9th Circ. Shouldn't Have Halted Rescission Of DACA

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November 15, 2018, 1:49 PM EST

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Last week the Ninth Circuit affirmed a nationwide injunction that bars the Trump administration from phasing out the Deferred Action for Childhood Arrivals, or DACA, program, which provides two-year, renewable deportation protections for about 690,000 “Dreamers,” unauthorized immigrants brought to this country as children. The decision in Regents of the University of California v. U.S. Department of Homeland Security[1] was the first appellate ruling on the validity of the effort to end the program. Two members of the appellate panel concluded that the rescission of DACA is subject to judicial review under the Administrative Procedure Act, or APA, and that the plaintiffs were likely to succeed on their claim that the administration’s rationale for rescinding DACA was arbitrary, capricious or not in accordance with law. The third member disagreed with this conclusion, but opined that the plaintiffs had plausibly alleged that the rescission of DACA was motived by unconstitutional racial animus. Both of these analyses are flawed. The rescission of DACA, while politically controversial, is lawful.

The Creation and Attempted Rescission of DACA

The DACA program was created by a memorandum issued by the U.S. Department of Homeland Security in 2012, during the Obama administration. It confers on eligible persons two-year grants of “deferred action” on their removal from the United States and allows them to obtain work permits. DACA was explicitly an exercise of discretion to ensure that DHS’ enforcement resources were not expended on cases the Obama administration deemed of low priority.

The Trump administration rescinded DACA through another DHS memorandum issued in September 2017. The agency said that its decision was based on consideration of two factors. One was a letter from the attorney general which stated that DACA “was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch.”

The second factor involved developments in litigation over another deferred action deportation program called Deferred Action for Parents of Americans, or DAPA. A Texas district court enjoined DAPA on the ground that it should have been promulgated through public notice-and-comment rule-making procedures. The Fifth Circuit affirmed the preliminary injunction, and the U.S. Supreme Court affirmed by an equally divided vote. The suit returned to the district court for adjudication on the merits. After the Trump administration took office, the plaintiffs threatened to amend the suit to include a challenge to DACA. Both the district and appellate courts had already indicated, in their opinions

addressing DAPA, that DACA should also have been implemented through notice-and-comment rule-making. The threat to expand the DAPA suit triggered the attorney general's letter to DHS, discussed above. The attorney general advised DHS that, because DACA "has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA."

Thus, DHS gave two distinct reasons for rescinding DACA. First, it viewed DACA as lacking proper statutory authority and amounting to an unconstitutional exercise of authority by the executive branch after Congress' repeated rejection of similar "Dreamer" legislation. Second, DACA faced an imminent court challenge that would likely result in a ruling that it had been unlawfully adopted.

The Rescission of DACA Is Not Subject to Review Under the APA

The threshold question before the Ninth Circuit in Regents was whether the decision to rescind DACA is subject to judicial review under the APA. That statute provides a broad grant of authority to federal courts to review final actions taken by agencies and set them aside if they are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.[2] But the APA does not apply to agency action that is committed by law to agency discretion.[3]

If an agency takes enforcement action against a person, the APA authorizes a court to review that action after the agency has reached a final decision. In contrast, the Supreme Court has ruled that agency decisions *not* to take enforcement action are so discretionary — involving a mix of legal, factual, policy and resource allocation considerations — that they should be presumed immune from judicial review under the APA.[4] But the court reserved judgment on whether this presumption against review applies where an agency refuses to institute enforcement proceedings based solely on the belief that it lacks jurisdiction to take action, which is a purely legal issue that a court is competent to decide.

The Regents majority started its analysis with the Supreme Court's decision. It then noted that the Ninth Circuit has addressed the issue reserved by the Supreme Court and has ruled that a nonenforcement decision is reviewable if the decision was based solely on the agency's belief that it lacked jurisdiction to act.[5] Extrapolating from these precedents, the majority reasoned that "where the agency's decision is based not on an exercise of discretion, but instead on a belief that any alternative choice was foreclosed by law, the APA's 'committed to agency discretion' bar to reviewability … does not apply."[6] The majority went on to hold that it could review DHS' decision to rescind DACA because that decision was based, not on an exercise of discretion by the agency, but instead on the view that DACA was unconstitutional — a purely legal issue. The majority concluded that DACA was constitutional and, therefore, that the agency's rescission of DACA was likely to be set aside under the APA when the merits of the case are litigated.

