws, as well as INA § 242(g) which bars judicial review concerning a range of decisions by DHS, including in which cases to commence removal proceedings, to adjudicate cases, and to execute removal orders.\textsuperscript{31} Furthermore, the regulations governing employment authorization have long recognized that deferred action is a legal category sufficient to support an immigrant’s right to work so long as “economic necessity” is shown.\textsuperscript{32} The letter also pointed to the Supreme Court’s own recognition of the importance of prosecutorial discretion in the recent case of \textit{Arizona v. United States}, 567 U.S. 387 (2012).\textsuperscript{33} As noted by

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\textsuperscript{28} See Steven Camarota, \textit{Time to End DACA}, Nat’l Review, Aug. 3, 2017; Thomas Ascik, \textit{Emotional Appeals for DACA Evade the Fact that It’s Blatantly Unconstitutional}, The Federalist, Sept. 7, 2017 (arguing that deferring deportation was outside the power of the presidency); Janet Napolitano, \textit{The Truth About Young Immigrants and DACA}, N.Y. Times, Nov. 30, 2016; Ian Millhiser, \textit{DACA is Not Unconstitutional}, ThinkProgress, Sept. 5, 2017 (reviewing the state of the law to come to the conclusion that the president did have the authority under prosecutorial discretion to implement DACA).


\textsuperscript{30} \textit{Id.}

\textsuperscript{31} \textit{Id.}

\textsuperscript{32} \textit{Id.}

\textsuperscript{33} \textit{Id.}
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prominent immigration scholars, prosecutorial discretion has long been a part of immigration law, regulations and procedures.\textsuperscript{34}

The expanded DACA (i.e., DACA-plus or DACA 2014 / DAPA) litigation brought against the prior administration’s Department of Justice (DOJ) is, as of this writing, still pending in federal district court.\textsuperscript{35} In that case, after Judge Hanen granted a preliminary injunction in a narrow ruling on a technical point that the executive branch had not followed appropriate notice and comment under the APA,\textsuperscript{36} the case was appealed to the Fifth Circuit.\textsuperscript{37} The Fifth Circuit sided with the plaintiffs (states’ attorneys general) and upheld the preliminary injunction.\textsuperscript{38} The Supreme Court then did not issue any substantive ruling as the justices split 4-4 when the case was brought to the high court.\textsuperscript{39} As a consequence, the case was remanded to the Fifth Circuit, and ultimately to Judge Hanen.\textsuperscript{40} As a further consequence, the Fifth Circuit’s decision stands.

Importantly, neither Judge Hanen nor the Fifth Circuit ever decided any Constitutional issues concerning the legitimate reach of presidential power.\textsuperscript{41} Instead, the Court of Appeals merely decided that the district court was correct in applying the discrete requirements for a


\textsuperscript{35} Josh Gerstein, Judge Rebuffs States’ Efforts to Drop Suit Against Obama Immigration Actions, POLITICO, Sept. 8, 2017.

\textsuperscript{36} Texas, 86 F.Supp.3d at 677.

\textsuperscript{37} Texas, 807 F.3d at 134.

\textsuperscript{38} Id. at 187.

\textsuperscript{39} United States v. Texas, 136 S.Ct. 2271 (2016).

\textsuperscript{40} Adam Liptak & Michael D. Shear, Supreme Court Tie Blocks Obama Immigration Plan, N.Y. Times, Jun. 23, 2016.

\textsuperscript{41} Texas, 86 F.Supp.3d at 677; Texas, 807 F.3d at 188.
preliminary injunction and that they had been met. Those included that the plaintiffs had standing; that the states established a “substantial likelihood of success” on the merits of their Administrative Procedure Act or APA claim; a substantial threat of irreparable injury; and that the issuance of the injunction did not disserve the public interest. The technical ruling on the “notice and comment” provisions of the APA claim was interpreted as a narrow ruling and recognized as not implicating the president’s underlying authority to actually exercise prosecutorial discretion. Judge Hanen did not moot or dismiss the case, but reserved jurisdiction over its disposition, and the case is still pending to date.

