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A Close Look At High Court's DACA Ruling

By **Bill Hing** (June 23, 2020, 5:45 PM EDT)


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The more than 700,000 beneficiaries of the Deferred Action for Childhood Arrivals, or DACA, program breathed a giant sigh of relief last week, when U.S. Supreme Court Chief Justice Roberts issued a 5-4 majority opinion vacating the Trump administration's rescission of the program.

Unlike President Donald Trump's travel ban, which went through three iterations before reaching the court, his administration stood by its first attempt to terminate DACA.

That was a fatal mistake, as the U.S. Department of Homeland Security ignored lower court rulings that going back to the drawing board and trying again by thoughtfully following the Administrative Procedure Act was all that was necessary.

Justices Ruth Bader Ginsburg, Stephen Breyer and Elena Kagan joined the opinion of the court in full. Justice Sonia Sotomayor concurred with the decision vacating the rescission, but disagreed with the plurality's striking of an equal protection claim. Justices Clarence Thomas, Samuel Alito, Neil Gorsuch and Brett Kavanaugh voted to uphold the rescission of DACA.

The DACA program was established by former President Barack Obama's administration in 2012 for Dreamers — undocumented children — who entered before 2007, completed high school or served in the military and were under age 31. Those who qualified benefited in two important ways: (1) they were not subject to deportation for two years and (2) they were permitted to work. These benefits could be renewed every two years.

Almost nine months after Trump took office, former Attorney General Jeff Sessions wrote to the former acting secretary of the U.S. Department of Homeland Security, Elaine Duke, advising that DHS should rescind DACA.

The only real reason that Sessions gave was that DACA was likely illegal, citing Texas v. United States, a decision of the U.S. Court of Appeals for the Fifth Circuit that had struck down a similar Obama administration program that would have granted forbearance from deportation and employment authorization to undocumented parents of U.S. citizen children — the Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA.

When Duke rescinded DACA on the attorney general's advice the next day, she simply cited the attorney general's letter and referenced the same Fifth Circuit DAPA opinion.

The Supreme Court addressed three issues: (1) whether APA claims were reviewable, (2) if so, whether the rescission was arbitrary and capricious in violation of the APA, and (3) whether the plaintiffs stated an equal protection claim.

Administrative Procedure Act

The preliminary question that the court decided was whether APA claims asserted were reviewable. The government argued that DACA is a nonenforcement policy and that its rescission is unreviewable by courts. However, the court found that the rescission was reviewable because DACA is much more

than a simple nonenforcement policy.

DACA involves an application process that includes a process to review the application, consideration of supporting documents and the issuance of formal notices that amount to an adjudication process.

DACA simply is not a passive nonenforcement process, but rather a program that confers affirmative immigration relief. Thus, the majority ruled that DACA's benefits are more than simple nonenforcement, largely because it includes work permission, and eligibility for Social Security and Medicare.

Arbitrary and Capricious

Once reviewability was determined, the question was whether the rescission was arbitrary and capricious. To answer that question, the natural starting point was Duke's announcement. However, the government urged the court to also consider a memorandum issued nine months after the Duke rescission, and after litigation challenging the rescission was initiated.

That new memo was issued by then-DHS Secretary Kirstjen Nielsen. Her memo began by reiterating that, "as the Attorney General concluded, the DACA policy was contrary to law."

Second, Nielsen added that, regardless, the agency had "serious doubts about [DACA's] legality" and, for law enforcement reasons, wanted to avoid legally questionable policies.

Third, Nielsen identified multiple policy reasons for rescinding DACA, including (1) the belief that any class-based immigration relief should come from Congress, not through executive nonenforcement; (2) DHS' preference for exercising prosecutorial discretion on "a truly individualized, case-by-case basis"; and (3) the importance of "project[ing] a message" that immigration laws would be enforced against all classes and categories of aliens.

Nielsen acknowledged the "asserted reliance interests" in DACA's continuation, but concluded that they did not "outweigh the questionable legality of the DACA policy and the other reasons" for the rescission discussed in her memorandum.

In its decision, the majority points out that the problem for the government is the foundational principle of administrative law — that judicial review of agency action is limited to the grounds that the agency invoked when it took the action. Nielsen's comments, coming nine months after Duke's rescission, were impermissible post hoc rationalizations that were not properly before the court.

Despite purporting to explain the Duke memorandum, the majority concluded that Nielsen's reasoning bore little relationship to that of her predecessor. Duke rested the rescission on the conclusion that DACA is unlawful. Period. The majority pointed out that, by contrast, Nielsen's new memorandum offered three "separate and independently sufficient reasons" for the rescission, only the first of which was the conclusion that DACA is illegal.

