AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Presidential Power to Execute the Law

Vidal v. Nielsen, 16-CV-4756 (E.D. N.Y. 2018)

*The Development, Relief, and Education for Alien Minors (DREAM) Act was unsuccessfully introduced in Congress several times since 2001, and in 2010 President Barack Obama endorsed the proposal as a key component of comprehensive immigration reform. At its core, the DREAM Act would grant amnesty to illegal aliens who arrived in the United States as children and are either in school or have graduated from high school and would authorize states to provide in-state tuition for public colleges and would extend eligibility to federally funded scholarships to illegal aliens. When Congress failed to pass the bill, President Obama announced in 2012 that the Department of Homeland Security would no longer take deportation action against individuals who met the criteria that would have been adopted in the DREAM Act (a program known as the Deferred Action for Childhood Arrivals, or DACA). In November 2014, after a televised address on the subject, the president further amended that policy with a guidance statement to prosecutors indicating that they should exercise prosecutorial discretion so as not to “defer action” on pursuing deportation of many of the adults who would have been covered by the DREAM Act. Notably, the statement indicated that “the Department’s limited enforcement resources” should “be focused on those who represent threats to national security, public safety, and border security,” not “children and long-standing members of American society.” The 2014 program was known as Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA. By the end of 2014, nearly three-quarter of a million individuals had applied for deferred action from the government, of which roughly 95 percent were accepted (primarily rejecting those who used the wrong form).*

*In 2017, the Trump administration announced that it would gradually end DACA. The administration was sued in federal district court seeking an injunction preventing the administration from terminating the program on the grounds that the administration had not followed the Administrative Procedures Act (APA) in unspooling the program. The district court found that the plaintiffs were likely to succeed on the merits and granted a preliminary injunction, though it emphasized that the administration did have the authority to eventually terminate the program. The court held that the administration’s belief that DACA was itself unconstitutional was legally erroneous, and thus an administrative decision based solely on that legal belief was arbitrary and capricious.*

Judge GARAUFIS,

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“Congress passed the [APA] to ensure that agencies follow constraints even as they exercise their powers. One of these constraints is the duty of agencies to find and formulate policies that can be justified by neutral principles.” *FCC v. Fox Television Stations, Inc.* (2009). To that end, the APA authorizes parties harmed by federal agencies to obtain judicial review of agency decisions. The reviewing court must set aside “action, findings, [or] conclusions” that are, among other things, “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Review under this “arbitrary and capricious” standard is “narrow,” and the court may not “substitute its judgment for that of the agency”; instead, the court considers only whether the agency’s decision “was the product of reasoned decisionmaking.” *Motor Vehicle Mfrs. Assn. of U.S. v. State Farm Mut. Auto Ins. Co.* (1983). . . .

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The APA thus sometimes places courts in the formalistic, even perverse, position of setting aside action that was clearly within the responsible agency’s authority, simply because the agency gave the wrong reasons for, of failed to adequately explain, its decision. Based on the present record, these appears to be just such cases.

Defendants indisputably can end the DACA program. Nothing in the Constitution or the Immigration and Nationality Act (INA) requires immigration authorities to grant deferred action or work authorization to individuals without lawful immigration status. The DACA program, like prior deferred-action and similar discretionary relief programs, simply reflected the Obama Administration’s determination that DHS’s limited enforcement generally should not be used to deport individuals who were brought to the United States as children, met educational or military-service requirements, and lacked meaningful criminal records. New Administrations may, however, alter or abandon their predecessors’ policies, even if those policy shifts may impose staggering personal, social, and economic costs.

The question before the court is not whether the Defendants could end the DACA program, but whether they offered legally adequate reasons for doing so. . . .

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An agency decision that is based on an erroneous legal premise cannot withstand arbitrary-and-capricious review. It si well-established that when “[agency] action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law.” . . . This rule also ensures that agencies are accountable for their decisions: If an agency makes a decision on policy grounds, I tmust say so, not act as if courts have tied its hands. . . .

Fairly read, the Sessions letter and DACA Rescission Memo indicate only that Defendants decided to end the DACA program because they believe that it was illegal. . .

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[T]he Attorney General concluded that DACA was unconstitutional because it “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” and “an open-ended circumventing of immigration laws,.” This conclusory statement does not support the proposition that DACA is unconstitutional.

DACA is not unconstitutional simply because it was implemented by unilateral, executive action without express congressional authorization. The Executive Branch has wide discretion not to initiate or pursue specific enforcement actions. Immigration officials have particularly “broad discretion” in deciding whom to deport, deriving from both the considerations specific to the Executive Branch in the foreign policy arena and from the fact that far more removable aliens reside in this country than DHS has resources to deport. Every modern presidential administration has relied on extra-statutory discretionary-relief programs to shield certain removable aliens from deportation. Far from cabining this authority, Congress has amended the INA in ways that expressly acknowledge the Executive Branch’s power to decline to initiate removal proceedings against certain removable aliens. It thus cannot be the case that, by recognizing that certain removable aliens represented lower enforcement priorities than others, the DACA program violates the Constitution.

Nor is DACA unconstitutional because it identified a certain category of removable aliens . . . as eligible for favorable treatment. The court is aware of no principled reason why the Executive Branch may grant deferred action to particular immigrants but may not create a program by which individual immigrants who meet certain prescribed criteria are eligible to request deferred action. It is surely with DHS’s discretion to determine that certain categories of removable alien – felons and gang members, for example – are better uses of the agency’s limited enforcement resources than law-abiding individuals who entered the United States as children. Indeed, unless deferred-action decisions are to be entirely random, they necessarily must be based at least in part on “categorical” or “class-based” distinctions. . . . The court cannot see how the use of such distinctions to define eligibility for a deferred-action program transforms such a program from discretionary agency action into substantive lawmaking and (somehow) an encroachment on the separation of powers.

Lastly, DACA is not unconstitutional because, as the Attorney General put it, that program was implemented “after Congress’ repeated rejection of proposed legislation that would have accomplished a similar result.” The “proposed legislation” to which the Attorney General referred would not have “accomplished a similar result” to DACA. The DREAM Act in its many variations would have offered its beneficiaries a formal immigration status and a pathway to lawful permanent residency. DACA, on the other hand, offers only forbearance from deportation, along with work authorization, and does *not* provide an immigration status or a pathway to citizenship.

. . . . Fruitless congressional consideration of legislation is not itself law, and is an unconvincing basis for ascertaining the “implied will of Congress” to oust the President from acting in the space contemplated by the proposed but un-enacted legislation. *Youngstown Sheet & Tube v. Sawyer* (1952). . . .

To the extent the decision to end the DACA program was based on the Attorney General’s determination that the program is unconstitutional, that determination was legally erroneous, and the decision was therefore arbitrary and capricious. . . .

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