### The Reasons Provided and the (Il)legality of Ending DACA in 2017

Acting Secretary of Homeland Security Duke relied upon the Fifth Circuit’s ruling, which - as mentioned - had nothing to do with the original DACA 2012 as the main legal justification to rescind the current program. In her words, “it is clear” that DACA “should be terminated” in light of the Fifth Circuit’s ruling in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), regarding DAPA. Attorney General Sessions in his own letter to Secretary Duke similarly referenced the *Texas v. U. S.* decision. He also mentioned then-Secretary of Homeland Security John Kelly’s decision to rescind the DAPA program, in June 2017, although it had already been subject to a nationwide injunction pursuant to the pending litigation. Then, Attorney General Sessions identified the real reason for the precipitous action to rescind DACA, which follows: “it is likely that potentially imminent litigation would yield similar results with

42 *Texas*, 807 F.3d at 188.
43 *Texas v. United States*, 86 F.Supp.3d.
44 *Id.*
respect to DACA. Attorney General Sessions labeled then-President Obama’s executive action on DACA as an “unconstitutional exercise of authority” but failed to identify how it was unconstitutional, nor did he explain why the executive would be prohibited from utilizing his well-settled prosecutorial discretion authority.

There are serious problems with the purported rationale behind the decision to rescind DACA. The threat of litigation by ten states to sue the present administration on DACA seems to have been the real reason precipitating the September 5th announcement of DACA rescission. This conclusion is supported by the fact that it was the very same day as the “deadline” imposed in the letter authored by Texas Governor Abbott to Attorney General Sessions on June 29, 2017. Notably, the threat to sue is not the same as a legal justification. In fact, there is a very real difference between having a principled reason for rescinding the program, and being worried about the “optics” which may have been triggered if the most prominent Republican states were to band together and carry out their threat to sue the Trump administration. Clearly, the political decision took precedence. Any legal reasons whatsoever, beyond this looks like it might

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46 Sessions, supra note 2.
47 Letter from Ken Paxton, Attorney General, State of Texas, to Jefferson Sessions, Attorney General, United States (Jun. 29, 2017). (on file with the Attorney General’s office)
48 There is one school of thought that says that the “threat” on the part of the states to sue the Trump Administration was collusive. In other words, the argument goes the so-called “threat” may have been used as a cover, under this theory, for the administration so that they would have an excuse to do what they already were inclined to do anyway. I actually disagree. I think that while there certainly are those advising President Trump who are anti-immigrant nativists who are fundamentally against DACA, the President may not be. The President has let it be known (sometimes in confusing ways to be sure) that he is not opposed to working on a solution to help Dreamers and has made reference to his support comprehensive immigration reform albeit in a “closed” meeting with reporters before his state of the union. See Maggie Haberman, Pelosi and Schumer Say the Have Deal with Trump to Replace DACA, N.Y. Times, Sept. 13 2017; Sheryl Gay Stolberg, Trump’s Support for Law to Protect ‘Dreamers’ Lifis Its Chances, N.Y. Times, Sept 14, 2017.
potentially “yield similar results” as the DAPA litigation, were missing from the Attorney General’s and DHS’s account of their decision to rescind.49

The failure to identify any precise legal reasoning behind the administration’s decision to rescind DACA is especially problematic in light of the content of the Fifth Circuit’s decision. Specifically, the Fifth Circuit (and, it is important to emphasize, also the District Judge) found that injunctive relief was appropriate, but not based on any substantive ruling about the scope of presidential power. Instead, both prior decisions were premised on a technical violation of the APA.50 How was it then that AG Sessions could represent in his letter that then-President Obama exceeded his executive authority, if that issue was never even pronounced upon by the courts in their decisions in Texas v. U.S.?51

There is a further crucial question: since, according to previous rulings in the Texas v. U.S. litigation, the APA apparently had been violated by the previous administration’s failure to follow “notice and comment” procedures required for a substantive rule, how could President Trump’s decision to rescind the very same program be in compliance with the APA without his own administration’s compliance with the “notice and comment” requirement?51 This point served as one of the cornerstones of the University of California’s federal court complaint

