

**Editor's Note :** [Click here for important resources on the nomination of Amy Coney Barrett and the confirmation process.](#)  
We're hosting a [symposium on the jurisprudence of the late Justice Ruth Bader Ginsburg](#). Click to follow along with the contributions.

**Briefly Mentioned :** [On Wednesday at 10 a.m., the justices will hear oral argument in \*Google v. Oracle\* and \*Ford Motor v. Montana Eighth Judicial District\*. Click here to tune in live.](#)

**Shoba Sivaprasad Wadhia** Guest  
Posted Thu, September 12th, 2019 2:30 pm

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## Symposium: Dream deferred

*Shoba Sivaprasad Wadhia is an immigration attorney, Samuel Weiss Faculty Scholar and founding director of the Center for Immigrants' Rights Clinic at Penn State Law – University Park. She has served as an expert or co-counsel in litigation in defense of DACA. The anecdotes in this post are drawn from her forthcoming book, "Banned: Immigration Enforcement in the Time of Trump," released on September 10, 2019.*

On November 12, 2019, the U.S. Supreme Court will hear [oral argument](#) in three consolidated cases challenging the end of the Deferred Action for Childhood Arrivals program, known as DACA. DACA was announced from the Rose Garden by former President Barack Obama on [June 15, 2012](#), and implemented two months later, allowing those who entered the United States before the age of 16 and who meet residency, educational and other requirements to seek deferred action for a two-year period. [Deferred action is one form of prosecutorial discretion](#) in immigration law. Those who are granted deferred action may apply for and receive employment authorization upon a showing of "economic necessity" and pursuant to a [regulation](#) published by the government in 1981. Outside of DACA, [thousands of deferred-action recipients](#) have been granted work authorization under this regulation.

DACA has a strong legal foundation. In 1976 Sam Bensen, then General Counsel of the Immigration and Naturalization Service, published a [memorandum](#) about the legal authorities behind prosecutorial discretion, pointing to the U.S. Constitution, immigration statute, court decisions and "inherent authority." These legal authorities have been [affirmed](#) by subsequent administrations and applied to deferred action for individuals including victims of domestic violence and sexual assault, widows and widowers of U.S. citizens and those with serious medical conditions or family ties, to name a few.

The DACA policy enabled nearly [800,000](#) people to live outside of the shadows, work in a range of industries and go to school. According to [one 2018 survey](#) published by the Center for American Progress, 93 percent of DACA respondents currently in school said that DACA allowed them to pursue "educational opportunities that [they] previously could not." This same survey showed that respondents had increased their earning power by 78 percent since receiving DACA. According to the [Migration Policy Institute](#), about 9,000 DACA recipients are teachers or in similar educational fields and 14,000 are in healthcare-related fields. I have witnessed the enormous contributions those with DACA make in the classroom and our educational institutions.

Despite the tremendous success of DACA and its [strong legal foundation](#), former Attorney General Jeff Sessions announced in a [press conference](#) on September 5, 2017, that DACA would end, calling DACA recipients "illegal aliens" and the policy an "unconstitutional exercise of authority by the executive branch." One DACA recipient who used her lunch break to listen to Sessions' speech shared her response with me: "Just hearing everything that he said knowing that that was such a lie, such an excuse, such bull ... It was just ... a pretty defeating, dehumanizing moment."

How DACA ended was the [subject of legal challenges](#) in federal courts based in California, Maryland, New York and the District of Columbia, and ultimately resulted in nationwide injunctions reinstating DACA for those who have ever received it. Three of these courts concluded that ending DACA without a rationale was arbitrary and capricious under administrative law. This conclusion was also reached by two appellate courts.

The human impact of the termination on "DACA-mented" individuals, their families and our country has been significant. One DACA recipient I spoke to talked about the mental toll: "I think it's not so much the effect of the policies that are being enacted, which are dangerous and poisonous to our democracy, but it's the psychological warfare that we're subjected to on a daily basis." Another DACA recipient I spoke to worries less about himself and more about the younger generation of "dreamers" who were too young to request DACA before it was terminated. For those who risk losing their DACA or who were too young to request it, the end of DACA and failure of a legislative solution amount to a dream deferred.

