



WRITTEN STATEMENT SUBMITTED TO THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Ex-Officio Hearing on the Human Rights Situation of Persons Affected by the Cancellation of TPS (Temporary Protected Status) and DACA (Deferred Action for Childhood Arrivals) in the United States

Submitted by:

American Civil Liberties Union

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The American Civil Liberties Union (ACLU) welcomes the Inter-American Commission on Human Rights' timely *ex officio* hearing on the "Situation of Human Rights of Persons Affected by the Cancellation of the TPS (Temporary Protection Status) and DACA (Deferred Action on Childhood Arrivals) in the United States."

I. Background on Rescission of the DACA Program

The Deferred Action for Childhood Arrivals (DACA) program allows some individuals who came to the U.S. as children to receive a renewable two-year period of deferred action from deportation and to be eligible for a work permit. To be eligible for DACA, individuals must meet specified educational and residency requirements and also pass extensive criminal background checks. DACA was created in June 2012 by former Department of Homeland Security (DHS) Secretary Janet Napolitano in the Memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,"¹ which was created under the Obama Administration in 2012. In announcing this temporary protection on June 15, 2012, President Obama said, "I believe that it's the right thing to do because I've been with groups of young people who work so hard and speak with so much heart about what's best in America, even though I knew some of them must have lived under the fear of deportation."²

On September 5, 2017, President Trump announced that he was ending the DACA program, while assuring DACA recipients that they "have nothing to worry about," and urged Congress to find a legislative solution.³ In rescinding this program, which protected close to 800,000 immigrant Americans, the U.S. government stopped processing any new applications for DACA and announced that the 154,000 DACA recipients whose status was set to expire within six months could reapply as long as they filed their request by October 5, 2017. Since the September 5 announcement, more than 20,000 DACA recipients have lost their status and work authorization because they were unable to—or were prevented from—meeting the 30-day

renewal deadline (and accompanying \$500 application fee).⁴ Most recently, due to a January 9th federal court order, the U.S. government has resumed accepting renewal requests (but not new requests for DACA).⁵

Over 900,000 individuals had applied for or been granted DACA at the time the program was rescinded, and many remain worried that the extensive personal data they have provided for their application could be shared with Immigration and Customs Enforcement (ICE), the agency charged with immigration enforcement (i.e., arrests, detention, and deportation).⁶ As stated in a letter by former DHS Secretary Jeh Johnson, “[s]ince DACA was announced in 2012, DHS has consistently made clear that information provided by applicants will be collected and considered for the primary purpose of adjudicating their DACA requests and would be safeguarded from other immigration-related purposes.”⁷ However, under President Trump, DHS has undertaken aggressive immigration enforcement practices around the United States, and the acting director of Immigration and Customs Enforcement (ICE), Thomas Homan, has publicly stated that *all* undocumented individuals are a priority for arrest and deportation.⁸ In April 2017, in response to questions about a DACA recipient who was removed from the country, Attorney General Jeff Sessions said, “We can’t promise people who are here unlawfully that they’re not going to be deported.”⁹ In September 2017, the former Acting Secretary of DHS, Elaine Duke, reportedly stated that she has never seen DHS guidance telling DACA applicants that their information would not be used for immigration enforcement purposes.¹⁰

Indeed, since President Trump was inaugurated, DHS has targeted DACA recipients for enforcement action. Notably, after the inauguration, DHS has engaged in a practice of revoking individual noncitizen’s DACA grants, prior to the original expiration date, without providing any notice or meaningful explanation. According to government data, the Department’s revocation of individual DACA grants increased by 25 percent after President Trump’s inauguration.¹¹ Since President Trump took office, numerous DACA recipients have been arrested, detained, and/or had their DACA grants revoked.¹²

After the decision to rescind DACA was announced, immigrants’ rights groups and universities challenged the termination of status in federal court.¹³ And on October 5, 2017, the ACLU filed a class action lawsuit on behalf of DACA recipients whose permission to live and work in the United States was arbitrarily stripped away by the U.S. government, with no notice, explanation, or opportunity to be heard, even though they still qualify for the DACA program.¹⁴ These individuals were either accused of a crime or found guilty of a minor misdemeanor that had no impact on their DACA status; nevertheless, their DACA status was unlawfully terminated without an opportunity to contest the allegations behind the termination. In November, a federal judge in California issued a decision enjoining DHS’s termination of the lead plaintiff’s DACA grant, holding that the agency’s termination of his DACA without providing notice or process was unlawful.¹⁵ The ACLU has now filed motions requesting a class-wide nationwide injunction on the same grounds.