50 Texas, 86 F.Supp.3d at 678. It should be noted furthermore that the technical violation of the APA was in the context of a preliminary injunction and thus not a final ruling. Therefore, although one could characterize it as a “violation of the APA” there was no such substantive ruling. Instead, the most that can be said is that Judge Hanen found that the equitable factors for the injunction were met at that time, and no final ruling has been issued.
against the Trump administration. In the complaint, plaintiffs argued *inter alia* that “[r]escission constitutes a substantive rule because it affirmatively circumscribes DHS’s statutory authority in providing deferred action and prohibits DHS from renewing recipients’ DACA status after October 5, 2017.” The complaint further avers that the DACA rescission is a final agency action and is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...”

As one commentator has noted there is real irony here. The argument that the APA should *not* apply to then-President Obama’s DACA 2012 program is made more persuasive since the program always made sure to emphasize that DACA applications would be decided on an *individual* basis and there was always discretion on the part of USCIS to deny individual applications. This made it seem more like an executive “policy” as opposed to substantive rule. By contrast, the Trump administration’s decision to rescind seems more like a “substantive rule” in that it is an across-the-board denial of *all* initial applications after September 5th with no discretion to approve after this critical date. Although a six-month window for implementation is built-in allowing for a limited subset of DACA recipients to apply for renewals, this fact in itself would not appear to change the nature of the rescission decision from policy to “substantive rule.”

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53 *Id.* para. 62.
54 *Id.* para. 54.
55 Hemel, *supra* note 51.
56 *Id.*
57 *Id.*
The Trump administration may attempt to mount a rejoinder to these arguments: because DACA 2012 was not in compliance with the APA, then the decision to rescind should be immunized from APA compliance, as well. The problem with such a counter-argument is that it flies in the face of case law.\(^{59}\) Courts have held that where there is a “substantive change” which has a “present binding effect” and alters the right or interests of the parties, the agency must go through notice and comment.\(^{60}\) Even if the initial policy were defectively promulgated that fact does not allow an agency to be insulated from APA notice and comment.\(^{61}\) To allow such an exception, in the words of one Court of Appeals, would be “untenable because it would permit an agency to circumvent the requirements of [the APA] merely by confessing that the regulations were defective in some respect and asserting that modification or repeal without notice and comment was necessary to correct the situation.”\(^{62}\) It is ironic that the Trump administration’s period since by its terms some DACA recipients were already affected as of September 5, 2017. I appreciated Shoba Wadhia’s thoughts on this issue and agree that the six-month window may be less an “implementation” period as a “wind-down” or “phase-out.”

\(^{59}\) See, e.g., Consumer Energy Council v. FERC, 673 F.2d 425, 447 n.79 (D.C. Cir. 1982) (“The Commission’s argument that notice and comment requirements do not apply to ‘defectively promulgated regulations’ is untenable because it would permit an agency to circumvent the requirements of § 553 merely by confessing that the regulations were defective in some respect and asserting that modification or repeal without notice and comment was necessary to correct the situation.”); American Forest Resource Council v. Ashe, 946 F. Supp. 2d 1, 26 (D.D.C. 2013) (“[O]rdinarily an agency rule may not be repealed unless certain procedures, including public notice and comment, are followed, and that this is true even where the rule at issue may be defective.”); National Treasury Employees Union v. Cornelius, 617 F. Supp. 365, 371 (D.D.C. 1985) (“There is some superficial appeal to the government’s argument that a provision which was promulgated in error is void ab initio and can be deleted without more ado. This position has however been rejected by the [D.C. Circuit] Court of Appeals . . .”)

\(^{60}\) Electronic Privacy Information Center v. U.S. Department of Homeland Security, 653 F.3d 1, 5-7 (D.C. Cir. 2011).

\(^{61}\) American Forest Resource Council v. Ashe, 946 F. Supp. 2d 1, 26 (D.D.C. 2013) (“[O]rdinarily an agency rule may not be repealed unless certain procedures, including public notice and comment, are followed, and that this is true even where the rule at issue may be defective.”)

