Could DHS Rescind DACA Based On Litigation Risk?

Tim Duncheon

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The U.S. Supreme Court will soon hear argument on whether the Department of Homeland Security (DHS) lawfully rescinded the Deferred Action for Childhood Arrivals (DACA) program. One of the government's key arguments is that it was reasonable to rescind DACA because leaving it in place risked a damaging "court-ordered shutdown."

Although some scholars have defended this argument, the Court should reject it.

The government's argument goes like this: It believed DACA had legal defects similar to those of Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), a program that the U.S. Court of Appeals for the Fifth Circuit enjoined in 2015. Because of these similarities, the government believed it was "probable" that a court could enjoin DACA as well.

It follows, according to the government, that DHS acted reasonably in rescinding DACA in an orderly fashion rather than risk "a court-ordered shutdown, the terms and timing of which would be beyond the agency's control." The government's contention seems to be that a court would suddenly revoke work authorization for hundreds of thousands of people—and even order their deportation—and the executive branch would look on helplessly.

As a preliminary matter, the government's argument may fail because it was not developed in the administrative record, as two federal appellate courts have concluded. The only discussion—much less analysis—of the litigation risk argument in the agency's record is a fleeting statement in a memorandum by then-U.S. Secretary of Homeland Security Kirstjen Nielsen. The memorandum quoted a brief letter by the U.S. Attorney General concluding that "it is likely that potentially imminent litigation would yield similar results with respect to DACA."

But even if the Supreme Court holds that the litigation risk argument *was* adequately presented in the record, it is still an unreasonable basis for rescinding DACA.

Granted, agencies can and should consider litigation risk, including the probability of a court-ordered shutdown. Agencies frequently modify their rules between their proposed and final versions to minimize exposure to litigation risk, as the Obama-era U.S. Environmental Protection Agency did with the Clean Power Plan. Furthermore, the Supreme Court has

implicitly acknowledged that litigation risk factors into decisions because an agency must set priorities and decide whether it is "likely to succeed if it acts."

But when an agency justifies a decision by claiming that "imminent litigation" will "likely" lead to a certain result, courts must ensure that the claim is reasonable. And, as I have argued, reasonable consideration of litigation risk requires a basic cost-benefit analysis of four key factors—none of which DHS took into account.

First, an agency must consider net benefits that would be forgone by prematurely ending DACA. These benefits must be weighed against the second and third factors—the probability of a court-ordered shutdown and the additional costs it would entail—which together determine the expected costs of the potential shutdown. Fourth, the agency must consider the contrary risk that the rescission itself would be shut down by courts.

Despite claiming to rescind DACA because of an anticipated court-ordered shutdown, DHS failed to consider these factors. Had it done so, the analysis would not have supported rescission.

In the first place, rescission of the DACA program would forgo significant benefits not only to DACA's 700,000 recipients, but also to the national economy. The Cato Institute concluded that ending DACA would cost the federal government $60 billion and sap the national economy of $280 billion over the next decade. The American Action Network has estimated that ending DACA would reduce the nation's gross domestic product by $42 billion annually.

A litigation risk assessment must weigh these considerable benefits against the second and third factors: the probability that a court would order a shutdown and the additional costs of such a shutdown.

A court-ordered injunction shutting down DACA was very unlikely. Key differences between DACA and DAPA might have led a court to conclude that DACA was in fact lawful, as both federal appellate courts in fact held. And unlike DAPA, DACA had been in effect for five years, a period of time long enough to bar an injunction under the equitable doctrine of laches, as a Republican-appointed judge eventually concluded.

Furthermore, judges issue injunctions only after balancing the equities at stake, so they would have to consider the consequences of suddenly ending work authorization for—and even deporting—hundreds of thousands of people. Even if inclined to issue an injunction, courts defer to government defendants in defining an injunction's scope to maintain proper separation of powers. If, despite all of these considerations, a court issued a disruptive injunction, the government would have petitioned the Supreme Court for review, and the Court would almost certainly have heard such a high-stakes case.

To claim that DACA had to be rescinded to avoid a damaging court-ordered shutdown is to predict that the Supreme Court itself would likely affirm a disruptive injunction over the objections of the executive branch. Such a prediction is far from reasonable.

Third, even in the extremely unlikely event that the Supreme Court viewed DACA as unlawful and affirmed an injunction dismantling the program, it would approve a gradual rescission no

more costly than the one the Trump Administration proposed. DHS's decision to rescind the program therefore would bring about the same high costs of the unlikely worst-case scenario, while also forgoing billions of dollars of benefits that would flow if DACA could continue in the meantime.

Finally, DHS failed to consider that undertaking its rescission also posed obvious litigation risk: namely, legal challenges to the rescission itself. Given the weakness of DHS's justifications and the paucity of the record, any administrative lawyer could have told the Department that its rescission might not withstand judicial review. In fact, of the two appellate courts that have released opinions analyzing the rescission, both have held that it was unlawful.

The Trump administration has the legal authority to rescind the DACA program. But it must present a rational justification for its decision, and a litigation risk argument requires at least a basic analysis of these four factors.

While courts must defer to agency expertise, they must be wary when agencies wave their hands and cite vague predictions about how *courts* will behave. Deference to poorly considered arguments about litigation risk will permit agencies to shift the responsibility for their decisions onto imaginary future judicial opinions. Lax judicial review will not only reduce political accountability—it will rope the courts further into the political fray.

In some future case, an agency might plausibly be justified in dismantling a program due to a risk of a court-ordered shutdown. But such an agency would need to show its work. The Supreme Court should conclude that the DHS simply failed to do so here.