

Arbitrary & Capricious

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

If you followed the news on January 9th -- and I KNOW that this podcast's listeners are very well informed! -- you know that Northern-California-based U.S. District Judge William Alsup issued a preliminary injunction ordering the Trump Administration to revive the DACA program (the Obama-era scheme of deferred deportation for the “Dreamers”). The program was scheduled to expire on March 5, 2018, after which undocumented aliens brought here as children would again face deportation; no longer could they apply for successive two-year deportation suspensions.

What you may not know – and may be surprised by – is that Judge Alsup didn't base his decision on any of the weighty constitutional-rights arguments (that is, equal protection, due process, privacy interests and equitable reliance) pressed by DACA defenders. Instead, the judicial red light stopping DACA's rescission for now relied on a seventy-two-year-old administrative/procedural law.

That's right! Although most people following the DACA controversy probably focus on big constitutional issues or the large individual and societal implications of DACA, the order reviving it is a perfect illustration of the usefulness of plain old “meat and potatoes” procedural objections to advance bigger agendas.

As the Trump Administration has demonstrated, executive orders issued by a previous president can be reversed by the stroke of a pen. However, complicated executive initiatives like DACA must be executed through federal administrative agencies (in this case, the Department of Homeland Security). And when federal bureaucrats establish, amend, or rescind official policies, they are presumptively subject to across-the-board requirements of the “APA,” the Administrative Procedure Act of 1946.

The litigants winning the first round in the dispute over rescinding DACA persuaded the federal district judge that the Administration's rationale for reversing course contradicted the APA by being “arbitrary, capricious, or an abuse of discretion.” (Translation: The rationale was irrational.)

Beyond showing the importance of arcane procedural rules, the recent controversy over DACA rescission -- and earlier Obama-era challenges turning on whether an offshoot of DACA violated the Administrative Procedure Act by adopting substantive policy changes without notice-and-comment rulemaking proceedings -- show a core element of judicial restraint in operation.

Federal jurists know that deciding constitutional questions is serious medicine. Changing judicial rulings about the meaning and application of the Constitution requires passing a constitutional amendment (which requires a super-majority consensus over a sustained period) or changing judicial personnel through new appointments (also a slow and error-fraught process.) This makes constitutional rulings especially resistant to change.

Non-constitutional rulings, by contrast, leave more room for elected officials to act by simple majority; they can rewrite statutes or respond with administrative-procedure “do overs.” To minimize unnecessary interference with the discretion of elected officials, then, a long-standing “avoidance canon” obligates judges to rule on non-constitutional bases if at all possible. This saves constitutional heavy lifting for truly necessary situations.

Beyond illustrating core constitutional dynamics in an especially dramatic context, the DACA-rescission ruling poses a number of novel legal questions: How deferential (forgiving) should a judge be in considering the rationality of a new Administration’s contrary legal position (as opposed, say, to its different political/policy views about proper immigration enforcement)? Even if the legal logic of challengers is faulty, does the fact that lower courts found it persuasive in a somewhat related context create a sufficient “litigation risk” justifying the Administration throwing in the towel? And – perhaps most interesting of all -- to what extent can a president’s statements (including tweets) while a candidate or as president be used to discredit his own Attorney General’s legal position?

Now that the Trump Administration has asked the U.S. Supreme Court to review District Judge Alsup’s preliminary ruling, many of these novel legal questions may soon be answered.