In the challenge to the rescission of the DACA program, on January 9, 2018, a federal judge in California issued a nationwide order, requiring the government to maintain the DACA program with the same terms and conditions in effect before its rescission (although new requests for DACA would not be processed, only renewals).¹⁶ The Department of Justice

announced it would appeal the decision directly to the U.S. Supreme Court. While this legal decision provides some immediate respite, it does not provide the security of a long-term legislative solution nor does it undo the damage, uncertainty and anxiety created by President Trump's decision to rescind DACA and expose thousands of immigrant Americans to the danger of deportation and family separation. Meanwhile, as the March 5th deadline for when DACA protections expire loomed, White House Chief of Staff John F. Kelly said that President Trump is not likely to extend the March deadline.¹⁷ Kelly further commented that President Trump's immigration plan (which includes funding a border wall with Mexico, significant changes to the legal immigration system, and other changes to the enforcement system that would undercut migrants' rights) would expand DACA protections to include not only those who had applied for DACA but also those "too lazy to get off their asses" and sign up for DACA protections.¹⁸

II. Potential Legislative Measures

Federal legislation to protect undocumented immigrants who came to the United States as children has been introduced and reintroduced for years; the initial version of the Development, Relief, and Education for Alien Minors (DREAM) Act was introduced in 2001. Congress has consistently failed to pass this legislation, leaving its hopeful beneficiaries (known as "Dreamers") in limbo. The Dream Act provides a path to U.S. citizenship for people who are either undocumented or have DACA and who graduate from U.S. high schools and attend college, enter the workforce, or enlist in the military. Depending on the version of the Dream Act, slightly over 2 million immigrant youth could benefit. As President Obama stated when he announced the creation of DACA, "[p]recisely because this (DACA) is temporary, Congress needs to act. There is still time for Congress to pass the DREAM Act this year, because these kids deserve to plan their lives in more than two-year increments."¹⁹

III. Human Rights Implications of the Termination of DACA

The DACA program provides immigrant Americans with necessary, if temporary, protection to live, work, and study in the United States without the looming threat of arrest and deportation. While it does not provide a direct path to permanent residence or citizenship, in the absence of a firm legislative solution, the program provided a critical safeguard for individuals with significant ties to the United States but no pathway to regularize their migration status.

The current situation, with the termination of DACA and similarly with the termination of some Temporary Protected Status designations (namely, for Sudan, Nicaragua, Haiti, and El Salvador) has implications for the United States' human rights obligations; first, by denying longtime residents an opportunity to regularize their status, and second, in exposing these individuals to arrest, detention, and deportation through a system with significant human rights violations.

A. Denial of Protection and Legal Status

As this Commission observed earlier this year, the United States' "policy of closing legal avenues to reach or gain status or international protection in the United States unnecessarily jeopardizes the rights of migrants and their families."²⁰ In 2017, the United Nations High

Commissioner for Human Rights also expressed concerns regarding U.S. “policies which greatly expand the number of migrants at immediate risk of deportation – without regard for years spent in the US or family roots. . . . I am especially disturbed by the potential impact of these changes on children, who face being detained, or may see their families torn apart.”²¹

Absent legal status, noncitizens may face economic exploitation or exclusion from public life and services as well as denial of basic human rights protections. As a recent United Nations issue brief noted, “regularization [of legal status] can be an effective means to address migrant vulnerability.”²² International human rights law is increasingly concerned with policies that leave noncitizens trapped in legal limbo with no pathway to regularize and formalize their status. For example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, to which the United States is not a party, holds that when migrant workers and their families are in an irregular legal situation, states shall “take appropriate measures to ensure that such a situation does not persist.”²³ Similarly, in 2016, the New York Declaration for Refugees and Migrants recommended that States consider “policies to regularize the status of migrants.”²⁴

In rescinding the DACA program, the Trump administration has done the exact opposite, removing critical protections that have been a lifeline to around 800,000 individuals and their families with deep ties to the United States. Rescinding this temporary protection from DACA recipients and similarly from TPS recipients—essentially stripping lawful status from individuals who have made their lives in the United States and without providing a robust replacement—has created devastating uncertainty for families around the United States.

B. On-going Human Rights Violations in the U.S. Deportation Process

As this Commission has noted, the decision to terminate the DACA program is not an isolated incident but is part of a constellation of harmful policies, including the end of TPS protections and the Central American Minors Refugee and Parole programs, and a proposal to alter and reduce the already beleaguered protections in place for unaccompanied children. The ACLU and other organizations have testified to the IACHR on several occasions that the existing deportation system violates human rights law (particularly in the areas of due process, detention, and *non-refoulement* obligations) as well as U.S. constitutional and statutory law.²⁵ For DACA recipients and beneficiaries of TPS who face the looming threat of arrest and removal from the United States, the inadequacies of the U.S. immigration system may subject them to unjust expulsion proceedings and harmful detention when they seek to remain with the families in the United States.