The court understood that DHS may rescind DACA. All parties agreed that it may. With that in mind, the government — as well as Justice Kavanaugh — advanced a form-over-substance argument, protesting that requiring a new rescission order before considering Nielsen's new justifications would be "an idle and useless formality."

However, the court adhered to the basic rule: An agency must defend its actions based on the reasons it gave when it acted. This was not a case for cutting corners. Thus, the court ruled that the government could only rely on Duke's explanation. If the government wanted to rely on new reasons like those provided by Nielsen, then it had to go back to square one and issue a new rescission order.

To assess the arbitrary and capricious claim on the facts before it, the critical issue for the court was whether Duke "failed to consider ... important aspect[s] of the problem" before her. The court noted that relying on the attorney general's advice, Duke simply said that DACA is illegal — a legal question for the attorney general. But Duke did not appear to appreciate the full scope of her discretion, which picked up where the attorney general's legal reasoning left off. Ultimately, the court lays the blame for the inadequacy of the rescission on both the attorney general and Duke.

By simply saying that DACA was illegal and referencing the Fifth Circuit DAPA case with no further explanation, the attorney general did no favors for Duke. The majority opinion points out that like DACA, the DAPA program also had the two components of forbearance from deportation and employment permission. However, the Fifth Circuit case left forbearance authority unimpaired — the defining feature of both DACA and DAPA.

The Fifth Circuit found that DAPA violated immigration laws because it extended eligibility for benefits to unauthorized aliens. The court notes that eliminating benefits eligibility — a work permit — while continuing forbearance thus remained squarely within Duke's discretion. Yet, rather than addressing forbearance in her decision, Duke treated the attorney general's conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation.

Treating a rationale that applied to only part of a policy as sufficient to rescind the entire policy was fatal. Duke's memo offered no reason for terminating forbearance. She instead treated the attorney general's conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation.

The rescission memorandum contains no discussion of forbearance or the option of retaining forbearance without benefits. Duke entirely failed to consider that important aspect of the problem. Thus, the court ruled that that omission alone rendered Duke's decision arbitrary and capricious.

But the court goes on to find there were other defects in the Duke rescission. Duke also failed to address whether there was legitimate reliance on the original 2012 DACA memorandum. When an agency changes course, as DHS did here, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters. Yet that is what Duke's rescission did.

At that point in the decision, the majority essentially provides instructions to DHS on how DACA might properly be rescinded, should it choose to do so. The court acknowledges that deciding how best to address a finding of illegality moving forward involves important policy choices, especially when the finding concerns a program with the breadth of DACA. Those policy choices are for DHS.

The court found that Duke plainly demonstrated some discretionary authority in winding down the program, such as allowing those DACA recipients whose benefits were set to expire within six months to apply for two-year renewals. But she failed to address other considerations, such as the fact that DACA recipients had enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance.

She also did not consider the consequences of the rescission to DACA recipients' families, including their 200,000 U.S.-citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them.

Importantly, the court instructs DHS that reliance by DACA recipients and the consequences faced by their families and friends are certainly noteworthy concerns, but they are not necessarily dispositive. For example, DHS could respond that reliance on forbearance and benefits was unjustified in light of the express limitations in the DACA memorandum. Or it might conclude that reliance interests in benefits that it views as unlawful are entitled to no or diminished weight.

And, even if DHS ultimately concludes that the reliance interests rank as serious, they could contend that they are but one set of factors to consider. The court said that DHS may determine, in the particular context before it, that other interests and policy concerns outweigh any reliance interests. Making that difficult decision was the agency's job, but the agency failed to do that in the Duke order.

Had Duke considered reliance interests, the court suggests that she might, for example, have considered a broader renewal period based on the need for DACA recipients to reorder their affairs.

Alternatively, Duke might have considered more accommodating termination dates for recipients caught in the middle of a time-bounded commitment, to allow them to, say, graduate from their course of study, complete their military service or finish a medical treatment regimen.

Or she might have instructed immigration officials to give salient weight to any reliance interests

engendered by DACA when exercising individualized enforcement discretion.

To be clear, in the court's view DHS was not required to do any of this or to consider all policy alternatives in reaching its decision. Agencies are not compelled to explore every alternative device. But, because DHS was not writing on a blank slate, the court concludes that DHS was required to assess whether there were reliance interests, determine whether they were significant and weigh any such interests against competing policy concerns. Duke should have considered those matters but did not. That failure was arbitrary and capricious in violation of the APA.