\(^{62}\) Hemel, supra note 51 (quoting Consumer Energy Council v. FERC, 673 F.2d 425, 447 n.79 (D.C. Cir. 1982).
DACA rescission relies on prior court proceedings where the preliminary outcome of those proceedings could only serve to strengthen the conclusion that the current attempt rescinding the program being done unlawfully.63

The purported rationale behind the rescission by the Trump Administration ignores another important point: the court decision of *Crane v. Johnson* where the court considered an attack on DACA 2012, the original unexpanded DACA program at issue here, the case was actually dismissed based on lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1) because ICE agents failed to allege sufficient injury in fact to satisfy constitutional standing.64 If DACA 2012 were so plainly unlawful as AG Sessions’ letter purports then why did the Fifth Circuit affirm the dismissal? Additionally, the court rejected Mississippi’s argument that DACA has caused additional aliens to remain in the state and, thus, causes the state to spend money on providing social services.65 Since DACA 2012, we have had five years to date of economic data which support the conclusion that DACA, far from being a drain on state

63 In addition to the APA cause of action found in the complaints thus far challenging the DACA rescission, the plaintiffs have also alleged causes of action, such as due process, equal protection, etc. Of those, the strongest argument, besides the APA, is that the individual DACA recipients were denied due process of law guaranteed under the Fifth Amendment. It is well-settled that undocumented persons, so long as they are here in the United States, are entitled to due process and they must be provided notice and an opportunity to be heard before they can be deprived of their employment authorization, specifically, and their DACA grant more generally. See *Zadvydas v. Davis*, 533 U.S. 678 (2001) (explaining that “once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent”), *Mathews v. Eldridge*, 424 U.S. 319 (1976) (explaining that “procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”)

64 *Crane v. Johnson*, 783 F.3d 244, 250 (5th Cir. 2015) (affirming the district judge’s grant of plaintiffs’ Fed. R. Civ. Proc. 12(b)(1) motion to dismiss based on lack of subject matter jurisdiction since, as the court found, the defendants could not show standing, in other words that there was a sufficient injury-in-fact).

65 *Id.* at 252
resources, actually is a boon to the economy and therefore states (were they to bring a challenge now to DACA 2012) would likely fail on standing grounds just like the plaintiffs in Crane v. Johnson. The rational by Session’s in his letter to Acting Secretary Duke fails to consider that the only litigation to date relating to DACA 2012 was dismissed.

**Legal Consequences for Individual DACA Recipients**

Having now outlined the arguments for the illegality of ending the DACA program, let’s turn to some of the many legal consequences flowing to individual DACA recipients. As of September 5th, many and perhaps as many as 600,000, received the news that there would be an end to their DACA status with no hope for renewal. Some of those have grants which will expire after March 5, 2018, and they still possess anywhere between 6 months and 2 years of time left to be protected under the program. Of the remaining 200,000 whose DACA status expires between September 5 and March 5, 2018, they are allowed to apply for renewal which must be filed by October 5, 2017. As expressed in a letter dated September 18, 2017 from Congressmen Coffman and Gutierrez, these apparently arbitrary deadlines impose hardships which can be partially remedied by the following proposed fixes: (1) allow individuals whose DACA expired before September 5 to apply for renewal; (2) accept and process renewals postmarked on or before October 5; (3) do not penalize applicants whose applications are rejected for minor, technical errors; and (4) for those currently with unexpired DACA, provide a

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68 *Id.*
2-year grant of deferred action from the date of expiration of the current DACA grant and not the date of approval, which often pre-dates the natural expiration of the current period of DACA.⁶⁹

These are well-considered proposed fixes designed to try to ameliorate some of the patent hardships associated with a rescission that will, by its own design, lead to unfairness and injustice and which has been proposed clearly in an arbitrary and capricious way. Beyond the well-intentioned proposed fixes, what happens to those recipients whose DACA grant is rescinded? Are they able to work lawfully at a job for which they have already begun? What remedies would they be able to invoke before the immigration judge in the event they are placed in removal proceedings? What is their likelihood of being detained if stopped at a checkpoint, by police on the roadways for a traffic violation, or as a consequence of a raid even if they are not the ones being targeted? What arguments may be made before the federal courts? These questions are legitimate ones which people have been asking and should be answered.⁷⁰ The remainder of this article, therefore, considers these issues and explores some of the troubling ramifications. Hopefully, a legislative fix will be forthcoming and these questions will become moot. If that does not transpire, then we as attorneys and advocates need to be ready with answers.