The fate of DACA at the Supreme Court is uncertain and may hinge either on whether the court believes the case can be reviewed or on the legality of how DACA ended. Representing the government, the [solicitor general has filed a brief arguing](#) that DACA cannot be reviewed under an "arbitrary and capricious" standard because the choice to end DACA is committed to the absolute discretion of the Department of Homeland Security. In the alternative, the government has argued that DHS provided multiple grounds for ending DACA. The government proposes three reasons for upholding the department's decision: 1) that the judicial outcome of an analogous deferred-action policy for parents known as DAPA, or Deferred Action for Parents of Americans, provides a basis for finding that DACA is unlawful; 2) that DACA creates an incentive for noncitizens to migrate to the United States through the southern border; and 3) that the department's conclusion that DACA is "not just legally questionable but indeed unlawful" was correct.

[DAPA](#) was a deferred-action policy announced by Obama in November 2014 that would have enabled qualifying parents of Americans to request deferred action from the United States Citizenship and Immigration Services. Texas and other states challenged the program as unlawful. The [case](#) went from a district court to the United States Court of Appeals for the 5th Circuit to the Supreme Court. The Supreme Court deadlocked 4–4, leaving the 5th Circuit's ruling barring implementation of the policy in place. DHS [rescinded the DAPA memorandum](#) on June 15, 2017.

The government's arguments to the Supreme Court raise several concerns. First, the litigation in the DAPA case had nothing to do with DACA. Whether the never-operational DAPA policy was a lawful exercise of prosecutorial discretion is simply unrelated to the legal question about how the current administration terminated DACA. Furthermore, the government's attempt to connect immigrants arriving at the southern border to the DACA policy is faulty. People arriving at the southern border are doing so in large part of the dangerous conditions back home, in my experience. By contrast, DACA recipients arrived in the United States at a young age, have lived in the United States for more than a decade and consider America home. Further, the government provides a flawed analysis for why DACA is unlawful, concluding without explanation that none of the statutory authorities that have long been interpreted to authorize prosecutorial discretion, and deferred action in particular, are valid. Finally, the government uses inflated numerical estimates for who might qualify for DACA to argue against the legality of the program. How many should qualify for DACA or any other deferred-action directive is a policy question, not a legal one. Previous administrations have employed deferred action and similar policies to protect groups of people and, as with DACA, have required the agency to assess each case on an individual basis.

Prosecutorial discretion is essential in any law-enforcement context and immigration is no exception. Because resources are limited, the government has to make decisions about whom to target for enforcement and whom to leave alone. Prosecutorial discretion has long been informed by compassion. Even before DACA, [thousands](#) of immigrants living in the United States were granted deferred action or another kind of prosecutorial discretion because of factors such as tender or advanced age, long-term residence or serving as a caregiver to a family member with serious medical needs. Regardless of how the Supreme Court rules in this case as a matter of law, the choice by the Trump administration to end DACA represents an extraordinary use of discretion that is morally troubling and out of sync with history and our humanity.

Posted in [Department of Homeland Security v. Regents of the University of California, Trump v. NAACP, Wolf v. Vidal, Featured, Symposium before oral argument in DHS v. UC Regents, Trump v. NAACP and McAleenan v. Vidal](#)

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- This Week at the Court ▲
- On Monday, the court released [additional orders](#) from the September 29 conference. The justices heard oral argument in [Carmey v. Adams](#) and [Texas v. New Mexico](#).
  - On Tuesday, the justices heard oral argument in [Rutledge v. Pharmaceutical Care Management Association](#) and [Tanzin v. Tanvir](#).
  - On Wednesday at 10 a.m., the justices will hear oral argument in [Google v. Oracle](#) and [Ford Motor v. Montana Eighth Judicial District](#).
  - On Friday, the justices will hold their October 9 conference.
- Statistical Snapshot ▼

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I never thought I'd get to hear about personal jurisdiction in the real world after law school. @chris\_j\_walker, I'm so sorry I ever doubted you.

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**Justice Ruth Bader Ginsburg awarded Liberty Medal**

On Thursday, Sept. 17, the National Constitution Center awarded its Liberty Medal to Justice Ruth Bader Ginsburg in a program featuring performances by internationally renowned opera singers and tributes from special guests. The award "honors men and women of courage and conviction who strive to secure the blessings of liberty to people around the globe." [...]

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