1. Due Process in Deportation Proceedings

Human rights law guarantees that all persons appearing before a judicial proceeding receive “a fair and public hearing by a competent, independent, and impartial tribunal.”²⁶ As discussed in previous ACLU submissions, despite this guarantee, and U.S. domestic law’s consistent recognition of the importance of fair deportation hearings, most people facing expulsion do not get a hearing before a judge or a real opportunity to make claims to enter and remain in the

United States. Moreover, the few who do get a hearing (around 15 percent of those removed from the United States each year) rarely have a lawyer.²⁷

While all these impediments to justice remain, in recent months, the fate of asylum seekers, children, and other migrants has become even more precarious and politicized. For example, President Trump's administration has continued to refer to asylum seekers as taking advantage of "loopholes,"²⁸ and increasingly focuses on the danger presented by the MS-13 gang, conflating children seeking protection with the organized crime they fled.²⁹

In another grievous development for children facing expulsion from the United States, on January 29, 2018, the Ninth Circuit Court of Appeals issued a decision concluding that the U.S. Constitution did not require that the government provide a lawyer to a child facing deportation.³⁰ The child in question was seeking asylum protections and, as the court even acknowledged, faces a serious risk of death at the hands of gangs in Honduras. This appears to be the first case in the United States to hold that a child can represent themselves when critical rights are on the line.³¹

These developments are particularly troubling given that ICE has ramped up its deportation activities within the interior of the United States.³² More longtime residents, including DACA and TPS recipients, may find themselves facing deportation to places where their lives could be in danger.

2. Immigration Detention

As discussed in our previous submissions, the U.S. government heavily and unnecessarily relies upon immigration detention, including the detention of children, asylum seekers, and migrants with mental disabilities. Every year, the US government detains hundreds of thousands of individuals in administrative immigration detention, sometimes for months or years while their immigration cases and any subsequent appeals proceed.

The Trump administration is moving to expand detention and is identifying sites for private immigrant detention facilities around the United States.³³ Moreover, conditions at these facilities continue to raise human rights concerns. In December 2017, more than 70 members of Congress wrote to the Department of Homeland Security to express concern with "the prevalence of reports of sexual abuse, assault, and harassment in U.S. immigration detention facilities, the lack of adequate government investigation into these reports, and the government's refusal to disclose relevant records. . ."³⁴

C. DACA Rescission Violates U.S. Human Rights Obligations

The rescission of the DACA program and U.S. failure to regularize the status of hundreds of thousands of immigrants raise serious concerns regarding their compatibility with the United States' regional human rights commitments. As a Member State of the Organization of American States (OAS), the United States has an obligation to respect and to ensure the human rights of every person within its jurisdiction, pursuant to the OAS Charter and the American Declaration of the Rights and Duties of Man. This obligation extends to all individuals regardless of nationality, migratory status, or other social condition, and includes the rights to, inter alia:

equality and nondiscrimination, due process of law and judicial protection, seek asylum (including the rights not to be subjected to refoulement or collective expulsion), liberty, freedom from torture and cruel or degrading treatment, special protection for children, and respect for family life. Further, the United States has ratified, among other instruments, the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).³⁵ Collectively, these instruments require the United States to respect and ensure the rights to, inter alia: equal protection and nondiscrimination, freedom from torture and cruel or degrading treatment, due process in immigration proceedings, liberty, family life, judicial protection, non-refoulement, and to seek asylum. These rights are implicated, and may already have been violated, by the recession of DACA. Furthermore, cancellation of DACA strips thousands of people of their basic rights and fundamental protections and effectively renders them stateless persons with little or no protection in violation of international law.

In addition to this honorable Commission, several international human rights bodies have raised serious concerns about the recession of DACA including the U.N. High Commissioner for Human Rights,³⁶ and more recently a group of U.N. human rights experts who said the “expiry of DACA offers a unique opportunity for regularization of many migrants who have strong economic, social, cultural and family links in the United States, and whose contribution to society is unquestionable.”³⁷

IV. Conclusion and Recommendations

The rescission of DACA and termination of TPS will have a long-lasting and devastating impact on hundreds and thousands of individuals. The ACLU recommends the following:

- Urge the United States government to reinstate the DACA program.
- Urge the United States government to rescind Executive Order 13768, Enhancing Public Safety in the Interior of the United States, issued on January 25, 2017.
- Urge the United States Congress to pass the Dream Act and pass legislation providing permanent protection for those with Temporary Protected Status.

We thank this Honorable Commission for convening this hearing and for the opportunity to present this statement on the human rights implications of the recession of DACA and termination of TPS. Should you have further questions regarding the information in this submission, please contact Sarah Mehta (smehta@aclu.org) or Lorella Praeli (lpraeli@aclu.org).



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³⁵ *See also* Sarah Davila-Ruhaak, *The Domestic and International Legal Implications of DACA*, THE JOHN MARSHALL LAW REVIEW, Sept. 23, 2017, *available at* <http://lawreview.jmls.edu/the-domestic-and-international-legal-implications-of-daca/>; David B. Thronson, Closing the Gap: DACA, DAPA, and U.S. Compliance with International Human Rights Law, 48 Case W. Res. J. Int'l L. 127 (2016), *available at* <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1573&context=facpubs>.

³⁶ “U.N. Rights Boss Urges U.S. Congress to Give ‘Dreamers’ Legal Status,” REUTERS, Sept. 11, 2017, *available at* <https://www.reuters.com/article/us-usa-immigration-un/u-n-rights-boss-urges-u-s-congress-to-give-dreamers-legal-status-idUSKCN1BMOVE>.

³⁷ U.N. Office of the High Commissioner for Human Rights (OHCHR), “UN Experts Make Urgent Call for US to Regularize, Protect Rights of Young Migrants as DACA Deadline Nears,” Feb. 20, 2018, *available at* <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22677&LangID=E>.