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The Role of Prosecutorial Discretion in the Constitutionality of DACA

Olivia Dixon*

On July 15, 2021, federal judge Andrew Hanen, from the Southern District of Texas, ruled that the immigration program called Deferred Action for Childhood Arrivals (hereinafter “DACA”) was unconstitutional and vacated the program.¹ In his memorandum, Hanen argues that the Department of Homeland Security (hereinafter the “DHS”) violated the Administrative Procedure Act (hereinafter the “APA”) when it implemented the program.² DACA provided a certain group of young undocumented immigrants with deferred action, which allowed them to establish a lawful presence for a two-year period of time, during which an individual is safe from deportation.³ One of the most important aspects of the program is that DACA is an act of prosecutorial discretion, meaning the Department of Homeland Security awards deferred action on a case-by-case basis through the program.⁴

DACA was implemented on June 15, 2012 as a response to the Development, Relief and Education for Alien Minors Act (hereinafter the “Dream Act”), which attempted to provide a pathway to citizenship to young undocumented immigrants who were brought to the United States by their parents when they were children, often called “Dreamers.”⁵ The Dream Act continuously failed to pass through Congress and therefore the Obama Administration signed DACA into place to protect

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¹ See generally, *Texas v. United States*, No. 1:18-CV-00068, 2021 WL 3025857 1 (S.D. Tex. July 16, 2021).

² *Id.* at 2.

³ *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/DACA>; *Deferred Action Definition*, U.S. IMMIGRATION, <https://www.usimmigration.org/glossary/deferred-action>.

⁴ *Deferred Action Basics*, NATIONAL IMMIGRATION FORUM (Apr. 15, 2016), <https://immigrationforum.org/article/deferred-action-basics/>.

⁵ Yamiche Alcindor and Sheryl Gay Stolberg, *After 16 Futile Years, Congress Will Try Again to Legalize ‘Dreamers’*, N.Y. TIMES (Sept. 5, 2017).

“Dreamers” until Congress could pass legislation to protect the population.⁶ The program requires that applicants: 1) be under 31 on June 15, 2012; 2) came to the United States before the age of 16; 3) has continuously resided in the United States since June 15, 2007 up to the present time of application; 4) was physically present on the date of June 15, 2012 and at the time of requesting consideration; 5) meets the educational requirements of being currently in school, graduated from high school or obtained a GED, or being a honorably discharged veteran; and 6) have never been convicted of a felony, significant misdemeanor, or three or more other misdemeanors.⁷

The goal of prosecutorial discretion and DACA is to make sure that agencies, such as the DHS, can focus their monetary and personnel resources on priority cases and individuals that are of a higher enforcement concern.⁸ This is a really important factor when looking at the reason why Judge Hanen’s constitutionality argument fails. Judge Hanen argues that DACA is not constitutional because 1) the DHS did not go through notice and comment rulemaking under the APA and 2) the implementation of DACA was not a reasonable exercise of the DHS’s authority.⁹ The fact that DACA was an act of prosecutorial discretion plays heavily into refuting these claims.

Procedurally, the DHS did not have to go through notice and comment rulemaking to promulgate the DACA program because it was a “general statement of policy,” which is a type of exception from notice and comment.¹⁰ This is because DACA is simply a statement to let the public

⁶ *The Dream Act: An Overview*; AMERICAN IMMIGRATION COUNCIL (Mar. 16, 2021), <https://www.americanimmigrationcouncil.org/research/dream-act-overview>.

⁷ *Consideration of Deferred Action*, *supra* note 3.

⁸ *Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor (OPLA)*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/about-ice/opla/prosecutorial-discretion>.

⁹ *Texas v. United States*, No. 1:18-CV-00068, 2021 WL 3025857 1, 34, 44 (S.D. Tex. July 16, 2021).

¹⁰ *Id.* at 19.

know how they proposed to exercise their discretionary power.¹¹ This is because DACA does not provide the DHS with a new power, it simply explains how it will use its already established discretionary power and who they have identified as a lower priority group, in this case young undocumented immigrants who came to the United States as young children and are continuing have a positive impact on the United States and its economy.¹² While DACA may have provided requirements that an applicant must meet, discretion is still kept, as an individual could meet all the necessary conditions and still be denied deferred action under DACA.¹³ Most importantly, the Biden Administration recently opened a sixty-day notice and comment period to fix the alleged procedural issues and strengthen DACA's foundation.¹⁴

Judge Hanen's substantive argument was based on the *Chevron* test, which states that when an agency, like the DHS, promulgates a new rule, there are two questions to be asked: 1) whether Congress has already addressed the issue in question and 2) if not, whether the agency's interpretation of Congress's statute is appropriate and reasonable.¹⁵ Judge Hanen argues

¹¹ *Id.* at 35 (citing *Lincoln v. Virgil*, 508 U.S. 182, 197 (1993) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979)).

