Why Proceduralism Won't Save Us from Trump

Daniel E. Walters 2020-08-27T13:50:19

Can procedural rules rein in the Trump Administration? Many people got their hopes up that they can and will, especially after the United States Supreme Court announced its decision this past June in *Department of Homeland Security v. Regents of the University of California.* The Court vacated the Trump Administration's decision to wind down the popular Obama-era immigration program for undocumented immigrants who had arrived in the US as children (Deferred Action for Childhood Arrivals, DACA), thus making a lot of new fans of a little-known procedural rule called the *Chenery I* doctrine. By the time the Department of Homeland Security is finished with the Court's decision, though, *Chenery I* may lose all of its new fans. Worse, like so many norms in the Trump era, procedural protections like *Chenery I* may sustain a delegitimizing, or at least disillusioning, blow.

Before *Regents*, *Chenery I* existed largely in obscurity. It holds that the only reasons that can sustain an agency's decision during judicial review are those provided by the agency itself in justifying its actions. In effect, agencies cannot concoct new reasons for a decision after it is challenged in court—they must defend the rule, if at all, only on the basis that they articulated at the time of taking the action. While legal scholars like Kevin Stack have previously pointed to *Chenery I* as foundational to the rule of law in the administrative state, the doctrine usually plays little role in challenges to agency decisions, if only because agencies have so thoroughly internalized its main lesson: justify everything, and do it from the start.

The procedural mistake in the DACA case

In *Regents*, a bare majority of the Supreme Court concluded that the Department of Homeland Security (DHS) failed *even Chenery*'s basic test of administrative professionalism. The problems started with the memorandum that initiated the rescission of DACA. In articulating how DHS would implement the rescission, then-acting Secretary of Homeland Security Elaine Duke did nothing more than parrot the reasons offered by Attorney General Jeff Sessions—namely, that DACA was illegal for the same reasons that a lower court had ruled that a related program, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), was illegal. Standing alone, this was never going to survive arbitrariness review. The lower court's DAPA decision held only that the extension of social benefits to DAPA recipients outside of the normal notice-and-comment rulemaking process violated administrative law principles. By adopting the lower court's reasoning as the Department's own, the Duke memorandum never got around to offering any reasons for the rescission of the heart of the DACA program: the "deferred action" of removal of eligible applicants. Legal scholar Jennifer Nou has suggested that this may have

been a deliberate act of bureaucratic resistance to the Trump Administration by acting Secretary Duke.

Whatever the reasons for the thin record, the Administration seemed to recognize the problem. Responding to early signals from the courts that the decision was insufficiently reasoned, Duke's successor, Kirstjen Nielsen, issued a supplemental memorandum that purported to offer reasons for the rescission of DACA's core features. Critically, Secretary Nielsen did not present the memo as a replacement of Duke's memorandum. Had she done so, *Chenery* likely would have had no relevance to the case. Even the remedy for a *Chenery* violation is often a remand to the agency to "deal with the problem afresh," and Nielsen could have taken the shortcut by styling her memorandum as the Department's standalone justification of a new rescission. As it was, she instead walked into one of the most avoidable mistakes in recent administrative law history. Almost three years after the initial memorandum, the Supreme Court held that Nielsen's memorandum could not be considered to be part of the Department's justification of the rescission, and the Duke memorandum, standing by itself, was arbitrary. Almost immediately, the U.S. Court of Appeal for the Fourth Circuit issued its mandate in the case, ordering DHS to resume accepting new applications for protection under DACA. With its simple, avoidable error, DHS had forfeited the opportunity to deliver a signature policy victory to the Trump Administration. At least it seemed that way in the afterglow of the decision.

The bar isn't terribly high

In late July, the acting Secretary of Homeland Security, Chad Wolf (just today nominated to be Secretary), announced that the Department would begin dismantling DACA yet again, this time keenly aware of its duty to offer reasons for its decisions. Acting Secretary Wolf's memorandum does much of what DHS had always hoped to do. The memo institutes a freeze on new enrollment in the program, restrictions on travel abroad for program beneficiaries, and a stingier renewal regime than had previously existed. The only thing not included is an intent to rescind the program—this decision, the memorandum states, will be made at a later date. For now, at least, the Department intends only to exercise "interim" authority to temporarily change DACA. Most importantly, though, the memorandum does far more than either the Duke or Nielsen memoranda to justify on policy grounds the Department's decision.

Although this latest memorandum feels like outright defiance of the spirit of the Court's decision in *Regents*, or at least defiance of the popular narrative that the Supreme Court "saved" DACA, in reality the new order is unlikely to meet the same fate. Some supporters of DACA have tried to pursue a contempt finding in the Maryland District Court in charge of implementing the Fourth Circuit's mandate to resume taking DACA applications. However, it is not likely to result in any change: technically, DHS was required to end its first rescission attempt, but DHS always retains authority to start fresh. Another line of attack on the new attempt is also developing, with California Attorney General Xavier Becerra recently filing in the trial court a status report stating his intent to challenge any decision inconsistent with a

lower court's order after *Regents* "requir[ing] DHS to resume accepting initial DACA applications from eligible immigrants, including those who had aged in to eligibility during the unlawful tenure of the Duke Memorandum." Yet any such challenge to an entirely *new* policy with its own set of justifications will face significant hurdles: a general disfavor of reviewing agency discretion to not enforce the law; arguments that the new memorandum is not final, reviewable agency action or that it is not an agency rule at all; and, most fundamentally, a light-touch arbitrariness review that the Department cannot possibly be inept enough to fail again. The bar is not terribly high—it never really was.

A hollow hope

Taking stock of what has happened over these three and a half years, the picture that emerges is not flattering. Other Administrations might well have been chastened enough by the Supreme Court's signal in *Regents* to rethink their approach. Especially in an election year, the best approach would have been to put DACA on the ballot instead of the administrative agenda, and then await a decision by the people. By issuing the newest memorandum, DHS took a position that, while likely legally defensible under the paper-thin administrative law jurisprudence governing agency nonenforcement discretion, exploits the trust Americans place in the dialogue between courts and agencies. What is concerning about this—beyond the immediate effects on so many current and would-be DACA beneficiaries—is that there is so little standing between a determined Administration and its policy goals, however noble or ignoble. The entire episode gives new significance to Gerald Rosenberg's observation that the Court is ultimately a hollow hope.

Some will blame Chief Justice Roberts, the author of the majority opinion in *Regents* and the key vote in favor of striking the DACA rescission. Victoria Roeck recently criticized the majority for centering on a mere "procedural failure" rather than on the arguments, pressed by the challengers, that the rescission was motivated by racial animus and was therefore suspect under the Equal Protection Clause of the United States Constitution. Grounding the error in a correctable procedure, especially in light of the Trump Administration's general willingness to cut corners and obliterate governing norms, arguably opened the door wide for DHS to quickly change course.

There is much to say about this reading of the case and this criticism of the Chief Justice. Roberts has developed something of a knack for crafting narrow and often procedural rebukes to the governing Administration, both during the Obama years and during the Trump years. Just one year before *Regents*, Roberts delivered a strikingly similar blow to the Trump Administration's efforts to add a citizenship question to the census, finding that the reasons offered in support of that policy change were pretextual. Ever the institutionalist, Roberts seems to believe that the Supreme Court's long game in what appears to be an escalating conflict between the branches is to insist on procedural fastidiousness at all costs and no matter how likely it is that the executive branch will respect that kind of proceduralism. Chief Justice Roberts is putting enormous pressure on administrative procedures, and, at least in the *Regents* case, it is not clear how well they are holding up.

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