

Department of Homeland Security v. Regents of the University of California and its Implications

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INTRODUCTION

In 2012, the Obama Administration’s Department of Homeland Security (DHS) created the Deferred Action for Childhood Arrivals program, or DACA.¹ DACA authorized certain undocumented people who arrived in the United States as children to apply for a two-year forbearance of removal from the United States (and eventually work authorization and various benefits, such as Social Security benefits).² DACA was a significant program—about 700,000 children took advantage of it—yet it was implemented through a DHS memorandum, not through rulemaking or another process that would allow public comment or public agency deliberation.³

The Obama Administration later sought both to expand DACA and to create a separate program, the Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA.⁴ DAPA would have made another 4.3 million people eligible for the same forbearance and benefits available under DACA.⁵

Twenty-six states obtained a nationwide preliminary injunction barring both the DACA expansion and DAPA. The injunction was upheld by the Fifth Circuit on the ground that the programs violated the federal

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¹ Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/CJ4M-P4CL>] [hereinafter Memorandum from Janet Napolitano].

² DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901–02 (2020).

³ *Id.* at 1901; see 5 U.S.C. § 553 (rulemaking provisions of the Administrative Procedure Act).

⁴ Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigr. Servs., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf [<https://perma.cc/REN2GMQ8>].

⁵ See *Regents*, 140 S. Ct. at 1902.

Immigration and Nationality Act (INA).⁶ The Supreme Court affirmed by an equally divided vote.⁷ Thus, DACA expansion and DAPA were gone.

Enter the Trump Administration, which did two things. First, it formally rescinded DAPA, which (as just explained) had been enjoined before it went into effect.⁸ Among the Trump Administration's reasons for rescinding DAPA were its asserted legal flaws and the administration's new immigration enforcement priorities.⁹ Second, the Attorney General wrote a letter to Acting Secretary of Homeland Security Elaine Duke advising her to rescind DACA because it had the same legal flaws as DAPA.¹⁰ The next day, Duke agreed with that advice in a memorandum—again, just like the Obama Administration, not through rulemaking.¹¹ Considering the legal rulings that led to DAPA's demise, Duke decided to terminate DACA with a phase-out.¹² She explained that DHS would no longer accept new applications but that existing DACA recipients whose benefits were set to expire within six months could apply for a two-year renewal.¹³ For all other DACA recipients, previous grants of relief would expire on their own terms with no chance for renewal.¹⁴

I. HISTORY OF THE DACA LITIGATION

Plaintiff groups sued in three different district courts,¹⁵ claiming that DACA's rescission was arbitrary and capricious under the Administrative Procedure Act (APA) and violated the equal-protection guarantee of the Fifth Amendment's Due Process Clause.¹⁶ All three district courts rejected

⁶ *Texas v. United States*, 809 F.3d 134, 179–86 (5th Cir. 2015).

⁷ *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam).

⁸ Memorandum from John F. Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin K. McAleenan, Acting Comm'r, U.S. Customs & Border Prot., et al., Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") (June 15, 2017), <https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf> [<https://perma.cc/AC2H-W9CD>].

⁹ *See id.* at 3.

¹⁰ Letter from Jefferson B. Sessions III, Att'y Gen., U.S. Dep't of Just., to Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec. (Sept. 4, 2017), https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf [<https://perma.cc/X4QV-JBAP>].

¹¹ Memorandum from Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Servs., et al., Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/UYM3-QQK9>].

¹² *See id.*

¹³ *See id.*

¹⁴ *See id.*

¹⁵ *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1903 (2020).

¹⁶ *Id.* The focus of this Essay is the administrative challenge to the rescission. The equal-protection argument—that DACA's rescission was borne of racial and ethnic animus—

the Trump Administration's arguments that the plaintiffs' suits were unreviewable under the APA and that the INA deprived the federal courts of jurisdiction.¹⁷ Two of the courts then preliminarily enjoined the rescission under the APA.¹⁸