¹² Tom K. Wong, *et al.*, *DACA Recipients' Livelihoods, Families, and Sense of Security Are at Stake This November*, AMERICAN PROGRESS (Sept. 19, 2019), <https://www.americanprogress.org/article/daca-recipients-livelihoods-families-sense-security-stake-november/> (noting the economic benefits that the DACA population has had on the United States' economy, such as establishing new businesses, job creation, and an increase in buying power).

¹³ *Frequently Asked Questions*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Aug. 31, 2021), <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions>. See generally, *Medina v. U.S. Dep't of Homeland Security*, 408 F. Supp. 3d 1224 (W.D. Wash. 2019) (noting the DHS terminated Ramirez's DACA status relying solely on speculative arguments and old, minor transgressions that "would not otherwise disqualify him for DACA"); *Garcia Herrera v. McAleenan*, 379 F. Supp. 3d 1143 (E.D. Wash. 2019) (noting the DHS terminated Herrera's DACA status, even though he had been accepted for years and his circumstances had not changed).

¹⁴ *DHS to Publish Notice of Proposed Rulemaking on DACA*, DEP'T OF HOMELAND SECURITY (Sept. 27, 2021), <https://www.dhs.gov/news/2021/09/27/dhs-publish-notice-proposed-rulemaking-daca>. See generally, 5 U.S.C. § 553(b)(3)(A).

¹⁵ *Chevron, U.S.A. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842–843 (1984).

both that the implementation of DACA addresses an issue already discussed by DACA and that even if not, the program was not a reasonable one to put into place.¹⁶ However, Judge Hanen is wrong in these conclusions and again, much of the reasoning against his argument is based on the fact that DACA is an act of prosecutorial discretion. Congress has in fact never specifically addressed the issue of the DACA population, only the general group of undocumented immigrants. Stating that “the DACA eligible population is removable,”¹⁷ is not the same thing as saying that the DACA population cannot receive deferred action. In fact, DACA does not bar the government from removing an applicant because, due to the program being an act of prosecutorial discretion, DACA can be revoked or not renewed at any time at the discretion of the DHS and therefore they can be removed afterwards.¹⁸ Additionally, the DHS’s implementation of DACA was very reasonable under the circumstances because it is an act of prosecutorial discretion. As stated, deferred action existed long before DACA was implemented and had been a tool that was publicly used by immigration since at least 1975.¹⁹ DACA did not create something new and instead just described how the DHS was planning on using it in relationship to young undocumented immigrants who came to the United States with their parents. It just created guidelines for DHS agents to follow when using their discretion in awarding individuals with deferred action. It follows Congress’s meaning behind prosecutorial discretion in that DACA allows the DHS to identify individuals of low priority, so that immigration can focus on higher risk cases.²⁰ The DACA population had no control over their situation, as they were children when they crossed the border into the United States, which

¹⁶ *Texas v. United States*, No. 1:18-CV-00068, 2021 WL 3025857 1, 44–45 (S.D. Tex. July 16, 2021).

¹⁷ *Id.* at 51.

¹⁸ *Frequently Asked Questions*, *supra* note 13.

¹⁹ Shoba S. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. L.J. 243, 246 (2010),

https://elibrary.law.psu.edu/cgi/viewcontent.cgi?referer=https://en.wikipedia.org/&httpsredir=1&article=1016&context=fac_works.

²⁰ *Frequently Asked Questions*, *supra* note 13.

demonstrates a strong lack of an intent to violate the law, and this has been recognized multiple times by the DHS.²¹

Therefore, contrary to Judge Hanen's argument, the DACA program was properly implemented by the DHS under the APA and therefore is constitutional. Because it was an act of prosecutorial discretion, the DHS did not have to use notice and comment rulemaking to promulgate it, and the program was a reasonable exercise of the DHS's authority. Judge Hanen's ruling should be vacated by the Supreme Court, and DACA should be ruled as constitutional. Even more importantly, it is important that the Government work on immigration reform and pass legislation that will allow the DACA population to have a legal pathway to citizenship, so that they can continue to make positive contributions to American society, both socially and economically.

Edited by Alex Beezley

²¹ See Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service to the Department of Justice's Regional Directors, District Directors, Chief Patrol Agents, and Regional and District Counsel (Nov. 17, 2000), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Memo-ProsDiscretion.pdf>; Memorandum from John Morton Director of U.S. Immigration and Customs Enforcement to the All Field Office Directors, Special Agents in Charge, and Chief Counsel (July 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.