The court's APA analysis is excellent. First, if the Trump administration wanted to end DACA, it certainly had to come up with a better explanation than to say that Obama acted illegally in creating it. The government made a royal mistake in relying on the Fifth Circuit opinion, which did not strike down the forbearance portion of DAPA. That was a major oversight on the part of the government.

Also, after lower courts told the government that DHS should go back to the drawing board, it's very hard to understand why that did not happen. After all, in the Muslim ban situation, the Trump administration went back to the drawing board twice and presumably did its homework. By the time the third iteration of the travel ban got to the Supreme Court, the record was replete with research on what was happening in the countries listed and many serious communications between government agencies about national security problems.

Nothing close to that was in the record in this case. As the court points out, that oversight alone was arbitrary and capricious.

Secondly, the APA analysis goes on to recognize the importance of what the DACA program has become. The reliance that DACA recipients have placed in the program is staggering in terms of employment rates, educational accomplishments, social integration and the numbers of families with citizen children.

This reasoning is important for future APA jurisprudence because federal agencies now must clearly address the effects that their rules have on the lives of people before acting in a manner that negatively impacts those individuals. In particular, the court's language suggesting that different accommodations may have to be made for different subclasses of individuals affected is particularly noteworthy. Future blanket rules changes may not pass muster — more nuance is likely going to be necessary in the future.

Equal Protection Claim

The court refused to rule, however, that the rescission was motivated by racial animus in violation of equal protection. The plaintiffs had alleged a selective enforcement claim — that the Trump administration, motivated by animus, ended a program that disproportionately benefits certain ethnic groups. They felt that the animus was evidenced by (1) the disparate impact of the rescission on Latinos from Mexico, who represent 78% of DACA recipients; (2) the unusual history behind the rescission; and (3) Trump's pre- and post-election, anti-Mexican statements.

The plaintiff's contended that the president's critical statements about Latinos evinced discriminatory intent. However, the court ruled that these statements — remote in time and made in unrelated contexts — do not qualify as so-called contemporary statements probative of the decision rescind DACA.

Majority's Conclusion

The majority concluded by emphasizing that the decision did not decide whether DACA or its rescission are sound policies. They simply addressed only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raised doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner. The appropriate recourse was therefore to remand to DHS so that it can reconsider its approach.

Separate Opinions

Justice Sotomayor concurred with the majority's decision to vacate the rescission order, but would have allowed the equal protection claim concurrence to be developed on remand. In her view, the complaints each set forth particularized facts that plausibly allege discriminatory animus — for example, then-candidate Trump's declarations that Mexican immigrants are "people that have lots of problems," Mexico sends "the bad ones," and "criminals, drug dealers, [and] rapists." She felt that the plurality minimized the disproportionate impact of the rescission decision on Latinos.

Justice Sotomayor appears to be a minority of one on the equal protection issue. She was abandoned by her liberal colleagues on the equal protection claim. However, technically, she makes an excellent point. The plaintiffs should have an opportunity to bring in supporting evidence to support the allegations in the complaint regarding Trump's racial animus. It is noteworthy, of course, that in the Muslim ban case, the majority opinion also excluded Trump's anti-Muslim rhetoric on the campaign trail.

Justices Thomas, Alito and Kavanaugh wrote separately, with Justice Gorsuch joining Justice Thomas. Justice Thomas relied heavily on the Fifth Circuit opinion and would have declared DACA as illegally established by the Obama administration. Therefore, in his view, DHS did not need to provide any explanation whatsoever when it decided to rescind DACA.

To Justice Alito, DACA presented a political issue that was not the court's business. He also doubted the legality of DACA.

Justice Kavanaugh would have given weight to the new reasons provided by DHS Secretary Nielsen nine months after the Duke rescission. Since all nine justices and the parties agree that the executive branch possesses the legal authority to rescind DACA, there was no reason to wait to authorize rescission.

What Now?

The outcome of the case means that the rescission is vacated and the DACA program continues. DACA recipients continue to be protected from deportation and are authorized to work. They can apply for two-year extensions for now. In fact, new applications can be filed if a person meets the DACA requirements established in 2012.

The question that remains is whether the Trump administration will follow the outline for proper rescission provided by the court. All parties and all the justices apparently agreed that the executive branch has the authority to rescind DACA if done correctly. That question, however, is a political question that likely will be answered by candidate Trump who is seeking reelection.

Rescinding DACA may play well with his base, but may hurt him with moderate and Latino voters in swing states. One never knows how to read the president's tweets on any subject substantively or whether his anti-immigrant advisers will hold sway over this matter. However, for now the more than 700,000 DACA recipients are a little more at ease.

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