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## The Supreme Court Rules That Trump's DACA Rescission Doesn't Pass Muster

By Peter Margulies Thursday, June 18, 2020, 5:12 PM

On June 18, the Supreme Court by a 5-4 vote ruled against the Trump administration's attempt to rescind the DACA (Deferred Action for Childhood Arrivals) program. In a narrow opinion by Chief Justice John Roberts based on administrative law doctrine, the court stressed the reliance interests of DACA recipients. Roberts found that the administration in its initial 2017 rescission decision had not adequately considered alternatives that would ease the "hardship" posed by rescission to the roughly 700,000 people in the program. In particular, the Supreme Court held that when the Department of Homeland Security found in 2017 that DACA was unlawful and thus required rescission, the department failed to address whether one facet of DACA—its "forbearance" in deferring removal of recipients—was in fact legal as an exercise of prosecutorial discretion. This flaw in the department's decision-making rendered the rescission invalid.

DACA was a signature immigration initiative of the Obama administration. The program provided a renewable reprieve from removal to foreign nationals who came to the United States as children and conferred eligibility for work authorization, as well as facilitating state benefits such as driver's licenses and tuition reimbursement. As Chief Justice Roberts observed, Obama's Department of Homeland Security had found that DACA would allow the United States to benefit from "productive young people" who "know only this country as home."

DACA was accompanied by another Obama initiative, Deferred Action for the Parents of Americans (DAPA), which the U.S. Court of Appeals for the Fifth Circuit held was too massive to fit within Congress's scheme under the Immigration and Nationality Act (INA). The Supreme Court, shortly after Justice Antonin Scalia's passing in 2016, affirmed the Fifth Circuit in a 4-4 tie without issuing any opinion, thus precluding DAPA from taking effect. For the Trump administration, the Fifth Circuit's legal analysis required DACA's rescission.

The Trump administration rolled out its rationale in two phases. In 2017, then-Attorney General Jeff Sessions opined in a letter that DACA was unlawful and unconstitutional as a unilateral exercise of executive power inconsistent with the INA's careful demarcation of foreign nationals entitled to enter or remain in the United States. Elaine Duke, then serving as acting secretary of homeland security, echoed Sessions's letter in a September 2017 memorandum.

In June 2018, after several courts had found the 2017 justifications inadequate, new Acting Secretary of Homeland Security Kirsten Nielsen issued more expansive reasons for the rescission. In addition to reiterating that DACA was simply unlawful, Nielsen asserted that the legality of DACA, like DAPA, triggered "serious doubts" that in themselves were a reasonable basis for ending the program. Nielsen also outlined policy reasons for rescinding the program, such as a preference for case-by-case decisions over DACA's broad eligibility criteria for childhood arrivals. While Roberts's opinion did not opine definitively on DACA's legal merits, it indicated that the Trump administration's stated justifications were inconsistent with the "reasoned decision[-]making" that the Administrative Procedure Act (APA) demands.

The APA's push for reasoned decision-making is vital because executive agencies do not exist in a vacuum; rather, they exercise power that Congress has delegated. An agency can responsibly exercise that delegated power only through careful reflection and the comprehensive provision of reasons. When the agency's stated reasons do not fit the stakes of the decision that the agency has made, the agency has failed to "turn square corners" with the people—as Roberts concluded regarding DACA, citing a phrase used first by Justice Oliver Wendell Holmes and later by the great liberal dissenter, Justice Hugo Black. In suggesting that the Trump administration's stated rationale was unconvincing, Roberts echoed the conclusion in the census case from last year—another administrative law decision—in which he found that the administration's stated reason for attempting to add a citizenship question to the census was pretextual.

In focusing on the Department of Homeland Security's 2017 reason for rescinding DACA and disregarding the more detailed 2018 memorandum from Nielsen, Roberts invoked a mainstay of administrative law: the *Chenery* doctrine. This principle, first announced by the Supreme Court in 1943's *SEC v. Chenery Corp.*, says that when it comes to justifications, an agency gets only one bite at the apple. The agency should state its reasons fully the first time around, rather than alter its positions to fit subsequent lawsuits. Allowing the agency to rely on after-the-fact, "post hoc" rationalizations would fail to give stakeholders adequate notice of the agency's reasoning and frustrate courts called upon to review agency action.

For that reason, Roberts concluded, Homeland Security could not rely on Nielsen's more detailed statement of legal and policy reasons for the rescission. The department was stuck with its 2017 rationale, prompting a new administrative law variant on an old maxim: reason in haste, repent at leisure.

Building on this "only one bite at the apple" principle, Roberts found Homeland Security's 2017 reasoning wanting. To reach this conclusion, Roberts divided DACA into two elements: its granting recipients eligibility for benefits, such as work authorization; and its forbearance of removal. According to Roberts, in 2017, then-Acting Secretary of Homeland Security Duke should have analyzed the legality of DACA's benefits and forbearance prongs separately. Even if the department had rightly concluded that the benefits prong was legally unsupportable, the department should *still* have considered whether the forbearance prong was consistent with the INA. Roberts suggested, without deciding, that some measure of forbearance was consistent with prosecutorial discretion that Congress has delegated to the executive branch.

In any case, Roberts found, Homeland Security could at least have *considered* whether forbearance would be appropriate as a general matter or in particularly compelling cases, such as when a recipient was completing a course of study, serving in the military or undergoing medical treatment. In failing to separately consider the lawfulness of such forbearance, the department also failed to fulfill its duty to soundly deliberate under the APA.

Roberts, having found against the administration on the APA issue, found that the challengers of the rescission had not made their case that the rescission also violated the Equal Protection Clause. Justice Sonia Sotomayor dissented from that part of the court's opinion. Justice Clarence Thomas, joined by Justices Samuel Alito and Neil Gorsuch, wrote a stinging dissent on the APA issue, asserting that DACA was illegal from the start. Alito also wrote separately to express his view that the majority had exceeded the bounds of the Supreme Court's role by thwarting a longtime policy goal of the Trump administration.

Finally, Justice Brett Kavanaugh's dissent eloquently discussed the plight of DACA recipients but found that the majority had applied the "one bite at the apple" principle too broadly, thus distorting administrative law. Kavanaugh described Nielsen's 2018 memo as a supplemental explanation, not an entirely new rationale. According to Kavanaugh, the 2018 Nielsen memo amplified the 2017 Homeland Security justification but did not seek to provide an entirely new rationale. The 2018 memo, in his view, was therefore not a post hoc rationalization that courts must ignore under the *Chenery* doctrine.

The Supreme Court's decision remanded the case to lower courts. As of now, current DACA recipients can renew their participation in the program—but the administration may try again to rescind DACA, using the majority opinion as a road map for how to follow the requirements of the APA. However, that task may face practical difficulties, akin to the obstacles that induced the administration to abandon efforts to put a citizenship question on the census after the Supreme Court's unfavorable decision a year ago. Drafting a new rationale takes time, as does litigation about the new rationale, which would surely follow.

It seems a stretch to believe that such an arduous process could unfold before the November 2020 election. A victory for former Vice President Joe Biden would result in DACA's preservation, consistent with Biden's pledge to maintain the program. A victory for Trump, by contrast, would allow the administration more time to attempt the rescission correctly. In this sense, the Supreme Court's decision highlighted the significance of the upcoming presidential contest.

Topics: Executive Power, Immigration

Tags: daca

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