But the third court—the District Court for the District of Columbia—took a different and unusual approach. It granted summary judgment to the plaintiffs on their APA claim but then stayed its order to permit DHS to reissue its memorandum rescinding DACA with a better explanation about why DACA was unlawful.¹⁹ Duke's successor, DHS Secretary Kirstjen Nielsen, responded to the court's order by (not surprisingly) declining to replace Duke's rescission decision and explaining why she thought Duke had been right about DACA's unlawfulness.²⁰ She also provided several new justifications for the rescission, including that “any class-based immigration relief should come from Congress, not through executive non-enforcement” and “the importance of ‘project[ing] a message’ that immigration laws would be enforced against all classes and categories of aliens.”²¹ The district court concluded that Nielsen's new reasoning failed to add meaningfully to Duke's rationale and so held DACA's rescission arbitrary and capricious under the APA.²² The Supreme Court granted the Government's cert petitions from these rulings. It then held, by a five-to-four vote, in an opinion penned by Chief Justice Roberts and joined by the four “liberals,” that the DACA rescission was arbitrary and capricious.²³

The Trump Administration's failure to eliminate DACA may have significant political consequences and surely had momentous consequences for many of DACA's hundreds of thousands of beneficiaries. But some commentators have noted that the Supreme Court's ruling is not a legal landmark—instead involving only the application of settled administrative-law principles discussed further below.²⁴ I mainly agree with that view.

was rejected by the Supreme Court by an 8-to-1 vote. *See id.* at 1915–16; *see also id.* at 1917 (Sotomayor, J., dissenting).

¹⁷ *See id.* at 1903–04 (majority opinion).

¹⁸ *Regents of the Univ. of Cal. v. DHS*, 279 F. Supp. 3d 1011, 1048 (N.D. Cal. 2018); *Vidal v. Nielsen*, 279 F. Supp. 3d 401, 420 (E.D.N.Y. 2018).

¹⁹ *NAACP v. Trump*, 298 F. Supp. 3d 209, 245 (D.D.C. 2018).

²⁰ Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec. (June 22, 2018), https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf [<https://perma.cc/NJQ6-KBVF>].

²¹ *Regents*, 140 S. Ct. at 1904.

²² *NAACP v. Trump*, 315 F. Supp. 3d at 471.

²³ *Regents*, 140 S. Ct. at 1910–15.

²⁴ *See, e.g.*, Jaelyn Kelley-Widmer, Opinion, *A Dream Deferred*, REGUL. REV. (July 20, 2020), <https://www.theregreview.org/2020/07/20/kelley-widmer-dream-deferred/> [<https://perma.cc/6A47-HZFN>].

Nonetheless, the decision’s administrative-law holdings are interesting, and the Court’s ruling contains several “extras”—little nuances that may affect the law over time and that should interest administrative-law nerds.

II. THE COURT’S FOUR HOLDINGS

The Court’s decision involves four holdings in my view: two about the federal courts’ authority to consider the challenges to the Trump Administration’s DACA rescission and two about APA arbitrary-and-capricious review.

First, the Court rejected the Government’s argument that DACA rescission was unreviewable as “agency action committed to agency discretion by law” under APA § 701(a)(2).²⁵ The Court reiterated the APA’s presumption in favor of judicial review of agency action—as expressed in decades of the Court’s jurisprudence—and that it reads the § 701(a)(2) exception “quite narrowly.”²⁶

The Government argued that DACA was an exercise of enforcement discretion, and so too must be its rescission, relying on the Court’s famous decision in *Heckler v. Chaney*,²⁷ which had held committed to agency discretion FDA’s decisions not to take enforcement action against states’ use of unapproved drugs for lethal injection.²⁸ *Heckler* viewed agency non-enforcement under § 701(a)(2) as similar to prosecutorial discretion, which invariably has been viewed as “the special province of the Executive Branch.”²⁹ That is, you cannot use the courts to force a prosecutor to prosecute.³⁰

The Chief Justice held that *Heckler*’s unreviewability principle did not apply to the judicial review sought in the DACA litigation because DACA was not actually a non-enforcement policy, but really something quite different: a process through which certain undocumented individuals would apply for forbearance based on government-issued criteria.³¹ That is, DACA involves an affirmative act of governmental *approval* rather than a refusal to act (which is what non-enforcement is all about). The icing on the

²⁵ *Regents*, 140 S. Ct. at 1905–07; see 5 U.S.C. § 701(a)(2).

²⁶ See *Regents*, 140 S. Ct. at 1905 (quoting *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018)); see also *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (reiterating that “§ 701(a)(2) makes it clear that ‘review is not to be had’ in those rare circumstances where the relevant statute ‘is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion’”).

²⁷ *Regents*, 140 S. Ct. at 1906.

²⁸ *Heckler v. Chaney*, 470 U.S. 821, 837 (1985).