In reaching this conclusion, the majority misapplied the principles governing judicial review of agency enforcement actions. The Supreme Court has rejected the notion that "if [an] agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable."[7] The Regents majority acknowledged this rule but went on to flout it, concluding that "an official cannot claim that the law ties her hands while at the same time denying the courts' power to unbind her."[8] The Supreme Court, however, has said that an

official can do just that. In ruling that an unreviewable agency action does not become reviewable simply because the agency gives a "legal" reason for taking that action, the court illustrated its point by noting that "a common reason for failure to prosecute an alleged criminal violation is the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction. That is surely an eminently 'reviewable' proposition, in the sense that courts are well qualified to consider the point; yet it is entirely clear that the refusal to prosecute cannot be the subject of judicial review."[9]

Even assuming that DHS' rationale for rescinding DACA was purely legal (which it was not) and was legally erroneous, nonetheless its decision was unreviewable under the APA. The APA authorizes judicial review of agency decisions about whom it will and will not "prosecute" in only two situations: (1) upon the conclusion of an enforcement action, and (2) where the agency *declines to enforce* based solely on the belief that it lacks jurisdiction to act. Judicial review is authorized for the second category to safeguard against an agency "abdicat[ing] its statutory responsibilities" or misapprehending its authority.[10] The rescission of DACA does not fit within either of these two categories. While it constituted a change in DHS enforcement policy, it did not announce that DHS would decline to take certain enforcement actions based on its view of governing law. To the contrary, it *ended* the Obama administration's nonenforcement policy and announced that DHS henceforth can *take enforcement action* against any and all individuals who are subject to removal under governing law.

The Obama administration instituted DACA as a matter of its enforcement discretion. The decision to terminate this discretionary nonenforcement policy is likewise committed to the agency's discretion and so cannot be the subject of judicial review under the APA *regardless* of the agency's stated reason for the change in policy. (The APA does permit review of the *procedure* by which an agency makes a change in its enforcement policy, i.e. whether notice and public comment is required.)

Moreover, the Regents majority mischaracterized the agency's decision in order to shoehorn it into their misconceived category of "legal" decisions that are subject to review under the APA. They asserted that "the Executive *did not* make a discretionary choice to end DACA — but rather acted based on an erroneous view of what the law required."[11] This is not what happened. Plainly, the Trump administration wanted to end a policy that it viewed as a "circumvention of immigration laws" and "an unconstitutional exercise of authority by the Executive Branch." The legal nature of these criticisms, however, does not demonstrate that the rescission of DACA was something other than a discretionary choice by DHS. No reasonable observer could conclude that the agency would have left DACA intact if it had been assured that the courts would uphold the legality of the policy. Although DHS did not specifically state that it was ending DACA as an exercise of its enforcement discretion, there is no question that it was doing so. While agency actions are reviewed on the basis of the justification that the agency provides, reviewing courts are supposed to "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[12] The majority's strained construction of why DHS decided to rescind DACA flies in the face of this principle.

The Rescission of DACA Does Not Violate Equal Protection

The third member of the Regents panel opined that the rescission of DACA could not be reviewed under the APA. He noted, however, that the plaintiffs had also alleged an equal protection claim which is subject to judicial review without reference to the APA. He concluded that the plaintiffs had plausibly alleged that the rescission of DACA was motivated by unconstitutional racial animus and that, because this claim has some likelihood of success on the merits, the preliminary injunction against rescinding the policy should be upheld on this basis.

In the Ninth Circuit, a plaintiff may obtain a preliminary injunction if it demonstrates (1) a likelihood of irreparable injury; (2) serious questions going to the merits; (3) a balance of hardships that tips sharply toward the plaintiff; and (4) that the injunction is in the public interest.[13] The judge opined that "the balance of equities here weighs heavily in favor of affirming the preliminary injunction." He reasoned that, "[a] merits decision from the district court concluding that the Executive rescinded DACA because of unconstitutional racial animus would be little more than an advisory opinion if by that time thousands of young people had lost their status due to the lack of an injunction preserving it."[14] This assessment of the equities is unimpeachable. Thus, whether an injunction should have issued turns on whether the plaintiffs raised substantial issues going to the merits of their equal protection claim.

The plaintiffs highlighted (1) the disproportionate impact that DACA's rescission has on individuals of Mexican heritage and Latinos, who together account for 93 percent of approved DACA applications; (2) "a litany of statements by the President and high-ranking members of his Administration that plausibly indicate animus toward undocumented immigrants from Central America;" and (3) "substantial procedural irregularities in the challenged agency action."[15] The judge opined that "[s]uch evidence — plus whatever additional evidence Plaintiffs muster on remand — may well raise a presumption that unconstitutional animus was a substantial factor in the rescission of DACA."[16] He relied upon a 1977 Supreme Court decision which assessed whether discriminatory purpose was "a motivating factor" in a zoning decision.[17]

This analysis fails to apply the correct standard of review, announced by the Supreme Court in Trump v. Hawaii, after this case was briefed and argued, which upheld President Donald Trump's "travel ban" against the contention that the ban is anti-Muslim.[18] The court noted that decisions about immigration are committed to the political branches and that courts generally limit their review of an immigration policy to whether it is facially legitimate and bona fide. The court assumed (without deciding) that it could look behind the face of the executive order at issue and consider extrinsic evidence about the motive behind that policy. But the court ruled that the policy would be upheld so long as it could reasonably be understood to have a legitimate grounding apart from any religious hostility.[19] This is a highly deferential standard of review under which, as the court acknowledged, it "hardly ever strikes down a policy as illegitimate."[20]

