In a 5-4 decision in *DHS v. Regents of the University of California*, the Supreme Court held that the decision to wind-down the Deferred Action for Childhood Arrivals (DACA) program violated the Administrative Procedures Act (APA). It is possible the Department of Homeland Security (DHS) will try again to end DACA.

DACA was established by DHS during the Obama presidency. The program allows certain undocumented persons who arrived in the United States as children to apply for a two-year forbearance of removal and receive work authorization and various federal benefits.

During the Trump presidency the Attorney General advised DHS to rescind DACA based on his conclusion it was unlawful. The Department’s Acting Secretary Elaine Duke issued a memorandum ending the program on that basis.

Litigation in the D. C. District gave DHS an opportunity to “reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority.” DHS Secretary Kirstjen Nielsen wrote a lengthier memo identifying multiple policy reasons for rescinding DACA.

The APA directs courts to “set aside” agency actions if they are “arbitrary” or “capricious.”

Chief Justice Roberts, writing for the majority, held that the decision to end DACA violated the APA because Acting Secretary Duke “failed to consider . . . important aspect[s] of the problem” before her and failed to address whether there was “legitimate reliance” on the DACA program.

The Court rejected considering the Nielsen memo because it contained additional reasons to rescind DACA beyond the only reason contained in the Duke memo, illegality, without going through APA procedural requirements for new agency actions. According to the Court, it is 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.”

Considering only the Duke memo, the Court determined DHS’s decision to rescind DACA was arbitrary and capricious.

First, despite the Attorney General’s determination DACA was illegal Duke still had “forbearance” discretion to defer removal of DACA recipients, but her memo offered no reason for terminating forbearance.

According to the Attorney General, DACA was illegal because the Fifth Circuit held that the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program was illegal, and the Supreme Court tied on the question. DAPA authorized deferred action for parents whose children were U. S. citizens or lawful permanent residents and granted parents the same removal forbearance and work eligibility as DACA recipients. The Supreme Court noted the Fifth Circuit only held that DAPA’s
eligibility for benefits was illegal—not its forbearance of removal. “[T]he Attorney General neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy.” So, “removing benefits eligibility while continuing forbearance remained squarely within the discretion of Acting Secretary Duke.”

Second, the Court concluded that Duke also failed to address whether DACA recipients and otherslegitimately relied on the program. The APA requires agencies to “be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’”

The federal government agreed that Duke didn’t consider the interests of those relying on the DACA program because it didn’t have to. The majority of the Court disagreed stating that even if DACA “conferred no substantive rights” and provided benefits only in two-year increments, “neither the Government nor the lead dissent cites any legal authority establishing that such features automatically preclude reliance interests, and we are not aware of any.”

Justices Ginsburg, Breyer, Kagan, and Sotomayor joined the majority opinion.

By:
Thursday, June 18, 2020 at 01:39 PM
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