²⁹ See *id.* at 832.

³⁰ Cf. *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973) (“[A] citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.”).

³¹ See *Regents*, 140 S. Ct. at 1906.

cake for the Court was that even if DACA could be viewed as a non-enforcement policy, it was not *only* a non-enforcement policy because of its associated benefits—work authorization and Social Security, for instance—which, the Chief Justice observed, are the types of government benefits that courts are traditionally called on to protect.³²

Although this holding is not a bombshell, it is not unimportant either. It further narrows APA § 701(a)(2) or, at the least, emphasizes its narrowness. Lawyers looking to subject agency policies billed as non-enforcement policies to judicial review should analogize to the attributes of DACA that the Court found salient in subjecting it to judicial review.

Second, the Government pointed to two jurisdiction-stripping provisions of the INA meant to channel review of individual deportation orders to assert that the courts lacked jurisdiction to review the DACA rescission.³³ The Court quickly nixed these arguments on textual grounds.³⁴ These provisions were unrelated to the DACA rescission,³⁵ which was an agency policy about the removability of non-citizens generally.³⁶ The provisions the Government relied on might strip the courts of jurisdiction if DACA were rescinded and DHS obtained an order of removal against a particular person. This holding about jurisdiction is not groundbreaking. It is of a piece with the Court's § 701(a)(2) holding and recent immigration decisions, such as the Court's recent ruling *Nasrallah v. Barr*,³⁷ in which the Court continues to emphasize the importance of judicial review and the narrowness of any exceptions to it.

Third, the Court turned to the APA question—whether DHS's DACA rescission was arbitrary and capricious—by first discussing *where to look* for the agency's explanation of its decision.³⁸ Relying on settled law, the Court decided that the agency could not rely on the post hoc explanation given by Secretary Nielsen.³⁹ It is, the Court explained, “a ‘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.*’”⁴⁰

³² *See id.* at 1906–07.

³³ *See id.* at 1907.

³⁴ *See id.*

³⁵ *See* 8 U.S.C. §§ 1252(b)(9), (g).

³⁶ Memorandum from Janet Napolitano, *supra* note 1.

³⁷ 140 S. Ct. 1683, 1691 (2020) (holding that the Immigration and Nationality Act's bar on judicial review of final orders of removal does not apply to immigrants' claims under the Convention Against Torture); *see also* *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (quoting *Kucana v. Holder*, 558 U.S. 233, 251 (2010) (holding that the provision of the Immigration and Nationality Act limiting judicial review to “questions of law” includes applications of law to settled facts, relying in part on “the presumption favoring judicial review of administrative action”).

³⁸ *Regents*, 140 S. Ct. at 1907.

³⁹ *Id.* at 1908.

⁴⁰ *Id.* at 1907 (emphasis added) (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)).

If those grounds are inadequate, the Court said, a court can remand for one of two things. First, the agency may provide “a fuller explanation of the agency’s reasoning *at the time of the agency action*.”⁴¹ Second, the agency can take “*new agency action*”⁴² and, in doing so, “must comply with the procedural requirements for [that] new agency action.”⁴³ Nielsen chose the first route, which meant she could only elaborate on her predecessor’s prior reasoning but could not engage in post hoc rationalization.⁴⁴ Nielsen did, however, justify her predecessor’s old policy with new reasons—for instance, terminating DACA to maintain confidence in the rule of law and to avoid burdensome litigation—which, according to the Chief Justice, appeared nowhere in the agency’s original justification for the law.⁴⁵

In dissent, Justice Kavanaugh suggested that requiring DHS to issue a new policy via a new rulemaking would be an empty formality leading to the same result.⁴⁶ The Chief Justice disagreed, saying that demanding contemporaneous explanations for new agency action, allowing the parties and the public to respond, and providing for orderly judicial review (as opposed to requiring litigants to chase a moving target) are important values.⁴⁷

In supporting this ruling, Chief Justice Roberts noted the celebrated dictum of Justice Holmes that the people “must turn square corners when they deal with the Government,”⁴⁸ but then observed that “particularly when so much is at stake, . . . ‘the Government should turn square corners in dealing with the people.’”⁴⁹ This is the first time the Court turned around the Holmes aphorism in a majority opinion, and that matters. Though it should be self-evident that “the Government” exists to serve “the people”—not the other way around—it apparently wasn’t to Holmes, and the Chief Justice’s statement forcefully underscores the point.⁵⁰

⁴¹ *Id.* at 1907–08 (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990)).