Although the claim in Trump v. Hawaii involved religious bias and the First Amendment, the court framed its ruling in broader terms that apply to challenges to immigration actions based on other forms of alleged bias. The majority rejected the dissent's argument that the court should engage in de novo review of the motivations behind executive actions, stating

that it saw no basis for engaging in such a “free-ranging inquiry” in the context of “immigration policies, diplomatic sanctions and military actions.”[21] Thus, the deferential rational basis standard of review applies to all challenges to executive branch decisions regarding the removal of unauthorized immigrants. While extrinsic evidence of improper motive may be offered in support of an equal protection challenge, the executive action can be invalidated only when there is no explanation for it other than an unconstitutional one.

Under this stringent standard of review, the equal protection claim in the Regents case fails. The plaintiffs have not raised a substantial issue as to whether the rescission of DACA was motivated solely by racial animus. Although racial animus may be one possible explanation for the rescission of DACA, it is plainly not the only explanation nor is it the most plausible one. As the government noted, it is highly implausible that the “decision to stop affirmatively sanctioning an ongoing violation of federal law by roughly 700,000 aliens without lawful status, in the face of significant questions about the legality of that policy, was … motivated in any respect by the particular race of the aliens at issue.”[22] The rescission of DACA can readily be explained by the legitimate rationales that (1) illegal conduct should not be condoned or encouraged, or (2) any policy like DACA must or should be enacted by Congress rather than being unilaterally imposed by the executive branch.

The Supreme Court has long been reluctant to invalidate legislation or executive actions based on the allegedly improper intent or motive of the lawmaker.[23] Indeed, Justice John Paul Stevens warned that, “in the long run constitutional adjudication that is premised on a case-by-case appraisal of the subjective intent of local decisionmakers cannot possibly satisfy the requirement of impartial administration of the law …”[24] The court, in Trump v. Hawaii, deliberately set the bar very high for a plaintiff to successfully challenge immigration policies, diplomatic sanctions or military actions on the grounds that they are motivated by forbidden animus. It wanted to forestall “free-ranging inquiry” by courts and litigants into the minds of executive branch decision-makers. Plaintiffs’ equal protection challenge to the rescission of DACA is the type of claim that the court wants to screen out. Because plaintiffs cannot satisfy the applicable standard of review, their claim for preliminary injunctive relief should have been denied.

Conclusion

The Regents majority make no secret of their sympathy for the Dreamers and their view that DACA is sound and humane policy. But those views should not influence the outcome of this case. From a legal perspective, DACA is simply an agency policy about how DHS will exercise its enforcement discretion. As such, the validity of the agency’s reasons for adopting or rescinding DACA are immune from review under the APA. Similarly, because the rescission of DACA is facially legitimate and is readily explicable for reasons other than racial animus, it cannot be successfully challenged on equal protection grounds. Whatever one may think about the wisdom of rescinding DACA, it is a lawful action that the Trump administration is entitled to take. The Ninth Circuit should have recognized this.

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[1] --- F.3d ----, 2018 WL 5833232 (9th Cir. Nov. 8, 2018).

[2] 5 U.S.C. § 706.

[3] 5 U.S.C. § 701(a)(2).

[4] Heckler v. Chaney, 470 U.S. 821, 831-32 (1985).

[5] Regents, 2018 WL 5833232, at *10-11.

[6] Id. at *11.

[7] I.C.C. v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270, 283 (1987).

[8] Regents, 2018 WL 5833232, at *13 (quoting NAACP v. Trump, 298 F.Supp.3d 209, 249 (D.D.C. 2018)).

[9] I.C.C. v. Brotherhood of Locomotive Eng'rs, 482 U.S. at 283.

[10] Heckler v. Chaney, 470 U.S. at 833 n. 4.

[11] Regents, 2018 WL 5833232, at *23 (emphasis in the original).

[12] Bowman Transp. Inc. v. Arkansas–Best Freight System Inc., 419 U.S. 281, 285-86 (1974).

[13] Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).

[14] Regents, 2018 WL 5833232, at *35.

[15] Id., at *34.

[16] Id., at *35.

[17] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).

[18] 138 S.Ct. 2392 (June 26, 2018).

[19] Id., at 2420.

[20] Id.

[21] Id., at n. 5.

[22] Gov. Reply Br. at 39-40.

[23] U. S. v. O'Brien, 391 U.S. 367, 383 (1968).

[24] Rogers v. Lodge, 458 U.S. 613, 643 (1982) (Stevens, J., dissenting).