



CAN THE ARBITRARY AND CAPRICIOUS STANDARD UNDER THE ADMINISTRATIVE PROCEDURE ACT SAVE DACA?

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The Supreme Court announced on June 28, 2019 that it would consider the legality of President Trump's ending of the Deferred Action for Childhood Arrivals Program. Although federal courts in [New York](#), [California](#) and [Washington DC](#) have blocked Trump's efforts to block DACA, the Supreme Court decided to take up the matter striking fear in the hearts of Dreamers. The Supreme Court had previously declined to take up DACA, and so it needn't have prematurely considered the ongoing challenges in the lower courts to Trump's rescission of the program, which have benefitted 800,000 Dreamers. Given the Supreme Court's new conservative majority, there is a chance that the Court could uphold Trump's action. It is indeed paradoxical that the nation's highest court is viewed with fear by many vulnerable immigrants rather than as a protector of their rights.

Still, even though DACA was [initiated by President Obama as an executive action](#), it cannot be arbitrarily and capriciously [rescinded](#) by the next president.

In one of the lower court decisions in April 2018, [NAACP v. Trump](#), Judge Bates invoked 5 U.S.C. §706(2)(A) of the Administrative Procedure Act to stay President Trump's decision to rescind DACA. The APA provides that a court "shall ... hold unlawful and set aside agency action ... found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Judge Bates ruled that the Trump administration provided scant legal reasoning to support its justification that DACA was unlawful. "A conclusory assertion that a prior policy is illegal, accompanied by a hodgepodge of illogical or post hoc policy assertions, simply will not do," Judge Bates opined in a [further ruling](#) in August 2018.

The ability for a court to set aside a decision by the administration under the Administrative Procedure Act if it is “arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law” is a powerful tool. It can be invoked by a foreign national who may no longer be able to remain in the United States based on the government’s unlawful actions. §706(2)(A) has also been successfully invoked in recent [challenges to denials of H-1B requests](#) by employers and foreign nationals.

Will the Supreme Court rely on §706(2)(A) to hold that Trump’s justification was arbitrary and capricious? One can find a clue in the Supreme Court’s recent decision in [Department of Commerce v. New York](#) where it questioned the Commerce Secretary’s insertion of a citizenship question in the 2020 census form. Plaintiffs challenged the insertion of the citizenship question on the ground that it would result in a chilling effect. Census Bureau experts had warned that adding the citizenship question would result in a significant undercount of households with at least one noncitizen member. The Supreme Court, in this case, examined whether the Commerce Secretary’s action was arbitrary and capricious under 706(2)(A) of the APA. Mr. Ross’s reason for adding the citizenship question was “solely” because the Justice Department “initiated the request” for the purpose of enforcing the Voting Rights Act, which relies on data collected by the Census Bureau. However, Chief Justice Roberts, writing for the majority along with the four liberal justice, indicated that “the evidence tells a story that does not match the explanation the Secretary gave for his decision.” The chief justice further opined that the voting rights rationale offered by Mr. Ross depended on an “incongruent” explanation that was not supported by proper evidence. “It is rare to review a record as extensive as the one before us when evaluating informal agency action — and it should be,” Chief Justice Roberts wrote. “But having done so for the sufficient reasons we have explained, we cannot ignore the disconnect between the decision made and the explanation given.” The Supreme Court remanded the matter to the lower court so that the Commerce Department could provide a better explanation.

The Supreme Court’s decision in *Department of Commerce v. New York* may provide a sliver of hope on how the Supreme Court may rule, if Justice Roberts and the four liberal justices again reach agreement that the administration’s justification in rescinding DACA was arbitrary and capricious under the APA. The key issue is whether the post hoc rationalization by the Trump

administration for rescinding the DACA program by [DHS Secretary Nielsen](#) was arbitrary and capricious in light of an earlier [2014 Department of Justice memo](#) justifying its legitimacy.

The Trump administration's animus against immigrants is no secret, and all its actions, whether it was the imposition of the travel ban against nationals of mainly Muslim countries or the repeal of DACA are driven by this animus. It is thus heartening that the Supreme Court did not make the same mistake as it made in [Trump v. Hawaii](#) by taking at face value Commerce Secretary's "contrived" explanation for adding the citizenship question. It is hoped that the Supreme Court will continue on the same trajectory when it rules on President Trump's rescission of DACA, and emphasize that although President Trump has broad powers relating to immigration, his actions must be held against the arbitrary and capricious standard under §706(2)(A) of the APA. Since most of the Trump administration's actions have been executive rather than legislative, challenging them under the APA appears to be the most viable and effective path. Justice Robert's invocation of Justice Friendly in the census decision is especially relevant as the Supreme Court continues to review Trump's executive actions relating to immigrants:

Our review is deferential, but we are "not required to exhibit a naiveté from which ordinary citizens are free." United States v. Stanchich, 550 F. 2d 1294, 1300 (CA2 1977) (Friendly, J.). The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.