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First, once an individual’s DACA grant has expired then the person will be considered as having returned to the status they previously had.\textsuperscript{71} This may mean, for example, an “overstay” if they stayed in the U.S. longer than a previous status had allowed, such as an F-1 (student) or B-1/B-2 (visitor), or if they entered without inspection (EWI), or some other category. Importantly, there now exists a class of DACA recipients who have since exited and re-entered the U.S. through Advance Parole, since they left for an approved reason after filing a successful I-131. This group may be able to apply for other types of relief depending on their particular situations, given that they have now entered the country through parole and therefore now would meet the definition under INA 245(a) of having been admitted, inspected or paroled into the United States. Such persons, for example, may be able to avail themselves of adjustment of status in the event they have a legitimate and \textit{bona fide} adjustment of status application.\textsuperscript{72}

\textsuperscript{71} Frequently Asked Questions: Rescission of Deferred Action For Childhood Arrivals (DACA), U.S. Department of Homeland Security (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca. Importantly, if a DACA recipient entered the U.S. lawfully (for example, as a child on a visitor’s visa) and overstayed their period of authorized stay then they may be able to apply to adjust their status to lawful permanent residence here in the U.S. if they have a \textit{bona fide} good faith marriage to a U.S. citizen. At a recent DACA workshop I personally saw two renewal applicants who fit this category. It should further be noted that under Matter of Quilantan, 25 I&N Dec. 285 (BIA 2010), a person who was “waved through” at the time of entry may have an argument for “procedural regularity” which would satisfy the INA § 245(a) requirement that the applicant had been “inspected and admitted or paroled” into the United States to adjust. No matter what their individual circumstances everyone who is undocumented should seek an individual consultation with competent immigration counsel to discuss their legal options and determine possible forms of relief, if any.

\textsuperscript{72} See Matter of Arrabally Yerrabally, 25 I&N Dec. 771 (BIA 2012) (holding that travelling abroad on an advanced parole does not constitute a “departure” triggering the 3/10 year bar); see also Matter of X-, St. Paul, Minn. (AAO Oct. 26, 2012), published on AILA InfoNet at Doc. No. 12102242 (denial of adjustment reversed where person re-entered on advanced parole and therefore eligible to adjust); Ortiz-Bouchet v. Att’y Gen. of the U.S., 714 F.3d 1353, 1357 (11\textsuperscript{th} Cir. 2013) (reversed IJ finding of inadmissibility under INA §212(a)(9)(B)(i)(II) based upon Arrabally).
Additionally, some expired DACA recipients may be advised about the possibility of filing Form I-601A (unlawful presence) waiver in conjunction with an adjustment application even if they entered without inspection and had accrued unlawful presence. Although not advisable for everyone, it could potentially allow a person to be consular processed back into the U.S. if USCIS approves the I-601A before they depart the U.S. (This route contains a risk. There is the possibility of problems arising even after the I-601A has been approved, if for example the Department of State decides that a person for some reason should be subject to a ground of inadmissibility. Additionally, a person could be stopped by Customs and Border Protection (CBP) at the border or Port of Entry upon re-entry if for some reason CBP asserts a ground of inadmissibility.)