⁴² *Id.* at 1908 (citing SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 201 (1947)).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See id.*

⁴⁶ *Id.* at 1934–35 (Kavanaugh, J., dissenting).

⁴⁷ *Id.* at 1909 (majority opinion). The Chief Justice noted as well that the rule against post hoc rationalizations applies to all agency statements, not just its litigating positions, rejecting Justice Kavanaugh’s position on that score. *Compare id. with id.* at 1934 (Kavanaugh, J., dissenting).

⁴⁸ *Id.* at 1909 (majority opinion) (citing Rock Island, Ark. & La. R.R. v. United States, 254 U.S. 141, 143 (1920)).

⁴⁹ *Id.* (quoting St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting)).

⁵⁰ The Chief Justice’s view may be contagious. Justice Gorsuch recently maintained, in *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021), that “[i]f men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.”

Fourth, the Court turned to the merits of the arbitrary-and-capricious issue. Here, the Chief Justice rejected DACA rescission, relying on the Court's famous air-bag case, *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance Co.*, which held that agency action that fails to consider "[an] important aspect[] of the problem before [it]" is arbitrary and capricious.⁵¹

The Court held that DHS had violated the *State Farm* principle in two ways. First, recall that DACA had two basic components: benefits, such as work authorization and forbearance as to deportation.⁵² Though DHS had regarded the illegality of benefits as sufficient to terminate DACA, it had offered no reason to terminate forbearance and had not even considered whether forbearance alone could or should be maintained. In short, under *State Farm*, DHS needed to consider a forbearance-only policy, including its legality.⁵³ That alone was enough, in the Court's view, to throw out DACA rescission.⁵⁴

But there was more: the agency had not considered reliance interests—that is, reliance on the Obama-era memorandum establishing DACA. The Chief Justice, citing the plaintiffs-respondents, noted:

DACA recipients have 'enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance' on the DACA program. The consequences of the rescission . . . would 'radiate outward' 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.⁵⁵

The Government did not deny that DHS had ignored reliance interests, but it—along with Justice Thomas in dissent⁵⁶—claimed that this did not matter because DACA itself conferred no substantive rights and provided only temporary benefits. The Chief Justice gave that argument the back of his hand, noting that neither the Government nor Justice Thomas could muster any authority for their position.⁵⁷

The Chief Justice pointed out that if DHS *had* considered reliance interests, it might have instituted a longer wind-down period as part of any

⁵¹ *Regents*, 140 S. Ct. at 1910 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)).

⁵² *Id.* at 1906, 1913.

⁵³ *Id.* at 1911–13.

⁵⁴ *Id.* at 1913.

⁵⁵ *Id.* at 1914 (citations omitted).

⁵⁶ *Id.* at 1930 (Thomas, J., dissenting).

⁵⁷ *Id.* at 1913 (majority opinion).

rescission “based on the need for DACA recipients to reorder their affairs.”⁵⁸

A couple final points. First, as to reliance interests, note that often in administrative law—and in American law generally—reliance interests focus on commercial interests. Indeed, the two decisions cited by the Chief Justice—*Smiley v. Citibank (South Dakota), N.A.*,⁵⁹ and the Court’s recent decision in *Encino Motorcars, LLC v. Navarro*⁶⁰—focused on commercial interests. Yet, in the DACA case, the Chief Justice was principally concerned with the reliance interests of undocumented immigrants who had relied on DACA. This concern is a good thing. After all, immigrants, consumers, workers, students, parents, and public-welfare beneficiaries—that is, “little guys” of all stripes—rely for their livelihood, health, education, and economic well-being on the benefits of American law. The Court’s decision provides a basis for broadening the law’s understanding that these people, too, possess reliance interests that warrant protection

Second, the difference-maker in this case was the Chief Justice. He took the traditional view of administrative law that process and regularity matter and that the ends cannot be justified when the means used for achieving them are inadequate or irregular. To the dissenters, DACA’s perceived illegality was all that mattered, and so the means by which its demise was to be achieved were irrelevant. The traditional view of the administrative process prevailed, at least for the time being.

⁵⁸ *Id.* at 1914.

⁵⁹ 517 U.S. 735 (1996).

⁶⁰ 136 S. Ct. 2117 (2018).