Other forms of relief, either made affirmatively before USCIS or defensively before the immigration court, will also be available to some former DACA recipients. Individuals are advised to consult with competent and qualified counsel who can discuss all the viable options. For example, if someone has a fear of returning to their country of origin, then applying for asylum may be a possibility. It should be noted that there is an exception to the one-year bar for those who can show “changed circumstances” or “extraordinary circumstances” and thereafter apply for asylum within a “reasonable time” after their status has expired.\(^7\)

\(^7\) 8 C.F.R. § 208.13 § (a)(2)(B) and (D).
to apply as an exception to the one-year bar despite the fact that it has been many years since they last entered the United States.\textsuperscript{74}

For those who have been in the U.S. for more than 10 years they \textit{may} meet the requirements for cancellation of removal for non-lawful permanent residents provided they can show good moral character and meet other requirements.\textsuperscript{75} This form of relief has many hurdles, but since DACA recipients by definition had entered before age 16 and were here in the U.S. since June 15, 2007 they \textit{ipso facto} have been here in the U.S. for longer than the requisite ten-year period. Furthermore, many may have established the requisite relationships which may be used to qualify such as a citizen or LPR spouse or children. Finally, although the standard is very high, “exceptional and extremely unusual hardship,” it is much less strict for those eligible for Violence Against Women Act (VAWA) cancellation, i.e. those applicants subjected to battery or extreme cruelty by a U.S. citizen or lawful permanent resident spouse or parent.\textsuperscript{76} In such case, the standard is “extreme hardship” and the required period of physical presence is three years.\textsuperscript{77}

With regard to working after the DACA grant has been rescinded, at such time there would be no employment authorization to work lawfully in the United States.\textsuperscript{78} Working unlawfully implicates certain penalties for employers.\textsuperscript{79} Working unlawfully also can be a bar to

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\item \textsuperscript{74} 8 C.F.R. \textsection 1208.20
\item \textsuperscript{75} 8 C.F.R. \textsection 1240.20.
\item \textsuperscript{76} 8 U.S.C. \textsection 1229b.
\item \textsuperscript{77} 8 U.S.C. \textsection 1255; \textit{See} INS Memorandum from Paul Virtue, INS General Counsel, Extreme Hardship and Documentary Requirements Involving Battered Spouses and Children (October 16, 1998) (“the alien must demonstrate that his or her removal would, in the opinion of the Attorney General, result in extreme hardship to the alien or the alien's child. These requirements are conjunctive, joined in the statutory text either by comma or by the word ‘and.’ As such, each must be met separately”).
\item \textsuperscript{79} 8 U.S.C. \textsection 1324a.
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adjustment of status and has other immigration consequences for the employee.\(^80\) If someone were to work unlawfully, for example, by using another’s social security card or identity, then they could be criminally prosecuted for associated crimes such as identity theft or fraud.\(^81\) Nevertheless, some advocacy groups have circulated information on working as an independent contractor as a way for former DACA workers to be able to maintain an income.\(^82\) In addition, the immigration scholar Michael A. Olivas has written extensively about\(^83\) and maintained information on the impact of DACA and undocumented status on professional licensing in various states.\(^84\) Despite the end of DACA, depending on the particular state, former

\(^80\) 8 U.S.C. § 1255 (c)(2) and (c)(8); See Policy Alert, Waiver Policies and Procedures, Unauthorized Employment, DEPARTMENT OF HOMELAND SECURITY (August 23, 2017), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartB-Chapter6.html (stating that bars for unlawful employment do not apply to certain classes of persons such as immediate relatives, VAWA applicants, and special immigrant juveniles, for example).

\(^81\) 8 U.S.C. § 1324c.


\(^83\) See, e.g. Michael A. Olivas, Dreams Deferred: Deferred Action, Discretion, and the Vexing Case(s) of DREAM Act Students, 21 Wm. & Mary Bill Rts. J. 463 (2012) (Discussing several earlier studies of the DREAM Act and the topic of undocumented college residency. The author also discusses the difficulty in conducting research upon pending legislation. In part one, a background of the DREAM Act is given; part II reviews the federal DREAM Act, and its failure to gain traction in 2007; and part three considers the politics of immigration reform that are the background for these changes. The conclusion assesses the projections for enactment of legislations conducive to immigration reforms); Michael A. Olivas, Within You Without You: Undocumented Lawyers, DACA, and Occupational Licensing (forthcoming, 52 Val. U. L. Rev., 2017) (In this essay, the author reflects on the different legal theories with regard to occupational licensing, and the intersecting state and federal scopes. He also tells the story of an undocumented immigrant, without legal status in the U.S., who was able to practice law with the support and accommodation by the California state bar licensing authority, the California Legislature, the State’s Governor, and the California Supreme Court).

\(^84\) Michael A. Olivas, Update on DACA, Tuition, and Other Unlawfully-present Issues, https://www.law.uh.edu/ihelg/DACA/.
DACAmmented individuals may be able to become licensed in various fields despite being undocumented.\(^85\)

DACA recipients are legitimately concerned with the future, and specifically with being detained at ICE checkpoints, being picked up for removal during raids or targeted enforcement, or being referred to ICE by local police after a traffic stop.\(^86\) These are possibilities that exist for all undocumented persons. For the DACA recipient, it is most important to understand the new “priorities” as part of the President’s executive order on interior enforcement, and also contained in an implementing memorandum issued by the then-Secretary of DHS, John Kelly.\(^87\) Those new priorities, as I have written about elsewhere, are very broad and potentially limitless in their applications.\(^88\) They include, for example, anyone who is convicted of “any criminal offense,” charged with any crime, or even one who has committed any acts which could lead to a charge.\(^89\) Also targeted are those who have engaged in a material misrepresentation in connection with an official matter, abused any program relating to public benefits, received a final order of removal.\(^90\) Finally, there is a far-reaching, catch-all category: those who “in the judgment of an immigration officer, otherwise pose a risk to public safety or national


\(^89\) *Id.*

\(^90\) *Id.*
security.” Given the expansiveness of these priorities, there is reason to worry that former DACA recipients with no criminal histories could be caught up in immigration enforcement and placed in removal proceedings or, worse, deported without the ability to see an immigration judge.

CONCLUSION

It is absolutely wrong to use the 800,000 DACA recipients as one giant bargaining chip. If the intent of the DACA rescission was really to get both sides to come to the table and to agree to a form of comprehensive immigration reform, which depending on its content could be a good thing, it is certainly a disastrous and cold-hearted move to endanger the lives of the brave DACA recipients who have boldly stepped forward to come out of the shadows. In the end, the shoddy

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92 The concern here is the expanded use of expedited removal. Under the new EO and implementation memo, the government may start to employ the expedited removal to the full extent provided under 8 C.F.R. § 1235.3 Inadmissible aliens and expedited removal. Previously, persons were subjected to expedited removal if they were within 100 miles of the border and found within 14 days of entry. Designating Aliens For Expedited Removal, 69 FR 48877. Under the new approach, those found anywhere in the U.S. and within 2 years of entry may be removed without the need to see an immigration judge. 8 C.F.R. § 1235.3 Inadmissible aliens and expedited removal; Exec. Order No. 13767, 82 FR 8793 (2017). Although most DACA recipients will not fall within this category, there is a concern that they not be erroneously grouped into this category and so should always have on their person proof of their length of time in the United States, as well as proof of their (former or current) DACA grant.

93 The White House released a "wish list" of hardline immigration-related measures on Oct. 8, 2017. See White House, Immigration Principles and Policies, http://i2.cdn.turner.com/cnn/2017/images/10/08/final.immigration.priorities.10.08.17.pdf. These measures lend credence to the view that the administration is using DACA recipients as a means to achieve a preconceived legislative agenda and not interested in protecting their interests as an
defense of a likely “similar result” in some new potential litigation based on the inapposite lawsuit in *Texas v. United States* is a poor excuse for DACA rescission. At the end of the day, everyone should be worried, not just applicants with pending DACA renewals, not just those with DACA whose grants will expire after March 5, 2018, but all of us. As a society, we risk a diminution not just of our economic prospects but of our values if we renege on the promise of DACA. DACA means protection for immigrants, those who entered as children through no fault of their own, who have lived here, attended school, worked, and contributed to our society, and who think of themselves as American. The time for legislative action is now.